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Antitrust Lawyers React To NFL's High Court Loss

Law360, New York (May 24, 2010) -- The U.S. Supreme Court on Monday shot down the National Football League's hard-fought bid for expanded antitrust protection. Law360 asked leading antitrust attorneys to weigh in on the scope and significance of the ruling.

Gerry Alexis

Perkins Coie LLP, partner

This appears to be the first of a long string of decisions over the last six years where the Supreme Court has not cut back substantially on existing antitrust precedent.

Visa and MasterCard must be quaking in their boots.

Daniel Asimow

Howard Rice Nemerovski Canady Falk & Rabkin PC, director

It reads very much like Justice Stevens' swan song on antitrust, and I suspect it was unanimous with no additional opinions because of the justices' respect to Justice Stevens.

Justice Stevens' extensive quotation from Justice Sotomayor's Second Circuit decision in Salvino reads like an attempt to pass the baton on Justice Stevens' relatively practical, pro-plaintiff, less-formalistic approach to antitrust.

The decision recognizes that almost any cartel can be described as a joint venture and refuses to permit the joint action requirement of Section 1 to act as a screen to immunize a whole category of anti-competitive activity.

Rather, the court finds that legality turns on whether the restraint is unreasonable under the rule of reason. Despite Justice Stevens' quote from his own decision in NCAA that the rule of reason "can sometimes be applied in the twinkling of an eye," joint marketing cooperatives may well require substantial analysis under the rule of reason. If the cooperatives are exclusive and have resulted in lower output or higher prices, they will violate Section 1 absent a very compelling justification.

Gary I. Blackman

Levenfeld Pearlstein LLC, partner in the sports law service group in Chicago

The Supreme Court was obviously concerned about the ramifications of allowing powerful umbrella organizations like the NFL to create a legal fiction by arguing, as the NFL did, that it was a "single entity" and could not be accused of conspiring with itself. Justice John Paul Stevens rejected this argument, writing: "Each of the (32) teams is a substantial, independently owned, and independently managed business ... Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that deprive the marketplace of ... actual or potential competition."

The ruling does not end the dispute because it did not rule on whether the NFL could do what it did. That will be left to the lower court who will now need to decide whether the NFL/Reebok deal unreasonably restricts competition. The importance of the ruling, however, goes far beyond the specific issue of whether the NFL can grant a vendor an exclusive license to sell team merchandise. It effects all dealing by the NFL and leaves open the possibility of an antitrust claims and the scrutiny that follows in whatever it does, including in its dealings with its players. Antitrust laws have been a tool for the unions. The players union has always had the threat, for example, that it would disband and sue the league if ever it was locked out. Now, that tool is still in the toolbox.

Barry J. Brett

Troutman Sanders LLP, partner and antitrust practice group leader in New York

Several aspects of this widely anticipated opinion are significant and disappointing. The opinion was written by retiring Justice Stevens for a unanimous court and decided on very narrow grounds. Specifically, the opinion relied largely on the venerable and rarely cited Sealy opinion to decide only that the NFL through its NFL Properties entity was not a single entity immune from Sherman Act § 1 scrutiny in connection with the marketing of products bearing the logos of the various teams. How antitrust rules apply to other aspects of the activities of the NFL (and other leagues or groups) is not resolved. The court did not expand or clarify the law of joint ventures, although that was the focus of the oral argument and much discussion.

As a result of the narrow ruling, the opinion does not provide the parties or the legal community with the guidance the parties hoped to secure. In an unusual step, the NFL had urged the court to decide the case even though it prevailed in the lower courts, and the NFL now faces a trial in this case brought by a company which was no longer able to market team logo products as a result of an exclusive agreement between NFL Properties and Reebok. The outcome of that trial is not resolved by this opinion. Other sports leagues had supported the NFL's requests for broad immunity from suit, hoping for a ruling that a sports league was a single entity and could not be found to be a conspiracy among its teams in dealings with others.

Perhaps the greater significance of the opinion will turn out to be that it breaks a string of well over a dozen cases, over almost 20 years, involving substantive antitrust rules, which were all decided in favor of the antitrust defendants.

Thomas Brown

O'Melveny & Myers LLP, partner and financial services practice member

The dispute involved a single question: whether the National Football League and its 32 separately owned and operated teams act as a single entity when licensing team trademarks and logos. The court's decision unanimously answers that question "no," but it leaves unanswered the larger question of what conduct, arising in the context of a lawful joint venture, violates Section One of the Sherman Act.

In the end, this much-anticipated decision stands for an utterly unremarkable proposition: that joint action among competitors (or potential competitors) is joint action among competitors (or potential competitors) and, thus,

subject to scrutiny under Section 1 of the Sherman Act. For those who hoped this decision would provide useful guidance on how to engage in concerted action without running afoul of the antitrust laws, it falls well short of the end zone.

Beau Buffier

Shearman & Sterling LLP, antitrust partner

This is a big fumble for the NFL. The decision clearly spells the end of the 'single entity' defense for sports leagues. Beyond that, the decision doesn't break any new ground in Section 1 jurisprudence ... nor does the court offer any suggestions as to how the NFL's licensing practices should be addressed under the rule of reason — it simply remands the case back to the lower court. So all in all, it's not a particularly adventurous or enlightening decision by the court, but it is a definite setback for the NFL and other sports leagues.

Richard H.C. Clay

Dinsmore & Shohl LLP, partner

This is an important and greatly anticipated Sherman Section 1 case, and it is no surprise that the unanimous opinion is authored by Justice Stevens, the court's leading antitrust authority. The importance of the opinion is in its holding that joint ventures — here one among the 32 NFL teams comprising the unincorporated association known as the NFL — are not categorically beyond Section 1 coverage. The court applies a functional analysis which expands the scope of its opinion in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, and holds that the inquiry is whether the agreement in question joins together "separate economic actors pursuing separate economic interests," such that it "deprives the marketplace of independent centers of decision-making."

If this occurs, then according to the court, concerted action covered by Section 1 exists, and a court must decide whether the restraint of trade is unreasonable and consequently illegal. Recognizing that some restraints on competition are necessary to produce the NFL's product, the court held that rule-of-reason analysis should apply on remand. This will be the last of a series of significant antitrust cases authored by Justice Stevens as he approaches retirement. It seems fitting that it arises from the world of professional sports, one of his greatest interests. It is also interesting to note that he quotes as authority a concurrence by then-Second Circuit Judge, now Justice, Sonia Sotomayor, in Major League Baseball Properties Inc. v. Salvino Inc., 542 F.3d 2990, 335 (2nd Cir. 2008).

Makan Delrahim

Brownstein Hyatt Farber Schreck LLP, shareholder in litigation and government relations departments and former deputy assistant attorney general

This was a welcome surprise opinion from the Supreme Court given some of its recent rulings.

The court, which in my view erred several years ago by expanding implied immunity from the antitrust laws in the CF First Boston case, struck a proper balance in deciding that the antitrust laws do apply in certain business dealings.

I would think the implications of this decisions is yet to be analyzed and could have real implications for the business of baseball as well as other business-oriented associations. Certainly, had the court gone the opposite direction, it would have had serious consequences for consumers.

David Evans

Chadbourne & Parke LLP, antitrust partner in the Washington office

The decision could have been significant if the court had found that Section 1 did not reach the activity of which American Needle complained. If the court had found for the NFL, it would have gutted Section 1 enforcement. Any time a group of competitors wanted to conspire, they could form a joint venture company. The court did not do that; the law remains basically the same.

Kenneth L. Glazer

K&L Gates LLP, antitrust partner in the Washington office

First, the ruling breaks a long winning streak for antitrust defendants in the Supreme Court. So it is remarkable on that score alone. Although the rule sought by the NFL was somewhat extreme, in light of this recent history it was not unreasonable to believe it could have obtained a majority of the votes on the court.

Second, the impact goes beyond sports leagues and will inform the analysis of joint ventures more generally. The court makes clear it will look at the economic substance of the venture and of the restraint at issue. The decision contains several warnings that a cartel can call itself a corporation, a joint venture, or a single entity but still be a cartel. It does not create any new doctrine or extend or overrule any important precedents, though it does offer some helpful discussion of Copperweld.

Third, the court does not provide any kind of bright-line test and seems to accept that some increase in litigation might be the price of assuring that harmful restraints are not immunized.

Jerome Hoffman

Holland & Knight LLP, partner

Sometimes appellate courts make things more difficult than they have to — this was such a case for the Seventh Circuit. Fortunately the Supreme Court got it righted. The fact that the court was unanimous in reversing illustrates how far wrong the Seventh Circuit's decision was. While the teams in any league have a common economic interest in promoting their sport over other sports and over other forms of entertainment, the boundaries of those shared interests are not limitless.

As Justice Stevens correctly points out, the teams compete for a wide variety of things: fans, players, coaches, sponsors and other related income streams. They share television revenues and gate receipts because those directly relate to the sport itself. Selling team apparel is not related to any shared economic interest and team might be able to sell its logo and another team not for a variety of reasons unrelated to how the team plays on the field. Clothing with the Raiders logo on it enjoyed what became an embarrassing popularity among gang members in Los Angeles in the 1980s and early 1990s that was far out of proportion to their mediocre performance on the field during those years, while other teams who enjoyed greater-on-the field excess during those years, like the Buffalo Bills with four straight Super Bowl appearances from 1990 to 1993, had a much harder time selling apparel.

The court's discussion of Copperweld and the need under Section 1 to examine the substance of the relationships between separate entities rather than the form they take is mainstream antitrust law. It should not have taken a trip to the Supreme Court to figure this out.

Jonathan Jacobson

Wilson Sonsini Goodrich & Rosati PC, antitrust partner

The Supreme Court's decision today is notable in that it was unanimous, represented the first plaintiff "win" in the Supreme Court since the Kodak decision in 1992, and was written by the court's most experienced antitrust jurist, Justice Stevens, in what is likely his antitrust swan song. In terms of business impact, the decision eliminates an artificial device some joint ventures had attempted to use over the past several years to avoid any review of the venture's collective activity. Had the court ruled otherwise, some significant restraints of competition might have been wholly immune from substantive antitrust review. The court rejected this view in favor of one that will permit inquiry into the effect of joint arrangements on competitive conditions.

Christopher Kelly

Mayer Brown LLP, antitrust and competition partner in the Washington office

At the ballpark, Turn-Back-the-Clock Day is fun, not least because everybody knows it's just for today — the awkward 1920s flannels or goofy 1970s double-knits are just for one nostalgic afternoon. But when the Supreme Court goes back in time like it did today in American Needle, the clock stays turned back — and prices go up, not down.

In holding that the National Football League's trademark licensing activities are concerted action subject to Section 1 of the Sherman Act, the court seems to suggest that virtually every significant act of a joint venture of actual or potential competitors should be analyzed as concerted action. The court ignores what seems to be a directly contrary holding just a few years ago in Dagher; instead, it relies on its widely criticized 1972 decision in United States v. Topco Associates, which condemned per se a joint venture among independent supermarkets to develop and market private-label foods.

Ultimately, the decision probably won't mean antitrust liability for many more joint ventures. The court is careful to remind everyone that lots of restraints on competition are justifiable when they're in support of a joint venture. But the decision will mean lots of added legal expense and uncertainty for joint venture participants as Section 1 investigations and litigation force them to justify conduct that would never raise concern under Section 2.

Michael A. Lindsay

Dorsey & Whitney LLP, antitrust practice group chair

It was a little disturbing to see the court favorably citing both Topco and Sealy. But the court cites those cases for the proposition that an agreement among competitors in a joint venture is not immune from challenge under Copperweld. The court's discussion of the rule of reason — and its favorable citation of Broadcast Music — should dispel any notion that the court was reviving the per se analysis of Sealy and Topco.

Ryan W. Marth

Robins Kaplan Miller & Ciresi LLP

The court's decision in American Needle is significant for many reasons. First, the decision will be the last in a series of decisions from Justice Stevens — starting with the Professional Engineers decision in 1978 — that will shape how the antitrust laws apply to collaborations among competitors for years to come. Secondly it was a thorough and unanimous decision from an ideologically divided court on an issue — the application of Section 1 to joint ventures — that has been hotly debated within the antitrust community over the past several years. The fact

that all nine justices signed on to such a broad pronouncement of the law shows just how important it was for the court to clarify the law in this area.

Thirdly, and perhaps most significantly, the court squarely rejected many of the arguments that defendants have put forth in recent cases to attempt to insulate agreements within joint ventures from Section 1. For example, the court held that, even within a "legally separate entity," agreements among actual or potential competitors will be subject to Section 1 scrutiny. And the court rejected the notion that once competitors create a "new product," agreements among those competitors are insulated from Section 1. In short, the court has been telling us for the past 20 years that antitrust looks to the effects of agreements rather than to their form, and now the court backed up that language with an important victory for the plaintiff.

James T. McKeown

Foley & Lardner LLP, national antitrust practice head and member of the firm's litigation department and sports industry team

The case should not be overread because the Supreme Court was not asked to decide — and did not decide — whether the NFL's decision to grant an exclusive license to Reebok and not to renew American Needle's license violated the Sherman Act. What the court noted at the outset was that it was deciding only the "narrow issue" of whether the NFL teams should be viewed as a single economic entity such that Sherman Act § 1 could never apply to their conduct.

American Needle still must prove a rule of reason case to establish liability by the NFL. The Supreme Court remanded for consideration under the Rule of Reason and noted that the need for teams to cooperate to produce NFL football and the league's "legitimate and important" interest in ensuring competitive balance would be relevant to the rule of reason inquiry.

To prevail on a rule of reason case on remand, American Needle will need to prove, among other things, that the NFL has market power in a market for licensing the use of trademarks and other intellectual property. That task may prove very difficult given the number of other potential brands and marks that are available for licensing.

Salil Mehra

James E. Beasley Professor of Law at Temple Law School and a former lawyer with the Department of Justice's Antitrust Division

Section 1 of the Sherman Act penalizes agreements among competitors that restrain trade. The NFL sought an immunity — which it didn't get — arguing that the teams were effectively a single entity and therefore couldn't make an illegal agreement. The court rejected this argument, which could have provided antitrust defendants with an exception that would swallow the rule.

However, it is a kind of line-in-the-sand victory. Although plaintiffs have lost numerous section 2 (monopolization cases), this opinion suggests that Section 1 — the core of antitrust — is still beyond the pale.

Rule of reason standard may still be winnable for the NFL. While they don't get an immunity, they get a chance to argue that anti-competitive benefits of joint NFLP licensing outweigh anti-competitive harms. If they lose, NFL faces a choice: license separately or fully merge.

Kendall Millard

Barnes & Thornburg LLP, antitrust partner in Indianapolis

The Supreme Court lowered the hurdle for proving joint action where otherwise economically separate actors combine for a joint purpose. If the combination is necessary to effect a pro-competitive end, it may be justifiable and perfectly legal under the antitrust laws, but that does not convert the actors into a single entity if they would have divergent economic interests in other respects.

The application of the decision will reach far beyond the NFL and the sports context, as the court set forth a practical framework for analyzing concerted action that would be applicable to joint ventures, trade association actions, and any other combination of actors with diversity of economic interests.

Ben Mulcahy

Sheppard Mullin Richter & Hampton LLP, sports industry team chair

By appealing the lower court ruling and seeking a broader antitrust exemption, the NFL gambled and lost. Although the NFL may end up winning this case on the merits on remand, this ruling will necessarily affect how the NFL and every other major sports league other than Major League Baseball, which enjoys a historical antitrust exemption that gives it greater latitude than the other professional sports leagues, negotiates league-level agreements with all sorts of licensees, not just in the apparel category.

Mark Nelson

Cleary Gottlieb Steen & Hamilton LLP, partner

The court's decision to open the NFL teams' collective action to possible review will not likely change the legal landscape significantly.

Barry Pupkin

Squire Sanders & Dempsey LLP, economic regulation practice head

The National Football League is probably regretting that it did not settle this case.

The NFL was trying to get the court to say that it was a single entity, incapable of conspiring.

In fact, the court said the teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel.

The court said that the leagues are not trapped by this reasoning. It said that in some instances cooperation is necessary. The teams must cooperate to produce the game and to schedule the game.

That was not like the conduct at issue in this case. Directly relevant to the case, the court said that the "teams compete in the market for intellectual property." To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks.

The case will go back to the federal court to be tried consistent with the decision. I suspect the NFL will have a hard time winning.

Bruce Schneider

Stroock & Stroock & Lavan LLP, partner

The court's holding that the teams' shared interest in making the league more successful or profitable is, at best, a pro-competitive justification under the rule of reason that may change how competitor collaboration cases get litigated. By taking a more restricted view of what constitutes unitary action by a group of potential competitors, the decision makes the litigation of these cases more complex, and it could be more difficult for defendants to obtain an early disposition. It remains to be seen whether lower courts become more accepting of the "quick look" rule of reason analysis that the court reminds us is available.

James Smith

Bryan Cave LLP, antitrust partner in the Phoenix office

Returning the case to the lower courts does not mean that the NFL's licensing agreement necessarily violates antitrust laws, but it could be a long and costly legal process to get an answer to that question.

Wendell L. Taylor

Hunton & Williams LLP, global competition practice partner

The fact that the decision was unanimous is a clear sign of the court's reliance on the two major signposts — Copperweld and Sealy — which both stand for the proposition that the substance of the economic transaction is more important than the form. Despite the structure of the NFL, its member teams necessarily competed against each other for licensing revenues.

Rod Thompson

Farella Braun & Martel LLP, partner in commercial litigation, intellectual property and antitrust practices

The American Needle decision is noteworthy for several reasons. It is the first Supreme Court decision in almost 20 years to side squarely with the plaintiff in an antitrust case. And it is a unanimous decision, which is increasingly rare with this often-fractured court. Finally, it is authored by retiring Justice Stevens, a potentially significant decision (albeit of relatively narrow impact) in the area of law — antitrust — where he was best known prior to joining the court more than 35 years ago.

The direct impact of the decision is narrow — the NFL is not "categorically" immune from all Section 1 antitrust claims. The decision allows the case to proceed under the rule of reason (but not on a pre se theory) because as a matter of "competitive reality" the "teams compete in the market" for intellectual property. While the holding should be limited to professional sports leagues, several phrases in the decision may be of more general use: "An ongoing Section 1 violation cannot evade Section 1 scrutiny by giving the ongoing violation a name and label," and "a history of concerted activity does not immunize conduct from Section 1 scrutiny."

Drew Tulumello

Gibson Dunn & Crutcher LLP partner who represents the NFL Players Association

The decision is significant because it makes crystal clear that the NFL does not get a free pass under the Sherman Act. This was a test case — the NFL won below but still supported review in the Supreme Court. Had the NFL

prevailed, we likely would have seen attempts by the NFL to expand its purported immunity under Section 1 to cover new areas, such as ticket pricing, television viewing, or perhaps the terms of free agency. The decision will serve as a constraint on the league, which is particularly important as the league and union move deeper into discussions over a collective bargaining agreement.

Robert Wierenga

Miller Canfield Paddock & Stone PLC, principal specializing in antitrust and sports litigation

The Supreme Court's decision is likely to make it easier for sports leagues to fend off antitrust challenges to their rules. American Needle broadly reaffirms the court's prior rulings that the 'special characteristics' of sports leagues 'may provide a justification for many kinds of agreements' among their members and that sports' league rules cannot be condemned as per se violations of the Sherman Act.

Indeed, the court went farther and stated that “essential” sports league rules are not only “likely to survive the rule of reason” inquiry, but that courts may often be able to dispose of antitrust challenges to such rules without conducting a detailed analysis. The court also recognized that sports league interest in matters such as maintaining competitive balance “is legitimate and important” and is “unquestionably an interest that may well justify a variety of collective decisions made by the teams.”

These holdings will, at a minimum, make it easier for sports leagues to win quick victories in antitrust cases brought over rules on matters such as scheduling, eligibility, permissible equipment and the like.

Quentin R. Wittrock

Gray Plant Mooty, antitrust and trade regulation team co-chair

The Supreme Court's decision is remarkable in several ways. Most notably, this is the first ruling in many years in which an antitrust plaintiff has prevailed in the high court, as this case departs from the pattern of the Supreme Court reversing decisions that had gone against defendants.

The case also can be seen as cementing Justice Stevens' antitrust legacy, in that he is retiring after this term.

A third notable aspect of the decision is its unanimity; not only did the plaintiff prevail, but it did so unanimously.

Beyond those immediately noticeable points, the logic and reasoning of the ruling also could have profound effects. If the court can reject the argument of the NFL and its teams that they are immune from Section 1 because they act together (a plausible argument given that no team can survive alone), then joint ventures of all types could be subject to antitrust scrutiny.

Future analysis will be under the rule of reason, and other defendants ultimately may still win, but plaintiffs will be more encouraged to attack collaborative efforts, and courts will be more reluctant to dismiss such cases.