
# NFL, Member Teams Not a "Single Entity" Immune to Prosecution Under Section 1 of the Sherman Act: *American Needle, Inc. v. National Football League*

**name redacted**
Legislative Attorney

June 22, 2010

**Congressional Research Service**
7-....
www.crs.gov
R41294

**CRS Report for Congress**
*Prepared for Members and Committees of Congress*

# Summary

In a decision that had the potential to upset decades of antitrust law, and also to have a broad impact beyond the immediate consequences for the litigating parties, the Supreme Court ruled, on May 24, 2010, that the intellectual-property licensing activities of the National Football League (NFL or League) and its member teams must be treated as those of separate entities whose cooperation and joint decisions are amenable to antitrust prosecution under Section 1 of the Sherman Act, which prohibits contracts or conspiracies "in restraint of trade" (*American Needle, Inc. v. National Football League*, 560 U.S. ___ (2010)). There had been some concern that a contrary ruling—a finding that the NFL's member teams are but "divisions" of an unincorporated NFL and so are incapable of ever conspiring with either each other or the League itself—could have affected existing antitrust jurisprudence concerning the status of entities in sports leagues generally, and also of those entities involved in cooperative or joint venture activity in such diverse areas as real estate services, financial services, and health care.

The immediate issues in the case were the teams' creation in 1963 of NFL Properties (NFLP) to license and market their team-owned intellectual property (primarily team logos); and their subsequent authorization for NFLP to replace the multiple, non-exclusive contracts it had awarded for the manufacture of team-logoed headwear with a single, exclusive contract. American Needle, a holder of one of the former, non-exclusive contracts sued, alleging violation of Section 1. Both parties relied on interpretations of the 1984 decision in *Copperweld Corp. v. Independence Tube Corp.* (467 U.S. 752) to support their arguments. The League successfully argued in both the U.S. District Court for Northern Illinois and the U.S. Court of Appeals for the Seventh Circuit that its structure should be considered analogous to the one analyzed in *Copperweld*; that case held that a parent corporation is incapable of conspiring, in violation of the antitrust laws, with its corporate division(s), or the divisions with each other, because all of those entities share a unity of economic interest. NFL teams, the League insisted, should be similarly viewed—as merely "divisions" of the unincorporated-parent NFL. American Needle had stressed the teams' status as "independently owned and controlled for-profit businesses that do compete, and are capable of competing with each other in numerous ways." The lower federal courts ruled in favor of the NFL because they believed that since team cooperation to produce the NFL product (football games) is indispensable, the teams, even though separately owned business corporations, are the practical equivalents of *Copperweld's* divisions of a corporate parent.

A unanimous *American Needle* Supreme Court disagreed with the NFL, reversing the lower-court decisions and remanding the case for trial. The Court was persuaded that the League's 32 teams, contrary to the NFL's characterization, are separately owned businesses that are engaged in competition for, for example, players, fans, and gate receipts; it quoted *Copperweld* to emphasize that because the teams are "separate economic actors pursuing separate economic interests," they cannot possess the unity of economic interest that would save them from Section 1 scrutiny: the antitrust legality of their cooperative activity must be judged under Section 1 of the Sherman Act, rather than under Section 2, which addresses the unilateral conduct of monopolists. At the same time, the Court specifically recognized that the teams' necessary and "perfectly sensibly justified" cooperation, for example, in the "production and scheduling of games," would provide the basis for rule of reason versus *per se* analysis of those or other cooperative agreements alleged to violate Section 1 of the Sherman Act. Moreover, the opinion observed, the League's activities are not necessarily doomed to violation-of-Section-1-status because "joint ventures and other cooperative agreements are … not usually unlawful … where the agreement … is necessary to market the product at all."

# Contents



## Contacts

# Background and Introduction

The teams of the National Football League (NFL or League) formed NFL Properties (NFLP) in 1963 to aid in the promotion of the NFL brand, including the manufacture, licensing, and marketing of team- and league-logoed, trademarked clothing and merchandise. Originally, the licenses granted by NFLP were non-exclusive (i.e., granted simultaneously to several parties); American Needle, a headwear manufacturer, was one of the non-exclusive licensees for several years. In 2000, the teams authorized NFLP to solicit bids for, and then grant, a single, exclusive license for the manufacture of headwear; when the license was awarded to Reebok, American Needle, one of the non-renewed, non-exclusive licensees, sued the NFL, NFLP, the individual teams, and Reebok, alleging, in pertinent part, that the teams' actions in creating NFLP violated Section 1 of the Sherman Act.[1] The NFL/team response was the assertion that as subsidiary members of an unincorporated association, the teams were legally incapable of conspiring either with each other or with the League.

American Needle was rebuffed in both the U.S District Court for Northern Illinois[2] and in the U.S. Court of Appeals for the Seventh Circuit.[3] Although the NFL was successful in those courts, it did not oppose American Needle's petition for *certiorari* in the Supreme Court.

The case had been carefully watched, given that a Supreme Court ruling endorsing the NFL's "single entity" argument would likely have had an impact on the application of the antitrust laws not only to other (professional) sports leagues and their decisions concerning, for example, player services, ticket pricing, stadium parking fees, and merchandise sales; but also to any business entity—especially those in such areas as financial services, real estate services, or health care—participating or contemplating participation in joint activities.[4]

---

[1] 15 U.S.C. § 1.

[2] American Needle, Inc. v. New Orleans Louisiana Saints. 496 F.Supp.2d 941 (N.D Ill. 2007); 533 F.Supp.2d 7901 (N.D. Ill. 2007) (both granting defendants' motions to dismiss).

[3] 538 F.3d 736 (7th Cir. 2008).

[4] *E.g.*: "The outcome of this case is of great interest to the [NFL] Players' Association. The antitrust settlement in the NFL is about to expire in 2011. The labor agreements in MLB [Major League Baseball], the NBA [National Basketball Association], and the NHL [National Hockey League] are similarly set to expire in or around 2011. The NFL owners' appeal in this case is a Trojan horse designed to free sports team owners from Section 1 scrutiny so they can restrain competition with impunity in the market for player services. If the broad single entity defense advanced by the owners were adopted, decades of antitrust precedents that have protected competition for player services would be reversed, the benefits that both players and consumers have gained from competitive markets would be jeopardized, and labor disputes and work stoppages would likely ensue." Brief Amici Curiae for the Players' Associations of the NFL, MLB, NBA, and the NHL in Support of Petitioner American Needle at 2; and, "[i]f the Court affirms, and particularly if it does so in explicit reliance on [Texaco v.] Dagher (547 U.S. 1 (2006) [a case in which the Court found no price fixing on the part of Texaco and Shell, when the joint venture they had formed to market gasoline sold their separate brands to stations at identical prices], *then American Needle could, as a practical matter, do significant damage to the enforceability of Section 1 of the Sherman Act; it could in effect immunize significant swaths of concerted conduct among competitors.* It would imply that comparatively unintegrated arrangements, like trademark licensing agreements among the NFL member teams, are just as 'economically integrated' as the defendants' joint venture in Dagher. In short order we would see horizontal arrangements throughout the economy purporting to have 'integrated' around some shared common purpose." Chris Sagers, *American Needle, Dagher, and the Evolving Antitrust Theory of The Firm: What Will Become of Section 1?* ANTITRUST SOURCE , Aug. 2009 (emphasis added) http://new.abanet.org/antitrust/Searchable%20Antitrust%20Library/antitrust-source-Aug09-Sagers8-12f.pdf. The announcement of a June 29, 2010 American Bar Association Teleconference titled, "*American Needle v. NFL*: Impact on Joint Ventures," refers to "a highly anticipated decision" which "may impact joint ventures under a § 1 Sherman Act analysis."

## Relevant Antitrust Statutes

Sections 1 and 2 of the Sherman Act[5] address, respectively, cooperative activity and unilateral activity by monopolists or would-be monopolists. Although Section 1 prohibits, without exception, contracts or conspiracies "in restraint of trade," the courts have created two classes of antitrust analysis—*per se* and rule of reason. Those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal under Sherman Act without elaborate inquiry as to precise harm they have caused or business excuse for their use."[6]

They are analyzed as *per se* (automatic) violations for which there can be no justification. In other words, if "[a ]practice facially appears to be one that would always or almost always tend to restrict competition and decrease output [rather than one that would] 'increase economic efficiency and render markets more, rather than less, competitive,'"[7] it will be deemed a *per se* offense. *Per se* offenses (there are not many) include price fixing, market allocation, and boycotts or joint refusals to deal; generally, only *per se* antitrust offenses are prosecuted criminally.

On the other hand, courts have long recognized that

> the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.[8]

Such agreements are analyzed as rule of reason offenses, and usually receive much more extensive scrutiny than do the relatively quickly disposed of *per se* offenses. Pursuant to rule of reason analysis, if, on balance, the precompetitive effects of the activity outweigh the anticompetitive results, the activity is found to be "reasonable," and even if it effectively violates the antitrust laws, it is deemed not unlawful.

Section 2 prohibits "monopolization" or "attempted monopolization,"[9] either of which may be engaged in by a single entity, and neither of which requires, but *may* involve, an agreement between two or more parties. As the Court has noted, with respect to the purpose and use of Section 2, "[t]he conduct of a single firm is governed by § 2 alone and is unlawful *only* when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression."[10]

---

[5] 15 U.S.C. §§ 1 and 2.

[6] Northern Pac. Ry. Co. v. U.S. 356 U.S. 1, 78 (1958).

[7] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. 441 U.S. 1, 19-20 (1979), *quoting and citing,* United States v. United States Gypsum Co., 438 U.S. 422, 441, n. 16 (1978).

[8] Board of Trade of City of Chicago v. U.S. 246 U.S. 231, 238 (1918).

[9] The statute does *not* prohibit monopoly, or the fact of being a monopolist, only conduct that may be characterized as "guilty behavior" designed to unlawfully achieve, maintain (*e.g.*, via predatory pricing behavior), or extend a monopoly, even a lawful one.

[10] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984) (note omitted, emphasis added).

There are no *per se* offenses associated with Section 2.

Not surprisingly, therefore, an entity with multiple members would prefer to be considered as a single entity amenable to prosecution only under Section 2 of the Sherman Act (the position, in fact, advanced by defendant/respondent NFL), rather than as multiple, separate entities that are legally capable of unlawful cooperation or agreement, and so always amenable to civil suit and/or criminal prosecution under Section 1 (plaintiff/appellant American Needle's argument).

## *Copperweld Corp. v. Independence Tube Corp.*

Throughout the *American Needle* case both parties relied on interpretations of the language and holding in *Copperweld Corp. v. Independence Tube Corp.*[11] to support their arguments.

*Copperweld* addressed a situation in which a corporation (Copperweld) was alleged to have unlawfully conspired, in violation of Section 1 of the Sherman Act, with a division it created to house its acquisition of another corporation (Regal Tube). Refusing to find a violation, the Supreme Court explained:

> The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination ... or conspiracy" in § 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the same company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. *The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.* Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.[12]

Previously in its opinion, the Court had noted the rationale for treating concerted behavior "more strictly" than unilateral behavior: *"It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands."*[13]

Although the situation in Copperweld involved a corporate division, the Court also discussed the status of a corporation and its wholly owned subsidiar(ies), a scenario that the NFL sought to convince the *American Needle* Court was analogous to its own. The *Copperweld* Court had noted that any court reviewing the antitrust legality of a conspiracy alleged to be in violation of Section 1 must not be overly concerned with the form of corporate structure but must look to its substance: "The economic, legal, or other considerations that lead corporate management to choose one structure over the other [unincorporated division or wholly owned subsidiary] are not relevant to whether the enterprise's conduct seriously threatens competition."[14]

[11] 467 U.S. 752 (1984).

[12] 467 U.S. at 769 (emphasis added).

[13] 467 U.S. at 769 (emphasis added).

[14] *Id.* at 772.

Both "the ultimate interests of …[either an unincorporated division and those of a wholly owned subsidiary] … and the parent are identical,"[15] as is the parent's ability to exercise complete control over either.

# *American Needle* in the Lower Federal Courts[16]

## The District Court

The United States District Court for Northern Illinois seemed to make much of the fact that plaintiff American Needle "did not claim that the NFL and its 32 teams [had] … acted improperly" in the initial creation of NFLP and the delegation to it of "the authority to grant licenses" for the teams' intellectual property; allegations of conspiracy in restraint of trade in violation of Section 1 were confined to the decision by NFL Properties to grant an exclusive license. That distinction was quickly rejected by the court: "The issue … is whether the 32 teams can agree on designating a common actor to exploit their various intellectual property rights."[17]

Granting the League and the teams' motion to dismiss, the district court issued both a conclusion directed specifically to that facet of the teams' actions: "the facts … lead undeniably to the conclusion that the NFL and the teams act as a single entity *in licensing their intellectual property,*"[18] as well as earlier, more broadly directed statements. For example, "*Copperweld* casts considerable doubt upon prior lower court decisions broadly rejecting the single entity concept."[19]

But the district court also appeared to rely on *Copperweld* only to support the assertion that "[d]elegated decision-making does not deprive the marketplace of independent centers of decision-making."[20]

The second district court decision was limited to disposing, favorably to the NFL, of the remaining counts of the complaint, which alleged monopolization in violation of Section 2.

## The Court of Appeals

Affirming the district court dismissal, the U.S. Court of Appeals for the Seventh Circuit characterized American Needle's assertion that "the NFL teams can be a single entity only if the teams have 'a complete unity of interest'" as a "legal proposition that we have rejected as 'silly.'"[21] While it is true that "the Supreme Court in *Copperweld* was concerned about the anti-

[15] *Id.*

[16] *Cf*, notes 2 and 3, *supra*.

[17] 496 F.Supp. 2d at 942-943.

[18] *Id.* at 944 (emphasis added).

[19] *Id.* at 943.

[20] *Id.* at 943. Moreover, the court also noted, pointedly, that "American Needle, Inc. does not suggest that it ever dealt with any of the teams as independent organizations" (*Id.* at 944).

[21] 538 F.3d 736, 743. The reference is to the Seventh Circuit interpretation of *Copperweld* in Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n 95 F.3d 593 (7th Cir. 1996): "Although that phrase ['complete unity of interest'] appears in *Copperweld*, the Court offered it as a statement of fact about the parent-subsidiary relation, not as a proposition of law about the limits of permissible cooperation. As a proposition of law, it would be (continued...)

competitive effects that collective action might introduce into the market," it is just as true that the foundation of that concern was "whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes."[22] Having already noted that there might well be "competing interests" among the entities involved, even among bona fide divisions of the same company, the court of appeals was not persuaded that the ability of the NFL teams to compete with regard to the merchandising of their intellectual property (logos et al.) should automatically foreclose the option of considering them as a single entity for purposes of the proper use of the antitrust laws: "the NFL teams can function only as one source of economic power when collectively producing NFL football."[23]

The court also relied on arguments set out in Supreme Court opinions[24] to the effect that the NFL as an entity competes with other league sports, to buttress its finding that the NFL cannot produce the several sources of independent economic control that would necessitate the use of Section 1.

Finally, the court disposed of American Needle's argument that even if the NFL and its member teams were considered as a single entity subject to Section 2's prohibition against monopolization, their joint action in authorizing an exclusive headwear licensing contract constituted conduct prohibited by that section: "an antitrust claim based on a single firm's denial of a license to a trademark would readily be dismissed …."[25]

# *American Needle v. NFL* in the Supreme Court

A unanimous Supreme Court, per Justice Stevens, defined the issue:

> As the case comes to us, we have only a narrow issue to decide: whether the NFL respondents are capable of engaging in a "contract, combination … or conspiracy" as defined by § 1 of the Sherman Act …, or, as we have sometimes phrased it, whether the alleged activity by the NFL respondents "must be viewed as that of a single enterprise for purposes of § 1." *Copperweld* …, 467 U.S. 752, 771 ….[26]

The ruling answered "yes" to the first "whether" and "no" to the second, deciding against the successful-in-the-lower-federal-courts NFL and in favor of the position taken by American Needle.

Summarizing the cases—ending with *Copperweld*—in which the Court had addressed the "now-defunct doctrine known as the 'intraenterprise conspiracy doctrine,'"[27] Justice Stevens noted that

(...continued)

silly. Even a single firm contains many competing interests."

[22] 538 F.3d at 743.

[23] *Id.*

[24] Most notably, National Collegiate Athletic Ass'n v. Bd. of Regents (468 U.S. 85, 101 (1984)), which quoted Robert Bork in THE ANTITRUST PARADOX (1978); and the dissenting opinion of Justice Rehnquist in Nat'l Football League v. No. American Soccer League (459 U.S. 1074, 1077 (1982)).

[25] 538 F.3d at 744, *quoting* from Gregory J. Werden, "Antitrust Analysis of Joint Ventures: An Overview," 66 ANTITRUST L.J. 701, 730-31 (1998).

[26] American Needle v. National Football League, 560 U.S. ___, ___ (2010), slip opinion at 4, 2010 WL 2025207 at *5.

[27] Slip opinion at 7, 2010 WL2025207 at *6.

the Court had previously concluded that the doctrine "was inconsistent with the 'basic distinction between concerted and independent action.'"[28] But he also noted that the Court has always looked at the functional (as opposed to the formal, legal) relationships among the entities litigating before it in order to determine whether competition had been, unlawfully, adversely affected:

> We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct *actually operate*.
>
> As a result, we have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity.[29]

Accordingly, the opinion proceeded to look at the "competitive reality"[30] existing in the NFL and its member teams, and to the purpose of Section 1 to determine whether their concerted actions are of the kind that the provision was enacted to deter and punish. The teams, albeit related by virtue of their status in the NFL, "compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel."[31]

Especially relevant to the case before the Court, the teams can and do compete in the market for intellectual property (team-logoed or otherwise trademarked merchandise, etc.): "[t]o a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. In the words of *Copperweld*, therefore, "'their general corporate actions are guided or determined by 'separate corporate consciousness,' and 'their objectives are' not 'common.'"[32]

The Court was not unmindful of the fact that there may be a common interest in the joint licensing of team/NFL trademarks, or in other cooperative action:

> Other features of the NFL may also save agreements amongst the teams. We have recognized, for example, "that the interest in maintaining a competitive balance" among "athletic teams is legitimate and important," *NCAA* [v. *Board of Regents*], 468 U.S. 85,117 …. While that same interest applies to the teams in the NFL, 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. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams.[33]

Nevertheless, Justice Stevens was constrained to point out that "illegal restraints often are in the common interests of the parties to the restraint," and that "[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action."[34]

[28] Slip opinion at 9, 2010 WL 2025207 at *7, *quoting* from *Copperweld*, 467 U.S. at 767.

[29] Slip opinion at 6, 2010 WL 2025207 at *6 (emphasis added).

[30] Slip opinion at 11, 2010 WL 2025207 at *9.

[31] Slip opinion at 12, 2010 WL 2025207 at *9.

[32] *Id.*, *quoting* from 467 U.S. at 771.

[33] Slip opinion at 19, 2010 WL 2025207 at *13.

[34] Slip opinion at 13, 14, 2010 WL 2025207 at *10, *11.

Having thus made clear that substance versus form will determine whether collective action is the kind of concerted action appropriately analyzed under Section 1 of the Sherman Act, and that the NFL/team intellectual-property licensing activities would continue to be analyzed under that section, Justice Stevens sought to reassure the NFL that "[f]ootball teams that need to cooperate are not trapped by antitrust law." He emphasized the Court's view that "collective decisions" by the League and its teams are "perfectly sensible" given the "special characteristics" of the football industry.[35] Therefore, although the antitrust analysis will generally occur under Section 1, the appropriate mode of analysis will almost certainly be the "flexible" rule of reason rather than the more rigid *per se* analysis.

The need to examine the League/team collective action in licensing their respective and common trademarks under Section 1 led the Court to remand the case to the U.S. Court of Appeals for the Seventh Circuit, which will, in turn, likely remand to the U.S. District Court for Northern Illinois for trial.

## Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

[35] Slip opinion at 18, 2010 WL 2025207 at *12, *citing* and *quoting* the "special characteristics" language of his own dissent in Brown v. Pro Football, Inc., 518 U.S. 231, 252 (1996), a case in which the Court found that the nonstatutory labor exemption from antitrust liability permitted the League to impose certain salary conditions on substitute players after collective bargaining on the issue between the League and the Players' Association had not produced any results.