

AntitrustConnect Blog

Bamboozled?

Robert E. Connolly (Law Office of Robert Connolly) · Friday, January 27th, 2023

One of the saddest lessons of history is this: If we've been bamboozled long enough, we tend to reject any evidence of the bamboozle. We're no longer interested in finding out the truth. The bamboozle has captured us. It's simply too painful to acknowledge, even to ourselves, that we've been taken. Once you give a charlatan power over you, you almost never get it back."

? **Carl Sagan, [The Demon-Haunted World: Science as a Candle in the Dark](#)**

I have long been a devotee of the Chicago School (at least on the limited level at which I understand it), but the FTC and Antitrust Division's recent aggressive civil enforcement actions have me questioning whether I've been bamboozled. The FTC's latest action, [FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition](#), FTC Press Release, January 5, 2023, is a case in point. While I question whether the FTC has the authority to enforce the proposed rule, I think I like it, despite the procompetitive arguments that can be made in favor of non-competes.

Two days ago I had a conversation with a friend about this proposed rule. We discussed a real life, current situation where a young salesperson is being asked to sign a non-compete clause. He was concerned. To refuse to sign might mean losing his at-will position. To sign might mean that if he was later laid off, he'd have a hard time getting another job in the field due to the scope of the non-compete clause he was being asked to sign. The relative bargaining power of the employer/employee was lopsided to say the least. And this was a young man who was alert enough to realize the implications of what he was being asked to sign. I'm sure many people sign such contracts simply because the boss said so without understanding the rights they have signed away.

I'm pretty familiar with the arguments in favor of non-compete clauses. Employers will be reluctant to invest in training employees if they can then jump ship and go to a competitor. Former Labor Secretary Gene Scalia is quoted as saying "It [the proposed non-compete rule] would also, by the FTC's own account, reduce capital investment, worker training and possibly job growth...." , Gus Hurwitz, [Truth on the Market](#), January 13, 2023 (quoting a Wall Street Journal article.) And that makes some sense to me. But given the way the vast majority of non-competes are used in the real world, is that really what will happen if the FTC rule is adopted? The FTC statement further says, "Research shows that employers' use of noncompetes to restrict workers' mobility significantly suppresses workers' wages—even for those not subject to noncompetes, or subject to noncompetes that are unenforceable under state law," said Elizabeth Wilkins, Director of the

Office of Policy Planning. The FTC “estimates the rule could increase workers’ earnings by nearly \$300 billion per year.” What do you think? The FTC has an open [comment period](#) for the new rule until Mach 20, 2023.

So, have I been bamboozled by Chicago School into thinking non-competes are pro-competitive? (and efficiency savings in mergers are passed on to consumers?, etc.) I don’t claim to be an expert or have studied the issue in great detail but this is where I come down: there are situations where a non-compete can be pro-competitive, but those situations can be dealt with by less restrictive means; perhaps a longer post training employment contract to keep the employee from “free riding” on training. Non-disclosure clauses are another way to protect intellectual property where employees truly have access to sensitive proprietary information. According to the FTC press release: “The proposed rule would generally not apply to other types of employment restrictions, like non-disclosure agreements.” The instances where the non-compete is pro-competitive seems (to me) to be dwarfed by the ubiquitous use of non-competes against workers for the purpose primarily of suppressing worker mobility in pursuit of better/higher paying jobs. Given the imbalance in negotiating power and the less restrictive means for employers to recoup training costs, I come out in favor of the FTC’s proposed non-compete clauses.

Was I bamboozled by the Chicago school? Am I being bamboozled by the FTC now? I’m not 100% sure but I love the word bamboozle so I decided to write this blog post. In William Shakespeare’s Hamlet, Polonius said: “Neither a bamboozler nor a bamboozlee be.” (Well, no he didn’t.) Maybe there is no bamboozle here. Just honest differences of opinion. That’s what makes antitrust such an interesting and important field.

PS: I remember the first time I was bamboozled. By the Pope no less! As a young lad in an Irish Catholic household I studied to be altar boy on what was hoped to be my first step to sainthood—or at least the priesthood. I had to learn to serve Mass in Latin—no easy feat for a kid that just wanted to play stickball. And no sooner had I “graduated” altar boy school, the Pope changed the Mass to English, which was not much easier for me to learn than Latin.

Thanks for reading.

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