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ANTITRUST UPDATE

The Supreme Court Clarifies the Scope of the Single-Enterprise Doctrine

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On May 24, 2010, a unanimous United States Supreme Court, in *American Needle, Inc. v. National Football League*, held that the collective product licensing activities of the 32 NFL teams are not exempt from antitrust scrutiny under § 1 of the Sherman Act. While the Court framed its opinion narrowly, answering only the question of whether National Football League Properties ("NFLP") constituted a "single enterprise", *American Needle* will receive careful scrutiny for the light it sheds on the federal courts' future treatment of the activities of joint ventures and standards-setting organizations ("SSOs"). The Court's rejection of the NFL's far-reaching argument should not be read to suggest that it is hostile to joint ventures and SSOs generally or that it fails to recognize their potential procompetitive effects. The Court affirmed that the activities of these enterprises may well survive antitrust review under the Rule of Reason to the extent that the restraint in question was necessary to achieve those benefits.

The result in *American Needle* was not particularly surprising, given that the NFL was urging the Court to immunize essentially all of the league's activities from § 1 scrutiny. Arguably, such a ruling would have broadened the protection afforded by the 1984 case of *Copperweld Corp. v. Independent Tube Corp.*, which stands for the proposition that multiple controlled subsidiaries or divisions of a single corporate entity cannot conspire (with each other) to violate the antitrust laws. At oral argument, counsel for the NFL acknowledged that the standard he was urging upon the Court might allow the teams to coordinate the terms and conditions of player employment, cap salaries for administrative staff, and set standard sale prices for individual franchises -- all potentially viewed as examples of possible § 1 conduct.

Of course, as the Court had previously recognized, for a joint venture of any kind to achieve procompetitive benefits, some cooperation among the individual participants is required. In the 2006 case of *Texaco v. Dagher*, the Court acknowledged that for a joint refining and marketing venture between horizontal competitors in the oil and gasoline markets to succeed, the participants had to agree not to compete with the business of the joint venture and to settle upon a single price to be charged for gasoline. These agreements were part of the "core activities" of the joint venture; the venture could not survive, and therefore could not capture the desired economic efficiencies, without these agreements. By contrast, the Court found it was not clear that for NFL football to exist as a product, the clubs must enter into agreements to fix prices and terms of dealing for apparel bearing the clubs' various trademarks. The Court declined to treat this kind of joint marketing as a "core activity" of the NFL.

While *American Needle* may prove to be a setback for the NFL, which may now face a trial, joint venture participants should not read the opinion with alarm. Justice Stevens took care to note that Rule of Reason analysis would adequately serve to protect the legitimate activities of joint ventures: "When restraints on competition are essential if the product is to be available at all, per se rules of illegality are inapplicable, and instead the restraint must be judged according to the Rule of Reason . . . . In such instances, the agreement is likely to survive the Rule of Reason . . . . And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye". The Court's opinion leaves undisturbed the series of cases, including *Dagher* and *Broadcast Music, Inc., v. Columbia Broadcast System*, that recognize the potential economic benefits of joint venture activity.

This analysis applies with equal force to standards-setting organizations ("SSOs"), which like joint ventures seek to capture certain efficiency benefits through cooperation among horizontal competitors. Given the growing recognition in the economic literature of the crucial efficiency-enhancing role of SSOs in innovation markets, SSO participants should not be discouraged by the fact that after *American Needle*, SSO activities will continue to be treated under the Rule of Reason. This is not to say, of course, that all forms of cooperative behavior in the SSO context will survive scrutiny; as Judge Posner has observed, the restraint must have "an organic connection to the venture and [be] reasonably necessary to make the venture more efficient or effective in achieving its procompetitive purposes". Knowledgeable counsel can aid their clients in limiting the clients' participation in SSO activities to those likely to meet this test.

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