

A Needle In The Eye Of A Joint Venture Of The NFL

IN A DECISION DATED MAY 24, 2010, THE U.S. Supreme Court held that the National Football League and its thirty-two member teams can be sued

James Morsch

for violating Section I of the Sherman Act by entering into exclusive dealing arrangements with companies that sell

NFL-branded products. The decision ends a streak of twenty plus victories for antitrust defendants in the Supreme Court and, more importantly, signals the possibility of increased scrutiny of companies' efforts to collaborate with their competitors. The case serves as a vivid reminder to those of us who advise joint venture participants to carefully evaluate the purpose, scope and effect of collaborations among competitors to ensure that such arrangements are not unduly exposed to successful antitrust challenge.

American Needle, Inc. v. National Football League involved the licensing of trademarked hats to Reebok. Founded in 1920, the NFL is an unincorporated association consisting of thirty-two, separately-owned professional football teams. Prior to 1963, each NFL team made its own arrangements for licensing its intellectual property and for marketing team jerseys, hats and the like. The teams formed National Football League Properties ("NFLP") in 1963 to coordinate their efforts to jointly market their products. Until 2000, the NFLP entered into non-exclusive licenses with a number of vendors, including American Needle, permitting them to manufacture and sell team apparel. When the NFLP decided to enter into an exclusive, 10-year license with Reebok in December 2000, American Needle sued, claiming the license was an unlawful restraint of trade under Section 1 of the Sherman Act.

In the trial court, the defendants moved for and were granted summary judgment on the ground the teams, the NFL and NFLP were incapable of violating Section 1's prohibition on contracts, combinations or conspiracies in restraint of trade because they are "a single economic enterprise" with respect to licensing NFL-branded headwear. The Seventh Circuit Court of Appeals affirmed, holding that the NFL and its teams share a "vital economic interest in collectively pro-

moting NFL football [and] ... competing with other forms of entertainment" that takes their joint licensing through NFLP outside the scope of Section 1. The Supreme Court, in a unanimous decision by retiring Justice John Paul Stevens, reversed.

In deciding to remand American Needle's claim back to the district court, the Supreme Court fundamentally rejected the notion that the joint activities of the NFL and its teams are immune from antitrust scrutiny because they acted through a single legal entity, NFLP. The Court pointed out that a single legal entity comprised of and controlled by a group of competitors can engage in the type of concerted activity made unlawful by the Sherman Act for, if that were not the case, participants in an illegal price-fixing conspiracy could simply incorporate a legal entity to organize and effectuate their conspiracy. The Court stressed that the key factor is not what form the joint activity takes but instead whether the venture reflects concerted action amongst "separate economic actors pursuing separate economic interests." Accordingly, the fact that the thirty-two NFL teams each have a role in the management of NFLP or that they share revenues earned from the NFLP's licensing arrangements was not dispositive on the question of whether the arrangement could be challenged under Section I of the Sherman Act.

In the case of the NFL and its teams, the Court found ample evidence that they each pursue their own corporate objectives. The teams compete with each other, not only on the playing field, but for fans, players and personnel. And although each team is affiliated with the NFL brand and shares an interest with the league and its competitors in promoting that brand, each team has its own name, colors, logos and related intellectual property. As a result, the decision by the NFL and its teams to collectively license these separately-owned trademarks deprives consumers of competition between the teams with respect to those trademarks.

The Court rejected as unpersuasive the defendants' argument that their joint venture should be immune from Section 1 challenge because cooperation between the NFL and its teams is necessary for professional

football's survival. While the teams might need to cooperate with each other in order to produce a NFL football game or, for that matter, to maximize the value of the NFL trademark, that just means such arrangements should be analyzed under the Rule of Reason rather than the Rule of Per Se Illegality. As the Court noted,

Any joint venture involves multiple source of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that the necessity of cooperation transforms concerted action into independent action: a nut and bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to a § 1 analysis.

In conclusion, the Court found that thirty-two teams "operating through the vehicle of the NFLP are not like the components of a single firm" but rather are "separately controlled, potential competitors with economic interests that are distinct from the NFLP's financial well being."

The Supreme Court's reversal in *American Needle* provides several important guideposts for corporations involved in or considering joint ventures with competitors. First, participants in joint ventures will not evade antitrust scrutiny simply by agreeing to incorporate a new legal entity to carry out the venture's activities. The days of dressing up illegal antitrust conspiracies as legitimate joint ventures by setting up a company or using an association to conduct what would otherwise be anticompetitive activities are over. Courts will no longer elevate form over substance in determining whether defendants charged with violating Section 1 can be sued in the first instance.

Second, given the Court's emphasis on whether the joint venture will deprive consumers of competition between "separate economic actors," nearly any collaborative venture between competitors could be subject to a Section 1 challenge. It will not be enough under such circumstances – as had been suggested in a number of earlier Supreme Court rulings – to show that the venture members share profits, risk and decision-making authority. Venture participants should be prepared to demonstrate that the collaboration has resulted in a product or innovation on which the venture participants previously did not compete.

Third, the Court's ruling in *American Needle* heightens the stakes associated with participating in any joint venture that includes competitors. While legitimate joint ventures amongst competitors should still pass muster under the Rule of Reason, much will depend on the scope of the joint venture's activities. In the case of exclusive licensing of team trademarks through the NFLP, the Supreme Court sounded dubious as to whether a collaboration amongst competitors was even necessary in light of the history of teams negotiating their own such arrangements and of the NFLP licensing the trademarks on a non-exclusive basis. The scope of a joint venture's activities, accordingly, should be carefully analyzed by experienced antitrust counsel to ensure that it is aligned with the venture's legitimate purposes.

Finally, unless a compelling business case can be made, exclusive dealing arrangements negotiated by a group of competitors should be avoided. Such arrangements not only call into question the legitimacy of the joint venture, but also create claimants like *American Needle* that may find success in the courts as antitrust plaintiffs.

James Morsch is a partner with Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. He concentrates his practice in complex commercial litigation, including counseling companies and litigating antitrust and other competition law matters. The views expressed are personal to the author.



BUTLER RUBIN
excellence in litigation™