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Supreme Court Rejects Single Entity Treatment for the National Football League's Licensing Activities

On May 24, 2010, in a unanimous decision authored by Justice Stevens, the Supreme Court of the United States reversed the Seventh Circuit and held that because the 32 teams of the NFL are independent centers of decision-making and could potentially compete with each other for the licensing of their separate intellectual property, "the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of [Section 1 of the Sherman Act, 15 U.S.C. 1]." See American Needle, Inc. v. N.F.L., No. 08-661, slip. op. at 1, 12, 560 U. S. ____ (2010). Thus, the Court remanded the case for further proceedings to determine whether the alleged concerted action is an "unreasonable restraint of trade" under the Rule of Reason. Id. at 1, 20.

Many commentators believe that the NFL has a solid argument to prevail under the Rule of Reason, such as requiring consistent quality of NFL merchandise to protect the value of the NFL brand and thereby promote NFL football to compete with other forms of entertainment, but the Supreme Court's decision denying the NFL immunity from antitrust scrutiny will cause it short term pain in potentially years of protracted discovery battles and trial, as well as long term antitrust challenges involving other collective business decisions. The Supreme Court concluded, however, with dicta that narrowed the impact of its ruling. The Court stated that, at a minimum, other types of necessary cooperation by the NFL like "the production and scheduled of games … is likely to survive the Rule of Reason." Id. at 18-19.

Background

As previously reported in this blog, the case arose in 2001 when NFL Properties ("NFLP"), a joint venture created in 1963 to develop, license, and market the intellectual property owned by the NFL's member teams, granted one of American Needle's competitors (Reebok International Ltd.) an exclusive license to manufacture headwear bearing all the teams' logos and trademarks. This decision resulted in American Needle losing its contract to manufacture headwear for one NFL team. American Needle then challenged this arrangement, *inter alia*, as a conspiracy among the teams to restrain trade in violation of Section 1.

The District Court for the Northern District of Illinois granted summary judgment for the NFL, concluding that "with regard to the facet of their operations respecting exploitation of intellectual

property rights, the NFL and its 32 teams … have so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose" and are thus immune from Section 1 challenges. See American Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 943 (2007). The Seventh Circuit affirmed reasoning that "only one source of economic power controls the promotion of NFL football, [and] it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football." American Needle, Inc. v. N.F.L., 538 F.3d 736, 743 (7th Cir. 2008). But, the Seventh Circuit sought to limit the precedential impact of its holding, noting that "the question of 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." Id. at 742.

In a somewhat rare move, the NFL (along with support from the NBA and NHL) joined American Needle in urging the Supreme Court to grant certiorari and hear the case.

Courts Must Engage in a Functional, Not Formal, Analysis to Determine whether there is Concerted Activity Subject to Section 1 Scrutiny.

The Supreme Court repeatedly cited precedent to answer the narrow question of whether the licensing activities of the 32 teams in the NFL and the NFLP actually operate in a manner constituting concerted action subject to scrutiny under Section 1. The Court did not reach the question of whether the conduct unreasonably restrains trade, but rather held that the licensing conduct at issue would be analyzed under the "flexible Rule of Reason" standard. American Needle, slip. op. at 1, 18.

In determining whether there is concerted action under Section 1, the Court stated that is has "long held" that it has "eschewed [] formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." Id. at 6. For instance, the Court explained that it has "repeatedly found instances in which members of a legally single entity violated §1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity" and "[c]onversely, there is not necessarily concerted action simply because more than one legally distinct entity is involved." Id. at 6-7. The relevant inquiry is whether the alleged concerted activity joins together separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace of independent centers of decision-making, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition. Id. at 10 (citations and internal quotations omitted). In fact, even in this unanimous and somewhat short opinion, the Court repeats the phrase of whether the activity "deprives the marketplace of independent centers of decision-making" no less than five times. See id. at 5, 9, 10, 12, 14.

The NFL's 32 Teams Are Functionally Separate regarding the Licensing of their Intellectual Property and thus subject to Section 1 Scrutiny.

Without much trouble, the Supreme Court found that the NFL's licensing activities constitute concerted action. The Supreme Court reasoned that the NFL's 32 teams are functionally separate because:

> Each of the teams is a substantial, independently owned, and independently managed business. . . . Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the "common interests of the whole" league but is instead pursuing interests of each "corporation itself". . . and each team therefore is a potential "independent cente[r] of decision-making." … Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned.

Id. at 12-13 (citations omitted). The Supreme Court then rejected the reasoning of the Seventh Circuit that the 32 NFL teams "constitute a single entity because without their cooperation, there would be no NFL football." Id. at 14. The Supreme Court responded with a pithy example: in "many [joint] ventures, the participation of others is necessary[;] … a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to §1 analysis." Id. at 14-15. However, the "necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason." Id. at 14 n.6.

The NFLP, a Joint Venture, is also subject to Section 1 Scrutiny.

Although it is a "closer" question, the Supreme Court also held that "for the same reasons" the NFLP's licensing decisions are subject to scrutiny under Section 1. Id. at 15. The Supreme Court cautioned that while "agreements within a single firm" are typically treated as independent, not concerted, action, "in rare cases" like here where the "teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being," "the intrafirm agreements may simply be a formalistic shell for ongoing concerted action." Id. at 16.

The Supreme Court also Stated that Necessary Cooperation by the NFL Teams Is Likely to Survive the Rule of Reason.

While many of the other sports leagues and their respective players' associations filed competing amicus curia briefs in the belief that the case could have major implications, the Court made a concerted effort to show that its holding was simply in line with the Court's 1984 decision in Copperweld Corp. v. Independence Tube Corp., 467 U. S. 752 (1984).

The Court also concluded its opinion by explaining that the necessary cooperation to produce NFL football would not be hamstrung by antitrust law. For example, the fact that NFL teams "must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions … . [and such] agreement is likely to survive the Rule of Reason" and "may not [even] require a detailed analysis." American Needle, slip. op. at 18-19.

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