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Sports Business Cases Challenge League Power

The Editor interviews Jones Day Partners ***Glen Nager*** *and* ***Joe Sims*****.**

Editor: Can you briefly describe your backgrounds for our readers?

Nager: I chair Jones Day's Issues and Appeals Practice. I've argued 13 cases in the United States Supreme Court, including the recent *American Needle* case and the earlier *Dagher* joint venture case. Although employment law is my substantive specialty, I've argued cases in many subject areas, including antitrust, intellectual property, and products liability.

Sims: I am Jones Day's senior antitrust lawyer. I've represented clients such as Apple, Chevron, Dell, General Motors, Procter & Gamble, Sirius-XM, Comcast, Hertz and CBS in a full range of antitrust issues. I believe I'm the only antitrust lawyer ever recognized (twice, in 2001 and 2009) as a "Dealmaker of the Year" by *The American Lawyer*, and earlier this year *National Law Journal* named me one of "The Decade's Most Influential Lawyers."

Editor: Glen, aside from your litigation work on sports disputes, could you tell us about your personal role in the world of golf?

Nager: I am presently Vice President of the United States Golf Association and a member of its 15-member Executive Committee. I am presently Chair of the Rules of Golf Committee, Chair of the Compensation Committee, Chair of the Men's State Team Championship, and a member of the Championship Committee, Future Sites Committee, Strategic Planning Committee, Commercial Committee, and Finance Committee. I am also a member of the Joint Rules of Golf Committee between the USGA and the R&A of Scotland. From 2006-2008, I was General Counsel of the USGA.

Glen Nager

Joe Sims

Editor: Can you give us an overview of Jones Day's involvement in sports representations and, in particular, your recent win versus the NFL before the U.S. Supreme Court?

Nager: Jones Day has been at the forefront of recent disputes involving the power of sports leagues to engage in mandatory collective economic activity to the exclusion of competition by others in the area of sports merchandising, licensing, marketing, broadcasting, and internet streaming. Jones Day represented American Needle in its Supreme Court litigation with the National Football League. Jones Day represented the New York Rangers in their litigation with the National Hockey League.

In *American Needle*, the Court held in May that agreements of the NFL's teams are subject to scrutiny under the antitrust laws. American Needle challenged an agreement among NFL teams to grant Reebok an exclusive license to produce and sell team-logoed headwear. The Seventh Circuit had affirmed summary judgment for the NFL on the ground that the NFL and its teams are a so-called single entity whose internal agreements are immune from scrutiny under Section 1 of the Sherman Antitrust Act. In a unanimous opinion, the Supreme Court reversed, holding that Section 1 scrutiny necessarily applies to agreements among entities that have separate economic interests and that are independent actors capable of making independent decisions. Applying this test to the NFL teams, the Court held that the NFL teams are separate and independent businesses that are not entitled to be treated as a "single entity"; accordingly, the teams' agreements (and those of the teams' instrumentality, NFL Properties, Inc.) must be scrutinized under the rule of reason.

Editor: How did Jones Day become involved in these matters?

Nager: The New York Rangers sought out Jones Day to handle its litigation with the National Hockey League because of Jones Day's reputation and resources in antitrust and litigation. Joe Sims and Meir Feder were part of the original Rangers team. I became involved when it looked like there might be an expedited appeal to the Second Circuit of a preliminary injunction issue. American Needle sought out Jones Day to handle its Supreme Court litigation with the National Football League because of Jones Day's experience in the Rangers case and because of Jones Day's Supreme Court practice. American Needle was particularly interested in the fact that the same team had handled another recent Supreme Court case involving antitrust scrutiny of joint ventures – a case called *Texaco v. Dagher*, where we were able to obtain a unanimous decision reversing the Ninth Circuit on behalf of Chevron (which had acquired the Texaco assets involved). The *Dagher* case involved some of the same issues of the application of antitrust law to joint ventures that were the focus of *American Needle*; in fact, the NFL's counsel heavily

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relied on *Dagher* to support their arguments. Since I had argued and won *Dagher* in the Supreme Court, we felt pretty strongly that the NFL's attempted use of *Dagher* to advance its arguments was misplaced and were grateful to get the opportunity to make that argument in *American Needle*.

Editor: Joe, can you tell us more about the antitrust status of sports leagues?

Sims: Professional sports leagues are interesting entities. In some ways, they are traditional joint ventures – independent entities that join together to produce a product that none can fully produce individually. The antitrust status of such joint ventures is reasonably clear: to the extent the venture increases rather than reduces competition, it is permissible, but any joint activity that reduces existing or potential competition must be justified as reasonably necessary to the venture itself. Professional sports leagues began as reasonably simple ventures, where the member teams agreed on playing rules and schedules, but left everything else to the individual member teams. Over the decades, there has been a steady increase in the collective activity of the leagues, and a corresponding elimination of the independent competitive activity of the individual teams.

For example, for many years the individual teams did all their own marketing and promotion – advertising, merchandise, and even broadcasting arrangements. Over time, the teams began to attempt to handle various aspects of this as a group. The early efforts to do so drew significant antitrust opposition; indeed, eventually Congress passed legislation exempting professional sports leagues from antitrust attack for collectively negotiating national television broadcasting agreements (an action that the Department of Justice had challenged as a violation of the Sherman Act). While that legislation was in fact very narrow, it seemed to encourage the teams to aggregate more and more collective activity in the leagues, and so over time the leagues became the vehicle for the teams to do many things jointly that had historically been done independently, from selling hats to (most recently) Internet activities. A parallel development that further empowered the league was the unionization of players and the resulting collective bargaining agreements between the teams (acting together as the league) and the players' unions in the various professional sports.

Of course, the antitrust laws did not go away, and over the years there were periodic attacks on various aspects of the collective activity of the teams acting through the league. Eventually, the lawyers for the leagues came to advance the notion that much of the collective activity of the teams through the league was exempt from antitrust attack because of the so-called single entity doctrine – the notion that to have a violation of Section 1 of the Sherman Act (the part that deals with collective action), there must be at least two participants, and that the league joint ventures were so integrated that they should be considered in toto, as just one entity, and thus subject only to Section 2 of the Sherman Act (the part that deals with monopoly). If this argument had been successful, antitrust challenges to team collective activity would have become much more difficult, since the legal standards for showing a violation of Section 2 (monopolization) are much tougher than those involving Section 1 (conspiracy and agreements in restraint of trade).

These single entity arguments came to be part of the standard defense strategy of professional sports leagues to almost every antitrust challenge. The NHL, for example, tried to make this argument in the Rangers litigation, but was unsuccessful. In fact, this argument had been uniformly unsuccessful until *American Needle*, when both the district court and the Seventh Circuit inexplicably accepted the argument as a complete defense to American Needle's antitrust challenge. We say inexplicably because, as the unanimous Supreme Court opinion shows, it is hard to understand how a joint venture like a sports league, made up of multiple independent entities (the teams) with widely varying interests and capacities, could plausibly be seen as an entity made up of venturers that had fully uniform interests. Nevertheless, the Seventh Circuit accepted the NFL's argument, American Needle sought certiorari from the Supreme Court, and that is when Jones Day joined the American Needle team.

Editor: What are the pressing issues professional sports franchises and suppliers have with regards to their interactions with leagues?

Nager: Sports leagues are artificial entities made up of individual teams that choose to join together to create what is in effect an annual tournament. They do this because they believe that there will be more interest, and thus more potential revenue, from a tournament competition than there would be from individual contests between teams. Of course, that was the beginning of professional sports in this country – individual teams barnstorming around the country playing games against each other or against local teams. Some professional sports teams still follow this model: the Harlem Globetrotters are perhaps the most well-known of the barnstorming teams. But over time, most teams concluded that banding together, creating a league with standardized rules and a tournament schedule that produced an annual champion, would maximize fan interest and revenues. Given the success of professional sports around the world, it is hard to argue with this logic. So a joint venture of individual teams that establishes a schedule, standardizes rules and (today in the U.S. at least) collectively bargains with players' unions has become the normal model; we call this joint venture a "league," but it is important to remember that it is not itself an entity that produces anything – it is simply the collective action of the individual teams.

While structures and practices vary dramatically around the world (thus making it inarguable that there are many different ways for teams to come together to create competitions that are attractive to fans), in the U.S. what has evolved is a single, overarching venture for each major professional sport. There is the NFL for football, the NBA for basketball, the NHL for hockey, and MLB for baseball. While these leagues vary pretty dramatically in many ways in how they are organized and managed, and in the scope and nature of their collective activity, as a general matter they all serve as the collective arm of the member teams in carrying out the activities that the teams choose to collectivize. But in addition, as the league structures have expanded and the leagues have steadily become monopoly structures in their particular sport (the NFL merged with the AFL to create the present monopoly structure in football, and the NBA merged with the ABA to create the counterpart in basketball; the American and National Leagues in baseball absorbed their competitors and