

WSGR ALERT

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**AMERICAN NEEDLE V. NATIONAL FOOTBALL LEAGUE:
NFL CAN BE LIABLE FOR CONSPIRING UNDER SECTION 1 OF SHERMAN ACT**

In a decision that was highly anticipated by antitrust lawyers and sports enthusiasts alike, the U.S. Supreme Court unanimously held that the National Football League (NFL) teams were not immune from liability for collaborative decisions.¹ The Court concluded that “NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action.”² Instead, the Court held that “[e]ach of the teams is a substantial, independently owned and independently managed business.”³ As a result, agreements among the individual NFL teams are subject to potential liability under Section 1 of the Sherman Act.

In 1963, the NFL and its constituent members formed the National Football League Properties (NFLP) for the express purpose of acting as the agent responsible for licensing individual team IP, and then sharing the revenues generated from the license of such IP equally among the NFL teams. American Needle was a licensee of NFLP and, as a result of its status as an NFLP licensee, was able to sell apparel bearing NFL team insignias. In December 2000, however, NFLP and Reebok reached an exclusive arrangement whereby Reebok would become the only licensee of NFLP that would be able to sell trademarked headware for all 32 teams; concurrently, and as a result, NFLP declined to renew American Needle’s license.

In *American Needle, Inc. v. National Football League*, the plaintiff filed an action alleging that agreements between the NFL, its teams, the NFLP, and Reebok related to the license of intellectual property and the marketing of trademarked items—such as team caps and jerseys—violated Section 1 of the Sherman Act.⁴ The teams moved to dismiss, arguing that the NFL, the NFLP, and the individual teams were a single economic enterprise with respect to the license of IP, and therefore were incapable of conspiring in violation of Section 1 of the Sherman Act. The district court agreed with the league and granted the NFL’s motion to dismiss,⁵ and the Seventh Circuit affirmed.⁶ The Supreme Court granted *certiorari* and reversed, in a 9-0 decision.⁷

As background, Section 1 only condemns illegal agreements by two or more persons. Actions by a single economic entity are not covered by Section 1; they are only potentially subject to liability under a different statute, Section 2 of the Sherman Act, for illegal monopolization or attempted monopolization. This distinction is important because the restraints of trade covered by Section 1 are broader than the monopolistic acts reached by Section 2.

In *Copperweld Corp. v. Independence Tube Corp.*, the Supreme Court concluded that an “intraenterprise conspiracy”—where a single

entity is involved—cannot be reached under Section 1 because “an internal agreement to implement a single, unitary firm’s policies does not raise the antitrust dangers that Section 1 was designed to police.”⁸ Such agreements, quite simply, do not “depriv[e] the marketplace of independent centers of decisionmaking.”⁹

The defendants in *American Needle* contended that they were immune from Section 1 because they were a single entity, and exempt from antitrust liability under the *Copperweld* doctrine. The Supreme Court found this argument overbroad: “To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the ‘common interests of the whole’ league but is instead pursuing interests of each ‘corporation itself.’”¹⁰

The NFL also argued that the formation of the NFLP shielded the joint decisionmaking from Section 1 scrutiny, and further contended that their cooperation was necessary to the functioning of NFL football. The Supreme Court disagreed with this argument as well. As a first matter, the Court found it unpersuasive that the formation of a single entity by independent third parties could somehow immunize joint conduct. The Court reasoned that it was not “dispositive that the

¹ *American Needle v. National Football League*, No. 08-661, 2010 WL 2025207 (May 24, 2010).

² *Id.* at *2.

³ *Id.*

⁴ 496 F. Supp. 2d 941 (N.D. Ill. 2007).

⁵ *Id.* at 943.

⁶ *American Needle v. National Football League*, 538 F.3d 736 (7th Cir. 2008).

⁷ *American Needle*, 2010 WL 2025207.

⁸ 467 U.S. 752, 769 (1984).

⁹ *Id.* at 768-69.

¹⁰ *American Needle*, 2010 WL 2025207, at *9 (citing *Copperweld*, 467 U.S. at 770).

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teams have organized and own a legally separate entity that centralizes the management of their intellectual property."¹¹ Such a sweeping immunity, according to the Court, could potentially protect a host of illegal agreements simply by forming a single entity to carry out the decisions of otherwise independent actors.

Furthermore, the justification that the NFLP was "necessary" for the functioning of NFL football, according to the Court, did not allow the individual NFL teams to collectivize their independent decisions without any concern for antitrust liability. "The mere fact that the teams operate jointly in some sense does not mean that they are immune."¹² "Apart from their agreement to cooperate in exploiting those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear to the sale of such items, and to the granting of licenses to use its trademarks."¹³

The Court cautioned that even though the collective decisions of the independent NFL teams were subject to Section 1 liability, that did not mean that every joint decision was actually illegal under the antitrust laws: only the question of *whether* Section 1 *could* reach the joint decisions of independent NFL

teams was before the Court. Whether Section 1 liability *should* attach to such collective decisions was a question remanded back to the district court. The Supreme Court set forth plausible justifications for the joint conduct, including a shared interest in making the entire league successful and profitable, and maintaining a proper competitive balance among the teams. However, in a caution to the defendants, the Supreme Court, in *dicta*, suggested that "it is not apparent that the alleged conduct was necessary at all. Although two teams are needed to play a football game, not all aspects of elaborate interleague cooperation are necessary to produce a game. Moreover even if leagewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football."¹⁴

American Needle will now proceed before the district court, to determine whether, under the antitrust rule of reason, the decision to jointly market and sell individual team intellectual property is on balance procompetitive or harmful to consumers.

For more information regarding the *American Needle* decision, please contact any member of Wilson Sonsini Goodrich & Rosati's antitrust practice.



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¹¹ *Id.* at *10.

¹² *Id.* at *11.

¹³ *Id.*

¹⁴ *Id.* at *11, n.7.