

## Supreme Court Refuses to Insulate NFL Joint Venture from Antitrust Scrutiny

On May 24, 2010, the Supreme Court released its much-anticipated decision in *American Needle, Inc. v. NFL*. A unanimous Court, speaking through Justice Stevens in the last antitrust opinion of his illustrious career, held that the decision by all 32 National Football League teams to authorize NFL Properties to grant an exclusive license comprised concerted action subject to review under Section 1 of the Sherman Act. *American Needle* signals that joint venture participants who are for some purposes competitors cannot expect to defeat challenges of anticompetitive collusion on the ground that a joint venture comprises a “single entity” whose conduct is not subject to Section 1 scrutiny.

*American Needle* concerned the decision of the 32 NFL teams to vote in 2000 to authorize the NFL’s licensing arm, NFL Properties (NFLP), to grant an exclusive license to produce NFL apparel bearing team insignia to a single licensee. Between 1963 and 2000, NFLP had granted nonexclusive licenses to numerous vendors. A former licensee, disappointed by the 2000 change in policy, brought suit under Section 1 of the Sherman Act, contending that the NFL’s decision comprised an anticompetitive restraint of trade. The district court granted summary judgment to the NFL on the ground that the conduct of the 32 NFL teams comprised the conduct of a “single entity” to which Section 1 did not apply, and the U.S. Court of Appeals for the Seventh Circuit affirmed.

The Supreme Court, ruling 9-0, reversed. The Court reiterated that, as explained in its 1984 *Copperweld* decision, the Sherman Act contains a fundamental distinction between “concerted” conduct subject to Section 1 of the Sherman Act, and “unilateral” conduct subject only to the monopolization provisions of Section 2. Whether conduct is “concerted” (and thus potentially subject to Section 1) or not, the *American Needle* Court explained, is a functional analysis that focuses on whether “the agreement joins together independent centers of decisionmaking” (Slip Op. at 11) (internal quotations omitted).

Applying this standard, the Court concluded that “[t]he NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action” (Slip Op. at 12). The Court observed that “the teams compete in the market for intellectual property” (*id.*), have different interests in their own trademarks (Slip Op. at 13), and remain “potential competitors with economic interests that are distinct from NFLP’s financial well-being” (Slip Op. at 16). The Court deemed irrelevant that each of the NFL teams shared profits through NFLP and had done so for a long period of time; if that were enough to oust Section 1, the Court reasoned, “then any cartel could evade the antitrust law simply by creating a ‘joint venture’ to serve as the exclusive seller of their competing products” (Slip Op. at 17). The Court also deemed the justifications for concerted action irrelevant to the application of Section 1. “The mere fact that the teams operate jointly in some sense does not mean that they are immune” from Section 1 scrutiny (Slip Op. at 15). Holding that Section 1 applied to the NFL teams’ conduct in connection with NFLP, the Court remanded the matter for analysis under Section 1’s Rule of Reason.

*American Needle* marks an important decision in the evolving jurisprudence concerning how the antitrust laws apply to joint ventures. The Supreme Court’s 2006 *Dagher* decision suggested that joint ventures that

completely terminate competition among their members might be treated in their operations as the conduct of a single entity. And, some commentators suggested, the Supreme Court might take the next step in *American Needle* and create an exception to Section 1 for closely-integrated joint ventures.

In decisively rejecting this course, *American Needle* shifts the emphasis of antitrust analysis from the categorical question of whether the conduct of a single entity is involved to the substantive determination of whether joint-venture conduct causes anticompetitive effects that are not offset by efficiencies. In short, while joint ventures might no longer be suspect “walking conspiracies,” *American Needle* endorses Rule of Reason analysis of many aspects of even closely-integrated joint ventures. Moreover, we can expect lower courts in the years ahead to grapple with the many questions *American Needle* leaves open concerning how its “functional” approach to the single-entity issue applies in other settings. Finally, and perhaps equally notably, *American Needle* marks the first antitrust Supreme Court decision in some time in which the antitrust defendant did not in some sense prevail.

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