

Supreme Court Provides Guidance on Applying Section 1 of the Sherman Act to Joint Ventures

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In the first Supreme Court victory for an antitrust plaintiff in nearly 20 years, the Court on Monday unanimously held that NFL teams should not be considered a “single entity” for the purposes of applying Section 1 of the Sherman Act to their licensing activities. Specifically, the Court held in *American Needle v. National Football League* that antitrust prohibitions on “contracts, combinations and conspiracies in restraint of trade” will apply if “an agreement joins together independent centers of decisionmaking. If it does, the entities are capable of conspiring under Section 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.” The *American Needle* decision clarifies in some respects what joint venture activity will be subject to potential challenge under Section 1 of the Sherman Act, but it also raises questions about how its standard for identifying “joint conduct” subject to Section 1 will be reconciled with existing precedent.

The *American Needle* case involves a challenge by a hat manufacturer—American Needle—to a license agreement between Reebok and National Football League Properties (NFLP) providing Reebok exclusive rights to manufacture and sell headware bearing the logos or other intellectual property of any NFL team. The NFL teams formed the NFLP “to develop license, and market” their respective logos and other intellectual property, activities that had previously been undertaken by the NFL teams themselves.

American Needle, which had previously owned a nonexclusive license to use NFL team logos on its headware, challenged the NFLP’s exclusive license agreement with Reebok, claiming that the license was the result of “agreements between the NFL, its teams, NFLP and Reebok” that, *inter alia*, violated Section 1 of the Sherman Act. In response, the NFL argued that the NFL and its member teams are “a single entity with respect to the conduct challenged” and incapable of conspiring within the meaning of Section 1. The district court accepted the NFL’s argument and dismissed the case. The Seventh Circuit Court of Appeals affirmed, and American Needle sought review by the Supreme Court.

The Supreme Court reversed the Seventh’s Circuit’s affirmation in an unanimous decision, holding that the determination of whether conduct is “joint”—and thus subject to Section 1 of the Sherman Act—requires “a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.” Thus, the licensing agreement with Reebok was not insulated from antitrust challenge just because NFL teams had formed an integrated organization—the NFLP—through which their intellectual property rights were licensed. The key question posed by the antitrust laws, according to the Court, is whether entities “are acting as separate economic actors pursuing separate economic interests, and each [entity] therefore is a potential independent center of decisionmaking.” Because there was nothing other than the agreement to form the NFLP that would “prevent each of the teams from making

its own market decisions relating to purchases of apparel and headware,” the licensing decisions of the NFLP were “joint activity” subject to Section 1 of the Sherman Act.

The Court was careful to point out that its holding that the NFL’s actions were subject to Section 1 of the Sherman Act did not mean that those actions necessarily violated the Sherman Act. “Contracts, combinations and conspiracies” only violate Section 1 of the Sherman Act if they are unreasonable—i.e., if they produce anticompetitive effects that outweigh any procompetitive benefits. The Court remanded the case to the Seventh Circuit to determine whether the license challenged by American Needle did, in fact, violate Section 1 pursuant to the Rule of Reason standard.

The *American Needle* decision clarifies in some respects standards the U.S. courts will apply in determining whether conduct by joint ventures is subject to potential challenge under Section 1 of the Sherman Act. The Court confirmed prior precedent in focusing on the “functional” characteristics of the entities involved in joint venture activity, rather than the “structural” characteristics of the joint venture itself. By focusing the functional inquiry on whether particular joint venture conduct “deprives the marketplace of independent centers of decisionmaking,” however, the *American Needle* decision potentially subjects a wider array of joint venture activity to scrutiny under Section 1 of the Sherman Act. A variety of collaborations among competitors will be subject to evaluation under the Court’s analysis, include joint production, purchasing, and sales ventures, which may independently compete in some markets with those entities forming the joint ventures.

Left unanswered is how *American Needle* will be reconciled with the Court’s 2005 decision in *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006). In *Dagher*, the Court held that an integrated joint venture could price its products without running afoul of antitrust prohibitions on price-fixing because “[w]hen persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures are regarded as a single firm competing with other sellers in the market.” That standard for determining whether joint venture activity is “single firm” conduct exempt from Section 1 of the Sherman Act is different from the *American Needle* standard, which focuses on whether a particular joint venture “joins together different independent centers of decisionmaking” rather than on whether the joint venture partners share the risk of loss and opportunities for profit. In fact, the *American Needle* Court specifically noted that “if the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from Section 1, then any cartel could evade the antitrust law simply by creating a joint venture to serve as the exclusive seller of competing products.” It is left to the lower courts to reconcile these two standards.

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