

SPORTS COMPETITION EXTENDS BEYOND PLAYERS AND FANS: *American Needle, Inc. v. National Football League, et al.*

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On May 24, 2010, the Supreme Court of the United States handed down an opinion on the case *American Needle, Inc. v. National Football League*. Justice Stevens wrote unanimously for the Court, reversing the Seventh Circuit's judgment and remanding the case for further proceedings. In a significant victory for sports merchandisers and consumers, the Court refused to exclude the National Football League (NFL) from the purview of the Sherman Act, finding that its conduct relating to licensing of intellectual property constitutes concerted action that is not categorically beyond Section 1 of the Sherman Act's coverage.¹ This note will analyze Justice Stevens' considerable opinion, the main tenets of several amicus briefs, and the likely implications that this decision will have on sports franchises and merchandisers throughout the nation.

The National Football League consists of 32 separately owned professional teams that comprise an unincorporated association.² In order to develop, license, and market their respective intellectual property, the teams formed the National Football League Properties (NFLP). Between 1963 and 2000, NFLP awarded nonexclusive licenses to various vendors, including American Needle, to manufacture and sell team apparel. This changed, however, when the teams authorized NFLP to grant exclusive licenses. In December 2000, NFLP granted Reebok an exclusive license to manufacture and sell headwear for all 32 teams and did not renew American Needle's license to produce and sell team-labeled apparel. Subsequently, American Needle filed an action in the Northern District of Illinois alleging that agreements between the teams and NFLP violated Section 1 of the Sherman Act.

The District Court granted summary judgment in favor of the NFL, essentially considering whether or not the NFL and its 32 teams act as a single entity.³ Respondents claim that they act as a single economic enterprise with respect to the conduct challenged, and therefore they are incapable of conspiring together according to Section 1 of the Sherman Act.⁴ The District Court agreed concluding that the respondents' operations are so integrated that "they should be deemed a single entity rather than joint ventures cooperating for a common purpose."⁵ In affirming the District Court's ruling, the Court of Appeals for the Seventh Circuit noted that the NFL is essentially one source of economic power that controls the promotion and production of NFL football.⁶ It further observed that while football itself is carried out jointly, it does not

¹ See *Am. Needle, Inc. v. Nat'l Football League*, No. 08-661, 2010 U.S. LEXIS 4166, at *2 (U.S. May 24, 2010) [*hereinafter* *American Needle v. NFL*].

² *Id.* at *1.

³ *Id.* at *1-*2.

⁴ *Id.* at *9.

⁵ *Id.*

⁶ *Id.* at *10.

follow that the individual teams have the authority or responsibility to market NFL football alone. Indeed, the Court of Appeals held that Section 1 does not apply because NFL teams had licensed their intellectual property collectively since they formed NFLP in 1963.⁷

Recognizing a split in the circuit courts, both American Needle and NFL supported certiorari. Petitioner sought to settle the uncertainty about national professional sports leagues and their antitrust status, stating that failure to review this question of law would perpetuate uncertainty and would prevent spectators and teams from operating uniformly because they would be operating under different rules in different circuits.⁸ On the other hand, respondent states that while the decision of the Seventh Circuit Court of Appeals is correct, it desires to “secure a uniform rule that (i) recognizes the single entity nature of highly integrated joint ventures and (ii) obviates the uncertainty, chilling effects, and forum shopping that inevitably result from the current conflict among the circuits.”⁹

In its merit brief, American Needle focuses on a broad application of Section 1 and emphasizes the Supreme Court’s uniform history of holding that all agreements between separately owned and controlled entities operating in interstate commerce are subject to Section 1 scrutiny.¹⁰ Petitioner also states that Section 1 applies to those joint ventures in which substantial cooperation is inherent in the nature of the enterprise. The crux of petitioner’s argument is the decision in *Copperweld Corp. v. Independence Tube Corp.*, which established that a parent and wholly owned subsidiary are inherently subject to a single source of control and are incapable of conspiring with each other under Section 1.¹¹ Petitioner points out that the Court in *Copperweld* found that competition between separately owned and controlled entities is at the core of Section 1 and that agreements between them fall within the application of Section 1 because of their intrinsic anticompetitive risk.¹²

Conversely, respondent focuses primarily on the theme and basic argument that a sports league is a single economic product as opposed to a collaborative effort among independent sources of economic power.¹³ With regard to the Sherman Act’s application, respondent notes that the Act’s intent is to limit cooperation among independent sources of economic power while attempting to avoid stifling competition by a single firm. Respondent claims that because the NFL collectively produces its product, it should be considered a single entity in some aspects of

⁷ *Id.* at *11.

⁸ See Certiorari –Stage Brief for Petitioner at 10-11, *American Needle, Inc. v. National Football League*, No. 08-661 (U.S. May 24, 2010).

⁹ See Certiorari –Stage Brief for Respondents at 4, *American Needle, Inc. v. National Football League*, No. 08-661 (U.S. May 24, 2010).

¹⁰ See Merits Brief for Petitioner at 10, *American Needle, Inc. v. National Football League*, No. 08-661 (U.S. May 24, 2010).

¹¹ 467 U.S. 752 (1984).

¹² Merits Brief for Petitioner at 10, *American Needle, Inc. v. National Football League*, No. 08-661 (U.S. May 24, 2010).

¹³ See Merit Brief for Respondents at 14, *American Needle, Inc. v. National Football League*, No. 08-661 (U.S. May 24, 2010).

its operations, particularly with regard to economic power, thereby differentiating the teams' collaboration from that of traditional joint ventures among actual or potential competitors.¹⁴

Various player's organizations, professional sports leagues, business groups, and economists submitted amicus briefs to the Court in this case. One brief submitted by several professional players associations argues primarily that Section 1 should be applied to professional sports leagues as it will ensure competition on a wide range of levels within the professional sports sector, impacting everything from fair salaries and ownership interests to effective work stoppage alternatives and local market broadcast rights.¹⁵ In contrast, several professional sports leagues argue in their brief that because no single league member or team can produce this product individually and the collective effort is required for the leagues' continued existence and success, sports leagues are single, albeit collective, producers of their own product out of necessity.¹⁶

When the Supreme Court granted certiorari in this case it had only one narrow issue to decide: whether respondents are capable of engaging in a 'contract, combination..., or conspiracy' as defined by Section 1, or, put differently, whether the alleged activity by respondents 'must be viewed as that of a single enterprise for purposes of § 1.'¹⁷ In ruling on this issue, the Court held that there was concerted action when NFLP made decisions concerning the teams' separately owned intellectual property.¹⁸ The Court found that the teams are separately controlled and potential competitors operating through NFLP, and it refused to classify the teams as components of a single firm attempting to maximize its profits.¹⁹

In determining whether an entity is capable of conspiring under Section 1, the Court notes that the relevant inquiry is "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, and therefore of diversity of entrepreneurial interests."²⁰ In determining whether agreements within a firm constitute independent action, the Court presumes that the components of the firm will take act to maximize the firm's profits.²¹ This is not always the case, however, because intrafirm agreements can constitute concerted action under Section 1 when the parties act on interests

¹⁴ *Id.*

¹⁵ See Amicus Brief for National Football League Players Association, Major League Baseball Players Association, National Basketball Players Association, and National Hockey League Players Association in Support of Petitioner at 3, *American Needle, Inc. v. National Football League*, No. 08-661 (U.S. May 24, 2010).

¹⁶ See Amicus Brief for ATP Tour, Inc., WTA Tour, Inc., Major League Soccer, L.L.C., and National Association for Stock Car Auto Racing, Inc. at 3-4, *American Needle, Inc. v. National Football League*, No. 08-661 (U.S. May 24, 2010).

¹⁷ See *American Needle v. NFL*, *supra* note 1, at *11.

¹⁸ *Id.* at *31.

¹⁹ *Id.*

²⁰ *Id.* at *21.

²¹ *Id.* at *30-31.

separate from those of the firm or use the agreements as a mask for ongoing concerted action.²² It follows that when a group of firms agree to produce a product together, even if the joint participation is necessary for the venture, this does not mean that cooperation among them is treated as independent conduct rendering them immune from Section 1.²³

The Court recognizes the shared interest that NFL teams have in the making the league successful and profitable.²⁴ It states that some cooperation among the teams is necessary, such as in game scheduling and production, and that this is a sensible justification for making a variety of collective decisions. If restraints on competition are necessary for a product to be available at all, however, those restraints should be judged by the Rule of Reason rather than *per se* rules of illegality.²⁵ The Rule of Reason essentially involves determining whether the restraint regulates and perhaps promotes competition or whether it depresses or even destroys competition.²⁶ This standard also takes into account the history, reasoning, purpose and intentions behind the restraint to help the court interpret facts and predict consequences.²⁷ In applying the standard to the merits of this case, the Court held that while the interest in maintaining a competitive balance among NFL teams is legitimate and important, “it does not justify treating them as a single entity for § 1 purposes when it comes to the marketing of the teams individually owned intellectual property.”²⁸

Even in acknowledging a certain degree of cooperation, the Court found that the conduct is concerted activity subject to Section 1.²⁹ As the 32 teams compete for intellectual property in the market as separate economic forces pursuing separate interests, they act as “independent centers of decision-making” and are thus actual or potential competitors on and off the field.³⁰ Thus, the Court reversed the Court of Appeals, stating that the joint interest shared by the teams may very well justify a multitude of collective decisions, but that these interests and the collective licensing decisions would be dealt with on remand through an application of the Rule of Reason.³¹

Though this decision did not create significant new precedent as much as it reaffirmed old, it highlighted the antitrust risks in joint marketing arrangements.³² In light of the Court’s refusal to expand the *Copperweld* analysis to immunize the NFL and its teams from the purview of Section 1, this decision may call into question opinions that previously provided immunity based

²² *Id.* at *31.

²³ *Id.* at *28.

²⁴ *Id.* at *35.

²⁵ *Id.*

²⁶ *Id.* at *36.

²⁷ *Id.* at *36-37.

²⁸ *Id.* at *37.

²⁹ *Id.* at *35.

³⁰ *Id.* at *24-25.

³¹ *Id.* at *36.

³² *The Supreme Court Denies NFL Antitrust Immunity for Joint Marketing*, THE SPOTLIGHT NEWSLETTER (Jenner & Block, Antitrust Litigation Update), June, 2010.

on common economic goals between entities promulgating restraints.³³ This decision effectively places companies on notice that competitors will not be treated as a single entity based on common interests alone.³⁴

The implications of this decision will hopefully flow from the highest level of ownership and management in professional sports down to those fans who support the many professional athletes and teams. It is clear that this impact will not only be felt in the NFL, but in every professional sports league in the country, possibly resulting in a more competitive, or at least less restrained, sports production, marketing, and sales industry. With any luck, the resulting business competition within the sports industry will be just as healthy and beneficial to professional sports as the competitive spirit that fuels professional athletes and fans.

³³ *Id.*

³⁴ *Id.*