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The U.S. Supreme Court Invites "Color Commentary" On The NFL From The United States: Calling For the Views Of The Solicitor General in *American Needle Inc. v. National Football League*

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On February 23, 2009, the Supreme Court issued an order inviting the Acting Solicitor General of the United States (SG) to file a brief expressing the views of the United States on whether the Court should grant review of a recent antitrust ruling by the Seventh Circuit in a suit by a clothing business against the NFL and Reebok International, *American Needle Inc. v. National Football League*, 538 F.3d 736 (7th Cir. Aug. 18, 2008). This legal update explains what such an "Invitation" from the Court means and how it is that the United States sometimes comes to play a significant role in private litigation before the Supreme Court at the request of the Court.

The Seventh Circuit in *American Needle* affirmed a grant of summary judgment against the plaintiff clothing business and rejected the clothing business's argument that an exclusive license between Reebok and NFL Properties, a corporation established by the individual NFL teams to license their intellectual property, violated Section 1 and Section 2 of the Sherman Act. On November 17, 2008, the clothing business filed a petition for a writ of *certiorari* asking the Supreme Court to review two questions about the licensing agreement.

First, the petition asks whether "the NFL and its member teams" constitute "a single entity that is exempt from rule of reason claims under Section 1 of the Sherman Act" because they "cooperate in the joint production of NFL football games," without regard "to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league."

Second, the petition asks whether the agreement of the NFL teams "among themselves and with Reebok International," pursuant to which the teams "agreed not to compete with each other in the licensing and sale of consumer headwear and clothing decorated with the teams' respective logos and trademarks, and not to permit any licenses to be granted to Reebok's competitors for a period of ten years," is subject to a rule of reason claim under Section 1 of the Sherman Act, "where the teams own and control the use of their separate logos and trademarks and, but for their agreement not to, could compete with each other in the licensing and sale of Team Products."

The NFL filed a brief in response on January 21, 2009, but instead of opposing review, the NFL agreed that the Supreme Court should grant *certiorari* and decide the questions presented. The NFL also signed some free agent help, so to speak, and the NBA and the NHL both filed *amicus* briefs in support of the NFL's position that the Court should grant review. Reebok waived its opportunity to file a brief in response.

When the Justices reviewed the *certiorari petition* and the other briefs, they did not issue the typical order either granting or denying review. Instead, the Court issued an "Invitation" to the SG to file a brief to weigh in on the question whether the Court should grant review. Such an Invitation is also known as a "CVSG" because it Calls for the Views of the Solicitor General. Like an invitation to the Super Bowl, it is an Invitation that is never refused.

The Supreme Court issues an Invitation to the SG only a dozen or so times each year. The Court does so in cases where it wants to be informed by the expertise of the United States in a case in which the federal government is not a party. Generally, Invitations are issued in cases where the federal government has a significant interest in the underlying federal law because of related federal programs or federal enforcement efforts. Thus, in this case, the Court's Invitation indicates an interest in hearing what the United States thinks about whether the case presents an important enough question of antitrust law to warrant review.

The SG's formulation of the views of the United States expressed in an Invitation brief are not limited to the views of the Department of Justice. When the Court issues an Invitation, the SG solicits views from any federal agency, department, or other component of the federal government that has an interest in the subject-matter area. For example, in the *American Needle case*, the SG may receive comments from not only the Antitrust Division of the Department of Justice, but also possibly the Federal Trade Commission and/or the Patent and Trademark Office. The NFL and the other private parties and interested private non-parties also may huddle and provide their views on the case to the SG.

An Invitation by the Supreme Court to the SG cannot be read as a determination that the Court ultimately will grant review. More often than not, the SG recommends that the Court deny the petition and the Court usually follows that recommendation. But, an Invitation does indicate that the odds of *certiorari* being granted in the case are significantly higher than for the typical *certiorari* petition. It takes four Justices to grant a *certiorari* petition and it also takes four Justices to issue an Invitation. The Court grants *certiorari* in only about 4% of *certiorari* petitions on the Court's "paid" docket, which consists of petitions where the filing fee is paid and excludes those petitions filed by a prisoner or other indigent individual. But, for paid petitions where the Court issues an Invitation for the SG's views, that percentage jumps to approximately 33%.

The timing of when the SG will file the Invitation brief in the *American Needle case* is not certain. The Supreme Court's practice is not to impose a specific deadline by which an Invitation brief must be filed. The Solicitor General usually takes at least 90 days to file an Invitation and often takes significantly longer than that. In the 2007 Term, the SG took an average of 4.7 months to file an Invitation brief. But the season of the year can affect the timing. For Invitations such as this one that are issued in late winter, the SG tries to file the Invitation briefs by some time in May to allow the Supreme Court enough time to decide to grant or deny review before it recesses for the summer.

Thus, we can expect the SG to file the Invitation brief in *American Needle* by the end of May 2009. The NFL, Reebok, and American Needle will all then have an opportunity to file a supplemental brief to try for extra points and the Court will be expected to grant or deny review before the end of June. If the Court grants *certiorari*, the briefing on the merits of the questions under Section 1 of the Sherman Act will take place during the summer and oral argument would be scheduled sometime in the late fall, after the Court kicks off its new Term in October 2009.