

Alert 10-124



Supreme Court Reaffirms Conspiracy Risks Of Joint Ventures

On May 24, 2010, the United States Supreme Court held, in *American Needle, Inc. v. National Football League, et al.*, that the NFL, its teams, and intra-league ventures, are not a single enterprise for the purposes of Section 1 of the Sherman Act,¹ and therefore the NFL's collective licensing of its teams' individually owned intellectual property could constitute concerted action – "a contract, combination . . . , or conspiracy." This bulletin summarizes the Court's analysis and a few of the decision's key implications.

Summary

This case arose from a 2000 agreement between NFL Properties ("NFLP") and Reebok, which made Reebok the exclusive licensee of all 32 NFL teams' intellectual property for the sale of hats. NFLP was formed in 1963 to "develop, license, and market" the intellectual property – including colors, names and logos – of the NFL teams. Prior to 2000, NFLP granted nonexclusive licenses for the manufacture and sale of NFL team merchandise to many companies, including American Needle.

American Needle sued the NFL, the NFLP, the NFL teams, and Reebok in federal court in Chicago for, among other things, violation of Section 1. The district court granted summary judgment in favor of the NFL defendants, concluding that, for the purposes of licensing intellectual property rights, the NFL and its teams act as a single entity, and thus are immune from the joint conduct provisions of antitrust law. The Court of Appeals for the Seventh Circuit affirmed, reasoning that potential competition between individual teams for intellectual property licensing agreements was insignificant because the teams "can function only as one source of economic power when collectively producing NFL football."

Rejecting a legally formalistic approach to the question whether the NFL operates as a single entity for intellectual property licensing purposes, the Supreme Court focused on the "competitive reality" underlying the agreement. The core inquiry, according to the Court, was "whether the agreement joins together 'independent centers of decisionmaking.'" Because NFL teams are independently owned and managed businesses, competing for ticket sales and player contracts, as well as for merchandise sales, they "do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action."

The Court also rejected the Seventh Circuit's reasoning that the NFL, its teams, and the NFLP constitute a single entity because their cooperation is necessary to produce NFL football. The necessity of cooperation to compete against other forms of entertainment, the Court observed, does not "transform[] concerted action into independent action" with respect to licensing the teams' respective intellectual property. Having found the NFL's group trademark licensing arrangement to be an "agreement" for purposes of Section 1, the Court remanded the case for analysis under the Rule of Reason to determine whether the agreement was pro- or anti-competitive.

Reframing the Question

The Court refined the core inquiry involved in analyzing whether an organization is capable of concerted action under *Copperweld Corp. v. Independence Tube Corp.*,² such that it could be subject to Sherman Act Section 1 liability. Observing that it is "perhaps a misdescription" to characterize the issue as "whether the alleged conspirators are a single entity[.]" the Court stated that substance, not form, should govern and that the "key is whether the alleged 'contract, combination . . . , or conspiracy' . . . joins together separate decisionmakers." This characterization of the key question for analysis is intended to focus a court's *Copperweld* inquiry on whether the agreement deprives the marketplace of

"actual or potential competition."

Implications

- On a general level, *American Needle* is significant because it was the first Supreme Court victory for an antitrust plaintiff since 1992, and it was unanimous. While this decision seems to preserve the status quo rather than break new ground, that is itself noteworthy in light of recent decisions, most notably *Bell Atlantic Corp. v. Twombly*, that have the effect of making it significantly more difficult for plaintiffs to bring and win antitrust cases.³ *American Needle* may mark a transition point where the antitrust pendulum begins to swing back toward plaintiffs (or at least stops swinging toward defendants).
- *American Needle* arises in the context of a sports league, and sports leagues have some distinctive characteristics.⁴ Intellectual property pooling arrangements like NFLP also have distinctive features. But while those factors may play a large role in the ultimate disposition of the case under the Rule of Reason on remand, they played no role in the Court's analysis. The Court's holding on the concerted action question was one of general applicability to joint ventures: if an agreement joins together "independent centers of decisionmaking," it is actionable under Section 1.
- Evaluating the antitrust risks of joint ventures will remain challenging. The Court declined to establish a black and white rule that would in effect immunize a wide range of joint venture conduct from liability under Section 1, as some commentators thought it might after *Texaco Inc. v. Dagher*.⁵ In *Dagher*, the Court concluded that the internal pricing decisions of an economically integrated joint venture do not constitute *per se* illegal horizontal price fixing. The Court in *Dagher* did not address, however, whether the core functions of an integrated joint venture are subject to Rule of Reason analysis, or whether they instead are the actions of a single entity and immune from Section 1 liability altogether. *American Needle* holds that such decisions by an integrated joint venture can still be subject to scrutiny as concerted action under Section 1.
- Although *American Needle* endorses the core holding of *Copperweld* – that wholly owned subsidiaries cannot conspire with their parents – the Court's reasoning is unclear in its effect on the application of *Copperweld* to other factual scenarios. For example, courts have frequently been willing to extend *Copperweld* to majority-owned subsidiaries. This has been a practical application of substance over form, since majority owned firms by their nature commonly serve the business interests and objectives of the majority owner. The emphasis in *American Needle* on the importance of looking at substance rather than form should reinforce the application of *Copperweld* in majority ownership situations. On the other hand, the references in *American Needle*, to "independent centers of decisionmaking" with a "diversity of entrepreneurial interests" applied literally to the existence of an owner or owners other than the majority owner could cut against the prior common sense outcome in cases involving majority owned subsidiaries.⁶

In sum, *American Needle* is a noteworthy, though not revolutionary, opinion significant for reaffirming the scope of Section 1 after nearly two decades of pro-defendant antitrust decisions in the Supreme Court. However, on the *Dagher* and *Copperweld* issues, *American Needle* opens up fresh areas of uncertainty and litigation.

¹ 560 U.S. ____ (2010).

² 467 U.S. 754 (1984).

³ 550 U.S. 544 (2007) (enhancing fact-pleading requirements for allegations of concerted action).

⁴ 560 U.S. ____ (Op. at 18).

⁵ 547 U.S. 1 (2006).

⁶ Op. at 10 (quoting *Copperweld*).

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