THE "SINGLE ENTITY" DOCTRINE AND POOLING OF IP LICENSING RIGHTS: PERSPECTIVES ON AMERICAN NEEDLE V. NFL

Last week, the Supreme Court heard oral argument in *American Needle, Inc. v. National Football League*, No. 08-661. One writer has blogged that the case "represents a crucial moment in sports law."[1] The case presents the questions of whether the NFL and its member teams, in collectively pooling their logos and marks and in entering into an exclusive license with Reebok to merchandise those logos and marks, acted as a "single entity" for purposes of Section 1 of the Sherman Act.

Background

Since 1963, the NFL and its member teams collectively have licensed their logos and trademarks through NFL Properties (NFLP). In late 2000, the NFL decided to enter into an exclusive 10-year licensing arrangement with Reebok International, beginning in 2001. At the same time, the NFL declined to renew the licenses of other apparel manufacturers, including American Needle.

American Needle filed suit in federal court in Illinois, alleging that the agreement among the various NFL teams collectively to market and license their logos and trademarks violated Section 1 of the Sherman Act.[2] The district court granted summary judgment in favor of the NFL and Reebok, ruling that because the NFL acts as a single entity for purposes of licensing its trademarks and logos, American Needle could not satisfy Section 1's requirement of a "contract, combination … or conspiracy" to restrain trade. The Seventh Circuit affirmed.

The NFL Seeks Broad Protection for League Activities Related to the "Promotion and Production" of Football

The NFL argued that because individual football teams lack independent economic power, they function as a single entity for purposes of promoting and producing the "product" of professional football. Relying heavily on *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), which held that parent and subsidiary companies cannot conspire to violate Section 1, the NFL argued that once the individual teams merged their individual activities to promote and produce "NFL Football," they became the functional equivalent of single business. The NFL maintained that this was true even if the individual teams did not share a complete "unity of interests."

American Needle countered that NFL teams are independent economic actors who actually and potentially compete in a variety of activities, including licensing and merchandising. Citing the Court's decisions in *Radovich v. NFL*, 352 U.S. 445 (1957) (alleged boycott of player subject to Section 1 challenge) and *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (policy precluding member schools from separately negotiating television contracts subject to Section 1 challenge),

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[1] Posting of Michael Mann to ACSBlog, http://www.acslaw.org/node/15087 (Jan. 13, 2010, 12:28 EST).

[2] American Needle also asserted claims under Section 2 of the Sherman Act, which the trial court dismissed. American Needle did not appeal that ruling.

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American Needle argued that any agreement among the various NFL teams was potentially subject to Section 1 scrutiny under the "rule of reason" standard.

Participating as *amicus curiae*, the United States – which had opposed *certiorari* – navigated a middle path. Recognizing that sports league do not fit neatly within existing antitrust doctrines, the government proposed a two-prong standard for evaluating single-entity claims. First, a court would determine whether "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." If the conduct at issue satisfied that standard, then the court would determine whether the "challenged restraint … significantly affect(s) actual or potential competition among the teams or between the teams and the league outside their merged operations."[3] The government urged remand for reconsideration of the facts under its proposed test.

At oral argument, the Court expressed skepticism at the outer limits of both American Needle's and the NFL's position. Justices Sotomayor, Ginsburg, and Kennedy appeared reluctant to adopt American Needle's contention that any collective decision by the NFL is potentially subject to antitrust scrutiny and the attendant burden and cost of litigation under the "rule of reason" standard.[4] Conversely, several justices aggressively challenged the NFL's claim that any decision of the league relating to the "promotion and production" of football should be effectively immunized from antitrust challenge. In particular, Justice Scalia rejected out-of-hand the NFL's contention that its licensing activities were for the purpose of promoting football rather than making money.[5]

The Court's questioning suggests that "traditional" ideological voting blocs may not hold in this case. Whereas Justice Ginsburg tends to side with antitrust plaintiffs (she dissented in the landmark case of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)), her questions indicate some sympathy to the NFL's arguments. Conversely, Justice Scalia's sharp questioning of the NFL and his apparent hostility to the single-entity argument stand in contrast to his joining the majority opinion in *Twombly*. And Justice Sotomayor's remark that she was "very swayed" by the NFL's argument[6] suggests that characterizations of her jurisprudence as "liberal" are premature, at least as far as antitrust law is concerned. Regardless of the ultimate outcome, the decision in *American Needle* and the voting alignment of the Justices will undoubtedly reverberate throughout the antitrust bar.

Potential Outcomes and Impact on the Sports Apparel Market

Based on the Court's aggressive questioning of the NFL's counsel at oral argument, many press observers believe that the Court will reject the NFL's position and remand to the district court for

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[3] Brief for the United States as *Amicus Curiae* Supporting Petitioner, at 16.

[4] Transcript of Oral Argument at 4-7; 19-21.

[5] *Id*. at 45.

[6] *Id*. at 58.

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further proceedings.[7] Those commentators, however, fail to appreciate that the case was decided on summary judgment rather than on a motion to dismiss, and that the trial court record on the "single entity" question was thoroughly developed and largely undisputed. As there is little need for additional fact-finding, we predict that the Court will issue a narrow decision affirming the Seventh Circuit's ruling as to the specific conduct at issue; i.e., the NFL's pooling and licensing of marks and logos through the NFLP. We further expect that the Court will decline to extend "single entity" status to NFL as a whole, leaving that issue for litigation on an activity-by-activity basis. Similarly, we think the Court will decline the government's invitation to announce a general rule for determining when a sports league can qualify for "single entity" status.

If the Court does remand, a quick resolution of the case appears unlikely. Beyond the outcome of the "single entity" question (which the trial court can always decide again in he NFL's favor), the NFL and Reebok have a number of additional defenses. For example, as Reebok argued in its submission to the Court, exclusive licenses are not inherently anti-competitive and have been repeatedly upheld against antitrust challenge where the licensor and licensee are not actual or potential competitors.[8]

The real question is how long it would take for a remanded case to run its course. Historically, the NFL tends to litigate aggressively and does not routinely seek settlement, particularly in antitrust cases.[9] If a remand occurs, Reebok and the NFL may decide to terminate the agreement before its expiration in 2011 in order to mitigate additional damages. At a minimum, the NFL may refrain from renewing Reebok's exclusive license or entering into another exclusive arrangement until it has obtained a final ruling confirming the legality of the Reebok agreement. In the interim, the NFL may choose instead to enter into short-term licenses with a variety of apparel manufacturers.

Contact Information

If you have any questions regarding this Client Alert, please contact David Hamilton at 410-545-5850 or Brent Powell at 336-728-7023 or one of our Antitrust or Business Litigation attorneys.

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[7] *See, e.g.,* Adam Liptak, *Justices Skeptical of N.F.L.'s Court Claim*, N.Y. Times, Jan. 13, 2010, at B20; Posting of Lyle Denniston to SCOTUSBlog, http://www.scotusblog.com/a-playoff-in-store-for-nfl-argument-recap/#more-14856 (Jan. 13, 2010, 11:42 EST).

[8] Brief for the Respondent Reebok Int'l, at 6-8.

[9] The NFL has a long history of antitrust litigation over the past 30 years (and beyond). At least two major cases in the 1980's (the USFL and Oakland Raiders litigation) went to trial. More recently, the NFL has had success in defeating antitrust litigation at the summary judgment stage and defending those decisions on appeal. *See, e.g., Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004) (affirming dismissal of antitrust challenge to draft eligibility rules).

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