Antitrust Alert

NFL Licensing Arm Subject to Antitrust Laws as a "Contract, Combination ... or Conspiracy"

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BY TYLER A. BAKER AND MARK S. OSTRAU

Fenwick

FENWICK & WEST LLP

On May 24, in *American Needle, Inc. v. National Football League*, the Supreme Court unanimously held that NFL Properties ("NFLP") must defend its licensing decisions under Section 1 of the Sherman Act. NFLP was incorporated by the teams of the National Football League in 1963 to develop, license, and market their intellectual property. The lower courts had held that NFLP was a single entity incapable of conspiring and therefore not subject to Section 1. At issue was the decision by NFLP to grant an exclusive license for caps bearing the NFL team insignias. Plaintiff American Needle had previously been one of a number of companies with non-exclusive licenses.

The Court's opinion includes an extensive survey of the case law on the "concerted action" requirement of Section 1. Although the path has not always been entirely straight, those cases have rejected an approach based on the formality of the defendant's structure. Thus, a single legal entity can be subject to Section 1 scrutiny when it is "controlled by a group of competitors and serve[s], in essence, as a vehicle for ongoing concerted action." Conversely, Section 1 does not necessarily apply simply because multiple legal entities are involved. For example, despite earlier cases to the contrary, Section 1 now does not apply to a so-called "intraenterprise conspiracy" between a parent corporation and a wholly owned subsidiary. In that context, the rationale for treating the separate legal entities as a single entity for antitrust purposes is that they are "controlled by a single center of decisionmaking and they control a single aggregation of economic power."

The Court framed the relevant inquiry as whether the alleged concerted action is among "separate economic actors pursuing separate economic interests" such that it "deprives the marketplace of independent centers of decisionmaking." It concluded that the NFL teams "do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action." The NFL teams compete not only on the field, but for fans, for contracts with managerial and playing personnel, and potentially in the market for intellectual property such as the valuable trademarks licensed by NFLP.

The lower courts had held broadly that NFLP was a single entity because, without cooperation, there could be no NFL football. The Court rejected this argument. It held that while the necessity of cooperation is relevant to the rule of reason analysis, it is not relevant to the threshold question whether that cooperation is concerted or independent action. In a footnote, the Court clearly indicated its belief that the argument proves too much even under the rule of reason. "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."

The Court acknowledged that agreements within a single firm are generally treated as independent action "on the presumption that the components of the firm will act to maximize the firm's profits." But in this case, the long-standing separate entity of NFLP was not entitled to that presumption because the interests of the separate teams were not entirely congruent with the league's interests. The Court cautioned that if the creation of a separate joint venture were sufficient to avoid the antitrust laws, then any cartel could simply form a joint venture to serve as the exclusive seller of its products.

In a short final section of the opinion, the Court held that the rule of reason should apply on remand. Under the rule of reason, the issue is whether the challenged practice unreasonably harms competition. The defendant is allowed to prove pro-competitive justifications and effects to counter-balance any harm to competition. In contrast, "naked" horizontal agreements among competitors on variables such as price are typically treated as per se illegal. However, where the agreement involves genuine integration and potential efficiencies, as in a joint venture, the rule of reason normally applies. Here, the Court was willing to acknowledge the potential importance of cooperation, at least in some aspects of the NFL's business. "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." The overall tenor of the opinion, however, cannot encourage the NFL. It clearly calls for careful scrutiny of any proffered justifications.

Lower courts have sometimes drawn the "single entity" conclusion based on an instinctive sense that the challenged conduct was reasonable. That conclusion ended a Section 1 case regardless of the actual competitive effect. Agreements about rules and scheduling, for example, are necessary to having a league, tempting a court to find such agreements by the members of the league to involve a single entity. This case pushed that argument beyond the breaking point.

As a matter of principle, it makes more sense to consider the need for cooperation in the rule of reason analysis, but this decision will expose the NFL to a wide variety of potential claims. Under the rule of reason, much depends on the market definition, and plaintiffs will no doubt argue that the NFL has become a market unto itself. Plaintiffs will also be able to argue that the restrictions are unreasonable because they are broader than necessary to achieve any claimed pro-competitive benefit. Quite apart from the NFL, any entity formed by competitors will have to consider *American Needle* very carefully.

For further information, please contact:

Tyler A. Baker, Co-Chair, Antitrust and Unfair Competition Group
tbaker@fenwick.com, 650.335.7624

Mark S. Ostrau, Co-Chair, Antitrust and Unfair Competition Group Group
mostrau@fenwick.com, 650-335-7269