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Supreme Court Clarifies Treatment of Joint Ventures Under Antitrust Law

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The Supreme Court recently released its unanimous opinion in *American Needle, Inc. v. National Football League*, 560 U.S.___ (2010), 2010 WL 2025207 (*American Needle*), its latest foray in the area of competitor collaboration under the antitrust laws (and specifically Section 1 of the Sherman Act, 15 U.S.C. § 1). In *American Needle*, the 32 member teams of the National Football League formed National Football League Properties (NFLP) to develop, license and market their intellectual property. Teams remained free to withdraw from NFLP and enter into license agreements apart from NFLP. After almost 20 years of granting nonexclusive licenses to market NFL products, the teams voted to authorize NFLP to grant exclusive licenses. American Needle, Inc., a manufacturer of specialty headwear, brought suit alleging that the agreements amongst the NFL, its teams, NFLP and Reebok (the now exclusive licensee of NFL brand products) violated Sections 1 and 2 of the Sherman Act. Defendants responded to the Section 1 claim by insisting that for purposes of pursuing the interests of NFLP they were a single economic enterprise, incapable of conspiring within the meaning of Section 1 under *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752 (1984). That case held that a parent and its wholly owned subsidiary had a unity of economic interest and so could not conspire with each other for the purposes of Section 1 of the Sherman Act.

The district court and the Seventh Circuit agreed, ruling that NFLP represented sufficient integration among the teams to constitute "only one source of economic power," *American Needle, Inc. v. New Orleans, La. Saints*, 538 F.3d 736, 743 (2008), and as such a single entity to which Section 1 did not apply. *Id*. at 744. The holding of the Seventh Circuit had significant implications for sports leagues and other competitor collaborations. However, the Supreme Court reversed the holding of the Seventh Circuit.

After tracing the history of the jurisprudence leading up to their opinion in *Copperweld*, and stressing that whether parties to an agreement could be considered separate entities for the purposes of Section 1 of the Sherman Act is a matter of "functional considerations" and not "formalistic distinctions," the Court noted that "[t]he question is whether the agreement joins together independent centers of decisionmaking. If it does, the entities are capable of conspiring under Section 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one." *American Needle*, at *9 (quotation marks and citation omitted.) Before *American Needle*, some courts may have misapplied *Copperweld*, at least to the extent that they focused solely on whether there was a unity of economic interest and not whether the agreement at issue removed a competitor from the marketplace.

Applying the "independent center of decisionmaking" test the Court easily found that the NFL teams were separate entities and thus NFLP actions subject to Section 1 scrutiny. The Court noted each team was independently owned, had "separate corporate consciousnesses" and competed with each other in a number of different ways. More relevantly to the case at hand, the teams directly competed in the market for intellectual property, the market in which they were engaged via NFLP. "[T]eams are acting as separate economic actors pursuing separate economic interests, and each team therefore is a potential independent center of decisionmaking." *American Needle*, at *9 (quotation marks and citation omitted.) The Supreme Court decision did not find the NFL teams' activities in forming and operating NFLP illegal or improper; it merely returned the case to the lower courts for analysis pursuant to Section 1.

It is now clear under *American Needle* that all agreements and collaborations among competitors or potential competitors are subject to review under Section 1 of the Sherman Act for reasonableness (and thus legality). It doesn't matter if the parties set up a joint venture, separately incorporated and separately operated. If the parties are competitors, or could be, in the relevant market, Section 1 is applicable. Some agreements, such as naked price fixing agreements, remain *per se* sanctionable. Others may pass rule of reason analysis "in the twinkling of an eye." *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla*., 468 U.S. 85 (1984.)

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