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Supreme Court Makes the Call: NFL Not Exempt from Antitrust Law when Licensing Team Trademarks for Merchandise

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Reversing the Seventh Circuit, the Supreme Court unanimously held that the National Football League's trademark licensing activities are "not categorically beyond the coverage" of federal antitrust laws. *American Needle, Inc., v. NFL*, No. 08-661, slip op. at 1 (S. Ct. May 24, 2010). The Court concluded that the league's actions constitute "concerted activity" under Section 1 of the Sherman Act, meaning that, on remand, the district court will evaluate American Needle's claims under the Rule of Reason standard. *Id*. at 18. This does not mean that the NFL necessarily will be found liable under the Sherman Act, or that such an outcome is even likely. Writing for the Court, Justice Stevens emphasized that the NFL may very well prevail under the Rule of Reason test, since NFL teams may have "a perfectly sensible justification for making a host of collective decisions." *Id*. Nevertheless, American Needle's antitrust claim will proceed for the time being.

Facts

National Football League Properties ("NFLP") is the trademark licensing arm of the NFL. It was formed in 1963. *Id.* at 2. Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, including American Needle, to manufacture and sell apparel with NFL team insignias. *Id*. That practice changed in 2000, when the NFL's teams "voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams." *Id*. American Needle, After NFLP declined to renewed American Needle's license, the vendor sued for antitrust violations under the Sherman Act.

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The NFL responded to the Section 1 claim by arguing "that the teams, NFL, and NFLP were incapable of conspiring within the meaning of Sec. 1 because they are a single economic enterprise, at least with respect to the conduct challenged." *Id.* at 2-3 (citation and quotation omitted). The NFL prevailed with this argument before the district court. The Seventh Circuit affirmed, finding that the teams "can function only as one source of economic power when collectively producing NFL football." *Id.* at 3 (citation omitted). The appellate court held that, since the NFL acted as a single entity with regard to trademark licensing, Section 1 of the Sherman Act did not apply to these activities at all.

The Supreme Court's Analysis

The Supreme Court disagreed with the Seventh Circuit and reversed. The Court explained that Section 1 makes illegal "every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade." *Id.* at 1. As interpreted in numerous prior Supreme Court decisions, the statutory text raises the antecedent question "whether the alleged 'contract, combination . . . , or conspiracy' is concerted action – that is, whether it joins together separate decisionmakers." *Id.* at 10 (emphasis added). When concerted action is found, courts evaluate antitrust claims under the Rule of Reason. *Id.* at 1.

Does the NFL's granting of a single exclusive license for manufacturing and selling headgear with team insignia constitute the unitary action of one single entity, or is it concerted action by several independent entities, thus possibly undermining competition? The Supreme Court emphasized that the inquiry "is one of competitive reality" and cannot be resolved by reference to corporate formalities. *Id.* at 11. It is therefore not decisive in this inquiry that the parties to an alleged Section 1 violation may be legally distinct entities or that they "have organized themselves under a single umbrella or into a structured joint venture." *Id*. Rather, "[t]he question is whether the agreement joins together independent centers of decisionmaking." *Id*. If it does, the resulting conduct is "concerted action" and subject to further antitrust inquiry. This is because "competition assumes and demands" independent centers of decisionmaking, and concerted action among such independent actors is "fraught with anticompetitive risk," even though it may not threaten actual monopolization. *Id.* at 5.

The Supreme Court found that the NFL teams "do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business." *Id.* at 11-12. Importantly, "the teams compete in the market for intellectual property." *Id.* at 12. More specifically, "[w]hen each NFL team licenses its intellectual property, it is not pursuing the common interests of the whole league but is instead pursuing interests of each corporation itself." *Id*.

This finding is the linchpin of the Supreme Court's analysis. The reality that the teams compete in the market for intellectual property (*i.e.*, their respective trademarks) trumps the formality that, "by forming NFLP, they have formed a single entity, akin to a merger, and market their NFL brands through a single outlet." *Id.* at 13. Under longstanding Supreme Court precedent, "[a]n ongoing Sec. 1 violation cannot evade Sec. 1 scrutiny simply by giving the ongoing violation a name and label." *Id*.

The NFL rejoined that the teams "constitute a single entity because without their cooperation, there would be no NFL football." *Id.* at 14. The Court rejected this argument, finding that the necessity for cooperation does not confer blanket immunity to Section 1 liability. "[A] nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to Sec. 1 analysis." *Id.* at 14-15. Here, though the teams conduct their trademark licensing activities through a single entity—NFLP—their interests are separate from NFLP's, and each team could choose at any time to make its own decisions on how to market its trademarks. *Id.* at 15-16. In short, "[i]n making the relevant licensing decisions, NFLP is . . . an instrumentality of the teams." *Id.* at 17. "For that reason, decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action" and must be further scrutinized under the Rule of Reason. *Id.* at 16.

<u>Lessons for Trademark Owners</u>

What does the Supreme Court's decision mean for trademark owners? Have the rules changed for trademark licensors or franchisors? Has the risk for antitrust liability increased? It is, of course, too early to tell what the effects of the Supreme Court's decision ultimately will be. However, the opinion provides a fair amount of guidance.

First, the Court's decision does not signal a revival of the "monopoly phobia" with respect to trademarks that was so prevalent in the first half of the twentieth century. The Supreme Court did not hold or imply that a strong trademark somehow confers undue market power. In fact, the strength of the licensed marks owned by the NFL teams is not material to the decision. The decision only concerns the issue of concerted action under Section 1 of the Sherman Act, rather than monopoly power under Section 2.

Second, while the case does not signal a return to monopoly phobia, it is also true that trademark-related conduct can indeed give rise to antitrust liability under established principles of antitrust law. In other words, *American Needles* shows that trademarks and trademark licenses are valid subjects for a judicial antitrust inquiry.

Third, it would be an overreaction to assume that the decision suddenly exposes any and all trademark licensing arrangements to antitrust liability. The Court's decision is based on well-established antitrust precedent and does not appear to change the application of antitrust law to trademark licensing decisively. The Supreme Court found "concerted action" in this case because "[t]he teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being." *Id.* at 16. This economic reality ultimately drives to the Court's holding. Conversely, in situations where such an underlying economic reality does not obtain, Section 1 of the Sherman Act does not apply. The great majority of existing licensing arrangements are unlikely to be based on facts analogous to those at issue here and will therefore be unaffected by this decision.

Fourth, certain complex licensing structures might be evaluated in light of the Supreme Court's analysis to ascertain whether they inadvertently create a risk of constituting "concerted action" under Section 1 of the Sherman Act. *American Needle* makes clear that the need for cooperation in one area does not automatically establish the need for cooperation in licensing and exploiting trademarks. With respect to the NFL, the Supreme Court explained this point as follows: "[E]ven if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football." An assessment of whether a given trademark licensing arrangement may constitute concerted activity under this test will necessarily be intensely fact contingent. Nevertheless, the guiding criterion is clear: joining together independent centers of decisionmaking for the purpose of trademark licensing (or otherwise) creates a risk of a finding of "concerted action" under Section 1 of the Sherman Act. Businesses must scrutinize trademark licensing arrangements that might be viewed as such combinations to minimize any risk of antitrust liability.

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