TACKLING THE MEANING OF ANTITRUST LAW FOR NFL TEAMS

by

Larry Bumgardner*

The National Football League's attempted "end run" around the Sherman Antitrust Act has been thrown for a loss by the U.S. Supreme Court. In *American Needle, Inc. v. National Football League*,[1] the court unanimously rejected the NFL's contention that the 32 separately owned NFL teams should be treated as a "single entity," and thus unable to collude in terms of antitrust law, in deciding how to license and sell team merchandise. That means the teams are not automatically exempt from Section 1 of the Sherman Act, which prohibits only concerted action to restrain trade.[2]

Nevertheless, the game is far from over for the NFL. The opinion by retiring Justice John Paul Stevens indicated that the teams' specific conduct in this case, while not categorically immune from antitrust law, might still be permissible under the more flexible "rule of reason" standard that is dominant in antitrust law today. The Supreme Court's ruling and analysis could prove to be significant beyond the narrow issue of applying antitrust law to sports leagues.

History of the American Needle Case

American Needle, an Illinois firm, had been one of many companies licensed to manufacture and sell caps and other headwear displaying the logos of the NFL and its various teams. The license was granted by NFL Properties (NFLP), a separate legal entity owned by all 32 NFL teams and given authority to license the teams' various logos. In December 2000, NFLP changed course and granted an exclusive license to Reebok to distribute apparel and headwear carrying NFL-related trademarks. American Needle's nonexclusive license for headwear expired early in 2001.

In 2004, American Needle filed an antitrust suit against the NFL and its teams, as well as Reebok, alleging both restraint of trade under Section 1 of the Sherman Act and various monopolization claims under Section 2.[3] Senior District Court Judge James B. Moran, of the Northern District of Illinois, eventually dismissed all of American Needle's claims, on the theory that the NFL and its teams should be treated as a single entity for purposes of this licensing arrangement. The judge explained: "That determination is essentially a conclusion that in that facet of their operations they have so integrated their operations that they should be deemed to be a single entity rather than joint venturers cooperating for a common purpose."[4]

The trial judge relied mainly on a 1984 Supreme Court case, *Copperweld Corp. v. Independence Tube Corp.*, which held that a parent company and its wholly owned subsidiary could not collude with each other for purposes of the Sherman Act.[5] In *Copperweld*, the court rejected the idea of an "intraenterprise conspiracy" between two companies under common ownership. District Judge Moran, applying *Copperweld* as well as subsequent lower court expansions of it, concluded that because the NFL teams were acting as a single entity in licensing their trademarks, the conduct was unilateral action

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*Associate Professor of Business Law, Graziadio School of Business and Management, Pepperdine University

rather than the concerted action required for a Section 1 violation. Moreover, they could not have conspired to monopolize under Section 2.[6]

The Seventh U.S. Circuit Court of Appeals affirmed the dismissal of American Needle's suit in 2008. Focusing primarily on the single entity issue as it related to Section 1, the three-judge panel acknowledged the difficulty of the decision:

> American Needle's argument leads us into murky waters. We have yet to render a definitive opinion as to whether the teams of a professional sports league can be considered a single entity in light of *Copperweld*. The characteristics that sports leagues generally exhibit make the determination difficult; in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under §1.[7]

The Supreme Court in *Copperweld* had found that the parent-subsidiary relationship "does not deprive the market of any independent sources of economic power," the Seventh Circuit ruling explained.[8] The appellate court said the NFL teams had similarly acted as a single source of economic power in licensing their logos and other intellectual property through NFL Properties since 1963. Thus, as in *Copperweld*, the Seventh Circuit found that the decision to license only one company to produce and sell headwear had not deprived the market of any independent source of economic power. The appellate court concluded: "Simply put, nothing in §1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages cooperation inside a business organization – such as, in this case, a professional sports league – to foster competition between that organization and its competitors."[9]

The legal gamesmanship then took an unusual turn, as both sides sought Supreme Court review of the Seventh Circuit ruling. Not surprisingly, American Needle asked that the dismissal be reversed and that it be allowed to take its case to trial. In an interesting strategic decision, the NFL, despite winning at the lower courts, sought to have the Supreme Court affirm the Seventh Circuit's single entity determination and thus establish that as the rule nationwide.[10] The Supreme Court granted *certiorari*, and the case was argued on January 10, 2010.

Supreme Court Ruling

The court issued its unanimous ruling on May 24, 2010. Justice Stevens, an antitrust lawyer before his lengthy judicial career, wrote what was one of his last Supreme Court opinions ever, and his final decision on antitrust law. The only issue before the Supreme Court was whether the NFL teams were capable of the concerted action needed to violate Section 1 of the Sherman Act, which prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[11]

Stevens noted the well-established principle that Section 1 should not be read entirely literally, as courts have long interpreted the statute to prohibit only unreasonable restraints of trade. "Not every instance of cooperation between two people is a potential 'contract, combination …, or conspiracy, in restraint of trade,'" he wrote.[12] Stevens also provided a succinct summary of the basic difference between the two main sections of the Sherman Act. "Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action 'monopolize[s]' … or 'threatens actual monopolization,' … a category that is narrower than restraint of trade."[13] The result, Stevens said, is that antitrust law treats "concerted behavior more

strictly than unilateral behavior" because it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands."[14]

Justice Stevens then explained that a decision on the presence or absence of concerted action turns on substance, rather than legal form. In some circumstances, joint owners of a legally single entity could still be found to have the concerted action needed to violate Section 1. On the other hand, the mere presence of two separate legal entities does not guarantee that concerted action will be present in all such cases. Stevens elaborated: "Although, under a now-defunct doctrine known as the 'intraenterprise conspiracy doctrine,' we once treated cooperation between legally separate entities as necessarily covered by §1, we now embark on a more functional analysis."[15]

The ruling then analyzed the 1984 Supreme Court decision in *Copperweld* – the precedent used by the lower courts in *American Needle* to reach a different result than the Supreme Court. The Stevens opinion did not indicate that he, as the only remaining justice from the 1984 court, had authored a lengthy dissent from the 5-3 decision in *Copperweld*. He wrote instead as if the ruling is now undisputed precedent. However, *American Needle* provided Stevens one last chance to explain its application and interpretation.

The rationale of *Copperweld*, in finding that a parent corporation and its wholly owned subsidiary are a single entity for purposes of antitrust law, is that "they are controlled by a single center of decisionmaking and they control a single aggregation of economic power," Stevens wrote.[16] As a result, their joint conduct would not "depriv[e] the marketplace of independent centers of decisionmaking."[17]

The question then was how to apply this *Copperweld* test regarding "independent centers of decisionmaking" to the conduct of the 32 NFL teams. There the court seemed to have little doubt. The unanimous opinion in *American Needle* stated:

> 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. … The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel.[18]

On the specific issue of licensing, Stevens noted that teams compete in that respect, as well. "To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks."[19] Although acknowledging that the NFL teams "have common interests such as promoting the NFL brand," the court found that "they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."[20] As a result, the court concluded that the conduct of NFL Properties was subject to review under Section 1 of the Sherman Act, "at least with regards to its marketing of property owned by the separate teams."[21] The court thus reversed the Seventh Circuit decision and remanded the case for further proceedings.

Rule of Reason

All that *American Needle* officially decided was that the licensing decision of the NFL teams, made through the NFLP, was concerted action and thus not immune from Section 1 scrutiny. The more intriguing aspect of the ruling was the discussion, though arguably *dicta*, of whether the conduct might still be legal under antitrust law even though it was concerted action.

Historically, federal courts have used two conflicting rules to interpret and apply antitrust law. The *"per se"* rule triggers automatic liability for antitrust violations. The conduct is deemed to be illegal in itself, regardless of its effect on competition or competitors. By contrast, the "rule of reason" approach analyzes the impact of the allegedly anticompetitive conduct. Does that conduct also create economic efficiencies, or have even pro-competitive effects? If the overall benefits of the conduct outweigh the anticompetitive aspects, then the court may excuse the conduct even if it violates the literal wording of the antitrust statutes.

In recent decades, with the rise of the Chicago School approach to antitrust law, the rule of reason has clearly supplanted the *per se* rule in most cases. The far stricter *per se* approach now is limited generally to what are considered to be the most egregious antitrust offenses, such as horizontal price-fixing. In a few paragraphs near the end of the *American Needle* decision, Justice Stevens provided what could be powerful reinforcement of the rule of reason rationale, at least in the setting of sports leagues. He wrote:

> Football teams that need to cooperate are not trapped by antitrust law. … 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.[22]

Quoting in part from his own opinion in a 1984 antitrust case involving the National Collegiate Athletic Association's unsuccessful attempt to limit the number of televised college football games, Stevens wrote in *American Needle*: "When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged by the flexible Rule of Reason."[23] If such a restraint is needed to make the product available, "the agreement is likely to survive the Rule of Reason."[24]

Stevens suggested other potential justifications for concerted action by the NFL teams. "Other features of the NFL may also save agreements amongst the teams. We have recognized, for example, 'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important,'" he wrote, once again citing the NCAA ruling.[25] He noted that the competitive balance issue is "unquestionably an interest that may well justify a variety of collective decisions made by the teams. What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand."[26]

Yet not all of Stevens' commentary was as favorable to the NFL teams. In a footnote earlier in the opinion, Stevens downplayed the need for teams to cooperate on trademark licensing issues:

> In any event, it simply is not apparent that the alleged conduct was necessary at all. Although two teams are needed to play a football game, not all aspects of elaborate interleague cooperation are necessary to produce a game. Moreover, even if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.[27]

It will be up to the lower courts to decide if Stevens was signaling the result that he or the Supreme Court as a whole might prefer under the rule of reason analysis. The wording is ambiguous enough to make that subject to debate and interpretation. However, his explanation of the applicable antitrust principles could provide a playbook for either side to use on remand. The NFL teams were given examples of various reasons for cooperation, while American Needle can assert that licensing decisions are not crucial to producing football games.

Nevertheless, Stevens' strong reaffirmation of the rule of reason could be useful to antitrust defendants in other settings. Admittedly, Stevens' preference for the rule of reason here stands in contrast to one of the more contentious Supreme Court decisions on antitrust law in recent years. In 2007, a sharply divided court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* overruled a nearly 100-year-old precedent and decided that vertical, minimum price-fixing (when a supplier tells a retailer that it must charge at least a certain minimum price on the supplier's product) should be judged by the rule of reason, instead of the *per se* rule.[28]

Stevens joined the dissenters on that 5-4 opinion, which split along the traditional conservative-liberal fault line of the high court of 2007. The five more conservative justices supported overturning precedent and applying the rule of reason to this conduct, while the four more liberal justices, including Stevens, wanted to retain *per se* analysis for that specific type of vertical price-fixing (also known as resale price maintenance).

Yet the *Leegin* decision was something of an aberration for the high court, which in recent years has been far less divided on antitrust cases than on many other areas of law affecting the business world. The Chicago School approach to antitrust began to gain legal acceptance in the late 1970s, rose to great prominence in the 1980s, and has remained the generally prevailing view for the next two decades (with some fluctuations over those years). That time frame roughly spans the tenure of Justice Stevens on the Supreme Court, as he was nominated by President Gerald Ford and confirmed by the Senate in 1976. That may not be a pure coincidence, as some attribute the shift in Supreme Court jurisprudence on antitrust in part to the influence of Stevens, the former antitrust lawyer.[29]

Though Stevens has not always sided with business defendants in antitrust cases, and in fact emerged as the leading liberal voice on the Supreme Court of the past two decades, those facts do not disprove his support of the Chicago School approach. Most private antitrust suits are battles between at least two businesses. Strong antitrust laws and enforcement might be bad for some large and powerful companies, such as Microsoft and Intel in recent years. Yet policing and penalizing anticompetitive conduct could actually work to the benefit of many smaller, upstart businesses trying hard to compete with powerful, established firms. Thus it is more difficult to assign the "pro-business" label to a particular side in antitrust litigation, and support for the Chicago School approach now generally bridges the typical conservative-liberal divide at the high court.

Impact of Ruling

As commentators noted after the opinion was released, the *American Needle* decision marked a rare victory for plaintiffs in an antitrust case decided by the Supreme Court.[30] It should be noted, however, that the victory was a limited and preliminary one. The final outcome of the case remains undecided, and it is entirely possible that plaintiff American Needle will still lose this case on remand. In short, the Supreme Court did not decide the winner of the contest, just the applicable rules of the game.

In most respects, then, the Supreme Court ruling is more important for what it did not do than for what it affirmatively did. Had the Supreme Court instead upheld the Seventh Circuit's decision, that could have cut a gaping hole in the defensive line of the Sherman Act. Such a ruling could encourage the NFL – and other sports leagues – to claim similar antitrust immunity for other business-related functions of the teams, such as the price of tickets to games. Finding the NFL teams to be operating as a single entity might have effectively immunized all sports leagues for virtually any business-related functions – perhaps everything but labor disputes. In fact, that is what District Judge Moran theorized in

his 2007 ruling, writing: "Perhaps a proper reading of *Copperweld* leads to the conclusion that in the NFL and most other sports league contexts for league-wide policy other than labor disputes, the leagues are single entities."[31]

A ruling to that effect could also have had sweeping and unintended consequences beyond the sports world. It might have encouraged actual or potential competitors in other business arenas to form joint ventures as a means of being treated as a single entity and thus evading antitrust liability.

Rejecting any categorical or guaranteed immunity, the Supreme Court opted instead for a case-by-case analysis relying on the substance of the conduct, not the technicality of the legal form. Some collaboration among teams in a league is essential and thus clearly protected, such as scheduling games and setting the rules of competition. Yet cooperation in other areas could go too far and cross the line into illegal collusion, depending on the need, purpose, and effect of the specific conduct.

This more nuanced approach seems desirable in many respects, but it also carries a significant downside. It provides far less certainty of outcome in any particular antitrust case, and that uncertainty may subject sports leagues and other quasi-competitors to extensive litigation on each particular type of collaboration. Finding and drawing the precise line between legal cooperation and illegal collusion will not be simple, for either courts or litigants.

The Remaining Anomaly

The NFL's strategy in seeking Supreme Court review of its lower court victory was seen by some as an effort to gain indirectly what Major League Baseball, and only baseball among sports leagues, already enjoys – a broad exemption from antitrust law. Baseball's longstanding antitrust exemption is more historical than logical in nature. The anomaly dates back to the 1922 decision of *Federal Baseball Club of Baltimore v. National League*, where the Supreme Court ruled that baseball was outside the scope of the Sherman Act because it was not interstate commerce.[32]

Oliver Wendell Holmes, the only Supreme Court justice to serve to an older age than 90-year-old Justice Stevens, wrote for a unanimous court in *Federal Baseball Club*: "The business is giving exhibitions of baseball, which are purely state affairs."[33] The fact that most teams had to cross state lines to play another team was merely incidental to a local game, he indicated. Although a baseball game is played for money, Holmes noted, it "would not be called trade or commerce in the commonly accepted use of those words" because "personal effort, not related to production, is not a subject of commerce."[34]

As outdated and incongruous as that finding seems today, it was not an entirely indefensible ruling in the 1920s, when federal courts had a much narrower view of what qualified as interstate commerce. The meaning of interstate commerce expanded markedly once the court reversed course and began upholding New Deal legislation in the late 1930s. Yet baseball's antitrust exemption has remained intact ever since.

The court has since declined two major opportunities to eliminate baseball's special immunity. The most notable case was baseball player Curt Flood's challenge to the "reserve clause," which bound a player to the major league team that originally signed him. In that 1972 case and in an earlier 1953 decision, the Supreme Court cited the precedent of its original 1922 ruling, as well as baseball's reliance on that enduring precedent, and the fact that Congress had never acted to eliminate baseball's antitrust exemption (despite frequent threats to do so).[35]

With Major League Baseball's acquiescence, Congress did finally repeal a portion of baseball's antitrust immunity in 1998. As an outgrowth of the baseball strike of 1994-95, the Curt Flood Act lifted the exemption as it related to labor relations issues for Major League Baseball players. At the same time, the statute effectively reaffirmed the remainder of the valuable exemption by stating that it was not removing the immunity for any issues other than labor relations.[36]

Because of its continuing immunity in most areas, Major League Baseball can still decide whether to allow any of its teams to relocate to a different city – but the National Football League cannot do the same without risking an antitrust suit. The NFL learned that lesson the hard way when Oakland Raiders managing general partner Al Davis won an antitrust suit against the NFL for refusing to allow his team to move to Los Angeles in the 1980s (before the Raiders eventually departed their new home of Los Angeles and returned to Oakland in the 1990s).

The Supreme Court in 1957 specifically refused to extend baseball's antitrust exemption to football or other sports in *Radovich v. National Football League*.[37] Referring to the earlier baseball cases, the 6-3 ruling in *Radovich* said that "we now specifically limit the rule there established to the facts there involved, *i.e.*, the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to – but not extend – the interpretation of the [Sherman] Act made in those cases."[38]

Congress added a limited exemption for some professional sports leagues in 1961 by enacting the Sports Broadcasting Act. The statute immunized professional football, basketball, and hockey leagues – as well as baseball – from antitrust liability for the awarding of television rights for their games. However, as Congress would do again decades later in the Curt Flood Act, the 1961 statute specifically stated that it was not otherwise affecting "the applicability or nonapplicability of the antitrust laws" to any other conduct of the professional sports leagues.[39]

With only minor changes since, that is essentially where the law stands today. Despite many court skirmishes on the issue, baseball continues to benefit from a broad antitrust exemption (except for labor relations issues dealing with big league players). By contrast, other professional sports remain generally subject to federal antitrust law.

Conclusion

That dichotomy on antitrust immunity in the sports world may provide the best explanation for why the National Football League decided to risk a "Hail Mary" pass by seeking Supreme Court review of its appellate court victory in *American Needle*. The Seventh Circuit decision, though legally significant, was of only limited practical value to a league that operates nationwide. Had the Supreme Court affirmed the decision and made that the rule nationwide, it could have come close to granting the NFL, and by extension other sports leagues, much of the antitrust immunity provided to Major League Baseball.

Of course, the NFL's "Hail Mary" pass fell incomplete in the end zone of the U.S. Supreme Court. Yet so far, that is all that has happened. To stretch the analogy arguably to the point of abuse, the NFL's long pass was not intercepted and run back for a touchdown by the other team. The NFL could still win this legal battle through application of the rule of reason. Whether its gamble was a worthy one will not be known for sure until the case proceeds through the lower courts (if it is not settled before then).

The *American Needle* ruling could also have political and practical significance. Both the Department of Justice and the Federal Trade Commission of the Obama Administration have strongly signaled their intent to reinvigorate enforcement of antitrust law – a change of direction from the prior Bush Administration.[40] However, their plans could be constrained, if not frustrated, by the fact that the federal courts remain dominated by judges who embrace much of the Chicago School philosophy on antitrust law. In reaffirming the primacy of the rule of reason approach through its unanimous decision in *American Needle*, the Supreme Court has provided a reminder of the limits that the federal courts could still place on vigorous antitrust law enforcement.

Footnotes

[1] Am. Needle, Inc. v. NFL, 560 U.S. ___ (2010).
[2] 15 U.S.C. § 1 (2009).
[3] Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony …" 15 U.S.C. § 2 (2009).
[4] Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941 (N.D. Ill. 2007).
[5] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
[6] District Judge Moran summarily dismissed two remaining claims in November 2007. Am. Needle v. New Orleans La. Saints, 533 F. Supp. 2d 790 (N.D. Ill. 2007).
[7] Am. Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008), at 741.
[8] *Id.* at 738.
[9] *Id.* at 744.
[10] Brief for the NFL Respondents, Am. Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008) (No. 08-661), 2009 U.S. S. Ct. Briefs LEXIS 523.
[11] 15 U.S.C. § 1 (2009).
[12] Am. Needle, Inc. v. NFL, 560 U.S. ___ , slip op. at 4-5.
[13] *Id.* at 5 (citations omitted).
[14] *Id.*
[15] *Id.* at 7-8.
[16] *Id.* at 9.
[17] *Id.*
[18] *Id.* at 11-12.
[19] *Id.* at 12.
[20] *Id.* at 13.
[21] *Id.* at 15.
[22] *Id.* at 18.
[23] *Id.*
[24] *Id.* at 19.
[25] *Id.* NCAA v. Board of Regents, 468 U.S. 85 (1984), was the cited case involving the NCAA.
[26] *Id.*
[27] *Id.* n.7.
[28] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
[29] George L. Priest and William Ranney Levi, *Stevens and antitrust,* NAT'L LAW J., May 24, 2010, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202458536633&Stevens_and_antitrust.
[30] Jarrett Bell, *Antitrust loss could help bridge gap between league, players union,* USA TODAY, May 25, 2010, at 6C.
[31] Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d at 943.
[32] Federal Baseball Club of Baltimore v. National League, 259 U.S. 200 (1922). Holmes retired from the bench in 1932, a decade after writing the Federal Baseball Club decision. He was 90 years and roughly 10 months old when he retired. Stevens retired in 2010, also at age 90, but only about two months after turning that age.
[33] *Id.* at 208.
[34] *Id.* at 209.
[35] Toolson v. New York Yankees, 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972). For a fuller discussion of these Supreme Court opinions, *see* Larry G. Bumgardner, *Baseball's Antitrust Exemption*, *in* DIAMOND MINES: BASEBALL & LABOR 83-95 (Paul D. Staudohar ed., 2000).
[36] Curt Flood Act of 1998, 15 U.S.C. § 26(b) (2009).

[37] Radovich v. NFL, 352 U.S. 445 (1957).
[38] *Id.* at 451.
[39] Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2009).
[40] *See, e.g.*, Stephen Labaton, *Administration Will Strengthen Antitrust Rules*, N.Y. TIMES, May 11, 2009, at A1.