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E-Flash Update

American Needle v. NFL: Everything New is Old Again In Hospital Joint Ventures

On May 24, 2010, the United States Supreme Court issued a rare unanimous opinion in an antitrust case which could have given a significant boost to health care providers seeking to form affiliations with other providers or develop accountable care organizations. In *American Needle v. NFL*, 2010 US Lexis 4166 (2010), the Court held that individual NFL football teams were capable of conspiring for purposes of licensing their intellectual property rights. The Court reversed a decision by the antitrust powerhouse Seventh Circuit Court of Appeals which held that the football teams shared a unity of interest, and therefore, were incapable of conspiring because they did not compete regarding the marketing of professional football. The Seventh Circuit's ruling, if upheld, would have given a major boost to health care providers that formed joint ventures for one purpose, but otherwise compete with each other for different purposes.

American Needle claimed that the NFL and the individual teams entered into an impermissible exclusive dealing arrangement with Reebok International Ltd. for the manufacture and production of clothing with NFL team logos. Prior to the exclusive contract, American Needle was one of the companies that produced official NFL team products. American Needle argued that the separate football teams conspired to form National Football League Properties (NFLP) to market team products. The NFL and the individual teams argued that they were one entity for purposes of antitrust law because they had a common purpose in promoting NFL football. Indeed, they argued that without team cooperation there could be no football, as each team needed an opponent to play the game. This need for cooperation was key to the success of the endeavor, and each team had a unitary interest in promoting the NFL. Thus, at least in the eyes of the trial court and the Seventh Circuit, this unitary interest in promoting football made the teams incapable of conspiring under the 1984 Supreme Court Case of *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984).

Copperweld held that a parent entity is incapable of conspiring with its subsidiaries because the parent and the subsidiaries act with one unitary economic interest and do not compete with each other. The *Copperweld* doctrine had been limited to corporate organizations in the same corporate lineage, such as parent/subsidiary, and sister corporations. It was not thought to be applicable to organizations outside the corporate lineage, such as, for example, joint venture partners. Applying the *Copperweld* defense to non-corporate affiliated entities would have expanded the protection that could be provided to joint venture participants, such as a hospital joint venture affiliation with another hospital. In addition, the Circuit Court opinion was significant because it held that the NFL teams had a unitary interest for all purposes even though the teams did compete for fans and for ticket sales. Again, in the health care context, most joint venture partners, while collaborating on the services in the joint venture, compete for patients in other areas. If affirmed, this defense would have potentially immunized many joint ventures from Section 1 antitrust scrutiny.

Unfortunately, the Supreme Court unanimously reversed, holding that the real issue was whether the individual teams competed with regard to the marketing of their separate intellectual property rights (i.e., their logos). For this analysis, it was irrelevant that teams shared a unity of interest for promoting NFL football as a whole. In order to be entitled to *Copperweld* immunity, an entity must have (1) unitary decision making; and (2) a single aggregation of economic power, neither of which were present in the teams' licensing agreements.

In essence, the Supreme Court returned the *Copperweld* doctrine to its original meaning. As to the resolution of the case, the Court held that it should be analyzed as any other joint venture under the rule of reason balancing test, whereby the potential anticompetitive harms are balanced against the efficiency reasons for creating the NFLP. In other words, everything new in the *Copperweld* defense is old again.

If you have any questions regarding affiliations or joint ventures, please contact Mark Mattioli in the Business Law and Litigation group at 215-587-1087 or at mmattioli@postschell.com.

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