WILLKIE FARR & GALLAGHER LLP

CLIENT MEMORANDUM

SUPREME COURT LIMITS DEVELOPMENT OF SINGLE-ENTERPRISE DOCTRINE

Earlier this year, the Supreme Court limited the expansion of the single-enterprise doctrine. As a result, more competitor collaborations, even when organized as stand-alone entities, are likely to be reviewed under the concerted-conduct standard of Section 1 of the Sherman Act.

American Needle speaks more about what a single enterprise is not than what a single enterprise is. The Supreme Court also did not eliminate the prospect of forming durable collaborations among competitors that are viewed as legitimate single enterprises subject only to Section 2 of the Sherman Act. Guidance in that regard is provided below.

Background

In *American Needle*, the Supreme Court unanimously held that an agreement among the 32 separately owned NFL teams and a corporate entity that they formed to manage their separately owned intellectual property constitutes concerted conduct subject to Section 1 of the Sherman Act.[1]

Each of the 32 NFL teams is separately owned and, in turn, each "has its own name, colors, and logo, and owns related intellectual property." Prior to 1963, each team licensed its intellectual property (*e.g.*, for caps) independently. In 1963, the teams formed a separate corporate entity called National Football League Properties (NFLP) in which the member teams were the shareholders. NFLP developed, licensed, and marketed each team's respective intellectual property. Most of the revenues generated by NFLP have been shared equally among the teams or given to charity.

Between 1963 and 2000, NFLP issued nonexclusive licenses, one of which was granted to American Needle to manufacture and sell apparel bearing team insignias. In 2002, the teams voted to authorize NFLP to grant an exclusive license, which NFLP granted to Reebok. American Needle's existing nonexclusive license was not renewed by NFLP.

American Needle subsequently filed an action alleging that the agreements among the NFL, its teams, NFLP, and Reebok violated Sections 1 and 2 of the Sherman Act. The defendants argued that the teams, the NFL, and NFLP were incapable of conspiring within the meaning of Section 1 "because they are a single economic enterprise, at least with respect to the conduct challenged."

The District Court granted summary judgment for the defendants, finding "that in [the relevant] facet of their operations they have so integrated their operations that they should be deemed a single entity rather than joint venturers cooperating for a common purpose." The Court of Appeals for the Seventh Circuit affirmed and the Supreme Court reversed.

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1 *American Needle, Inc. v. National Football League*, 2010 WL 2025207, 560 U.S. __ (May 24, 2010).

The Single Enterprise Question

American Needle presented the question whether NFLP reflects the "concerted" activity of its 32 shareholders or the "independent" action of a single actor in the market. Section 1 of the Sherman Act applies only to concerted action, whereas Section 2 can apply to concerted or independent action, but only insofar as such conduct monopolizes or attempts to monopolize a market. The narrower scope of Section 2 ensures that intra-firm business decisions (*e.g.*, an agreement among a firm's employees on prices to charge for the firm's products) are not "restraints of trade" subject to judicial scrutiny under Section 1.

The Court held that whether conduct constitutes unilateral or concerted action should be based on whether the arrangement "deprives the marketplace of independent centers of decisionmaking" and thus of "actual or potential competition."

The Court found that "the NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action." Rather, each of "the teams is a substantial, independently owned, and independently managed business" and, the Court found, the teams "compete in the market for intellectual property." Thus, "[d]ecisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that deprive the marketplace of independent centers of decisionmaking and therefore of actual or potential competition."

The Court acknowledged that the teams organized and own a legally separate entity that centralizes the management of their intellectual property. But the teams' interests in licensing team trademarks are not necessarily aligned because the teams remain separate, profit-maximizing entities and retain at least the potential to compete against each other in the sale of their respective intellectual property.

Implications

The Supreme Court's decision has limited the expansion of a more flexible single-enterprise doctrine that had been promoted by some federal courts of appeals. For example, in the 1996 *Chicago Bulls II* opinion, Judge Easterbrook concluded that the single-enterprise question must be asked "one league at a time—and perhaps one facet of a league at a time." The Supreme Court did not accept that standard, which had been employed by the Seventh Circuit in *American Needle*.

American Needle may be more useful for identifying ventures that are not single entities than it is for designing a joint venture that would be construed as a single entity and subject to review only under Section 2 of the Sherman Act. Still, *American Needle* seems to imply that a venture in which potential or actual competitors durably commit and transfer ownership of the relevant resources to a common undertaking may constitute a single enterprise. Although other forms of competitor collaborations may also satisfy *American Needle* scrutiny, designing such collaborations will require the careful work of both business personnel and counsel.

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