NEW DEVELOPMENTS

Seventh Circuit Refuels Wisconsin Gasoline Minimum-Markup Law

On September 3, the Seventh Circuit overturned the district court’s decision in Flying J v. Van Hollen that ruled that the Wisconsin Uniform Sales Act was preempted by Section 1 of the Sherman Act. The Wisconsin law requires gasoline wholesalers to sell to retailers at prices that include state-imposed minimum markups. Flying J, a gasoline retailer, challenged the law as being preempted by the Sherman Act, arguing that it had the effect of facilitating horizontal price fixing among wholesalers, and therefore was inconsistent with the Sherman Act’s promotion of price competition. The district court agreed and issued an injunction against the enforcement of the law. In reversing, the Seventh Circuit reasoned that state statutes violate the Sherman Act only when they facilitate private collusion. The Wisconsin statute, by contrast, mandated a fixed price, which in the court’s view left no discretion to private actors. The court therefore rejected the facial challenge to the Wisconsin law but did not foreclose the possibility of future suits that allege actual collusion among gasoline wholesalers.

Congress Takes Steps to Bar Reverse Payment Pharmaceutical Settlements

The House passed legislation restricting “reverse payment” settlements in pharmaceutical-patent litigation and the Senate attached similar legislation to a pending financial bill. In a typical reverse payment settlement, litigation over a patent is settled with a payment to a generic manufacturer in exchange for it dropping a challenge to a pharmaceutical patent. Under the new legislation, the FTC would have authority to initiate a proceeding against parties to any agreement settling a patent dispute and deem presumptively anticompetitive any reverse payment patent settlement unless the parties to the agreement demonstrate by clear and convincing evidence that the competitive benefits of the agreement outweigh anticompetitive effects. Similar legislation has been introduced in the past but has never reached a vote in either chamber.
NEW DEVELOPMENTS CONTINUED

California Supreme Court Finds No Cartwright Act Pass-On Defense in Clayworth v. Pfizer

The California Supreme Court held that the Cartwright Act, California’s state antitrust law, does not generally allow a pass-on defense. Exceptions for “cost-plus” contracts and to avoid duplicative recovery remain, though the Court did not address them in detail.

In Clayworth the plaintiff pharmacies alleged that the defendant pharmaceutical manufacturers conspired to keep prices high. The plaintiffs were, according to the defendants, able to pass on the additional cost to their customers. In federal antitrust law the “pass-on” defense was rejected by the United States Supreme Court in Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968). But the California Appeals Court ruled that California law did allow the pass-on defense.

After the California Supreme Court overturned the appeals court in Clayworth, the California state antitrust law is now largely consistent with federal law on the question of a pass-on defense. The state law is different, however, with regard to the “indirect purchaser” rule. Under Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), federal law generally bars the indirect purchaser of a good or service from recovering against the antitrust violator. In California, Illinois Brick was repealed by statute, meaning that both the direct purchaser and the indirect purchaser may have standing to recover (in the Clayworth case, the pharmacy and its customers). California now joins Minnesota as the only states that allow indirect-purchaser suits and prohibit the pass-on defense.

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The Clayworth decision notes that the repeal of Illinois Brick creates the potential for duplicative recovery as both the pass-on plaintiffs and the indirect purchasers could sue. Clayworth suggests, however, that avoiding duplicative recovery may be achieved by joinder, interpleader, consolidation, and other procedural means to bring all claimants before the court and allocate damages between different direct and indirect purchasers.

Also of interest in this case is a question of standing. The defendants argued that the passing on of overcharges defeated the plaintiffs’ standing under the Cartwright Act, which requires that a plaintiff must have lost money or property. The court found that even if the plaintiffs mitigated any injury by passing on increased costs, they are still entitled to remedy because their initial loss at the time of overcharge met the standing requirements of the Cartwright Act. Separating the right to injunctive relief from the right to financial compensation, the California court found that the plaintiffs were entitled to seek injunctive relief even if they could not seek restitution due to their successful mitigation of their damages.

Clayworth shows that California law is generally consistent with federal law on the question of a pass-on defense. The exceptions to this rule in California for cost-plus and duplicate recovery cases may provide solace to defendants who may have feared duplicative payouts to direct and indirect purchasers under the Cartwright Act.
Over the course of three decades on the Court, Justice John Paul Stevens played a significant role in the development of antitrust law. Before his time on the Court, he was a successful antitrust trial lawyer, then a judge on the Seventh Circuit Court of Appeals beginning in 1970, where he heard and authored several antitrust decisions. Justice Stevens authored many significant antitrust decisions during his term as a Justice, and has filed separate concurrences and dissents in others. These separate writings, though not backed by a majority at the time, have still managed to influence later decisions that govern antitrust analysis today.

Justice Stevens’ skillful subtlety and common-sense approach to antitrust law made his writings especially influential.

This article will focus on two areas in which Justice Stevens made a particularly strong mark on antitrust law: standing and joint ventures. Of course, Stevens’ significant antitrust decisions are not limited to these antitrust issues. His opinion in Aspen Skiing Co. v. Aspen Highlands Skiing Corp. dealt with the circumstances in which a monopolist is required to cooperate with its competitors. This doctrine, referred to as the “essential facilities” doctrine, had seen little attention since the 1912 decision U.S. v. Terminal Railroad, which established that, when an “essential facility” in the market is controlled by less than the entire market of competitors, the market players in possession or control of that facility must allow other competitors to participate in ownership and control of that facility. Justice Stevens, writing for the majority, set forth the principle that, while a monopolist has no general duty to cooperate with its competitors, the right not to cooperate is not unqualified.

In 1982, Stevens authored a dissent in Blue Shield of Virginia v. McCready. The following term, he authored the majority opinion in Associated General Contractors of California, Inc. v. California State Council of Carpenters, which incorporated the principles behind his dissent in McCready into the test for standing in an antitrust action.

In McCready, the plaintiff sued her health-insurance provider over its policy of reimbursing treatment received from psychiatrists but not from psychologists. McCready alleged that she was injured when Blue Shield refused to reimburse her for clinical-psychology treatment. The majority set forth the test for standing as an examination of the nexus between the alleged violation and the harm to the plaintiff, and whether the injury claimed is the type that Congress was concerned with when it made that conduct unlawful. The Court held that McCready did have standing to sue for an antitrust violation under this test.

Justice Stevens dissented, concluding that McCready was not injured “in her business or property by reason of anything
Justice Stevens emphasized that the consumer of medical services has a choice, and that this choice limits the injury suffered as a result of the restriction set by the insurance company. Under Justice Stevens’ analysis, even going to a psychologist and not receiving reimbursement is not sufficient to establish injury, because he or she will still have received therapeutic services that “presumably were worth the payment.” Ultimately, he argues that McCready did not suffer an injury to her property “by reason of the restriction of insurance coverage to psychotherapeutic services performed by psychiatrists.”

In American General Contractors the following term, Justice Stevens wrote for the majority, and set forth the issue presented in the same manner he did in his dissent in McCready. Associated General Contracting is a critical antitrust standing decision because of the five-factor test Justice Stevens subtly advanced in the opinion, which has now become the critical standard for determining standing in antitrust actions. These five factors include (1) causation between the antitrust violation and the injury alleged by the plaintiff, including whether the harm was intended; (2) the nature of the injury, and whether the plaintiff is a consumer or competitor in the relevant market; (3) the directness of the injury, and the speculative nature of the damages; (4) the potential for recovery, and the difficulty of asportioning damages; and (5) the existence of more direct victims. Echoing a theme from Justice Stevens’ jurisprudence, the Associated General Contractors decision eschews a bright-line test for standing and instead demands a fact-based inquiry into the nature of the plaintiff’s injury and its relation to the defendant’s conduct and the purpose of the antitrust laws. Nearly three decades later, the factors that Justice Stevens set forth in Associated General Contractors continue to guide courts’ analysis of standing.

Joint Ventures

Justice Stevens also played an important role in the development of the antitrust analysis of joint ventures. Once again, Justice Stevens looked to the effects of the alleged violation on the market. But even though Justice Stevens’ opinions carefully examined the effects of the facts presented to the Court, they avoided the trap of making the Rule of Reason an automatic victory for defendants. Beginning with his opinion in National Society of Professional Engineers in 1978 through his final antitrust opinion in American Needle, Inc. v. NFL in May 2010, Justice Stevens developed the evaluation of joint-venture conduct through an analysis of the purpose and effects of the agreement on competition.

Writing for the majority in National Society of Professional Engineers, Justice Stevens applied the Rule of Reason to determine whether a canon that prohibited price-based, competitive bidding of a professional association of engineers violated Section 1 of the Sherman Act. The issue was framed as “whether the canon may be justified under the Sherman Act. . . because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety.” Although the Court declined to apply the per se rule because the restraint was adopted by members of a professional association, the Court found the rule to be illegal under the Rule of Reason. The Court reasoned that, because the canon itself restrains trade within the meaning of Section 1, the agreement would be illegal if it suppressed any form of competition. Although the agreement was not technically price fixing, the effect of the agreement was an absolute ban on competitive bidding. Justice Stevens pointed out that the defense raised by the Society, namely that the agreement was necessary because competition could lead to unsafe results by engineers, supported the fact that the agreement was intentionally anticompetitive, not procompetitive.

In the next term, Justice Stevens again looked to the effects of restraints within joint ventures in his dissent in Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) offered only blanket licenses of their entire music catalog to television stations, such as CBS. CBS sued, alleging that the agreement constituted illegal price fixing. The Court, led by Justice White, held that the agreements did not amount to a per se violation of the Sherman Act, and remanded to the Court of Appeals for an analysis under the Rule of Reason. Justice Stevens authored a separate dissent, arguing that the Rule of Reason question was presented properly before the Court and should therefore be decided.

Justice Stevens looked at the purpose and effect of the
license. The blanket license was an “[e]xclusive, all-or-nothing” arrangement. Additionally, the market itself was dominated by these blanket licenses, as nearly every copyrighted composition in the U.S. was in the catalogs of the two defendants. Finally, though Stevens admitted that the prices at issue were not more than what a large television network like CBS could pay, and may even have been a good value for the amount of music licensed to CBS under the agreements, the fact was that CBS did not have the option to negotiate for a different arrangement, and was forced to buy the entire catalog. The price paid may therefore have been more than what it would have been in a competitive market, which Justice Stevens reasoned was harmful to competition and illegal under a Rule of Reason analysis.

In NCAA v. Board of Regents of the University of Oklahoma, Justice Stevens demonstrated how joint conduct could be challenged with less than a full Rule of Reason analysis. At issue in NCAA was a joint venture between college football teams and conference leagues that entered into agreements with television networks that limited the number of times that any school could appear on television. The NCAA’s stated purpose for the agreement was to encourage attendance at games and to equalize revenues between schools, thus equalizing competition among the schools on the football field.

Justice Stevens, writing for the Court, rejected the NCAA’s justifications. First, Stevens looked to the relevant market to determine the appropriate test. He rejected the use of the per se rule even though the agreement amounted to price fixing, because the nature of the college sports market itself required cooperation among the competitors to exist. Even though Justice Stevens’ majority opinion did not apply the per se rule, it eschewed a full blown Rule of Reason analysis and instead relied on a statement by Professor Arceda that the Rule of Reason could be applied “in the twinkling of an eye.” Under this test—which came to be known as the “Quick Look” Rule of Reason—the burden shifts to the Defendant to offer a procompetitive justification once the plaintiff demonstrates a harm to competition, such as a price increase or output reduction. In NCAA, the majority found an output reduction in the fact that fewer games were broadcasted under the NCAA’s rules than would have been in a competitive market. The Court, speaking through Justice Stevens, rejected all of the NCAA’s justifications for its restrictions, reasoning that they did not have the purported procompetitive effects. The agreement was therefore unlawful.

Justice Stevens authored the majority opinion in FTC v. Superior Court Trial Lawyers Association. There, a group of lawyers who represented indigent defendants agreed to cease representation until their compensation was increased. The FTC sued, alleging that the boycott violated antitrust laws. Justice Stevens held that the agreement to withhold legal services to increase their compensation constituted a “naked restraint” on price and output. The defendants justified their boycott on the grounds of political impact, but Justice Stevens rejected this argument, reasoning that both the means employed and the ends desired were economic – rather than political – in nature. Justice Stevens explained for the Court that “[t]he effectiveness of price-fixing agreements is dependent upon many factors, such as competitive tactics, position in the industry, the formula underlying pricing policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness.” Therefore, as there was no procompetitive justification, the conduct was facially unlawful.

Even when Justice Stevens applied the per se rule, he did so in a way that examined the particular facts of the case before the Court. In Arizona v Maricopa County Medical Society, an association of physicians agreed to provide medical services on a fee-for-service basis, and established a maximum fee schedule for those services. Justice Stevens’ majority opinion held that the agreement constituted a per se violation of Section 1 of the Sherman Act, reasoning that a price-fixing agreement that sets a maximum price is equally as anticompetitive as one that sets a minimum price. The Court observed that the price restraint provided the same economic rewards to all participating physicians, regardless of their professional ability and experience. It also expressed concern over the effects that the agreement may have on the market, in deterring experimentation and new procedures, or the entry of new professionals.

Most recently, Justice Stevens authored the opinion for a unanimous Court in American Needle v. National Football League, holding that the teams of the NFL were not beyond the reach of a Section 1 violation for “concerted action.” This decision reversed the Seventh Circuit’s holding that the NFL teams constituted a “single entity” when they licensed their intellectual property to Reebok to produce sportswear with team logos. The reasoning Justice Stevens advanced is largely based on the principles of Copperweld Corp. v. Independence Tube Corp., which establishes the “basic distinction” in the Sherman Act between concerted and independent action. Although Justice Stevens dissented in Copperweld, he applies its principles in American Needle and again takes a commonsense approach: “We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.” What is relevant, then, is whether the agreement at issue “joins together ‘independent centers of decisionmaking.’” If so, then the entities themselves are “capable of conspiring under § 1.” Here, the agreements at issue constituted agreements among competitors, bringing them under Section 1 scrutiny. Justice

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Stevens reasoned that because the individual teams could themselves independently license their own intellectual property, the decision to license collectively qualifies as the joining together of “independent centers of decisionmaking.” Justice Stevens explained, “competitors ‘cannot simply get around’ antitrust liability by acting ‘through a third-party intermediary or ‘joint venture.’” Justice Stevens again emphasized the effects on the marketplace over any static or formalistic approach.

Conclusion

Justice Stevens’ unique position as an antitrust practitioner before his time on the Court led him to have a particularly significant impact on the evolution of antitrust jurisprudence. He approached antitrust cases as a trial lawyer would, by closely examining both the facts of the case and the practical impact the challenged behavior had on the marketplace. Thus, his antitrust jurisprudence is rooted in commonsense and a philosophy of protecting competition in the marketplace. Justice Stevens’ desire to look at the actual impact on the marketplace shaped antitrust developments throughout his tenure on the Court and will continue to influence the law long after his retirement.

1 Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir. 1974); Eason v. Gen. Motors Acceptance Corp., 490 F.2d 654 (7th Cir. 1973); Protectoseal Co. v. Barancik, 484 F.2d 585 (7th Cir 1973); Papercraft Corp. v. F.T.C., 472 F.2d 927 (7th Cir. 1973); Denison Mines, Ltd. v. Michigan Chem. Corp., 469 F.2d 1301 (7th Cir. 1972); Zegers v. Zegers, Inc., 458 F.2d 726 (7th Cir. 1972).


5 Id. at 21-29.


8 McCready, 457 U.S. at 492.

9 Id. at 493-94.

10 459 U.S. at 537-44.


12 Id. at 681.


14 Id. at 26.


16 Id. at n.39.


18 Id. at 423.

19 Id. at 435.


21 130 S.Ct. 2201 (2010).


23 Am. Needle, 130 U.S. at 2208 (quoting Copperweld, 467 U.S. at 767).

24 Am. Needle, 130 S.Ct. at 2209.

25 Id. at 2212 (quoting Copperweld, 467 U.S. at 769).

26 Id.

27 Id. at 2212, 2215.

28 Id. at 2215-16.
Associate Justice Elena Kagan was confirmed by the United States Senate by a vote of 63 to 37. She was sworn in Saturday, August 7, 2010 as the 112th Justice of the United States Supreme Court. During her confirmation hearings many Senators and commentators noted (some with trepidation) that Justice Kagan had not previously served as a judge. In the search for insight into her jurisprudence, researchers explored her work as a scholar, solicitor general, and law school dean.

On antitrust, Kagan is certainly not an open book. Unlike her predecessor Justice Stevens (a former antitrust lawyer), and the previous Obama appointee Justice Sotomayor (who as an appellate judge authored three decisions and a concurrence on the federal antitrust laws), Justice Kagan does not have a record of her own view of the antitrust laws. She has not articulated her views in scholarship or judicial opinion.

During questioning, Senator Al Franken (D-MN) raised an antitrust question by quizzing Kagan on the antitrust implications of the proposed Comcast – Universal merger. Franken suggested that if the same company owns the programming and the delivery mechanism (as would occur if Comcast merged with Universal, which controls NBC), that is “a First Amendment problem... [and] an antitrust problem.” Citing United States v. Associated Press Franken read from Justice Black’s opinion a quote explaining that the freedom to publish is protected, but the freedom to combine to stop others from publishing is not. Then-nominee Kagan expressed hesitation to comment on a merger that is still being reviewed, but stated that “the First Amendment does not provide a general defense I think to antitrust laws.” When pressed further on this and on the topic of Net Neutrality (which would require internet service providers to treat all content equally and not favor content from certain providers), Kagan reiterated the importance of the First Amendment and added that on the question of whether “First Amendment values” should inform approvals of mergers in the media sphere, she “would defer to people who know a lot more about antitrust policy than I do on that.”

The most substantive discussion of antitrust case law during public questioning came from Senator Herb Kohl (D-WI), who asked Kagan to opine on recent Supreme Court decisions in Leegin, Twombly, and Trinko that many commentators (and Senator Kohl) believe generally favored large corporations at the expense of antitrust plaintiffs and consumers. Focusing on Leegin, Kagan noted that it overturned a precedent that had stood for nearly a century, but Kagan did not give a clear statement of her agreement or disagreement with the decisions, stating that “there is some question... about how new economic understandings ought to be incorporated into antitrust law.” In a reference to cases that upend precedent she added “on the one hand, it’s clear the antitrust law needs to take account of economic theory and economic understandings, but it needs to do so in a careful way, and to make sure that it does so in a way that is consistent with the purposes of the antitrust laws...”

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which is to ensure competition, which is... to be a real charter of economic liberty.\textsuperscript{9} While declining to “grade” the \textit{Leegin} decision, Kagan does state that “a very important question for the Court going forward” is “when the antitrust laws have been interpreted in one way over time, and new economic understandings, new economic theory might suggest a different approach, how one balances those two things.”\textsuperscript{10}

While it is dangerous to read too much into the choreographed dance that is the modern confirmation hearing, Justice Kagan’s discussion of antitrust with Senators Franken and Kohl suggests she will not lead the charge for the Court to take up cases arising from mergers anytime soon. She expressed confidence in the regulatory authorities to regulate mergers and her suggestion that it is a “policy” issue suggests great deference to the other branches of government. Interestingly, Justice Kagan acknowledged that economic theory and “new economic understandings” may influence past antitrust precedents. She did not go into detail about exactly how much influence these economic theories should have or whether they will indeed change the way the Court views precedential antitrust cases. With very little to go on, antitrust litigants, practitioners, and commentators will watch her closely to see if she is willing to defer policy questions such as Senator Franken’s and how she will balance over a century of antitrust precedent against new economic theories that may favor overturning settled law.

\begin{itemize}
  \item \textbf{1} As a Judge on the 2nd Circuit Justice Sotomayor authored the opinions in \textit{Clarett v. Nat’l Football League}, 369 F.3d 124 (2d Cir. 2004); \textit{Innomed Labs LLC v. ALZA Corp.}, (368 F.3d 148 (2d Cir. 2004); \textit{Major League Baseball Prop. v. Salvinio Inc.}, 542 F.3d 290 (2d Cir. 2008) (concurring; and \textit{Todd v. Exxon Corp.}, 275 F.3d 91 (2d Cir. 2001).
  \item \textbf{2} 326 U.S. 1 (1945).
  \item \textbf{4} 551 U.S. 877 (2007).
  \item \textbf{5} \textit{Bell Atlantic Corp. v. Twombly}, 550 U.S. 544 (2007).
  \item \textbf{7} \textit{Dr. Miles Med. Co. v. John D. Park & Sons Co.}, 220 U.S. 373 (1911).
  \item \textbf{9} \textit{Id.}
  \item \textbf{10} \textit{Id.}
\end{itemize}
On April 27, 2010, the United States Supreme Court ruled 5-3 that arbitrators could not impose class arbitration where the parties’ agreement didn’t explicitly provide for it. The case represents a rebuke of class arbitration where parties never intended it, but leaves some openings for collective action by plaintiffs, even when not explicitly agreed to, depending on the jurisdiction governing the contract and standard practice within the industry.

**Trends Toward Class Arbitration**

Antitrust plaintiffs often bring their claims as class actions, whereby a single party asserts a claim on behalf of an entire class negatively affected by another party’s illegal conduct. But over recent decades, as arbitration became a popular way to settle disputes, **class arbitration** emerged as a method for allowing arbitration-bound plaintiffs to pursue collective action. As of September 2010, the AAA was administering 278 class arbitrations, up from 190 in 2007. These trends were due in part to court decisions compelling arbitration but mandating that litigants be able to proceed on behalf of the class in that forum.

In 2003, the Supreme Court addressed this trend in *Green Tree Financial Corp. v. Bazzle.* In that case, a plurality of the Court decided that arbitrators, not courts, were charged with the task of determining whether class arbitration was permitted under an arbitration clause. Many viewed the opinion as an endorsement for the availability of class arbitration. And in response, companies began inserting class-action waivers within arbitration agreements to avoid the prospect of class actions in arbitral forums. Yet, many contracts remained silent on the issue of class arbitration, which led to the issue faced in *Stolt-Nielsen.*

**Behind Stolt-Nielsen**

The case arose from a 2003 investigation by the Department of Justice that revealed that Stolt-Nielsen and other operators of “parcel tankers”—large vessels that lease compartments to customers wishing to move goods overseas—engaged in an illegal price-fixing conspiracy. The Justice Department obtained guilty pleas against two of the companies involved in the cartel. AnimalFeeds, a customer, brought a class action against Stolt-Nielsen on behalf of all affected customers in federal court. The court compelled arbitration of the antitrust dispute pursuant to an arbitration clause within the parties’ standard contract. AnimalFeeds then demanded that it be allowed to represent the class in arbitration. The agreement was silent on whether class arbitration was allowed, so the parties submitted the issue to a New York arbitration panel. The panel concluded, based on post-*Bazzle* arbitration decisions, that the contract allowed AnimalFeeds to pursue their action on behalf of the aggrieved class.

Stolt-Nielsen petitioned the Southern District of New York, which vacated the arbitration decision based on the arbitrators’ failure to consider New York or maritime law. The Second Circuit, however, reversed. The court of appeals found that, applying high deference to the arbitrators’ interpretation of the contract, the finding that class arbitration was an option intended by the parties was valid absent a judicial ruling holding otherwise.

**The Supreme Court’s Decision**

The Supreme Court reversed the Second Circuit and the decision of the arbitration panel, remanding the case to proceed in arbitration without class representation. The Court noted that it will reverse an arbitrator only when he or she “strays from
interpolation and application of the agreement and effectively dispenses his own brand of industrial justice.”

The Court found that high standard met because the arbitrators’ decision to allow class arbitration without an explicit agreement contravened the parties’ intent. Under the Federal Arbitration Act (FAA), an arbitrator has the power to resolve disputes only insofar as the parties have contracted. So, according to the Court, a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. No agreement could be implied solely from the existence of an arbitration clause because class-action arbitration fundamentally “changes the nature of arbitration.” In the face of no agreement, the arbitrators were supposed to ascertain custom and usage according to New York or maritime law. Because the Court found evidence that commercial parties in this situation never intend to permit class arbitration, it concluded that class arbitration could not be permitted under the circumstances.

Justice Ginsberg dissented, joined by Justices Breyer and Stevens. She found the appeal lacking in finality and not properly before the Court. She also noted that the arbitrators’ award should be affirmed on the merits because they did in fact rely on contract interpretation and New York and maritime law.

The Future of Class Arbitration

In many cases Stolt-Nielsen will preclude plaintiffs from bringing class arbitration unless a specific provision in the arbitration clause provides for it. But it is not certain that class arbitration can never proceed without explicit agreement. As Justice Ginsberg observed, class arbitration may be able to proceed without express agreement if some contractual basis implies an agreement. Another “stopping point” she noted is that, where class arbitration is custom in the industry or where one party is a consumer presented with an adhesion contract, contractual silence may permit class arbitration. So, while businesses with arbitration clauses (but no class-arbitration waiver) have less exposure to class arbitration than before, they should still look to applicable state law and other contract-interpretation methods to learn if class actions are allowed under their contracts.

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6 Id. at 451-53.
7 Carole J. Buckner, Due Process in Class Arbitration, 58 Fla. L. Rev. 185, 187 (2006) (stating that Bazzle “implicitly permitted class arbitration”); Matthew Eisler, Difficult, Duplicative and Wasteful?: The NASD’s Prohibition of Class Action Arbitration in the Post-Bazzle Era, 28 Cardozo L. Rev. 1891, 1907 (2007) (stating that Bazzle held that “class arbitration is permissible under the FAA, even where the agreements are silent”).
9 130 U.S. at 1765.
11 Id. at 1764-65
12 Id. A standard contract in the maritime trade is known as a “charter party.” Id. at 1764.
13 Id. at 1765-66
16 Stolt-Nielsen, 548 F.2d at 102.
17 Stolt-Nielsen, 548 F.2d at 101.
18 Stolt-Nielsen, 130 S. Ct. at 1777.
19 Id. at 1767 (quotations omitted).
20 Id. at 1776.
22 Stolt-Nielsen, 548 F.2d at 1773.
23 Id. at 1775.
24 Id. at 1775. These changes include the sheer volume of additional parties to a class action, a loss of privacy and confidentiality normally applicable in arbitration, and the fact that a class award affects absent parties in addition to the litigating parties. Id. at 1776.
25 Id. at 1769.
26 Id.
27 Id. at 1777. Justice Sotomayor took no part in the case. Id. at 1763.
28 Id. at 1779.
29 Id. at 1779-82.
30 Id. at 1783.
31 Id.
On May 24, 2010, the United States Supreme Court unanimously reversed and remanded the United States Court of Appeals for the Seventh Circuit in *American Needle v. NFL*. This decision is significant both because it represents the first meaningful victory by a plaintiff in front of the Court in two decades, and also because the Court rejected many of the arguments that defendants have recently proffered to avoid scrutiny under Section 1 of the Sherman Act. Section 1 prohibits separate entities from taking concerted action that unreasonably restrains trade. The case involved an agreement by the NFL and its teams to exclusively license the teams’ intellectual property to Reebok—a competitor of the NFL’s former headgear licensee and plaintiff, American Needle, Inc. If while exclusively licensing, the NFL and its teams acted collaboratively, as opposed to as a “single entity,” they may have run afoul of Section 1. This article summarizes the case’s history and the recent decision.

**Background of American Needle v. NFL**

The NFL is an unincorporated association of 32 separately owned and operated football teams which, as a group, produce over 250 interrelated NFL football games annually. In 1963, the NFL teams formed NFL Properties to collectively license their intellectual property and to promote NFL football. Shortly after its formation, NFL Properties granted headwear licenses to several different vendors—one of which was American Needle. American Needle held this license for nearly 40 years. But in 2001, after the NFL teams permitted NFL Properties to solicit bids for an exclusive headwear license, American Needle and others lost their headwear contracts when the NFL granted an exclusive 10-year license to Reebok.

American Needle reacted by suing the Defendants, claiming that the exclusive licensing agreement among the NFL teams was a conspiracy to restrict competing vendors from using team trademarks, unreasonably restraining trade in violation of Section 1. American Needle further claimed that the agreement monopolized the use of NFL teams’ intellectual property in violation of Section 2 of the Sherman Act.1

The United States District Court for the Northern District of Illinois granted summary judgment in favor of the NFL on both the Section 1 and Section 2 claims.2 The Seventh Circuit unanimously affirmed, by assuming that the licensing of headwear was an integral part of promoting NFL football.3 Because the promotion of NFL football cannot be performed by any one team, the court reasoned that joint licensing did not deprive the market of an “independent source of economic power.”4 The court applied the Supreme Court’s precedent in *Copperweld* to conclude that the NFL teams were a “single entity” when they jointly licensed products through NFL Properties.5 In a remarkable move, both parties sought review by the United States Supreme Court and the Court granted certiorari on June 29, 2009.6 A decision came May 24, 2010, with the Court unanimously reversing and remanding to the Seventh Circuit.7

**The Justices Punt Back to the District Court**

At the oral arguments, the Justices responded by directing questions to the NFL on why it should be treated differently than other joint ventures routinely subject to Section 1 scrutiny. The Justices’ line of questioning suggested that it was not visibly comfortable in affirming a grant of Section 1 immunity to the NFL and its teams.

Justice Stevens authored the unanimous decision reversing the Seventh Circuit. The Court rejected the NFL’s argument that agreements within an independently incorporated entity could never fall within Section 1 and remanded for a Rule of Reason analysis.8 The Court held that even within a “legally separate entity,” agreements among actual or potential competitors will be subject to Section 1 scrutiny.9 The Court found “that a history of concerted activity does not immunize conduct from § 1 scrutiny” and that “intrafirm agreements may simply be

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a formalistic shell for ongoing concerted action.” The Court also rejected the argument presented by some amici for the Defendants that “once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct.” This decision is a strong statement from the Court that these agreements may harm competition and are subject to Section 1, even when they are made in the context of “independent” corporate entities.

Conclusion

The Court’s decision is significant for many reasons. First, it is a thorough and unanimous decision from an ideologically divided court on an issue — the application of Section 1 to joint ventures — that has been debated over the past several years. Secondly, it is the first plaintiff victory at the high court in two decades. Finally, it eschews formalistic distinctions for determining whether conduct falls within Section 1, just as the Court had previously shunned formalistic rules for liability.

4 Id.
5 Id.
9 Id. at 12-13.
10 Id. at 14-16.
11 Id. at 14-15.

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