Is the NFL a Single Entity and Therefore Exempt from Antitrust Liability?

CASE AT A GLANCE

For twenty years, American Needle, Inc., held a license from the National Football League Properties LLC (NFLP) to produce and sell headwear adorned with the logos and trademarks of teams within the National Football League (NFL). In 2001, NFLP granted an exclusive license to Reebok International Ltd. to produce NFL headwear for ten years, effectively ending American Needle's license. American Needle responded by bringing an antitrust suit against the NFL, NFLP, each of the NFL teams, and Reebok.

American Needle, Inc. v. National Football League et al.
Docket No. 08-661

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From: The Seventh Circuit

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ISSUES

Are the NFL and its member teams a single entity that is exempt from the rule of reason claims under Section 1 of the Sherman Act?

Do the NFL member clubs function as a single entity in collectively licensing and marketing their identifying trademarks?

FACTS

The NFL is an unincorporated association of independently owned football teams. Although the number of teams has fluctuated over the past eight decades, the NFL is currently made up of thirty-two teams. Each of these teams together produce a series of games (called a season) that totals more than 250 football contests. The season ends with a playoff tournament and the Super Bowl, the league championship game. All these contests are produced through coordinated activity of the member teams. The contests cannot take place without a significant measure of cooperation between the teams. As a result, the success of each of the individual teams is necessarily tied to the success of the league as a whole. Teams share costs and revenue, while contributing funds to help provide stadiums for each of the teams. Although the NFL consists of independently owned teams, the NFL makes decisions regarding production and promotion of the league and the games themselves. The NFL also determines the schedule, establishes the game rules, administers the code of conduct for players and team officials, and regulates the sale and location of franchises. Although the member teams own the rights to their intellectual property, the league controls the teams' colors and mascots and must approve any changes.

For over forty years the NFL member clubs have promoted their product jointly. In 1963, the NFL teams formed NFLP, a separate corporate entity. NFLP was given the responsibility of developing, licensing, and marketing the intellectual properties of each team, including the teams' logos and trademarks. NFLP was also responsible for creating and promoting advertisement campaigns on behalf of the NFL and its member teams. To further accomplish this goal, the NFL teams granted to NFLP the authorization to grant licenses to vendors so that the vendors could manufacture and sell products bearing the teams trademarks and logos, including shirts, jerseys, and headwear.

Initially, NFLP granted licenses to numerous vendors, allowing the vendors to produce merchandise sporting the teams' trademarks and logos. One of these vendors was American Needle. It held a license to produce NFL headwear for more than twenty years. In 1982, the NFL teams created the NFL Trust, which was granted near-exclusive rights to license the NFL teams' intellectual property. The trust was to extend until 2004, though two teams refused to enter into the trust. However, in 2000, the NFL teams together gave authorization to NFLP to solicit bids for an exclusive license in headwear that would be granted to a single manufacturer. After receiving bids, NFLP awarded the exclusive ten-year license to Reebok. As a result, American Needle's license was not renewed.

American Needle responded to NFLP's failure to renew its license by filing an antitrust action against the NFL, NFLP, each of the individual NFL teams, and Reebok. It claimed that the exclusive license granted by NFLP to Reebok violated Section 1 of the Sherman Act, which forbids the creation of any "contract, combination … or conspiracy, in restraint of trade." 15 U.S.C. § 1. The crux of its claim was that, because each of the individually owned NFL teams held the rights to their own trademarks and logos, their collective agreement to allow NFL properties to grant an exclusive license to Reebok constituted a conspiracy to prevent other vendors from accessing licenses to produce products bearing the trademarks and logos of any of the NFL teams. American Needle further contended that through the authori-

zation by the NFL teams to allow NFLP to grant the exclusive license to Reebok, the teams monopolized the licensing of the NFL teams and the wholesale markets of their products, in violation of Section 2 of the Sherman Act.

The NFL responded by filing a motion for summary judgment on the Section 1 claim. The NFL claimed that under the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752 (1984), and the cases that followed it, the NFL is immune from any liability under Section 1. The Supreme Court had held in *Copperweld* that a parent corporation and its wholly owned subsidiary are immune from liability under Section 1 because they are a single entity for antitrust purposes.

American Needle responded to the motion for summary judgment by filing a Rule 56(f) motion for a continuance and asking for discovery. After protesting the scope of the discovery request, the NFL and other defendants produced the relevant discovery. American Needle again responded with a Rule 56(f) motion stating that defendants still possessed information it needed in order to respond to the motion for summary judgment. The district court took this motion under advisement and ordered American Needle to respond to the merits of the motion for summary judgment. The district court then denied American Needle's Rule 56(f) motion and granted summary judgment to defendants regarding its Section 1 claim. The district court determined that the NFL teams together constitute a single entity in the licensing of their intellectual property. It held that the purpose of the exclusive licensing agreement was to promote the NFL as a whole. Through the promotion of the NFL, the teams act as a unit and should be seen as a single entity. Thus, the defendants were immune from an antitrust claim under Section 1. The district court also granted summary judgment for defendants on the Section 2 claim, stating that its previous determination that the NFL is a single entity necessarily precluded an antitrust claim under Section 2. As a single entity, the NFL and its teams could grant an exclusive license without violating any antitrust laws.

American Needle appealed to the U.S. Court of Appeals for the Seventh Circuit. A three-judge panel affirmed the decision of the district court. On the discovery dispute, the circuit court held that American Needle had failed to show that the district court was wrong in denying additional discovery. The permissible scope of discovery at that point in the case was limited to the Section 1 claim. The district court had, according to the appellate court, all the facts it needed to make a decision on the motion for summary judgment. As to the "single entity" ruling, American Needle argued that the district court misapplied *Copperweld* by concluding that the teams acted together in concert, when the question should have been whether or not the teams could compete against each other in licensing their intellectual property and whether or not their joint licensing agreement deprives the economic market of independent entities. The Seventh Circuit held that though the teams could compete against each other in an open marketplace, this fact alone cannot prevent them from being a single entity for antitrust purposes. The circuit court reasoned that the NFL teams are a single entity in the promotion of NFL football because no single team can produce an NFL football game without working jointly with another team. Each team, thus, has an important economic interest in promoting the league as a whole. The circuit court found most persuasive that, since 1963, the NFL teams have worked jointly under the auspices of NFLP to conduct the licensing of intellectual properties of the teams. As a result, Section 1 does not prohibit NFL teams from cooperating so that the NFL as a whole can compete with other types of entertainment.

The Seventh Circuit also agreed with the district court's conclusion that, by holding that the NFL respondents made up a single entity under Section 1, American Needle was precluded from asserting a successful claim under Section 2. As a single entity, the NFL respondents were free to grant an exclusive license to their intellectual property.

American Needle petitioned the Supreme Court for a writ of certiorari, which was granted on June 29, 2009.

CASE ANALYSIS

Numerous briefs have been filed in this case for both sides. The NFL Coaches Association and the NFL Players Association have sided with American Needle. Amicus briefs were filed on behalf of the NFL by a variety of professional and collegiate sports leagues, along with other businesses with an interest in the matter. The crux of the disagreement is whether or not the NFL teams, as individually owned entities with independent income-producing capabilities, are part of a single entity known as the NFL. If they are, then the NFL's decision to grant Reebok an exclusive license is effectively immune from antitrust scrutiny. If they are not, then the NFL's decision is subject to the "rule of reason" analysis under Section 1 of the Sherman Act.

American Needle argues that the NFL teams are each separate entities and thus not a single entity for antitrust purposes. Section 1 of the Sherman Act terms illegal "[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade.'" 15 U.S.C. § 1. The Supreme Court held in *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752 (1984), that a parent corporation and its wholly owned subsidiary could not conspire with each other to restrain trade as they are subject to the same source of control and no agreement between them could have an effect on commerce that would not otherwise exist. American Needle's position is that *Copperweld* is inapplicable. Each NFL team is individually owned and operated and makes profits individually. Each team is a separate entity capable of conspiring to violate Section 1 of the Sherman Act. Furthermore, these teams are capable of competing against each other economically, making the exclusive licensing agreement NFL properties made with Reebok a restraint of trade in violation of Section 1. American Needle cites *Radovich v. NFL,* 352 U.S. 445 (1957), where the Supreme Court held that the NFL was subject to antitrust law for its actions regarding an employment dispute with a player. American Needle also cites *NCAA v. Board of Regents,* 468 U.S. 85 (1984), where the Supreme Court applied Section 1 to an agreement between separately owned and operated college teams in a single league.

The NFL argues that courts have stated that the applicability of antitrust law should not be determined simply by the organizational structure that a corporation or entity happens to adopt. Corporations are free to structure themselves in a manner best fit to promote their businesses, as the Court has indicated in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19 (1962), among other cases. In *Sunkist,* the Court found an organization made up of three independently owned subparts to be a single entity. The NFL terms the decisions in *Radovich* and *NCAA* inapplicable because

those cases involved agreements between multiple leagues, and not within a single league such as the NFL.

The NFL argues that its member teams are not separate entities capable of independent economic activity. The nature of football requires each team to work together to create a football game. All economic viability of each team's intellectual property is derived directly from these jointly produced ventures and in turn enhances the value of the game itself. NFLP has been the distributor of licenses of the teams' intellectual property for fifty years and does so for the benefit of the league as a whole, not the individual teams themselves. Further, revenue from the sale of products carrying the intellectual property of the teams is shared among the teams and the league.

American Needle points to a number of judicial decisions in which courts have allowed antitrust actions to proceed against entities that have, like the NFL, chosen to create cooperative ventures rather than to compete individually. These cases suggest that the NFL member teams could compete against each other in a competitive market, pitting their intellectual property and licensed merchandise against that of other teams. American Needle claims that courts "uniformly" apply Section 1 to agreements made by independently owned entities in this situation. The NFL responds, however, that its member teams lack the kind of economic independence that the Supreme Court relied upon when it assessed antitrust claims in the cases cited by American Needle. Unlike separate organizations that have joined together and formed an agreement not to compete, the NFL argues that its member teams are inherently linked and cooperation is essential to their ability to make profits.

American Needle also argues that the purpose of *Copperweld* was to shield agreements between smaller components of a larger firm and the larger firm. It was not to immunize agreements between individually owned entities such as the NFL teams. In the petitioner's view, *Copperweld* protects an entity that creates agreements with smaller subsets of itself. American Needle contends that circuit courts after *Copperweld* have held Section 1 applicable to separately owned entities. Among the examples it cites are *Rothery Storage & Van Co. V. Atlas Van Lines, Inc.,* 792 F.2d 210 (D.C. Cir. 1986), and *Freeman v. San Diego Ass'n of Realtors,* 322 F.3d 1133 (9th Cir. 2003).

American Needle also argues that federal legislative actions suggest that NFL teams are subject to antitrust actions. Congress has rejected numerous requests by the NFL and other sports leagues for antitrust immunity. Instead, it has enacted several pieces of legislation that suggest, implicitly, that Section 1 of the Sherman Act does apply to sports leagues, including the Sports Broadcasting Act, 15 U.S.C. § 1291, the Curt Flood Act, 15 U.S.C. § 26b(a). Congress has also denied extending antitrust protection to the Raiders NFL franchise during two different location changes. The NFL's position on this argument from implicit congressional understanding is to claim that these two statutes were narrowly drawn and did not apply to the licensing of products.

Finally, American Needle argues that, even if *Copperweld* applies, the Seventh Circuit's decision in that case was erroneous. NFL member teams are not identical to wholly owned subsidiaries. The NFL does not exert full control over teams; moreover, member teams are not obligated to act in the best interests of the NFL at all times. The NFL counters that all competition among teams is on the playing field only. Teams have no incentive to compete against each other off the field. Promotion of the league is tantamount to promotion of individual teams. The league and its teams share in any gains in popularity.

American Needle also asserts that the Seventh Circuit was wrong in concluding that a league is necessary for the teams to produce football games. Although the teams must cooperate to play each individual game, the teams do not need to be a part of a larger organization. Many college football teams do not belong to a particular league and most NASCAR teams are seen as individual entities though they compete against each other on a regular basis. The petitioner also differs with the appellate court's application of *Copperweld* because the NFL, according to American Needle, does not constitute a single source of economic power. The teams have profits and losses separate from those of the league, thus making their economic interests separate from those of the league. The fact that teams are individual businesses also makes them potential competitors in the marketplace. Teams could compete for fans, and they could compete for purchasers of products containing intellectual property.

The United States in its amicus brief proposes a test to determine whether Section 1 of the Sherman Act should apply to sports leagues. It suggests that a grouping of sports teams should be treated as a single entity only when (1) the teams and the league "have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere" and (2) the restraint being challenged does not "significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations." The NFL, however, contends that the government's proposed test is at odds with *Copperweld,* which did not look to see if a parent and its subsidiary were "effectively merged" but instead asked whether they were "independent sources of economic power previously pursuing separate interests." 467 U.S. at 771. Further, the second prong of the government's test would lead to confusion and scrutiny of unintentional competitive consequences of league decisions. The NFL argues that the government's proposed test would lead to Section 1 scrutiny of nearly every decision made by a sports league, creating a heavy burden on sports leagues as a whole.

Reebok adds to the NFL's position by contending in its brief that the manner in which NFLP solicited bids enhanced competition instead of stifling it. Section 1 was not designed to protect an organization that lost out on a bid. American Needle had an opportunity to offer a winning bid for the exclusive license of the NFL teams' intellectual property, but it failed to do so. According to Reebok, American Needle's failure should not give rise to Section 1 review.

SIGNIFICANCE

Single entity status has long been the NFL's holy grail. Section 1 of the Sherman Act explicitly requires an agreement, and an agreement requires more than one entity. As a matter of law, a single entity cannot violate Section 1. Antitrust law has been a thorn in the NFL's side throughout its existence. If the Supreme Court affirms the decision of the Seventh Circuit, then the NFL will be effectively immune from antitrust liability. Courts have often been asked to review NFL policies under antitrust law, including restrictions on player movement, the entry draft, and various devices designed to maintain competitive balance. The NFL has been able to implement these restraints,

despite antitrust concerns, through collective bargaining with the National Football League Players Association. (Federal law exempts the results of collective bargaining from antitrust law through the nonstatutory labor exemption insofar as the bargain primarily affects mandatory subjects of bargaining, such as players' wages, hours, and other conditions of employment.) If the Court rules in the NFL's favor, the league could adopt potentially anti-competitive policies without the need to engage in collective bargaining and without the threat of Section 1 liability.

A decision against the NFL would also be significant, but not as important as a decision in its favor. Should the Court reverse the lower court opinion, the case will be returned to the trial court for application of the Sherman Act's "rule of reason" analysis. It is quite possible that the NFL would win that fight on the factual grounds that this particular restraint of trade does not harm consumer welfare. Nonetheless, the NFL will be from a legal standpoint no better off than it is now. Section 1 liability will continue to cast a shadow over all NFL collective decision making, rendering the league subject to suit whenever it acts as a single entity. Should the NFL lose, then for all practical purposes the single entity defense will be put to pasture, and the NFL will continue to have to navigate the uncertainties of collective bargaining and antitrust liability as it tries to combine the two competing features of modern professional sports: individual team ownership and competitive balance.

Even if the NFL wins its desired grant of immunity, that grant will not be unlimited. The NFL surely would enjoy its special status only for functions that are essential or at the core of its football operations and promotions. Should the NFL one day venture out into unrelated business markets, it could not shield itself from all antitrust scrutiny merely because the unrelated business was launched under the auspices of the NFL. At one level, this case is about definitions: exactly what business is a "core function" of professional football? Both parties implicitly agree that the NFL may legally cooperate in organizing a football season, including scheduling, game rules, and a championship tournament. The parties differ as to whether or not the exploitation of team trademarks through merchandise sales should be included in these core, cooperative functions. The NFL contends that the sale of headwear is an extension of game cooperation; American Needle and its amici argue that this business is one in which NFL teams may compete against each other in an open market.

In any event, it is doubtful that the Supreme Court would grant the NFL an unmitigated, blanket exception from antitrust law. Not even the Seventh Circuit decision did that. Instead, even if the NFL is deemed a single entity for the limited purpose of collectively granting an exclusive license for use of its trademarks on merchandise, it would not necessarily constitute a single entity for its other controversial business arrangements, including broadcast rights, video game reproduction rights, and wage restrictions. Each of these would have to be litigated. With a decision in its favor, the NFL could litigate the legality of these arrangements on a legal question of whether or not the NFL constitutes a single entity in that particular market. The NFL would not have to undertake the more expensive and involved factual litigation typical of the "rule of reason" analysis under Section 1 of the Sherman Act.

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PREVIEW of United States Supreme Court Cases, pages 177–180.

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