

LEGAL DEVELOPMENTS

May 24, 2010

The Supreme Court Monday handed the NFL a loss for the league in a decision that carries implications for antitrust treatment not just of sports leagues, but of joint ventures generally. In *American Needle, Inc. v. National Football League*, the Court struck down the Seventh Circuit's ruling that NFL Properties, a company the teams formed to manage their intellectual property, constitutes a single entity for antitrust purposes. In reaching that decision, the Court focused on the substance of economic decision-making power by the participants in the joint venture, rather than the venture's formal arrangement.

Background:

In 1963, the NFL teams formed NFL Properties to jointly develop and manage their intellectual property, including licensing the teams' trademarks for apparel manufacture. Between 1963 and 2000, NFL Properties granted nonexclusive licenses to a number of vendors to manufacture and sell apparel with team colors and insignias. In 2000, however, NFL Properties granted Reebok International Ltd. an exclusive 10-year license and declined to renew its nonexclusive licenses.

American Needle, Inc., was one of the former licensees that lost a license in 2000. It filed suit in the Northern District of Illinois alleging that the agreements between the NFL, its teams, NFL Properties, and Reebok violated §§1 and 2 of the Sherman Act. Defendants countered that the teams, the NFL, and NFL Properties were incapable of conspiring within the meaning of §1 because they are a single economic enterprise with respect to licensing of the teams' intellectual property. The district court agreed and the Seventh Circuit affirmed, reasoning that the teams "can function only as one source of economic power when collectively producing NFL football."

The Supreme Court Decision:

Writing for a unanimous Court, in what is likely his final antitrust opinion, Justice Stevens rejected the reasoning espoused by the district court and Seventh Circuit. He first emphasized that whether an arrangement comprises concerted action, and thus falls within the ambit of Section 1, is a functional analysis that does not turn on the formal structure of the arrangement. Instead, the essential question is whether the arrangement "deprives the marketplace of independent centers of decision-making." The Court decided the NFL teams are such independent decision makers: "Each of the teams is a substantial,

independently owned, and independently managed business." But for the joint venture, these independent businesses would compete in the market for intellectual property.

The Court did acknowledge that the teams can only produce NFL football collectively, but said that this fact does not alter each team's individual economic interest in exploiting its intellectual property. As a result, decisions regarding licensing of the teams' trademarks are concerted action and subject to antitrust scrutiny.

The decision does not mean, however, that NFL Properties may not continue collectively licensing the teams' intellectual property, or that the plaintiff American Needle will now prevail. Justice Stevens expressly pointed out that the NFL's interest in maintaining a competitive balance "may well justify a variety of collective decisions made by the teams." Whether NFL Properties' decision to switch multiple licenses to one exclusive license can be justified by the NFL's interest in parity among the teams – or otherwise – will now be analyzed by the district court.

Takeaways:

- **Substance, not form, controls single-entity analysis.** The legal form of a joint venture is not determinative.
- **The universe of joint ventures immune from Section 1 as single-entities has not expanded.** *American Needle* puts the brakes on expansive application of single-entity status. The case can be viewed as a companion to *Texaco v. Dagher* in adhering to the Rule of Reason as the preferred mode of analysis for conduct by legitimate joint ventures.
- **Antitrust risk may have increased.** Leagues, businesses, associations, and other arrangements that combine entities that share certain economic incentives but can nonetheless be viewed as potential competitors may be at risk of greater antitrust scrutiny as a result of *American Needle*. The Court's approving citation of *United States v. Sealy* and *United States v. Topco Associates* – cases that many thought moribund – could prove fertile ground for new antitrust challenges.

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