NFL Sacked by the Sherman Antitrust Act

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In a ruling that is still sending tremors across professional sports leagues, the U.S. Supreme Court rejected the National Football League's (NFL) request for antitrust law protection, finding the league to be 32 separate teams and not a single entity—when selling merchandise such as sweatshirts, hats and jerseys—and therefore could be liable for collaborative decisions under Section 1 of the Sherman Antitrust Act.

The U.S. Supreme Court's unanimous decision in *American Needle, Inc. v. National Football League et al*., No. 08-661, 2010 WL 2025207 (May 24, 2010), may change how professional sports leagues do business with outside vendors. The Supreme Court's ruling struck a significant blow to the longstanding joint venture between the NFL and its 32 member teams to license and market team-owned trademarks through a single entity.

The NFL is an unincorporated association of 32 separately owned professional football teams. Each team owns its own intellectual property and fights for publicity and a wide fan base. In order to develop, license and market its intellectual property, in 1963 the league formed a distinct legal entity, known as the National Football League Properties (NFLP).

The Rules of the Game

The Sherman Antitrust Act is divided into three sections. Section 1 delineates and prohibits specific means of anticompetitive conduct, while Section 2 deals with end results that are anticompetitive in nature. Therefore, these sections supplement each other in an effort to prevent businesses from violating the spirit of the Sherman Act, while technically remaining within the letter of the law. Section 3 simply extends the provisions of Section 1 to U.S. territories and the District of Columbia.

By seeking immunity to antitrust law, the NFL is looking to avoid being subject to scrutiny under Section 1 of the Sherman Act.

The Fumble

In 2000, the 32 NFL teams voted to authorize the NFLP to grant apparel giant Reebok International Ltd. an exclusive 10-year license to produce and sell trademarked headwear for all 32 teams. Former official NFLhat maker American Needle Inc., frustrated by losing its

contract to Reebok, sued under Section 1 of the Sherman Antitrust Act of 1890, which prohibits "every contract, combination . . . or conspiracy, in restraint of trade." American Needle alleged that the league violated antitrust law because the 32 separate NFL teams worked together to squeeze it, and other small companies, out of the NFL-licensed hat making business by giving Reebok an exclusive 10-year license.

In 2008, a unanimous three-judge panel of the U.S. Court of Appeals for the Seventh Circuit in Chicago ruled for the NFL on summary judgment, finding that the league is a single entity and not 32 separate and distinct companies. The panel likened the legal issue to "a Zen riddle," asking, "Who wins when a football team plays itself?"

As a result, American Needle appealed to the Supreme Court, but so did the NFL—hoping to get broad antitrust immunity on the theory that it has across-the-board immunity to antitrust law when its teams join in a commercial activity.

The NFL's Hail Mary Pass

The Supreme Court agreed to review the Seventh Circuit decision to address whether joint action by all 32 teams was the only way to promote the brand of NFL football, such that its joint conduct must be immune from antitrust scrutiny.

The NFL argued that it was incapable of "conspiring" with respect to exploitation of intellectual property rights because the NFL and its 32 teams act as a "single entity" and, therefore, it was immune from antitrust laws. The NFL contested that a decision not in favor of its position would "convert every league of separately owned clubs into a walking antitrust conspiracy," and bring legal challenges to any decisions that the teams make collectively, such as scheduling or marketing.

Justice John Paul Stevens, who grew up in Chicago as an avid sports enthusiast and began his career as an antitrust lawyer, authored the Supreme Court decision.

Stevens disagreed with the NFL's position, explaining that NFL teams directly compete against each other on numerous levels. Citing the two teams from the last Super Bowl, the New Orleans Saints and the Indianapolis Colts, Stevens noted that teams compete against each other "to attract fans, for gate receipts and for contracts with managerial and playing personnel." Stevens explained that the teams compete in the market for intellectual property, and therefore, "[t]o a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks."

"Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that 'deprive the marketplace of independent centers of decision making ... and therefore of actual or potential competition,'" Stevens wrote.

The Court ruled that just because NFL teams have a single organization, the NFLP, to jointly develop, license and market its logos, it does not mean the NFL can escape antitrust scrutiny.

"If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from" antitrust law, Stevens wrote, "then any cartel could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products."

The Court also rejected the argument that NFL teams need each other to play an NFL season, analogizing "a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to" antitrust scrutiny.

Further, the league's collective decision to license independently owned trademarks to a single vendor deprived the marketplace "of actual or potential competition."

The Supreme Court remanded the case back to the lower court to decide whether the NFL should be liable under Section 1 of the Sherman Act. American Needle will still need to prove three things in the lower court: that the NFL clubs collectively exercise market power in a some relevant market related to merchandise; that the NFL's exclusive licensing practices overall are anti-competitive in this market; and that as a result of the NFL's exclusive licensing practices consumers have been harmed through either higher prices or a reduction of output within that relevant market.

The Monday Morning Quarterback

The implications of the Court's ruling are widely speculated in both the sports world and legal community. As for the intellectual property licensing implications, the ruling may result in the lower court prohibiting the 32 NFL teams' joint venture to license and market their individually owned teams through a single entity.

Both the National Basketball Association and the National Hockey League filed amicus briefs in support of the NFL, and the MLS, NASCAR and the NCAA publicly supported the NFL, hoping the high court would expand broad antitrust exemption to other sports. However, the Supreme Court's decision sends the message to these professional sports leagues that their own goals for single entity recognition are just as unlikely to materialize.

Perhaps the answer to "who wins when a football team plays itself?" is "the fans." Without a waiver for antitrust violations, the NFL appears to be barred from unilaterally increasing ticket prices across the board. Further, this ruling could prohibit the NFL from collectively cornering the market on team merchandising—allowing for competitive pricing in purchasing

and wearing of identifying team gear. In the end, by telling the most powerful sports league in the country that it cannot do whatever it wants, it appears the country's highest court may have been looking out for the fans.

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