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presents

Competitor Collaborations After American Needle v. NFL

Avoiding Antitrust Violations in Joint Ventures with Competitors

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

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Wednesday, July 21, 2010

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Competitor Collaborations After *American Needle*

Strafford Webinar, July 21, 2010

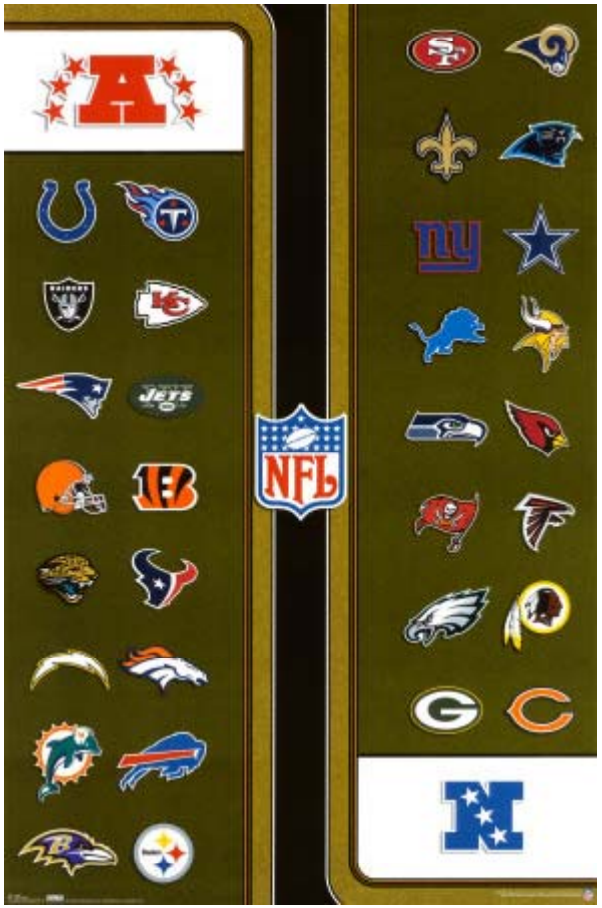
- Robert B. Bell, Kaye Scholer LLP
- William L. Monts III, Hogan Lovells US LLP
- Robert S. Schlossberg, Freshfields Bruckhaus Deringer US LLP

Agenda

- *American Needle*
  - Factual and Procedural Background
  - Lower Court Decisions
  - Supreme Court Decision
- *Copperweld*
- *Dagher*
- *Rothery*
- Practical Implications of *American Needle*

The NFL

- Unincorporated, non-profit association of 32 teams
- Each team operates as an independent, for-profit business
- Each team owns trademarks on its name and logos
- Teams authorized NFL Properties to engage in marketing and promotional activities, including licensing of NFL logos for apparel



The Licensing Controversy

- From 1963 to 2000, NFL Properties sold non-exclusive licenses to makers of headwear
- In 2000, NFL Properties held a bidding process for an exclusive license to manufacture headwear with team logos
- Reebok International, Ltd. won the bidding process and received a 10-year license
- NFL Properties cancelled the other licenses; American Needle, Inc. filed an antitrust suit

District Court Decision

- *American Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007)
  - Held teams of NFL constituted a "single entity" for antitrust analysis purposes
  - Teams incapable of "conspiracy" under Section 1; Section 2 monopolization claim untenable because owner of IP has right to grant exclusive license
  - *Cf*. DOJ & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 4.1.2 (1995) ("Generally, an exclusive license may raise antitrust concerns only if the licensees themselves, or the licensor and its licensees, are in a horizontal relationship.")

Court of Appeals Decision

- *American Needle, Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008)
  - Affirmed district court
  - "American Needle's proposed approach is one step removed from saying that the NFL teams can be a single entity only if the teams have 'a complete unity of interest'-a legal proposition that we have rejected as 'silly.'" 538 F.3d at 743.
  - "Certainly the NFL teams can function only as one source of economic power when collectively producing NFL football. Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?" *Id*.

Certiorari Stage

- American Needle petitioned for certiorari on the Section 1 claim only
  - 2 questions: whether the teams of the NFL constitute a “single entity” for antitrust purposes, and whether the agreement with Reebok violated Section 1
- The NFL took the unusual step of urging the Court to grant certiorari
  - Circuits were divided over the “single entity” issue; NFL hoped to gain blanket Section 1 immunity
- Certiorari granted on the “single entity” question

Supreme Court Decision

- American Needle Inc. v. National Football League, No. 08-661 (U.S. May 24, 2010)
- In a unanimous opinion by Justice Stevens, the Court reversed the 7th Circuit.
- The Court held that the NFL and NFLP engaged in concerted action with respect to the licensing of intellectual property and are therefore subject to scrutiny under §1.
- The finding of concerted action "does not simply turn on whether the parties involved are legally distinct entities" but instead demands a "functional consideration;" it is "not determinative that two legally distinct entities have organized themselves under a single umbrella or into a structural joint venture."

Supreme Court Decision, cont'd

- The inquiry is whether the agreement involves "separate actors pursuing separate economic interests" such that the agreement "deprives the marketplace of independent centers of decision making "and thus of actual or potential competition."

The NFL

- The claimed inability of the teams to produce NFL football except through cooperation was "not relevant to whether that cooperation is concerted or independent action."
- The NFL teams are independently owned, independently managed, and compete with each other; they are potentially competing suppliers in the market for intellectual property.

Supreme Court Decision, cont'd

NFLP

- When teams license intellectual property, they are pursuing "separate economic interests" and not the "common interests of the whole "league."
- The formation of NFLP as a separate legal entity to act as the centralized manager of the intellectual property does not preclude Section 1 scrutiny.
- The long history of NFLP's role in licensing does not overcome the fact that the teams have "distinct, potentially competing interests in licensing their intellectual property."

Supreme Court Decision, cont'd

- NFLP is "an instrumentality" of the teams, and its decisions about licensing the teams' separately owned intellectual property are concerted action.

Remand

- On remand, a flexible rule of reason will apply, which, depending on the activity in question, may not require detailed analysis.
- The teams' shared interest in making the league successful, the need to cooperate to produce games, and their interest in "maintaining competitive balance" may justify the collective action, but that is left to the district court on remand.

Copperweld v. Independence Tube Corp. 467 U.S. 752 (1984)

- Held: A parent and its wholly-owned subsidiary are incapable of conspiring with each other for purposes of §1 of the Sherman Act.
- Because “there is no sudden joining of economic resources that had previously served different interests … there is no justification for §1 scrutiny.”
- Joint conduct by a parent and a subsidiary does not “deprive the marketplace of independent centers of decision making.”

Texaco, Inc. v. Dagher, 547 U.S. 1 (2006)

- Texaco and Shell created a joint venture, Equilon, to refine and sell gasoline in the western U.S. Equilon set a single price for both brands.
- The Ninth Circuit held that setting a price for both brands constituted price fixing that is *per se* illegal under §1.
- Held: When a lawful, integrated joint venture sets prices, it is not a *per se* violation of §1; those pricing decisions "do not fall within the narrow category of activity that is *per se* unlawful under §1 of the Sherman Act."

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.)

- Several agents of Atlas Van Lines sued challenging agreement among agents that each would not ship goods interstate for their own account using Atlas' interstate regulatory authority, *i.e.*, agents of Atlas would not compete against the venture using venture assets.
- Plaintiff claimed that agreement was horizontal group boycott that was either *per se* illegal or unlawful under the rule of reason.
- *Held*: Agreement is not *per se* illegal and passes muster under the rule of reason

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.)

- On question of concerted action, several strains of analysis similar to *American Needle*
  - Court described Atlas in many respects as a single firm, noting that Atlas was "an enterprise" and "an enterprise or firm intergrated by contracts, one which is indistinguishable in economic analysis from a complex partnership."
  - Even though Atlas bore the hallmarks of a single firm, D.C. Circuit rejected the argument that agreements made among distinct carriers were not concerted action on analysis very similar to that ultimately adopted in *American Needle*.
  - At time challenged restraint went into effect, Atlas consisted of numerous actual or potential competitors, which was sufficient to make the conduct in question the product of concerted action

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.)

- Merits analysis shows that many restraints of the type challenged in Atlas will be upheld.
- Court characterized the restraint in question as ancillary to the formation of the Atlas venture. As such, restraint was not *per se* illegal.
- Restraint prevented Atlas member agents from taking a free ride on the venture. By preventing competition with the venture among members unless members used their own separate regulatory authority, restraint ensured that members shared economic benefits of Atlas name with one another when they used Atlas assets.

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.)

- Prevention of free riding held to be a legitimate justification for restrictions on competition by venturers with venture.
- Atlas market share in the 5-6% range and thus too low to raise inference of market power.
- Without market power, Atlas' restraint could not restrict output and harm competition in the market for nationwide movement of goods.

Practical Implications of *American Needle*

- No single-entity status for Visa, MasterCard, local real estate boards, franchisee councils, franchisors-franchisees, hospital peer review committees, etc.
- "Internal" joint venture decisions vs. decisions of joint venturers
  - Employment or other "firmwide" decisions
  - Pricing or other output decisions

Practical Implications of *American Needle*

- "Internal" joint venture decisions vs. decisions of joint venturers (cont'd)
  - Exclusive supply or sales relationships
  - Standards for distinguishing "internal" venture conduct from decisions of the venturers that constitute concerted action
- Importance of documenting business and economic justifications for ancillary restraints
  - Status of ancillary restraints doctrine
  - Standards for determining "reasonable necessity" of ancillary restraint
  - Competition with venture vs. competition among venturers outside the scope of the venture – compare *Rothery*

Practical Implications of *American Needle*

- Importance of documenting business and economic justifications for ancillary restraints (cont'd)
  - Antitrust as a tool for micromanaging joint ventures
  - Litigation – screens to discovery?
  - Reconciliation of traditional notice pleading concepts with issues that have generally been viewed as fact questions