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Client Alert

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Supreme Court Rejects NFL's "Single Entity" Argument; Clarifies Rules for Determining When Joint Ventures Are Subject to Section 1 Scrutiny

Last week, in *American Needle, Inc. v. NFL*, the Supreme Court unanimously held that the 32 NFL teams' pooling of their intellectual property rights into a single company for the purposes of jointly licensing those rights constitutes concerted action under § 1 of the Sherman Act. In so holding, the Court announced a new functional test for identifying concerted action that focuses on whether the challenged conduct "joins together separate decisionmakers" pursuing different economic interests and thereby deprives the market of competition between those independent decisionmakers.

Applying this new standard, the Court held that because each of the member teams of the NFL are independently-owned and operated businesses that would otherwise compete in the market for intellectual property, their joint licensing program constituted concerted action under § 1. The Court concluded that NFL Properties – the entity that administered the licensing of the teams' intellectual property rights – was also subject to § 1 scrutiny because it was simply an instrumentality of the teams and not a separate decision-making entity.

The Court did not resolve the question of whether the concerted action was anticompetitive, but remanded the case back to the trial court for resolution under the "rule of reason" standard. The Court noted that the fact that NFL teams must cooperate in the production and scheduling of games could provide a justification for a number of collective league decisions, but that fact did not insulate the challenged licensing program from antitrust scrutiny.

American Needle signals that challenges to joint ventures between actual or potential competitors will almost certainly satisfy the "concerted action" requirement under § 1 of the Sherman Act. The decision also raises the possibility that joint arrangements previously considered to be "single entities" will now be vulnerable to antitrust suits. Many businesses in many industries have benefited from the "single entity" protection; now, new challenges from plaintiffs should be expected in antitrust litigation. Although the decision leaves open the possibility that joint venturers may ultimately establish that their activities are pro-competitive under the "rule of reason," courts will seldom be able to make that determination without the parties engaging in expensive and burdensome discovery. Businesses engaged in any joint arrangements or operations would be wise to conduct a careful review of those arrangements to determine whether they require modification in light of *American Needle*.

If you have any questions concerning the issues raised in this alert, please contact the authors of this alert, David Hamilton at 410-545-5850 or Brent Powell at 336-728-7023 or any of our other experienced Antitrust attorneys.

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