

ALI-ABA Topical Courses
American Needle:
**Supreme Court Sacks NFL for Loss of 9, Holding Joint Ventures Not
Outside Reach of Sherman Act**

July 13, 2010
Telephone Seminar/Audio Webcast

**The Supreme Court Passes on Clarifying Joint Venture Rules:
*American Needle, Inc. v. National Football League***

By

Barbara T. Sicalides
Pepper Hamilton LLP
Philadelphia, Pennsylvania

The Supreme Court Passes on Clarifying Joint Venture Rules: *American Needle, Inc. v. National Football League*

By Barbara Sicalides
Pepper Hamilton LLP
Philadelphia, PA

For the first time in almost two decades, the U.S. Supreme Court has ruled in favor of a plaintiff in an antitrust action. Specifically, the Court held in *American Needle, Inc. v. National Football League*,¹ that the decisions of a lawful joint venture entity remain subject to Section 1 of the Sherman Act's prohibition of conspiracies or agreements in restraint of trade if they are the result of an agreement among "independent centers of decisionmaking."

Before the Court's decision on May 24, 2010, commentators and practitioners alike were predicting that *American Needle* would provide guidance and perhaps even clarity on at least two issues: (1) whether the professional sports leagues and other firms established by actual or potential competitors constitute a single entity under *Copperweld v. Independence Tube Corp.*² and (2) the extent and nature of the integration required for a joint venture's activities restraining competition to be lawful under the Sherman Act. For example, one author wrote about the changes that *American Needle* might bring:

Among the decisions most important consequences will be what it has to say about another recent decision, the underappreciated 2006 ruling in *Texaco Inc. v. Dagher*. If the Court reverses in *American Needle*, it may signal that *Dagher* is to be a narrow decision, limited to a fairly peculiar set of facts. If the Court affirms, and particularly if it does so in explicit reliance on *Dagher*, then *American Needle* could, as a practical matter, do significant damage to the enforceability of Section 1 of the Sherman Act; it could in effect immunize significant swaths of concerted conduct among competitors.³

These predictions and a number of similar other predictions have not come to pass. Instead, the Court left the law essentially as it was before and left antitrust counselors still looking for guidance on what level of integration is necessary for a joint venture and its parent companies to act without fear of Section 1 of the Sherman Act.

¹ Civ. A. No. 08-661, 2010 U.S. LEXIS 4166 (May 24, 2010).

² 467 U.S. 752 (1984).

³ Chris Sagers, *American Needle, Dagher, and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1*, Antitrust Source, Aug. 2009, at 1.

A Little Bit of Recent Supreme Court History -- *Texaco Inc. v. Dagher*

The decision many hoped would be clarified – *Texaco v. Dagher*⁴ – involved somewhat unique facts. In *Dagher*, the Supreme Court held that a lawful, economically integrated joint venture formed by competitors did not commit a *per se* violation of Section 1 by setting the prices at which it sells its products.⁵ The decision placed the regular activities of a structural joint venture essentially on par with those of a single firm, at least when formation of the joint venture ended competition between its members. Although the decision itself was rather narrow, the Court’s opinion contained intriguing dicta that might have meant diminished antitrust risks for the internal operations of legitimate joint ventures.

In 1998, Shell Oil and Texaco entered into a “massive” nationwide alliance consisting of two separate joint ventures. One joint venture, named Equilon Enterprises, combined Shell’s and Texaco’s downstream operations in the western United States. The other venture, named Motiva, was formed by Shell, Texaco and Saudi Refining Inc.,⁶ and combined the three companies downstream operations in the eastern United States.

Texaco and Shell Oil pooled their resources and shared the risks of profits and losses from Equilon’s business. The creation of the alliance ended the national competition between Shell and Texaco in their downstream operations via non-compete agreements, shared ownership of the two joint ventures, and a unitary pricing scheme whereby the Shell and Texaco brands would have the same price in the same market areas, despite the fact that each parent company maintained its respective brand as a distinct product with its own unique composition, trademark, and marketing strategy. The two oil companies, however, continued to compete with each other with respect to oil and gas exploration and production operations.

The FTC and several state attorneys general had reviewed the formation of Equilon and had approved it subject to some modifications and divestments. The consent order conditionally approving the formation of Equilon placed no restrictions on its pricing of its gasoline.

Employees of Texaco and Shell Oil comprised Equilon’s board of directors. The two companies agreed not to compete with Equilon, and further agreed not to manufacture or market certain other fuels in the western United States. A single Equilon executive set a uniform price for the two brands of gasoline.

The plaintiffs brought suit on behalf of themselves and 23,000 other Texaco and Shell Oil service station owners who had purchased gasoline from Equilon. They brought suit in the U.S. District Court for the Central District of California, alleging that Equilon’s consolidated pricing

⁴ 547 U.S. 1 (2006)

⁵ *Id.* at 6-7.

⁶ Saudi Refining Inc. was dismissed from the case based on the plaintiffs lack of standing to pursue a claim against it. No named plaintiffs had purchased gasoline from either Saudi Refining Inc. or from Motiva. *Dagher v. Saudi Ref., Inc.*, 369 F.3d 1108, 1115-1116 (9th Cir. 2004).