



Antitrust Law Alert

A Litigation Department Publication

June 2010

This Antitrust Law Alert is intended to provide general information for clients or interested individuals and should not be relied upon as legal advice. Please consult an attorney for specific advice regarding your particular situation.

Donald M. Barnes
202-778-3056
dbarnes@porterwright.com

Salvatore A. Romano
202-778-3054
sromano@porterwright.com

Helen J. Kim
202-778-3020
hkim@porterwright.com

Please see our other publications at www.porterwright.com/publications.

U.S. Supreme Court Reverses Seventh Circuit Decision — Refuses to Treat NFL as a Single Business Entity

In a unanimous decision, the United States Supreme Court rejected the National Football League's ("NFL") argument that it should be accorded antitrust protection as a single business entity with respect to its licensing of intellectual property, rather than as the concerted action or conspiracy of 32 member teams. *American Needle, Inc. v. National Football League*, No. 08-661, slip op. (Sup. Ct. 2010) ("*American Needle*"). The Court reversed the Seventh Circuit's decision, which held that the NFL's exclusive licensing agreement with Reebok International Ltd. ("Reebok") did not violate the antitrust laws because the NFL was a single entity and, as such, could not be treated as a conspiracy of, or concerted action by, its 32 member teams. *American Needle, Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008).

The NFL is an unincorporated association of 32 separately owned professional football teams. Each team owns their respective logos, colors, and other related intellectual property. Until 2000, the NFL granted nonexclusive licenses to the intellectual property through its licensing arm — National Football League Properties ("NFLP") — to vendors including American Needle, Inc. ("*American Needle*"). NFLP then entered into an exclusive licensing agreement with Reebok to manufacture and sell hats and other products bearing the logos of its 32 member teams. When its license was not renewed, American Needle sued, alleging that the agreements constituted a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. The lower court granted summary judgment for the NFL, and the Seventh Circuit affirmed, holding that the NFL, its 32 teams, and NFLP constituted a single entity under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and not a conspiracy with respect to the licensing of logos and trademarks of its member teams.

After the Supreme Court granted *certiorari* to review the Seventh Circuit's decision, the Federal Trade Commission and the Department of Justice submitted an *amicus curiae* brief supporting reversal of the Seventh Circuit's decision. The agencies viewed the Seventh Circuit's decision as effectively shielding the NFL from antitrust scrutiny with respect to its exclusive licensing deal for hats and other products bearing member football team logos. The agencies argued that the teams were separately owned and controlled and, therefore, the NFL

and its members were not entitled to be treated as a single entity under *Copperweld*.

The Supreme Court held that the NFL and its 32 member teams should not be treated as a single entity for the purposes of the antitrust laws. Justice John Paul Stevens, writing for the Court, noted that concerted action under §1 did not depend on corporate formalities, but whether “separate decisionmakers” were involved. Justice Stevens emphasized that the Seventh Circuit erred in failing to take into account the importance of potential competition among the teams as “separate economic actors pursuing separate economic interests.” *American Needle*, at 12, quoting *Copperweld*, 467 U.S. at 769. Justice Stevens concluded that each team was a “substantial, independently owned and independently managed business,” and while they operate jointly in some circumstances, they were competitors in the market for intellectual property. *Id.* at 12 (“To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks.”). The Court held that the NFL was not immune from the antitrust laws as a single entity and that the licensing of the teams’ intellectual property constituted a joint venture. As a joint venture, the Court treated the NFLP’s licensing activities under the Sherman Act’s rule of reason and not the *per se* rule. The Court remanded the case for further proceedings consistent with its opinion.

The upshot of the case is that the NFL’s intellectual property licensing program will be evaluated under the rule of reason. The Court even suggested that a “quick look” rule of reason approach would be appropriate and that it was likely that a host of NFL collective activities could be justified under the rule of reason approach.