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## In *American Needle v. NFL*, Supreme Court Holds That NFL Joint Venture Is Subject to Antitrust Scrutiny Under Section 1 of the Sherman Act

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*In American Needle, Inc. v. National Football League, et al. (560 U.S. \_\_\_ (2010)), decided May 24, 2010, the Supreme Court held in a unanimous decision authored by Justice Stevens that the National Football League Properties' exclusive contract with Reebok amounted to "concerted action" by separate entities that warranted scrutiny under Section 1 of the Sherman Act.*

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### Background

The National Football League ("NFL") is an unincorporated association of 32 separately owned professional football teams. In 1963 the teams formed the National Football League Properties ("NFLP") to develop, license, and market their intellectual property; the NFLP distributes the profits evenly among the teams and to charity. At first, NFLP granted nonexclusive licenses to American Needle and other vendors to manufacture and sell team apparel. Eventually, NFLP granted an exclusive license to Reebok International Ltd. to produce and sell trademarked headwear for all 32 teams. When NFLP failed to renew American Needle's license, American Needle filed an action against the NFL, NFLP, and Reebok ("Respondents"), alleging that the agreement violated Sections 1 and 2 of the Sherman Act. The NFL countered that by forming NFLP they had formed a single entity, akin to a merger, and thus they were incapable of conspiring with respect to the challenged conduct. The District Court granted Respondents summary judgment, and the Seventh Circuit affirmed.

### The Supreme Court's Analysis

The narrow issue before the Court was "...whether the alleged activity by the NFL respondents 'must be viewed as that of a single enterprise for purposes of § 1.'" *Id.* at \*4 (quoting *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 771 (1984)). According to the Court, the question was not whether the defendant was a legally separate entity or had a single name; nor was the question whether the parties

involved “seemed” like one firm or multiple firms. Rather, the “key” was whether the conduct joined together separate decisionmakers such that it deprived the market of “independent centers of decision-making.” *Id.* at \*10-\*11.

Applying this test, the Court explained that the 32 NFL teams competed with each other not just on the field but to attract fans, for gate receipts, for contracts with managerial and playing personnel, and in the market for intellectual property. The Court also found it relevant that each team was a substantial, independently owned and independently managed business and that each team’s general corporate actions were guided by a “separate corporate consciousness.” *Id.* at \*12. The Court repeatedly emphasized that each team owned its own intellectual property and explained that “[t]o a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the ‘common interests of the whole’ league but is instead pursuing the interest of ‘each corporation itself...’” *Id.* at \*12 (quoting *Copperweld Corp.* at 770).

The Court rejected the NFL’s argument that the NFLP should be held to be a single entity because, without cooperation between the teams, NFL football could not exist. The Court reasoned that this is true of many joint ventures, because any joint venture involves multiple sources of economic power cooperating to produce a single product. The Court noted that “a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis.” *Id.* at \*14-\*15.

Although the Court observed that the question of whether NFLP decisions could constitute concerted activity under § 1 was closer than whether decisions made directly by the 32 teams were covered by § 1, it ultimately held that the teams could not escape antitrust scrutiny for decisions made regarding separately owned intellectual property by acting through a separately managed entity. *Id.* at \*15,\*17. In so holding, the Court cited to Justice Sotomayor’s concurrence in *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2nd Cir. 2008), where she wrote that competitors cannot simply get around antitrust liability by acting through a third-party intermediary or “joint venture.” As such, the Court held that the restraint had to be judged under the rule of reason and remanded the case for that purpose. *Id.* at \*1, \*20.

Despite its conclusion that concerted action existed, however, the Court made clear that it was not holding the activity in question to be illegal under the Sherman Act. Rather, the Court noted that when “restraints on competition are essential if the product is to be available at all,” *per se* rules of illegality are inapplicable and the restraint must be judged under the “flexible” rule of reason. *Id.* at \*18. In discussing the “flexible” rule of reason, the Court suggested that agreements among the teams might pass scrutiny without the need for a detailed analysis. Among the factors the Court discussed that might justify a variety of collective decisions made by the teams were their shared interest in making the league successful and profitable, their need to cooperate in the production and scheduling of games, and their interest in maintaining a competitive balance.

### Significance and Unanswered Questions

The decision has immense potential significance, not only for the multifaceted operations of sports leagues operating under a wide variety of organizational structures that may differ in important respects from that in *American Needle*, but in evaluating the antitrust risks presented by all joint ventures. One of the most important questions after *American Needle* is when, if ever, the activities of a legitimate joint venture will be treated as those of a single entity. Under the Court’s analysis, the potential that the operations of the venture will be subject to challenge as unlawful concerted action exists, even if the formation of the joint venture itself is entirely lawful. The Court’s opinion appears to recognize that some actions of a joint

venture may be found to constitute unilateral action, but the scope of that protected area is unclear and may be narrow.

Solicitor General Elena Kagan argued in the government's amicus brief that entities are incapable of conspiring under § 1 if they have "effectively merged" the relevant aspect of their operations, thereby eliminating actual and potential competition in that operational sphere *and* the challenged restraint does not significantly affect actual or potential competition outside their merged operations. Brief for the United States as Amicus Curiae Supporting Petitioner, *American Needle, Inc. v. National Football League, et al.*, 560 U.S. \_\_\_ (2010) (No. 08-661). The Court found it unnecessary to adopt this test, but offered little guidance of its own, broadly holding that courts should consider the substance of an alleged single entity over its form and limiting its holding to a situation where various joint venture participants own separate intellectual property.

Despite the potential sweep of *American Needle* on the underlying question of concerted action, however, the decision makes clear that joint venture activities that are reasonably ancillary to the operation and success of a legitimate joint venture itself are properly analyzed under the rule of reason, and in most instances, are likely to be sustained. It also suggests that in many cases, the required rule of reason analysis may be truncated. Nevertheless, pending further clarification, the decision presents the risk of potentially burdensome antitrust challenges to many joint venture activities, even if they ultimately lack merit.

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If you have any questions regarding the content of this advisory, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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