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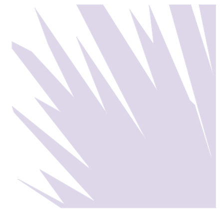

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ANOTHER VIEW OF *AMERICAN NEEDLE*

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I. INTRODUCTION

This paper will respond to the very fine paper, *The Application of the Sherman Act to Joint Ventures: The Law after* American Needle, by Gregory J. Werden ("Werden paper"). Having had the benefit of Mr. Werden's erudition and impressive analysis, this author concluded that he had certain basic disagreements with Werden. Specifically, this paper will present the views that:

(1) The Supreme Court's decision in *American Needle, Inc. v. NFL*,[1] has much broader applications to joint ventures than merely professional sports leagues and generally forecloses the single entity defense for virtually all joint ventures.

(2) *Texaco Inc. v. Dagher*,[2] does not provide a basis for resurrecting the single entity defense for future joint ventures.

(3) Despite the initial euphoria of antitrust plaintiffs counsel over finally winning an antitrust case in the Supreme Court, the first plaintiff's victory in 18 years, since *Eastman Kodak v. Image Technical Servs.*,[3] reports of the rebirth of antitrust, as of Mark Twain's death, are greatly exaggerated, as American Needle is likely to find out on its return to the trial court, where it will find its problems are just beginning.

The first two points take a view that might fairly be described as contrary to that of the Werden article. The third is more or less consistent with the Werden article, but explores some areas not examined or partially examined by Werden.

II. IS *AMERICAN NEEDLE* PRIMARILY A CASE ABOUT SPORTS LEAGUES?

In discussing the reach of *American Needle*, Werden observes, "Although *American Needle* left no significant scope for single-entity treatment of actions by major professional sports leagues, implications for other sorts of joint ventures are less clear."[4] He then explores "two arguments for single-entity treatment."[5] The view of this writer, however, is that *American Needle*'s "implications for other sorts of joint ventures" are quite clear. The opinion itself seems to close the door on a single entity defense for virtually any type of joint venture, sports or non-sports.

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1 130 S. Ct. 2201 (2010).
2 547 U.S. 1 (2006).
3 504 U.S. 451 (1992).
4 Werden paper at 254.
5 *Id.* at 254.

The language of the opinion is broad in describing the Court's approach to determining whether conduct is joint or single:

> We have long held that concerted action under Section 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.
>
> As a result, we have repeatedly found instances in which members of a legally single entity violated Section 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity.[6]
>
> * * *
>
> We have similarly looked past the form of a legally "single entity" when competitors were part of professional organizations or trade groups.[7]
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> * * *
>
> …we now embark on a more functional analysis.
>
> The roots of this functional analysis can be found in the very decision that established the intraenterprise conspiracy doctrine. In *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), we observed that "corporate interrelationships. . . are not determinative of the applicability of the Sherman Act" because the Act "is aimed at substance rather than form". … We nonetheless held that cooperation between legally separate entities was necessarily covered by Section 1 because an unreasonable restraint of trade "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent."[8]

The key and operative language of the decision, its *ratio decidendi*, appears at page 10:

> …the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination …, or conspiracy" is concerted action—that is, whether it joins together separate decision makers. The relevant inquiry, therefore, is whether there is a "contract, combination … or conspiracy" amongst "separate economic actors pursuing separate economic interests," … such that the agreement "deprives the marketplace of independent centers of decision making," *ibid.*, and therefore of "diversity of entrepreneurial interests"….[9]

The Court adds,

> Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged Section 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together "independent centers of decision making." … If it

6 *American Needle, supra,* at 2209.
7 *Id.* at 2210.
8 *Id.* (internal citations omitted).
9 *Id.* at 2211 (internal citations omitted).

> does, the entities are capable of conspiring under Section 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.[10]

The foregoing is obviously not language that appears limited to sports leagues or other types of athletic associations. The question then becomes whether in applying this test to the NFL and its licensing joint venture to find concerted action, the Court speaks in terms that would be particularly applicable to sports organizations, and not to other, non-sports joint ventures. The answer is that it does not.

The Court proceeds with a two-step analysis: first, to determine whether the 32 teams making up the NFL can be deemed to operate as a single entity; and, second, to determine whether NFL Properties ("NFLP"), their licensing joint venture is a single entity. Neither survives scrutiny under analysis that is in any way specifically limited or tailored to sports.

As to the NFL, the Court finds that "[e]ach of the teams is a substantial, independently owned, and independently managed business. '[T]heir general corporate actions are guided or determined' by 'separate corporate consciousnesses,' and '[t]heir objectives are' not 'common.'" The Court further finds competition among the teams "not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel," as well as "in the market for intellectual property." Their decision to license their trademarks collectively thus "'depriv[es] the marketplace of independent centers of decision making,' … and therefore of actual or potential competition."[11] Finally,

> …it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. An ongoing Section 1 violation cannot evade Section 1 scrutiny simply by giving the ongoing violation a name and label. "Perhaps every agreement and combination in restraint of trade could be so labeled."[12]

Nor is the justification for the joint activity relevant "to whether that cooperation is concerted or independent action" if the joint activity "deprives the marketplace of independent centers of decision making."[13] To clinch the issue, the Court provides an example about as far from sports as one can possibly imagine:

> Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to Section 1 analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct.[14]

As to NFLP, the Court denies single entity treatment based on its findings that "NFLP's licensing decisions are made by the 32 potential competitors"; "there would be

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10 *Id.* at 2212 (internal citations omitted).
11 *Id.*
12 *Id.* at 2213.
13 *Id.* at 2214.
14 *Id.*

nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks"; "[t]he teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being"; "each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits"; and "[i]n making the relevant licensing decisions, NFLP is therefore 'an instrumentality' of the teams."[15]

Finally, the Court rejects a single entity defense based on the teams' sharing equally in the profits of NLPA:

> If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from Section 1, then any cartel "could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products."[16]

The Court further declines to address

> …the Government's position that entities are incapable of conspiring under Section 1 if they "have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition … in that operational sphere" and "the challenged restraint [does] not significantly affect actual or potential competition … outside their merged operations."[17]

One searches in vain for anything in the language of this analysis that would suggest either that it has particular, special, or unique application to sports, or that it leaves unanswered questions as to joint ventures not involving sports. What the Court appears to be saying, unequivocally, is that if the joint venture partners (1) retain their individual existence, (2) have interests separate from the joint venture and adverse to each other, and (3) participate in or control the decisions of the joint venture with their own individual interests in mind, the actions of the joint venture are not those of a single entity, but of an instrumentality of the joint venture partners, and are subject to Section 1.

Such a reading of *American Needle* in no way limits the decision to sports or leaves unanswered questions about the Section 1 status of non-sports joint ventures. What it says is that *all* joint ventures will be subject to Section 1 under the three conditions specified. The rule of *American Needle* is not about sports or the NFL; it is about joint ventures in general.

If there is any unanswered question, it is whether *any* joint venture can ever fail to meet the specified conditions and therefore avail itself of the single entity defense. From what appears in *American Needle*, one would be inclined to answer that question in the negative. The reason for that is that the Court in *American Needle* fails to cite a single case in which it approves single entity treatment for a joint venture. Instead, the Court cites only cases falling within the recognized ambit of *Copperweld Corp. v. Independence Tube Corp.*,[18] such as agreements between parent corporations and wholly-owned subsidiaries, between sister companies, or between companies and their employees or agents. The force of the conclusion that the single entity defense is dead for joint ventures is fairly irresistible.

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15 *Id.* at 2215.
16 *Id.*
17 *Id.* at 2216.
18 467 U.S. 752 (1984).

Moreover, there appear to be no Supreme Court decisions pre- or post-*Copperweld* that afford a single entity defense to joint ventures.[19] The consistent absence of single-entity jurisprudence in these decisions suggests that the entire issue is not the product of Supreme Court precedent, but the product of the fertile imaginations of defense counsel, able to convince credulous lower court judges of a similar ideological persuasion.

III. DOES *DAGHER* SAY OTHERWISE?

In his article, Werden quite rightly and astutely observes, "*American Needle* is notable for the lack of even brief discussions of two prior Supreme Court decisions lending some support to the single-entity argument."[20] Those decisions are *Ariz. v. Maricopa County Med. Soc'y*,[21] and *Texaco Inc. v. Dagher*.[22]

Werden attributes the "boost" in *Maricopa County* to the Court's dictum "that a 'joint arrangement[] in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit' is 'regarded as a single firm competing with the other sellers in the market.'"[23] This, however, is a slender reed on which to base an argument for single entity treatment for a joint venture, particularly in view of the Court's dismissal of sharing of profits as an indicium of a single entity in *American Needle*. "If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from Section 1, then any cartel 'could evade the antitrust law simply by creating a "joint venture" to serve as the exclusive seller of their competing products.'"[24] Werden appropriately gives this dictum from *Maricopa County* short shrift.

With *Dagher*, however, Werden provides a much more extensive discussion, in which he argues that *Dagher* can be harmonized with *American Needle*. This discussion of how *Dagher* can be harmonized with *American Needle* would seem to suggest that Werden believes that *Dagher* provides some guidance or may serve as a precedent for identifying joint ventures for which single entity treatment may be appropriate. With all due respect, this author, who was counsel for Dagher and the other plaintiffs, disagrees.

Dagher was a case in which a number of Shell and Texaco gasoline dealers sued Shell and Texaco for price-fixing in violation of Section 1 of the Sherman Act. Shell and Texaco had combined their United States refining and marketing operations in the United States into two joint ventures. Eight months after forming the ventures, Shell and Texaco caused the ventures to charge the same dealer tank wagon prices for the Shell and Texaco brands of gasoline, which to that point had been separately and differently priced. The plaintiff dealers challenged this practice as a violation of Section 1 under the *per se* rule or the quick look rule of reason. The plaintiffs specifically declined to proceed under the full rule of reason. After losing in the district court on summary judgment, the plaintiffs prevailed, in a 2-1 decision, in the Ninth Circuit, and the Supreme Court granted *certiorari* and reversed.[25]

19 *See, e.g., United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

20 Werden article at 256.

21 457 U.S. 332 (1982).

22 547 U.S. 1 (2006).

23 *Dagher, supra,* at 1277-78.

24 *American Needle* at 2215.

25 *Dagher v. Saudi Ref., Inc.*, 2002 U.S. Dist. LEXIS 27935 (C.D. Cal. 2002), *rev'd*, *Dagher v. Saudi Ref., Inc.*, 369 F.3d 1108 (9th Cir. 2004), *rev'd*, 547 U.S. 1 (2006).

Writing for a unanimous Court, reversing the Ninth Circuit, Justice Thomas got right to the point in the first paragraph of the *Dagher* opinion:

> From 1998 until 2002, petitioners Texaco Inc. and Shell Oil Co. collaborated in a joint venture, Equilon Enterprises, to refine and sell gasoline in the western United States under the original Texaco and Shell Oil brand names. Respondents, a class of Texaco and Shell Oil service station owners, allege that petitioners engaged in unlawful price fixing when Equilon set a single price for both Texaco and Shell Oil brand gasoline. We granted certiorari to determine whether it is *per se* illegal under Section 1 of the Sherman Act, 15 U. S. C. Section 1, for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products. We conclude that it is not, and accordingly we reverse the contrary judgment of the Court of Appeals.[26]

Section I of the opinion,[27] sets out the facts and history of the case to the extent deemed material by the Supreme Court. Because the facts are so summarily presented, the Supreme Court's recital is quoted in full:

> In 1998, Texaco and Shell Oil formed a joint venture, Equilon, to consolidate their operations in the western United States, thereby ending competition between the two companies in the domestic refining and marketing of gasoline. Under the joint venture agreement, Texaco and Shell Oil agreed to pool their resources and share the risks of and profits from Equilon's activities. Equilon's board of directors would comprise representatives of Texaco and Shell Oil, and Equilon gasoline would be sold to downstream purchasers under the original Texaco and Shell Oil brand names. The formation of Equilon was approved by consent decree, subject to certain divestments and other modifications, by the Federal Trade Commission, see *In re Shell Oil Co.*, 125 F.T.C. 769 (1998), as well as by the state attorneys general of California, Hawaii, Oregon, and Washington. Notably, the decrees imposed no restrictions on the pricing of Equilon gasoline.[28]

The opinion then recites, "After the joint venture began to operate, respondents brought suit in district court, alleging that, by unifying gasoline prices under the two brands, petitioners had violated the *per se* rule against price fixing that this Court has long recognized under Section 1 of the Sherman Act . . . ."[29] The opinion notes that the district court granted summary judgment for the oil companies, after determining the rule of reason, rather than the *per se* rule or the quick look doctrine, to be applicable. The Ninth Circuit reversed the district court, and the Supreme Court "granted certiorari to determine the extent to which the *per se* rule against price fixing applies to an important and increasingly popular form of business organization, the joint venture."[30]

Section II of the opinion,[31] provides the rationale for reversing the Ninth Circuit. The opinion first notes that the Court "presumptively applies rule of reason analysis" to agreements in restraint of trade and that "[*p*]*er se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'"[32] Although horizontal price-fixing agreements between

26 *Dagher,* 547 U.S. at 3.
27 *Id.* at 2-3.
28 *Id.* at 4.
29 *Id.*
30 *Id.* at 5-8.
31 *Id.*
32 *Id.* at 5.

competitors are *per se* illegal, "[t]hese cases do not present such an agreement, however, because Texaco and Shell Oil did not compete with one another in the relevant market—namely, the sale of gasoline to service stations in the western United States—but instead participated in that market jointly through their investments in Equilon."[33]

Footnote 1 of the decision then explains that the Court presumes "for purposes of these cases that Equilon is a lawful joint venture." The presumption is based upon approval "by federal and state regulators, and there is no contention here that it is a sham."[34] Moreover, "[t]here is a voluminous record documenting the economic justifications for creating the joint ventures," including "numerous synergies and cost efficiencies," "up to $800 million in cost savings annually."[35] The footnote concludes, "Had respondents challenged Equilon itself, they would have been required to show that its creation was anticompetitive under the rule of reason."[36]

Given the presumed lawfulness of the joint venture, the Court finds that "the pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products."[37] Noting that "Texaco and Shell Oil shared in the profits of Equilon's activities in their role as investors, not competitors," the Court concludes, quoting from *Arizona v. Maricopa County Medical Society*, "When 'persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit … such joint ventures [are] regarded as a single firm competing with other sellers in the market.'"[38] Accordingly, "though Equilon's pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense."[39]

The opinion observes that the correctness of the Court's conclusion is confirmed by "respondents' apparent concession that there would be no *per se* liability had Equilon simply chosen to sell its gasoline under a single brand."[40] According to the Court, if Equilon could sell only a single brand of gasoline and lawfully set the price for that brand, it could lawfully choose to sell two brands and set the same price for those brands. In any event, "it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful."[41] No precedents are cited.

In footnote 3, the Court concludes that liability under the quick look doctrine is inappropriate in this case "for the same reasons that *per se* liability is unwarranted here."

Finally, the opinion addresses the Ninth Circuit's decision, which found the pricing restraints to be *per se* unlawful "by invoking the ancillary restraints doctrine."

> We agree with petitioners that the ancillary restraints doctrine has no application here, where the business practice being challenged involves the core activity of the joint venture itself—namely, the pricing of the very goods produced and sold

33 *Id.* at 5-6.
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.* at 6.
38 *Id.*
39 *Id.* at 2
40 *Id.* at 6-7.
41 *Id.*

> by Equilon. And even if we were to invoke the doctrine in these cases, Equilon's pricing policy is clearly ancillary to the sale of its own products.[42]

The decision cites the statement in *Broadcast Music*, "Joint ventures and other cooperative arrangements are ... not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all."[43]

Notwithstanding Werden's argument that *Dagher* provides possible guidance for predicting when joint ventures should receive single entity treatment, this author disagrees for two reasons.

First, *Dagher* is cited only twice in *American Needle*, and neither citation has any bearing on the single entity issue. The Court's first citation of *Dagher* is for the uncontroversial proposition that Section 1 of the Sherman Act does not cover *every* contract that may affect price.[44] The second and much more significant citation to *Dagher* is in support of the proposition, "When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason."[45] The citation to *Dagher* is "*see, also*."

The obvious import of the paucity of citation to *Dagher* in *American Needle* is that the Court viewed *Dagher* as providing no significant guidance or illumination on the single entity question before it. One can also infer that the Court viewed *Dagher* as standing for nothing more than its narrow holding, that a joint venture's price-setting for its own products is inappropriate for per se treatment under Section 1. At the time of *American Needle*, *Dagher* represented the Court's most recent consideration of the application of antitrust law to joint ventures. If the Court believed that *Dagher* had anything to offer on the single entity question, or that the Court had dealt with the issue in *Dagher*, the Court surely would have said so in its opinion in *American Needle*. That the Court did not do so amounts to nearly irrefutable proof that *Dagher* is of no precedential value on the single entity issue, and that to read *Dagher* otherwise is to rewrite history and to misread both *Dagher* and *American Needle*. Rather, *Dagher* should be left to moulder on the slag heap of history, as standing for the very narrow rule that the per se rule does not apply when a joint venture prices its own products.

The second reason for rejecting *Dagher* as providing any guidance on the single entity issue is that the issue was extensively briefed in *Dagher*, indeed briefed *ad nauseam*, not only by the parties, but also by numerous amici curiae, yet was wholly neglected and ignored in the Court's opinion, or at least not discussed in any coherent, intelligible manner.

A primary argument of the oil companies in the Supreme Court in *Dagher*, stressed even more by certain of their *amici*, was that *Copperweld* prohibited any application of Section 1 of the Sherman Act to the post-formation conduct of the oil companies' joint ventures, Equilon and Motiva.[46] According to this argument, once each of the ventures was formed, its internal decision-making could not constitute joint action by its owners, as required by Section 1. In other words, each venture and its owners constituted only a single entity, incapable of supplying the plurality of actors necessary for a violation of Section 1.

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42 *Id.* at 7-8.
43 *Id.* (quoting *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).)
44 *American Needle* at 2208.
45 *American Needle* at 2216.
46 Brief for Petitioner Texaco Inc., at 11-26; Motion for Leave to File and Brief of Visa U.S.A. Inc., The Coca Cola Company, and Microsoft Corporation as Amici Curiae Supporting Petitioners, *passim*.

The Supreme Court's opinion of course never really discusses this issue. The closest it comes is the quotation from *Maricopa County Medical Society*, "When 'persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market.'" 547 U.S. at 6. *Copperweld* itself is cited by the Court only once in the decision, in footnote 1, for the proposition, "Had Respondents challenged Equilon itself, they would have been required to show that its creation was anticompetitive under the Rule of Reason." The decision thus offers no guidance on when activity by participants in a joint venture becomes the conduct of a single entity and is therefore outside the reach of Section 1.

Indeed, the most that one can infer from the *Dagher* opinion is that the Court believed that the pricing conduct under challenge was presumably *not* conduct of a single entity, and therefore fell within the ambit of Section 1. Otherwise, the Court could simply have reversed the Ninth Circuit on the basis of *Copperweld*, as petitioners and their *amici* urged. Certainly, some clarification of the reach of *Copperweld* to joint ventures would have been helpful. Petitioners and their *amici* emphatically denounced the uncertainty wrought by the Ninth Circuit's decision with respect to future decision-making by joint ventures. The *amici* in particular advocated the blanket extension of *Copperweld* to internal joint venture decision-making as a salutary bright line and safe harbor. Instead, the Court ducked the issue altogether.

In light of the language in both *American Needle* and *Dagher*, it is therefore not a productive or enlightening exercise to look to *Dagher* for guidance on the single entity question. *Dagher* did not consider the issue. To claim that the decision in *Dagher* is consistent or can be harmonized with *American Needle* is no more helpful than saying that the decision in *Continental T.V., Inc. v. GTE Sylvania Inc.,*[47] is consistent or can be harmonized with the decision in *United States v. Socony-Vacuum Oil Co.*[48] The cases decide different, unrelated questions.

IV. WHAT HAPPENS NEXT?

After nearly two decades of an unbroken string of crushing defeats in the Supreme Court, the antitrust plaintiffs bar is understandably euphoric over the *American Needle* decision. The question, however, is should they be, other than having the near certainty that they will not have to worry about the single entity defense in future joint venture cases? This writer believes the optimism to be unwarranted.

Particularly ominous is the Court's admonition in *American Needle* that, on remand, the lower court is to consider the NFL's joint licensing under the rule of reason. In the very first paragraph of the decision, the Court makes this clear: "We conclude that the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of Section 1. The legality of that concerted action must be judged under the Rule of Reason."[49] Again, at the end, the Court repeats the point, with some helpful (for defendants) elaboration:

> Football teams that need to cooperate are not trapped by antitrust law. "[T]he special characteristics of this industry may provide a justification" for many kinds

47 433 U.S. 36 (1977).
48 310 U.S. 150 (1940).
49 *American Needle* at 2207.

> of agreements. *Brown*, 518 U.S., at 252 (STEVENS, J., dissenting). The fact that NFL 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 decision. … When "restraints on competition are essential if the product is to be available at all," *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.[50]
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> * * *
>
> Other features of the NFL may also save agreements amongst the teams. We have recognized, for example, "that the interest in maintaining a competitive balance" among "athletic teams is legitimate and important," *NCAA*, 468 U.S. at 117. While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for Section 1 purposes when it comes to the marketing of the teams' individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams. What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand.[51]

One must first scratch one's head in perplexity as to how this language found its way into the opinion at all. The Court's digression on why football teams need not feel themselves "trapped by antitrust law" seems to rest on the language quoted from *Broadcast Music*: "When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." But making available merchandise with NFL individual team logos on it does not require restraints on competition if the merchandise is to be made available at all. Each team individually can certainly arrange for the manufacture and sale of goods bearing its logo without the cooperation of its competitors, the remaining 31 teams. What then is the Supreme Court saying other than that the lower courts are to give the NFL a break on remand?

Although plaintiffs' counsel can take some solace in the Court's adverting to the possibility of applying the "quick look" rule of reason "And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.' ";[52] the receptiveness of courts towards the quick look is more than somewhat doubtful after the Supreme Court's decision in *California Dental Association v. FTC,* 526 U.S. 756 (1999).

As most experienced practitioners know, the subliminal message that accompanies proceeding under the rule of reason is "defendant's paradise" or "defendant wins." The quick look, first approved by the Supreme Court in *NCAA* and subsequently in *FTC v. Indiana Federation of Dentists*,[53] levels the playing field by allowing the plaintiff to dispense with proof of effects in a relevant market where there is a showing of a naked restraint on price or output, with no showing by the defendant of a compensating procompetitive justification. The Court's subsequent decision in *California Dental*, however, reversing the Ninth Circuit's affirmance of application of the quick look, has had and will continue to have a chilling effect on the quick look's future use because of the opinion's failure to provide clearly articulated guidelines for the doctrine's use.

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50 *Id.* at 2216.
51 *Id.* at 2217.
52 *Id., citing National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).
53 476 U.S. 447 (1986).

Hence, when American Needle returns to the trial court, it will undoubtedly have to proceed under the full rule of reason. In doing so, it will face not only the difficulties inherent in any full rule of reason case, but also the problem of articulating an actionable theory of recovery, some of the difficulties of which Werden has astutely pointed out.

The first and perhaps last question that comes to mind is what exactly is the violation claimed by American Needle. Here, there is a choice. Is the claim that the violation is the exclusive rights agreement given to Reebok, or that the violation is the collective decision by the 32 teams to choose a licensee or licensees, rather than having each team independently select its licensee? If the former, *American Needle* has what looks like an unwinnable case for two reasons. First, there is the issue of antitrust injury. American Needle is an unsuccessful bidder or applicant for an exclusive supply agreement. Unsuccessful would-be suppliers generally fail to convince courts that they have suffered antitrust injury, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[54] In other words, courts tend to conclude that the claim is not that competition was foreclosed, but that there was competition and the plaintiff lost.

Second, the law of exclusive dealing is heavily weighted against American Needle. For example, what is the relevant market in this case: NFL team logoed clothing; sports league logoed clothing; casual clothing; all clothing? The answer is obviously important, because the bigger the market, the smaller the NFL's share and market power, the smaller the percentage of market foreclosure, and the more difficult for American Needle to show a denial of access and an inability to get its products to customers, all essential elements of a challenge to an exclusive dealing agreement by a supplier claiming foreclosure.[55]

Instead of framing its case as an exclusive dealing claim under Section 1, American Needle would be much better off challenging the collective nature of the decision-making itself by the NFL teams, rather than attacking the resulting exclusive supply agreement. Instead of making the claim that it should be the exclusive supplier instead of Reebok, a claim destined to fail, American Needle would be arguing that if each team had been allowed to decide individually on its licensed vendor, American Needle could have obtained some share of the business, as demonstrated by its 20-year history of selling NFL team hats. Then the issue being litigated is the procompetitive benefits and competitive necessity of making the decision collectively to have a single supplier, versus the anticompetitive effects of doing so. The relevant market issue is still a big one, but potentially a jury question buttressed by sufficient expert testimony that there is a group of distinct customers that will accept no substitute for NFL logoed merchandise. In any event, the context of the case is a collective refusal to deal, where American Needle stands a much chance of prevailing, rather than an exclusive dealing arrangement.

As is apparent, American Needle's chances of reaching a favorable outcome if the case is fully litigated are hardly sewn up.

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54 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).
55 *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, (1961); *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir.1997).