Legal Backgrounder

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AMERICAN NEEDLE v. NFL: HIGH STAKES IN THE HIGH COURT FOR PROFESSIONAL SPORTS

by

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At the drop of a hat, or in this case a gavel, professional sports as we know them may be in for a big change. That change could come courtesy of the U.S. Supreme Court, which on January 13 will hear oral arguments in *American Needle, Inc. v. National Football League*. This LEGAL BACKGROUNDER briefly discusses antitrust law in organized sports, the case of *American Needle, Inc. v. National Football League*, and the significant ramifications a decision favoring the NFL would have.

The Story. For over twenty years, the American Needle Corporation enjoyed a non-exclusive license with the National Football League to design and manufacture caps and hats bearing the names and logos of the NFL teams. That license came to a halt in 2000 when the NFL signed an exclusive contract with one of American Needle's main competitors – Reebok. This exclusive contract precluded American Needle from not only negotiating with the League but also the individual teams that make up the League. Pursuant to the Reebok agreement, the teams agreed (1) not to compete with each other in the licensing of team products, and (2) not to grant licenses to Reebok's competitors for ten years. On December 1, 2004, American Needle sued the NFL in the Northern District of Illinois, alleging that the new NFL licensing arrangement with Reebok violates section 1 of the Sherman Antitrust Act. 15 U.S.C. § 1 (2006). American Needle argued that the NFL used its monopoly powers to illegally deprive American Needle of its share of the market. The NFL answered that the arrangement is pro-competitive, and also that the teams combined to form a single-entity that exempts them from antitrust scrutiny.

The Issue. *American Needle* presents the Court with a common, yet interesting question: does the competition here involve thirty-two teams competing among themselves, or is the NFL a single entity competing with other providers of entertainment? Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. 1 (2006). In 1911, the U.S. Supreme Court created what is known as the "rule of reason" analysis to determine if a violation of the Sherman Act has occurred. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911). In *Standard Oil*, the Court explained that to violate the Sherman Act, combinations and contracts must *unreasonably* restrain trade. *Id.* at 60. If the Court decides the NFL is a single entity, and not thirty-two competing teams, it would be impossible to establish any violation of American antitrust law. A single entity cannot be in combination,

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contract, or conspiracy with itself. If the NFL wins its case, the League would be immune from antitrust challenge for the decisions responsible for protecting free agency and establishing player unions. Such a ruling would exponentially strengthen not only the NFL, but also other professional sports leagues.

An organized sports league, like the National Football League, has a peculiar business model – its members must act as partners despite competing furiously on the football field. Antitrust laws are meant to discourage coordination between competitors, but the very nature of the NFL requires some degree of coordination among its teams. The NFL already enjoys a limited antitrust exemption – it can reach telecasting agreements with TV networks (15. U.S.C. § 1291 (2006)), can issue blackouts of non-local games when local teams are being telecast, and can blackout local teams when they fail to sell out their stadiums (15 U.S.C. § 1292 (2006)). But in *American Needle*, the NFL seeks a more far-reaching exemption from antitrust liability, one that would stretch to their collaborative actions for both outputs, like product licensing and broadcasts, and inputs, like stadiums and players.

The Lower Courts' Decisions. The U.S. District Court for the Northern District of Illinois granted summary judgment against American Needle's section 1 claim, holding that "the NFL and the teams act as a single entity in licensing their intellectual property." *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 944 (N.D. Ill. 2007). The NFL teams' "cooperative marketing does serve to promote NFL football," and therefore the NFL teams "act[ ] as an economic unit" and "should be deemed to be a single entity." *Id.* at 943-44. The court concluded that American Needle's Section 1 claim failed because, under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), single entities cannot restrain trade in violation of the Sherman Act. *See American Needle*, 496 F. Supp. 2d at 943-44. Because of this finding, the district court also granted summary judgment against American Needle on its Section 2 claim because as a single entity, the NFL and its member teams could collectively license their intellectual property "to one or many without running afoul of the antitrust laws." *Am. Needle, Inc. v. New Orleans La. Saints*, 533 F.Supp.2d 790 (N.D. Ill. 2007).

American Needle appealed and the Seventh Circuit affirmed the summary judgments. Citing its decision in *Chicago Professional Sports Ltd. Partnership* v. *NBA*, 95 F.3d 593 (7th Cir. 1996) (*Bulls II*), the court held that "whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'" *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 742 (7th Cir. 2008). The court therefore "limit[ed] [its] review to (1) the actions of the NFL, its members teams, and NFL Properties; and (2) the actions of the NFL and its member teams as they pertain to the teams' agreement to license their intellectual property collectively via NFL Properties." *Id.* The court explained that when "collectively producing NFL football," the NFL teams "can function only as one source of economic power." *Id.* at 743. The court continued that "the NFL teams share a vital economic interest in collectively promoting NFL football" because "the league competes with other forms of entertainment for an audience of finite (if extremely large) size, and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success." *Id.* The court also stressed that for years "the NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football." *Id.* at 744. Based on this holding, the Seventh Circuit concluded that "NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." *Id.*

Right Time, Right Court? Despite being in a fourth-and-long situation, American Needle did not punt. As with most cases where a party seeks High Court review, it was a long shot. But then the NFL did something pretty remarkable – it told the Court that it supported American Needle's petition for review. Instead of taking its lower-court wins, the League asked the Supreme Court to consider an issue with implications far beyond hats. In taking this risk, it wants the Court to grant the NFL complete immunity from antitrust scrutiny altogether – an immunity that would extend to Major League Baseball (although thanks to *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200

(1922), the MLB is already fairly immune to antitrust claims), the National Hockey League, and the National Basketball Association.

The NFL and its lawyers must feel the time is right. The Court in recent years has consistently sided with antitrust defendants. One interesting fact to consider is that in 2004, Ohio State running back Maurice Clarett unsuccessfully tried to alter the draft age requirements of the NFL after a federal judge overturned a ruling that would have allowed him to participate in the 2004 draft. *See Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004). The judge who penned the pro-NFL opinion – Sonia Sotomayor. However, it must also be considered that Justice Sotomayor sided with the players during Major League Baseball's 1995 work stoppage. *See Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246 (S.D. N.Y. 1995).

Solicitor General: Wrong Time, Wrong Court. Even with support from both parties, Solicitor General Elena Kagan did her best to punt away *American Needle*. The United States' *amicus* brief recommended denial of certiorari for two reasons: (1) even if the NFL is a single entity (the Solicitor General does not think it is), American Needle would still lose on other grounds, and (2) "the somewhat idiosyncratic nature of the relationship between individual NFL teams and the league as a whole makes this case an unsuitable vehicle for resolving broader questions of the kind the NFL respondents identify." Brief for the United States as *amicus curiae* at 21, *Am. Needle, Inc. v. NFL*, No. 08-661 (U.S. May 28, 2009). But these arguments were not enough to stop the Court from granting cert.

The Supreme Court Grants Certiorari. For decades, the NFL has (mostly unsuccessfully) tried to gain immunity from antitrust attacks through its single entity argument. Over the years, federal courts have routinely agreed that NFL teams compete with each other for sponsors, free-agent players, coaches, fans, executives, naming rights, etc. The Seventh Circuit's decision that the NFL is a single entity, exempt from rule of reason analysis, conflicts with the decisions of the First, Second, Third, Sixth, Eighth, Ninth, and D.C. Circuits. It is this conflict (and probably the unique fact that both parties sought review) that likely led the Court to grant cert. Section 1 of the Sherman Act is being inconsistently applied across the United States, and the Court has an ideal opportunity create an "enormously impactful precedent." Interview by SI.com with Jon Wertheim, senior writer for *Sports Illustrated* and non-practicing attorney (July 22, 2009), *Why NFL licensing case could be biggest sports decision in decades*, *available at* http://sportsillustrated.cnn.com/2009/football/nfl/07/22/american.needle/index.html.

American Needle's Point. American Needle relies on a U.S. Supreme Court opinion from 1957 involving the blacklisting of a player who violated his contract – *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957). In *Radovich*, the Court held that professional football, unlike professional baseball, was subject to Section 1 of the Sherman Act because *Federal Baseball* and *Toolson v. New York Yankees, Inc.*, 346 U.S.256 (1953), decisions which exempt pro baseball from antitrust laws, were specific to the business of baseball. *Id.* at 447-49. Because the Seventh Circuit's decision directly conflicts with *Radovich*, and because courts have consistently held that professional sports leagues are subject to rule of reason analysis under Section 1 of the Sherman Act, American Needle argues it raises an important issue that requires the Court's review. The Seventh Circuit decision also conflicts with those from the First, Second, Third, Sixth, Eighth, Ninth, and D.C. Circuits, and the Court must resolve this circuit split. American Needle wants the Court (1) to answer once and for all whether Section 1 of the Sherman Act applies to the NFL and other professional sports leagues, and if it does, (2) to ensure that it is applied consistently throughout the circuits.

The NFL's Defense. The NFL relies in large part on a U.S. Supreme Court opinion from 1984 – *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). In *Copperweld*, the Court held that a parent company and its wholly-owned subsidiary constituted a single entity for Section 1 purposes because their coordinated activities do not "deprive[] the marketplace of independent centers of decisionmaking" or "represent a sudden joining of two independent sources of economic power previously pursuing separate

interests." *Id.* at 768, 769, 771, 777. Although the NFL believes the Seventh Circuit got it right, it asked the Supreme Court to review the case because "the courts of appeals are divided on whether a professional sports league of separately owned teams can constitute a single entity for purposes of Section 1." Brief for the NFL Respondents at 3-4, *Am. Needle, Inc. v. Nat'l Football League*, No. 08-661 (Jan. 21, 2009). The NFL, in its brief to the Court, continued:

> That division reflects a deeper split among the circuits over the application of this Court's *Copperweld* decision to joint ventures that involve a high degree of economic integration . . . This issue is a recurring one that limits the ability of professional sports leagues and similar joint ventures to engage in and enhance inter-brand competition, and it opens the door to repeated, costly antitrust suits that burden not only the joint venture participants but also the federal courts.

Id. at 4.

Conclusion. Almost five years ago, *American Needle* was nothing out of the ordinary – just one of many antitrust actions frequently brought against the NFL. The NFL's Washington, D.C. firm has been defending against these types of suits for nearly sixty years. But *American Needle* has much bigger implications than any prior case thanks to its unique setting (both parties supported review, Solicitor General suggested punting, but Supreme Court granted cert). "If the NFL is successful, then players, maverick owners, networks, paraphernalia manufacturers, fans and others will find themselves conducting business with what would be one of the most powerful cartels ever." *See* Lester Munson, *Antitrust case could be Armageddon*, *available at* http://sports.espn.go.com/espn/columns/story?columnist=munson_lester&id=4336261. ESPN's Munson summed it up best: "Experts agree that the case known as *American Needle v. NFL* could easily be the most significant legal turning point in the history of American sports." *See id.*

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