

THREADING THE 'AMERICAN NEEDLE':

The Supreme Court Adopts a New Standard of Concerted Action Under the Sherman Act

Robert W. Hayes • 215.665.2094 • rhayes@cozen.com
Abby L. Sacunas • 215.665.4785 • asacunas@cozen.com

In a unanimous decision likely to transcend its unique factual background, on Monday, the United States Supreme Court in *American Needle, Inc. v. National Football League, et al.*, established a new test for determining whether related parties are single entities for purposes of establishing an agreement, combination or conspiracy in violation of Section 1 of the Sherman Act.

In *American Needle Inc.*, an apparel producer challenged the legality of exclusive licenses the National Football League (NFL) granted to Reebok to produce and market hats bearing NFL team logos. American Needle alleged that the agreements among the NFL, NFL Properties (which granted the licenses), the individual NFL teams and Reebok unreasonably restrained trade in violation of, among other statutes, Section 1 of the Sherman Act. Noting that only concerted action among independent entities is actionable under Section 1, the District Court entered summary judgment against American Needle, holding that, at least as to the licensing of intellectual property, the NFL and its 32 teams "have so integrated their operations that they should be deemed a single entity rather than joint venturers cooperating for a common purpose."¹ The Seventh Circuit affirmed on the grounds that the NFL was operating as a single entity, with a single corporate consciousness, and as such, was shielded from antitrust scrutiny under Section 1 of the Sherman Act.

American Needle sought certiorari, which in a surprising twist, the NFL urged the Court to grant, in order to resolve a circuit court split arising out of different interpretations of *Copperweld Corp. v. Independence Tube Corp.*² In *Copperweld*, the Court held that parents and their wholly owned subsidiaries are deemed a single entity incapable of entering into an agreement,

combination or conspiracy in violation of Section 1. Applying *Copperweld* in other factual contexts, the lower courts disagreed as to its analytical basis, with some finding that related parties cannot be considered a single entity unless they share a "complete unity of interest," others considering whether the parties' activity derived from a "single source of economic power" and still other courts focusing on whether the parties acted as a "single enterprise."

The *American Needle* Court read *Copperweld* as establishing that "substance, not form, should determine whether a[n] entity is capable of conspiring under § 1."³ It accordingly held that the inquiry is not simply whether there is a general "unity of interests," but whether the agreement joins together "separate economic actors pursuing separate economic interests," such that it "deprives the marketplace of independent centers of decision-making."⁴ If this occurs, then, according to the Court, concerted action covered by Section 1 exists, and a court must decide whether the restraint of trade is unreasonable and consequently illegal under the rule of reason.

Applying this analytical framework to the NFL's grant of an exclusive license to manufacture all 32 teams' caps, the Court found that the NFL should not be viewed as a single, independent firm, principally because decisions made by the NFL were based on the separate economic interests of the 32 teams. Writing for the Court, Justice Stevens concluded that: "[w]hile teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."⁵

The *American Needle* decision is significant even though the case arose within the unique factual background of a professional sports league. It appears to represent a retreat from what was

1. *American Needle v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 943 (2007) citing *Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 (2006).

2. 467 U.S. 752 (1984).

3. *American Needle*, 560 U.S. at 10* (2010) citing *Copperweld*, 467 U.S. at 773, n. 21.

4. *Id.*

5. *American Needle*, 560 U.S. at 13* (2010).

perceived, certainly by the NFL in supporting the grant of certiorari, to be the treatment of joint ventures formed by competitors as a single actor. Just a few years ago, in *Texaco v. Dagher*,⁶ upon which the Seventh Circuit relied, the high court opined that “when persons who would otherwise be competitors pool their capital and share in the risks of loss as well as the opportunities for profit, such joint ventures are regarded as a single firm competing with other sellers in the market.” Without referencing *Dagher*, the Court appears to have withdrawn from this position by concluding that it is not “determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture.”⁷

Prior to *American Needle*, joint ventures formed by competitors to pool resources, for example for research and development or marketing, could presumably set prices for their products, allocate territories or engage in other conduct that would be unlawful if accomplished through concerted action, provided that the venture was an actual operating entity and its formation was not in and of itself anticompetitive. The functional analysis

the *American Needle* Court established would appear to apply to any type of joint venture and raises the specter that even ventures whose formation is on balance pro-competitive may incur antitrust liability or, at least the attendant costs of defending a rule of reason challenge, for engaging in conduct in which single entities may without question lawfully engage.

American Needle makes clear that courts’ willingness to treat a joint venture as a single entity will depend heavily on the extent of economic integration, continued competition between the venturers, and even, as in the case of the NFL, the specific activity of the joint venture as to which single entity status is sought. This case underscores the importance of careful review of the specific facts underlying any proposed joint venture and the need for consultation with antitrust counsel to evaluate the applicability of the single entity status exception to Section 1 liability.

6. 547 U.S. 1 (2006).

7. *American Needle*, 560 U.S. at 11* (2010).