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SEPTEMBER 19, 2022

# Eleventh Circuit reinstates no-hire antitrust claims against Burger King

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**Takeaway:** Restrictive covenants have generated a lot of controversy lately, especially with the Department of Justice's continued focus on illegal no-poach hiring agreements between Silicon Valley companies and other firms. Recently, an Eleventh Circuit panel reinstated Sherman Act claims against Burger King based on the "No-Hire Agreement" in Burger King's standard franchise agreements. *Arrington v. Burger King Worldwide, Inc.*, --- F.4th ----, No. 20-13561, 2022 WL 3931471 (11th Cir. Aug. 31, 2022). In so ruling, the panel rejected a district court's ruling "that Burger King and its franchisees constituted a single economic enterprise and were not capable of the concerted action that a Section 1 violation requires." 2022 WL 3931471, at *2.

In *Arrington*, a line cook, crew member, and general manager for Burger King restaurants in Illinois filed a putative class action against Burger King, alleging Section 1 Sherman Act antitrust claims based on the No-Hire Agreement in the Burger King franchise agreements, alleging further that "the No-Hire Agreement prevented them from being able to obtain employment at other Burger King franchise restaurants and, as a result, caused them to be paid artificially depressed wages, suffer decreased benefits, and be deprived of job mobility." *Id*. at *3.

Burger King moved to dismiss the antitrust claims and the district court granted the motion, on the ground that (as noted above) Burger King and its franchisees constituted "a single economic enterprise" incapable of conspiring under the Sherman Act.

With a shout-out to the Miami Dolphins, Judge Robin Rosenbaum based the panel's decision on the Supreme Court's opinion in *American Needle, Inc. v. Nat'l Football League* , 560 U.S. 183 (2010). That case involved National Football League Properties ("Properties"), an entity formed by the National Football League ("NFL") and its 32 member football clubs, which had granted an exclusive license to Reebok to sell all 32 teams' intellectual property. While recognizing that the NFL and its football teams had interests in common, the Supreme Court observed that the 32 football teams competed against each other for players, fans, and even with respect to sales of team merchandise. Accordingly, the exclusive-licensing decision made by the 32 teams and Properties constituted "concerted action," thereby satisfying the essential element of antitrust conspiracy for a Section 1 Sherman Act an antitrust claim.

According to the panel, the Supreme Court's reasoning in *American Needle* required the reversal of the district court's dismissal. The Burger King restaurants were independently owned franchises. Indeed, Burger King's Franchise Disclosure Document not only made it clear that each restaurant did *not* possess any sort of exclusive territory, the disclosure advised (among other things) that "[o]ther BURGER KING Restaurants may compete with your Restaurant or may affect customer trading patterns. Because you will not receive an exclusive territory, you may face competition from other franchisees, from outlets

that we own, or from other channels of distribution or competitive brands that [Restaurant Brands] control[s]." *Id*. at *3.

The panel concluded: "Burger King and its franchisees, though they certainly have some economic interests in common, each separately pursue their own economic interests when hiring employees." *Id*. at *6. It therefore reversed the district court's "concerted action" ruling and remanded for further proceedings.