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The Changing Landscape of Challenges to Class Certification in No-Poach Cases

By Adam Hemlock and Naz Akyol

In *Alston v. NCAA*, the U.S. Supreme Court stated that the rule of reason is the presumptive standard for considering alleged violations of Section 1 of the Sherman Act. Importantly, this decision raised the bar for class certification in antitrust cases by making it harder for plaintiffs to convince courts that certification is appropriate—when there are more factual questions at issue (such as market definition) it is less likely that common issues will predominate over individual ones among a proposed class.

Alston has already influenced follow-on class actions challenging allegedly anticompetitive practices in labor markets. Despite increased scrutiny by regulators of no-poach practices leading to numerous high-profile investigations and settlements, employees hoping to bring follow-on nationwide class actions face material challenges at the class certification stage. Recent cases like *DeSlandes* and *Conrad* underscore the difficulty faced by putative classes specifically in the no-poach context.

Trend of Increased Antitrust Enforcement in Labor Markets

No-poach and wage-fixing agreements have increasingly become an area of focus for both state and federal enforcers in recent years. A key milestone was in 2016, when the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) jointly issued their Antitrust Guidance for Human Resource Professionals, which warned employers about the anticompetitive risks associated with wage-fixing and no-poach agreements. Recently, President Biden's July 2021 Executive Order on competition reinforced that antitrust scrutiny of labor markets will remain a high priority for the federal government going forward. High-profile settlements that resulted from state investigations of no-poach agreements, such as the New York Attorney General's settlement with the title insurance underwriters Old Republic and AmTrust in 2021 and 2022 respectively, confirm that no-poach provisions will continue to be an area of focus at the state level as well.

Often, and not surprisingly, government enforcement has led to follow-on class action litigation. For example, a high-profile DOJ investigation of no-poach agreements among the leading competitors in the technology industry back in 2010 led to a large follow-on class action (*In re High-Tech Employee Antitrust Litigation*) in which a group of defendants settled the claims for $415 million in 2015. Earlier, in 2013, three of the seven defendants had already settled for a total of $20 million. During 2017 and 2018, several state attorneys general began investigating no-poach provisions in franchise agreements in the fast food industry, and these investigations were followed by dozens of private class actions. Two of the most notable such cases are discussed in more detail below as they contain important lessons for those contemplating or facing class actions involving no-poach provisions.

DeSlandes and Local Labor Markets

In a private action filed following the Washington State Attorney General's highly public investigation of no-poach provisions in McDonald's franchise agreements, a former McDonald's employee alleged that the no-poach provision in the franchise agreement between her employer and McDonald's prevented her from taking a higher paying position at a different McDonald's location. *DeSlandes v. McDonald's USA, LLC*, 2021 WL 3187668 (N.D. Ill. July 28, 2021) (*appeal filed*). Plaintiff DeSlandes and Plaintiff Turner, who had filed a related suit, then attempted to certify a nationwide class of all McDonald's employees who worked for any franchise during a five-year period between 2013 and 2018. The court denied class certification and later granted McDonald's motion for judgment on the pleadings. Plaintiffs DeSlandes and Turner, whose cases were consolidated after class certification was denied, appealed the judgment on the pleadings in favor of McDonald's to the Seventh Circuit. The appeal is ongoing.

Significant to both the denial of class certification and the granting of McDonald's motion for judgment on the pleadings was the fact that the proposed class neglected to define a geographic market in the pleadings, insisting that a "quick look" analysis that does not require plaintiffs to define relevant markets should apply to their claims. The court even gave DeSlandes leave to amend her complaint to include a claim under the rule of reason because, "[t]hough the court has concluded that plaintiff has stated a claim for a restraint that might be unlawful under quick-look analysis, the evidence at a later stage may not support it," but DeSlandes refused. The court then held, relying on *Alston* and the court's lack of experience with antitrust challenges to no-poach provisions in franchise agreements that the rule of reason analysis, which does require plaintiffs to define the relevant markets, applied to the Plaintiffs' claims. The judge interpreted Plaintiffs' complaint and proposed class definition as asserting the existence of a national market for their labor, and in denying class certification, focused on the fact that there were "likely hundreds or thousands of relevant markets among the class members," as "the relevant market for each plaintiff's labor is a small, geographic area." The judge concluded that, due to the fragmented geographic market for each class member's labor, localized issues predominate over common ones, making the case unfit for resolution on a class-wide basis.

DeSlandes makes it quite clear that geographic market definition is and will continue to be a significant roadblock to class certification for plaintiffs seeking to certify nationwide classes in no-poach cases because labor markets, especially for relatively low-paying jobs, are often regional or local, limited by commuting distance, moving expenses, and other considerations. In explaining that it is unlikely for there to be a national labor market for the jobs at issue in *DeSlandes*, the court in that case contrasted these positions with the few jobs that are for such highly skilled and highly paid individuals (like CEOs) that they might actually merit national or perhaps even international markets for hiring. The difficulty of defining a geographic labor market brings up other potential issues related to class certification in the no-poach context: Plaintiffs who are willing to concede that labor markets are local, as described by the judge in *DeSlandes*, may find an unexpected obstacle in the numerosity requirement of Rule 23(a) depending on just *how* local the relevant markets are.

Conrad and Adequate Representation

In *Conrad*, a former Jimmy John's employee attempted to certify a class of roughly 615,000 current and former employees across the country who worked at either Jimmy John's franchises or corporate stores during a four-year period between 2014 and 2018. *Conrad v. Jimmy John's Franchise, LLC*, 2021 WL 3268339 (S.D. Ill. July 30, 2021). The prospective class included all Jimmy John's employees, including managers in charge of enforcing the no-poach provisions as well as nonsupervisory employees who were the subject of such policies. The *Conrad* court applied the rule of reason to the antitrust claims and denied class certification. The parties have since settled.

Like the court in *Deslandes*, the court in *Conrad* held that the named plaintiff's "failure to offer classwide evidence of a relevant labor market is case-ending." However, failure to properly define a geographic market was not the only roadblock to certification in *Conrad*. In finding that the predominance requirement of Rule 23(b)(3) was not satisfied, the *Conrad* court took note of the fact that the putative class "failed to establish that common evidence will show that the Jimmy John's franchisees had a conscious commitment to suppress labor mobility." Furthermore, the putative class failed to satisfy predominance because individualized inquiries would be required to assess the impact of the no-poach provisions on each class member—each class member was subject to different versions of the no-poach provision contained in different franchise agreements that were in effect at different times, and were impacted differently by the relevant provision based on their position at Jimmy John's. Finally, the fact that there were unharmed class members, and plausible arguments that class members may have even benefitted from the no-poach provisions at issue, made it impossible for common issues to predominate over individual ones in the damages analysis in the case. In fact, Defendants argued that, "most putative class members likely benefited from the No-Poach Provision because it gave franchisees an added incentive to provide more training, thus promoting employee advancement." It is important to note that assessing the procompetitive benefits of a restraint, such as the benefit to employee advancement of the no-poach provision at issue in *Conrad*, is an exercise that is unique to the rule of reason analysis, which the court found applied in this case.

The *Conrad* court not only found that the predominance requirement of Rule 23(b)(3) was not satisfied by the putative class, but also found that the putative class failed to satisfy the requirements of Rule 23(a) including typicality and adequacy of representation. Conrad alleged that the typicality requirement was satisfied simply because he worked at Jimmy John's. However, his core allegation of harm to class members, *i.e.*, that the no-poach provision prevented them from moving between franchises for better wages, did not apply to him at all because, "[h]e did not leave his job at Jimmy John's in search of higher wages, and he was never denied the opportunity to change locations because of the [no-poach provision]." Indeed, Conrad admitted that the no-poach provision was "irrelevant" and "just didn't really have anything to" do with him because he never sought employment at another Jimmy John's location.

Finally, in addition to failing to satisfy the typicality requirement of Rule 23(a), the putative class in *Conrad* also failed to satisfy the adequacy of representation requirement because, among other reasons, the class representative's interests as a manager were in clear conflict with the interest of class members who held nonsupervisory positions. At Jimmy John's, managers like Conrad were tasked with enforcing the no-poach provisions at issue in the case against employees such as in-shoppers and drivers that the managers supervised. Jimmy John's even claimed that "[a]t any trial of this case, certain managers would be called as defense witnesses, testifying about the very decisions at issue here." The court decided that this intra-class conflict of interest whereby some putative class members were in charge of enforcing the challenged conduct prevented the class representative from providing adequate representation to all class members. Furthermore, there was a profit-sharing program at Jimmy John's that included managers but not nonsupervisory employees, further misaligning the class representative's incentives with those of other class members. It is not difficult to imagine that such intra-class conflicts of interest precluding

certification would be common in putative classes in no-poach cases that include employees of different ranks and positions, whose injury or lack thereof is linked to their individual roles and responsibilities.

A Changing Standard of Antitrust Analysis

Recent cases illustrate that the standard of antitrust analysis that applies to no-poach cases going forward will be highly determinative of the success of class certification attempts because, as the court in *Conrad* said, “the rule of reason raises more individualized issues precluding class certification.” In the wake of *Alston*, federal courts have either applied the rule of reason to no-poach cases up front, an approach that was bolstered by the DOJ’s Statement of Interest in a former no-poach case explaining that “most franchisor-franchisee restraints are subject to the rule of reason,” or punted the decision of which standard to apply to after the motion to dismiss stage. Statement of Interest of the DOJ, *Stigar v. Dough Dough*, 2:18-CV-00244, p. 11 (E.D. Wash. March 8. 2019). State courts, in contrast, have been more amenable to applying the *per se* standard in line with the 2016 Guidelines and the Washington State Attorney General’s approach in the fast food franchise cases.

The DOJ, however, has changed course since *Stigar* to advocate for a more enforcement-friendly standard. Although McDonalds cited the DOJ’s *Stigar* Statement of Interest in favor of applying the rule of reason to no-poach cases in the franchise context in its motion for summary judgment in *DeSlandes*, this move was met with pushback from the DOJ itself. In a last-minute motion for leave to file a statement of interest in *DeSlandes*, the DOJ claimed that the “Statement of Interest in *Stigar* … does not fully and accurately reflect the United States’ current views.” The DOJ’s motion in *DeSlandes* was denied, but the judge said that he would “note that there’s a change in [the DOJ’s] position.” The DOJ and FTC then jointly filed an amicus brief in the Seventh Circuit appeal of *DeSlandes*, clarifying their position that, “agreements among competing employers not to hire or solicit each other’s employees are per se unlawful unless defendants establish ancillarity.”

With the government changing its stance on the correct mode antitrust analysis to apply in antitrust cases involving no-poach provisions in the franchise context—potentially shifting from the rule of reason to a *per se* approach and urging courts to follow—plaintiffs may find some support in their class certification ambitions. However, if the rule of reason approach remains the norm, employers that are able to convince courts that labor markets are local and individual employees are impacted in different ways by no-poach provisions may be able to avoid costly follow-on class litigation, even if they are subject to investigations into their labor practices and enter into public settlements with enforcement agencies as a result. It remains to be seen whether the tide will truly turn, but one thing is certain: the outcome of class certification attempts in no-poach cases will continue to depend on what mode of antitrust analysis applies.

Ninth Circuit Places Constitutional Limit on Aggregated Statutory Damages Awards in *Wakefield v. ViSalus, Inc.*

By David Singh

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Background

In the last few decades, there has been a sharp uptick in the use of consumer privacy laws as the basis for class action lawsuits. For example, the Telephone Consumer Protection Act of 1991 (TCPA) restricts how companies can use telemarketing calls and prerecorded messages to contact customers. The Act, like many others of its kind, also carries with it a $500 minimum in statutory damages, irrespective of whether of the calls actually caused injury to the consumer. And in an age where companies can contact thousands, or even millions, of customers using fully automated systems, these minimum statutory damages can easily add up to tens of millions of dollars in class action liability, despite causing nowhere near that amount in actual injury.

The threat of these massive awards has forced many a company to settle the claims for smaller but still sizeable amounts instead of risking a lost case. For example, Capital One and its affiliated collections agencies agreed to settle a TCPA suit in 2014 for $75 million. Even more threatening for companies is that these lawsuits are often recurring: for example, SiriusXM agreed to pay $32.4 million in 2020 to settle a TCPA suit brought by 14 million subscribers, but just three years later, they find themselves facing yet another one.

And while the TCPA is the most well-known of these consumer protection laws, plaintiffs have also made use of other consumer privacy laws to achieve similar results. The Video Privacy Act of 1988 has been another popular vehicle for these cases, and has forced companies like Netflix to settle lawsuits for millions of dollars. And in October, the Northern District of Illinois awarded a class of truck drivers a staggering $228 million in aggregated statutory damages under the state's Biometric Information Privacy Act.

The Ninth Circuit's Decision in *ViSalus*

However, the Ninth Circuit's recent decision in *Wakefield v. ViSalus, Inc.* may signal a potential end to the regime of these massively disproportionate awards. From 2012 to 2015, as part of a move to regain former customers, multi-level marketing company ViSalus used an automated system to place a total of 1,850,440 calls to phone numbers its former members provided upon enrollment. A class of customers who received the calls filed suit in the District of Oregon alleging violation of the TCPA, claiming that by receiving the automated calls, they had suffered a cognizable injury. After years of litigation, ViSalus lost the case and was ordered to pay a staggering $925,218,000 in aggregated statutory damages. It filed a motion challenging the award as unconstitutionally excessive under the Fifth Amendment's Due Process Clause, but the District Court denied the motion, stating that it was within Congress' discretion to fix the minimum statutory damages for the TCPA, and that due process did not require the court to consider the constitutionality of the damages.

But on appeal, the Ninth Circuit found *de novo* that the District Court had in fact violated the Due Process Clause through such a large award. In its decision, the Ninth Circuit turned to *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919), where the Supreme Court held that statutory damages can violate due process when the award is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." And while *Williams* only dealt with an award for a single violation, the Ninth Circuit nonetheless held that its reasoning also applied to cases involving aggregated damages for multiple smaller violations. In its view, applying this logic would

not only ensure that the total damages award was proportionate to the offense, but also prevent per-violation awards from becoming unduly punitive, rather than deterring, when aggregated.

To determine whether an aggregated award is disproportionate to the offense, the Ninth Circuit relied on factors established its previous ruling in *Six Mexican Workers v. Arizona Citrus Growers*: (1) the amount of award to each plaintiff, (2) the total award, (3) the nature of persistence of the violations, (4) the extent of the defendant's culpability, (5) damage awards in similar cases, (6) the substantive or technical nature of the violations, and (7) the circumstances of each case. 904 F.2d 1301, 1309 (9th Cir. 1990) (quoting *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985). The case was therefore remanded to the District Court to determine whether the damages award was disproportionate in consideration of these factors.

Implications of the Decision

The *ViSalus* decision actually finds its roots in two previous decisions from the Second Circuit and Eight Circuit, and is the first in more than a decade to hold that aggregated statutory damages have a constitutional upper limit. In *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2nd Cir. 2003), the Second Circuit recognized that aggregated statutory damages had the potential to "distort the purpose of statutory damages and class actions" in favor of punitive goals, but the case itself did not present an opportunity for them to rule on the issue. And in *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 963 (8th Cir. 2009), the Eighth Circuit affirmed a decision by the Eastern District of Missouri holding that an aggregated statutory damages award of $1.6 billion violated the Due Process Clause. *ViSalus*, though indirectly, has reaffirmed that there are in fact constitutional limits on aggregated statutory damages, and now presents another tool for defendants to use in cases involving technical violations of consumer protection statutes where the plaintiff suffers no real injury.

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Whether our clients face a nationwide class action in one court or statewide class actions in courts across the country, we develop tailored litigation strategies based on our clients' near- and long-term business objectives, and guided by our ability to exert leverage at all phases of the case – especially at trial. Our principal focus is to navigate our clients to the earliest possible favorable resolution, saving them time and money, while minimizing risk and allowing them to focus on what truly matters – their businesses.

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