

American Needle: Sea Change Or Steady As She Goes?

Law360, New York (July 06, 2010) -- In *American Needle Inc. v. NFL*, the U.S. Supreme Court held that competitors participating in the joint venture analyzed in that case were not immune from scrutiny under Section 1 of the Sherman Act even if they acted together through a single entity. 2010 U.S. LEXIS 4166 (U.S. May 24, 2010) at * 33.

Based on various articles published since that decision, many commentators appear to view *American Needle* as representing not only a retraction from *Texaco v. Dagher*, 547 U.S. 1 (2006), but also a sea change in joint venture analysis generally. However, the holdings in *Dagher* and *American Needle* can be readily reconciled, which is consistent with both being unanimous opinions.

In *Dagher*, the court rejected the proposition that competitive decision-making by a venture entity was per se unlawful. In *American Needle*, the court found that competitive decision making of that venture was not per se lawful (or immune from a Section 1 challenge). In both cases, the court declined to rule on the broader question of whether the competitive decision-making of an integrated joint venture can ever be immune from a Section 1 challenge.

While that question remains for another day, other significant decisions provide companies with guidance about the acceptable boundaries of conduct in competitor collaborations. The key questions facing firms and counselors — and the basic analytical framework — in evaluating joint ventures, therefore, remain fundamentally unchanged.

American Needle

American Needle challenged the 32 NFL teams' agreement to license their logos and intellectual property through a jointly owned entity, NFL Properties Inc. ("NFLP").

The court focused on whether the NFL teams remained "independent centers of decision making" for their logos and trademarks that rendered their joint conduct capable of eliminating actual or potential competition in violation of Section 1. *Id.* at *22-23.

While acknowledging that the question of "whether NFLP decisions can constitute concerted activity covered by Section 1 is closer than whether decisions made directly by the 32 teams are covered by Section 1," the court unanimously ruled that NFLP's actions remained subject to Section 1 scrutiny. *Id.* at *30.

The court concluded that NFLP is "an instrumentality of the teams" and "simply a formalistic shell for ongoing concerted action" among the 32 separate teams. *Id.* at *31. In reaching this conclusion, the court focused on the fact that the individual teams retained control over the intellectual property they each licensed to the joint venture.

The court noted that despite the existence of NFLP, the teams like the Colts and Saints were potentially competing suppliers of their marks, and all the NFL teams were competitors and “are able to and have at times sought to withdraw from this arrangement.” Id. at *8.

The court cited the retained, independent ownership of the logos and assets three times in the opinion, in each instance noting that each of the teams was “free to market those trademarks as they see fit.” Id. at *24-26, 30, and 34 n. 9.

The court then held that the NFL teams, which the court said retained those independent marketing rights, remained subject to potential antitrust liability because they still had separate competing economic interests that were not necessarily aligned. Id. at *26.

Thus, under the record as the court interpreted it, the case involved the question of whether firms that create a joint venture entity to compete in the marketplace, but themselves retain assets that enable each of the firms to compete in the same marketplace as that entity, may be subject to Section 1 liability. Viewed in that light, American Needle is neither surprising, nor particularly remarkable.

Can a Joint Venture Be Immune From Section 1 Attack After American Needle?

What is left unanswered in American Needle is whether, under different facts, a joint venture (and its parents) would be found to be immune from Section 1 challenge for the conduct of the operation of the venture. American Needle does not foreclose that possibility.

Properly read, American Needle rejected per se immunity under the facts presented, but did not preclude immunity if a venture were structured differently, and in fact some of the language in the opinion hints that immunity might apply.

The U.S. government’s amicus position was that that some competitor collaborations “are incapable of conspiring under Section 1 if they have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition ... in that operational sphere and the challenged restraint [does] not significantly affect actual or potential competition ... outside their merged operations.” Id. at *33-34, n. 9.

The court determined that there was “no need to pass upon the government’s position” to resolve this case. According to the court, “because the teams still own their trademarks and are free to market those trademarks as they see fit,” the agreements between them as to how NFLP would license them were agreements between competitors. Id. at 34 *, n. 9.

So, again, the court focused on its understanding that each of the teams retained ownership of assets that could compete against each other, or potentially against NFLP for that matter.

The court also noted that “NFLP’s actions also are subject to §1, at least with regards to its marketing of property owned by the separate teams.” Id. at *30. This indicates that the analysis of whether there is joint conduct may hinge on whether the competitive assets have been relinquished by the parents to the venture.

At a minimum, the court’s decision leaves open the possibility that a venture can avoid Section 1 exposure altogether for its operations if the parents contribute all of their relevant assets to that venture, so the parents no longer have the ability to compete, in which case the merger analogy put forth by the government might be more applicable.

In order to understand the context of the court's ruling in *American Needle* it is worth examining another recent Supreme Court decision on joint ventures: *Dagher*.

Like *American Needle*, a unanimous court held in *Dagher* that the pricing decisions of the Equilon joint venture created between Shell and Texaco to market and sell gasoline in the Western United States were not subject to *per se* condemnation. 547 U.S. at 8.

The Equilon joint venture unified the marketing and pricing for separately branded Shell and Texaco service stations in the Western United States. *Id.* at 4.

In contrast to the *American Needle* opinion's repeated references to the teams' retained trademarks allowing them the ability to compete against each other, the court in *Dagher* took pains to emphasize that Shell and Texaco did not compete separately from Equilon to supply gasoline in the region, and had contributed all their relevant assets to the venture, which owned those assets. *Id.* at 5.

Therefore, the court concluded that "the pricing policy challenged here amount[ed] to little more than price setting by a single entity — albeit within the context of a joint venture — and not a pricing agreement between competing entities with respect to their competing products." *Id.* at 6.

The court determined that pricing activity was not *per se* unlawful and since the *Dagher* plaintiffs did not assert a Rule of Reason claim, they had stated no claim and the case was dismissed. *Id.* at 7, n. 2. Because it could dismiss on that narrow basis, the court noted, but did not address, the defendants' alternative argument that Section 1 of the Sherman Act does not apply to fully integrated joint ventures. *Id.*

If *Dagher* had made a rule of reason claim, it is possible the court could have concluded that it was a single entity and immune from Section 1 challenge on that basis. *American Needle* does not foreclose that argument. Instead, *American Needle* evaluated the "narrow issue" presented, including what the court viewed as the teams' retained ownership and ability to compete against one another in licensing their trademarks. 2010 U.S. LEXIS 4166 at *11.

Based on this reading, it would not appear that *American Needle* represents a significant change in the law. Joint venturers who contribute all of their relevant competitive assets to the venture so they cannot compete against each other, or against the venture, in that space should be evaluated under a merger-type standard with respect to the competitive implications of the combination of those assets in the venture.

Having done that, we think the venture and its parents should not be viewed as having the ability to conspire through the operation of that venture. Thus, the structuring of the venture in ways that remove parents' ability to compete with each other and the venture may yet provide insulation from a Section 1 challenge, even after *American Needle*.

A Sliding Scale Analytical Framework for Rule of Reason Analysis of Competitor Collaborations

The court has now, twice, found that conduct in the operation of a joint venture is not *per se* illegal, but must be evaluated under the Rule of Reason, balancing pro-competitive benefits against the potential anti-competitive harm of any cooperation. However, the extent of any Rule of Reason analysis a competitor collaboration may face will likely vary with the type of conduct in question.

A partial answer to the question of how in depth of a Rule of Reason analysis a competitor collaboration may face can be found in the FTC's decision in the *Three Tenors* case. *In re Polygram Holding*, 136 F.T.C. 310 (F.T.C. 2003).

In the Three Tenors, the Federal Trade Commission found — and the D.C. Circuit affirmed — that two music labels that formed a joint venture to market a new Three Tenors concert CD violated the antitrust laws because, following their decision to enter a co-marketing and distribution joint venture for a new Three Tenors CD, the labels had agreed to restrict the advertising and discounting of two previous Three Tenors CDs that each of the labels separately marketed and distributed. *Id.*; affirmed by *PolyGram Holding Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

Using a “quick look” rule of reason analysis, the FTC found that these agreements on advertising and discounting of products that they had not contributed to the venture, were not sold by the venture, and likely would compete against the venture’s new Three Tenors CD, were “inherently suspect” and that the labels lacked any legitimate pro-competitive justification for them. *Id.* at 352.

The FTC ruled that the advertising and discounting restrictions were outside the scope of the joint venture and not necessary for its effective operation. Thus, anti-competitive conduct that is “inherently suspect” or outside the legitimate scope of a competitor collaboration may be subject to a truncated rule of reason or “quick look” analysis.

The court in *American Needle* also provides insight to the question of the rigor with which a rule of reason analysis may be applied to collaborative conduct at the opposite end of the spectrum to that at issue in *Three Tenors*. Indeed, the court makes clear that certain joint conduct among competitors may be inherently less problematic than other conduct.

For example, restraints on competition that are essential if a product or service is to be available at all, “may not require a detailed analysis,” because the rule of reason “can sometimes be applied in the twinkling of an eye.” 2010 U.S. LEXIS 4166 at * 36. Thus, under rule of reason analysis as explained in *American Needle*, while some conduct may be “inherently suspect,” other conduct might be “inherently reasonable.”

The bottom line is that parties contemplating ventures, or who are currently in ventures, need to consider their proposed joint venture activities (and the constituent elements of those activities) in the rule of reason framework. In some cases, the conduct may be so clearly be at one end of the spectrum or the other (“inherently suspect” or “inherently reasonable”) to short circuit that analysis, but that analysis needs to be undertaken.

Conclusion

Where do *American Needle* and prior rulings leave the law governing legitimate competitor collaborations? What seems clear is that when parties to a competitor collaboration do not contribute all of their operations so that some potential for competition between the collaboration and the participants or among the participants themselves remains, then they must remain sensitive to Section 1 issues in the operation of the venture.

While there is no Supreme Court precedent squarely on point, it seems clear that, from a Section 1 standpoint, the safest course would be to have the venture own the relevant assets so the parents cannot compete in the same space independently.

Even after *American Needle*, parties clearly have the ability to argue that, under those facts, there can be no basis for Section 1 liability. Until the Supreme Court sanctions that argument, however, parties should be prepared to defend their venture conduct under the rule of reason.

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[1] See ABA Section of Antitrust Law, Antitrust Law Developments 472 (6th ed. 2007) (“Joint ventures allowing for competition among the joint venture and its parents in the joint venture market can raise complex issues.”).

[2] Of course, if the venture colluded with another unrelated organization (not one of its parents / owners), Section 1 would reach that conduct.