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A Free Pass On Antitrust Scrutiny For NFL Teams

Law360, New York (October 23, 2008) -- The United States Court of Appeals for the Seventh Circuit has held that the National Football League is a single entity for purposes of licensing team trademarks, thus freeing the NFL's licensing decisions from Sherman Act § 1's prohibition against group conduct that unreasonably restrains trade. American Needle Inc. v. NFL, No. 07-4006 (7th Cir. Aug. 18, 2008).

The court also held that Sherman Act § 2's prohibition against unilateral conduct establishing or maintaining a monopoly did not constrain the NFL's decision to grant an exclusive license for team apparel.

American Needle Inc. was a long-time NFL licensee, selling hats embellished with team logos. In 2000, the NFL teams collectively authorized NFL Properties LLC, a separate corporation charged with licensing and marketing the team-owned trademarks and logos, to solicit bids from vendors on an exclusive headwear license.

In 2001, NFL Properties awarded Reebok, the high bidder, a 10-year exclusive license and did not renew other headwear licenses, including American Needle's.

American Needle sued the league, its individual teams, NFL Properties and Reebok. It alleged that because the exclusive license agreement with Reebok prevented other vendors from obtaining license rights, the agreement restrained trade unreasonably in violation of Sherman Act § 1.

American Needle also claimed that the NFL teams had monopolized markets for NFL team licensing and product wholesaling in violation of Sherman Act § 2 when they authorized NFL Properties to grant an exclusive license.

The district court, relying on the doctrine of Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), which provides that corporations and their wholly-owned subsidiaries are single actors for Sherman Act purposes, granted the NFL defendants summary judgment, holding that for producing and promoting NFL football games, the

league, its teams, and its licensing agent, NFL Properties, were a single economic entity for Sherman Act purposes.

On appeal American Needle argued that Copperweld's single-entity doctrine should not apply to the NFL, its teams, and NFL Properties because, unlike a corporation and its wholly-owned subsidiary, each was a separate economic actor with the individual ability to license its intellectual property.

As potential competitors in a market for granting these licenses — for example, the Jets might compete against the Packers in awarding a hat manufacturer a logo license — the teams, argued American Needle, could not be considered unified in economic interest.

The court of appeals agreed that the single entity analysis requires a court to "examine whether the conduct in question deprives the marketplace of the independent sources of economic power that competition assumes." Id. at 14.

But the court was not persuaded that the teams' ability to compete against each other in offering individual licenses required finding the teams to be separate economic actors for Sherman Act purposes.

Instead, the court started with the premise that the teams could only produce "NFL Football" through joint conduct: "Certainly the NFL teams can function only as one source of economic power when collectively producing NFL football." Id. at 15.

Because combined action is necessary to produce games, the court reasoned "that only one source of economic power controls the promotion of NFL football; it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football." Id. at 15-16.

The court found support for this view in the uncontradicted evidence submitted by the NFL that the league competes with other forms of entertainment and that the teams had collectively licensed their intellectual property since 1963, when they formed NFL Properties to conduct and engage in advertising campaigns and promotional ventures on their behalf.

Nothing in Sherman Act § 1, the court announced, "prohibits the NFL teams from cooperating so the league can compete against other entertainment providers." Id. at 17.

The need to compete for consumer entertainment spending, the court concluded, transforms the several individual teams into a single economic entity whose internal agreements are immune from regulation by Sherman Act § 1:

Simply put, nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers.

Indeed, antitrust law encourages cooperation inside a business organization — such as, in this case, a professional sports league — to foster competition between that organization and its competitors.

Viewed in this light, the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property, and we thus cannot say that the district court was wrong to so conclude. Id.

Turning to American Needle's § 2 claim, the court reasoned that, as a single entity, the NFL and its teams could grant exclusive licenses without risking Sherman Act § 2 liability: “As a single entity for the purpose of licensing, the NFL teams are free under § 2 to license their intellectual property on an exclusive basis, even if the teams opt to reduce the number of companies to whom they grant licenses.” Id.

While the court acknowledged its earlier view that whether a professional sports league should be treated as a single entity “should be addressed not only ‘one league at a time,' but also ‘one facet of a league at a time,'” Id. at 12-13 (quoting Chicago Prof'l Sports Ltd. v. NBA, 95 F.3d 593, 600 (7th Cir. 1996) (Easterbrook, J.)), American Needle suggests broadly that a sports league's common economic interest in producing league games supports treating the league and its component teams as a single economic entity at least for the purpose of intellectual property licensing.

Other courts construing different factual circumstances and other panels of the Seventh Circuit, have arguably not extended the single entity doctrine so far.

Compare Fraser v. Major League Soccer, LLC, 284 F.3d 47, 55-56 (1st Cir. 2002) (rejecting the view that sports leagues should be treated as a single entity because teams must cooperate to produce product and noting that “[s]ingle entity status for ordinarily organized leagues has been rejected in several other circuits as well”); and Chicago Prof'l Sports, 95 F.3d at 597-600 (suggesting the NBA is not a single entity for all purposes).

Only time will tell whether American Needle's holding will fully immunize other leagues' joint licensing and promotional conduct from antitrust scrutiny.

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