The NFL and Its Teams Must Defend Restraint of Trade Claims: Supreme Court Reverses Seventh Circuit in *American Needle* v. *NFL*

In the *American Needle* opinion handed down on May 24, 2010, the Supreme Court ruled that the decision of the National Football League and its teams to grant the plaintiff's rival an exclusive license to make NFL team hats was not categorically beyond the coverage of §1 of the Sherman Act[1] and would have to be judged under the Rule of Reason.[2] The unanimous decision authored by Justice Stevens overturned the Court of Appeals for the Seventh Circuit's determination that the NFL and its teams should be treated as a single entity that is incapable of engaging in concerted action subject to §1. The decision does not reach the question of whether the arrangement violated the antitrust law. It emphasizes the distinction between the question of whether action by a group of several entities should be treated as the action of a single actor for legal purposes and the question of the lawfulness of the conduct even if the conduct is treated as the action of multiple actors. The opinion is also a valedictory for Justice Stevens, an acknowledged antitrust authority who was a prominent voice, sometimes for the majority, more recently in dissent, in many of the Court's most significant antitrust decisions in recent decades.

I. Background

In *American Needle, Inc.* v. *National Football League*, a supplier of caps and hats bearing sports teams' logos brought an antitrust suit against the National Football League (NFL) and its member teams after losing its long-standing league-wide NFL headwear license. Such licenses were issued through National Football League Properties (NFLP), a corporate entity founded in 1963 by the NFL to develop, license, and market the intellectual property of the NFL. The complaint alleged that NFLP's award of an exclusive license to another firm constituted an unlawful conspiracy among the NFL and its member teams to restrict access to licenses for the teams' intellectual property.

The district court granted the defendants' motion for summary judgment and the Court of Appeals for the Seventh Circuit affirmed,[3] noting that in accordance with the Supreme Court's 1984 decision in *Copperweld*, [4] sports leagues can, in some circumstances, be considered a single entity that is incapable of forming a conspiracy in violation of §1 of the Sherman Act.

The circuit court stated that although NFL teams could have competing interests regarding the licensing of their team logos, they can still function as a single entity with respect to the promotion of their jointly produced product—NFL football—to better compete with other forms of entertainment. As such, they could not be said to have engaged in concerted action, which is a predicate for liability under §1 of the Sherman Act.

American Needle sought review by the Supreme Court and, in an unusual move, the NFL supported the petition for certiorari.[5] The United States Department of Justice and Federal Trade Commission recommended that the Supreme Court deny certiorari, even though they found the Seventh Circuit's reasoning "problematic."[6] The Supreme Court granted certiorari on June 29, 2009.[7]

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1 15 U.S.C. §1.

2 *American Needle, Inc.* v. *National Football League*, No. 08-661, slip op. at *1, 560 U.S. ____ (May 24, 2010).

3 538 F.3d 736 (7th Cir. 2009).

4 *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984) (holding that a corporate parent and its wholly owned subsidiary should be treated as a single entity for §1 analysis).

5 Certiorari Brief for the NFL Respondents, *American Needle, Inc.* v. *National Football League*, No. 08-661, slip op., 560 U.S. ____ (May 24, 2010) (available at http://www.scotusblog.com/wp-content/uploads/2009/12/NFL-merits-brief.pdf).

6 *Brief for the United States* at p. 7, *American Needle, Inc.* v. *National Football League*, No. 08-661, slip op., 560 U.S.

II. *American Needle* at the Supreme Court

On May 24, 2010, the Supreme Court reversed and remanded, holding that "the NFL's licensing activities constitute action that is not categorically beyond the coverage of §1."[8] The Court called the question presented a "narrow" and antecedent one as to whether the NFL teams and the NFLP are "capable of engaging in" violations of §1 of the Sherman Act.[9] The Court made clear that it was not deciding whether that agreement unreasonably restrained trade.

The Supreme Court observed that it must delve deeper than simply looking at the legal status of the entity in question. Eschewing such a formulaic reading of the Sherman Act, the Court explained:

> The key is whether the alleged contract, combination, or conspiracy is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a contract, combination, or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests.[10]

While the decision reaffirmed the recognition in *Copperweld* that conduct by a unitary economic actor is beyond the reach of §1 of the Sherman Act, the Court rejected the NFL's invitation to expand *Copperweld*'s application. While operating a football league necessitates collaboration among the NFL's member teams, in other respects the teams are "separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."[11]

Because the Court found that the NFL and NFLP brought together "independent centers of decisionmaking," the NFL teams were capable of conspiring under §1.[12] Thus, the lower court must decide whether the concerted action is unreasonable and therefore illegal.[13] The Court indicated that the procompetitive justifications advanced by the NFL should be considered in evaluating the restraint, noting that "[w]hen restraints on competition are essential if the product is to be available to all, *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason."[14] The Supreme Court indicated that the procompetitive benefits of collectively marketing the NFL teams' "individually owned intellectual property" should be weighed, and noted that "the interest of maintaining a competitive balance" among the teams is one consideration that "may well justify a variety of collective decisions made by the teams."[15]

____ (May 24, 2010) (available at http://ftc.gov/os/2009/05/090529nfl.pdf).

7 129 S. Ct. 2859 (2009).

8 *American Needle, Inc.* v. *National Football League*, No. 08-661, slip op. at *1, 560 U.S. ____ (May 24, 2010).

9 *Id.* at *4.

10 *Id.* at *10 (internal citations and quotations omitted).

11 *Id.* at *13 (internal citations omitted).

12 The Court cautioned that, to find otherwise, could mean that "companies could act as monopolies through [ ] joint ventures" and that "competitors cannot simply get around antitrust liability by acting through a third-party intermediary or joint venture. *Id.* at *17 (citing *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 335-36 (2d Cir. 2008) (Sotomayor, J., concurring)).

13 *Id.* at *11.

14 *Id.* at *18-*19 (quoting *National Collegiate Athletic Association* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 101, 109, n. 39 (1984)).

15 *Id.*

III. Justice Stevens's Valedictory

With its strong affirmation of the general applicability of Rule of Reason analysis to a broad range of antitrust claims, the unanimous opinion in *American Needle* illustrates the significant impact that Justice Stevens has had upon the field of antitrust law. As a litigator, a scholar, a judge, and finally, as a Supreme Court Justice, Justice Stevens has played a critical role in the development of antitrust law over the past thirty years. Under his influence, the Court took a fresh look at categories of conduct that had been traditionally subjected to summary condemnation as *per se* unlawful and are today judged under the Rule of Reason,[16] which itself has come to be redefined as a continuum, rather than as a bifurcated set of choices wherein an agreement is either *per se* lawful or unlawful. In *NCAA* v. *Board of Regents of the University of Oklahoma*,[17] Justice Stevens explained that "there is often no bright line separating *per se* from Rule of Reason analysis" given that "[*p*]*er se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."[18] Where the harm from anticompetitive conduct is obvious, the Rule of Reason can be applied in the "twinkling of an eye."[19] Justice Stevens's view of the Rule of Reason as a "spectrum" or "sliding scale" was endorsed by the Supreme Court in *California Dental Association* v. *FTC*.[20] In holding that the Rule of Reason applies in *American Needle*,[21] the Court's opinion both showcases Justice Stevens's extensive influence upon the development of antitrust law and the concise way in which a court may apply the Rule of Reason.

IV. Conclusion

Aside from clarifying the treatment of various (non-baseball) sports leagues, which have sought a special place in antitrust law at least since Major League Baseball was declared exempt from the Sherman Act in 1922,[22] the decision does not change the law and should not lead to significant modification in the antitrust analysis of joint ventures and other collaborations. However, the case may lead to efforts by some to re-examine some of the outer bounds of the application of *Copperweld.* The decision's lasting impact may also be Justice Stevens's dicta on the flexibility of the Rule of Reason and the courts' authority to apply that standard in a "twinkling of an eye" not only to condemn practices but also to approve them.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Patricia Farren at 212.701.3257 or pfarren@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Dean Ringel at 212.701.3521 or dringel@cahill.com; Laurence T. Sorkin at 212.701.3209 or lsorkin@cahill.com; or Lawrence A. Reicher at 212.701.3383 or lreicher@cahill.com.

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16 *See, e.g.*, *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2, 15-18 (1984).

17 468 U.S. 85 (1984).

18 *Id*. at 104, n. 26.

19 *Id*. at 109, n. 39.

20 526 U.S. 756, 780 (1999) (holding that a quick look Rule of Reason is appropriate in some cases, but not under the facts at issue).

21 *American Needle, Inc.* v. *National Football League*, No. 08-661, slip op. at *18, 560 U.S. ____ (May 24, 2010).

22 *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922). The scope of the judicially created baseball immunity has been limited by some lower courts and legislation.