

Supreme Court Rules Against National Football League In Antitrust Opinion

On May 24, 2010, the Supreme Court ruled that the National Football League's licensing activities are not categorically exempt from antitrust scrutiny under Section 1 of the Sherman Act. Instead, courts must evaluate the legality of that activity under the more fact-intensive Rule of Reason. The reasoning has important implications for groups or associations of competitors in other industries, too.

The NFL's Headwear Licensing Program Leads To Litigation

This dispute arose out of NFL Properties' decision to grant an exclusive license to Reebok International to manufacture hats with NFL team logos. American Needle, which had previously produced headwear for the league, alleged that the NFL, NFL Properties, the individual NFL teams, and Reebok International violated Sections 1 and 2 of the Sherman Act. The NFL is an unincorporated association almost 90 years old and now consists of 32 separately-owned and operated teams. Each team is a separate corporate entity or partnership but, of course, no single team can produce a game, a season, or the playoffs. The teams must work together to do that. The NFL teams formed NFL Properties in 1963 to license and market the teams' intellectual property and to advertise the league.

For many years, NFL Properties granted headwear licenses to different vendors, including American Needle. In 2000, however, the teams authorized NFL Properties to solicit bids for an exclusive license for the entire NFL, which resulted in Reebok obtaining the exclusive license in 2001 for ten years. American Needle sued, alleging that the licensing agreement amounted to a contract, combination, or conspiracy in restraint of trade under Section 1 of the Sherman Act because it restricted other vendors' ability to obtain licenses from teams individually. American Needle also alleged that the teams monopolized the NFL team licensing and wholesale markets in violation of Section 2.

The district court granted summary judgment for the NFL, finding that it and its member teams operated as a single entity. As a single entity, the NFL and teams could license their intellectual property to one or many vendors without violating the antitrust laws. The Seventh Circuit affirmed and

agreed that, for marketing and licensing purposes, the NFL defendants are a single entity immune from Section 1 liability. As such, the teams also are free to grant exclusive licenses for their intellectual property under Section 2. *American Needle Inc. v. Nat'l Football League*, 538 F.3d 736, 741, 744 (7th Cir. 2008), *rev'd*, 560 U. S. __ (2010).

Many Sides Vie To Be Heard In The Supreme Court

The Supreme Court proceedings attracted substantial interest from *amici curiae*:

Amici Supporting The NFL		Amici Supporting American Needle	
ATP Tour, Inc.	Electronic Arts, Inc.	National Football League Players Association	National Football League Coaches Association
WTA Tour, Inc.	Major League Soccer, LLC	Major League Baseball Players Association	National Basketball Players Association
NASCAR, Inc.	MasterCard World	American Antitrust Institute	United States of America
National Hockey League	Visa, Inc.	Consumer Federation of America	
National Basketball Association	NCAA		

Players unions were concerned that leagues will be exempt from antitrust laws if the Supreme Court ruled broadly that the teams are a single entity; such a ruling could affect salaries and free agency. Sports leagues hoped for a broad ruling that could allow them to license products, regulate ticket prices, set salary limits, *etc.*

A 1922 Supreme Court opinion concluded that baseball games were not interstate commerce subject to the antitrust laws, so Major League Baseball has enjoyed an antitrust exemption for many decades. That explains baseball's absence from the sports leagues that filed briefs. No other sports league enjoys such an exemption.

The Supreme Court Opinion: The NFL Does Not Enjoy A Broad Exemption From Antitrust Scrutiny

Whether concerted action is subject to Sherman Act § 1 scrutiny does not depend on whether the parties are legally distinct entities. The Court noted that members of a single entity, such as a professional organization or trade group, may violate the law although the organization is a single legal entity. Conversely, there is not always concerted action merely because more than one distinct legal entity is involved. [Slip Op. at 6-7] Antitrust law requires a more functional analysis. The cornerstone is whether the joint activity deprives the marketplace of independent centers of decisionmaking. Are separate decisionmakers joining together? In the instances of a parent and subsidiary corporation, or the president and vice president of the same corporation, they are not considered separate. It is not enough, however, that legally distinct entities joined together "under a single umbrella or into a structured joint venture." [Slip Op. at 11] If such an arrangement joins separate centers of

decisionmaking, then the participants are capable of conspiring under § 1 and a court must perform the Rule of Reason analysis.

The NFL presents a situation of separately-owned and managed teams that must cooperate in some ways (*e.g.*, to play games) but that also compete with each other for fans, ticket sales, front office personnel, and players. More specifically, they compete in marketing their logos and other intellectual property. [Slip Op. at 12] Thus, a decision to collectively market trademarks and to do so with only one vendor deprives the market of independent decisionmakers. The teams' common interest in promoting the NFL brand does not alter the fact that they are separate entities "and their interests in licensing team trademarks are not necessarily aligned." [Slip Op. at 13] The 32 separate teams make the decisions for NFL Properties; those are 32 potential competitors with separate economic interests now working collectively. The need to cooperate for some purposes (*e.g.*, playing games) does not insulate joint actions for other purposes (*e.g.*, marketing hats). "[E]ven if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football." [Slip Op. at 15 n.7] Some league agreements are necessary to produce league games and are not subject to antitrust scrutiny; for example, teams have an interest in maintaining competitive balance (perhaps through rules changes or personnel restrictions). Marketing the teams' separate intellectual property, however, does not come within that scope.

This does not mean that the NFL's conduct violates antitrust law. But the courts will evaluate the licensing agreement under the Rule of Reason to determine if an agreement only regulates—and may promote—competition or, on balance, suppresses or injures it. Such Rule of Reason inquiries often lead to very costly litigation, though the Court reiterated that the analysis need not always be detailed: "it 'can sometimes be applied in the twinkling of an eye'." [Slip Op. at 19]

The Importance For Antitrust Law Going Forward

Through Solicitor General (and Supreme Court nominee) Elena Kagan, the United States urged the Court to adopt something of a bright line test for antitrust scrutiny in these settings. The Court concluded that it did not need to address that proposed test, but it did not seem favorably-disposed to it here. [See Slip Op. at 17-18 n.9] The teams still own their licenses and remain free to market their separate trademarks, so this agreement amounted to concerted conduct even under the government's suggested test. Moreover, the teams control NFL Properties, so its actions that the government test might view as "independent" "are for all functional purposes choices made by the 32 entities with potentially competing interests." [*Id.*] Thus, the Court has not adopted that proffered test and seems to believe it may not provide as much utility as the government suggested.

In addition, the Court clarified that it is not enough to escape antitrust scrutiny that members of a joint venture share in the profits or losses of the venture. If that were true, then any cartel could evade scrutiny by creating a "joint venture" to be the exclusive seller of the product. [Slip Op. at 17] This may be an attempt to clarify a recent opinion, *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006), though the Court did not expressly say as much. Some commentators wondered how broadly lower courts should interpret *Dagher*. This mention in *American Needle* may signal that *Dagher's* scope is fairly limited.

Conclusion

This opinion makes clear that broad exceptions to antitrust scrutiny remain the exception. The courts will focus on whether a joint venture, combination, or other cooperative effort brings together separate decisionmakers who otherwise would compete with one another. If they do, the Rule of Reason analysis applies, even if the participants share in the profits or losses of the effort. Courts will be reluctant to recognize new categories of ventures that are not subject to the Rule of Reason, so members of industry should not anticipate that they will be able to avoid the often expensive and time-consuming antitrust litigation if they work with competitors to market or distribute products or services.

For additional information, please contact a member of the [Antitrust, Franchise, and Consumer Law Client Service Group](#).

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