

IS THE NATIONAL FOOTBALL LEAGUE A “SINGLE ENTITY” INCAPABLE OF CONSPIRING UNDER THE SHERMAN ACT?: THE SUPREME COURT WILL DECIDE

Steven Semeraro*

INTRODUCTION

In *American Needle v. National Football League*,¹ a sports clothing manufacturer, American Needle, sued the National Football League (“NFL”) alleging that an exclusive agreement between the NFL and Reebok to manufacture caps with team logos constituted a concerted refusal to deal among the teams in the league.² American Needle alleged that such an agreement violated section 1 of the Sherman Act, which prohibits contracts, combinations, and conspiracies in restraint of trade.³ The district court granted summary judgment in favor of the NFL, and the Seventh Circuit affirmed. Both courts found that the league constitutes a single business entity, and therefore the individual teams were incapable of conspiring under section 1. “[T]he NFL teams,” Judge Kanne wrote for the Seventh

* Professor of Law at the Thomas Jefferson School of Law. The author thanks Shuba Ghosh and D. Daniel Sokol for publishing an early and much shorter version of this paper as a blog entry on the Antitrust & Competition Policy Blog; the editors of GCP: The Online Magazine for Global Competition Policy for including a different early version in their May 2009 issue; and Abigail Kite and James Mullen for their assistance in researching, drafting, and editing the expanded article that appears here.

1. 538 F.3d 736 (7th Cir. 2008).

2. This issue has been the subject of extensive scholarship treatment. *See, e.g.*, James T. McKeown, *2008 Antitrust Developments in Professional Sports: To the Single Entity and Beyond*, 19 MARQ. SPORTS L. REV. 363 (2009); Marc Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891 (2008).

3. Section 1 of the Sherman Act, 15 U.S.C. § 1 (2000), prohibits “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce.”

Circuit, “are best described as a single source of economic power when promoting NFL football through licensing the teams’ intellectual property.”⁴ Put simply, the lower courts held that you cannot conspire with yourself.

The decision’s significance is hard to overstate. Antitrust challenges to the conduct of sports leagues are quite common.⁵ The NFL, despite its victory in the lower court, supported U.S. Supreme Court review in an effort to ensure that the *American Needle* analysis would apply nationwide.⁶ The National Basketball Association (“NBA”) and the National Hockey League (“NHL”) also concurred in *American Needle*’s petition for certiorari to the U.S. Supreme Court.⁷ Even Major League Baseball (“MLB”), which is generally exempt from antitrust scrutiny,⁸ recently cited the Seventh Circuit’s decision to justify its new exclusive license with the Topps baseball card company.⁹ This new deal will end a quarter century of open competition among trading card producers.¹⁰ Despite the Solicitor General’s (“SG”) recommendation against hearing the case,¹¹ on July 29, 2009, the Supreme Court granted certiorari.¹²

This article reviews the case law assessing the single-entity defense and evaluates the *American Needle* decision. It concludes that the Seventh Circuit wrongly decided the case and that the U.S. Supreme Court should thus reverse and remand for a full trial under

4. *Am. Needle*, 538 F.3d at 744.

5. *See infra* nn.20–23.

6. Brief for the NFL Respondents at 4, *Am. Needle, Inc. v. Nat’l Football League*, No. 08-661 (U.S. Jan. 21, 2009).

7. The National Basketball Association and the National Hockey League both filed amicus briefs urging the Court to hear the case. Brief of Amici Curiae National Basketball Association and NBA Properties in Support of the NFL Respondents’ Response, *Am. Needle, Inc. v. Nat’l Football League*, No. 08-661 (U.S. Jan. 21, 2009); Brief for Amicus Curiae the National Hockey League in Support of the NFL Respondents, *Am. Needle, Inc. v. Nat’l Football League*, No. 08-661 (U.S. Jan. 21, 2009).

8. *Flood v. Kuhn*, 407 U.S. 258, 284 (1971).

9. Richard Sandmir, *Topps Gets Exclusive Deal With Baseball, Landing a Blow to Upper Deck*, N.Y. TIMES, Aug. 6, 2009, <http://www.nytimes.com/2009/08/06/sports/baseball/06cards.html> (quoting Tim Brosnan, Executive Vice President for Business at Major League Baseball).

10. *Id.*

11. Brief for the United States as Amicus Curiae, *Am. Needle, Inc. v. Nat’l Football League*, No. 08-661 (U.S. May 28, 2009).

12. *Am. Needle v. Nat’l Football League*, 129 S. Ct. 1400 (2009) (mem.).

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the rule of reason, a test requiring the court to determine whether the challenged agreement restrains or enhances competition.¹³

Although the NFL functions as a single entity for some purposes, the sale of logo caps is not one of them. Individual teams can meaningfully compete to sell caps and other items bearing team logos, and consumers would benefit from this competition. The closest substitute for logo gear from one NFL team is likely to be logo gear from another NFL team. Permitting the teams to act collectively and issue a single exclusive license thus eliminates the most effective form of competition to reduce price and increase the styles and options available to consumers.

There is no reason to believe that this form of competition would detract from the overall success of the NFL in competing with other forms of entertainment. The presence in the marketplace of a greater variety of logo gear at varying quality and price levels could not feasibly affect the popularity of the NFL vis-à-vis MLB or the NBA in any significant way. As a result, the individual teams in a given sports league cannot justify an agreement not to compete in the sale of logo gear on the ground that the league constitutes a single entity.

All this does not mean that the NFL's exclusive license to Reebok violated the antitrust laws. Jointly licensing the team logos has pro-competitive benefits. It would likely save on administrative expenses by enabling (1) clothing manufacturers to obtain the right to use all NFL team logos through a single negotiation, and (2) the league to monitor logo cap sales more efficiently than could the individual teams. In addition, sharing revenue from joint licenses could contribute to financial parity among the teams, which may make the league more attractive to fans. Because the lower courts decided the case by declaring the NFL a single entity, they did not consider the magnitude of these benefits or whether they could be obtained with fewer competitive restrictions. Findings on these issues are needed to reach the ultimate question: whether the anticompetitive aspects of joint licensing outweigh its benefits.

Part I of this article reviews the circuit court law on the single-entity defense prior to *American Needle*. Part II summarizes the *American Needle* litigation, and Part III critiques the Seventh

13. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779–81 (1999) (describing the Rule of Reason as requiring the court to determine “whether or not the challenged restraint enhances competition” by applying “an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint”).

Circuit's opinion and provides an alternative framework of analysis. The article concludes that the NFL should not be treated as a single entity for the purpose of licensing team logos and that the case should be remanded and the lower court instructed to assess the exclusive license under the rule of reason.

I. *PRE-AMERICAN NEEDLE* LITIGATION INVOLVING THE SINGLE-ENTITY DEFENSE

Professional sports leagues have long been magnets for antitrust claims because their rules, policies, and contracts can be viewed as the product of an agreement among independently owned teams that both play in and direct the league. Popular sports leagues also have substantial power in some markets because, for loyal fans, there is no reasonable substitute for watching their favorite team. Those who are disgruntled by the actions of a sports league thus have little difficulty couching their grievance as a contract, combination, or conspiracy that triggers section 1 scrutiny.¹⁴

From the beginning, sports leagues responded to these claims by arguing that they are single entities incapable of conspiring under the antitrust laws. Although individual teams are separate businesses that compete on the field of play, the leagues contend that the teams do not compete with each other in the marketplace. The economic success of each team is fundamentally tied to the prospects of the league as a whole, and thus to all other teams.

Moreover, the product that the teams produce—a particular brand of sport—is a joint product that no single team can provide. The sport of football in the NFL, for example, includes a rich history and set of traditions, season-long standings, statistical comparisons among players, playoffs, championships, and of course competition between teams on the field. The NFL has argued that producing this joint product requires coordination akin to the internal regulations of a single large enterprise, rather than agreement among economic rivals.

Over the years, the Supreme Court has offered some observations that could be read to support the single-entity defense. In 1996, in assessing the scope of the non-statutory labor exemption to the antitrust laws, a majority of the Court recognized in dicta that NFL teams are not ordinary competitors and that in some cases the

14. See 15 U.S.C. § 1 (2000).

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league is “more like a single bargaining employer.”¹⁵ Years earlier, then-Justice William Rehnquist, in a dissent from the denial of certiorari, emphasized that “the league competes as a unit against other forms of entertainment” and “individual NFL teams... rarely compete in the market place.”¹⁶

Despite this hopeful rhetoric, the single-entity defense has met with little success in the lower courts.¹⁷ In the 1970s and early 1980s, the Second, Third, and Ninth Circuits all applied section 1 to NFL rules relating to: (1) the ownership of teams in other leagues;¹⁸ (2) team movement to new cities;¹⁹ and (3) the admission of new teams into the league.²⁰ In numerous other cases, involving a variety of different sports, the courts simply applied section 1 to league decisions without addressing the single-entity issue.²¹

The Supreme Court’s 1984 *Copperweld* decision gave the NFL and other sports leagues new hope.²² The Court held that a parent company and its wholly-owned subsidiary were incapable of

15. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248–49 (1996) (“[T]he [teams] that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival.”).

16. *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari).

17. *See, e.g., L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984).

18. *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982) (describing single-entity defense as a “loophole” that “would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects”).

19. *L.A. Mem’l Coliseum*, 726 F.2d at 1389–90 (9th Cir. 1984) (explaining that the necessity of cooperation does not render competitors immune from section 1 liability). *But see S.F. Seals, Ltd. v. Nat’l Hockey League*, 379 F. Supp. 966, 970 (S.D. Cal. 1974) (holding NHL a single entity, but rejected by the Ninth Circuit in *L.A. Mem’l Coliseum*).

20. *Mid-South Grizzlies v. Nat’l Football League*, 720 F.2d 772, 786–87 (3d Cir. 1983) (recognizing some economic competition among members of the league).

21. *See, e.g., Radovich v. Nat’l Football League*, 352 U.S. 445, 449–52 (1957); *Mackey v. Nat’l Football League*, 543 F.2d 606, 620 (8th Cir. 1976); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978); *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315, 1321 (D. Conn. 1977); *Robertson v. Nat’l Basketball Ass’n*, 389 F. Supp. 867, 890–93 (S.D.N.Y. 1975); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 500 (E.D. Pa. 1972); *Bowman v. Nat’l Football League*, 402 F. Supp. 754 (D. Minn. 1975); *Kapp v. Nat’l Football League*, 390 F. Supp. 73 (N.D. Cal. 1974); *Levin v. Nat’l Basketball Ass’n*, 385 F. Supp. 149 (S.D.N.Y. 1974); *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1061 (C.D. Cal. 1971).

22. *Copperweld Corp. v. Independence Tube*, 467 U.S. 752 (1984).

conspiring under the antitrust laws because they did not constitute independent voices in the competitive marketplace.²³ The parent corporation could treat the subsidiary as a division of the same company, which would be a single entity incapable of conspiring with itself.²⁴ Antitrust analysis, the Court emphasized, must turn on economic realities not corporate formalities.²⁵ Because the parent has the power to completely control its wholly-owned subsidiaries' conduct, only a single entity exists for antitrust purposes even though subsidiaries are technically separate companies.

In several post-1984 cases, a variety of sports leagues cited *Copperweld* for the proposition that formally separate entities cannot conspire under the antitrust laws when those entities are working toward a common end.²⁶ To be sure, teams are not subsidiaries of the league. But they do sell a single product and thus, the leagues contend, they are akin to independently owned McDonald's franchises that sell a standardized product. No one would expect those franchises to compete with one another in introducing new sandwiches or claiming that one makes better a Big Mac than another.²⁷ The leagues contend that the same is true of sports teams. Just as a parent company and its subsidiaries coordinate their activities to compete with separately owned companies, sports teams seek to make their league a more effective competitor with other forms of entertainment. The classic, though perhaps overbroad, list of competitors for a typical sports league includes other leagues playing the same sport, other sports, "and other entertainment such as plays, movies, opera, TV shows, Disneyland, and Las Vegas."²⁸ Far from placing limits on the agreements teams may reach, one court paraphrased the league's argument as follows: "antitrust law permits, indeed encourages, cooperation inside a business organization... to facilitate competition between that organization and other producers."²⁹

23. *Id.* at 771–72.

24. *Id.* at 772–73.

25. *Id.* (holding that antitrust liability should not "turn[] on the garb in which a corporate subunit was clothed").

26. *See, e.g.,* *Fraser v. Major League Soccer*, 284 F.3d 47, 57 (1st Cir. 2002); *Chicago Prof'l Sports Ltd. v. Nat'l Basketball Ass'n*, 95 F.3d 593, 598 (7th Cir. 1995) [hereinafter *CPS Case*].

27. *See CPS Case*, 95 F.3d at 598.

28. *Id.* at 597 (per Easterbrook, J.).

29. *Id.* at 598.

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Sports leagues, however, differ from parent and subsidiary companies in a significant way. A parent company is the single marketplace voice that ultimately controls the activities of its subsidiaries, and those junior companies must abide by the dictates of their parent. The Supreme Court analogized wholly-owned subsidiaries to “a multiple team of horses drawing a vehicle under the control of a single driver.”³⁰ In contrast, a sports league’s teams control both the decisions of the league and retain the right to secede and create a new competitive league.³¹ Rather than a central authority that governs its sub-parts, the real power in a sports league rests with the individual team owners.³² The teams are thus quite distinct from mindless horses unquestioningly following the dictates of the wagon driver.

Perhaps because of this distinction, most post-*Copperweld* decisions have continued to reject the single-entity defense.³³ That the teams have business interests that differ from those of the league, however, may not entirely rule out single-entity status. In a mid-1990s case that remains the definitive opinion on the issue, renowned antitrust expert and Seventh Circuit Judge Frank Easterbrook explained that differing interests exist even within a single corporation.³⁴ One division, for example, may benefit at the expense of another.³⁵ The key to whether section 1 applies is not simply whether different interests exist, but whether a business arrangement reduces the number of independent marketplace decision-makers without the countervailing “efficiencies that come with integration

30. *Copperweld Corp.*, 467 U.S. at 771.

31. See *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 518 F. Supp. 581, 584 n.4 (E.D. 1981).

32. *Fraser v. Major League Soccer*, 284 F.3d 47, 57 (1st Cir. 2002); *L.A. Mem’l Coliseum Comm’n*, 726 F.2d at 1389.

33. *Fraser*, 284 F.3d at 55–59; *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469–70 (6th Cir. 2005); *McNeil v. Nat’l Football League*, 790 F. Supp. 871, 879–80 (D. Minn. 1992). *But see Seabury Mgmt., Inc. v. PGA of Am., Inc.*, 878 F. Supp. 771, 777–78 (D. Md. 1994), *aff’d in part*, 52 F.3d 322 (4th Cir. 1995) (holding Professional Golf Association and its separately incorporated sections to be a single entity).

34. *CPS Case*, 95 F.3d at 598 (explaining that one division could benefit if it could sell to outside users in addition to supplying the company’s own operations, nevertheless the company is permitted to limit the divisions production to that necessary for internal needs).

35. *Id.*

inside a firm.”³⁶ In *Copperweld*, Easterbrook concluded, the Supreme Court treated parent companies and wholly-owned subsidiaries as single entities because they were likely to generate the same sort of efficiencies as a single integrated company.³⁷

Easterbrook never reached the issue of whether sports leagues create efficiencies similar to those generated by the coordinated activities of a parent and subsidiary companies. In a case involving whether the NBA could limit an individual team’s ability to televise games, Easterbrook wrote for a panel that remanded for further examination of the structure of the relevant market. His analysis began with a confusing double negative: “We see no reason why a sports league *cannot* be treated as a single firm It produces a single product; cooperation is essential . . . ; and a league need not deprive the market of independent centers of decision-making.”³⁸ He then presented his most important insight: whether a league constitutes a single entity turns on the nature of the competition allegedly restrained, rather than on the structure or organization of the league itself.³⁹ For example, a sports league is almost certainly a single entity with respect to rules that govern how the teams compete on the field of play. Without agreement on these rules, the product could not exist. The efficiencies and benefits of agreements among the teams on the rules of play thus surely outweigh any anti-competitive losses. By contrast, from the perspective of a college basketball player looking toward a professional career, independent decision-making by the teams in the league assumes significantly greater competitive importance.⁴⁰ An agreement prohibiting rivalry among teams to sign players would restrain voices of the independent marketplace competing for the most talented players.

Although Easterbrook thought that the NBA was almost certainly entitled to set limits on individual team broadcast rights, he refrained from pronouncing the league a single entity for that purpose. Instead, he suggested that drawing the line between undertakings properly viewed as unilateral and those that are conspiratorial might not be worth the effort. “[G]iven the difficulty of resolving [the

36. *Id.*

37. *Id.*

38. *Id.* at 598–99.

39. *Id.* at 599 (explaining that “[t]o say that the league is ‘more like a single bargaining employer’ than a multi-employer unit is not to say that it necessarily is one, for every purpose”).

40. *Id.*

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single entity] issue,” he wrote, “it may be superior to approach [a sports league case] as a straight Rule of Reason case.”⁴¹

Seven years later, another leading antitrust expert, First Circuit Judge Michael Boudin, came to the same conclusion in a case involving Major League Soccer’s limit on player salaries. He explained that “[o]nce one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point To the extent the criteria reflect judgments that a particular practice in context is defensible, assessment under section 1 is more straightforward and draws on developed law.”⁴²

Both jurists thus concluded that a court might as well apply the rule of reason in a sports league case. In analyzing the nature of competition in the relevant market, which is necessary to determine whether a league should be treated as a single entity, the court is necessarily determining whether the alleged restraint harmed competition and violated the rule of reason. Given the similarity of the two inquiries, both judges concluded that courts should simply apply the more firmly established rule of reason.

II. THE AMERICAN NEEDLE LITIGATION

For many years, the NFL licensed competing entities, including American Needle, to manufacture and sell caps bearing team logos. In 2000, however, the league decided to issue an exclusive license to Reebok.⁴³ Angered because it was being foreclosed from a lucrative market, American Needle sued. The company argued that the decision to award an exclusive contract constituted a concerted refusal to deal with other manufacturers violating section 1 of the Sherman Act. This Part summarizes the district and appellate court opinions, as well as the briefing leading to the U.S. Supreme Court’s decision to hear the case.

A. *The District Court Granted Summary Judgment in Favor of the NFL*

The NFL responded to American Needle’s complaint by moving for summary judgment on the ground that the league constituted a

41. *Id.* at 601.

42. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002); *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994).

43. *Am. Needle, Inc. v. New Orleans, La. Saints*, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007).

single entity incapable of conspiring under section 1 of the Sherman Act.⁴⁴ The district court, without permitting full discovery, agreed.⁴⁵ It concluded that the teams had “so integrated their operations” that they should “be deemed to be a single entity” rather than a “joint venture.”⁴⁶ The district court recognized that NFL Properties efficiently provided one-stop shopping for companies wishing to make products bearing NFL team logos. Further, it allowed the teams to reduce their administrative costs by eliminating both the need to identify manufacturers and retailers, and to monitor the market for quality control and infringement.⁴⁷ The court also stressed that the sharing of logo licensing fees also served the pro-competitive purpose of promoting parity among the league’s teams.⁴⁸

American Needle did not dispute that NFL Properties generated efficiencies, arguing that the teams could negotiate jointly, “so long as the licenses were spread around a number of competitors.”⁴⁹ The court reasoned that this position effectively precluded the plaintiff from arguing that the league was not a single entity for licensing purposes.⁵⁰ As the court understood it, the owner of a trademark may choose to license one company or many to manufacture goods bearing the mark.⁵¹ If joint licensing were permissible when the owners chose to issue multiple licenses, then the owners must also be permitted to act jointly to issue an exclusive license.⁵²

44. *Id.*

45. *Id.* at 944.

46. *Id.* at 943.

47. The Court explained:

It is the responsibility of NFL Properties to assist in the development and protection of the various marks and to implement marketing strategies. Therefore, it coordinates the development of intellectual property rights, promotes consistent branding and quality, and engages in nationwide promotion. That means, for example, that the Green Bay Packers need not find and monitor suppliers for apparel bearing its logos, need not locate outlets in Chicago, Tampa or Seattle, need not unilaterally pursue infringers, and need not coordinate marketing strategies with 31 other teams and the NFL. Further, a supplier need not negotiate separate licenses with 32 different teams and the NFL.

Id. at 942.

48. *Id.* at 944–45.

49. *Id.* at 942.

50. *Id.*

51. *Id.*

52. *Id.*

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Citing *Copperweld*, the court asserted that the agreement with Reebok did not constitute a “sudden joining of independent sources of economic power previously pursuing separate interests” because the NFL teams had been coordinating their activities through NFL Properties since 1963.⁵³ As a result, the exclusive agreement did “not deprive the marketplace of independent centers of decision-making.”⁵⁴

Finally, American Needle argued that even if the NFL constituted a single entity, the exclusive deal with Reebok nonetheless constituted a vertical agreement subject to section 1 scrutiny because Reebok had sought an exclusive license.⁵⁵ The court rejected that argument, asserting, “If NFL Properties can issue an exclusive license, then whether or not the licensee urged, solicited, or vigorously argued for the change is irrelevant.”⁵⁶

B. The Seventh Circuit Agreed that the NFL Constitutes a Single Entity

On appeal, the Seventh Circuit affirmed the trial court’s decision.⁵⁷ Judge Kanne’s opinion for the court acknowledged Easterbrook’s insight that a league did not necessarily constitute a single entity or a group of competitors for all purposes, but rather particular competitive practices had to be analyzed independently to determine whether the league constituted a single entity with respect to that practice.⁵⁸ The court entirely ignored, however, the more important aspect of Easterbrook’s and Boudin’s earlier analysis—namely that applying the rule of reason was necessary to inform the single-entity inquiry. Instead, the Seventh Circuit used the single-entity defense to side step any meaningful competitive analysis of the market for clothing bearing NFL team logos.

First, Judge Kanne claimed that the NFL must be a single source of economic power because a single team could not produce the product, *i.e.* professional football games. “Asserting that a single football team could not produce a football game,” he quipped, “is less of a legal argument than it is a Zen riddle: Who wins when a football

53. *Id.* at 943.

54. *Id.*

55. *Id.* at 943 n.2.

56. *Id.*

57. *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736 (7th Cir. 2008).

58. *Id.* at 741–42.

team plays itself.”⁵⁹ From this truism, he concluded that “[i]t thus follows that only one source of economic power controls the promotion of NFL football; it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football.”⁶⁰

Second, Judge Kanne relied on “uncontradicted evidence that the NFL teams share a vital economic interest in collectively promoting NFL football” and must compete against other forms of entertainment.⁶¹ From an economic perspective, the real competitors of the Dallas Cowboys are not the Washington Redskins and New York Giants, but alternative forms of entertainment to which Cowboy fans might turn if they become dissatisfied with NFL football.

Finally, and “most importantly,” Judge Kanne recognized that the NFL has licensed its intellectual property through NFL Properties—a single entity—for more than forty years.⁶² Presumably realizing that the length of an anticompetitive agreement cannot change its effect, the court focused on NFL Properties’ corporate charter, which says that the entity was created to promote the NFL. Promoting one’s product, the court concluded, is obviously a good thing.⁶³

C. *The Parties and Amicus Briefing on Certiorari*

The certiorari proceedings in *American Needle* were unusual in that both the plaintiff and the defendant urged the U.S. Supreme Court to take the case.⁶⁴ Two other professional sports leagues, the NBA and the NHL, filed amicus briefs in favor of granting certiorari even though they agreed with the lower court’s decision. The Solicitor General (“SG”), however, advised the Court not to hear the case even though she believed that the Seventh Circuit’s decision was overbroad and could lead to insufficient scrutiny of anticompetitive conduct in future cases. This section reviews the principal arguments made by the parties and amici.

59. *Id.* at 743.

60. *Id.*

61. *Id.*

62. *Id.* at 744.

63. *Id.*

64. See Brief for the NFL Respondents at 4, *Am. Needle, Inc. v. Nat’l Football League*, No. 08-661 (U.S. Jan. 21, 2009).

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American Needle's petition for certiorari was straightforward. The apparel maker argued that the Seventh Circuit's decision conflicted with the Court's own decision in *Radovich v. Nat'l Football League*,⁶⁵ which held that the antitrust laws applied to the league, as well as the decisions of the First, Second, Third, Sixth, Eighth, Ninth, and D.C. Circuits, all of which had previously rejected the single-entity defense.⁶⁶

Although they read the case law as more favorable to their position, the NFL,⁶⁷ along with the NBA⁶⁸ and NHL,⁶⁹ agreed that a conflict among the circuits existed. More importantly, they argued that the nature of sports leagues—amalgamations of separately owned teams—made them lightning rods for antitrust claims because any league action could be viewed as a conspiracy among the teams.⁷⁰ The prospect of expensive and time-consuming litigation under the rule of reason chilled the leagues' business decisions⁷¹ and created pressures to settle meritless cases.⁷² The leagues also argued that a high court decision would have benefits beyond sports leagues, because it would clarify when any joint venture agreement could create a single entity for antitrust purposes.⁷³

65. *Radovich v. Nat'l Football League*, 352 U.S. 445, 450 n.7 (1957).

66. Petitioner for a Writ of Certiorari at 7, 11–12, *Am. Needle, Inc. v. Nat'l Football League*, No. 08-661 (U.S. Nov. 17, 2008) (citing *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469–70 (6th Cir. 2005); *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 57 (1st Cir. 2002); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984); *Mid-South Grizzlies v. NFL*, 720 F.2d 772, 787 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1257 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. Nat'l Football League*, 543 F.2d 606, 616–17 nn.19, 20 (8th Cir. 1976)).

67. Brief for the NFL Respondents, *Am. Needle, Inc. v. Nat'l Football League*, No. 08-661 (U.S. Jan. 21, 2009) [hereinafter NFL Brief].

68. Brief of Amici Curiae National Basketball Association and NBA Properties in Support of the NFL Respondents' Response at 3, *Am. Needle, Inc. v. National Football League*, No. 08-661 (U.S. Jan. 21, 2009) [hereinafter NBA Brief].

69. Brief for Amicus Curiae the National Hockey League in Support of the NFL Respondents, *Am. Needle, Inc. v. Nat'l Football League*, No. 08-661 (U.S. Jan. 21, 2009) [hereinafter NHL Brief].

70. NFL Brief at 3–4; NHL Brief at 8–9; NBA Brief at 3–5.

71. NHL Brief at 15–16.

72. *Id.* at 19; NFL Brief at 10; NBA Brief at 6–7.

73. NFL Brief at 14 (claiming that the Court left this question unanswered in *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006)); NHL Brief at 4 (same).

The Court requested that the SG provide the government's view on whether it should hear the case.⁷⁴ The SG recommended against review despite acknowledging that the Seventh Circuit's reasoning swept too broadly.⁷⁵ The lower court opinion, the government argued, could be read to grant single entity status to any legitimate joint venture with an economic interest in integrating its conduct even if meaningful competition was suppressed.⁷⁶ The government was also critical of the lower court's presumption that, because the NFL had jointly licensed logos for many years, the practice must be efficient.⁷⁷ The SG pointed out that time cannot cure an agreement that restrains competition.⁷⁸

Nevertheless, the SG concluded that Supreme Court review would be imprudent for two reasons. First, the Seventh Circuit limited its opinion to cases dealing with the joint licensing of trademarks.⁷⁹ None of the supposedly conflicting circuit cases dealt with sports leagues in that context,⁸⁰ and thus no actual conflict existed.⁸¹ Second, the plaintiff did not challenge the collective licensing of trademarks by the teams in the league. Instead, it sought only to undo the exclusive license granted to Reebok.⁸² As a result, the lower courts had never analyzed whether competition among the teams in a league with respect to trademarks would benefit

74. *Am. Needle, Inc. v. Nat'l Football League*, 555 U.S. ---, No. 08-661 at 2 (U.S. Feb. 23, 2009), <http://www.supremecourtus.gov/orders/courtorders/022309zor.pdf> ("The Acting Solicitor General is invited to file briefs in these cases expressing the views of the United States.").

75. Brief for the United States as Amicus Curie at 7, *Am. Needle, Inc. v. Nat'l Football League*, No. 08-661 (U.S. May 28, 2009) [hereinafter SG Brief].

76. *Id.* at 6 ("The court's reasoning could be understood to extend single-entity treatment to separately owned NFL teams with respect to their decision to collectively license their intellectual property, without regard to the possibility that the teams' agreement would eliminate the potential for meaningful competition among them, simply because potential efficiencies are associated with collective marketing by participants in a lawful venture to produce NFL football. Neither *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), nor any other decision of this Court supports such an expansive application of the single-entity concept."); *id.* at 8 ("Contrary to the court of appeals' apparent understanding, an agreement to restrict competition among separate firms does not cease to be concerted action simply because it may be efficiency-enhancing.").

77. *Id.* at 11–12.

78. *Id.*

79. *Id.* at 5.

80. *Id.* at 17.

81. *Id.* at 15.

82. *Id.* at 13.

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consumers, and, absent that analysis in the lower courts, high court review would be unwise.⁸³

III. CRITIQUING THE SEVENTH CIRCUIT'S DECISION

The Seventh Circuit's analysis simply fails to engage any of the issues that should drive the decision in an antitrust case. To the extent that the lower court's rhetoric about the Zen of teams playing themselves makes any sense at all with respect to logo cap sales, it makes a far too sweeping claim. The NFL's need for standards to produce its primary product, football games, does not *ipso facto* render competition unnecessary with respect to ancillary products sold by the teams, such as logo caps. Teams could not engage in meaningful competition on the field if one team treated a touchdown as six points, while the other claimed ten points. By contrast, different teams could produce caps with their logo in different styles and at different price points without undermining competition between them.

The National Collegiate Athletic Association ("NCAA") football telecasts case made this point abundantly clear.⁸⁴ Universities had to agree on many rules to make NCAA football possible, but the schools could nonetheless compete on licensing television rights, and section 1 of the Sherman Act required them to do so.⁸⁵ The Seventh Circuit never explains why it believed that the licensing of broadcast rights should be distinguished from the licensing of trademarks.

In a case dealing with televising professional basketball games, Judge Easterbrook carefully distinguished the NBA from the NCAA, finding meaningful distinctions that made the NBA more likely to function as a single entity.⁸⁶ Nevertheless, Easterbrook refused to pronounce the NBA a single entity, recognizing the difficulty of the question.⁸⁷ By contrast, Judge Kanne found it easy to hang the single entity label on the NFL without ever explaining why the NFL's licensing of logo caps is different from the NCAA's licensing of football telecasts.

83. *Id.* at 13, 20.

84. Nat'l Collegiate Athletic Assoc. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

85. *Id.* at 120.

86. *CPS Case*, 95 F.2d 593, 600 (7th Cir. 1996).

87. *Id.* at 601.

The portion of the Seventh Circuit's opinion that addresses the benefits of integration for the NFL teams similarly conflicts with the Supreme Court's decision in the *NCAA* case. As the government recognized in its brief, similar benefits would apply to any group of competitors fixing prices or engaging in any other restraint of trade.⁸⁸ As the SG put it, "The effect of declaring the league and its teams to be a single entity... preclude[d], as a matter of law, any consideration under section 1 of the possibility that a loss of competition among the teams outweighed the efficiency-enhancing potential of the joint licensing."⁸⁹ In one of the first cases rejecting the single-entity defense, the Ninth Circuit recognized that cartel members always share a vital interest in promoting their own products to better compete with those outside the cartel.⁹⁰ Any group of competitors will share a common interest in minimizing competition among the members of the group. That fact alone, however, hardly eliminates the need for section 1 scrutiny.

Finally, the Seventh Circuit's reference to the teams' common interest in the promotion of the league again goes too far. The *American Needle* case was not about promoting NFL Football, *per se*. It dealt with selling merchandise bearing team logos. A unified approach to purchasing magazine and television advertising, promoting NFL Football might well be performed most efficiently by a single entity that could effectively coordinate the impact of the various media buys in the context of a very competitive advertising market. Were the league to rely on individual teams to buy advertising, some teams might seek to free ride on the advertising of others and, because of a lack of coordination, some markets would likely be oversaturated while others would be underserved.

In contrast, the right to manufacture logos caps could readily be licensed by each individual team without creating significant free rider or coordination problems. Each NFL team would have an incentive to license its own logo, knowing that no other team would. Moreover, each team very likely has market power in a sports logo cap market, because each team could readily charge well above the marginal cost, plus normal profit, of producing a cap bearing that

88. SG Brief at 6.

89. *Id.* at 10.

90. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1389 (9th Cir. 1984) ("Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel.").

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team's logo.⁹¹ The exclusive license attacked in *American Needle* allows the NFL teams to exploit collectively each team's power by eliminating competition from the closest substitute products, *i.e.* logo caps from other NFL teams. Fans wishing to purchase an NFL logo cap will have only a single choice of cap brand, presumably at a high price. No team may compete to capture additional cap sales by also licensing its logo to another cap manufacturer that could produce lower cost products or a greater variety of designs and features. Cap output is almost certain to be lower with a single exclusive license than it would be if each team licensed its own logos to different cap manufacturers.

In the NBA television licensing case, one could argue that an individual team might not fully internalize the negative effects of over-saturation of the airwaves. This potential for over-saturation could have a negative impact on the marketability of NBA games on television, particularly given the substantial competition from other sports and non-sports programming. This is true because individual teams would only consider the effect of adding additional telecasts on their own revenues, not those of the entire league. Limiting the individual teams' ability to televise games locally might thus have been a legitimate decision in the interest of the league as a whole.

A number of critical questions must be answered before drawing a similar conclusion about the NFL and logo cap sales. Would over-saturation or poor quality really hurt the NFL in any substantial way that would not be internalized by an individual team licensing its logo to a lower cost cap producer? Do NFL logo caps face the same level of outside competition as NBA basketball telecasts? As a fan of the NFL and an antitrust scholar and lawyer, I suspect that the answer to both of these questions is no. As the government pointed out in its brief to the Court, the appeal of the NFL's product depends on the appearance of fierce rivalry among the teams.⁹² So, there is reason to believe that competition in the sale of logo-adorned products could enhance the league's appeal.

Whatever the precise balance between the pro- and anti-competitive effects of the joint licensing in this case may be, I am certain that the lower courts erred in refusing to permit the discovery of the facts necessary to answer these questions more definitively. By

91. United States Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 1.5 (Revised Version Apr. 8, 1997).

92. SG Brief at 21–22.

simply declaring the NFL a single entity, the *American Needle* court sidestepped the critical questions—questions that, as Judges Easterbrook and Boudin counseled, are most readily answered within the confines of a rule of reason inquiry under section 1 of the Sherman Act.

The district court did a somewhat better job by pointing out that (1) joint licensing creates significant efficiencies for both the teams and sports apparel manufacturers by providing one-stop shopping, and (2) the teams' decision to share revenue for logo apparel sales helped promote parity among the teams, which makes the league a more attractive option compared to other forms of entertainment.⁹³ But these facts merely show that joint licensing has some pro-competitive effects, not that those effects necessarily dominate the anticompetitive ones. The efficiencies of joint licensing might be obtainable in less restrictive ways, and individual team control of their own trademarks might yield more effective exploitation of those marks and more vigorous competition to the benefit of consumers.⁹⁴ Those possibilities cannot be assumed away without careful fact-finding.⁹⁵

In the end, Judges Easterbrook and Boudin correctly concluded that single-entity analysis is unhelpful in sports league cases in which the league consists of independently owned teams that ultimately control league decisions. Although there are many cases in which sports teams' integrated action will be pro-competitive, the single entity rubric does not assist courts in identifying those cases. The leagues are effectively seeking immunity from antitrust scrutiny under section 1 regardless of the competitive effects of their policies. The Supreme Court should reject that request and hold that cases against sports leagues should be analyzed under the rule of reason.⁹⁶

93. See *supra* Part I.

94. See *Dallas Cowboys Football Club, Ltd. v. Nat'l Football League Trust*, No. 95-civ-9426 (S.D.N.Y. 1996) (challenging league control of the Cowboys trademark).

95. SG Brief at 20 (quoting *Jack Russell Terrier Network v. Am. Kennel Club*, 407 F.3d 1027, 1034 (9th Cir. 2005) (“[T]he single-entity inquiry is unique to the facts of each case.”)).

96. The leagues' concern about the cost of litigation, particular discovery, is real. Lower courts should thus be diligent in the management of the discovery process to minimize these costs.

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CONCLUSION

The Seventh Circuit's decision in *American Needle* is badly flawed. The Supreme Court should explicitly recognize that single-entity analysis complicates cases without providing any meaningful guidance toward a decision that best advances consumer interests. The Court should thus reverse and remand for consideration under the rule of reason.

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