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## The Supreme Court Rules Against the N.F.L. in Highly Anticipated Antitrust Case

Earlier this week, in a highly anticipated decision, the Supreme Court in *American Needle v. National Football League* unanimously held that the National Football League's licensing activities pertaining to teams' intellectual property should not receive single entity treatment and are therefore within the reach of Section 1 of the Sherman Act. By refusing to grant NFL single entity treatment, exclusive dealing arrangements and other collective activities undertaken by NFL teams or competitors in other industries will be subject to the Rule of Reason, which will test the function rather than the form of the collective activity in question.

### Background

In 1963, NFL teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property. Between 1963 and 2000, NFLP granted non-exclusive licenses to a number of vendors, including the Petitioner, American Needle, allowing them to manufacture and sell team apparel. In December, 2000, the teams voted to authorize NFLP to grant exclusive licenses and NFLP granted Reebok an exclusive 10-year license to manufacture and sell trademarked headware for all 32 teams. American Needle alleged that the agreement violated Sections 1 and 2 of the Sherman Act. The respondents argued that the individual teams could not have conspired within the meaning of Section 1 "because they are a single economic enterprise" with respect to licensing of teams' intellectual property. The District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals held that the operations of the NFL are so integrated that they should be deemed a single entity in some contexts. Both, American Needle and the NFL petitioned the Supreme Court to hear the case.

### Supreme Court's Decision

The Supreme Court emphasized that "substance, not form, should determine whether a[n]...entity is capable of conspiring under §1." Following that premise, the Court concluded that the relevant inquiry is not whether the defendant is a single legal entity, but "whether there is a contract, combination...or conspiracy amongst separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace of independent centers of decision-making."

The Court determined that the teams compete in the market for intellectual property, in the sense that teams are competing suppliers of valuable trademarks (e.g., blue stars, white wings, lightning bolts, etc.). Therefore, when each team licenses its intellectual property, “it is not pursuing the common interests of the whole league, but is instead pursuing the interests of the corporation itself.” As a result, NFL teams’ decisions “to license their separately owned trademarks collectively and to only one vendor are decisions that deprive the marketplace of independent centers of decisionmaking” and are concerted activities under the Sherman Act subject to §1 analysis. The Court was not persuaded by the respondents’ argument that they constitute a single entity because, without their coordination, there would be no NFL football. The Court held that “[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action.”

The Court, however, held that this agreement is not *per se* illegal; an analysis reserved for a limited number of anticompetitive agreements such as price fixing, but is subject to the Rule of Reason analysis because some degree of cooperation between the teams is necessary to preserve the market. Under the Rule of Reason analysis, the district court will examine the facts peculiar to the agreement, the nature of the restraint, the actual and probable effect of the restraint, and the competitive effects of the agreement to determine whether the agreement promotes or destroys competition.

### Implications

While *American Needle* was decided on a narrow basis, the decision may well have implications beyond sports leagues. Agreements between competitors who are members of joint ventures will be subject to review under the *Copperweld Corp. v. Independence Tube Corp.* standard—whether the coordination “deprives the marketplace of independent centers of decisionmaking.” This analysis requires courts to consider the substance of the coordination between entities rather than the particular form that it takes.

The Supreme Court was not willing to accept the position offered in an *amicus brief* by the Department of Justice, that certain joint venture decisions, those that “do not significantly affect actual or potential competition...outside their merged operations,” deserve single entity treatment. The Supreme Court has previously held that price setting by a joint venture is not *per se* illegal in *Texaco v. Dagher*. Even though *Dagher* equated some joint venture decisions to those of a single entity, the Court in *American Needle* made it clear that those agreements, at least the ones that satisfy the *Copperweld* test, will be subject to antitrust scrutiny under the Rule of Reason. The Court left open the question of whether decisions by participants in a joint venture, where the participants have a “complete unity of interests,” could entirely avoid Section 1 issues.

The Court’s rejection of the NFL’s single entity defense ensures that collective activity undertaken by the NFL will be subject to the same scrutiny under the antitrust laws that are applied to other business entities. Had the Court ruled in favor of the NFL, it would have established that individual teams have no independent economic power and that joint actions by teams would make them legally immune from the antitrust laws. That decision could have opened the door for professional sports leagues and other joint ventures to pursue single entity protection for a wide range of business activities. It is important to note that the *American Needle* decision does not change

existing law, except with respect to rejecting the Seventh Circuit, because it leaves many open questions and does not provide any new standard for evaluating agreements made under the shield of a joint venture.

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