



US Supreme Court: joint venture not immune from antitrust scrutiny

On 24 May 2010, the United States Supreme Court issued its unanimous ruling in *American Needle, Inc v National Football League*. The Court held that a co-operative trade mark licensing venture created by teams in the National Football League (NFL) is subject to scrutiny under section 1 of the Sherman Act. The Court rejected the position of the lower court of appeals and of the NFL that the venture was a 'single entity' immune from such scrutiny, concluding rather that the licensing activities constituted concerted action that should be analysed under a 'rule of reason' to determine whether they violated the antitrust laws.

Background

Until 1963, NFL teams reached independent licensing agreements with headwear and clothing manufacturers for production of goods carrying their teams' logos. In 1963, the teams created National Football League Properties (NFLP), which was tasked with performing these licensing functions for every team in the league. Revenues generated by the NFLP were shared equally among teams, and teams have exercised their right to withdraw from the organisation.

From 1963 to 2000, NFLP issued non-exclusive licences to several manufacturers to allow them to sell items bearing participating teams' logos. In 2000, the teams authorised NFLP to grant a 10-year exclusive licence to Reebok, and subsequently failed to renew the non-exclusive licences it had granted to other manufacturers.

American Needle was one such former recipient of a non-exclusive licence. In its complaint, American Needle alleged that the NFLP constitutes an illegal 'contract, combination, or conspiracy' in restraint of trade under section 1 of the Sherman Act because it prevents individual teams from reaching their own licensing arrangements with manufacturers. Lower courts disagreed with this assertion, with the Seventh Circuit Court of Appeals holding that teams participating in the NFLP are not independent actors with divergent economic interests, but rather 'one source of economic power when collectively producing NFL football'.

Decision

The question before the Supreme Court was discrete: are teams in the NFLP a single 'economic power' incapable of conspiring to restrain trade, or are they separate entities with diverging economic interests whose co-operation is subject to review under section 1 of the Sherman Act, which renders unlawful agreements that unreasonably restrain trade? The Court's answer is unremarkable, in light of numerous relevant facts, including:

- that each team is an independently owned and managed business, one that competes with other teams in the league for spectators, management, and playing talent; and
- that as separate owners of their respective trade marks and related intellectual property, the teams are, or easily can be, competing suppliers/licensors of valuable trademarks.

Because the NFLP 'deprives the marketplace of independent centres of decisionmaking,' the Court held that its behaviour on behalf of NFL teams may be reviewed under section 1 of the Sherman Act.

Implications

The issue before the Court was very narrow—the Court was not asked to review the reasonableness of the joint venture. The only salient question was whether the licensing activities should be viewed as those of a single entity immune from section 1, which requires two or more separate economic actors having reached an agreement. Although the Court's conclusion was

unremarkable, it did articulate and reconfirm some principles that are applicable more widely to the general question of when two or more actors should be viewed as sufficiently independent as to be capable of conspiring and, more specifically, with respect to joint ventures. As to the former concept, the Court cited to and quoted from its leading case in this area, *Copperweld Corp v Independence Tube*, which held that a parent and wholly-owned subsidiary were incapable of conspiring. The Court maintained its commitment to a ‘function over form’ analysis when scrutinising the behaviour of co-operating entities; the Court will look at whether the co-operation has eliminated ‘separate centers of economic decisionmaking’ from a given market. As the case arose in the joint venture context, the decision provides no greater guidance as to ‘just how separate is separate enough?’ In the more than 25 years since *Copperweld*, the lower courts have to some extent struggled with that question and will still continue to do so without further concrete guidance.

Regarding joint ventures, the Court made quite clear that, even though venturers like the NFL teams may need to co-operate to produce the ‘product’ (football games), this ‘does not mean that necessity of cooperation transforms concerted action into independent action... Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct.’ Thus, the agreements that are inherent in forming and running a joint venture are always subject to review under the antitrust laws for reasonableness; and although in the end the joint venture may be perfectly reasonable and pro-competitive, its formation cannot be said to change concerted conduct into unilateral conduct.

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