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Is the Law of Antitrust Conspiracy in Trouble? Or Is It Just Fine, Thank You?

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There are many complicated concepts in antitrust, but one that appeared to be less difficult was the notion of "contract, combination or conspiracy": two or more people agreeing on something. Of course, that is oversimplifying a bit, but for most purposes – and particularly when explaining the concept to clients – that was the law. But with the *American Needle*[1] case, and all of the noise it generated, it is appropriate to consider whether anything changed.

Actually, the law of *horizontal* conspiracy was fairly clear. But when one considered *vertical* conspiracies, particularly in the area of resale price maintenance, things were somewhat confusing. The courts would sometimes tangle up the concept, such as the line of cases trying to identify the distinction between "coerced" agreements and unilateral conduct, when the only way to defend against a resale price maintenance charge was to show that there was no "agreement." The cases spawned in this line were some of the worst examples of artificial, arbitrary, inconsistent, and formalistic line-drawing. The upshot was that no matter how "unilateral" one tried to be, when a client insisted on a distribution plan that relied on this line of cases the litigation risk ramped up due to the conflicting precedent. Some courts did go off on a tangent, finding that certain distribution or franchising agreements were not conspiracies since the parties shared a unity of interest.[2] But these cases misunderstand the significance of the shared interests of manufacturer and distributor or franchisor and franchisee when it comes to the conspiracy question,[3] and it would have been (and still is) highly risky to assume that there will be no actionable conspiracy in these vertical relationships.

The courts also could untangle the law of conspiracy, such as the *Copperweld*[4] resolution of whether there could be a conspiracy when one entity owned another. *Monsanto*[5] and *Sharp*[6] helped clarify when a conspiracy would be considered about price or about something else. And things seemed to be cleaned-up considerably in the resale price maintenance area by *Khan*[7] and *Leegin*[8] so that, instead of focusing on pettifogging distinctions between what was unilateral and what was conspiratorial, the analysis could focus on what was reasonable and what was unreasonable. While rule of reason cases may not provide black-letter legal guidance, one could at least focus on what facts justified – or failed to justify – the restraint in question.

Is There a Simple Rule?

Now we have *American Needle*. The Supreme Court has spoken in an attempt to clarify the law in the area of horizontal conspiracy. So, can one tell his or her clients when there will or won't be an antitrust conspiracy? On first reading, the rules do not jump out. But after parsing the case a few times, one can discern some helpful guidelines. Even though the Court did not provide a simple one-sentence rule, it made it clear what it believed were the indicators of either singularity or "concertedness." It necessitates what might be considered a "rule of reason" for determining concerted action, with a goal to avoid what one might call "sham singularity."

In the opinion, the Court quoted from *Copperweld* that concerted activity is inherently fraught with anticompetitive risk. It also said that it did not want to rely on "formalistic distinctions," such was whether legally distinct entities were involved, preferring to look at how the group actually operated. It noted cases where an entity was controlled by a group of competitors and was a vehicle for concerted activity, as in *Sealy*.[9]

The key factor, according to the Court, was whether the entity represented separate economic actors representing separate economic interests so as to deny the marketplace of independent centers of decisionmaking. This lack of independence removes from the marketplace actual or potential competition, which requires a court to determine if the reduction in competition is unreasonable. *American Needle* dealt with the NFL football teams jointly agreeing to exclusively license a company to produce clothing with team logos. The Court noted that each team was a substantial, independently owned business, with a separate corporate consciousness, and whose objectives were not common. While it is obvious that the teams cooperate in some areas (e.g., scheduling games), they compete with one another on the playing field, for fans, and for players and managers.

These independently owned businesses (the teams) are potentially competing suppliers in the market for intellectual property. In their licensing activities, they are not pursuing the interests of the NFL as a whole, but their own, individual interests. The Court acknowledged that it is necessary for the teams to cooperate to produce games, which provides a perfectly sensible justification for a host of collective decisions. But these are restraints on competition by individual entities – that is, concerted action – to be evaluated under the rule of reason.

Creating a Rule of "Sham Singularity"

The result is what one might call the rule of "sham singularity." Not a term the Court used, but it sums up their approach. So, how does one counsel a client, trying to figure out if the joint venture or other group that it formed will be exempt from antitrust scrutiny as a single entity, or its actions subject to a reasonableness analysis as a combination?

The Court said that the reason for cooperation is not relevant to whether the cooperation is concerted or independent action. Yet, from a counseling perspective, the first question one should ask is "Why did the entities come together?" The

answer will tell a lot about the nature of the combination. The Court stated that there was nothing to prevent the individual teams from marketing their own products or granting licenses individually – in other words, the combination itself was not essential to compete. It noted that, in rare cases, a combination within a single firm can constitute concerted action when the parties act on interests separate from those of the firm itself, and thus the "entity" is just a formalistic shell for concerted action. The entity created in *American Needle* to license logos was just such an "instrumentality" of the individual teams.

But we never really received clear guidance from the Court as to when a combination put together by competitors (or by anyone, for that matter) would be acceptable – that is, treated as a single entity for Sherman Act conspiracy purposes. As with many Supreme Court decisions, lower courts are left with the task of filling in the details. Until that happens, one would be well-advised not to rely on a single entity defense except in those instances where it was obvious that an independent legal entity was present, and the legal call would be fairly .easy.

So, while it is entirely possible that an "entity" put together by competitors could avoid the conspiracy label, in most cases it will be a relatively high-risk approach. But if one is looking for what might remove the "sham singularity" label from an entity, you can glean the following conclusions from the case:

- Using the single-entity defense should be reserved for those instances where a separate entity is created with several indicia of separateness, such as:
    - Separate incorporation
    - Irrevocable transfer of assets
    - Hart-Scott-Rodino review and approval
    - Separate management.
- If there is something less than complete separateness as defined above, then there may be considerations that would offset the inference of "sham singularity," such as:
    - How closely related are the business operations of the entity to the primary business of the parties that put it together?
    - Are the parties that put the entity together close competitors in their primary businesses?
    - Is there a strong business justification (other than the increase of profits) for the entity to exist?
    - Are the parties that contributed assets to the entity still actively involved in its management?
    - Does the entity compete with other companies?

The bottom line is that in questionable cases, trying to show the singularity of an entity that retains lots of participation by the parties that put it together will be difficult. So, rather than relying solely on singularity to defend the actions of the entity, whatever the purpose of the entity, the parties should always be prepared to show that its actions are reasonable.

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[1] *American Needle, Inc. v. National Football League*, No. 08-661, 2010 BL 115240, 560 U.S. ___ (2010).

[2] *See, e.g.*, *Williams v. I.B. Fischer Nevada*, 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993).

[3] For example, under the Wisconsin Fair Dealership Law, Wis. Stat. §§ 135.01 – 135.07, a grantor may not terminate or fail to renew a dealership agreement without good cause. In determining whether the law will be applied, the courts will examine a vertical relationship to see if there was a "community of interest" between the parties, in that they share a continuing financial interest in the operation of the dealership and were interdependent. *Zeigler v. Rexnord, Inc.*, 139 Wis. 2d 593, 407 N.W.2d 873 (1987). This has nothing to do with whether there is an agreement, or whether the arrangement is reasonable. It is only meant to indicate that where the interdependence is so minor (as when a dealer carries products manufactured by a large number of manufacturers), the protections of the dealership statute do not apply. The same concept is found in several other laws.

[4] *Copperweld Corp. v. Independence Tube Corp.*, 467 U. S. 752 (1984).

[5] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984).

[6] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

[7] *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

[8] *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007).

[9] *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).