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Expert Analysis

American Needle v. NFL: The Supreme Court Tackles Whether Pro Football Should Be Exempt From Antitrust Laws

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It has long been recognized that, with the exception of Major League Baseball, there is no antitrust immunity for professional sports leagues. However, the application of the antitrust laws to the National Football League is currently being revisited in *American Needle Inc. v. National Football League*, No. 08-661, in which the U.S. Supreme Court is considering whether the NFL and its 32 member teams can conspire among themselves in violation of the antitrust laws.

American Needle arose from the NFL's agreement to exclusively license team logos and other intellectual property to Reebok. The NFL had previously licensed this intellectual property for several decades to competing apparel manufacturers, including American Needle. On its face, the decision will affect whether such licensing agreements violate the antitrust laws. A Supreme Court decision in favor of the defendant, however, may have much broader implications by effectively immunizing the NFL, or any professional sports league, from antitrust scrutiny.

History of NFL Licensing

In 1963 the NFL formed NFL Properties Inc. to, among other things, license league and team intellectual property. NFL Properties thereafter licensed individual team and league logos to a variety of competing apparel manufacturers, including Nike, Champion, Puma and American Needle. However, in 2001 NFL Properties opened bidding for an exclusive license for this intellectual property, and Reebok won the bid, ending the 20-year, nonexclusive license American Needle had enjoyed to manufacture hats bearing NFL team logos.

The Lower Court Decisions

American Needle launched its offensive against the NFL by filing a complaint in the U.S. District Court for the Northern District of Illinois Dec. 1, 2004, alleging violations of Sections 1 and 2 of the Sherman Act.

The plaintiff specifically alleged that because NFL teams own the right to individually license team logos, their collective agreement to provide Reebok with an exclusive license amounted to a conspiracy to restrain trade. The NFL responded that American Needle could not state a viable antitrust claim because the league and its member teams are the functional equivalent of one entity. Since the league could not conspire with itself, there could not be any antitrust violation.

American Needle argued that the NFL and its member teams were not a single entity.

To violate Section 1 of the Sherman Act, which makes unlawful any contracts, combinations or conspiracies in restraint of trade, a plaintiff must demonstrate that there are a “plurality” of actors. This plurality requirement emanates from the Supreme Court’s seminal decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), wherein the court concluded that a parent corporation and its wholly owned subsidiary are a single entity for antitrust purposes.

The underlying rationale for this decision was that the collaboration between a parent and its subsidiary could not produce the same anti-competitive effect as two unrelated competitors joining forces, since the former scenario did not eliminate a previously independent player in the market. In other words, the court found that the parent-subsidiary relationship is always “guided or determined not by two separate corporate consciousnesses, but one.” *Id.* at 753. The *Copperweld* decision was later extended to a number of situations beyond the traditional parent-subsidiary relationship, where affiliated companies or individuals could be considered a single entity in certain circumstances.¹

Thus, the application of *Copperweld* was a key issue at the lower court level. American Needle argued that *Copperweld* did not immunize the NFL’s conduct because NFL teams are separately owned and maintain ownership over their respective trademarks.

In fact, NFL teams do not share profits and losses and they each earn their own revenue from a number of different income streams, including stadium naming rights, sales of luxury boxes, stadium concessions, parking fees and local broadcast rights. Thus, American Needle argued that the NFL and its member teams

were not a single entity as required by applicable Supreme Court precedent.

In a Hail Mary attempt to win an argument it had already lost on seven prior occasions, the NFL countered that, based on *Copperweld*, it was immune from prosecution because it could not conspire with itself.²

After allowing only minimal discovery on the NFL’s *Copperweld* defense, the District Court granted summary judgment against American Needle, holding that it could not state a valid Section 1 claim where the NFL and its member teams acted as a single entity for purposes of licensing its intellectual property. Thus, the District Court became the first court to declare that the NFL is a single entity despite 25 years worth of case law to the contrary.

On appeal, the 7th U.S. Circuit Court of Appeals affirmed, holding that the NFL and its member teams operate as a single entity because they cooperate in the joint production of league football games. In an opinion written by Judge Michael Kanne, the panel found instead that “NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams’ intellectual property.” *Am. Needle v. NFL*, 538 F.3d 736 (7th Cir. 2008).

Importantly, the 7th Circuit was not persuaded by the fact that NFL teams compete on a large number of issues, which it found tangential to the league’s role in producing football games. The court, channeling its inner John Madden, found that “[a]sserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?” *Id.* at 743.

In so holding, the 7th Circuit departed from the approach taken by the 1st, 2nd, 3rd, 8th and 9th circuits, all of which refused to hold professional sports leagues to be single entities that enjoy immunity from antitrust liability. However, perhaps in an attempt to blunt its radical departure from precedent on the issue, the 7th Circuit did advise that the issue of whether a sports league operates as a single entity must be decided not only “one league at a time” but also “one facet of a league at a time.” *Id.* at 742 (citation omitted).

The Supreme Court Proceedings

Following its defeat in the 7th Circuit, American Needle threw down a red-flag challenge and requested

Supreme Court review. In its brief *American Needle* relied heavily on the Supreme Court's landmark decision in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), which was decided within days of the *Copperweld* decision.

At issue in that case was whether the NCAA's restrictions on the right of member teams to enter into separate television broadcasting contracts violated Section 1 of the Sherman Act. Although the court acknowledged that "a certain degree of cooperation is necessary" in sports leagues, it nevertheless held that the restraint violated Section 1 of the Sherman Act because it prevented NCAA teams from competing with one another.

In a surprising maneuver, the NFL supported the petition for *certiorari*, requesting that the court accept review "in an effort to secure a uniform rule that (1) recognizes the single-entity nature of highly integrated joint ventures and (2) obviates the uncertainty, chilling effects and forum shopping that inevitably result from the current conflict among the circuits." *Am. Needle v. NFL*, No. 08-661, 2009 WL 164245, at *4, *respondents' brief filed* (U.S. Jan. 21, 2009).

The National Hockey League and the National Basketball Association also filed *amicus* briefs requesting the court to grant the petition for *certiorari* and decide the issue.

In a surprising maneuver, the NFL supported the petition for certiorari.

On Feb. 23 the court issued an order inviting the acting solicitor general to file a brief expressing the views of the United States on whether the court should grant review of the 7th Circuit's decision. The solicitor general, joined by the Federal Trade Commission, argued that the court should not hear the case because, among other things, the 7th Circuit made clear that its decision was limited to the particular facts before it.

Interestingly, the solicitor general's brief did note that the potential implications of the 7th Circuit's decision were "problematic."

"The court's reasoning could be understood to extend single-entity treatment to separately owned NFL teams with respect to their decision to collectively license their intellectual property, without regard to

the possibility that the team's agreement would eliminate the potential for meaningful competition among them, simply because potential efficiencies are associated with collective marketing by participants in a lawful venture to produce NFL football." *Am. Needle v. NFL*, No. 08-661, 2009 WL 1497823, at *6, *amicus brief filed* (U.S. May 28, 2009).

To the surprise of many, the Supreme Court granted *certiorari* even though the United States recommended against it. As framed by the NFL, the issue to be decided is "[w]hether, under the standards articulated in *Copperweld*, a professional sports league and its separately owned member clubs, which collectively produce an entertainment product that no member club could produce on its own, constitute, or at least can function as, a single entity for Section 1 purposes." See *Am. Needle*, 2009 WL 164245, at *i.

By comparison, *American Needle* frames the issue as whether "the NFL and its member teams are a single entity that is exempt from rule-of-claims analysis under Section 1 of the Sherman Act simply because they cooperate in the joint production of NFL football games, without regard to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league." *Am. Needle v. NFL*, No. 08-661, 2008 WL 4948434, at *ii, *petition for cert. filed* (U.S. Nov. 17, 2008).

The Department of Justice, joined by the Federal Trade Commission, submitted a joint brief, ostensibly in support of *American Needle*, in which it argued that the conduct of joint ventures such as the NFL generally constitutes concerted action subject to Section 1 of the Sherman Act. However, the government asked the court to vacate the lower court's ruling and remand with instructions to apply the following two-pronged test to determine whether the requisite unity of interest exists to forgo antitrust scrutiny under *Copperweld*:

First, the teams and the league must have effectively merged the relevant aspects of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere. Second, the challenged restraint must not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations.

Am. Needle v. NFL, No. 08-661, 2009 WL 3070863, at *6-7, *amicus brief filed* (U.S. Sept. 25, 2009).

The American Antitrust Institute, the Consumer Federation of America, the Merchant Trade Associations, the NFL Players' Association, the Major League Baseball Players' Association, the National Basketball Players' Association, the National Hockey League Players' Association and the NFL Coaches Association also filed *amicus* briefs supporting American Needle.

Consequences of the Supreme Court's Decision

Although the Supreme Court has cautioned that antitrust exemptions should be construed narrowly, it is highly conceivable that the NFL will finally cross the goal line and obtain the immunity it has been seeking for the last 25 years.³

To be sure, the Supreme Court has issued nine separate antitrust opinions in the last six years, all of which significantly narrowed private enforcement of the antitrust laws.⁴ There is little reason to think the court will depart from this course in *American Needle*. Such a decision in favor of the NFL will, however, have a number of far-reaching consequences.

First, even though the Sherman Act was enacted to protect consumers, they are the very people who will suffer the most should the court confer an antitrust exemption on the NFL. It is clear that consumers of apparel embellished with NFL team logos now have fewer choices since only one manufacturer is currently licensed to manufacture these goods.

Beyond restricting consumer choice, however, there is also evidence that the prices of this clothing have risen since Reebok obtained its exclusive license. On this issue, American Needle cited a Reebok executive in its petition for writ of *certiorari*, which explained that in 2006 "basic fitted caps that were selling for \$19.99 a few years ago because of the price pressures are now selling for \$30." See *Am. Needle*, 2008 WL 4948434 at *4.

Second, the court's decision could reach beyond the NFL into other professional sports or even other types of corporate associations. Not surprisingly, in the wake of the 7th Circuit's decision, many professional leagues have proclaimed that they too operate as a single entity. This was precisely the argument the National Hockey League made in *Madison Square*

Garden L.P. v. NHL, No. 07-8455 (S.D.N.Y. Sept. 28, 2007), wherein the New York Rangers challenged the NHL's collective Web site rules. These rules prohibited the Rangers from selling team merchandise on its Web site during the 2007 playoffs.

The Justice Department submitted a brief ostensibly in support of American Needle.

After being threatened with a \$100,000-a-day fine for selling the merchandise, the Rangers sued the NHL for essentially operating as a cartel. As expected, the NHL responded with a motion to dismiss the case, arguing that under *Copperweld* and *American Needle*, it could not violate Section 1 of the Sherman Act because it operates as a single entity. While the court declined to decide the issue at the pleading stage, the parties are without question closely following the *American Needle* proceedings.

Thus, if the NFL is blessed as a single entity by the Supreme Court, it is clear that other professional sports leagues and similar corporate associations will take the ball and run with it.

Most profoundly, the decision could give the NFL the antitrust exemption it has sought for decades. Indeed, the NFL is arguing that it should be declared a single entity for all "core venture functions," including labor matters. Thus, a decision in its favor would not only translate into higher prices for NFL-branded merchandise, but it could mean lower salaries for players and coaches and could even sack players' rights to free agency.

The current antitrust immunity enjoyed by Major League Baseball illustrates how this immunity could play out on and off the field.⁵ Take for example, the issue of franchise relocation. It had been decades since a team in Major League Baseball had relocated to a new city prior to the Nationals moving from Montreal to Washington. Even though the failing team did eventually relocate, it took more than five years because of the veto power of the owner of the Baltimore Orioles, as well as other team owners who did not want competition in their local markets.

By comparison, free-market competition has led to seven team relocations in the NFL during the same time period. Thus, a logical consequence of a Supreme

Court decision in favor of the NFL is a virtual lock-in of football teams in their current geographic territories despite the economic realities of continuing to do business in these markets.

Similarly, the adverse economic impact of baseball's antitrust immunity on labor relations could repeat itself in the NFL. This is best illustrated by MLB's infamous Curt Flood debacle. Flood was the star player for the St. Louis Cardinals, who was unwillingly traded to the Philadelphia Phillies. He did not want to play for the Phillies, in no small part because of the city's then notoriously racist mayor.

After losing his battle in the courts, Flood chose to retire instead of playing for a team against his will. Congress ultimately intervened to restore antitrust protection in the Major League Baseball players' labor market through the Curt Flood Act, 15 U.S.C. § 26(b)(a). Should the Supreme Court side with the NFL, football players may very likely find themselves in the same predicament as Flood.

Conclusion

The Supreme Court's decision in *American Needle* may mark a watershed moment in the application of antitrust law to professional sports. At one extreme, the court could definitively hold that sports leagues may not rely on *Copperweld* as a defense in antitrust litigation. Such an approach would be consistent with the long line of case law rejecting this defense in similar circumstances and would properly take into account the negative consequences that antitrust immunity has had on Major League Baseball.

While the court could proceed more moderately and endorse the two-pronged approach for single-entity inquiries advocated by the Justice Department, it is more likely to issue a sweeping holding immunizing the NFL from antitrust scrutiny at least with regard to its licensing functions.

The NFL, by requesting Supreme Court review, is also gambling that the court might go further and immunize all sports league activity from antitrust scrutiny. This type of victory for the NFL could revolutionize both antitrust law and the way professional sports leagues operate in the future.

Notes

¹ See, e.g., *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 275 (8th Cir. 1988) (interpreting *Copperweld* by explaining that "thrust of the holding is that economic reality, not corporate form, should control the decision of whether related entities can conspire").

- ² *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1256 (2d Cir. 1982); *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1388 (9th Cir. 1984); *McNeil v. NFL*, 790 F. Supp. 871, 895 (D. Minn. 1992); *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994); *Shaw v. Dallas Cowboys Football Club Ltd.*, No. 97-5184, 1998 WL 419765, at *5 (E.D. Pa. June 23, 1998); *St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851, 853 (8th Cir. 1998).
- ³ See *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982).
- ⁴ *Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *Volvo Trucks v. Reeder-Simco GMC*, 546 U.S. 164 (2006); *Ill. Tool Works v. Indep. Ink*, 547 U.S. 28 (2006); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Leegin Creative Leather Prods. v. PSKS Inc.*, 551 U.S. 877 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Pac Bell Tel. Co. v. Linkline Commc'ns* 129 S. Ct. 1109 (2009).
- ⁵ See *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922) (holding that baseball is not subject to federal regulation because it involves "personal effort" that is "not a subject of commerce").



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