American Needle v NFL: Charting An Uncertain Future

Thomas P. Brown & Katherine M. Robison
O’Melveny & Myers
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I. INTRODUCTION

In retrospect, the National Football League (“NFL”) did not do itself or future antitrust defendants any favors when it joined with American Needle in urging the Supreme Court to grant review of the Seventh Circuit decision awarding the NFL summary judgment on American Needle’s claim. The NFL had urged the Supreme Court to take up the petition in the hope that it would emerge with a decision that would support its claim to single-entity status for some aspects of its operations.

It has emerged with anything but that. The Supreme Court’s decision in American Needle holds, decisively and unambiguously, that the NFL and its licensing arm, National Football League Properties (“NFLP”), are subject to scrutiny under Section One of the Sherman Act. And the Court’s analysis in reaching this conclusion is far from a model of clarity. American Needle’s analysis of the intra-enterprise conspiracy doctrine, an issue that seemed entirely settled before the Court issued its decision, seems particularly likely to produce mischief for future antitrust defendants.

But the decision does not provide any real guidance on how courts should review joint activities generally or the NFL’s actions specifically. And it is far from clear that this decision will make it any easier for antitrust plaintiffs to press their claims.

II. A CLEAR SHIFT IN TONE

American Needle represents a pretty clear shift in tone from the opinions that the Supreme Court has produced in the relatively recent past. In the past few years, the Supreme Court has issued decisions overturning the nearly century old per se bar on vertical resale price minimums, rejected an effort to revive a theory of predation via a price squeeze predicated on Judge Hand’s landmark decision in Alcoa, and required antitrust plaintiffs to come forward with more than the mere outline of a potential claim. 2

On its face, the Court’s decision in American Needle is difficult to reconcile with this recent trend. American Needle relies on two cases that are generally thought to be out of step with the contemporary approach to antitrust law—Sealy3 and Topco.4 Those cases struck down arrangements as per se illegal that would likely survive rule of reason review today. And American Needle dismisses out of hand the suggestion that, in at least some respects, competitor collaborations should be viewed through the same lens as single entities.

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1 Thomas P. Brown is a partner and Katherine M. Robison is counsel at O’Melveny & Myers LLP. Both are members of the Antitrust & Competition practice group and practice in the firm’s San Francisco office. The views expressed herein are the views of the authors alone and are not the views or opinions of O’Melveny & Myers LLP or the publisher.


Until the arrival of *American Needle*, *Sealy* and *Topco* were generally thought to have been relegated to the dust heap of abandoned antitrust doctrine. Their rejection was reflected in the Supreme Court’s approach to competitor collaborations as well as the guidance on competitor collaborations issued by the Antitrust Division of the Department of Justice and the Federal Trade Commission.

Although *American Needle* discusses *Sealy* in the context of joint action, *Sealy* arose from an effort to circumvent the now-abandoned *per se* rule against vertical resale price minimums. A small group of mattress and bedding manufacturers had formed a cooperative trademark venture. The trademark venture licensed the Sealy mark to the owners and, trying to take advantage of a licensing exception to then-prevailing bar on resale price maintenance, set a price on the resale of mattresses and bedding sold under the Sealy mark. The Supreme Court held the entire arrangement illegal *per se* under Section One.\(^5\)

*Topco* similarly involved a small cooperative venture. The backdrop for the venture was the grocery store industry, and the catalyst was the development of massive grocery store chains that brought vast purchasing power and logistical efficiencies to the purchase and delivery of groceries to retail locations. As a response to the rise of massive grocery chains, twenty-five small and medium-sized regional supermarket chains had attempted to pool their purchasing power by creating a common purchasing agent.\(^6\) The accumulated buying power of the cooperative was small relative to the power of the larger chains with which it competed, and it yielded clear efficiencies for the participants that they could not otherwise obtain. Nevertheless, the Department of Justice challenged the arrangement as *per se* illegal because it involved collaboration among competitors, and the Supreme Court agreed.\(^7\)

But *Sealy* and *Topco* hardly represent the Supreme Court’s most recent word on the subject of competitor collaborations, and the Supreme Court distanced itself from the reflexive analysis of such collaborations in two subsequent decisions—*BMI*\(^8\) and *NCAA*.\(^9\) Both *BMI* and *NCAA* reject the types of *per se* theories embraced in *Sealy* and *Topco*. *BMI* upholds a blanket intellectual property license against an attack as a *per se* illegal price fix. And *NCAA* refuses to condemn a package of restrictions placed on television broadcasting of member football games as *per se* illegal, though it does strike the package down under the rule of reason. Although *NCAA* concludes that the package cannot withstand scrutiny under the rule of reason, it exempts the restraints from *per se* treatment since they arose in an industry where horizontal restraints are essential for the product (college football) to exist.\(^10\) Indeed, lower courts have read *BMI* and *NCAA* to overrule *Topco* and *Sealy*.\(^11\)

The shift in the treatment of legitimate joint ventures is reflected in the approach that the Department of Justice and Federal Trade Commission take toward them. In April 2000, the agencies jointly issued guidelines outlining their analytical approach to competitor collaborations.

\(^6\) Topco, *supra* note 4, 405 at 599.
\(^7\) Id. at 608.
\(^10\) Id. at 101.
\(^11\) See, e.g., Rothery Storage & Van Co., 792 F.2d at 226 (to the extent Topco and Sealy stand for the proposition that all horizontal restraints are illegal *per se*, they were effectively overruled by BMI and NCAA).
collaborations. The guidelines explain that competitor collaborations are sometimes necessary to enable competition in modern markets—such as by allowing firms to expand into new markets, fund expensive innovation efforts, and lower production or other costs. The guidelines explicitly recognize competitor collaborations as not only potentially benign but pro-competitive. And they outline “antitrust safety zones” to encourage the development of such collaborations. The zones apply: (1) when the collaborating competitors own no more than twenty percent of the relevant market; and (2) when competitors collaborate on research and development in innovative markets.

III. A RECIPE FOR CONFUSION

The discussion of Copperweld and Dagher in American Needle is also somewhat jarring. The distinction between Section One of the Sherman Act and Section Two of the Sherman Act is ultimately formalistic. Decisions that yield precisely the same effect on consumers are subject to different levels of scrutiny depending on their characterization as unilateral or multilateral. American Needle ultimately reinforces the formalistic distinction that separates Section One from Section Two, but it does so without offering any justification for this distinction. Instead, the opinion devotes more than half of its length to an ultimately fruitless effort to define it away.

At the outset, it is not obvious why a discussion of an antitrust claim against a joint venture should include a discussion of Copperweld. As a historic matter, Copperweld put an end to the so-called intra-enterprise conspiracy doctrine. Prior to Copperweld, some courts had allowed plaintiffs to challenge under Section One of the Sherman Act agreements between corporate parents and their wholly owned subsidiaries. Copperweld holds that such agreements are not subject to challenge under Section One of the Sherman Act. By definition, such agreements arise in the context of unitary economic actors. As such, they do not give rise to the concern about cartel behavior that animates the distinction between coordinated conduct and unitary conduct that is generally understood to motivate the decision to subject coordinated conduct to more strenuous review.

On its face, the Copperweld doctrine does not apply to joint venture claims. Joint ventures, by definition, do not involve single unitary entities. Firms come together to create joint ventures, such as the National Football League, precisely because they want to preserve some measure of independence. Joint ventures invoke the Copperweld analogy because they want to claim the benefit of unitary treatment without actually going through the trouble of creating that unitary economic actor that is the ultimate antidote to a Section One claim.

To be sure, rejection of a Copperweld defense on this ground is subject to a formalistic criticism. It is not at all clear why a joint venture, integrated for some purposes but not for others, should be subject to Section One scrutiny for aspects of its operation that it has integrated

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13 Id. at p. 1.

14 Id. While the agencies will subject collaborations that always or almost always tend to raise prices or reduce output to a rule of *per se* illegality, the majority of agreements are treated under the Rule of Reason. (Id. at pp. 8-9.)

15 Id. at pp. 25-27. Depending on how the relevant market is defined, NFLP’s exclusive license may fall within the first antitrust safety zone. If the relevant market here is baseball caps, or even baseball caps bearing logos of sports teams, it is very likely that all of the NFL teams combined have less than a twenty percent share in these markets.
as opposed to those it has not. If the concern about potential cartel behavior justifies subjecting joint ventures to stricter scrutiny than integrated firms, that concern manifests itself when the joint venture participants integrate the formerly separate functions; subjecting the ongoing operation of the now integrated entity to continuing scrutiny seems to do little more than put joint ventures at a competitive disadvantage relative to their more traditionally organized competitors.

But simplicity is a virtue when designing legal rules, particularly rules that are purely formalistic. And the analogy to Copperweld could have been rejected on the principle that the price of preserving independence with respect to some functions is ongoing scrutiny with respect to all.

American Needle takes a different tack. It attempts to trace the full history of the intra-enterprise conspiracy doctrine and to place Copperweld in this context. It characterizes the Copperweld ban on intra-enterprise claims as functional rather than formalistic. In the process, American Needle arguably undermines Copperweld by suggesting that its ban on intra-enterprise claims is not absolute:

Agreements made within a firm can constitute concerted action covered by §1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.16

In the end, the long exegeses has little payoff. American Needle rests its rejection of Copperweld on the formalistic truism that the extended discussion seemingly strives to avoid:


But despite the many pages devoted to the subject, American Needle does not attempt to tie the decision to subject the joint ventures to stricter scrutiny back to the concern about nascent cartel behavior. Instead, it asserts, without any support, that joint ventures, unlike traditional firms, fail to maximize their collective rather than individual welfare:

The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP’s financial well-being. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team’s decision reflects not only an interest in NFLP’s profits but also an interest in the team’s individual profits.18

IV. WHAT DOES IT ALL MEAN

As a work of judicial art, American Needle leaves quite a bit to be desired. But it is far from clear that any of these failures will amount to anything. The opinion has the potential to do mischief on a couple of grounds, particularly the confusion that it injects into the Copperweld doctrine. But as we have elsewhere noted, the decision answers a very narrow question. And
although the decision’s definitive answer to this question makes clear that joint ventures cannot hope to escape the reach of Section One, its broader legacy is a matter of pure conjecture.

_American Needle_ provides no guidance on how courts should assess the reasonableness of joint venture conduct. The opinion does not apply the Rule of Reason (“Rule”) or give any hint of whether the challenged restraint should be upheld under the Rule. This is unfortunate since the question of how to properly structure the analysis of collaborative conduct under Section One is one with which the lower courts have struggled mightily for decades.19

The Rule contemplates assessing and then weighing the relative benefits and burdens associated with the challenged business practice to determine, at large, whether the restraint is unreasonable. While this requires the consideration of the competitive forces in the relevant market(s), “the courts are of limited utility in examining [such] difficult economic problems.”20 As then Professor and now Chief Judge Easterbrook explained long ago, judges cannot do what open-ended formulas like the Rule of Reason require.21 In fact, because the inquiry under the Rule of Reason “is so often wholly fruitless when undertaken,” the Court has attempted to formulate _per se_ rules to avoid the uncertainty inherent in the Rule.22 The Court’s current confidence that the Rule of Reason can draw distinctions between pro-competitive and anticompetitive collaborations is, therefore, surprising.

But even if this is the only legacy of _American Needle_, the opinion seems destined to do more harm than good. The Rule of Reason will place a burden on collaborating competitors out of proportion with the anticompetitive impact, if any, of their collaborative conduct. The analysis under the Rule of Reason is broad and potentially burdensome, and defending against an antitrust lawsuit is costly.23 Under the Rule of Reason everything is relevant and “[w]hen everything is relevant, nothing is dispositive. Any one factor might or might not outweigh another, or all of the others, in the fact-finder’s contemplation. _The formulation offers no help to businesses planning their conduct._”24 Without predictability, the real danger posed by the Rule of Reason is its inherent potential to discourage the creation of collaborative enterprises, even those with clear pro-competitive benefits.25

20 Topco, _supra_ note 4, at 609-10.
22 _Id._ at 609 n. 10; Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958).
24 Easterbrook, _The Limits of Antitrust_, _supra_ note 21, at *12.
25 _See_, e.g., Antitrust Guidelines for Collaborations Among Competitors, _supra_ note 12, at p. 1.