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*American Needle* and the Seventh Circuit's  
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## The Single Entity Battle Continues: *American Needle* and the Seventh Circuit's Hybrid Approach

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Courts have long struggled to articulate a coherent or sensible approach to applying the Sherman Act to sports leagues. While Major League Baseball avoided the complications through its infamous judicial exemption from the antitrust laws, antitrust decisions involving other professional sports leagues are riddled with inconsistencies and confusion. The Seventh Circuit recently added to the morass with its decision in *American Needle*.<sup>2</sup> In *American Needle*, the plaintiff, a manufacturer and designer of sports apparel, brought an antitrust suit challenging the decision of the National Football League (“NFL”) and its teams (via NFL Properties) to enter into an exclusive licensing relationship with Reebok for the manufacture and sale of headwear bearing NFL team logos. The NFL moved for summary judgment, arguing that it was immune from Section 1 scrutiny because it functions as a single entity.

Sports leagues have long viewed the single entity defense as the antitrust “holy grail.” Section 1 of the Sherman Act prohibits any “contract, combination...or conspiracy, in restraint of trade.”<sup>3</sup> The crux of the leagues’ argument is that the teams and their respective leagues operate as one entity, creating a single product that competes with similar products created by, *inter alia*, other sports leagues. These single entities, in turn, are incapable of violating Section 1 because a single entity, by definition, cannot enter into a conspiracy with itself. For nearly half a century, the leagues failed to reach this holy grail, as virtually every court to address the issue—including the Second, Eighth, Ninth, and D.C. Circuits—concluded that teams and leagues were multiple entities capable (and often guilty) of conspiring in violation of Section 1.

Much of the single entity debate over the last quarter-century has focused on *Copperweld*,<sup>4</sup> where the Supreme Court held that a parent corporation and its wholly owned subsidiary are a single entity for antitrust purposes. The Court reasoned that “a parent and its wholly owned subsidiary have a complete unity of interest” and that an agreement between the two “does not deprive the market of any independent sources of

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<sup>2</sup> *American Needle v. National Football League*, 538 F.3d 736 (7th Cir. 2008)

<sup>3</sup> 15 U.S.C. § 1.

<sup>4</sup> *Copperweld Corporation v. Independence Tube Corporation*, [467 U.S. 752 \(1984\)](#).

economic power.<sup>5</sup> The Court concluded that a parent-subsidary relationship does not present the anticompetitive risks that Section 1 of the Sherman Act was designed to prevent.

The Supreme Court has never decided how far *Copperweld* applies beyond the parent-subsidary relationship, and *Copperweld* seemed to provide little support for single entity treatment of the separately owned and (mostly) autonomous teams that make up sports leagues. And, for a brief period of time, it appeared that the sports leagues had actually conceded defeat in their quest for the single entity defense. The Seventh Circuit, however, resuscitated the single entity argument for sports leagues in the 1990's in a dispute involving television restrictions implemented by the National Basketball Association.<sup>6</sup> Judge Easterbrook reasoned that sports leagues may be hybrids for purposes of antitrust analysis—multiple entities competing with each other in certain markets (e.g., the market for players and coaches) and single entities when operating in others. As Judge Easterbrook put it,

“Sports are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld* 's functional question one league at a time—and perhaps one facet of a league at a time, for we do not rule out the possibility that an organization such as the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities.”<sup>7</sup>

In *American Needle*, the Seventh Circuit utilized the hybrid approach and limited its investigation of the NFL to one “facet” of the league—the licensing of NFL intellectual property. The court then rejected the plaintiff's argument that the potential for competition among the teams in the apparel market rendered the teams multiple entities. Instead, the court concluded that

“NFL teams can function only as one source of economic power when collectively producing NFL football. Asserting that a single football team could produce a football game is less of a legal argument than [sic] it is a Zen riddle: Who wins when a football team plays itself? It 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.”<sup>8</sup>

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<sup>5</sup> *Id.* at 771

<sup>6</sup> See *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n* 95 F.3d 593 (7th Cir. 1996).

<sup>7</sup> *Id.*, at 600.

<sup>8</sup> *American Needle*, *supra* note 2, at 743.

The court therefore held that the NFL and its teams act as a single entity and are immune from Section 1 scrutiny when collectively licensing their intellectual property rights.

Putting aside the problems inherent in treating overlapping and related markets as distinct and separate, the Seventh Circuit's discussion in *American Needle* seems to miss the point (pun not intended, but enjoyed). The court was no doubt correct that teams are more interdependent than traditional competitors and that some degree of cooperation among individual sports teams is necessary for a sports league to exist. To use a simple example, the Saints cannot play the Falcons unless both teams agree to play a game on a certain date, with certain rules of the game, in a particular city, at a chosen stadium, and so on. This fact, however, does not render sports leagues single entities. Rather, as many courts have concluded, the necessity for cooperation permits sports leagues to avoid *per se* illegality. Of course, this does not immunize such conduct from Section 1 scrutiny. Instead, it merely subjects it to the rule of reason for a determination of the net competitive effect of the conduct. The Seventh Circuit, however, seems to be taking the argument to the other extreme. That is, the court concludes that the necessity for some cooperation among NFL teams not only allows it to avoid *per se* illegality, but also renders their conduct inherently net pro-competitive and thus *per se* legal.

Why would the court make such a jump from blanket prohibition to blanket immunity? The court may have made the leap based on its belief that the NFL's exclusive licensing agreement was defensible and should be protected. The court concludes that "[s]imply put, nothing in Section 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages cooperation inside a business organization—such as, in this case, a professional sports league—to foster competition between that organization and its competitors."<sup>9</sup>

The court's conclusion may be correct, but it again misses the point. The assessment of the pro-competitive nature of the NFL's agreement must be made under Section 1, not used as a means for avoiding Section 1. The NFL's agreement may foster competition between the NFL and its competitors, but that determination must be made by examining the competitive effects of the agreement under Section 1. And, the fact that the NFL's agreement was pro-competitive (assuming such a fact was proven) does not, of course, mean that the NFL was incapable of conspiring. Rather, it simply means that the result of the conspiracy was permissible under the Sherman Act.

Granted, avoidance of a full blown rule of reason analysis, as was accomplished in *American Needle*, serves an important function in conserving judicial resources, particularly where the challenged agreement is obviously net pro-competitive (as may

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<sup>9</sup> *Id.* at 744

be the case here). Courts should be encouraged to use heuristics to avoid unnecessarily long and expensive antitrust trials. These heuristics, however, must be used to aid a court in determining the competitive effects of a restraint, not to allow a court to avoid the determination altogether.