



To read the decision in *American Needle, Inc. v. National Football League, et al.*, please [click here](#).

## The Supreme Court Finds NFL Licensing Activities Subject to Rule of Reason Antitrust Scrutiny

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Today, in *American Needle, Inc. v. National Football League, et al.*, No. 08-661, the Supreme Court unanimously held that professional sports teams in the same league cannot immunize their joint licensing decisions from antitrust scrutiny by authorizing a single entity to make such decisions. Instead, the Court found such decisions subject to the “Rule of Reason” analysis because the joint venture was an instrumentality of otherwise separate decision makers.

### BACKGROUND

Since 1963, NFL merchandizing has been jointly conducted through National Football League Properties (“NFLP”), in which each NFL team has an equal interest. For over 20 years, NFLP granted American Needle licenses to use NFL and NFL team trademarks on the headwear it manufactured. NFLP terminated this arrangement in 2000 when it entered into an exclusive license arrangement with Reebok.

American Needle filed suit in the Northern District of Illinois, alleging that NFL teams, NFLP, the NFL and Reebok had engaged in an illegal conspiracy to eliminate competition for their intellectual property licenses, resulting in significantly higher prices for consumers. Upon a motion to dismiss by the NFL defendants, the district court rejected American Needle’s claim that the NFL defendants’ behavior was a *per se* violation, but upheld the viability of a claim under Section 1 of the Sherman Act under the Rule of Reason provided there is an agreement among competitors here that on balance has anticompetitive effects in a relevant market. The court allowed limited discovery as to whether the NFL teams were a “single entity” with respect to licensing and marketing their intellectual property, or whether the conduct here should be treated as an agreement among competitors and thus be subject to Section 1. On a motion for summary judgment, the court rejected American Needle’s remaining Sherman Act claims, holding that the NFL teams “have, through various forms of NFL Properties, acted as an economic unit.” 496 F. Supp. 2d 941, 944. Since the NFL was acting as a single entity, its conduct could not be challenged as a conspiracy among competitors.

The Seventh Circuit observed that there has not yet been “a definitive opinion as to whether the teams of a professional sports league can be considered a single entity in light of *Copperweld*.” 538 F.3d 736, 741. The court therefore analyzed American Needle’s appeal through the lens of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in which the Supreme Court concluded that a parent corporation and its wholly owned subsidiary are a single entity for antitrust purposes and therefore are incapable of conspiring with one another. Under the Seventh Circuit’s standard, in determining the

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existence of a single entity, "courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." 538 F.3d at 742. The presence of competing interests among firms acting collectively does not necessarily mean that an independent source of economic power is removed by the collective action.

In affirming the lower court's decision, the Seventh Circuit observed that producing football games inherently requires a degree of cooperation. "[M]ost importantly . . . since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFLP—to license their intellectual property collectively and to promote NFL football." *Id.* at 744. According to the court, "nothing in § 1 [of the Sherman Act] prohibits the NFL teams from cooperating so the league can compete against other entertainment providers." *Id.* American Needle's Section 2 monopolization claim, the court held, failed for similar reasons: "[a]s a single entity for the purposes of licensing, the NFL teams are free under § 2 to license their intellectual property on an exclusive basis . . . even if the teams opt to reduce the number of companies to whom they grant licenses." *Id.*

#### SUMMARY OF THE DECISION

In a unanimous opinion, written by Justice Stevens, the Supreme Court held that: "the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of §1." The Court therefore reversed the judgment of the Seventh Circuit and remanded the case for proceedings consistent with its decision.

The Court first noted that the only issue on appeal is whether the NFL defendants' activities are excluded from scrutiny under Section 1 because they are activities of a single entity. The Court observed: "We have long held that concerted action under §1 does not turn simply on whether the parties involved are legally distinct entities." Instead, the Court employs a "functional analysis," and has: "repeatedly found instances in which members of a legally single entity violated §1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity."

The Court clarified that, consistent with *Copperweld*, the key question at issue here "is whether the alleged contract, combination . . . , or conspiracy is concerted action—that is, whether it joins together separate decisionmakers." The focus, therefore, is whether there is an agreement by "separate economic actors pursuing separate economic interests" that could harm actual or potential competition. "If it does," according to the Court, "the entities are capable of conspiring under §1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one."

Applying this standard here, the Court found: "The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action." The Court observed that the teams compete with each other, not only to attract spectators and managerial and playing personnel, but also to market their intellectual property. The Court therefore concluded that: "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."

The Court rejected the NFL defendants' argument that they should be immune from antitrust liability for joint licensing conduct because, without cooperation, there would be no NFL football. According to the Court: "The justification for cooperation is not

*"We conclude that the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of §1."*

#### OPINION OF THE COURT

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#### OPINION OF THE COURT

*"The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to §1 analysis."*

#### OPINION OF THE COURT

relevant to whether that cooperation is concerted or independent action." The Court explained: "The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to §1 analysis."

The Court also rejected the argument that the NFL defendants should be immune from antitrust liability because they shared in profits from the joint marketing activities. The Court warned: "If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from §1, then any cartel could evade the antitrust law simply by creating a joint venture to serve as the exclusive seller of their competing products."

In holding that the NFL defendants' activities are subject to antitrust scrutiny, however, the Court made clear that its decision does not imply that these activities are in violation of Section 1. On the contrary, when "restraints on competition are essential if the product is to be available at all," the Court suggested that "the agreement is likely to survive the Rule of Reason." The Court also observed: "Other features of the NFL may also save agreements amongst the teams," such as an interest in maintaining competitive balance within the league.

#### IMPLICATIONS

In *American Needle*, the Court made clear that joint activities by competitors – even those made through a legally distinct entity – are subject to antitrust scrutiny under Section 1. In its decision, the Court is not critical of all such arrangements, and, in fact, suggests that they may be justified in certain circumstances, such as those present in this case. Nevertheless, in reversing the Seventh Circuit's decision, the Court declined to expand the "single entity" exclusion to antitrust scrutiny to include decisions jointly made by competitors through a separate entity that may very well be justified under the Rule of Reason.

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