

So Whatever Happened to American Needle?

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You remember *American Needle*, right? It is the 2010 U.S. Supreme Court opinion that explains when the action of a joint venture is the action of a single entity or, instead, the result of an agreement among the joint venture members. Now back on remand in federal district court in Chicago, some recent summary judgment decisions might eventually make the case known for some interesting market definition questions.

American Needle was a licensee of NFL Properties (NFL) that challenged under Sherman Act Section 1 the NFL's decision in 2000 to terminate the licenses of American Needle and others to make NFL-trademarked hats and grant an exclusive license to Reebok. One of the NFL's defenses was that it was a single entity incapable of reaching the requisite agreement under Section 1. Four years ago, the Supreme Court disagreed with that "single entity" defense and found that the license was the product of an agreement among the NFL teams subject to Section 1 challenge; however, the Court described several potential procompetitive factors that "may well justify [this] collective decision" when it was viewed under the rule of reason on remand.

In April 2014, the court in the Northern District of Illinois denied three motions for summary judgment, one by American Needle and two by the NFL. American Needle wanted the exclusive arrangement with Reebok determined to be a Sherman Act violation after only an abbreviated or "quick look" rule of reason analysis. The court relied on the Supreme Court's *California Dental Ass'n v. FTC*

case to deny the motion. It found that such an abbreviated analysis was appropriate only where the net anticompetitive effect was obvious, not where, as in this case, the defendants made facially plausible claims of procompetitive effects. The NFL moved for summary judgment on causation, claiming that American Needle could not show that it would have maintained a license if another licensing structure was chosen. The court found sufficient evidence for a jury to find that American Needle could have continued as a licensee and that it suffered damage as a result of the licensing decisions.

The court action that might raise the most interesting issues, however, is the denial of the NFL's summary judgment motion for American Needle's failure to provide sufficient evidence of a relevant market. One of the court's bases for denying the motion was that a relevant market definition was not necessary in this rule of reason case. This assertion by the court seems to go beyond even what American Needle suggested -- that its only requirement at this point was to provide evidence of the "rough contours of a relevant market" along with direct evidence of anticompetitive effects. The court quotes the Supreme Court's *Indiana Federation of Dentists* opinion for support: "proof of actual detrimental effects ... can obviate the need for an inquiry into market power [and definition], which is but a surrogate for detrimental effects." The court finds evidence, though disputed, of direct effects such as lower output and higher prices. The court also cites two appellate court opinions, *Law v. NCAA* from the 10th Circuit and *Valley Liquors v. Renfield* from Judge Posner in the 7th Circuit.

These statements by the court seem at odds with blanket statements from authorities like *Antitrust Law Developments (Seventh)*: "Application of the rule of reason ... typically requires a detailed examination of a restraint's actual competitive impact in a properly defined relevant market." The exceptions, other than cases judged under the per se standard, are those - like *Indiana Federation of Dentists* and *Law* - that are judged under the quick look standard. Of course, the court here had earlier determined that a full rule of reason analysis, not a quick look, was appropriate when it denied American Needle's summary judgment motion. *Law* also seems distinguishable on additional grounds. In that case, the NCAA did not dispute that its rules limited the salaries of some assistant coaches; here, the NFL strenuously objects to the allegation that its licensing decisions had anticompetitive price or output effects.

The inclusion of the 1982 *Valley Liquors* opinion only adds to the confusion because it seems to support the NFL, not American Needle. In that case, a supplier decided to reduce the number of distributors and one of the terminated distributors sued and was denied a preliminary injunction. On appeal, the 7th Circuit made a number of the same arguments used by the NFL in this case to explain why such a reduction in the number of distributors might actually increase competition. More precisely on this point, the court gave the plaintiff the burden to show the net effect on competition, usually through a showing of market power which requires a determination of market share in a relevant market. Because “no evidence of market share was presented [and] no market was defined,” the denial of the preliminary injunction for the plaintiff was affirmed.

The court’s second basis for denying the NFL’s relevant market summary judgment motion was that if American Needle actually was required to show a relevant market, it had done so sufficiently to defeat this motion. After extensive briefing and argument for the parties, the court found sufficient evidence of a submarket for the “wholesale market for NFL trademarked hats” and so denied the motion.

The wisdom or efficacy of defining markets in antitrust law has been the subject of some debate recently, articulated best in several articles by Prof. Louis Kaplow. The court here, however, references no part of that debate and instead, with little support from the parties or caselaw, appears to expand the times when a plaintiff can forego defining a market. If the case continues through the courts, perhaps practitioners will receive further guidance on the necessity for market definition and *American Needle* will be a case known for more than just the single entity concept.