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I. INTRODUCTION

American Needle v. National Football League has been variously dubbed the "most important case in sports history,"[2], "an opportunity to reshape sports law,"[3] "a case that could have far-reaching consequences throughout the law of Sherman Act Section 1,"[4] and "a case that might fundamentally change professional sports and rewrite sports antitrust law."[5] The forthcoming U.S. Supreme Court decision in the case could potentially affect not only how sports leagues operate, but also the operation of other joint ventures that have nothing to do with sports, such as payment systems (e.g., Visa, Mastercard) and medical care providers.

The central issue that the Court has been asked to decide is whether the Appeals Court of the Seventh Circuit erred by upholding the district court's finding that the National Football League ("NFL") and its member clubs are a "single-entity" with respect to the collective licensing of club trademarks and logos.[6] Since, according to the district court, the activities of the NFL and its member clubs occurred within a "single-entity," those activities cannot be an antitrust conspiracy in violation of Section 1 of the Sherman Act because a conspiracy, by definition, requires the participation of more than one entity. As a result, after permitting discovery only on the single-entity issue, the district court granted summary judgment to the NFL, and the Seventh Circuit upheld the decision.

The basic question raised by *American Needle* is: Are the NFL and its member clubs a single-entity with respect to their trademark licensing activities? In answering this question, an even more basic question is raised: By what criteria can a single-entity be identified? There is profound disagreement on the answer to this question, not only between the litigants, but also among the courts, economists, and legal scholars as well.[7]

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[1] Vice President, Compass Lexecon.

[2] Michael McCann, *Why American Needle-NFL Is Most Important Case in Sports History*, SI.com (January 12, 2010).

[3] Michael McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726 (2010).

[4] Chris Sagers, *American Needle, Dagher, and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1?*, ANTITRUST SOURCE 1 (August 2009).

[5] Gabriel Feldman, *The Puzzling Persistence of the Single Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, WIS. L. REV. (forthcoming), at 1.

[6] American Needle Inc. v. National Football League, 538 F.3d 736 (7th Cir. 2008).

[7] *See, for example*, McCann, *supra* note 3; Sagers, *supra* note 4; Feldman, *supra* note 5; Nathaniel Grow, *A Proper Analysis of the National Football League Under Section One of the Sherman Act*, 9 TEXAS REV. ENT. & SPORTS L. 281 (2008); 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); and Dean Williamson, *Organization, Control and the Single Entity Defense in Antitrust*, EAG 06-4, Economic Analysis Group Discussion Paper, Antitrust Division, U.S. Department of Justice (January 2006).

II. COMPETING SINGLE-ENTITY TESTS IN AMERICAN NEEDLE

The *American Needle* litigation is awash in proposed criteria by which a single-entity can be identified. Not only do the parties to the lawsuit have their proposed criteria, the Seventh Circuit (which decided the case) has its criteria, the U.S. Government has proposed a two-part test, and groups of economists have proposed still other criteria. Not surprisingly, none of these sets of criteria is free of criticism. Thus, the U.S. Supreme Court has a variety of single-entity tests from which to choose. Of course, the Court may very well instead devise a single-entity test of its own.

A. The Seventh Circuit's Test

In an earlier decision,[8] the Seventh Circuit expressed skepticism that the Supreme Court's *Copperweld*[9] decision could provide the definitive single-entity test for sports leagues and concluded that the question of whether a sports league is a single-entity should be addressed not only one league at a time, but one facet of a league at a time. The Seventh Circuit agreed with American Needle that, in making a single-entity determination, courts must examine whether the challenged conduct deprives the market of independent sources of economic control. But the Seventh Circuit did not fault the district court for not considering whether NFL clubs could compete against one another in licensing and marketing their intellectual property. In other words, the ability to compete with each other is not a criterion relevant to a single-entity determination.

The Seventh Circuit pointed to three distinctive features of the NFL in reaching its conclusion that the NFL and its member clubs are a single-entity with respect to the licensing and marketing of club trademarks and logos. First, no single NFL club can produce a NFL game, which means that the NFL clubs function as one source of economic power when producing NFL football. And, therefore, the NFL clubs function as one source of economic power when promoting their joint product. According to its Articles of Incorporation, NFL Properties was formed "[t]o conduct and engage in advertising campaigns and promotional ventures on behalf of the [NFL] and the member [teams]."[10] Second, the NFL clubs have been acting as one source of economic power to promote NFL football since 1963 when NFL Properties was formed. Third, cooperation among the NFL clubs fosters competition between the NFL's entertainment product and those of other entertainment providers. The Seventh Circuit concluded: "Viewed in this light, the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property, and we thus cannot say that the district court was wrong to so conclude."[11]

Each of these points has been subject to criticism. First, just because NFL clubs need to cooperate to produce NFL games does not in any way imply that they need to cooperate to license and market their intellectual property. In fact, prior to the formation of NFL Properties in 1963, the NFL teams did exactly that. Second, just because certain conduct has been occurring for years—even decades—does not make the conduct permissible under the antitrust laws. Third, the pro-competitive benefits of the challenged conduct, while relevant to a rule-of-reason

[8] Chicago Professional Sports Limited Partnership v. National Basketball Association, 95 F.3d 593 (7th Cir. 1996).

[9] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

[10] American Needle, *supra* note 6, at 744.

[11] *Id.*

analysis of that conduct, is irrelevant to the question of whether the NFL and its member clubs are a single-entity with respect to the licensing and marketing of their intellectual property.

B. American Needle's Test

In its brief to the U.S. Supreme Court, American Needle posed the question:

> Whether an agreement of the 32 teams of the National Football League not to compete with each other or with a jointly selected monopoly licensee in the licensing of their individually owned intellectual property is immune from scrutiny under Section 1 of the Sherman Act, notwithstanding that the teams are independently owned and controlled for-profit businesses that do compete, and are capable of competing, with each other in numerous ways, including in the licensing and marketing of their respective intellectual property?[12]

American Needle observed: "For over a century, this Court has uniformly held that all agreements between separately owned and controlled entities operating in interstate commerce are subject to scrutiny under [Section 1 of the Sherman Act] … This Court's decision in *Copperweld* reaffirmed this long-standing antitrust principle."[13] Thus, American Needle's single-entity test is very simple: Is the challenged conduct interstate commerce carried out by separately owned and controlled entities?[14]

American Needle's single-entity test has been criticized on a number of fronts. The Seventh Circuit characterized American Needle's proposed test as "one step removed from saying that the NFL teams can be a single entity only if the teams have 'a complete unity of interest'—a legal proposition that we have rejected as 'silly.' … As we have explained, "*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities;""[e]ven a single firm contains many competing interests.""[15]

Another criticism of American Needle's single-entity test is that it focuses on structure, whereas the Court's *Copperweld* and *Dagher*[16] decisions set forth a more functional approach. A structural approach focuses on how the clubs make decisions, whereas the functional approach focuses on whether those decisions restrain actual or potential competition. In carrying out the NFL's functions in producing games, it must make a multitude of decisions, including major decisions such as where to play the Super Bowl each year and minor decisions such as where to buy needed office supplies. By American Needle's single-entity test, all of the decisions would be vulnerable to a Section 1 challenge. As evidenced by the questions posed to American Needle by

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[12] American Needle v. NFL, Brief of Petitioner (September 18, 2009), at i.

[13] *Id.*, at 10.

[14] In their brief in support of American Needle, Merchant Trade Associations argue in favor of a similar rule based on unity of interests:

> Because of the risk that is 'inherent' in collaborations among horizontal competitors, this Court should establish a rule of law that independently owned joint venturers cannot be deemed a 'single economic entity' if those competitors have divergent economic interests… This rule would not mean that horizontal joint venturers and other horizontal competitor collaborations would be *per se* illegal… Rather, they would be analyzed under some form of the rule of reason, in which the factfinder considers the defendants' market power, the extent of the alleged harm to competition, and the relationship of the restraint to the overall efficiency-enhancing aspects of the joint venture.

American Needle v. NFL, Brief of Amici Curiae Merchant Trade Associations in Support of Petitioner American Needle, Inc. and For Reversal of the Decision of the United States Court of Appeals for the Seventh Circuit" (September 25, 2009), at 24-25.

[15] American Needle, *supra* note 6, at 743, quoting from Chicago Professional Sports, *supra* note 8, at 598.

[16] Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

the U.S. Supreme Court justices on January 13, 2010, at least some justices have the sense that the NFL should be deemed a single-entity with respect to at least some of its activities, such as whether to buy paper from, say, Staples or Office Depot. In other words, American Needle's single-entity test may be too strict.

C. The National Football League's Test

In its brief to the U.S. Supreme Court, the NFL posed the question: "Whether, consistent with the principles articulated in *Copperweld*, a professional sports league and its separately owned member clubs, which exist to produce collectively an entertainment product that no member club could produce on its own, function as a single entity for Section 1 purposes in promoting that product."[17] Those *Copperweld* principles are that conduct which does not represent a sudden joining of independent sources of economic power previously pursuing separate interests does not warrant Section 1 scrutiny. Therefore, the NFL's proposed single-entity test is that a league and its member clubs are a single-entity in the production and promotion of its entertainment product if: (1) the league is legitimately formed and (2) its member clubs are not independent sources of economic power which previously pursued separate interests.

The NFL's test has been strongly criticized for being too lax. Just because the formation of a joint venture satisfied a rule-of-reason scrutiny does not immunize all subsequent actions of the venture participants from Section 1 scrutiny. Moreover, a joint venture would fail to receive single-entity treatment only with respect to those functions that do not inherently require collaboration. In other words, all activity relating to core venture functions would be immune from a Section 1 challenge. Since, in the case of the NFL, the core venture functions would include the terms and conditions of player employment, the movement of clubs, the raising of capital, rules regarding permissible equipment, and many others, adoption of the NFL's single-entity test would result in a vast expansion of antitrust immunity. In fact, Justice Scalia asked the NFL if, under its proposed test, NFL clubs could agree on the prices at which their franchises could be sold and the NFL replied that, because the NFL clubs are not independent sources of economic power, the answer is yes—to which Justice Scalia replied: "I thought I was reducing it to the absurd."[18]

Justice Sotomayor asked the NFL if, under its proposed test, the league could impose a $1,000-a-year salary for secretaries for all clubs and the NFL responded that, indeed, since the NFL clubs are not separate sources of economic power and thus are a single-entity, the league could cap secretarial salaries across clubs.[19] The NFL added, however, that since each club has historically set the salaries of its secretaries, one could argue that the league should not be permitted to do so. Likewise, the NFL conceded that the terms and conditions of coaches' employment have historically been set by each club.[20]

More generally, the NFL stated:

> We recognize that if the member clubs of a professional sports league appear to have genuine autonomy in a particular aspect of their operations—if, in the words of Judge Easterbrook, "from the perspective of" a category of suppliers or consumers, the clubs reasonably appear to be completely autonomous—that

[17] American Needle v. NFL, Brief for the NFL Respondents (November 17, 2009), at i.

[18] American Needle v. NFL, Official Transcript Proceedings Before the Supreme Court of the United States (January 13, 2010), at 63-64.

[19] *Id.*, at 49-51.

[20] American Needle, *supra* note 17, at 53.

> might support an argument to treat them as if they were independent sources of economic power in that particular area.[21]

Therefore, even the NFL seems to recognize that its proposed single-entity test is too lax. Not surprisingly, numerous organizations that would benefit from a lax single-entity test have filed briefs in support of the NFL, including the National Basketball Association,[22] the National Hockey League,[23] the Association of Tennis Professionals Tour, the Women's Tennis Association Tour, Major League Soccer, Nascar,[24] the National Collegiate Athletic Association,[25] and Mastercard and Visa.[26]

D. The U.S. Government's Test

The U.S. Supreme Court invited the U.S. Government to offer its opinion. In its brief, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") argued that single-entity treatment for the NFL and its member clubs is appropriate if and only if two conditions are satisfied: (1) "the teams and the league must have effectively merged the relevant

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[21] *Id.*

[22] The NBA argues: "The test for whether a professional sports league functions as a single entity is whether its economic power flows from a single source, rather than from multiple, independent sources." American Needle v. NFL, Brief of Amici Curiae National Basketball Association and NBA Properties in Support of Respondents (November 24, 2009), at 6.

[23] The NHL argues that Section 1 of the Sherman Act should not reach to the internal agreements of legitimate business combinations, but should apply to alleged restraints that fall outside the venture's scope. American Needle v. NFL, Brief for Amicus Curiae the National Hockey League in Support of the NFL Respondents (November 24, 2009).

[24] The joint brief of these four organizations argues: "The decisions of non-competing entities concerning the operation of a lawful enterprise are not subject to §1 review." American Needle v. NFL, Brief for ATP Tour, Inc., WTA Tour, Inc., Major League Soccer, L.L.C., and National Association for Stock Car Auto Racing, Inc. as Amici Curiae in Support of Respondents (November 24, 2009), at 5.

[25] The NCAA argues:

> The test for determining whether a league rule or action may properly be regarded as the product of a single entity should focus on the character of the alleged restraint itself, and on the fundamental question of whether promulgation or enforcement of the rule can be said to have eliminated any preexisting economic competition among league members that had survived formation and operation of the league. The analysis should not focus on such irrelevant factors as the business form under which the league or its members are organized, as Petitioner and several of its *amici* suggest. Nor should the analysis hinge on whether the league exhibits some generic level of "integration," or whether the league members engage in independent activities outside the league, or whether it is possible to imagine ways in which the league members could stage their sport under a different league structure. All of these inquiries are irrelevant to the question posed by *Copperweld*, which is not whether a sports league satisfies some arbitrary status-based conception of "leagueness," but rather whether an alleged "restraint" actually results in a lessening of preexisting or potential economic competition among independent entities."

American Needle v. NFL, Brief for the National Collegiate Athletic Association as Amicus Curiae Supporting Respondent (November 24, 2009), at 6-7.

[26] Mastercard and Visa argue:

> … Section 1 should not apply … with respect to (a) conduct of a joint venture in which the individual venturers have effectively merged the relevant aspect of their operations; or (b) collaborative conduct commercializing a joint venture product that the individual venturers could not produce alone. Indeed, the main effect of applying Section 1 in these contexts would be to distort the very interbrand competition the antitrust laws were designed to protect, because these joint ventures would be subject to the burdens of Section 1, while their competitors with formal "single entity" status would not.

American Needle v. NFL, Brief of Mastercard Worldwide and Visa Inc. as Amici Curiae in Support of Respondents (November 24, 2009), at 3.

aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere" and (2) "the challenged restraint must not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations."[27] The DOJ and FTC recommended that the case be remanded to "allow the lower courts to clarify the scope of petitioner's challenge and to apply the correct single-entity analysis in the first instance."[28]

Under the Government's test, since NFL clubs do not compete in establishing the rules for on-field play, the clubs are a single-entity when establishing such rules, as long as those rules do not affect actual or potential competition among the clubs in other areas. Similarly, the NFL and its member clubs act as a single entity when hiring referees or central administrative staff. Thus, a wage scale could be set for secretaries working in the NFL's central office; but if, say, the New York Giants and New York Jets agreed to impose a wage scale for secretaries working in their club offices, the agreement could be challenged under Section 1 because the first prong of the Government's test is not met. Likewise, an agreement not to poach another club's coaching talent could be challenged under Section 1 because, once again, the first prong of the test is not met.

Both American Needle and the NFL criticize the Government's single-entity test. American Needle argues that the Government's test "is conceptually and doctrinally unsound, and it will create a lack of clarity where there presently exists clarity in the cases, and it will produce inefficiency and waste in the conduct of litigation that does not presently exist."[29] As American Needle explains in its Reply Brief, the Government's test is conceptually and doctrinally unsound because there is no need for common ownership—a mere contract integration could be sufficient to be deemed a single-entity. The Government's test would create a lack of clarity because a competitive effects analysis is more properly conducted as part of a rule-of-reason analysis. The Government's test would produce inefficiency and waste in the conduct of litigation because determining whether operations have been effectively merged would be more difficult than making a determination about separate ownership and control. American Needle argues that the Government's test yields no offsetting judicial benefits and concludes: "The proposed "effective merger" test is obviously just a truncated Rule of Reason inquiry into competitive effects that lacks prior precedent to draw upon… The United States offers no reason why applying the traditional Rule of Reason will not be a superior means to the same end."[30]

The NFL argues that the first prong of the Government's test assumes the answer to the second prong because it presumes that each NFL club is capable of creating the NFL's product. Moreover, even conduct which clearly meets the first prong, such as conduct establishing the rules for on-field play, would, if challenged, require the NFL to defend that conduct if it had an alleged effect, intended or not, on the actual or potential competition among clubs in some other operational sphere. Furthermore, the Government's test:

> would lead to confusion, to endless and costly rounds of litigation, and ultimately to nonsensical results. The government would distinguish, for example, between

[27] American Needle v. NFL, Brief for the United States as Amicus Curiae Supporting Petitioner (September 2009), at 6-7.

[28] *Id.*, at 32.

[29] American Needle, *supra* note 18, at 23.

[30] American Needle v. NFL, Reply Brief of Petitioner (December 17, 2009), at 26.

> (a) the NFL's decision to structure a season of games culminating in a Super Bowl championship (under the test, the act of an "effectively merged" single entity), and (b) the NFL's decision that member clubs will play no additional games against each other (under the test, the act of "collaborators" subject to Section 1 scrutiny)… It would defy common sense to apply such different standards to these two interrelated decisions.[31]

E. The Test of Economists in Support of American Needle

A group of distinguished economists filed an amicus curiae brief in support of American Needle which purported to describe "the consensus among research economists about the relationship between the structure of a league and its operating efficiency, the efficient scope of competition among teams within a league, and the extent of competition between a league and other forms of entertainment and recreation."[32] The economists argued that:

> the validity of the single-entity defense hinges on the same economic evidence that is necessary to undertake a rule-of-reason analysis… The claim that the NFL is a single entity in product licensing is based [on the] asserted efficiencies of joint licensing. If such efficiencies do not exist, a joint venture for product licensing is a collusive cartel of horizontal competitors.[33]

In their questions, the justices probed whether and, if so, how a test to determine whether single-entity treatment is warranted differs from a rule-of-reason analysis. Justice Sotomayor questioned the NFL why, if the challenged conduct is so clearly "reasonable," a single-entity test is needed at all. The NFL's response was that defending Section 1 claims is very costly, to which Justice Sotomayor replied:

> But isn't the proposition of antitrust law that we have a reason for worrying about concerted activity? We have a genuine concern as … well, Congress does … about independent entities joining together and fixing prices… And we permit them to do so, as Justice Breyer indicated, when the venture has a purpose that's independent … from the individual interests, but we say, when it doesn't, we have to ensure, under the rule of reason, that what they are doing is reasonable.[34]

F. The Test of Economists in Support of the NFL

Another group of distinguished economists[35] filed an amicus curiae brief in support of the NFL, arguing that, from an economic perspective, the issue of whether the NFL and its member clubs should be treated as a single-entity with respect to the licensing of club trademarks "should be addressed in light of the economic theory of a firm and not based on the legal corporate structure of the league or of NFL Properties. Economic theory suggests that there exist legitimate, procompetitive reasons why professional sports teams would organize themselves as a league that

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[31] American Needle, *supra* note 17, at 49.

[32] American Needle v. NFL, Amicus Curiae Brief of Economists in Support of Petitioner (September 24, 2009), at 2. The group consisted of Robert Baade, David Berri, Timothy Bresnahan, Dennis Coates, Craig Depken II, Rodney Fort, Ira Horowitz, Brad Humphreys, Lawrence Kahn, Leo Kehane, Stefan Kesenne, Roger Noll, James Quirk, Allen Sanderson, Martin Schmidt, John Siegfried, John Solow, Stefan Szymanski, Lawrence White, and Andrew Zimbalist.

[33] *Id.*, pp. 32-34.

[34] American Needle, *supra* note 18, at 60-61.

[35] The group consisted of George Daly, Steven Davis, Kenneth Elzinga, R. Glenn Hubbard, Kent Kimbrough, Benjamin Klein, Frank Mathewson, Fiona Scott Morton, Barry Nalebuff, Richard Schmalensee, Evan Hoffman, Chad Syverson, Steven Wiggins, Ralph Winter, and Ann Witte.

centralizes certain functions."[36] The amicus brief of the Petitioner Economists is criticized for offering "no analysis of the externalities and free riding concerns faced by the NFL generally or with respect to trademark licensing in particular."[37]

The Respondent Economists caution that their brief "does not address league operations beyond the one raised in this case—namely the centralized promotion and licensing of team trademarks. In particular, it does not address any issues relating to a sports league's employment of players or coaches."[38] Yet, if the Court endorses the NFL's single-entity test, the impact on NFL players and coaches may be considerable.[39]

III. IS NFL PROPERTIES MORE LIKE TRUCKING OR NFL FOOTBALL?

Thus far, the discussion has glossed over a key issue: What is the relationship between the collective licensing of NFL club marks and the joint-product of the NFL and its member clubs, namely NFL football games? In the Court's proceedings, a hypothetical non-venture activity is postulated—namely, trucking. Suppose each NFL club began trucking operations. Would the NFL and its member clubs be a single-entity with respect to their trucking operations?

Both American Needle's and the NFL's single-entity tests would say no. According to American Needle's test, the NFL clubs are separately owned and controlled and therefore cannot be a single-entity with respect to their trucking operations. The NFL single-entity test would focus on the fact that there is no need for the NFL clubs to collaborate in their trucking operations—they are non-venture activities—whereas there is a need for NFL clubs to collaborate to produce NFL football. Thus, both single-entity tests agree that the NFL and its member clubs are not a single-entity with respect to trucking. So the question arises: Is NFL Properties closer to "trucking" or "NFL football"?

The NFL argues that there is undisputed evidence that the function of NFL Properties is to promote NFL football. The value of club marks is related to the production of NFL football. Without NFL football, club marks are virtually worthless, as evidenced by the low value of marks of defunct NFL clubs. NFL Properties promotes NFL football, which benefits NFL clubs by enhancing television viewership of games and demand for game attendance.[40] In contrast,

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[36] American Needle v. NFL, Brief of Economists as Amici Curiae in Support of Respondents (November 24, 2009), at 2. Two licensees, Reebok and Electronic Arts, filed briefs stressing the pro-competitive effects of licensing from a collective licensing organization such as NFL Properties. *See*, American Needle v. NFL, Brief of Respondent Reebok International Ltd. (2009), and American Needle v. NFL, Brief for Electronic Arts Inc. as Amicus Curiae Supporting the NFL Respondents (2009).

[37] Brief of Economists…, *Id.*, p. 19.

[38] *Id.*, p. 2.

[39] Both the NFL Coaches Association and the NFL Players Association (together with Major League Baseball, National Basketball Association, and National Hockey Players' Associations) filed briefs in support of American Needle. *See*, American Needle v. NFL, Amicus Brief of the National Football League Coaches Association in Support of Petitioner (2009), and American Needle v. NFL, Brief Amici Curiae for National Football League Players Association, Major League Baseball Players Association, National Basketball Players Association, and National Hockey League Players' Association in Support of Petitioner (September 25, 2009).

[40] Gary Gertzog, senior vice president of the NFL, testified before a congressional subcommittee:

> Licensing of NFL intellectual property is an integral part of the collective efforts of the League and its member clubs to promote their collective entertainment product, NFL Football. Products bearing NFL intellectual property, including apparel, are an important expression of the image of the NFL and its brand. They offer NFL fans an opportunity to demonstrate their interest in NFL Football generally and their allegiance to a particular team, and they serve to promote NFL Football by communicating that interest and allegiance to others. By increasing the visibility of

American Needle's position is that NFL Properties is more analogous to trucking—there is no need for NFL clubs to collaborate to license their marks and, in fact, they did not so collaborate prior to the formation of NFL Properties in 1963.[41]

Another possibility is that while NFL Properties may have been formed to promote NFL football in 1963, it has evolved as the NFL's popularity has soared. In NFL Properties' early years, it donated its proceeds to charity, thereby generating positive publicity for the NFL and its member clubs. However, as the revenues generated by NFL Properties climbed, the NFL and its member clubs decided to stop giving all the money to charity. Today, characterizing NFL Properties as not interested in making money is likely to draw laughter, as it did during the Court's proceedings. Justice Scalia commented that:

> the stated purpose [of NFL Properties] is to promote the game. The purpose is to make money. I don't think that they care whether the sale of the helmet or the T-shirt promotes the game. They … sell it to make money from the sale… Now, it promotes the game if the money from the sale goes to the whole group, I suppose. But … don't tell me that … absent this agreement, there would not be an independent, individual incentive for each of the teams to sell as many of its own … shirts and helmets as possible.[42]

The NFL contends that whether "a function" or "the sole function" of NFL Properties is to promote NFL football is irrelevant in answering the question of whether the NFL and its member clubs are a single-entity with respect to the licensing of club marks, as is the fact that NFL Properties generates revenues (i.e., makes money) from its promotional activities:

> NFL Football, promoting loyalties, and fostering rivalries, these licensing activities enhance the NFL's ability to compete with other entertainment providers. Control over the licensing of NFL intellectual property and the quality of NFL-licensed products is thus integral to the success of NFL Football.

Gertzog also testified that the equal sharing of revenue from these activities collectively benefits all NFL member clubs, as well as NFL fans. Gary Gertzog, Testimony Before the Subcommittee on Courts and Competition Policy of the Committee on the Judiciary, U.S. House of Representatives (January 20, 2010).

[41] In their brief in support of American Needle, the American Antitrust Institute and the Consumer Federation of America characterize the activity of NFL Properties as "a separate but related activity":

> The court of appeals improperly jumped from the premise that the NFL teams were a single entity when "producing NFL football" to the conclusion that the NFL teams were also a single entity in collectively licensing the teams' intellectual property. Even if inter-club cooperation is the most efficient way to produce NFL football, collective action in related endeavors is not necessarily justified… The analytical framework for assessing otherwise anticompetitive restraints that are related to an efficiency-enhancing integration is well-settled: where the restraint is *necessary* to achieve the pro-competitive benefits of the integration, the restraint is analyzed under the rule of reason… [The Seventh Circuit's *American Needle* decision] overturns this well-accepted analytical framework in holding that when a joint venture is sufficiently integrated to be deemed a single entity for one purpose, a restriction on competition in a separate but related activity is immune from review, regardless of whether the restriction is actually necessary for the proper functioning of the venture and even if it reduces output or quality, raises prices, and restricts innovation or consumer choice. In addition, the court offered no coherent guide for determining how far afield from the underlying single-entity activity immunity should extend… Respondents and their *amici* would limit immunity to "core venture functions," but it is not evident how or why one would define a "core venture function" other than in reference to what is necessary for the joint venture to achieve its procompetitive objectives.

American Needle v. NFL, Brief of the American Antitrust Institute and Consumer Federation of America as Amici Curiae in Support of Petitioner (September 25, 2009), at 16-20.

[42] American Needle, *supra* note 18, at 47.

> The government questions whether promotion of NFL Football is "a purpose" or "the sole purpose" of the League's licensing activities … but the answer has no practical or antitrust significance. Every fan who dons an NFL-licensed cap or sweatshirt becomes a walking promotion for NFL Football; NFL Football in turn creates demand for NFL-licensed products. League licensing decisions are thus no different from a venture's decision to set price for its product or to determine how its product is sold; each constitutes the action of a single entity… That is true even if the entity seeks by its promotional activities to generate revenues directly (e.g., through royalties) as well as indirectly (e.g., through increased game attendance, increased broadcast viewership, or goodwill resulting from committing the revenues to "charitable and educational" causes …).[43]

Justice Breyer commented that the question of whether promoting NFL football is closer to NFL football or trucking "seems to me to be something that you can't decide in theory. It's a matter of going back to economic facts with witnesses and so forth."[44]

IV. WHAT ARE THE IMPLICATIONS OF THE U.S. SUPREME COURT'S DECISION?

The single-entity test which the U.S. Supreme Court ultimately endorses may have a profound impact on not only the activities of sports leagues, but other joint ventures as well, such as payment systems like Mastercard and Visa.

A. American Needle and Other Potential Licensees

Even if the Court overturns the Seventh Circuit's decision, the NFL's challenged activities would be subject to a rule of reason analysis—and there are several reasons to doubt whether American Needle would prevail. First, American Needle's alleged product market (i.e., NFL-logoed hats and apparel[45]) may be found to be too narrow. Justice Stevens suggested the market should be sports paraphernalia,[46] while Justice Breyer argued that competition for the NFL-logoed apparel of one club does not come from the NFL-logoed apparel of other NFL clubs, but rather from MLB-, NBA-, and NHL-logoed apparel.[47]

Second, there are strong pro-competitive arguments in favor of the collective licensing of club marks. Collective licensing may reduce transaction costs, generate scale efficiencies, and overcome negative externality (i.e., hold-out) problems.[48]

Third, American Needle has stated that it suffered no harm from the anticompetitive activities of the NFL and its member clubs for most of NFL Properties' existence. NFL Properties was formed in 1963 and became the exclusive licensor of NFL club marks (with some minor exceptions) in 1982. The conduct that American Needle is directly challenging—the decision to award a single license and to award it to Reebok—did not occur until 2000 and 2001, which is when American Needle claims to have first suffered an antitrust injury.

B. Sports Leagues, Players, Coaches, and Fans

As discussed earlier, if the U.S. Supreme Court adopts the NFL's single-entity test, the consequences may be profound for NFL players and coaches (and secretaries), as well as for those in other sports leagues as well. However, the experience of Major League Baseball, which has

[43] American Needle, *supra* note 17, at 27-28.
[44] American Needle, *supra* note 18, at 54.
[45] *Id.*, at 27.
[46] *Id.*
[47] *Id.*, at 17-18.
[48] *See* the briefs of Reebok, Electronic Arts, and the Economists in Support of the NFL, *supra* note 36.

long had an antitrust exemption, suggests that the NFL will have to negotiate the terms of any player restrictions with the NFL Players Association. However, NFL players would lose the ability to decertify the union and bring an antitrust lawsuit against the NFL, possibly raising the probability of strikes and lockouts.

Another possible consequence of the Court adopting the NFL's single-entity test could be the movement of televised NFL games from free-TV (i.e., over-the-air TV) to pay-TV (i.e., cable or satellite TV), possibly on the NFL Network. As Stephen Ross explained to a congressional subcommittee, the Sports Broadcasting Act of 1961 gave the NFL a partial antitrust exemption with respect to the sale of television rights to its games, but the exemption applies only to "sponsored telecasting," which courts have interpreted to mean "free TV," not "pay TV."[49] The Court's acceptance of the NFL's single-entity test would result in an expansion of Section 1 protection to pay-TV as well. Similarly, the NFL may choose to stop abiding by other terms of the Sports Broadcasting Act concerning the televising of NFL games on Friday nights or Saturday during the high school and college football season.

The president of the NFL Players Association testified:

> The NFL's ideal post-*American Needle* world is indeed chilling: Sports leagues could set ticket prices and prevent teams in the same or adjacent markets from competing for fans; owners could end free agency by restricting player movement from team to team and imposing a salary schedule for coaches and players; leagues could transfer all television and radio broadcasts of their games, including local rights, to their own, wholly owned subscription cable and satellite networks; leagues could even require any stadium built be completely subsidized by local taxpayers.[50]

Other sports leagues such as the NBA and NHL would probably do likewise.

C. Other (Non-Athletic) Joint Ventures

If the Court upholds the Seventh Circuit's *American Needle* decision, there may be consequences far beyond sports. Merchants have been locked in a Section 1 antitrust battle with Visa and Mastercard over interchange fees.[51] Merchant Trade Associations ("MTA") filed a brief in support of American Needle:

> Amici are merchant trade associations that represent hundreds of thousands of merchants that are forced to pay supracompetitive fees that are imposed on them by the Visa and MasterCard payment-card networks, which traditionally have operated as joint ventures of nearly every large bank in the United States. Acting through the auspices of the Visa and MasterCard networks, the banks impose supracompetitive fees on the merchants that accept their cards and have enacted rules that prevent merchants from protecting themselves against these supracompetitive fees by steering consumers to lower-cost forms of payment."[52]

MTA argued that if the Court upholds the Seventh Circuit's decision, the Court's ruling "may allow banks—which through their participation in the Visa and MasterCard networks have

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[49] Stephen Ross, Testimony Before the Subcommittee on Courts and Competition Policy of the Committee on the Judiciary, U.S. House of Representatives (January 20, 2010).

[50] Kevin Mawae, Testimony Before the Subcommittee on Courts and Competition Policy of the Committee on the Judiciary, U.S. House of Representatives (January 20, 2010).

[51] *See*, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, MDL Docket No. 1720, Eastern District of New York.

[52] American Needle, *supra* note 14, at 1.

a near monopoly in payment-card issuance in the United States—to argue that horizontal agreements among them are completely immune from Section One."[53]

> Mastercard and Visa, in their brief in support of the NFL, counter:
>
> What the MTA fails to tell the Court is that, under the U.S. antitrust laws, interchange fees have been recognized as procompetitive network functions necessary to make networks work… The MTA wants merchants to pay less for a valuable product, thereby shifting the costs of the network onto others, including consumers.[54]

The MTA also suggests that the Court's refusal to overrule the Seventh Circuit's *American Needle* decision could impact the conduct of medical care organizations. In its 1982 decision in *Arizona v. Maricopa County Medical Society*, the U.S. Supreme Court held that the maximum-fee agreements of the medical care foundations organized by Maricopa and another medical society were price-fixing agreements and, therefore, were *per se* unlawful under Section 1 of the Sherman Act.[55] The MTA argues that, if the Court had endorsed an *American Needle*-like decision at that time, Maricopa would have been able to evade Section 1 scrutiny. Thus, if the Court upholds the Seventh Circuit's *American Needle* decision, medical care organizations may be emboldened to engage in activities that had been held to be Section 1 violations.

V. CONCLUSION

The Seventh Circuit's *American Needle* decision has been described as a "blockbuster."[56] The Supreme Court's forthcoming decision will likely be even more significant. The Court has been presented with a number of proposals for how to identify a single-entity. If the Court upholds the Seventh Circuit's decision, and especially if it does so by endorsing the NFL's single-entity test, the consequences would extend far beyond the NFL, to other sports leagues and to joint ventures that have nothing to do with sports, including Visa and Mastercard, and possibly medical care providers as well. And one can be confident that joint ventures will be structured in the future to exploit any Section 1 loopholes in the Court's test.

[53] *Id.*, at 5.
[54] American Needle, *supra* note 26, at 28.
[55] Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982).
[56] Sagers, *supra* note 4, at 9.