NFL v. NINTH INNING, INC. – SHOULD SECTION 1 APPLY TO JOINT VENTURES' DECISIONS ON DISTRIBUTION OF THEIR NEW PRODUCTS?

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CPI ANTITRUST CHRONICLE
NOVEMBER 2020

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I. INTRODUCTION

When the Supreme Court denied certiorari in *National Football League v. Ninth Inning, Inc.*, No. 19-1098, 592 U.S. ___ (Nov. 2, 2020),[2] the immediate upshot was that the antitrust challenge to the NFL's centralized distribution of game telecasts would proceed. The denial of cert left intact the Ninth Circuit's decision that the plaintiffs' complaint against that distribution system and the league's decision to license out-of-market game telecasts exclusively in the United States through DirecTV's Sunday Ticket package alleged facts sufficient to survive a motion to dismiss. See *In re National Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136 (9th Cir. 2019). An accompanying statement from Justice Kavanagh, however, suggests that the case might meet a very different fate should it return after a judgment on the merits. Noting blandly that "denial of certiorari should not necessarily be viewed as agreement with the legal analysis of the Court of Appeals," Justice Kavanagh then cut the legs out from under[3] plaintiffs' entire case, which "appears to be in substantial tension with antitrust principles and precedents." 592 U.S. at ___ (slip op., at 2). In particular, Justice Kavanagh points out, "antitrust law likely does not require that the NFL and its member teams compete against each other with respect to television rights." *Id.*[4]

II. THE QUESTIONABLE APPLICABILITY OF SECTION 1 TO JOINT VENTURE PRICING OF NEW JOINT VENTURE PRODUCTS

Justice Kavanagh's observation, which goes not to whether plaintiffs adequately pled a rule of reason claim but rather to whether such a claim could exist at all against the NFL's distribution of game-telecast rights, appears to pick up on the central point of an amicus brief that a distinguished group of antitrust economists (the "Economists") submitted in support of the NFL's cert petition.[5] While the brief supported the NFL's argument that the plaintiffs had failed to allege facts sufficient to plausibly support a rule of reason claim under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, it identified a more fundamental economic problem with the plaintiffs' case: the only competition that the allegedly anticompetitive agreement restrained was *ex post* competition – competition that existed only by virtue of the creation of the joint venture product, NFL Football. Consequently,

2 Available at https://www.supremecourt.gov/opinions/20pdf/19-1098_j426.pdf.

3 Here and throughout this article, the reader is welcome to replace the printed text with any number of football clichés. Because, for many readers, one sports pun is one too many, the author has chosen not to risk outkicking his coverage, except in this sentence.

4 Justice Kavanagh also points out that the plaintiffs, as indirect purchasers of the NFL telecasts, "may not have antitrust standing to sue the NFL and the individual teams." *Id.*

5 Brief of Expert Antitrust Economists as *Amici Curiae* in Support of Petitioners, Case No. 19-1098 (April 8, 2020) ("*Amicus* Br."), available at http://www.supremecourt.gov/DocketPDF/19/19-1098/141187/20200408154828856_19-1098acExpertAntitrustEconomists.pdf. The author is counsel of record for the Economists, but this article reflects his own views, not necessarily those of the Economists.

this case presented an opportunity for the Supreme Court to confirm for once and for all that, as the economists put it, "a venture that creates a venture product – which no venture member has created, or can create efficiently, by itself – may control how to distribute and sell the venture product *without implicating Section 1*." *Amicus* Br. at 1-2 (emphasis added).

As the brief explains, a joint venture's decisions on how to distribute its venture product should not be subject to Section 1 scrutiny because, by definition, they cannot affect "the proper concern of U.S. antitrust law: *ex ante* competition among the venture members" – the competition that existed or was reasonably likely to exist absent the joint venture. *Id.* at 2. In this case, because NFL Football exists only by virtue of the NFL joint venture, the same is true as to the telecasts that distribute the NFL Football product worldwide. Without the NFL joint venture, there would be no NFL Football telecasts. There is thus no *ex ante* competition as to NFL Football telecasts that a decision on how to make telecasts available could affect.

In contrast, the Economists point out, subjecting a joint venture's distribution decisions to Section 1 scrutiny imposes a real cost on venture formation, one that inevitably discourages the efficient and procompetitive joint ventures that U.S. antitrust law means to encourage. In particular, discouraging ventures from controlling the distribution of their products through the possibility of antitrust liability makes them vulnerable to free riding by individual members, meaning that ventures and their members are less able to ensure that they capture the value that their investments have created. The inevitable result of this vulnerability to self-destructive free riding is diminished incentives to invest in joint ventures that are necessary to develop and produce products that individual firms cannot.

Although one will not find the Economists' proposed rule stated in the case law with such clarity, it is not a new idea. To the contrary, it is inherent in the notion that the antitrust laws do not create liability for not creating as much competition as one might have. See, e.g., *United States v. Westinghouse Elec. Corp.*, 648 F. 2d 642, 648 (9th Cir. 1981) (affirming dismissal of Section 1 claim based in part on license of non-U.S. patents but not of U.S. patents; "no court has held that a patentee must grant further licenses to potential competitors merely because he has granted them *some* licenses") (emphasis added). If one brings a product to market, the antitrust laws do not create liability for decisions on how to price the product, where to sell it, to whom to sell it, or at what quality level to design the product. Those decisions do not implicate *ex ante* competition. Thus, the Antitrust Division/FTC IP licensing guidelines state that "[t]he Agencies ordinarily will not require the owner of intellectual property to create competition in its own technology," and thus hold IP owners liable for not licensing as broadly as they could. *Antitrust Guidelines for the Licensing of Intellectual Property* § 3.1 (rev. 2017).[6] Rather, the agencies concern themselves with whether licenses "harm[] competition among entities that would have been actual or potential competitors . . . in the absence of the license" — *ex ante* competitors. *Id.* The agencies' 2000 competitor-collaboration guidelines do not offer such a broad assurance. To the contrary, they suggest that the agencies may separate joint ventures and other collaborative relationships into multiple "relevant agreements" and analyze each individually. *Antitrust Guidelines for Collaborations Among Competitors* § 2.3.[7] At the same time, they recognize that in some instances, what might otherwise be considered separate "relevant agreements" are "so intertwined that they cannot meaningfully be isolated," and thus are analyzed together. *Id.* That this approach may extend to fundamental distribution decisions as to a jointly produced product is evident in one of the Guidelines' examples, in which a joint venture "to jointly develop and market" a new product, "with expenses and profits to be split equally," is "an efficiency-enhancing integration of economic activity that promotes procompetitive benefits" — antitrust-speak for "okay" — without any suggestion that the joint marketing and cost-and-profit sharing threatened any competitive harm. *Id.* Example 6.

Similarly, the rule the Economists' brief proposes has been implicit in federal antitrust case law of the last several decades. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979), the Court recognized the absurdity of treating BMI's pricing of a blanket license, combining its members' disparate music performance rights into a new composite product, as price fixing by its members, observing that "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." Indeed, "the agreement on price is necessary to market the product at all." *Id.* at 23. The Court reiterated the point in Texaco, *Inc. v. Dagher*, 547 U.S. 1, 6 (2006), concluding that a joint venture's distribution decisions as to its joint product are generally no different from a single firm's decisions as to its own product – those decisions are not "restraints in the antitrust sense."

By contrast, in *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010), the Court showed what kind of products do *not* merit that approach: products that, like the teams' separately-owned logos and other intellectual property, exist separately from, and possibly even predate, the venture product and can be sold in competition with other venture members without undermining the venture. In fact, a

6 Available at https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.

7 Available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

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deconstruction of the Court's articulation of the "relevant inquiry" as to whether the joint team-IP licensing was "concerted action" subject to Section 1 shows that the Court's ultimate concern is exactly that of the expert Economists. The inquiry, the Court said, was "[1] whether there is a 'contract, combination, . . . or conspiracy' amongst 'separate economic actors pursuing separate economic interests,' . . . *such that* [2] the agreement 'deprives the marketplace of independent centers of decision making,' *and therefore* [3] of 'diversity of entrepreneurial interests,' *and thus* [4] of actual or potential competition." 560 U.S. at 195 (citations omitted and emphasis added). That "actual or potential competition" of which the agreement would "deprive[] the marketplace" (*id.*) is, of course, *ex ante* competition. Indeed, the Court confirms this in citing Professor Hovenkamp's observation that the "'central evil addressed by Sherman Act § 1'" is the "'elimin[ation of] competition that would otherwise exist.'" *Id.* (quoting 7 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1462b, p. 193–194 (2d ed. 2003)). In other words, the ultimate reason that the NFL teams' joint IP licensing is "the sort of 'combination' that section 1 is intended to cover" is not that it "deprive[d] the marketplace of independent centers of decision making" (560 U.S. at 195), but because it therefore affected *ex ante* competition — "the proper concern of U.S. antitrust law" (*Amicus* Br. at 2).

Thus, the Economists' simple question of whether *ex ante* competition is at risk is exactly *American Needle's* "relevant inquiry," except that it cuts to the chase, clearing out the single-firm-or-multiple-firm intermediate steps that can drive readers of *Dagher* and *American Needle*, especially in tandem, to despair. Perhaps Justice Kavanagh had something like this in mind when, just after saying that "antitrust law likely does not require that the NFL and its member teams compete against each other with respect to television rights," he cited *American Needle* for comparison. See 592 U.S. ___ (slip op., at 2) (citing *American Needle*, 560 U.S. at 202). In drawing that comparison, Justice Kavanagh appears to be making precisely the Economists' point. In *American Needle*, unlike with telecasts and with the underlying games, ex ante competition was at stake, and thus Section 1 had a role to play.

The same point is evident even in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984). Considering the NCAA's output controls over telecasts of college football games, the Court had little doubt that Section 1 applied: "there can be no doubt that the challenged practices of the NCAA constitute a 'restraint of trade' in the sense that they limit members' freedom to negotiate and enter into their own television contracts." *Id.* at 98. But football is hardly the only college sport on television, particularly in March. The telecasts of other NCAA sports were not before the Court, of course, but the Court's reference to them suggests that there would be little cause for antitrust concern. Noting that the NCAA "has not undertaken any regulation of the televising of [non-football] athletic events," the Court adds offhandedly that "Presumably, however, it sells the television rights to events that the NCAA itself conducts." *Id.* at 87 and n.2. That is the end of the discussion. If those centralized sales, which would seem to resemble the NFL's distribution of television rights, presented any potential of a Section 1 issue, would the Court ever have mentioned them so matter-of-factly? That the NCAA's centralized television-rights activity as to the events that it created did not even warrant a caveat of some kind — e.g. "but that is for another day" — suggests that the Court realized that the centralized dissemination of television rights for events the NCAA produced — like NFL Football — simply did not raise a potential issue; it was no more than the sale of a product.

III. CONCLUSION

If the NFL and DirecTV eventually need to take Justice Kavanagh up on his invitation to "raise [their] legal arguments again in a new petition for certiorari, as appropriate" (592 U.S. at ___ (slip op., at 2)), the Economists' core point may be back before the Court along with other issues that arise under the rule of reason. And at that point, perhaps we will see whether the point resonates with the entire Court as much as it seems to have with Justice Kavanagh. In the meantime, possibly other courts, including the district court and the Ninth Circuit in this case, will have a chance to enrich antitrust case law with their analysis of whether Section 1 should apply to joint ventures' distribution decisions as to their jointly developed new products.

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