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LEGAL ALERT

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Supreme Court Applies "Functional Analysis" to Determine Joint Venture Is Not a "Single Entity" Immune from Antitrust Liability

In *American Needle, Inc. v. National Football League*, 560 U.S. __ (2010), the Supreme Court unanimously held that teams in the National Football League and a corporate entity that they formed to manage their intellectual property should be considered separate entities capable of conspiring with one another for purposes of antitrust liability under Section 1 of the Sherman Act. The *American Needle* decision has direct implications for sports leagues and other joint ventures, and the "functional analysis" the Court adopted for this purpose may also have implications in other contexts in which the "single entity" defense may be asserted.

The National Football League and its member teams have established a joint venture, National Football League Properties (NFLP), to develop, license, and market their trademarks and other intellectual property. Until 2000, NFLP granted a number of non-exclusive licenses to plaintiff American Needle and other licensees, but it then decided instead to grant a 10-year exclusive license to Reebok International Ltd. to manufacture and sell trademarked headwear for all 32 NFL teams. After NFLP declined to renew its non-exclusive licensees, American Needle sued the NFL, its member teams, NFLP and Reebok, contending that the defendants' collective licensing arrangement constituted an unreasonable restraint of trade that was unlawful under Section 1 of the Sherman Act. The defendants successfully argued to the district court and Seventh Circuit Court of Appeals that the NFL, its teams, and the NFLP operate as a single entity, incapable of conspiring under Section 1 of the Sherman Act. The Supreme Court reversed.[1]

Rejecting formulaic distinctions, such as the legal forms of the parties or what the parties call themselves, the Supreme Court set out what it described as a "functional analysis." That is, courts must focus on whether the parties are " 'separate economic actors pursuing separate economic interests,' such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' and therefore of 'diversity of entrepreneurial interests.' " *See American Needle*, slip op. at 10 (citations omitted). Applying this standard, the Supreme Court found: "The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action." *Id.* at 11-12. In particular, each NFL team is "a substantial, independently owned, and independently managed business" and is a potentially competing supplier of its respective intellectual property. *Id.* at 12. The Court thus treated the defendants as independent entities capable of conspiring.

It remains to be seen whether the defendants will ultimately be found liable with respect to their joint licensing arrangement. The Court made it very clear that its decision answered only the initial question of whether the NFL and its teams were entities capable of concerted activity in violation of the Sherman Act. The Court acknowledged that the NFL teams share an interest in making the entire league successful and that it is therefore possible that collective decisionmaking may be justified under a rule of reason

[1] Interestingly, the defendants joined the plaintiffs in asking that the Seventh Circuit's decision be reviewed by the Supreme Court. Presumably, they were seeking a definitive ruling that they were immune from antitrust liability that they might in turn use in other contexts, such as labor negotiations. Their hopes in this regard were clearly misplaced.

analysis on remand. *See Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) (holding that a joint venture by oil companies to consolidate operations in the western United States and sell separately branded gasoline to service station owners at prices established by the joint venture was not a per se illegal horizontal price fixing agreement).[2]

Beyond the immediate application to sports leagues, *American Needle* will have obvious implications for other joint ventures where the participants might argue that their relationship with each other and the joint venture is immune from scrutiny. When independent actors form a joint venture while retaining their independent business identity, they may well be able to justify their venture and ancillary agreements under the rule of reason. But it seems likely that in most cases, joint venture participants will be unable to meet the functional tests established by the Court for immunizing their conduct under a single entity defense.

The analysis in *American Needle* may also have implications in other settings in which the single entity defense is advanced. For example, the Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), found that a parent and wholly owned subsidiary constituted a single entity as a matter of law, because there was a complete unity of economic interest. This rule operates without regard to functional analyses of whether the parent in fact exercises control over the subsidiary, since it has the ultimate right to do so, and without regard to whether the two hold themselves out as competitors in the market. However, courts have reached seemingly inconsistent results in applying *Copperweld* when the percentage of ownership is less than 100%.[3] By focusing on both the "unitary decisionmaking quality" and the "single aggregation of economic power characteristic," the Court seems to suggest that the extent of common economic interest and whether the parent exercises control in fact will both be relevant in this analysis.[4]

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[2] In *Dagher*, the Court stated that pricing by this joint venture "amounts to little more than price setting by a single entity," and used other language which seemed to suggest the possibility that the Court might have been open to a single entity defense in a joint venture context. However, the Court's holding was more limited: "… [T]he pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful under §1 of the Sherman Act. . . ." 547 U.S. at 8. Because the participants had transferred the relevant properties to the joint venture, and the price setting mechanism was necessary and integral to the joint venture, the price setting mechanism could not be challenged in isolation as per se unlawful price fixing. Nevertheless, it appears that the joint venture as a whole, including the pricing component, could have been challenged under the rule of reason as an unlawful agreement between competitors. *Cf. id.* at 7 ("If Equilon's price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason").

[3] *Compare Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477 (D. Or. 1987) (rejecting argument that parent cannot conspire with 75% owned subsidiary, though dismissing antitrust claims on other grounds), *with Novatel Communications v. Cellular Telephone Supply*, No. C85-2674A, 1986 WL 15507 (N.D. Ga. 1986) (a parent ultimately controls and therefore cannot conspire with a 51% percent subsidiary); *see also Siegel Transfer Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1133 & n.7 (3rd Cir. 1995) (noting that courts have extended *Copperweld* to apply to the 80%-100% ownership range).

[4] Of particular interest in this context is the *American Needle* Court's citation to *United States v. Citizens & Southern Nat. Bank*, 422 U.S. 86 (1975) ("*C&S*"). *See American Needle,* slip op. at 9 (describing *C&S* as looking to "economic substance"). In *C&S*, the Supreme Court evaluated the relationship between a holding company and certain 5% owned subsidiaries established by the holding company to circumvent state anti-bank-branching laws. Despite, or perhaps to some extent because of, the extensive direct and indirect control mechanisms between the holding company and these subsidiaries, the Court found no unreasonable restraint of trade among them. The Court further held that the acquisition of these subsidiaries by the holding company posed little competitive harm in light of the general absence of existing competition among them. The *C&S* defendants did not actually rely on a single entity defense, as such, and the *American Needle* Court's citation of this opinion is interesting in perhaps suggesting that close

Similarly, while some courts accord single entity status to principal/agent relationships on a virtually automatic basis, others go into a detailed analysis of whether the agent possesses some independent economic interest or whether the principal in fact exercises control.[5] The *American Needle* decision's emphasis on a "functional analysis" suggests that both the existence of independent interests and the actual exercise of control may be relevant in these cases and that the application of the single entity defense may often be treated as an issue of fact.

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common control may in some circumstances justify the use of such a defense, even at low ownership percentages, where the parties functionally act as one entity.

[5] *See, e.g., Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, n.5 (2nd Cir. 1979) (listing several elements to consider in determining whether an agent is a separate economic entity, including the degree to which the agent exercises discretion concerning price and terms); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (officer, director and shareholder of corporation capable of conspiring with corporation when he had an "independent personal stake" in a competitor); *Bogan v. Northwestern Mut. Life Ins. Co.*, 953 F. Supp. 532, *opinion vacated on other grounds by* 30 F. Supp. 2d 610 (S.D.N.Y. 1997) (life insurance general agents capable of conspiring with each other where, among other things, agents exercised independent control in soliciting customers, covering expenses, and setting the level of service for a particular policy).