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Supreme Court Rules that NFL and Its Teams Cannot Be Considered a "Single Entity" When Making Joint Licensing Decisions

American antitrust law draws a fundamental distinction between the conduct of a single firm and the conduct of multiple firms. The conduct of a single firm is governed by § 2 of the Sherman Act, 15 U.S.C. § 2, and can be found unlawful only when the firm has monopoly power or a dangerous probability of obtaining such power. In contrast, § 1, 15 U.S.C. § 1, applies only where there is an agreement among multiple actors, and condemns any agreements that unreasonably restrain trade. Although it is often clear whether conduct involves multiple actors for purposes of antitrust analysis, the Supreme Court had not addressed the issue in more than 25 years. In late May 2010, the Supreme Court clarified the analysis that applies when determining whether a joint venture should be treated as a single entity or rather as an agreement among its participants.

On May 24, 2010, the Supreme Court unanimously held that licensing agreements made collectively by the 32 National Football League (NFL) teams are not the actions of a single entity and therefore are subject to review under § 1 of the Sherman Act. *American Needle, Inc.* v. *Nat'l Football League*, No. 08-661, slip op. (May 24, 2010) (Slip Op.). Although the Court invoked language from *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), stating that "substance, not form, should determine whether a[n]…entity is capable of conspiring under §1," *id.* at 773 n.21, it declined to analogize the NFL structure to the parent-subsidiary corporate form characterized as a single entity in *Copperweld*. The *American Needle* Court determined that the "NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action" and accordingly that the teams' joint licensing agreement brought together "independent centers of decisionmaking." Slip Op. at 11-12.

In declining to characterize the NFL as a single entity, the *American Needle* Court rejected the NFL's appeal for broad antitrust immunity if it does not possess monopoly power or a dangerous probability of obtaining such power. The decision therefore represents a victory for the NFL Players Association, which feared that owners would no longer be restrained in labor negotiations by the threat of potential antitrust violations, and a possible loss to other professional sports leagues (other than baseball), which are likely to be bound by the holding. Ultimately, however, it was the NFL that was seeking a dramatic change in current antitrust analysis applied to joint ventures, and the Court's rejection of the NFL's arguments does not represent a dramatic alteration in antitrust law.

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And although it was denied a favorable ruling in *American Needle*, the NFL has not yet lost this particular suit; on remand American Needle must show, just as in any § 1 action analyzed under the rule of reason, that the restraint on competition was unreasonable.

A. BACKGROUND

The NFL is an unincorporated association composed of 32 independently owned professional football teams. Slip Op. at 1. Although each team owns its name, colors, and logo, since 1963 National Football League Properties (NFLP) has developed, licensed, and marketed the teams' intellectual property. Slip Op. at 2. Until 2000, NFLP awarded nonexclusive licenses to several vendors—including American Needle, Inc.—that provided for the sale of apparel bearing team insignias, but the teams subsequently voted to allow NFLP to grant exclusive contracts. *Id.* After NFLP awarded an exclusive 10-year license to Reebok International Ltd. and declined to renew American Needle's nonexclusive license, American Needle filed suit, alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated §§ 1 and 2 of the Sherman Act. *Id.*

The district court granted summary judgment for the NFL, concluding that, with respect to intellectual property rights, the teams' operations were sufficiently integrated for the League to be considered a single entity and therefore not subject to review under § 1. Slip Op. at 3. The Court of Appeals for the Seventh Circuit affirmed. *Id.* The circuit panel noted that the relevant inquiry was whether the agreements deprived the "market place of independent sources of economic control" and concluded that, because the teams must function collectively to produce NFL football, there was no such deprivation in this case. *Id.* Accordingly, given that "only one source of economic power controls the promotion of NFL football," the court found that the NFL was a single entity, and that its conduct was not subject to review under § 1. Slip Op. at 3-4.

The Supreme Court granted certiorari to decide the "narrow" issue of whether the NFL is capable of engaging in a "contract, combination,…, or conspiracy" under § 1 of the Sherman Act or if, under a broad reading of *Copperweld*, the NFL should be considered a single entity for the purposes of § 1. Slip Op. at 4. Despite prevailing in the lower courts, the NFL supported certiorari in an attempt to procure a uniform rule that "recognize[d] the single-entity nature of highly integrated joint ventures." Brief for NFL Respondents On Petition for *Writ of Certiorari*, *American Needle, Inc.* v. *National Football League*, at 4 (May 24, 2010) (No. 08-661).

B. THE COURT'S OPINION

The Court held that, because "NFLP's licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed assets," NFLP should not be considered a single entity and therefore remains subject to § 1. Slip Op. at 15. Importantly, the teams still retained the ability to make their own market decisions relating to the licensing of their intellectual property. Slip Op. at 15-16. Accordingly, "[t]hirty-two teams operating independently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits." Slip Op. at 16. Rather, NFLP acts simply as a "formalistic shell" around the separate interests of the 32 teams. *Id.*

Section 1 of the Sherman Act makes illegal "[e]very contract, combination…or, conspiracy, in restraint of trade." In determining whether an agreement within the scope of § 1 exits, the Court uses a functional, rather than formalistic, approach to determining when actions are concerted rather than independent. Slip Op. at 6. Thus there may be concerted activity by members within a legally single entity. *See, e.g.*, *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967) (holding that a company operated by a group of mattress manufacturers, which licensed the Sealy trademark to those same manufacturers, was subject to § 1 review). The functional analysis also dictates that there is not necessarily concerted action in agreements by members of legally distinct entities. Slip Op. at 7-8; *see, e.g.*, *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962) (holding that three agricultural cooperatives were "in practical effect" a single "organization"); *United States* v. *Citizens & Southern Nat. Bank*, 422 U.S. 86, 119-20 (1975) (finding that a holding company's control of several branch

banks did not constitute concerted action). Espousing this substance over form approach, *Copperweld* held that a parent corporation and its wholly owned subsidiaries cannot fall within the purview of § 1, because they are controlled by a single center of decisionmaking. Slip Op. at 9.

Accordingly, the key inquiry in determining whether activity is concerted is whether it joins together separate decisionmakers and therefore deprives the marketplace of "diversity of entrepreneurial interests." *Id.* (quoting *Fraser* v. *Major League Soccer, L.L.C.*, 284 F.3d 47, 57 (1st Cir. 2002)). Applying this test to the NFL teams, the Court concluded that the teams are competitors in the market for intellectual property licenses. Slip Op. at 12. The organization of the teams into a separate entity, NFLP, is not dispositive: "[a]n ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label." Slip Op. at 13. "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.* Further, the Court rejected the NFL's argument that cooperation among the teams was necessary for the existence of NFL football and asserted that "[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action." Slip Op. at 14. The Court noted that if mere sharing in profits and losses amongst members of a joint venture immunized the activity from §1, then "any cartel 'could evade the antitrust law simply by creating a "joint venture" to serve as the exclusive seller of their competing products.'" Slip Op. at 17 (quoting *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, concurring in judgment)).

The Court concluded its opinion with language sympathetic to the NFL: "The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions." Slip Op. at 18. Although NFLP actions are subject to §1 review, the district court on remand must still apply the "flexible" Rule of Reason to the restraint on competition. *Id.* Moreover, the Court stated that the interest in achieving a competitive balance between teams in a league "may well justify a variety of collective decisions made by the teams." Slip Op. at 19.

C. IMPLICATIONS

1. *The Impact on Business Practice*

The *American Needle* Court's rejection of the NFL's request for a uniform rule that it should be treated as a single entity regardless of the context in which it is acting is consistent with prior *Copperweld* and joint venture precedent. The Court clarified that *Copperweld*, which held only that "the coordinated activity of a parent and its wholly-owned subsidiary must be viewed as that of a single enterprise for purposes of § 1," 467 U.S. at 771, cannot be broadly applied to all ventures comprised of separately owned members, such as NFLP. In so doing, the Court declined to go beyond its holding in *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006), that a fully integrated joint venture's collaborative price setting of different gasoline brands did not violate the Sherman Act. While the Solicitor General's brief in *Dagher* argued for a single firm analysis, the Court held only that a joint venture's pricing decisions could not be condemned as per se illegal and did not address the single firm issue. The Court's decision in *American Needle* thus reflects a consistent approach to joint venture analysis rather than any significant doctrinal change.

2. *The Outlook on Remand*

Although the NFL gambled and lost in supporting the petition for certiorari despite prevailing in the lower courts, the ultimate cost of *American Needle* to the League remains unclear. The Supreme Court held only that NFLP's conduct is within the scope of § 1, not that it was unlawful. To prevail on remand, American Needle must show that the NFLP-Reebok contract is an unreasonable restraint on competition. The Court's decision noted that unique "features of the NFL may…save agreements amongst the teams," Slip Op. at 19, including the shared "interest in making the entire league successful and profitable" and the interest in achieving a "competitive balance" among athletic teams, Slip Op at 18, 19. Citing *Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979), the Court indicated that if cooperation is necessary for the

product to be available at all, "the agreement is likely to survive the Rule of Reason." Slip op. at 19. Thus, even though the NFL did not prevail on the "single entity" issue, American Needle may face substantial hurdles before proving the NFL liable.

D. CONCLUSION

Ultimately, *American Needle* does not so much represent a loss for the NFL as it does a failure for the League to secure a transformative victory. Aligning with conventional expectations for the case, the Court deemed the NFL teams separate entities—at least with respect to licensing each team's intellectual property—whose concerted activities are subject to review under § 1 of the Sherman Act.

If you would like more information about any of the matters discussed in this advisory, please contact your Arnold & Porter attorney or:

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