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ANTITRUST

'American Needle' has repercussions beyond sports

Ruling supports suits against some joint ventures in real estate, health care and other industries.

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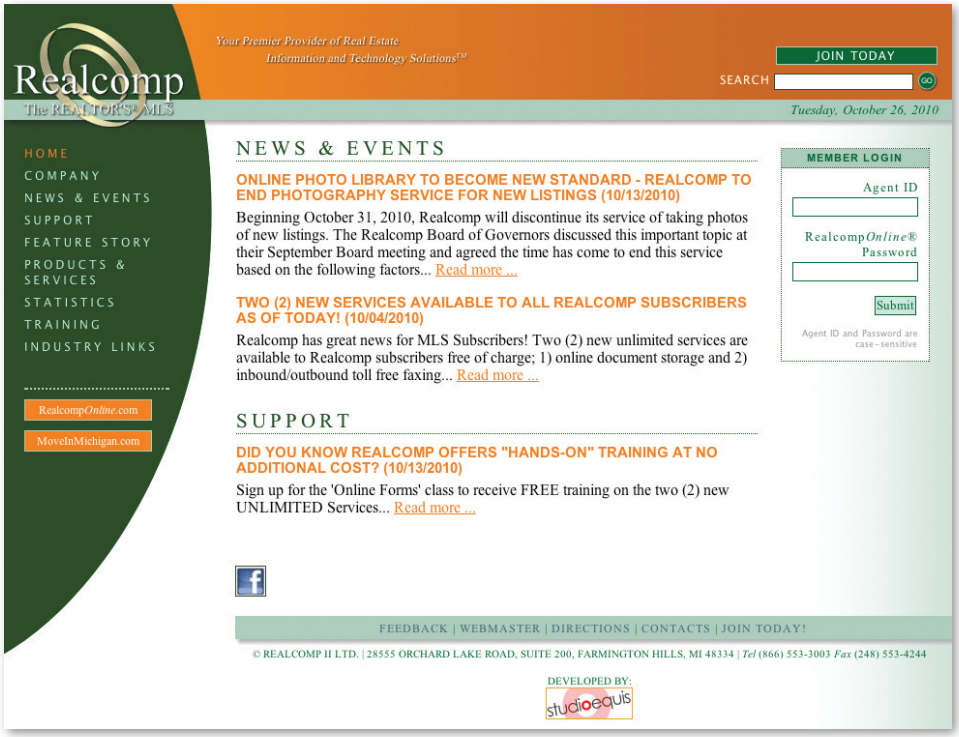
In *American Needle Inc. v. National Football League*, 130 S. Ct. 2201 (2010), the U.S. Supreme Court unanimously held that collective licensing of the 32 National Football League teams' intellectual property constituted an "agreement" among competitors under § 1 of the Sherman Act, 15 U.S.C. 1. The Court's decision will extend well beyond the arena of professional sports, however, to preserve or strengthen antitrust enforcement in several critical sectors of the U.S. economy. In particular, the Court's decision supports government and private suits against real estate multiple-listing services, physician joint ventures and payment-card networks, and perhaps joint ventures in other industries as well.

The facts of *American Needle* date back to 1963, when the separately owned and operated teams of the National Football League created an entity known as NFL Properties (NFLP) to license the intellectual property—such as logos, names and colors—of the individual teams. Until December 2000, NFLP licensed to clothing manufacturers on a nonexclusive basis. Then, the NFL teams authorized NFLP to grant an exclusive license to produce headwear (such as baseball caps and stocking hats) and other items to Reebok International Ltd. In so doing, the NFL refused to renew the license of American Needle, which previously produced headwear under the nonexclusive license.

American Needle sued the NFL, its teams and Reebok, claiming that the grant of an exclusive license was an illegal agreement among competitors in violation of § 1 of the Sherman Act. The district court granted summary judgment for the defendants, and the U.S. Court of Appeals for the 7th Circuit affirmed, holding that the teams of the NFL were a "single entity" incapable of conspiring within the meaning of § 1. 538 F.3d 736 (7th Cir. 2008). The 7th Circuit accepted the NFL's assertion that the joint-licensing arrangement was necessary to promote "NFL football" and reasoned that the joint licensing did not implicate § 1 because the promotion of NFL football could be performed only through joint action.



BEYOND SPORTS: The FTC found the practices of a real estate listing service improperly constrained competition.

Speaking through Justice John Paul Stevens, a unanimous Supreme Court reversed. The Court observed that the individual NFL teams were actual or potential competitors in the market for the licensing of intellectual property. The Court therefore reasoned that NFLP's collective licensing of the teams' intellectual property deprived the marketplace of "independent centers of decisionmaking," which, under the Court's decision in *Copperweld v. Independence Tube*, 467 U.S. 752 (1984), mandated that the collective licensing be treated as an agreement among competitors for purposes of § 1. The Court stated that the fact that NFLP was a separately incorporated entity was inapposite because the separate entity "may simply be a formalistic shell" for concerted activity. The Court was also unpersuaded by the argument of the NFL and its amici that the creation of a "new product"—namely "NFL football"—eliminated the teams' conspiratorial capacity.

Similar to the teams of the NFL, real estate agents cooperate to produce a product that none could offer alone—the real estate multiple-listing service (MLS). An MLS is a database that is created by one or more associations of real estate agents, which displays each association's for-sale properties in a given region. Although the creation of multiple-listing services is undoubtedly pro-

consumer, the associations that created the services can collectively exercise their market power by denying access to agents who offer fewer services than traditional agents or charge less than the customary commission.

The Federal Trade Commission's decision against Realcomp, a Detroit-area MLS, illustrates how multiple-listing services can become tools to collectively exercise market power. Realcomp is a separate corporation that is owned by seven area boards of real estate agents, which collectively represented more than 14,000 real estate agents, the majority of whom operate on a full-service (and full-price) business model. *In the Matter of Realcomp II Ltd.*, 2009 FTC Lexis 250, at *20 (FTC Oct. 30, 2009). Although Realcomp allowed low-cost real estate agents to list their properties in the MLS, the association's member-elected board of directors adopted policies that, among other things, prevented members from displaying properties listed by low-cost real estate agents on the Realcomp Web site or any of the members' own Web sites, where the majority of consumers start their home searches.

The FTC condemned the restrictions imposed by Realcomp as unreasonable restraints on trade under an "inherently suspect" analysis because of the "intuitively obvious inference of anticompetitive effect." Id. at *55. The FTC found that Realcomp's practices "improperly constrain competition and impede the emergence of a new business model that has considerable benefits for consumers." The FTC could fairly easily condemn Realcomp's practices because Realcomp is "an entity composed of horizontal competitors" that was able to coordinate the behavior of its members to boycott the low-cost providers. Id. at *57. Had *American Needle* held that teams of the NFL were a "single entity," the MLS might prevail on an argument that it is a "single entity," which could likely exclude the low-cost providers at will because, under the antitrust laws, even monopolists do not have a duty to deal with competitors. See *Verizon Commun's, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). Thus, applying a real-world analysis of "single-entity" claims, *American Needle* had the effect of promoting cost-based competition in a market that otherwise would have lacked serious price competition.

American Needle also strengthens antitrust safeguards against another form of joint conduct—collective negotiation by health care providers.

One recent case, *In the Matter of North Texas Specialty Physicians*, 140 F.T.C. 715 (2005), aff'd in part and rev'd in part, 528 F.3d 346 (5th Cir. 2008), resulted in an FTC opinion, confirmed by the 5th Circuit, that joint negotiation between a physician association and health care payors was illegal under the same "inherently suspect" analysis that the FTC used in *Realcomp*. The association, North Texas, was incorporated as a "memberless non-profit corporation" that surveyed participating physicians as to the minimum reimbursement they would accept for various procedures and used the results to determine a minimum level of reimbursement for its negotiations with payors. Only if North Texas could secure a payor-reimbursement level that exceeded its calculated minimum would it forward a negotiated contract to its participating physicians.

The FTC and the 5th Circuit held that this arrangement constituted an agreement among competitors because the physicians granted authority to North Texas to negotiate on their behalf with the knowledge that other participating physicians were doing the same. Because North Texas' conduct involved an agreement among competitors, the FTC and the court easily concluded that it had a clear anti-competitive effect by "raising the prices that 'low end' physicians would otherwise earn." Id. at 363-64.

Notwithstanding the effects of North Texas' conduct, an NFL victory in *American Needle* could have opened a loophole for physician groups to continue their conduct under the guise of a "single entity." If the NFL teams escaped § 1 liability by outsourcing licensing decisions to a third party, collective negotiating could be legal on its face so long as participating physicians fully transferred negotiating authority to the third party and avoided direct communications among themselves. Clearly, this result would have had the same effect on price and would have been contrary to the spirit of Stevens' American Needle opinion.

> "'American Needle' also strengthens antitrust safeguard against collective negotiation by health care providers.

Finally, *American Needle* will help antitrust enforcement in payment-card markets. The Visa and MasterCard payment-card networks were traditionally organized as joint ventures of competing banks. The banks elected members to the networks' boards of directors, and those directors in turn established rules that applied to all members and set "interchange fees"—transfer payments from merchants to cardholders' (card-issuing) banks. Courts and antitrust enforcers found that several of these network-established rules restricted the competitive activities of the member banks and harmed competition. In *U.S. v. Visa*, 344 F.3d 229, 241 (2d Cir. 2003), the 2d Circuit rejected the networks' claims that they were "single entities" and held that Visa and MasterCard's rules that prevented member banks from issuing American Express or Discover cards constituted collective action of the member banks and harmed competition by restricting rivals' access to the market for "network services." And in *In re Currency Conversion Fee Antitrust Litigation*, No. MDL-1409 (S.D.N.Y), the card networks and many of their large member-banks paid more than $330 million to settle cardholders' claims that the networks' currency-conversion fees were collectively imposed by the banks that governed Visa and MasterCard, in violation of § 1.

The networks now face class action litigation pending in the Eastern District of New York on behalf of merchants that challenge the "interchange fees" as collectively imposed minimum prices for card acceptance. Although the court has yet to make a substantive determination on the merchants' claims, the European Commission concluded under substantive law that is similar to § 1 of the Sherman Act that MasterCard's interchange fees "create an artificial cost base" that is common to all banks and merchants. Commission Decision relating to a proceeding under Art. 81 of the E.C. Treaty & Art. 53 of the EEA Agreement (COMP/34.579 MasterCard; COMP/36.518 EuroCommerce; COMP/38.580 Commercial Cards) ¶ 411 (Dec. 19, 2007).

After the merchants filed suit but before *American Needle*, MasterCard and Visa conducted initial public offerings in an attempt to turn themselves into "single entities" immune from the merchants' suit and similar challenges. But as commentators have now recognized, *American Needle* stands in the way of the networks' attempt to remake themselves because they still coordinate the competitive activity of the banks, just as the bank-elected boards had done before the IPOs and just as the NFL teams had done through NFLP. Thus, the Court's decision closes the loophole that the banks sought to create by outsourcing the fee-setting activity to a bodies that include "independent" actors. Herbert Hovenkamp & Christopher Leslie, "The Firm as Cartel Manager," ___ Vand. L. Rev. ___ (forthcoming) (advance copy at 42-45).

It will be up to the lower courts to determine the reach of *American Needle*. But the decision is almost certain to have a monumental impact on pending enforcement actions against joint ventures.

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