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Supreme Court Holds That NFL Does Not Enjoy Automatic Immunity from Antitrust Laws

On May 24, 2010, the United States Supreme Court issued its decision in American Needle v. National Football League,[1] holding that the NFL does not enjoy automatic immunity from the antitrust laws for marketing decisions it makes on behalf of the entire league and its teams.

The case concerned Section 1 of the Sherman Act, which makes illegal "every contract, combination . . . or conspiracy in restraint of trade." From this very general language has grown a small universe of law and regulation. It is Section 1 that makes it illegal for competing companies to agree on the prices they will each charge their customers (i.e., price-fixing); or for competitors to divide up territory amongst themselves, giving each competitor a specific territory, and keeping each competitor from the other's territory. Violations of Section 1 can result in criminal and civil liability.

Importantly, Section 1 prohibits agreements of a certain kind, and agreements require more than one party. Section 1 cases, then, often turn on the question whether an apparent agreement actually involves more than one party. For example, the courts have held that it is not a violation of Section 1 for a corporation and its wholly-owned subsidiary to enter into an agreement about the price at which they will each sell certain products. Although the two may technically be different companies, they are a single entity for the purposes of Section 1, and cannot be held guilty of violating Section 1 for a conspiracy between themselves.[2]

American Needle. Each of the 32 teams that make up the NFL owns its own logo, trademark, and related intellectual property. The 32 teams together formed National Football League Properties ("NFLP") to manage the licensing of their logos and trademarks. Prior to 2000, the NFLP granted nonexclusive licenses to plaintiff American Needle and other vendors to produce and sell headgear with team logos and other intellectual property. Starting in December 2000, the NFLP granted an exclusive license for the production and sale of that apparel. Through that agreement, Reebok, and Reebok alone, had the right to produce such apparel for *all* of the teams. American Needle sued, alleging that this exclusive licensing deal violated Section 1.

1 American Needle, Inc. v. National Football League, et al., 560 U.S. _ (May 24, 2010), available at http://www.supremecourt.gov/opinions/09pdf/08-661.pdf.

2 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984) (corporation and its wholly-owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act").

The question the case presented was whether the NFL is a single entity, which has every right to enter into an exclusive licensing agreement for trademarked apparel, or whether this was really a deal between Reebok and all 32 individual teams, in which the individual teams had banded together to give the licensing rights to one company alone.

The lower courts held that the NFL was a single entity, and dismissed American Needle's case. American Needle appealed that dismissal to the Supreme Court, and the Supreme Court reversed the dismissal, holding that the NFL in this context was not a single entity, but was rather 32 independent teams.

The Court explained that decisions whether an entity is a single entity or a group of independent competitors are not made on the basis of form over substance; rather, they are based on the underlying goal of the antitrust laws, the promotion of competition. The question is whether the case concerns independent economic actors and decision-makers, who would otherwise be in competition with one another, or whether it concerns a single entity, functioning as such. The Supreme Court held that when it comes to marketing branded apparel, the teams are independent economic actors and decision-makers, who are indeed in competition with one another.

It is important to note that the Court did not hold that the NFL or the teams had violated the Sherman Act. The question was simply whether the lower courts were right to dismiss American Needle's case from the start, and the Supreme Court held that the case should not have been dismissed. The case will now go back to the federal district court, and the licensing deal will be judged under what is called the "rule of reason," which essentially requires an economic analysis of whether particular conduct is pro-competitive or anit-competitive. The NFL may still get out of this lawsuit; it simply cannot do so on the basis that it is a single entity.

The Supreme Court also was careful to note that there are many legitimate league functions that clearly do not violate the antitrust laws. "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," said that Court.[3] Cases challenging some conduct could still be dismissed with little judicial inquiry.

The long-term effects of the decision remain to be seen. In subjecting certain economic activity of the league to antitrust scrutiny, it may weaken the power of the leagues when it comes to economic or profit-oriented activity, as opposed to pure game governance behavior. We suspect that activities likely to be easily upheld would include establishing rules of the game, implementing drug-testing practices and procedures, setting game schedules, or player disciplinary activity. The Supreme Court's decision also may make the branded apparel market more competitive, with individual teams reaching separate licensing agreements, or with the league returning to non-exclusive licensing arrangements, which would be less suspect under the antitrust laws.

In addition, Major League Baseball has long enjoyed a peculiar exemption from the antitrust laws. The exemption began with a 1922 Supreme Court decision, which held that baseball was not interstate commerce, but rather an association for exhibition activities.[4] This exemption has not been extended to other sports. It has long been criticized by legal commentators: why should baseball be exempt if other sports are not? Nonetheless, the exemption persists. Even before American Needle, the distinction has been important. For example, because of the exemption, major league baseball has been able to prevent team relocations to a greater extent than have other sports leagues. We believe that American

[3] American Needle, slip op at 18.

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Needle may lay the groundwork for the reversal of the baseball exemption, since the logic of the decision would seem to apply equally to professional baseball.

4 Federal Base Ball Club of Baltimore v. National League of Professional Base Ball Clubs, 259 U.S. 200 (1922).