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Football and Antitrust Law: American Needle v. NFL and It's Meaning for Combinations in Restraint of Trade and the Rule of Reason in the 21st Century

Introduction

NFL football. And antitrust law. What, if anything, do they have in common? A great many things, one might say. Both conjure up images of powerful contestants vying for control on the field of play. Each participant utilizing its skills, its knowledge, and its intuition to gain an edge and dominate the game. Competition in its purest form. Unless somebody cheats, of course.

But rules ---- that is why we must have rules. Otherwise competition descends into chaos, battle descends into barbarism, and injuries inevitably follow. Football, for all its controlled violence, has rules that must be followed.

In the realm of business, and the controlled violence we call "competition," antitrust law provides these rules, in large part to keep the game fair and provide the proverbial level playing field. Thus, even from this small comparison, we can see that professional football and antitrust law have something in common, after all.[1]

Now add to the aforementioned confluences the recent Supreme Court decision in American Needle, Inc. v. National Football League, et al.,[2] where the underdog, a maker of sporting apparel, decided to challenge on antitrust grounds the loss of its right to manufacture league-sanctioned hats and headwear. Given that the high Court's decision lacked finality, this case has not yet reached the level of a Super Bowl victory. Nonetheless, it is akin to a playoff win that well positions the upstart hatmaker on the road to a possible upset win over what is arguably America's best organized and most formidable sports league.

The first half of this Article will introduce, in pertinent part, the essentials of antitrust law relevant to understanding the Supreme Court's decision, including a brief overview of the preceding landmarks that formed the basis of the Justices' ultimate ruling.

The second half of the Article shall be devoted to the actual "play by play" of the Court's decision, and how it was arrived at. And just like any given Sunday, the conclusion will mimic a postgame report as to what this decision means, and where do the contestants go from here. But far more important, a forecast for what American Needle means, for the business of sports other than football, and the business of business itself, shall be the coda. That said, it is time for the kick off.

I.

ANTITRUST LAW - THE BASICS

Antitrust law did not evolve in a vacuum. Quite to the contrary, it is deeply entwined with American history, its roots going back to the progressive President Theodore Roosevelt, and his goal of stamping out or at least curtailing the monopolistic business practices that so dominated late-Nineteenth Century America.[3]

Antitrust law in the United States essentially begins with the Sherman Act, promulgated in 1890.[4] The Sherman Act was intended to be a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition" by assuring that natural competitive forces interact freely, without manipulation or restraint.[5]

The Supreme Court has been steadfast in regarding the Sherman Act as akin to a common law statute, and, in interpreting that body of law, the federal courts act more as common law courts than in other areas governed by federal statute. This is so the antitrust law "adapts to modern understanding and greater experience… to meet the dynamics of present economic conditions. "[6]

Its three foremost weapons against restraint of trade are firstly Sections 1 and 2 thereof. Section 1 explicitly prohibits "[e]very contract, combination in the form of trust or otherwise, or, conspiracy, in restraint of trade." [7] Section 2, in turn, makes illegal any monopoly or attempt to monopolize.[8] But the true weapon of mass destruction found in the antitrust arsenal is the provision for an award of treble damages to prevailing private plaintiffs.[9] Since the singular focus of this Article is Section 1, as exposited by American Needle, henceforth the following analysis shall be limited to that statutory prohibition.

It is essential to remember that the Sherman Act "prohibit[s] only unreasonable restraints of trade." [10] It is axiomatic that Section 1 outlaws "only restraints affected by a contract, combination, or conspiracy."[11]

To be certain, Section 1 liability has been limited to concerted conduct for nearly a century.[12] Therefore, it maintains a fundamental distinction between concerted and independent action.[13] The penultimate question is then whether allegedly anticompetitive conduct stems from independent decisions or from an agreement between otherwise distinct actors.[14]

The federal courts have judiciously employed Section 1 to condemn business combinations or more nefarious conspiracies that unlawfully restrain competition.[15] Basic prudential concerns relevant to Section 1 enforcement are premised upon the reality that exclusive contracts are commonplace, and therefore any firm with a modicum of market power that enters into such an exclusionary accord risks an antitrust suit. The unacceptable and unjustified risk of such a litigious free-for-all must be counterbalanced against the real need to ensure vigorous and freely competitive markets via judicious and rational enforcement of the provisos of Section 1.[16]

For these reasons, combinations such as joint ventures have always been adjudged under the Rule of Reason.[17] As we shall see below, the Rule of Reason has assured the sensible enforcement and adjudication of the antitrust laws for over a century now.

An icon of antitrust law, historically as well as jurisprudentially, is of course Standard Oil Co. of New Jersey v. United States.[18] Ironically for this Article, we cite this case nearly on the day of its centennial. And as well discussed in the last one hundred years, Standard Oil caused the breakup of the insidious Rockefeller oil monopoly, only in recent decades to see the once independent "Seven Sisters" turn back the clock via merging into the handful of "supermajor" oil companies left on the American scene.[19]

In pertinent part, the legal truisms of Standard Oil are easily related to Section 1 enforcement. The Justices of that era declared that the statute "should be construed in the light of reason."[20] To be certain, said the high Court, Section 1 is not aimed to interrupt all collaboration in business; rather, its explicit and rightful goal is to protect the free flow of commerce "from contracts or combinations… which would constitute an interference with, or an undue restraint upon [commerce]."[21] And to achieve a just and sensible result when enforcing the statute, Standard Oil decreed that "the standard of reason which had been applied at common law should be applied in determining whether particular acts [are] within its prohibitions."[22]

Not surprisingly, such fidelity to reason extends to the remedies to be accorded when Section 1 is violated. As characterized by the Standard Oil Court a hundred years ago, the specific remedy to an unlawful combination is two-fold: first, enjoin the continuation of the offending behavior; and two, abolish the combination or conspiracy, so as to rob it of its unlawful power.[23] In dispensing this remedy, the Supreme Court cautioned, courts must consider the actual results of their decrees, and therefore refrain from inflicting serious injury on the public by a needless and deleterious interference with commerce.[24]

And in a final, precautionary reminder, Standard Oil confirms that the objective of American antitrust law is never to deprive business of the power and the right to make "normal and lawful contracts," but instead solely to restrain malefactors from engaging in illegal combination or conspiracies aimed at the unlawful restraint of trade.[25]

In closing out this section of our discussion, it is only appropriate to end with a final word on The Rule of Reason from the legendary Justice Brandeis, who provided the classic formulation of the Rule of Reason in Chicago Board of Trade:[26]

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint,

> the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; [but because knowledge of intent may help the court to interpret facts and to predict consequences.[27

The foregoing primer on antitrust law now concluded, we can turn to the actual Supreme Court decision in American Needle, and how it represents the newest landmark in this important, century-old field of law.

II.

GAME TIME: AMERICAN NEEDLE VS. THE NFL

At the time of this writing, American Needle has attained outsized prominence, partly for reasons we shall discuss below. Much of that has to do with the prime defendant, the NFL. And given the enormous popularity of professional football in the United States today, only a brief exposition of the relevant facts is necessary.

The National Football League ("NFL") includes 32 separately owned professional football teams, each with its own distinctive names, colors and logos, as well known to millions of fans.[28] In 1963, the constituent clubs organized National Football League Properties ("NFLP"), an unincorporated entity, to develop, license, and market their intellectual property. From its inception until 2000, NFLP granted nonexclusive licenses to a number of vendors, permitting them to manufacture and sell apparel adorned with team logos.[29] American Needle was one of those licensees.[30]

All this changed at the end of 2000, when the teams voted to authorize NFLP to enter into exclusive licenses, and NFLP then granted such an exclusive deal for 10 years to Reebok International Ltd. Reebok now had the sole right to manufacture and sell trademarked headwear for all 32 NFL teams. As a direct consequence, NFLP did not renew American Needle's nonexclusive license.[31]

Understandably chagrined, American Needle filed an antitrust action against the NFL and others, alleging that the exclusive contracts violated Sections 1 and 2 of the Sherman Act.[32] As their key defense, the NFL, the teams, and NFLP replied that they constituted a single economic enterprise, and therefore were incapable of conspiring to restrain trade within the meaning of Section 1.[33]

On this singular question, the district court sided with the league, concluding that the NFL and its constituent members comprised a single entity.[34] The Seventh Circuit affirmed, finding, inter alia, that football can only be carried out jointly, and the league can function only as one source of economic power when presenting NFL football.[35] But it was not "game over" just yet. Certiorari was granted,[36] and the matter came before the high Court.

Delivering the final opinion of his storied career, Justice John Paul Stevens[37] began by reciting the language of Section 1 of the Sherman Act, in that every contract, combination or conspiracy in restraint of trade is illegal under American antitrust law.[38] But the first question to be asked is "whether an arrangement is a contract, combination, or conspiracy" before inquiring if it unreasonably restrains trade.[39]

Writing for a unanimous Court, Justice Stevens framed the precise issue here as that "antecedent question" in relation to the NFL and its formation of NFLP to manage its intellectual property.[40] Wasting no time, the Supreme Court declared that the league's action "is not categorically beyond the coverage of [Section] 1," and the legality --- or lack thereof --- "must be judged under the Rule of Reason."[41]

Having posited and then answered the question before it in such a delimited fashion, the Court confirmed that it had but one, narrow issue to adjudicate; whether the NFL and its affiliates were a single enterprise or, conversely, were independent actors capable of contracting, combing or conspiring in restraint of trade, as such activity is defined by the Sherman Act.[42]

Invoking the hallowed distinction the Sherman Act makes between Sections 1 and 2, the Court reminds that the former only applies to concerted action that restraints trade. In contradistinction, the latter covers both concerted and independent action, but only if that action monopolizes or threatens to monopolize, by definition a narrower category than restraint of trade.[43]

In the high Court's view, this stricter oversight for concerted behavior is rooted in Congress' recognition that joint action is inherently fraught with anticompetitive risk.[44] Moreover, since concerted action is but a "discrete and distinct" category of endeavor, restricting that segment only leaves unmolested "a vast amount of business conduct."[45]

Thus, opined Justice Stevens, action done in concert is easier to examine, and easier to remedy. Indeed, the high Court has judged collaborative action much more harshly.[46] But of course the inquiry must be made as to whether the actors are in fact working in concert, and to that the Court now turned.[47]

To find concerted action "does not turn simply on whether the parties involved are legally distinct entities."[48] Justice Stevens set out the Court's long held view disregarding overly formalistic distinctions, instead relying upon "a functional consideration of how the parties … actually operate."[49] Mere labels do not persuade, said the learned Justice, but the reality of identities can and should motivate the Court's deliberations.[50]

Therefore, business organizations that hold themselves out as formally distinct actors can still be encompassed by Section 1's oversight.[51] It is the rule, posited Justice Stevens, rather than the exception, for the Court to look beyond the form of a purported single entity when nominal competitors come together to form professional organizations or trade groups.[52]

Function rules over form, declared Justice Stevens, and a functional analysis is justified by the Sherman Act's goal of regulating substance, unswayed by mere formalisms.[53] Calling upon the landmark of Copperweld, the American Needle Court adhered to the axiom of substance over form in determining if an entity is capable of conspiring pursuant to Section 1.[54]

Justice Stevens found it a misconception to describe such an inquiry as simply asking if the alleged malefactors are a single entity. No one merely asks if it "seems" like the parties are one or independent in any metaphysical sense, observed the Court.[55] "The key," according to Justice Stevens, is whether the concerted action "joins together separate decision makers."[56]

Putting a finer point upon the inquiry is to ask if there is a contract, combination or conspiracy amongst individual economic units who would normally be pursuing individual economic interests.[57] If the accord between these entities deprives the marketplace of independent decisionmaking and chills the diversity of separate entrepreneurial interests, then it is violative of the antitrust law.[58]

Summarizing this portion of the opinion, the high Court emphasized that "the inquiry is one of competitive reality," and not artificial formalisms.[59] The conjoining of formerly legally distinct entities under a single label is not a bulwark against appropriate inquiry.[60]

The paramount question, declared American Needle, is whether the former independence of once distinct centers of decisionmaking is compromised into something lacking the normal vigor of competitive business.[61] If so, the actors so united now have the capability to conspire in violation of Section 1, and it is then appropriate for courts to decide "whether the restraint of trade is an unreasonable and therefore illegal one."[62]

Against these rubrics, the Justices now turned to the controversy before them. Without equivocation or apology, the unanimous Court found that "[d]irectly relevant to the case, the [NFL] teams compete in the market for intellectual property."[63] Whenever each team licenses its valuable logos and trademarks, it is not acting for the league's greater good. Quite to the contrary, each franchise is motivated solely by its own corporate aims to enhance individual wealth.[64]

With a reference specific to the case at bar, here American Needle's disenfranchisement from the lucrative ballcap manufacturing trade, Justice Stevens invoked the imagery of the then-reigning Super Bowl contestants. "[T]he [New Orleans] Saints and the [Indianapolis] Colts are two potentially competing suppliers of valuable trademark…. [t]o a firm making hats."[65] In making business decisions as to who to grant such remunerative licenses to, each club is an independent economic entity pursuing individual economic interests. A fortiori, each team is capable of making independent business decisions.[66]

Therefore, from all this the Court reached the inescapable conclusion that "[d]ecisions by NFL teams to license their separately owned trademarks collectively and to only one vendor … depriv[e] the marketplace of independent centers of decisionmaking. "[67]

In this context, the high Court made short shrift of the NFL's defense that, by incorporating NFLP as a single entity to market the

entirety of the league's intellectual property as a unitary whole, the actors escaped antitrust scrutiny. It is not dispositive, opined Justice Stevens, that those competitors on the field of play combined on the field of business to organize a fresh legal entity to market their valuable logos and colors.[68]

"An ongoing [Section] 1 violation cannot evade [Section] 1 scrutiny simply by giving the ongoing violation a name and label," said the Court."[69] Indeed, in once again declaring that in antitrust cases form can never subdue substance, the Justices remind in one voice that condoning such facile labeling could condemn antitrust law to impotence.[70]

To be sure, the high Court acknowledged that "NFL teams have common interests" in promoting the league as a unified brand. Nevertheless, the clubs "are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."[71]

Justice Stevens went on to characterize the teams' common interests in the league's brand as a partial unification of their separate economic agendas, "but the teams still have distinct, potentially competing interests."[72] And therein lies the danger, held American Needle, for reason that "illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties."[73] Such harm to others is precisely what the antitrust law is designed to prohibit.[74]

The Supreme Court continued by taking up the Seventh Circuit's view that "without [the teams'] cooperation, there would be no NFL football."[75] The high Court acknowledged this element of the league's defense, duly noted that some degree of collective action is inherent to the NFL's business, as well as in taking the field of play. Nonetheless, the Justices found the appellate tribunal's reasoning unpersuasive.[76]

Here Justice Stevens coined an analogy sure to be enshrined in the pantheon of antitrust jurisprudence. The learned justice posited that "a nut and bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to [Section] 1 analysis."[77] Wisdom for the ages, to be sure. Thus, American Needle declared unequivocally that while the teams may work in unison in some sense, they are surely not immune from antitrust scrutiny when they do collaborate economically.[78]

Given this conclusion, it was but a short step for the high Court to likewise declare NFLP subject to inquiry pursuant to Section 1, "at least with regards to its marketing of property owned by the separate teams." The Justices based that holding upon the fact that the promotional entity's licensing decisions are made by 32 potential competitors, each of which is the actual owner of its share of this jointly managed intellectual property.[79]

Decisive here, indicated the Court, is that if NFLP had never been created, "there would be nothing to prevent each of the teams from making its own market decisions" with regard to their trademarked apparel businesses.[80]

From this analysis of what the licensing entity is capable of (and, conversely, what its existence forestalls the clubs from doing individually in competition with each other), the Supreme Court ruled that "decisions by the NFLP regarding the teams' separately owed intellectual property constitute concerted action."[81] Justice Stevens sharply refuted the notion that the league members acting through NFLP is akin to components of a single entity meshing to create a collective profit. In actuality, found American Needle, the 32 football teams retain independence, operate as individual profit centers, distinct from each other and NFLP, and are at least potential (if not actual) competitors.[82]

To be sure, the Supreme Court reached this holding with a view towards preserving the integrity of the antitrust laws. The Justices hypothesized that if potential competitors could share profits or losses in a joint venture without worry of Section 1 inquiry, "then any cartel could evade the antitrust law simply by creating a joint venture to serve as the exclusive seller of their competing products."[83] The high Court made clear that it would never permit colluding parties to circumvent the antitrust laws by acting through the artifice of some straw third-party or a so-called joint venture.[84]

Drawing to the end, Justice Stevens offered some words of comfort to the NFL and others similarly situated. Certainly, '[f]ootball teams that need to cooperate are not trapped by antitrust law."[85] A "host of collective decisions," such as scheduling and then producing games, "provides a perfectly sensible justification" for concerted action without needless fear of incurring Section 1 liability.[86] To discern sensible, neutral joint action as opposed to unlawful restraint of competition, the Supreme Court pledged that the axiomatic and flexible Rule of Reason would be applied, explicitly to the football league, and, implicitly, to others similarly situated in the world of sport business, as well as business in general.[87]

Finally, having refined and then applied the parameters of concerted action subject to Section 1 scrutiny, and having confirmed the proven Rule of Reason is to be the yardstick for evaluating same, the Supreme Court reversed the holding below, and cleared the path for the case to continue on remand.[88] And so ended the Supreme Court's newest landmark of antitrust law.

III.

ANALYSIS & COMMENTARY

We now come to the concluding portion of this Article, the customary analysis and commentary upon the case that has been the subject under discussion. Before proceeding, however, circumstances call for the issuance of a caveat.

Certainly, and as well noted above, American Needle is, technically speaking, an interlocutory decision. It lacks finality, as it makes no decision as to the ultimate winners and losers in the subject litigation. It is a preliminary decision, one that sets the rules, and remands to the lower courts for further determinations consistent with its holdings.

As candidly noted at its outset by Justice Stevens, American Needle is delimited to a threshold inquiry, here, what concerted action is subject to Section 1 scrutiny. But this self-imposed limitation of the question presented does not diminish one bit the vigor and the precedent-setting aspect of this new holding.

It can well be said that threshold determinations often presage the outcome of an entire case. Opening the door to further inquiry, as American Needle unquestionably does here, might be all that is needed to turn the tide of battle in favor of one side. At the least, the guarantee of further litigation compels a change in tenor for both sides: akin to a turnover of ball possession, the NFL, seeking a quick dismissal, has had its hopes dashed. The plaintiff American Needle may now renew its offensive, and all that comes with it.

As with so many notable Supreme Court edicts, American Needle of today may prove to be the last time these contestants take the field before the high Court. Thus, the Justices' decision might prove to be the first, and the last, contemporary word on the case at bar. There then is a reminder not to underestimate the importance of this holding to the field of antitrust law, its supposed preliminary nature notwithstanding.

Let us now proceed to the more sanguine elements of our analysis, and place American Needle in perspective. Our first point is timing, as purely a happenstance as that may be.

We noted early on how this Article is written more or less on the centennial of that most famous of American antitrust cases, that of Standard Oil. Ironically, American Needle has been, in most likelihood, the most quoted and publicly visible antitrust ruling of the Supreme Court since the turn of the last century. We would be hard pressed to think of an antitrust case decided since Standard Oil that has consumed as much newsprint and garnered as much notoriety in the popular press as the instant case. The reason for that is well known.

At the time of this writing, the NFL owners and the NFL Players' Association (the "NFLPA," distinguished, to be sure, from NFL Properties as discussed herein) have been embroiled in an epic labor dispute. We need not provide a citation here, since this struggle has been reported daily on the front of the sports page (if not the main page) of every media outlet in the nation. It is an apt demonstration of the American psyche, that with all of the pressing issues of the day about the Recession, the price of gasoline, and health care, just to name a few, so much ink is spilled on coverage of whether or not there shall be NFL football this year.

As is equally well known, American Needle is mentioned in nearly every news article on football's labor strife, been the subject of radio and television sports talk, and has thereby captured the attention of the general population like few other Supreme Court cases. Among other examples, various pundits have offered it in support of the players, relied upon it as exposing the supposed vulnerability of the NFL to antitrust claims, and cited it as evidence that judicial intervention may ultimately decide if there will be a football season.

To be sure, this is a nonsubstantive observation. But the inescapable point remains that the public's awareness of American Needle is far more attenuated than the vast majority of Supreme Court cases. Be that as it may, however, the paramount concern

of this Article is legal substance, so to that we now turn.

Having noted above the public's fascination with American Needle vis-à-vis professional football, of what note has or should the NFL take of the high Court's decision? A great deal, one would say, and not just because the underlying antitrust action is alive and well. Obviously, how the NFL markets its intellectual property in the years to come will be largely determined by the final outcome (be it in court or via settlement) of the instant case. But there is much more.

As in all modern professional sports, the NFL engages in concerted action on a number of fronts, not just marketing its team logos for hats and tee shirts. Two that immediately come to mind are television broadcast rights and the drafting of collegiate players into the professional ranks. While those aspects of professional football's business are far too intricate to make a worthwhile comparison here, the undeniable point remains, and it is that the NFL shall henceforth be deemed to be a collection of independent economic forces that, from time to time, band together and act in economic concert in order to enhance their corporate profits.

Given such, when these formerly independent economic actors band together and act as one, American Needle makes plain that they have thus deprived the marketplace of the free competition brought about by maintaining separate centers of financial autonomy. That step taken, the teams cannot escape antitrust scrutiny, pursuant to Section 1 at the least, when they engage in joint endeavors. Put in football terms, it is early in the season. As the "game changer" of American Needle takes firmer hold within the federal courts, it remains to be seen who will emerge the victor, the league or its opponents.

The above is one emerging issue for the NFL. What of the other leagues in the business of sports? One need not be a legal scholar to rightly conclude that they have the same exposure.

The other professional associations, whether in the acknowledged major American sports or the ones of lesser stature, all have operating characteristics similar to that of the NFL, in one form or another. Generally, each individual competitive team willingly accedes its rights as an independent economic actor, and collaborates with its on-the-field rivals in joint endeavors aimed at increasing each constituent's profits.

To be sure, the case law predating American Needle, and this new landmark itself, make plain there is a safe harbor for appropriate collaboration. Once again, Justice Stevens echoes high Court landmarks of years past in acknowledging that presenting professional sporting events requires cooperation. The Supreme Court has long acknowledged that league sports intrinsically need to cooperate and take concerted action in order to function.[89] Clearly, there shall be no break in that continuity.

American Needledoes nothing to upset the truism that a team cannot play itself. Thus, all leagues in all sports can proceed with general confidence that not every collaborative action will subject its members to an antitrust lawsuit. That is as it has always been, as it should be, and it shall clearly remain so.

Nonetheless, all professional sports leagues must proceed mindful that American Needle is as applicable to badminton as it is to NFL football. Each and every professional league must take due note that when collaboration exceeds the boundaries of what is essential and appropriate to put on an exhibition of their sport, and crosses the line into a stifling of competition, to the injury of others, then antitrust scrutiny shall be next week's opponent. And unlike a regularly scheduled game, the teams do not profit when playing inside a staid courthouse.

As we alluded to early on in this writing, the field of sports is often a metaphor for the field of business. The similarities abound, and we Americans are oft times guilty of borrowing the strategies and tactics of one, and applying them to the other (and this interchange, most certainly, works in both directions). What then, does American Needle portend for American business, not the business of sports to be sure, but the business of business, be it high-tech, low-tech or anywhere in between?

Not to be unduly repetitive, but the firm conclusion is that the lessons remain the same. Competing businesses may not play in an organized "league," and they may not sell team jerseys with the name of your favorite CEO on the back, but they most certainly do compete. Yet sometimes they put aside their competitive fervor, to act for their common good in trade associations or as lobbyists, to deal with common problems, or to act in concert in certain combinations or joint ventures. And that is where business lines up on the field against American Needle and its teammates, also known as legal precedents.

Here are the headlines for American business generally, as drawn from American Needle. First, what some might characterize as the "bad news," or at least the one with potentially negative implications for some of the players: just as in professional football, combinations that rob the free market of independent centers of competing economic interests are illegal.

At a minimum, those that submerge their competitive vigor in return for collaboration open the doors wide to antitrust scrutiny pursuant to Section 1. Such examination, accompanied by the threat of treble damages under the Sherman Act, might be enough by itself to drive such noncompetitors from the field of play. To be sure, bad for them, but good for competition.

Businesses, regardless of what their precise occupations are, must hereafter be mindful that joint ventures, combinations and other forms of concerted action can expose them to antitrust liability. They are on notice to monitor their collaborations accordingly, and scrupulously avoid any conspiratorial urges that might fatten their bottom lines at the expense of normal competitive forces.

If that is the bad news, one must candidly admit it is not all the bad, for at the least it is merely today's iteration of the laws of antitrust that have ruled for at least a century. In sum, no one is really changing the size and shape of the playing field. Potential malefactors confront, more or less, the same law and penalties that they always did. In that regard, the news is only bad if you were intent on violating the law.

That said, let us turn to the good news. American Needle maintains the same consistency within antitrust jurisprudence that has abounded for over a century. It is beyond cavil that business hates uncertainty more than anything else. By reaffirming tried and true maxims, this latest Supreme Court landmark maintains that much valued consistency, and business can act accordingly and with certitude that the rulebook has not been altered from seasons past.

Next, this latest pronouncement acts in defense of full and fair competition. The American economy, probably more so than any other in the world, is profoundly based upon free competition. This is reflected in our laws, in our history, and indeed in the very mindset of how we conduct business in these United States.

American Needlecontinues and reinvigorates this rich and storied tradition, by giving paramouncy to the fostering of free and unfettered competition. American businesses have always worked within this framework, and this new case encourages them to continue to do so, and with confidence that free competition will not be compromised.

American Needlefurthermore reaffirms the notion that not every combination is bad. Business, quite naturally, sometimes draws competitive forces together, whether by contract, joint action or via some other form of mutually beneficial combination. That, by itself, is not evil, and today's case says so. Justice Stevens makes clear that the law has always reserved its scrutiny for joint ventures that truly act to restrain competition, in this case the elimination of nominal and healthy competitive forces by restraining these erstwhile combatants from truly engaging each other in the marketplace.

That unification leads to our next point, that of actors usually engaged in stiff competition who, shall we say, strip off their opposing colors and join under one banner for concerted action. In this and all other respects, American Needle confirms the long held and undeniably just maxim that substance rules over form. Mere labels have no sway in antitrust cases, nor should they, says the high Court.

As in the preceding century, the next hundred years of antitrust jurisprudence will exalt the substance of any subject activity over the mere accident of its form. For those whom the substance of their business activity conforms to the laws fostering free competition, that is good news. Conversely, it is only detrimental to those who would attempt to cloak their lawbreaking ways under the guise of a meaningless label. Put in sports terms, it does not matter what jersey you wear; it is what you do on the field of competition that counts.

Now to our last, and possibly the greatest, point of American Needle. As described above, the Rule of Reason has dominated the process of antitrust analysis since the law's inception well over a century ago. We need expend few words to affirm the rightness and sagacity of that precept. Suffice to say that truly free enterprise is a cathedral of rationality, of decisions made for good reason, and not based upon emotion, ideology nor other factors.

Therefore, the law overseeing same, and seeking to justly assure that the market remains free and fair to all participants, should

likewise, in the main, examine its doings in the light of that same reasonability. In its own way, American Needle is the modern implementation of Chief Justice Hughes' maxim that "[realities] must dominate the judgment in antitrust cases."[90]

In sum, American Needle does more than just declare the Rule of Reason is applicable to the case at bar; its fundamental adjudication confirms the ongoing and essential role of such a mode of analysis in all such cases to come.

Conclusion

In conclusion, American Needle has gone from making headlines in the field of law to now the field of professional football. It affirms that even the obvious need for collaboration in the business of the NFL has its just limits, those boundaries to be measured by the nation's longstanding antitrust laws. So too for other professional sports, and so too for the rest of American business. But in doing so, we find the Supreme Court affirming basic notions that not all collaboration is illegal, rather only concerted action that unlawfully drives out competition. Tried and true rules, above all the proven and just Rule of Reason, will dominate the field when measuring such actions for their propriety. It is still early in the game, but American Needle makes certain that, in the end, the real winner will be justice.[91]

[1] Over a half-century ago, the Supreme Court declared that the NFL falls "within the coverage of the antitrust laws." Radovich v. National Football League, 352 U.S. 445, 448 (1957) (Clark, J.) (holding baseball's antitrust exemption inapplicable to professional football). See also Brown v. Pro Football, Inc. dba Washington Redskins, 518 U.S. 231, 233 (1996) (Breyer, J.) (dealing with "the intersection of… labor and antitrust laws" in the context of professional football). Professional basketball and boxing also fall under the purview of the antitrust laws, to name but a few sports. See Haywood v. N.B.A., 401 U.S. 1204 (1971); U.S. v. International Boxing Club of New York, 348 U.S. 236 (1955). Of all the major American sports leagues, only Major League Baseball ("MLB") enjoys an exemption from the antitrust laws. To appreciate the rich but convoluted history of the immunity enjoyed by the National Pastime, see Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 209 (1922); Toolson v. New York Yankees, Inc., 346 U.S. 357, 357 (1953); Flood v. Kuhn, 407 U.S. 258, 282-84 (1972).

[2] __ U.S. __, 130 S.Ct. 2201 (May 24, 2010) (hereinafter "American Needle" at 130 S.Ct.).

[3] See Edmund Morris, THEODORE REX (Random House 2001). In this, the second of three installments chronicling the life of America's twenty-sixth Chief Executive, Roosevelt's preeminent biographer Edmund Morris devotes substantial discussion to President Roosevelt's determination to utilize the still nascent Sherman Act to curb the monopolistic practices then prevalent in the American economy, for instance, Roosevelt's initiation of the groundbreaking Northern Securities case. THEODORE REX, inter alia, at 88-89, 314-316, 427-28; See Northern Securities Co. v. U.S., 193 U.S. 197 (1904) (pluralityopinion), cited by Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 761 n.4 (1984). See also Northern Securities, 193 U.S. at 361 (Brewer, J., concurring in the result) (proposing the Rule of Reason in order to contain the antitrust laws within the walls of rationality in a free enterprise system).

[4] See Anti-Trust Act of July 2, 1890, ch. 647, 26 Stat. 209.

[5] Northern Pacific R. Co. v. U.S., 356 U.S. 1, 4-5 (1958), quoted by N.C.A.A. v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 104 n. 27.

[6] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885-87 (2007).

[7] 15 U.S.C. § 1.

[8] 15 U.S.C. § 2.

[9] 15 U.S.C. § 15(a).

[10] N.C.A.A. v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 98 (1984)(Stevens, J.); State Oil Co. v. Kahn, 522 U.S. 3, 10 (1997); Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (Thomas, J.).

[11] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984), cited by Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553 (2007) (while substantively an antitrust case, Twombly has become the modern age's preeminent holding on the pleading standard for federal cases).

[12] U.S. v. Colgate & Co., 250 U.S. 300 (1919), cited by Copperweld, supra, 467 U.S. at 775-76.

[13] Monsato Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984).

[14] Twombly, supra, 550 U.S. at 555, quoting Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540 (1954). See also Copperweld, supra, 467 U.S. at 769.

[15] See, e.g. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977); Chicago Board of Trade v. United States, 246 U.S. 231, 238-39 (1918).

[16] See United States v. Microsoft Corp., 253 F.3d 34, 82 (D.C. Cir. 2001) (per curiam).

[17] See Continental T.V., Inc., supra, 433 U.S. 36 (1977); Chicago Board of Trade, supra, 246 U.S. 231 (1918).

[18] 221 U.S. 1 (1911).

[19] See Wysocki, "The Progeny of Standard Oil," Wall Street Journal (Wednesday, December 2, 1998) at p. B1 cl. 4. See also Lavelle, "Rockefeller's Revenge," U.S. News & World Report (December 14, 1998) at p. 27 cl. 1 (charting and discussing the disassembly of the Rockefeller empire into the colloquially known "Seven Sisters" of the U.S. oil industry, and detailing how the "merger mania" of the 1990s drove them to reunite, leaving essentially only three surviving siblings (ExxonMobil, BP, and Chevron).

[20] Id. at 1.

[21] Id. at 3.

[22] Id. at 3.

[23] Id. at 3-4.

[24] Id. at 4. Cf. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724-26 (1988) (Rule of Reason presumed to apply in Section 1 cases).

[25] Id. at 4.

[26] Supra, 246 U.S. 231 (1918).

27] Id. at 238, cited by American Needle, supra, 130 S.Ct. at 2217 n. 10. See also Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885-87 (2007); National Soc. of Professional Engineers v. United States, 435 U.S. 679, 688-91 (1978).

[28] American Needle, supra, 130 S.Ct. at 2207.

[29] Id.

[30] Id.

[31] Id.

[32] Id. The NFL is no stranger to antitrust litigation. In addition to the cases cited ante, see, e.g., United States Football League v. N.F.L., 842 F.2d 1335, 1340 (2d Cir. 1988) (affirming the famous jury verdict whereby the NFL, although found guilty of violating the antitrust laws, had to pay only one dollar to the defunct upstart USFL).

[33] Id.

[34]Id., citing American Needle, Inc. v. New Orleans Louisiana Saints, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007), affirmed sub nom., 538 F.3d 736 (7th Cir. 2008), reversed and remanded, supra, 130 S. Ct. 2201 (2010), where Senior District Judge Moran found that "in the jargon of antitrust law…. [the NFL teams] so integrated their operations that they should be deemed to be a single entity."

[35] Id. at 2207-08, citing American Needle Inc. v. National Football League, 538 F.3d 736, 737 and 744 (7th Cir. 2008) (Kanne, J.) (holding intrinsic nature of NFL football "requires extensive coordination and integration between the teams," and thus "the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property"). But compare Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 55-56 (1st Cir. 2002) (Boudin, C.J.) ("Single entity status for ordinarily organized [sports] leagues has been rejected in several [of the] circuits." (summarizing cases).

[36] Id. at 2208.

[37] Of the then-sitting Justices, no one was better suited to the task at hand than Justice Stevens. Before his appointment to the nation's highest court, he was renowned as an antitrust law attorney and scholar. The only other Justice who might have been a worthy candidate to craft this opinion was the by-then-retired Justice Byron "whizzer" White, who was the high Court's only member to have achieved stardom as a collegiate football player. See Biskupic, "Justice Stevens to Retire from the Supreme Court," (April 12, 2010) USA Today. See also Biskupic, "Stevens Ascends to His Final Day on Bench," (June 27, 2010) USA Today.

[38] Id. at 2006. See 15 U.S.C. § 1.

[39] Id.

[40] Id.

[41] Id. at 2206-07.

[42] Id. at 2208.

[43] Id. at 2208-09, citing Copperweld, supra, 467 U.S. at 777 (abolishing so-entitled "intraenterprise conspiracy" theory). See also 15 U.S.C. § 1 and § 2.

[44] Id. at 2209, citing Copperweld, supra, 467 U.S. at 768-69 ("This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.").

[45] Id. at 2209.

[46] Id., citing Copperweld, supra, 467 U.S. at 768.

[47] Id.

[48] Id.

[49] Id.

[50] Id., citing U.S. v. Sealy, Inc., 388 U.S. 350, 353 (1967).

[51] Id. at 2209-10, citing, inter alia, N.C.A.A., supra, 468 U.S. 85 (1984).

[52] Id. at 2210 (footnotes omitted).

[53] Id.

[54]Id. at 211, citing Copperweld, supra, 467 U.S. at 773 n. 21.

[55] Id. at 2211-12.

[56] Id. at 2212.

[57] Id., quoting Copperweld, supra, 467 U.S. at 769. Copperweld was limited to the very narrow question of whether a parent corporation and its wholly owned subsidiary were capable of conspiring in violation of Section 1. Copperweld, supra, 467 U.S. at 767. The Court there declared no, because "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise" for Section 1 purposes. Id. at 771. Noteworthy with regard to better understanding American Needle today, consider the stress by Chief Justice Burger in writing in Copperweld that coordination between a parent corporation and an internal division "does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests," and thus immunizing such activity from Section 1 scrutiny. Id. at 770-71. As we will see, the harmlessness of the parent/subsidiary coordination in Copperweld stands in sharp contradistinction to the joint endeavors of the league and teams in American Needle.

[58] Id. (citations omitted).

[59] Id.

[60] Id.

[61] Id.

[62] Id. In some ways, in writing for the high Court in American Needle, Justice Stevens revives the observation made in his dissent in Copperweld, whereby he questioned absenting two or more corporations from Section 1 scrutiny when "they are controlled by the same godfather." Copperweld, supra, 467 U.S. at 796 (Stevens, J., dissenting). Criticizing that Supreme Court of over twenty five years ago for not confronting the question, Justice Stevens took a step towards answering it in his penultimate opinion as a Justice.

[63] Id. at 2213.

[64] Id. at 2213.

[65] Id.

[66] Id.

[67] Id. (quotations omitted) (emphasis supplied). See also Areeda & Hovenkamp, VII ANTITRUST LAW 2d ed. at ¶ 1478a, at 318 (unquestionably, the most pernicious threats to competition arise when actual or potential competitors join forces in a joint endeavor).

[68] Id.

[69] Id.

[70] Id.

[71] Id. Furthermore, while allowing there is some similarity between the NFL and a single enterprise that owns several pieces of intellectual property which chooses to license them jointly, that outward similarity is wholly undercut here because in "the relevant functional sense" the NFL's constituent teams compete against each other for revenue from intellectual property as much as they vie for dominance on the field of play. Id.

[72] Id. (citations omitted).

[73] Id.

[74] Id. Here, the Court quickly disposed of another of the NFL's defenses, that it had marketed its intellectual property in this unitary fashion for some time. The Court's unanimous rejoinder: "a history of concerted activity does not immunize conduct from [Section] 1 scrutiny." Id. at 2213-14.

[75] Id. at 2214. See, supra, 538 F.3d at 737 and 744.

[76] Id.

[77] Id. (emphasis supplied).

[78] Id.

[79] Id.

[80] Id. at 2214-15. Parenthetically, we acknowledge the Court's observation that the law "generally treat[s] agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits." Id. at 2215. Notwithstanding that convention, the Court allowed that in "rare cases" said presumption must be discarded, such as where intrafirm agreements impact economic interests wholly apart from the firm itself. Section 1 scrutiny is therefore called for when such an intrafirm agreement is merely "a formalistic shell for ongoing concerted action." Id. at 2215.

[81] Id. at 2215.

[82] Id. The Court widened the gap separating NFLP from league members, finding the former to be an instrumentality of the latter, with regard to licensing decisions. Id. Clearly this separation undergirds the holding that the NFL, the teams, and NFLP are actors with distinguishable economic interests, and were taking concerted action in licensing their intellectual property. Id.

[83] Id., quoting Major League Baseball Properties, Inc. v. Salvino Inc., 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring in judgment) (internal quotations omitted).

[84] Id. at 2215-16.

[85] Id. at 2216.

[86] Id.

[87] Id. See also Brown, supra, 518 U.S. at 252 (Stevens, J., dissenting). Presaging his opinion for the majority in American Needle, there Justice Stevens advocated applying the Rule of Reason in benchmarking the NFL's activity vis-à-vis the league's potential for restraining the market.

[88] Id. at 2217.

[89] See N.C.A.A., supra, 468 U.S. at 101-02, quoting R. Bork, "The Antitrust Paradox" 278 (1978).

[90] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933), quoted by Copperweld, supra, 467 U.S. at 774.

[91] As of this writing, recent events in professional football have ordained an extraordinary role for the precedents cited above. See Brady, et al. v. National Football League, et al., 11 CV 00639 (SRN) (D. Minn.), a class antitrust action brought by professional football players against the NFL and its constituent teams, seeking, inter alia, monetary damages and injunctive relief. Complaint at p. 48-50. In pleadings headlining Super Bowl winning quarterbacks Tom Brady, Peyton Manning, and Drew Brees, the players charge the league with engaging in "group boycotts, concerted refusals to deal and price fixing," alleging same as per se violations of Section 1 of the Sherman Act. Complaint at Para. 4, page 3. Most pertinent to this Article, the plaintiffs allege these actions "constitute an unreasonable restraint of trade under the rule of reason." Id. Thus, we witness two of the linchpins of the foregoing discussion as being highly determinative in this new lawsuit. And so, American Needle may yet prove to be the catalyst for a day of reckoning for the NFL and the players.

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