

**BRANDING
TRADEMARKS &
COPYRIGHTS**

Mark I. Peroff, Chair
212.784.5806
mperoff@hblaw.com

Peter J. Bilinski
Christopher E. Blank
Keith E. Danish
Thomas R. FitzGerald
Ronald S. Kareken
John Kelepurovski, Jr.
Thomas I. Mandelbaum
Alpa V. Patel
Richard J. Paul
Darren W. Saunders
Monika A. Tashman

CORPORATE

James J. Canfield, Chair
315.425.2763
jcanfield@hblaw.com

W. Cook Alciati	Robert J. Lanza
Jeffrey B. Andrus	Edwin M. Larkin
H. Douglas Barclay	Robert N. Latella
William A. Barclay	Kathryn A. Lisandrelli
Christopher J. Bonner	John P. Lowe, Jr.
Eileen A. Casey	Oksana M. Ludd
Roger F. Cominsky	Charles C. Martorana
Amanda K. Davis	Francis X. Matt, III
Donald S. Day	Gerard M. Meehan
Richard J. Day	Emily C. Micale
George S. Deptula	Gary L. Mucci
Richard Fischbein	Sandra S. O'Loughlin
Lawrence J. Gallick	Laurence B.
Herbert J. Glose	Oppenheimer
James S. Grossman	Richard J. Paul
Robert P. Heary	Joseph P. Pylman
Holly J. Hoehner	Nicholas A. Scarfone
John A. Jadhon	Gerald F. Stack
Ronald S. Kareken	Edward J. Trombly
John Kelepurovski, Jr.	Arnold N. Zelman

This client alert is not intended to render legal services; the publisher assumes no liability for the reader's use of the information herein. © 2010 Hiscock & Barclay, LLP

Attorney Advertising



NFL's Drive for "Single Entity" Antitrust Immunity Blocked by a Unanimous Supreme Court

American Needle, Inc. v. National Football League (No. 08-661, decided May 24, 2010)

Following a long string of victories in favor of antitrust defendants before the U.S. Supreme Court, the Court recently held that the National Football League's intellectual property licensing activities are subject to scrutiny under the federal antitrust laws, although such conduct may be lawful under the "rule of reason" test. The unanimous opinion was authored by Justice John Paul Stevens, who will retire after the current Court term ends.

The NFL's licensing arm, NFL Properties (NFLP), had for many years licensed team trademarks and logos for use on caps, jerseys and other merchandise and, until 2000, such licenses were granted on a nonexclusive basis. American Needle, Inc. held a nonexclusive license. However, in 2000 the NFLP began granting exclusive licenses, Reebok being given one in the field of headwear, with American Needle being denied a renewal of its license to make such goods. American Needle brought an antitrust action against NFLP, the NFL, and its constituent teams (collectively "Defendants"), alleging such activity constituted a contract, combination or conspiracy in restraint of trade under Section 1 of the Sherman Act (15 U.S.C. § 1). The trial court granted summary judgment for Defendants, finding they should be considered a "single entity" regarding their licensing activities and, therefore, not subject to antitrust scrutiny. That holding was affirmed by the Court of Appeals for the Seventh Circuit, which found there is only one source of economic power which controls the promotion of NFL football, so the licensing of its promotional symbols was properly exercised by a "single entity."¹

American Needle asked the Supreme Court to reverse the lower courts' holdings, and the NFL, in what might be described as a "Hail Mary" pass,² also sought review and asked the Supreme Court to confirm that "a professional sports league can and should be regarded as a single entity in at least some aspects of its operations." The latter would exempt it from Sherman Act scrutiny. The NFL has never had antitrust immunity,³ unlike Major League Baseball, which, through a line of Supreme Court cases dating back to 1922, held baseball games did not constitute "interstate commerce" under the Sherman Act. (MLB's antitrust immunity was narrowed in the field of labor relations as a result of the Curt Flood Act of 1988, 15 U.S.C. § 27(a)).

¹ Most sports leagues are comprised of independently-owned teams, but the short-lived "XFL" football league was a true "single entity" with all teams being owned by the league. Also, Major League Soccer is technically a single business entity, but each team has an owner-operator. The NFL has been described as a "joint venture."

² "A 'Hail Mary pass' or 'Hail Mary play' in American football refers to any very long forward pass made in desperation with only a small chance of success, especially one thrown at or near the end of a half." (*Wikipedia*)

³ The NFL obtained a statutory antitrust law exemption to enable it to merge with the American Football League, and to negotiate the sale of television rights on behalf of individual clubs.

(Continued on back)

Hiscock & Barclay is a full service, 200-attorney law firm, with offices throughout the major cities of New York State, as well as in Boston, Washington, D.C. and Toronto. We provide comprehensive legal and business counsel to a diverse client base in 30 specialized practice areas with statewide and regional expertise as well as with national and international capabilities.

Branding, Trademarks & Copyrights
 Commercial Litigation
 Construction & Surety
 Corporate
 Creditors' Rights
 Economic & Project Development
 Energy & Utilities
 Environmental
 Financial Institutions & Lending
 Health Care & Human Services
 Immigration
 Indian Law
 Insurance Coverage & Regulation
 Intellectual Property Litigation
 International Business
 Labor & Employment
 Lobbying & Election Law Compliance
 Media & First Amendment Law
 Municipal & Land Use
 Patents & Prosecution
 Professional Liability
 Public Finance
 Real Estate
 Real Property Tax & Condemnation
 Regulatory
 Sports & Entertainment
 Tax
 Telecommunications
 Torts & Products Liability Defense
 Trusts & Estates

A finding that the NFL was acting as a single entity when licensing its trademarks would exempt it from Sherman Act § 1 liability because there would have been no “contract, combination.....or conspiracy in restraint of trade.” The NFL argued the Supreme Court’s 1984 *Copperweld*⁴ decision supported its position. There the Court held a parent corporation and its wholly-owned subsidiary constitute a single entity for antitrust purposes because they are controlled by a single center of decision making. “[S]ubstance, not form, should determine whether a[n]...entity is capable of conspiring under § 1.”⁵

In *American Needle*, the Court concluded that each NFL team is a substantial, independently owned and independently managed business and that NFL teams compete with one another on other than the playing field. When NFL teams license their intellectual property, they are pursuing their own separate interests in addition to promoting “NFL football.” In any case, the Court noted concerted activity in marketing intellectual property is not necessary to produce a football season. Ultimately, the Court held the collective action by NFL teams deprived the marketplace of “independent centers of decision making,” thus subjecting it to review under Sherman Act § 1, according to the “rule of reason” test,⁶ which requires a fact-based analysis by the trial court (on remand) of the challenged restraint and the context in which it operates.⁷

The Supreme Court provided some guidance on how the challenged licensing practices (or other collective decisions by members of a sports league) are to be evaluated under the rule of reason analysis. The Supreme Court noted that NFL teams must cooperate in order to make the entire league operate successfully and maintain a competitive balance, and that the special characteristics of the industry may provide a justification for many kinds of agreements as there can be no product called “NFL football” without a great deal of cooperation by the 32 individually-owned teams in the league. In this context, the Court alluded to an abbreviated analysis known as the “quick look” (although this type of analysis is generally limited to a situation where the anticompetitive effects of the challenged restraint of trade are obvious and are likely to be deemed illegal).

During the oral argument of this case, Justice Sotomayor exclaimed to the NFL’s attorney: “...you are seeking through this ruling what you haven’t got from Congress: An absolute bar to an antitrust claim.” The Court decisively rejected the NFL’s position and the judicial activism of the Court of Appeals, but may have left sports leagues (and similar joint ventures) with some hope that other types of concerted action more directly supportive of their core business functions may avoid antitrust scrutiny, or at least be easier to justify. ■

4. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Justice Stevens, who authored the *American Needle* opinion, wrote the dissenting opinion in *Copperweld*.

5. *American Needle, Inc. v. NFL*, *supra* (p. 10, slip opinion)

6. Justice Stevens had also applied the rule of reason in a case involving the NCAA and its restrictions on telecasting of college football games, because “a certain degree of cooperation is necessary if the type of competition that petitioner [the NCAA] and its member institutions seek to market is to be preserved.” *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 117 (1984).

7. In *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), Justice Brandeis explained the rule of reason as follows: “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. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.”