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Supreme Court Clarifies Antitrust Treatment of Joint Ventures

Rejects Standard That Could Have Put Many Ventures Beyond Antitrust Scrutiny

The Supreme Court ruled last week that the actions of a joint venture that joins together separate economic decisionmakers cannot be considered those of a single entity for antitrust purposes under the so-called *Copperweld* doctrine (named after a 1984 Supreme Court decision). Ruling that the decision of a venture established by National Football League (NFL) teams to license team trademarks and logos to only one apparel manufacturer could be challenged as concerted activity under Section 1 of the Sherman Act, the Court held that the teams "do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action," and that the agreement therefore joined together "separate economic actors pursuing separate economic interests . . . such that it deprives the marketplace of independent centers of decisionmaking." In so doing, the Court reversed the Seventh Circuit's ruling that the actions of the venture were immune from Section 1 attack because the teams and the NFL constitute a single entity incapable of agreeing with itself.

The ruling makes clear that the actions of an economically integrated joint venture will be considered under the antitrust rule of reason, and not as a per se illegal agreement among competitors, and that in many cases the reasonableness of a restraint may be determined by a "quick look." Thus, the ruling is not intended to unduly restrict the operations of legitimate joint ventures, which remain a valuable form of business integration. It does, however, make clear that such ventures remain fully subject to antitrust scrutiny.

The Dispute

NFL Properties (NFLP) was established in 1963 by all of the NFL teams to handle the licensing of the intellectual property each owns in its name, colors and logo. Until 2000, NFLP granted nonexclusive licenses allowing vendors, one of which was American Needle, to make and sell caps, jerseys and other apparel with the team insignias. In December 2000, the teams voted to authorize NFLP to grant exclusive licenses. NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams, and terminated American Needle's nonexclusive license. American Needle then sued the teams, the NFL and NFLP alleging that these agreements violated sections 1 and 2 of the Sherman Act.

The Seventh Circuit affirmed the dismissal of the suit on the basis that the teams were not acting as the "independent sources of economic control that competition assumes." The appeals court noted that no single team could put on a football game, and that "NFL teams share a vital economic interest in collectively promoting NFL football . . . [to] compet[e] with other forms of entertainment." Since it followed

"that only one source of economic power controls the promotion of NFL football," the appeals court held that the NFLP venture was properly analyzed as a single enterprise and not as a combination of its members, which meant that the agreement-among-separate-actors element of Section 1 was not satisfied and the case properly dismissed.

American Needle petitioned for review to the Supreme Court and, in an unusual move given that it was the winner below, the NFL cross-petitioned to resolve a conflict in the circuits on the "single enterprise" issue.

The Decision

The Supreme Court decided only the issue whether the NFL defendants were capable of engaging in the concerted activity required under Section 1, or whether their conduct "must be viewed as that of a single enterprise for purposes of §1." (citing *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 771 (1984)). The Court found the defendants capable of entering into such an agreement, but did not consider whether the challenged agreements violated Section 1 as an unreasonable restraint of trade. That must now be decided by the trial court under a rule of reason analysis.

To determine whether the teams, the NFL, and NFLP acted as a single enterprise, the Court engaged in a "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." The Court noted that such a functional approach had led to its holding in *Copperweld* that "an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that Section 1 was designed to police." The question is not whether one or many distinct legal entities are involved, but whether the agreement "joins together independent centers of decisionmaking." NFL teams have a common interest in promoting the NFL brand, "but they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."

In reaching this conclusion, the Court noted that the teams compete to attract fans, for gate receipts and for contracts with managerial and playing personnel. To an apparel manufacturer, each team is a potentially competing supplier of valuable trademarks, and thus in licensing their property the teams are not pursuing the common interests of the whole league, but, instead, the interests of each corporation itself. Although the teams have to work together as a league to create value in each brand, "a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to §1." The need to cooperate is a factor relevant to whether the agreement is lawful or not under a rule of reason analysis, but is not relevant to determining if action is unitary or concerted. In any event, the Court found that "even if league-wide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football."

The ruling with respect to the NFL teams applied to the NFLP as well. Its status as a separate venture did not change the analysis, since if "the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from §1," then any cartel "could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products."

The Court concluded by noting that the venture was not "trapped by antitrust law." "When "restraints on competition are essential if the product is to be available at all," *per se* rules of illegality are inapplicable, and instead the restraint will be judged according to the flexible rule of reason And depending on its nature, the concerted activity may be approved without a detailed analysis; the rule of reason "can sometimes be applied in the twinkling of an eye." For example, here the league's interest in maintaining a competitive balance among teams is "legitimate and important," even if it does not justify treating the teams as a single entity under Section 1 as to marketing of their individually owned intellectual property. Analysis thus depends on the specific nature of the restraint at issue.

Implications

The Court's decision offers a useful clarification of the application to joint ventures of the principles of *Copperweld* distinguishing unilateral from concerted activity. The Court's reaffirmation that economic realities rather than legal formalisms should govern is welcome, but by declining to adopt

any bright line rule as to when joint ventures can be considered a single entity, the Court has apparently concluded that some increase in litigation is an acceptable price to allow fuller analysis of challenged restraints. The result is that joint ventures may face increased litigation as to restraints that are ultimately determined not to have anticompetitive effects. The Court also did not clarify how the rule of reason should be applied to a venture once concerted activity is found. The Court reminded that concerted activity has often been found when competitors were part of professional organizations or trade groups.

The Court did not find it necessary to rule on the position presented by the government (as amicus) that entities should be deemed incapable of conspiring under §1 if they "have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition . . . in that operational sphere" and "the challenged restraint [does] not significantly affect actual or potential competition . . . outside their merged operations." The Court found that the challenged NFL licensing activity would be concerted even under this test, since each entity still owns its own trademarks and is free to market those trademarks as it sees fit. The "effective merger" approach thus might be adopted in different circumstances.

The Court has been more accepting in the past of joint venture activity that must be undertaken by the venture itself or is necessary to its functioning--for example, the pricing of output of a petroleum marketing venture where the venturers had divested their marketing assets to the venture. (*Texaco Inc. v. Dagher* (2006)). Here, the Court's conclusion appears to have been influenced by its view that the joint licensing at issue was not necessary to create and present football games. In any event, the decision makes clear that careful case-by-case analysis is required to determine the antitrust treatment of restraints imposed by joint ventures and that integration will not alone remove joint ventures from the shadow of Section 1.

Finally, where a firm owns more than 50% of a joint venture, it is generally safe to assume that *Copperweld* prevents any claim of conspiracy between that firm and the joint venture. In that situation, there would be a sufficient "unity of interest" to preclude any claim of conspiracy, and nothing in the *American Needle* decision suggests otherwise. (The factual context there was of course very different, for no single team owns more than a small fraction of NFLP.) At the same time, it cannot be assumed that *Copperweld* necessarily would apply to the relationship between the joint venture and firms that own less than 50%, or the relationship between the principals. It might apply, but *as American Needle* demonstrates, that question turns on the specific facts at hand.