

Supreme Court Holds in NFL Case that Whether Members of a Group Are Capable of Conspiring Under the Sherman Act Depends on Whether They Are "Separate Decisionmakers"

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On May 24, a unanimous United States Supreme Court held that National Football League ("NFL") teams are capable of conspiring with each other concerning joint licensing agreements, because they compete not only on the playing field but also for fans, apparel sales, ticket sales, manager contracts, and player contracts. *American Needle, Inc. v. National Football League*, No. 08-661, 2010 WL 2025207, 560 U. S. __ (2010). The Court instructed that the relevant inquiry is whether the defendants are "separate economic actors pursuing separate economic interests" such that an agreement among them "deprives the marketplace of independent centers of decisionmaking...and thus of actual or potential competition..." While clearly of concern to sports leagues and similar groups, the decision is also a reminder to competitors involved in other joint ventures that their conduct is subject to antitrust scrutiny.

Background

In 1963, the NFL teams formed National Football League Properties ("NFLP") as a joint venture for licensing the right to market NFL logos. From 1963 to 2000, the NFL granted nonexclusive licenses to several vendors, granting the right to manufacture and sell apparel with team logos. In 2000, NFLP decided not to renew its agreement with American Needle, Inc. ("American Needle"), and granted Reebok an exclusive 10-year license concerning trademarked headgear. American Needle sued the NFL and Reebok, claiming that this agreement violated antitrust law. The Northern District of Illinois disposed of the case on summary judgment, and the Seventh Circuit affirmed, reasoning that the teams act as "one source of economic power when collectively producing NFL football." In doing so, the Seventh Circuit extended the scope of the Supreme Court's decision in *Copperweld v. Independence Tube Corp.*, in which a parent company was held incapable of conspiring with its wholly-owned subsidiary because they share "a unity of interest," to a context in which there was no common ownership or control.

The Supreme Court's Opinion

The Supreme Court, in a decision by retiring Justice John Paul Stevens, reversed the Seventh Circuit's ruling and remanded to the trial court for further consideration. The Court noted that the proper standard emphasizes function rather than form; NFL teams did not stop competing with each other

when they formed NFLP. The Court noted that if the law were otherwise, joint venture formation would become a device for evasion of antitrust law. The Court found that each NFL team "is a substantial, independently owned, and independently managed business." Slip Op. at 12. This competition extends to intellectual property because each team's decision reflects "not only an interest in NFLP's profits, but also an interest in the team's individual profits." For example, "[t]o a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks." *Id.*

The Court rejected the Seventh Circuit's reasoning that, because a single NFL team cannot produce a football game, cooperation among members is necessary for survival, and therefore the league must be considered as one entity. According to the Court, the fact that "restraints on competition are essential if the product [NFL football] is to be available at all," may "justify a variety of collective decisions" under the rule of reason in antitrust cases, but does not inform the issue of whether the group members are capable of conspiring with each other. (The rule of reason inquires whether the potential anticompetitive effects of the agreement outweigh the potential benefits to competition.)

The Court concluded by noting that the NFL's special characteristics are likely to provide benefits to consumers. For example, the Court observed, if cooperation is truly necessary for survival, or if the agreement is entered for the purpose of maintaining competitive balance among teams, the agreement may well be justified. The Court ordered the trial court to consider on remand whether such characteristics outweighed any potentially harmful effects arising from the exclusive deal.

Implications

By clarifying the limited conditions under which companies acting together will be found not to be capable of conspiring, *American Needle* should help businesses involved in joint ventures, trade groups and other collaborations to better understand when they face exposure to antitrust risks. In reaffirming that corporate form will not insulate coordination among entities who compete, the Court declined the NFL's invitation to expand the scope of antitrust immunity to companies without common ownership or control.

The decision leaves intact the litigation uncertainty facing joint venturers. The Court declined to set out bright line rules to guide businesses and the lower courts in determining whether an agreement among parties which are not owned or controlled by the same party is illegal.