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Threading The (American) Needle: U.S. Supreme Court Provides Further Guidance On When A Joint Venture Is Subject To The Antitrust Laws

On May 25, 2010, in U.S. Supreme Court issued its unanimous decision in *American Needle, Inc. v. National Football League*, No. 08-661. The Court held that the National Football League was not a "single entity" for antitrust purposes and the NFL's termination of a licensing deal with American Needle in favor of an exclusive deal with Reebok was subject to scrutiny under the antitrust laws as concerted action. The Court did not hold that the NFL had behaved unlawfully but simply concluded that the NFL's conduct could be challenged as concerted action by the NFL teams, not unilateral action by the NFL or its licensing entity, NFL Properties (NFLP).

The decision followed another unanimous decision of the Court, in *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), where the Court held that the pricing decisions by a venture between Texaco and Shell Oil to refine and sell gasoline in the western United States under the two companies' original brand names were not necessarily illegal under the antitrust laws because such pricing "is not price fixing in the antitrust sense."

American Needle appears to have answered in the affirmative a question left unresolved in *Dagher* – whether the decisions of a joint venture of competitors might be subject to scrutiny under the antitrust "rule of reason." In doing so, *American Needle* appears, as a practical matter, to have tightened the potential scrutiny that such ventures will face. *American Needle* also broke a many years' long streak of defendant victories in antitrust cases at the Supreme Court.

The antitrust law at issue is Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits "[e]very contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade." Although broadly written, Section 1 has been interpreted as applying to concerted action taken by *separate* economic entities, and not reaching unilateral conduct.

Over the years, the Court has considered the line between conduct undertaken by separate economic entities and unilateral conduct. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), for example, the Court held that coordinated action by a corporation and its wholly-owned subsidiary, although nominally involving separate legal entities, is unilateral conduct as a matter of law and cannot be challenged under Section 1.

In *American Needle*, the Court considered, and rejected, the opposite argument – that the conduct of a single entity was necessarily immune from Section 1 liability. The Court held that "functional considerations of how the parties involved in the alleged anticompetitive conduct actually operate" was the critical consideration and noted past cases that stood for the proposition that "a legally single entity [can violate] §1 when the entity [is] controlled by a group of competitors and serve[s], in essence as a vehicle for ongoing concerted activity." The Court held that the question turned on "whether the agreement joins together 'independent centers of decisionmaking.'"

In light of those considerations, the Court rejected the argument that NFLP, which at least nominally made the licensing decision under challenge, was a single entity for these purposes. Although the Court did not identify one factor above others, it stressed the fact that NFLP was, in a functional sense, merely a marketing vehicle that did not own the underlying intellectual property assets. Indeed, absent the joint agreement of the NFL teams to grant NFLP exclusive marketing rights, each NFL team could market separately. Distinguishing NFLP from the usual corporate situation, the Court noted that "[u]nlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in the NFLP's profits but also an interest in the team's individual profits." The Court labeled the NFLP a mere "instrumentality" of the teams, not the sort of independent entity the actions of which would be immune from scrutiny under Section 1.

The Court likewise rejected the NFL's contention that it was a "single entity" for purposes of Section 1. In rejecting that argument, the Court noted the fact that the various NFL franchises "compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and player personnel." The Court added that the teams also competed (or could compete) in "the market for intellectual property."

Having found that the decision by the NFL teams, through NFL Properties, to terminate American Needle's license could be challenged under Section 1, the Court concluded that such a challenge would be under the antitrust rule of reason. The Court reasoned that, because some restraints on competition among the NFL teams were necessary for the NFL product to exist at all, condemning the concerted action as illegal *per se* under Section 1 was not warranted. The Court added that rule of reason analysis can sometimes be relatively simple and cited a number of factors that might weigh in the NFL's favor, such as "the interest in maintaining a competitive balance," which it said "may well justify a variety of collective decisions made by the teams." It left the details of the rule of reason analysis to further proceedings in the lower courts.

Reconciling *American Needle* with *Dagher*, which the Court scarcely mentioned in its decision, will surely occupy courts and antitrust practitioners. On one level, the reconciliation is easy because *Dagher* explicitly reserved on the question of whether there was a potential "rule of reason claim," which was the issue in *American Needle*. *Dagher* did hold, however, that the pricing decisions in *Dagher* were not "price fixing in the antitrust

sense," even though those decisions caused uniform pricing for gasoline sold under the Texaco and Shell brands. That holding seemed to suggest that the pricing decision might not be illegal under any antitrust theory, including the rule of reason.

Putting that issue aside, there were important distinctions between the joint venture in *Dagher* and NFL Properties that may be relevant in future cases. Among those are the fact that, in *Dagher*, the production assets of the two joint venture partners were integrated, whereas in *American Needle*, there was no such integration. Rather, the NFL teams maintain ownership over the products that NFLP sells. In that sense the joint venture in *American Needle* was more potentially problematic because it could more easily be viewed as analogous to a price-fixing arrangement under a corporate umbrella. In addition, although not entirely clear from the decisions, it appears that the Court concluded that the joint venture in *Dagher* was a functioning independent business, where NFL Properties was much more closely controlled on a day-to-day basis by the NFL teams. In the Court's words, "competitors cannot simply get around antitrust liability through a third-party intermediary or joint venture."

In addition, the Court's enunciation of a "functional" approach to the analysis of single entity versus collective action could be read as impacting *Copperweld*, particularly as it pertains to coordination among entities under *partial* common ownership. To be sure, the Court's approving citation of *Copperweld* throughout the opinion suggests that the holding of *Copperweld* – that a corporation cannot violate Section 1 through an agreement with a wholly-owned subsidiary – remains rock solid. Courts may, however, interpret *American Needle* as suggesting that whether the same result should obtain in partial ownership situations should turn on functional considerations, rather than bright-line tests.

Retiring Justice Stevens, who was an antitrust lawyer in private practice before joining the Court in 1975, wrote the opinion. Justice Stevens citation to then-Judge Sotomayor's concurrence in *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008), has led some to speculate that Justice Stevens sees now Justice Sotomayor as a possible heir to his antitrust legacy, but that remains to be seen.

Whatever the future makeup of the Court, competitors and firms involved in or evaluating involvement in such ventures will be well advised to consider the implications of *American Needle*.

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For additional information regarding *American Needle* please contact any of your usual contacts at Cleary Gottlieb or any member of the Firm's antitrust practice.

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