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AMERICAN NEEDLE AND THE APPLICATION OF THE SHERMAN ACT TO PROFESSIONAL SPORTS LEAGUES

GREGORY J. WERDEN*

I. INTRODUCTION

In 1963, the National Football League's ("NFL") teams formed National Football League Properties ("NFLP"), a joint venture that has licensed their intellectual property for use on merchandise.[1] Each team gave NFLP the exclusive right to license its trademarks and logos for use on merchandise.[2] After decades of non-exclusive

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1. *See* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2207 (2010) (asserting, "[p]rior to 1963, the teams made their own arrangements for licensing their intellectual property and marketing trademarked items such as caps and jerseys."). The record before the Court, however, contains no support for that assertion; at oral argument, Justice Sotomayor asked counsel for the NFL whether intellectual property ever had been licensed "by the individual teams," and counsel responded: "It was done, I believe collectively, through Roy Rogers Enterprises." Transcript of Oral Argument at 44, *Am. Needle*, 130 S. Ct. 2201 (No. 08-661), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-661.pdf. During the four years prior to the formation of NFLP, Roy Rogers Enterprises licensed merchandise for all NFL teams. *See* MICHAEL ORIARD, BRAND NFL: MAKING AND SELLING AMERICA'S FAVORITE SPORT 3 (Univ. of N. Carolina Press 2007) (relating role of Roy Rodgers Enterprises in licensing NFL merchandise). The first president of NFLP was Larry Kent, who had been manager of the marketing at Roy Rogers Enterprises. *See* Neil Steinberg, *He Could Always Move Merchandise*, SPORTS ILLUSTRATED, July 27, 1998, *available at* http://images.si.com/vault/article/magazine/MAG1013413/index.htm (noting tenure of Larry Kent's NFLP presidency from 1962 to 1971). Public sources consulted by the author reveal no merchandise licensing by an NFL team before 1959.

2. *See* Joint Appendix at 350-58, Am. Needle, Inc. v. Nat'l Football League, No. 08-661, 2009 WL 3006320 (Sept. 18, 2009) [Hereinafter Joint Appendix 1] (discussing Trust Agreement wherein teams formally pooled their intellectual property in NFL Trust in 1982); *see also* Joint Appendix at 387, Am. Needle, Inc. v. Nat'l Football League (No. 08-661), 2009 WL 3022168 (Sep. 18, 2009) [Hereinafter Joint Appendix 2] (highlighting exclusive licensing provision in License Agreement). *See* Brief for Petitioner, Dallas Cowboys Football Club, Ltd. v. Nat'l Football League Trust (No. 95- 9426), 1996 WL 34473933 (S.D.N.Y. filed Jan. 11, 1996) (stating "in 1982, the NFL created the aptly-named 'NFL Trust' to control the licensing of the marks of the NFL's member clubs."). *See* Joint Appendix 2, *supra* at 464 (noting that Dolphins and Raiders did not sign Trust Agreement but granted rights directly to NFLP); Joint Appendix 1, *supra* at 238, 247-48 (detailing NFL Defendants' Response to Plaintiff's Statement of Additional Facts in Support of Its Response to Motion of NFL Defendants for Summary Judgment (Single Entity) and asserting all but two NFL Clubs entered into the 1982 Trust Agreement).

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licensing, NFLP granted Reebok a ten-year exclusive license for use on apparel.[3] Hat manufacturer American Needle, Inc. ("ANI"), a long-time NFLP licensee, brought suit, alleging that the NFL and its teams unlawfully acted in concert in granting the Reebok license.[4] ANI based its claim on section 1 of the Sherman Act, which "reaches unreasonable restraints of trade effected by a contract, combination . . . or conspiracy between separate entities."[5] The NFL moved for summary judgment, arguing the League and its teams acted as a single economic entity and therefore could not be liable.[6] The lower courts credited the NFL's single-entity argument, but the Supreme Court unanimously reversed.[7] Although the Court did not preclude single-entity treatment for a joint venture under every possible circumstance, the Court apparently did foreclose single-entity treatment for any significant action by a major professional sports league.[8]

II. THE LEGAL ANALYSIS OF *AMERICAN NEEDLE*

The Supreme Court's analysis initially notes the Sherman Act's "basic distinction . . . between concerted and independent action," explaining Congress "treated concerted behavior more strictly than unilateral behavior" because concerted action "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands."[9]

On the question of what is, and is not, concerted action, the Court observes its prior decisions "eschewed . . . formalistic distinctions in favor of a functional consideration of how the parties in-

3. *See Am. Needle*, 130 S. Ct. at 2207 (noting in December 2000, "[NFLP] granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams.").

4. *See id.* (discussing ANI filing suit in Northern District of Illinois regarding agreements between NFL, NFL teams, NFLP and Reebok).

5. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984) (internal quotations omitted). *See Am. Needle*, 130 S. Ct. at 2208 (reiterating "section 1 applies only to concerted action that restrains trade").

6. *See Am. Needle*, 130 S. Ct. at 2207 (relating "single entity" theory as basis for motion for summary judgment).

7. *See* Am. Needle, Inc. v. New Orleans Louisiana Saints, 496 F.Supp.2d 941, 944 (N.D. Ill. 2007), *aff'd sub nom*, Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 744 (7th Cir. 2008) (holding in favor of NFL that member teams constitute single entity exempt from section 1 rule of Sherman Antitrust Act); *Am. Needle*, 130 S. Ct. at 2217 (reversing lower court decisions by holding NFL is not single entity for antitrust purposes).

8. *See Am. Needle*, 130 S. Ct. at 2217 (refuting "single entity" theory regarding marketing of "the teams' individually owned intellectual property").

9. *Id.* at 2208-09 (quoting *Copperweld*, 467 U.S. at 767-69).

volved in the alleged anticompetitive conduct actually operate."[10] The Court notes that it previously found concerted action, even though a single legal entity was involved, when "the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity."[11] To illustrate, the Court cites cases involving professional organizations and trade groups, as well the trademark licensing joint venture at issue in the *Sealy* case.[12] The Court also discusses that it found concerted action to be absent, even though multiple legal entities were involved.[13] To explain, the Court traces the decline of the "intraenterprise conspiracy doctrine," culminating in the *Copperweld* decision, which held a corporation is legally incapable of conspiring with a wholly owned, but separately incorporated, subsidiary.[14]

Building on this foundation, the Court explains that in determining whether conduct is concerted, the "key is whether the alleged contract, combination . . . or conspiracy . . . joins together separate decisionmakers . . . pursuing separate economic interests."[15] Applying this insight, the Court finds collective licensing by the NFL teams is concerted conduct.[16] The Court observes that each team "is a substantial, independently owned, and independently managed business" and that "the teams compete in the market for intellectual property."[17] The Court also declares, in licensing intellectual property, the teams acted as "separate economic actors pursuing separate economic interests," and consequently, the decision to license collectively and the decision to license Reebok exclusively, "depriv[ed] the marketplace of independent sources of decisionmaking."[18]

The Court separately addresses the actions of NFLP, noting that "it is not dispositive that the teams have organized and own a

10. *See id.* (discussing United States v. Sealy, Inc., 388 U.S. 350 (1967)).

11. *Id.*

12. *See id.* (detailing issues in *Sealy*).

13. *See id.* at 2209 (highlighting strict Congressional treatment of concerted behavior as compared to unilateral behavior and parties as legally distinct entities is not dispositive of concerted action under section 1).

14. *See id.* at 2210-11 (noting intraenterprise conspiracy doctrine "treated cooperation between legally separate entities as necessarily covered by § 1" but *Copperweld* held this doctrine inconsistent with organizational distinctions).

15. *Id.* at 2212 (internal quotations omitted).

16. *See id.* at 2215 (finding concerted action because "[t]hirty-two teams operating independently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits").

17. *Id.* at 2212-13.

18. *Id.* at 2213 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).

legally separate entity that centralizes the management of their intellectual property" but "[t]he question whether NFLP decisions can constitute concerted activity covered by § 1 is closer than whether decisions made directly by the thirty-two teams are covered by § 1."[19] The Court observes:

> We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. 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 . . . .[20]

The Court ultimately holds "decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action" because the teams have "economic interests that are distinct from NFLP's financial well-being;" therefore, the teams "are not like components of a single firm that act to maximize the firm's profits."[21] Rather, the Court declares: "The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for the NFLP."[22] The Court concludes: "In making the relevant licensing decisions, NFLP is therefore 'an instrumentality' of the teams," noting that a per se unlawful cartel could be formed through a marketing joint venture acting as an instrumentality for a group of competitors.[23]

19. *Id.* at 2213-14.

20. *Id.* at 2215.

21. *Id.* The Court contrasts the NFL teams' involvement with NFLP to "typical decisions by corporate shareholders" on the basis that "NFLP's licensing decisions effectively require the assent of more than a mere majority . . . ." *Id.* But no such finding was made in the case, and NFLP's articles of incorporation are silent on the matter. *See* Joint Appendix 1, *supra* note 2, at 311-16 (discussing corporate structure). The Court also comments that "each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits." *Am. Needle*, 130 S. Ct. at 2215. The two interests need not diverge; a public company's shareholders vote in accord with their individual interests need not align perfectly with those of the company. *See id.* (analyzing corporate shareholder analogy). Finally, the Court observes: "The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for the NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property." *Id.* This would have been true if individual teams did their own merchandise licensing, but independent licensing had been prohibited by contract. *See* Joint Appendix 2, *supra* note 2, at 387 (noting exclusive licensing provision in License Agreement).

22. *Am. Needle*, 130 S. Ct. at 2215.

23. *Id.* at 2215-16 (quoting United States v. Sealy, Inc., 388 U.S. 350, 353 (1967)).

III. AMERICAN NEEDLE ON REMAND

ANI based its damages claim on section 4 of the Clayton Act, which entitles "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to recover treble damages.[24] The "by reason of" proviso is an important limitation; ANI must show "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."[25] The NFL is apt to move for summary judgment on the grounds that ANI cannot make the requisite showing.[26]

ANI was injured by the denial of a license, resulting in lost profit it would have earned from selling hats with NFL team logos.[27] Consumers plausibly were also injured as they likely paid higher prices for NFL team hats and selected from a reduced variety as a consequence of Reebok's exclusive license.[28] Given the Supreme Court's decision, collective licensing by the NFL teams plausibly violated section 1 of the Sherman Act by eliminating licensing competition among the teams; nevertheless, ANI could have great difficulty defeating the NFL's summary judgment motion.[29]

Although the injury to consumers in this case was "injury of a type the antitrust laws were intended to prevent," it is not clear that the injury "flow[ed] from that which [made] the defendants' acts unlawful."[30] Consumer injury was caused by the elimination of competition among makers of hats, not by the elimination of competition among the NFL teams in licensing their trademarks and logos; consumers would have suffered the same injury if Reebok obtained an exclusive license from each individual team.

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24. 15 U.S.C. § 15 (2010).

25. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

26. The NFL has been granted summary judgment on a comparable basis in prior cases. *See, e.g.*, St. Louis Convention & Visitors Comm'n v. Nat'l Football League, 154 F.3d 851, 862-65 (8th Cir. 1998) (affirming summary judgment for failure to present evidence indicating "the NFL's anticompetitive acts were an actual, material cause of the alleged harm to competition"); Murray v. Nat'l Football League, No.94-5971, 1998 WL 205596, at *11-12 (E.D. Pa. 1998) (granting summary judgment on basis that there was no causal connection between challenged action by NFL and injury complained).

27. *See Am. Needle*, 130 S. Ct. at 2207 (relating non-renewal of ANI's nonexclusive license).

28. *See id.* at 2209 (discussing harmful effects of anticompetitive behavior on market).

29. *See id.* at 2215 (stating NFLP decisions regarding teams' individual intellectual property constitutes concerted action not beyond scope of section 1 of the Sherman Act).

30. *Brunswick Corp.*, 429 U.S. at 477.

More importantly, the injury to ANI appears not to "flow from that which makes the defendants' acts unlawful."[31] Consumers of NFL team hats presumably would have suffered the same injury if ANI had been awarded an exclusive license for hats rather than Reebok, yet ANI would not have been injured. Hence, ANI's injury was neither necessary to produce the injury to consumers, nor was it a consequence of that injury. Furthermore, ANI could not have suffered injury from elimination of licensing competition among the teams. ANI sought to license the intellectual property of all of the teams, as its business model was to produce hats for every team.[32] Therefore ANI could not have played one team off against another team in licensing negotiations.

If the case survives to trial, ANI will face significant proof problems. Most importantly, ANI must prove a relevant market consisting of NFL team trademarks and logos; this entails proving both that other trademarks and logos (including those from other sports leagues) are not good substitutes for those of the NFL teams, and that the trademarks and logos of individual NFL teams are good substitutes for each other.[33] The former proposition is dubious, and some jurors are apt to find the latter proposition preposterous, as they would tend to agree with Justice Breyer, a long-time Boston resident, who remarked at oral argument: "I don't know a Red Sox fan who would take a Yankees sweatshirt if you gave it away."[34]

IV. THE SCOPE FOR SINGLE-ENTITY TREATMENT WITH PROFESSIONAL SPORTS LEAGUES

American Needle does not adopt a general test for determining when a joint venture acts as a single economic entity, but the decision's analysis of NFLP is suggestive. The Supreme Court focuses on whether the participants in the venture "act on interests separate from those of the [venture]" and consequently do not act "to maximize the [the venture's] profits."[35] With that focus, some joint ventures would be treated as single economic entities.

31. *Id.*

32. *See Am. Needle*, 130 S. Ct. at 2207 (noting that prior to 2000, ANI was recipient of non-exclusive license from NFLP "to manufacture and sell apparel bearing team insignias.").

33. *See id.* at 2213 (acknowledging existence of market competition between NFL teams regarding intellectual property).

34. Transcript of Oral Argument, *supra* note 1, at 16.

35. *Am. Needle*, 130 S. Ct. at 2215.

American Needle suggests that a joint venture is treated as a single economic entity when its participants have no material interests outside the venture.[36] Such joint ventures could be uncommon, but examples include some professional services partnerships. If the partnership agreement prohibits outside practice, the reasoning of *American Needle* suggests that the partners do not engage in concerted action when they set a schedule of fees for the firm: They must be maximizing the partnership's profits because they have no outside professional interests that could be advanced by the fee schedule.

American Needle also suggests that a joint venture is treated as a single economic entity when its participants can be expected to maximize the venture's profits rather than act on interests they have outside the venture.[37] That expectation is reasonable if a joint venture is set up and operated as an ordinary profit-maximizing business, and if all outside interests of the participants are not closely related to the business of the venture.[38] An example from antitrust history is Penn-Olin Chemical Co., formed in 1960 by Pennsalt Chemicals Corp. and Olin Mathieson Chemical Corp.[39] Penn-Olin was organized as a stock company with each owner contributing half the capital and holding half of the stock.[40] Neither parent competed in the relevant market, nor had an outside interest directly affected by the venture; Penn-Olin apparently operated as an ordinary profit-maximizing business.[41] The same is likely true

36. *See id.* (suggesting circumstances under which joint ventures may be single entities).

37. *See id.* at 2214-15 (articulating certain aspects of relationship between participants in joint venture).

38. Input supply ventures formed by competitors are particularly unlikely to operate as profit-maximizing companies because the participants' actions are apt to be driven by their interests downstream. A joint venture formed by merging the captive supply operations of several competitors could be operated so as to restrict the aggregate output in the downstream market and thereby force up prices. Alternatively, the venture could be operated to increase the downstream marginal costs of production and thereby induce higher downstream prices. That could be done by setting the price for the input well above competitive levels and paying out the joint venture's profits in fixed ownership shares. For a discussion of these possibilities, see Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 723-24 nn.89-93 (1998).

39. *See generally* United States v. Penn-Olin Chem. Co., 378 U.S. 158, 163 (1964) (providing useful summary of history of anti-trust law).

40. *See id.* at 163 (discussing fundamental points in antitrust law).

41. *See id.* at 170 (viewing venture as "a new competitive force" in relevant market). Olin Mathieson had never produced sodium chlorate; Pennsalt produced sodium chlorate but only far outside the relevant geographic market. *See id.* at 161-64 (explaining prior history of production of sodium chlorate by companies). The Court's analysis of the potential competition issue presented by the case assumed "that neither [parent] will compete with the progeny in its line of

for companies such as Dow Corning, Sony Ericsson, and Verizon Wireless. Each is organized as a joint venture, yet presumably each operates as ordinary profit-maximizing company.[42]

American Needle does not articulate a test for when a joint venture acts as a single economic entity, but the Solicitor General did so in briefing the case.[43] Consistent with the Sherman Act principles articulated in the decision, she argued that a sports league acts as a single economic entity if, and only if, two conditions are met:

> First, the teams and the league must have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere. Second, 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.[44]

American Needle recites these conditions but finds "no need to pass upon the Government's position that entities are incapable of conspiring under § 1" if, and only if, these conditions are met.[45] The Court declares that the case involves "agreements amongst potential competitors and would constitute concerted action under the Government's own standard" because "the teams could decide to license their own trademarks."[46] The Court also indicates that test

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commerce" and that the progeny will not go "into competition with the parents." *Id.* at 169.

42. *See About Dow Corning,* DOW CORNING, http://www.dowcorning.com/content/about/default.aspx?WT.svl=1&bhcp=1 (last visited Mar. 24, 2011) (showing Dow Corning is joint venture of The Dow Chemical Co. and Corning, Inc.); *Mission: Welcome to Sony Ericsson Mobile Communications,* SONY ERICSSON MOBILE COMM., http://www.sonyericsson.com/cws/companyandpress/aboutus/mission?cc=gb&lc=en (last visited Mar. 24, 2011) (showing Sony Ericsson is joint venture of Sony Corp. and Telefonaktiebolaget LM Ericsson); *About Us: Facts-at-a-Glance,* VERIZON WIRELESS, http://aboutus.vzw.com/ataglance.html (last visited Mar. 24, 2011) (showing Verizon Wireless is name under which business is conducted by Cellco Partnership, which is joint venture of Verizon Communications Inc. and Vodafone Group Plc.).

43. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 17, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010) (No. 08-661) (constructing two part test for Court to use in deciding case).

44. *Id.* (discussing Court's application of test).

45. *Am. Needle, Inc.*, 130 S. Ct. at 2216 n.9 (2010) (discussing importance of teams maintaining control of NFL Players Association).

46. *Id.* This assertion is difficult to rationalize with documents relating to the NFL's intellectual property licensing. *See* Joint Appendix 1, *supra* note 2 (discussing NFL's intellectual property licensing agreements). Amending or dissolving the NFL Trust Agreement requires consent of three-quarters of the participating

was not satisfied because the NFL teams, which have "potentially competing interests," were ultimately responsible for the decisions of NFLP.[47]

When participants in joint ventures defend a claim brought under section 1 of the Sherman Act on the basis that the venture and its participants should be treated as a single economic entity, a court could ask, as *American Needle* suggests, whether the participants "act on interests separate from those" of the venture.[48] Alternatively, a court could pose the questions framed by the Solicitor General. A court could ask whether the joint venture's participants had "effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition" in the relevant market. If so, a court could ask whether the particular actions at issue nevertheless "significantly affect actual or potential competition among" the participants in some related market. These questions plot a course to the particular destination implied by the Supreme Court in *American Needle.*

A professional sports league entirely owned and operated by a single person undoubtedly would be treated as a single economic entity, even though the teams compete on the field of play, and even though the teams have separate identities and fan loyalties. But all major professional sports leagues have independently owned and operated teams, and *American Needle* instructs lower courts to reject single-entity treatment for such a league because the teams have independent economic interests. *American Needle* is unclear, however, on one important point—whether a court should treat a league pooling all of the teams' revenues and costs as single economic entity or as a cartel. By stressing the potential for competition, *American Needle* suggests treatment as a cartel, but by focusing on incentives to maximize league profits, the decision suggests single-entity treatment.[49]

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teams. *See* Joint Appendix 2, *supra* note 2, at 360 (discussing Trust Agreement §§ 6.01-.02).

47. *See Am. Needle*, 130 S. Ct. at 2216 n.9 (describing how NFL teams did not satisfy test).

48. *See id.* at 2215 (providing example of one course of action courts could take when participants in joint venture defend claims brought under section 1 of Sherman Act on basis that participants should be treated as one economic entity).

49. *See id.* at 2215-16 (discussing treatment as cartels).

V. ANTITRUST AND THE CORE ACTIVITY OF MAJOR PROFESSIONAL SPORTS LEAGUES

Suppose that Congress removes the antitrust exemption long enjoyed by Major League Baseball ("MLB") which then decides to avoid freezing temperatures, returning to the 154-game schedule after four decades with a 162-game schedule.[50] Disgruntled fans file a Sherman Act suit and move for summary judgment, citing Supreme Court precedent indicating that an output reduction establishes a rule of reason violation for an agreement among competitors on how they compete, or at least that it does so absent a pro-competitive justification.[51]

MLB could counter with its own summary judgment motion, arguing that it acts as a single economic entity in scheduling games. A court, however, almost certainly would hold that *American Needle* forecloses this argument, citing the final section of the opinion:

> The fact that . . . teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to § 1 analysis.[52]

MLB would do better to rest its motion on a somewhat different argument premised on the Supreme Court's decision in

50. Judicial fiat exempted the "business of baseball" from the antitrust laws. *See* Flood v. Kuhn, 407 U.S. 258, 282–84 (1972) (illustrating concept of judicial exemption); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (holding similarly); Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922) (showing judicial fiat). The exemption no longer extends to disputes between the players and the league. *See* Curt Flood Act of 1998, Pub. L. 105-297, § 3, 112 Stat. 2824 (codified as 15 U.S.C. § 26b) (showing cut-off between players and league). Dealings between players unions and team owners, however, fall within the non-statutory labor exemption to the antitrust laws. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (discussing dealings between players and teams owners); Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004) (discussing differences of specific type of negotiations).

51. *See* FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 460-61 (1986) ("proof of actual detrimental effects, such as a reduction of output, can obviate" other aspects of rule of reason inquiry). *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770-71 (1999) ("the burden of procompetitive justification" is placed on those restraining trade when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect"); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 (1984) (a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis").

52. *Am. Needle*, 130 S. Ct. at 2216.

Dagher.[53] The backdrop for that decision was the formation by Shell and Texaco of ventures "ending competition between the two companies in the domestic refining and marketing of gasoline."[54] A class action lawsuit alleged that the western venture, Equilon Enterprises, engaged in price fixing, a per se violation of section 1 of the Sherman Act, when it adopted the policy of equalizing the prices of Shell and Texaco gasoline.[55] The Ninth Circuit reversed a grant of summary judgment in favor of the defendants, holding that adopting the policy might be per se unlawful price fixing.[56] Invoking the ancillary restraints doctrine, that Court held that the conduct was per se illegal price fixing unless "reasonably necessary to further the legitimate aims of the joint venture" and that summary judgment was wrongly granted because the defendants "failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies."[57]

The Supreme Court reversed, explaining that the ancillary restraints doctrine "governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities" but the doctrine "has no application" when "the business practice being challenged involves the core activity of the joint venture itself."[58] Seven justices joined

53. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 3 (2006) (holding it is not *per se* illegal under section 1 of Sherman Act for lawful, economically integrated joint venture to set prices at which products will be sold).

54. *Id.* at 4.

55. *See id.* (stating why Ninth Circuit chose to adopt policy).

56. *See* Dagher v. Saudi Refining Inc., 369 F.3d 1108, 1121 (9th Cir. 2004) (stating court's holding), *rev'd,* Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

57. *Dagher,* 369 F.3d at 1121-22. *See generally* Gregory J. Werden, *The Ancillary Restraints Doctrine after Dagher,* 8 SEDONA CONF. J. 17 (2007) (explaining use of and application of ancillary restraints doctrine). The court found the record "close to establishing that the price-fixing scheme was sufficiently unrelated to accomplishing the legitimate objectives of the joint venture as to justify granting the plaintiffs' motion for summary judgment" but concluded that denying both sides' summary judgment motions was proper under the circumstances. *Dagher,* 369 F.3d at 1122 n.16.

58. *Dagher,* 547 U.S. at 7 (2006). *Dagher's* rationale for declining to apply the ancillary restraints doctrine has been understood by one court and many commentators to be based on the Court's view that Equilon acted as a single economic entity in setting prices. *See In re* ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1012 (N.D. Cal. 2008) ("In the Supreme Court's recent *Dagher* decision, the Court also clarified that . . . an economically-integrated joint venture amounts to a single entity. . . ."); Herbert Hovenkamp, *American Needle and the Boundaries of the Firm in Antitrust Law* (Aug. 15 (2010)), *available at* http://papers.ssrn.com/abstract=1616625 ("Once [Equilon] was found to be lawfully created, the legality of its prices was not a matter of conspiracy law."); Jeffrey L. Kessler et. al., *The Supreme Court's Deci-*

in the unanimous opinions in both *Dagher* and *American Needle*, including both authors, so no judge would read *American Needle* to undermine anything in *Dagher*. Thus, a judge considering the cross motions for summary judgment might agree with MLB's contention that it need not explain the necessity of particular choices relating to core activities such as scheduling games.

If MLB's motion is denied, the fans' motion might be granted. In opposing the fans' motion, MLB could argue that *American Needle* mandates deference to its scheduling decisions, citing the Court's comment that restraints on competition necessary for the league to operate are "likely to survive the Rule of Reason" and that its application "may not require a detailed analysis."[59] A judge, however, might see no basis in that comment for denying the fans' motion in view of MLB's inability to explain why its scheduling decision "stimulate[s] competition" or is in "the consumer's best interest," which are the touchstones in the Court's most recent articulation of the rule of reason.[60]

VI. CONCLUSION

American Needle held that the NFL's intellectual property licensing was concerted conduct and suggested that essentially all activities of the major professional sports leagues also entail concerted conduct.[61] The NFL's hopes of torpedoing future antitrust suits have been dashed, but the Supreme Court did not change the law nor clarify it significantly.

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sion in Dagher: Canary in a Coal Mine or Antitrust Business as Usual?, ANTITRUST, Fall 2006, at 44, 49 ("The Court's statement in *Dagher* that 'though Equilon's pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense,' is thus nothing more than a restatement of the truism that pricing by a 'single firm' does not restrain competition.") (footnote omitted); James A. Keyte, *Dagher and "Inside" Joint Venture Restraints*, ANTITRUST, Summer 2006, at 40, 44 ("much of the *Dagher* Court's analysis stemmed from its conclusion that a legitimate joint venture should be viewed in the law as a 'single entity'" allowing *Dagher* could now be reinterpreted).

59. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2216-17 (2010). "The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. . . . In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885-86 (2007). The Court also observes that "'the interest in maintaining competitive balance' . . . may well justify a variety of collective decisions made by the teams." *Am. Needle*, 130 S. Ct. at 2217 (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984)).

60. *Leegin Creative Leather Prods.*, 551 U.S. at 885-86.

61. *See Am. Needle*, 130 S. Ct. at 2217 (describing final holding of Court).