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REPORT FROM WASHINGTON

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The Supreme Court Considers Whether the NFL is a "Single Entity" and thus Immune from Antitrust Scrutiny

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The Supreme Court heard oral arguments yesterday in *American Needle, Inc. v. National Football League, et al.*, No. 08-661, in which the Court is expected to address whether professional sports teams belonging to the same league can act in a coordinated fashion without being subject to antitrust scrutiny under the "Rule of Reason" analysis commonly employed to assess joint ventures under Section 1 of the Sherman Act. Specifically, the case presents the question of whether, for purposes of the Sherman Act, the individual teams of the National Football League ("NFL") collectively constitute a "single entity"—as opposed to a collection of competitors—when they jointly license their respective intellectual property. Although *American Needle* focuses on the NFL's licensing arrangements, the decision could have implications for many other types of joint ventures.

BACKGROUND

Since 1963, though each NFL team owns their trademarks and other intellectual property individually, NFL merchandizing has been jointly conducted through National Football League Properties ("NFLP") (in which each NFL team has an equal interest). For over 20 years, NFLP granted American Needle licenses to use NFL and NFL team trademarks on the headware it manufactured. All that changed in 2000 when NFLP entered into the exclusive license arrangement with Reebok, thereby ending the right of American Needle to use NFL and NFL team trademarks.

American Needle filed suit in the Northern District of Illinois, alleging that NFL teams, NFLP, the NFL and Reebok had engaged in an illegal conspiracy to eliminate competition for their intellectual property licenses, resulting in significantly higher prices for consumers. The NFL defendants moved to dismiss the case, arguing that American Needle failed to adequately define the relevant affected market, a required element unless the conduct is a *per se* violation of the Sherman Act. Although the district court rejected American Needle's claim that the NFL defendants' behavior was a *per se* violation, the court upheld the viability of the Rule of Reason and monopolization claims and allowed limited discovery as to whether the NFL teams were a "single entity" with respect to licensing and marketing their intellectual property. On a motion for summary judgment, the court rejected American Needle's remaining Sherman Act claims, holding that the NFL teams "have, through various forms of NFL Properties, acted as an economic unit." 496 F. Supp. 2d 941, 944. Since the NFL was acting as a single entity, its conduct could not be challenged as a conspiracy among competitors.

The Seventh Circuit observed that there has not yet been "a definitive opinion as to whether the teams of a professional sports league can be considered a single entity in

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light of *Copperweld*." 538 F.3d 736, 741. The court therefore analyzed American Needle's appeal through the lens of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in which the Supreme Court concluded that a parent corporation and its wholly owned subsidiary are a single entity for antitrust purposes. Under the Seventh Circuit's standard, in determining the existence of a single entity, "courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." *Id.* at 742. The presence of competing interests among firms acting collectively does not necessarily mean that an independent source of economic power is removed by the collective action.

In affirming the lower court's decision, the Seventh Circuit observed that producing football games inherently requires a degree of cooperation. "[M]ost importantly . . . since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFLP—to license their intellectual property collectively and to promote NFL football." *Id.* at 744. According to the court, "nothing in § 1 [of the Sherman Act] prohibits the NFL teams from cooperating so the league can compete against other entertainment providers." *Id.* American Needle's Section 2 monopolization claim, the court held, failed for similar reasons: "[a]s a single entity for the purposes of licensing, the NFL teams are free under § 2 to license their intellectual property on an exclusive basis . . . even if the teams opt to reduce the number of companies to whom they grant licenses." *Id.*

SUMMARY OF THE ARGUMENT

"I don't know a Red Sox fan who would take a Yankees sweatshirt if you gave it away."

JUSTICE BREYER

Yesterday, in front of the Supreme Court, American Needle requested that the Court reverse and remand the case on the grounds that the lower court should have scrutinized NFLP's decision to grant Reebok an exclusive license under the Rule of Reason before granting summary judgment. Specifically, American Needle maintained that the NFL defendants' conduct in this case amounts to a horizontal restraint among competitors because separate decision makers joined together to decide whether or not to produce a product. American Needle contended that the facts here are analogous to those in *NCAA v. Board of Regents* because, in both instances, decisions of the jointly-owned entity are controlled by a vote of the competing stakeholders, requiring application of the Rule of Reason to the joint venture's activities.

Justice Breyer questioned whether two teams actually compete with each other for the sale of team logo merchandise: "I don't know a Red Sox fan who would take a Yankees sweatshirt if you gave it away."

"There are some things that it just seems odd to subject to a rule of reason analysis. . . . Why doesn't it make sense to sort of carve those out at the outset, rather than at the end of the case?"

CHIEF JUSTICE ROBERTS

Justices Ginsburg, Alito and Kennedy asked American Needle to identify the "zones" of conduct in which NFL teams are allowed to act in a concerted fashion without scrutiny. Justice Alito, for instance, questioned whether scheduling decisions needed to be analyzed under the Rule of Reason. Justice Ginsburg observed that, were the Court to rule in American Needle's favor, more frivolous cases may be subject to discovery, needlessly driving up the costs of litigation.

Chief Justice Roberts noted that "[t]here are some things that it just seems odd to subject to a rule of reason analysis," and questioned "[w]hy doesn't it make sense to sort of carve those out at the outset, rather than at the end of the case?"

The United States, represented by the Office of the Solicitor General, also argued in favor of remand. The Government advocated that the formation of an organization to make joint decisions on behalf of independent entities is always subject to Rule of Reason analysis; however, assuming its formation passes muster under antitrust laws,

subsequent decisions of that organization should only be subject to Rule of Reason analysis under certain circumstances. Accordingly, an organization would receive immunity from Section 1 as a "single entity" only if: (1) component entities have effectively merged the relevant operations in the operational sphere at issue; and (2) the challenged restraint does not significantly affect competition between the entities in areas outside the merged operations.

Justice Breyer noted that the Government's second criterion—whether the conduct affects competition in other areas—is similar to a Rule of Reason analysis. He also observed that some courts, including the Seventh Circuit, "have taken *Copperweld* terminology and transferred it to a place where it does, I think, perhaps not belong." Justice Sotomayor asked "what [would] the different questions . . . be under the single control theory you are proposing and a rule of reason application in its normal course?"

The NFL defendants argued that, because the NFL teams are not independent sources of economic power, and because American Needle does not challenge the formation of NFLP, the teams effectively act through NFLP as a single entity and are thus immune from Section 1 liability. They analogized their coordinated activities to a law partnership's decision to set billing rates for its partners, distinguishing a circumstance where two unaffiliated attorneys agree on billing rates. The NFL defendants therefore maintained that the Court should affirm because the lower court, after discovery, correctly determined that the NFL acted as a single entity in setting licenses.

Justice Breyer questioned "[s]hould they be permitted to join their centers of economic power into one when they promote and sell T-shirts, sweatshirts, et cetera?" He also questioned the Seventh Circuit's conclusion that "the NFL teams are best described as a single source of economic power when promoting NFL football though licensing," asking "how do we know that? . . . I don't know what, in fact, *Copperweld* has to do with it." Justice Breyer also commented that the Seventh Circuit was "taking this word 'single entity' and . . . throwing it around all over the place and stopping the economic analysis."

Justice Scalia inquired whether an independent purpose of licensing logos was to make money and suggested that a fact question about the purpose of the challenged conduct would be a triable issue.

"So the answer to my question is, . . . you are seeking through this ruling what you haven't gotten from Congress: An absolute bar to an antitrust claim."

JUSTICE SOTOMAYOR

Justice Ginsburg asked whether any conduct would come under scrutiny based on the NFL defendants' assertion that the NFL teams are not independent sources of economic power. Justice Scalia, for instance, questioned whether NFL teams could agree on the price for selling a franchise. The NFL defendants responded that they could, to which Justice Scalia commented that he "thought [he] was reducing [their argument] to the absurd [with his hypothetical]." Justice Sotomayor questioned whether "you are seeking through this ruling what you haven't gotten from Congress: An absolute bar to an antitrust claim."

On rebuttal, American Needle restated its position that determining the purpose and competitive effects of a concerted action as part of an analysis of whether a group of actors should be considered a single entity would confuse courts. Instead, according to American Needle, those inquiries should be analyzed as part of the Rule of Reason analysis. American Needle disputed the NFL defendants' assertion that a law partnership is not subject to Rule of Reason analysis, contending that law partnerships' conduct is not routinely challenged because the partnerships hold no market power.

IMPLICATIONS

In *American Needle*, the Court is poised to provide guidance as to the extent to which joint ventures and other entities that coordinate to provide a product to the marketplace are free from antitrust scrutiny. While Congress has explicitly exempted certain aspects of professional sports leagues' conduct from the antitrust laws—notably, the licensing of broadcasting rights and most decisions by Major League Baseball—the Supreme Court has never held that a professional sports league is covered under the single entity doctrine. In the event the NFL defendants were to prevail, many activities of sports leagues and other joint ventures in which companies pool resources and/or coordinate licensing could fall under an exception to antitrust scrutiny under Section 1 for their coordinated activities.

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