The Antitrust Review of the Americas 2019

Published by Global Competition Review in association with

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The Antitrust Review of the Americas 2019

A Global Competition Review Special Report

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Cover image: iStock.com/blackdovfx

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ISBN: 978-1-78915-102-2

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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Global Competition Review is delighted to publish the 2019 edition of *The Antitrust Review of the Americas*, one of a series of three special reports that deliver specialist intelligence and research designed to help subscribers – general counsel, government agencies and private practice lawyers – successfully navigate the world's increasingly complex competition regimes. Read in conjunction with *The European, Middle Eastern and African Antitrust Review* and *The Asia-Pacific Antitrust Review*, subscribers have unparalleled annual updates on the development of the world's competition regimes.

In preparing this report, *Global Competition Review* has worked exclusively with leading competition practitioners. It is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put them into context – which makes the report of particular value to all those doing business in the Americas today.

Although every effort has been made to ensure that all matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to *Global Competition Review* will receive regular updates on any changes to relevant laws over the coming year.

Global Competition Review
London
August 2018

United States: Energy

Layne Kruse, Anne Rodgers and Eliot Turner
Norton Rose Fulbright

Antitrust and employment in the oil patch

In October 2016, the Department of Justice's (DOJ) Antitrust Division and the Federal Trade Commission (FTC) issued *Antitrust Guidance for Human Resource Professionals*.[1] For most antitrust and competition lawyers, there was little unexpected in the guidance; indeed, the agencies' description of what employment-related conduct might violate the Sherman Act (eg, no-hire agreements, wage-fixing and information exchanges), could have been taken out of any antitrust casebook. What did come as a surprise, however, was the DOJ's statement that it intended to 'proceed criminally against naked wage-fixing or no-poaching agreements'.[2]

Surprising as that was to antitrust lawyers, antitrust enforcers were also surprised. Mainly at how commonplace 'no poaching' agreements and 'wage fixing' are. Indeed, Makan Delrahim, the current Assistant Attorney General, remarked: 'I've been shocked at how many of these there are, but they're real'.[3] Deputy Assistant Attorney General Barry Nigro echoed Delrahim's comments this past May, saying that he was 'really surprised at how prevalent the practice is'.[4]

But long before the recent emphasis by enforcers on antitrust scrutiny of employment practices, companies in the oil and gas sector were the target of lawsuits and investigations into their alleged employment practices. The lessons from those experiences are particularly relevant today, given the renewed focus by the antitrust enforcers on employment practices and the raft of private litigation that has followed.

Todd v Exxon

Roberta Todd was a Wharton MBA who began working from Exxon in 1981 as an auditor.[5] Todd stopped working at Exxon in 1994 and three years later she filed a class action lawsuit alleging that Exxon, along with 13 other oil companies, violated section 1 of the Sherman Act by 'sharing salary information regarding certain of defendants' employees and agreeing to use this information to set the salaries of these employees at artificially low levels'.[6]

According to Todd, the defendants did this through 'periodically conducted surveys comparing past and current . . . salary information and . . . regular meetings at which current and future salary budgets were discussed'.[7] The defendants also took the data and standardised it in a way that allowed them to compare salaries of various positions through the use of benchmark positions and certain adjustments.[8] The companies also exchanged data that allowed them to compare salaries by job, taking into account the experience and academic backgrounds of employees.[9]

Despite the detailed description of the information exchange, the district court treated Todd's complaint sceptically. It was unpersuaded that Todd had met threshold requirements to plead a claim under the Sherman Act. First, the court found that Todd failed to allege a relevant market. Todd's proposed class covered all 'nonunion, managerial, professional, and technical employees'.[10] The court concluded that managerial, professional and technical employees could not be part of the same market because they were not interchangeable. 'How is it', the court asked, 'that accountants lawyers, chemical engineers and other [managerial, professional, and technical] employees in the oil and petrochemical industry are interchangeable with one another when the jobs they perform are so different?'[11] The court also observed that the proposed market was 'in another senses . . . quite underinclusive'.[12] That was because, Todd hadn't 'adequately explain[ed] why an antitrust lawyer employed by an oil company does not compete in the same market as an antitrust lawyer at a commercial bank or in a private law firm'.[13] The district court also concluded that Todd's allegations failed because they were as 'consistent with permissible conduct as with an illegal conspiracy'.[14] In so doing, the court recognised that antitrust enforcers and the Supreme Court had acknowledged that information exchanges among competitors were often pro-competitive[15] Because the district court did not believe that Todd had alleged an anticompetitive agreement, it concluded that her complaint should be dismissed.[16]

Todd appealed. Then Judge Sonia Sotomayor wrote an opinion for the Second Circuit reversing the district court's decision.[17] To begin with, the Second Circuit concluded that Todd had alleged a plausible market. It held that the district court erred by discussing the interchangeability of employees instead of the interchangeability of employers.[18] It explained that the district court was wrong to focus on 'the interchangeability of, for example, lawyers with engineers. At issue is the interchangeability, from the perspective of an . . . employee, of a job opportunity in the oil industry with, for example, on in the pharmaceutical industry'.[19] The appellate panel also disagreed that Todd's alleged market, which was limited to employees in the oil and petrochemical industry, was 'underinclusive'. Noting that market definition is a 'fact intensive inquiry', the court found plausible Todd's allegations that industry experience may limit employees' mobility to leave the oil and petrochemical industry.[20] The Second Circuit did note, however, that the class might not be able to support the allegations after discovery.[21]

Unlike the district court, which had treated Todd's information exchange-based claim sceptically, the Second Circuit recognised that information exchanges, although not per se illegal, can violate the Sherman Act if certain conditions are met.[22] In analysing the complaint to determine whether Todd had plausibly alleged anticompetitive conduct, the Second Circuit looked to her allegations about the structure of the market and the specificity of the information exchanged.[23]

The court had little trouble in concluding that the alleged market structure made it susceptible to coordination among the defendants. It noted that Todd had alleged that the defendants, between them, employed somewhere between 80 to 90 per cent of the proposed class – and even though there were differences among the jobs covered by the proposed class, the nature of the information exchange and standardisation of that information to allow for comparison of similar positions across companies made coordination possible.[24]

The court also found that the specificity of information alleged to have been exchanged made Todd's claim plausible. She had alleged that the defendants were exchanging current information regarding salaries and that the data was not sufficiently aggregated to prevent the participants in the information exchange from determining information about their competitors' salaries.[25] All this led the court to conclude that 'the characteristics of the data exchange in this case are precisely those that arouse suspicion of anticompetitive activity'.[26]

The Second Circuit's reversal of the district court's decision dismissing Todd's complaint was, in some ways, only the beginning of the story. Shortly after, several similar cases were filed and they were consolidated with *Todd v Exxon* in a multi-district litigation in federal court in New Jersey.[27] The defendants fared much better in the multi-district litigation and, indeed, many of the criticisms they levelled at Todd's complaint, and in particular her proposed market, served as the basis for the district court's decisions denying class certification and later granting summary judgment to the defendants dismissing the claims altogether.

For example, in denying class certification, the district court noted that denying certification did not create a risk of 'inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class', because in its view, if an individual plaintiff in a particular job class prevailed at trial, while another individual plaintiff in another job class did not, relief could be tailored to job classes that had prevailed. As the court explained:

> *If a geologist succeeded in a lawsuit . . . and was granted injunctive relief, that relief could be fashioned to prohibit Defendant's sharing of information concerning geologists only. At the same time, a labor attorney, for example, might fail in an identical claim, so that Defendants would be able to continue sharing information concerning labor attorneys.*[28]

Likewise, in determining whether to certify a class seeking injunctive relief, the district court concluded that the individualised issues, raised by the many different job categories included within the proposed class precluded a finding of 'cohesiveness' necessary for certification.[29]

The defendants' summary judgment motion also returned to a number of arguments that had been rejected at the motion-to-dismiss stage. Principally, the defendants argued that the plaintiffs couldn't prove that 'the relevant product market is limited to oil and petrochemical industry employers or that [the plaintiffs] lack substitutable job opportunities outside of those employers'.[30] In short, the court found that the plaintiffs did not have sufficient evidence to create a fact issue that the employment market was limited to oil and petrochemical companies. For example, after leaving Exxon, Todd went to work for Ernst & Young.[31] Although Todd and the remaining plaintiffs appealed, they eventually reached a settlement with the defendants, but after nearly 12 years of litigation.[32] Moreover, Todd's suit not only resulted in a lengthy litigation for the defendants, it also spurred a parallel investigation by the FTC into the defendants' hiring practices, which continued even past the settlement of Todd's case.[33]

Verdin et al v R&B Falcon Drilling USA, Inc et al

In another early case, *Verdin v R&B Falcon Drilling USA, Inc*, companies in the oil and gas sector were accused of wage fixing. A proposed class of offshore drilling workers there sued 22 drilling companies accusing them of violating section 1 by meeting to 'set, stabilise, maintain or limit the wages and benefits paid to offshore drilling employees'.[34] Although the defendants in *Verdin* were accused of having actually conspired to fix wages, they had, as in *Todd*, participated in 'wage and benefit surveys'.[35] The plaintiffs alleged the defendants conducted quarterly surveys to ensure that each participant in the alleged conspiracy was adhering to their agreement.[36]

Aside from the alleged conduct, the case is also notable for another reason. Discovery revealed that at least one of the defendants was concerned about antitrust risk due to its participation in wage and benefit surveys. That company's general counsel wrote a memorandum regarding the antitrust risks associated with participating in such surveys. His memo was later shared with other companies participating in the survey – all a number of years before the litigation began.[37] The memo's existence came to light during discovery and the defendants attempted to withhold the document from production based on an assertion of the common interest privilege, which has generally applied to communications between defendants in litigation or potential defendants in potential litigation.[38] Despite the defendants' assertion of the privilege, the district court ordered production.[39] The Court of Appeals, in denying a mandamus petition, (remarkably) rejected the defendants' contention that the common interest privilege applied because it concluded the memo was written well before there was a 'palpable threat of litigation' and shared communications – even about compliance with antitrust law did not qualify for protection.

Verdin was much a shorter affair than *Todd v Exxon*. It took just over a year for the parties to reach a settlement.[40] But of course, that didn't mean it wasn't still costly – the defendants settled the case for US$75 million.[41] That, though, seems like a bargain compared to more recent litigation involving 'no hire agreements'. Following the Department of Justice's investigation of no hiring agreements among software firms in Silicon Valley, a private class action settled for US$415 million.[42]

What this means today

The FTC and DOJ are both actively looking for antitrust violations related to employment practices. Investigations often start when parties propose a merger and the DOJ or FTC uncovers the agreement while reviewing documents submitted by the merging parties.[43] Indeed, the DOJ's recent enforcement action and settlement with Knorr Bremse AG and Westinghouse Air Brake regarding their no hire agreement resulted from a merger review.[44] And where a DOJ investigation results in an enforcement action, private litigation is sure to follow – indeed, days after the DOJ announced its settlement, plaintiffs began filing class actions against Knorr Bremse and Westinghouse Air Brake. Even though one might have expected that no-poaching agreements were rare, the DOJ's experience has proved otherwise. Even extremely sophisticated companies with ample resources, the likes of Apple and Google, have run afoul of antitrust law by entering into them. And now, there is potential criminal exposure for companies (and their employees) who enter into these types of agreements.

While the DOJ's focus has been traditionally on 'naked restraints', private plaintiffs are now challenging ancillary agreements. For example, employees of McDonald's franchises filed a class action challenging provisions in McDonald's franchise agreements that prevented franchisees from hiring each other's employees.[45] That case recently survived a motion to dismiss.[46] And as *Todd* demonstrates, even when a defendant can successfully defend a case, it often takes a significant amount of time and resources to do so.

But ancillary restrictions on hiring are not just found in franchise agreements, they are common in joint venture agreements, agreements with consultants and other places. Counsel scrutinising such agreements should be mindful that although often legal, there is now a greater risk that such agreements will be challenged. And, of course, companies need to do more than just ensure that new agreements don't contain such terms (or that any restrictions truly are ancillary and narrowly tailored), they need to ensure that old agreements do not violate antitrust law. That is especially so given the DOJ's position that agreements entered into before the guidelines, but that remain in force after will be potentially be subject to criminal prosecution.

Finally, companies need to ensure that their human resources personnel are aware of the antitrust risks these kinds of agreements and programmes like information exchanges can pose. Companies should also ensure that when they do participate in things such as information exchanges, or their human resources professionals participate in trade associations or attend industry conferences, they are familiar with best practices for interacting with competitors. Given that enforcers and the plaintiffs' bar have only recently begun focusing on these issues, many companies' compliance programmes have neglected human resources as a risk area. But as in almost all things, an ounce of prevention is better than a pound of cure.

Notes

1 https://www.justice.gov/atr/file/903511/download.
2 Id at 4.
3 https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works.
4 https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/number-of-no-poach-agreements-uncovered-by-doj-shocking,-official-says.
5 ECF No. 157 at 1, *In re Compensation of Managerial, Professional and Technical Employees Antitrust Litig.*, MDL 1471 (DNJ)
6 *Todd v Exxon Corp,* 126 F Supp. 2d 321, 322 (SDNY 2000).
7 *Todd v Exxon Corp*, 275 F3d 191, 196 (2d Cir. 2001).
8 Id.
9 Id.
10 *Todd*, 126 F Supp. 2d 321 at 323.
11 Id at 325.
12 Id.
13 Id.
14 Id at 327.
15 Id.
16 Id.
17 *Todd v Exxon Corp*, 275 F.3d 191 (2d Cir. 2001).
18 Id at 202.
19 Id.
20 Id at 204–05.
21 Id at 205.
22 Id at 198–99.
23 Id at 207, 211,
24 Id at 209–10.
25 Id at 212–13.
26 Id at 213.
27 *In re Compensation of Managerial, Professional and Technical Employees Antitrust Litig.*, 206 F Supp. 2d 1375 (JPML 2002)
28 *In re Compensation of Managerial, Professional and Technical Employees Antitrust Litig.*, MDL No. 1471, 2006 WL 38937, at *5 (DNJ 5 January 2006).
29 Id at *6.
30 *In re Compensation of Managerial, Professional and Technical Employees Antitrust Litig.*, MDL No. 147, 2006 WL 3887619, at *3 (DNJ 20 August 2008).
31 ECF No. 157 at 2, *In re Compensation of Managerial, Professional and Technical Employees Antitrust Litig.*, MDL 1471 (DNJ).
32 Stipulation to Dismiss the Appeal, *In re Compensation of Managerial, Professional and Technical Employees Antitrust Litig.*, Case No. 08-3827 (3d Cir. 5 June 2008).
33 Thomas Catan, 'FTC Investigates Oil Firms Over Hiring, Wages,' *Wall Street Journal* (26 April 2010).
34 *In re Santa Fe Int'l Corp.*, 272 F3d 705, 706-07 (5th Cir. 2001).
35 Id at 708.
36 Rosanna Ruiz, 'Offshore Firms to Settle Wage Suit for $75 Million', *Houston Chronicle* (9 November 2001).
37 *Santa Fe Int'l*, 272 F3d at 709.
38 Id at 710.
39 Id at 706.
40 LM Sixel, 'Like Price Fixing, Wage Fixing Illegal', *Houston Chronicle* (15 November 2001).
41 Id.
42 Dan Levine, 'US Judge Approves $415 mln Settlement in Tech Worker Lawsuit', *Reuters* (3 September 2015).
43 Leah Nylen, 'Number of no-poach agreements uncovered by DOJ "shocking," official says', *MLex* (17 May 2018).
44 Id.
45 ECF No. 1, *Deslandes v McDonald's USA, LLC et al*, Case No. 17-cv-4857 (ND Ill.).
46 ECF No. 53, *Deslandes v McDonald's USA, LLC et al*, Case No. 17-cv-4857 (ND Ill).

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