

NFL: Single Entity or Sherman Act Violator?

High Court assesses the National Football League in pending 'American Needle' case.

ON JAN. 13, 2010, the U.S. Supreme Court heard arguments in *American Needle Inc. v. National Football League*, No. 08-661, a well publicized case that may dramatically alter the application of antitrust law to professional sports leagues and other competitor collaborations.

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At issue is whether the National Football League and its 32 member teams operate as a “single entity” when jointly licensing intellectual property. Looming beneath the surface, however, is the much larger question of whether the NFL should be entirely exempt from antitrust scrutiny.

Road to the High Court

American Needle arose from the NFL's agreement to exclusively license NFL team logos and other intellectual property to Reebok International Ltd. after previously granting licenses to American Needle Inc., among other apparel suppliers.

American Needle responded to the exclusive Reebok deal by filing a lawsuit against the NFL in the U.S. District Court for the Northern District of Illinois. American Needle alleged that, because each NFL team owns its team logo, the NFL's decision to provide Reebok with an exclusive license violated the Sherman Act's prohibition on agreements in restraint of trade.

The NFL countered that American Needle could not state a viable antitrust claim because the league and its member teams functioned as a single entity. In other words, it argued that the requisite plurality of actors necessary

for a Section 1 claim did not exist because it could not conspire with itself.

The Supreme Court last addressed this “plurality” requirement in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). There, the Court held that a parent corporation and its wholly owned subsidiary were a single entity for antitrust purposes. Although *Copperweld* rejected the “intra-corporate conspiracy” doctrine, some courts later extended the Court's rationale to situations beyond the traditional parent-subsidiary relationship, holding that affiliated companies or individuals similarly could be considered a single entity in certain circumstances.¹

American Needle argued in the lower courts that *Copperweld* did not immunize the NFL's exclusive licensing agreement because NFL teams are separately owned and operated, and each team independently owns its respective trademarks. Moreover, NFL teams do not share profits and losses, and each team earns its own revenue from a variety of sources, including stadium naming rights, sales of luxury boxes, stadium concessions, parking fees and local broadcast rights.

Despite losing the single entity point on seven prior occasions, the NFL responded to American Needle's arguments by arguing that *Copperweld* immunized it from antitrust liability.² The district court granted summary judgment against American Needle, and became the first court ever to declare the NFL a single entity despite a quarter century of case law to the contrary.

The U.S. Court of Appeals for the Seventh



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Circuit affirmed, departing from the approach taken by the First, Second, Third, Eighth and Ninth circuits. In an opinion authored by Circuit Judge Michael Kanne, it held that the NFL and its member teams operate as a single entity “when promoting NFL football through licensing the teams' intellectual property.” *Am. Needle Inc. v. Nat'l Football League*, 538 F.3d 736, 744 (7th Cir. 2008). The appellate court did advise, however, that future single entity determinations must be made not only “one league at a time” but also “one facet of a league at a time.” *Id.* at 742 (citation omitted).

American Needle, relying heavily on *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984), petitioned the Supreme Court for review. In *NCAA*, which was decided within days of *Copperweld*, the Court held that the

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National Collegiate Athletic Association's restrictions on its member teams' television broadcasts violated Section 1 of the Sherman Act under a rule of reason theory.

In a surprising maneuver equated by Super Bowl quarterback Drew Brees to challenging his own 80-yard touchdown pass, the NFL supported American Needle's petition for certiorari.³ The league argued that Supreme Court review was necessary both to secure a uniform rule regarding the single entity nature of highly integrated joint ventures and to prevent forum shopping due to a split in the circuits. *Am. Needle Inc. v. Nat'l Football League*, No. 08-661, 2009 WL 164245, at *4 (U.S. Jan. 21, 2009).

The Court subsequently granted certiorari even though the Solicitor General recommended against it.

Game Day: Oral Argument

By most accounts, the Supreme Court argument did not go well for the NFL.

For example, the justices did not appear persuaded by its argument that the league and its teams join together in all respects for the promotion of the sport. Justice Antonin Scalia dismissed the argument, tersely stating that "the purpose is to make money" and that he did not think that the teams "care whether the sale of the helmet or the T-shirt promotes the game...they sell it to make money from the sale."⁴

Justice Sonia Sotomayor put an even finer point on it, stating that the NFL and its member teams "promote[] the making of money...and once you fix prices for making money, that's a Sherman Act violation."⁵ Justice Stephen Breyer seemed to agree, and questioned why the teams should be exempt from scrutiny when collaborating to sell merchandise off the field.⁶

In one awkward moment that underscored the justices' incredulity, Justice Scalia asked the NFL's lawyer whether accepting his argument would mean that the league and its teams "can agree to fix the price at which their...franchises will be sold, by concerted agreement, because, after all, they are worthless apart from the NFL?"⁷ When the league's lawyer responded that such conduct should be permissible, Justice Scalia replied: "Oh...I thought I was reducing it to the absurd."⁸

Although American Needle's lawyer fell

into a similar trap when asked whether the league and its teams operate as a single entity in developing playing rules (he answered in the affirmative), the tone of the justices' questioning indicated an unwillingness to rule broadly in favor of the NFL.

Who Wins and What Impact?

The Supreme Court can resolve the *American Needle* dispute in a number of ways.

It could rule broadly in favor of the NFL or American Needle, adopt a two-pronged factual inquiry advocated by the Solicitor General, or narrowly affirm based on the Seventh Circuit's holding. As discussed below, each of these approaches would have monumental antitrust implications for businesses on and off the field.

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Should the Court bless the league and its member teams as a single entity in all respects, the NFL would effectively obtain the antitrust exemption it has sought for decades. This outcome would inevitably lead to lower salaries for players and coaches, and all but eliminate a player's right to free agency. Indeed, the now infamous Curt Flood debacle could then repeat itself in professional football.

Curt Flood, a standout center fielder for the St. Louis Cardinals, was traded against his will to the Philadelphia Phillies. After losing his battle for free agency at the Supreme Court, Flood chose to retire instead of play for a city with an infamously racist mayor. It later took an act of Congress, through the Curt Flood Act, 15 U.S.C. § 26(b)(a), to restore competition in the major league baseball labor market.

A broad ruling in favor of the NFL could also implicate the ability of the Department of Justice and Federal Trade Commission to challenge anticompetitive aspects of otherwise lawful joint ventures.

For example, the FTC and the DOJ may examine whether a proposed joint venture includes conditions that unreasonably restrict competition and are unlikely to contribute to the core purpose of the collaboration. In this instance, government enforcers will examine whether these conditions are reasonably necessary to achieve the efficiencies sought by the joint venture, and if not, may challenge it.

Thus, if General Motors and Ford agreed to jointly develop a hybrid engine, and in turn also set the prices of all vehicle models that they sold to dealers, the FTC or DOJ would likely challenge the agreement. However, a broad ruling in favor of the NFL could limit the ability of government enforcers to challenge restraints by empowering competitive collaborators to argue that all functions of a lawful joint venture are immune from antitrust scrutiny.

If Court Rules Against NFL

It is also possible that the Court will issue a sweeping decision in favor of American Needle. Such a holding would bring an end to the long standing question regarding the proper antitrust treatment of the NFL and its member teams. A blanket ruling in favor of American Needle could also have a less obvious impact on businesses off the field.

To be sure, video game publisher Electronic Arts is carefully watching the proceedings from the sidelines. Electronic Arts markets the wildly successful Madden NFL Football video games and currently enjoys an exclusive license to produce these games using NFL players' names and images as well as NFL team names, logos and trademarks.

In a recent proposed class action antitrust lawsuit, Electronic Arts was hauled into court for allegedly using these exclusive licenses to stifle competition. Indeed, plaintiffs in the class action lawsuit allege that Madden NFL Football prices have risen nearly 70 percent since it obtained its exclusive licenses.

Recognizing the potential reach of the *American Needle* decision, Electronic Arts filed an amicus brief in support of the NFL, contending that its competitive success hinges on the league being held a single entity for purposes of licensing intellectual property. Should the Court rule in favor of American Needle, the NFL would be required to license this intellectual property on a

non-exclusive basis and companies such as Electronic Arts would be forced to individually negotiate licenses from each NFL team.

Arguably, while inconvenient to Electronic Arts, such a ruling could benefit consumers by initiating the development of multiple NFL branded video games and lower prices for these games.

The Two-Pronged Approach

The Court could also endorse the two-pronged approach to joint venture analysis advanced by the Solicitor General in the amicus brief filed with the Court. While the Solicitor General argued that the conduct of joint ventures such as the NFL generally constitutes concerted action subject to Section 1 of the Sherman Act, the Court was asked to vacate and remand with the following instructions to determine whether *Copperweld* applies:

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 Inc. v. Nat'l Football League, No. 08-661, 2009 WL 3070863, at *6-7 (U.S. Sept. 25, 2009).

Should the Court adopt this two-pronged approach, it would not only perpetuate the lingering confusion over the proper antitrust treatment of the NFL, but it would further complicate joint venture analysis generally. Moreover, such an outcome would be an unfortunate missed opportunity for the Court to provide clear guidance in an otherwise murky area of antitrust law.

A Seventh Circuit Affirmance

Finally, despite the Court's skepticism at oral argument, it may nevertheless affirm the Seventh Circuit's limited holding insofar as it declared the NFL and its member teams a single entity when jointly licensing intellectual property. This approach would not only impact American Needle, but would likely impact consumers in the form of fewer choices and increased prices for apparel embellished with NFL team logos.

This approach would also likely implicate the business activity of other professional sports leagues.

The National Hockey League, for example, has already raised the single entity defense in the aftermath of the Seventh Circuit's decision. In *Madison Square Garden, L.P. v. NHL*, No. 07-8455 (S.D.N.Y. Sept. 28, 2007), the New York Rangers challenged the National Hockey League's requirement that all merchandise bearing team logos be sold on the NHL's Web site instead of each individual team's Web site. The Rangers subsequently filed a lawsuit against the NHL, challenging the collective Web site rules as an unlawful agreement in restraint of trade.

The NHL responded with a motion to dismiss the case, arguing that *Copperweld* and *American Needle* immunize it from antitrust liability because the NHL operates as a single entity. The court declined to decide the issue at the pleading stage and the parties subsequently settled the litigation.

Nevertheless, it is clear that other professional sports leagues will aggressively defend their joint arrangements if the NFL's exclusive license is upheld by the Court.

Conclusion

American Needle presents a ripe opportunity for the Court to resolve the long disputed single entity status of the NFL and its member teams.

At one end of the spectrum, the Court could broadly immunize the NFL from antitrust scrutiny. Based on the recent oral argument before the Court, however, it is unlikely that the justices will give the league the touchdown it seeks. Indeed, at one point during the argument Justice Sotomayor astutely questioned whether such an approach would give the NFL a judicial antitrust immunity that was never intended by Congress.

On the opposite end of the spectrum, the Court could hold that the NFL is categorically subject to antitrust scrutiny, which would put an end to the 25 year dispute on the issue. Given the last nine antitrust decisions by the Court, all of which limited private enforcement of the antitrust laws, it is unlikely that the Roberts Court will offer such a sweeping decision in favor of American Needle.⁹

While the Court could also endorse the two-pronged approach advanced by the Solicitor General, it is more likely that it will issue a limited holding shielding the NFL from antitrust

scrutiny with regard to its licensing functions. This approach would, unfortunately, provide little guidance as to the proper antitrust treatment of other "facets" of the NFL, thus allowing the single entity question to linger on into overtime.



1. See, e.g., *Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 275 (8th Cir. 1988) (interpreting *Copperweld* by explaining that the " 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. Nat'l Football League*, 670 F.2d 1249, 1256 (2d Cir. 1982); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1388 (9th Cir. 1984); *McNeil v. Nat'l Football League*, 790 F. Supp. 871, 895 (D. Minn. 1992); *Sullivan v. Nat'l Football League*, 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), aff'd, 172 F.3d 299 (3d Cir. 1999); *St. Louis Convention and Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851, 853 (8th Cir. 1998).

3. Drew Brees, "NFL Antitrust Case Has Big Implications for Fans, Players," Washington Post, Jan. 8, 2010.

4. Oral Argument Transcript, at 45, *Am. Needle Inc. v. Nat'l Football League*, No. 08-661, 2010 WL 110134 (U.S. Jan. 13, 2010).

5. Id. at 58.

6. Id. at 59-60.

7. Id. at 61.

8. Id. at 61.

9. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Volvo Trucks N. Am. Inc. v. Reeder-Simco GMC Inc.*, 546 U.S. 164 (2006); *Illinois Tool Works Inc. v. Indep. Ink Inc.*, 547 U.S. 28 (2006); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. Inc.*, 549 U.S. 312 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Leegin Creative Leather Prods. Inc. v. PSKS Inc.*, 551 U.S. 877 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007) and *Pacific Bell Tel. Co. v. Linkline Commc'ns Inc.*, 129 S. Ct. 1109 (2009).