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The Application of the Sherman Act to Joint Ventures: The Law after *American Needle*

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THE APPLICATION OF THE SHERMAN ACT TO JOINT VENTURES: THE LAW AFTER *AMERICAN NEEDLE*

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Hat manufacturer American Needle, Inc. brought suit under Section 1 of the Sherman Act, alleging that the NFL and its teams unlawfully acted in concert in granting Reebok an exclusive license to all the teams' logos and trademarks for use on apparel. The NFL moved for summary judgment, arguing that the league and its teams had acted as a single economic entity and therefore could not be liable under Section 1. The lower courts accepted the NFL's single-entity argument,[1] but the Supreme Court unanimously reversed in language affording little scope for such an argument in sports league cases.[2] The decision, however, is less clear on when the single-entity argument has merit with joint ventures other than sports leagues, and it fails to harmonize several prior decisions of the Court.

I. THE LEGAL ANALYSIS OF *AMERICAN NEEDLE*

The *American Needle* opinion begins with background. The Court observed that the NFL has 32 separately owned teams, each with trademarks and logos familiar to sports fans.[3] The court then asserted that NFL teams had "made their own arrangements for licensing intellectual property" until 1963, when they formed a joint venture called NFL Properties (NFLP) through which they subsequently licensed.[4] The licensing was non-exclusive until December 2000, when the teams voted to grant Reebok an exclusive ten-year license.[5]

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1 *American Needle, Inc. v. New Orleans Louisiana Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007), *aff'd*, *American Needle, Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008). Prior to this case, the NFL often had made the single-entity argument without any success. *See, e.g.*, *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994) (restraint on franchise ownership); *Los Angeles Mem'l Coliseum Comm. v. NFL*, 726 F.2d 1381, 1387–90 (9th Cir. 1984) (franchise location restraints); *McNeil v. NFL*, 790 F. Supp. 871, 878–80 (D. Minn. 1992) (labor market restraint).

2 *American Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010).

3 *Id.* at 2207.

4 *Id.* In this regard, the Court appears to have rewritten history. I have uncovered no reliable indication of merchandise licensing by an NFL team before 1959. At that time, Roy Rogers pitched a marketing plan. Roy Rogers Enterprises then licensed merchandise for all NFL teams until 1963, when NFLP took over. The first president of NFLP was Larry Kent, who had been manager of the marketing at Roy Rogers Enterprises. *See* MICHAEL ORIARD, BRAND NFL: MAKING AND SELLING AMERICA'S FAVORITE SPORT 3 (2007); Neil Steinberg, *He Could Always Move Merchandise*, SPORTS ILLUSTRATED, July 27, 1998, *available at* http://images.si.com/vault/article/magazine/MAG1013413/index.htm. At oral argument, Justice Sotomayor asked counsel for the NFL whether intellectual property ever had been licensed "by the individual teams," and he responded: "It was done, I believe collectively, through Roy Rogers Enterprises." Transcript of Oral Argument at 42, American Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010) (No. 08-661), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-661.pdf.

5 *American Needle*, 130 S. Ct. at 2207.

The Court's legal analysis first reviewed Sherman Act jurisprudence on the basic "distinction between concerted and independent action."[6] The Court then turned to the central question of what is, and is not, concerted action, explaining that its prior decisions "eschewed . . . formalistic distinctions in favor of functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."[7] The Court noted that it previously had 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."[8] And the Court noted that it had found concerted action to be lacking, even though multiple legal entities were involved, tracing the intraenterprise conspiracy doctrine to it demise in *Copperweld*.[9]

Building on this foundation, the Court explained 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."[10] Applying this concept, the Court found it clear that collective licensing by the NFL teams was concerted conduct. The Court observed that each team "is a substantial, independently owned, and independently managed business" and that "the teams compete in the market for intellectual property."[11] The Court declared that, in licensing, the teams had acted pursuant to their "'separate economic interests,'" so their collective decisions "'depriv[ed] the marketplace of independent sources of decisionmaking.'"[12]

The Court separately addressed the actions of NFLP, noting that the question of whether its "decisions can constitute concerted activity covered by Section 1 is closer than whether decisions made directly by the 32 teams are covered by Section 1."[13] The Court observed:

> 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 Section 1 when the parties to the agreement act on interests separate from those of the firm itself . . . .[14]

The Court held that NFLP's "marketing of property owned by the separate teams" is concerted action because the teams have "economic interests that are distinct from NFLP's financial well-being" and so "are not like components of a single firm that act to maximize the firm's profits."[15] The Court concluded: "In making the relevant licensing decisions, NFLP is therefore 'an instrumentality' of the teams."[16]

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6 *Id.* at 2208–09.
7. *Id.* at 2209.
8 *Id.* (*citing United States v. Sealy, Inc.*, 388 U.S. 350 (1967)).
9 *Id.* at 2201–11 (*citing Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)).
10 *Id.* at 2212 (internal quotations omitted).
11 *Id.* at 2212–13.
12 *Id.* at 2213 (quoting *Copperweld*, 467 U.S. at 769).
13 *Id.* at 2214.
14 *Id.* at 2215.
15 *Id.* The Court contrasted the NFL teams' involvement with NFLP to "typical decisions by corporate shareholders" on the basis that "NFLP's decisions effectively require the assent of more than a mere majority." *Id.* But no such finding was made below, and NFLP's articles of incorporation are silent on the matter. *See* Articles of Incorporation, National Football League Properties, Inc., *American Needle*, Joint Appendix at 311–16. The Court also observed that "each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits." *American Needle*, 130 S. Ct. at 2215. But the two interests need not diverge, and a public company's shareholders vote in accord with their individual interests, which need not align perfectly with those of the company.
16 *Id.* (quoting *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967)).

Although the holding of *American Needle* is limited to the intellectual property licensing activities of the NFL, the opinion strongly suggests that nearly all of the league's conduct comes within the scope of Section 1 of the Sherman Act. The Court specifically stated that "the production and scheduling of games . . . is still concerted activity" even though cooperation among the teams is essential.[17] So any aspect of the NFL's operations that is single entity conduct is apt to be inconsequential.[18] Moreover, the other major professional sports leagues are organized much as the NFL, with independently owned and operated teams, so Section 1 is apt to apply to nearly all aspects of their operations.[19]

II. *AMERICAN NEEDLE*'S PROSPECTS ON REMAND

After six years of litigation, the *American Needle* case remains very far from a judgment in favor of the plaintiff. The case seems apt to settle because the amount of money at stake could be much less than the cost of litigation and because the ten-year Reebok deal has terminated. If the case does go forward, American Needle faces at least four significant hurdles.

The NFL can be expected to move for summary judgment on the grounds that American Needle did not suffer antitrust injury. American Needle argued that the exclusive license with Reebok caused an increase in the prices of NFL-team hats, which could have been the basis for a damages action by hat buyers, but the higher hat prices did not harm American Needle. Had American Needle been the NFL's exclusive licensee rather than Reebok, hat buyers would have suffered the same injury, but American Needle would have benefitted. Consequently, the district court could be persuaded to grant summary judgment on the grounds that American Needle is not claiming "injury of a type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."[20]

The NFL also could move for summary judgment on the Section 1 claim on the basis that collective action by the teams did not cause American Needle's injury. American Needle sought the intellectual property of all 32 NFL teams, as did other NFL licensees. Its business model is to produce hats for every team. Consequently, neither American Needle, nor any other licensee with a comparable business model, could play one team off against another team in licensing negotiations.[21] Thus, collective action by the NFL teams did not eliminate otherwise meaningful competition among them in licensing to American Needle, and therefore did not proximately cause American Needle's injury.

If the case survives to trial, American Needle will face some significant proof problems. Most importantly, American Needle must prove a relevant market for NFL team trademarks and logos. This entails proving both that other trademarks and logos (including

17 *Id.* 2216.

18 Actions of the Commissioner presumably are those of a single entity if the teams are unaffected.

19 However, a substantial amount of professional sports activity is exempt from antitrust law. The "business of baseball" is exempt. *See Flood v. Kuhn*, 407 U.S. 258, 282–84 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922). But the exemption does not extend to disputes between the players and the league. *See* Curt Flood Act of 1998, Public Law 105-297, Section 3, 112 Stat. 2824 (codified at 15 U.S.C. Section 26b). On the other hand, dealings between players unions and team owners are covered by the non-statutory labor exemption. *See, e.g., Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004). Finally, broadcasting contracts are exempt under the Sports Broadcasting Act of 1961. Public Law 87-331, 75 Stat. 732 (codified at 15 U.S.C. Sections 1291–95).

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

21 One can imagine different business models, but it is difficult to imagine a business model affording meaningful competition among the NFL teams in licensing their intellectual property. The most likely alternative business model involves a licensee selling merchandise in a single locality (or just a few). Consider a vendor operating only in New Orleans engaged in negotiations with the Saints. The vendor could threaten to license from some other team, but that threat would not provide it with significant bargaining leverage.

those from other sports leagues) are not good substitutes for those of the NFL teams, and, more importantly, that the trademarks and logos of individual NFL teams are good substitutes for each other. The latter proposition is apt to run contrary to the experience of jurors who think along the lines suggested by Justice Breyer: "I don't know a Red Sox fan who would take a Yankees sweatshirt if you gave it away."[22]

Finally, the NFL likely most likely will have the considerable advantage of a favorable jury instruction on justifications. The Supreme Court declared that the NFL teams' "need to cooperate" may justify "many kinds of agreements."[23] The Court further observed that the league's "interest in maintaining a competitive balance . . . is . . . unquestionably an interest that may well justify a variety of collective decisions made by the teams."[24] The teams equally divide the now-substantial licensing revenue, and the competitive balance justification for collective licensing was advanced early in the litigation.[25]

III. SINGLE-ENTITY TREATMENT OF JOINT VENTURES OUTSIDE SPORTS

Although *American Needle* left no significant scope for single-entity treatment of actions taken by the major professional sports leagues, implications for other sorts of joint ventures are less clear. The Court did not adopt a general test, nor did it directly address any factual setting other than that presented by the NFL. Nevertheless, the Court's analysis of NFLP does provide useful guidance. As quoted above, the Court observed, as a completely general matter, that "concerted action covered by Section 1" occurs within a single firm "when the parties to the agreement act on interests separate from those of the firm" because, in that event, they do act "to maximize the firm's profits."[26] This reasoning implies that some joint ventures are properly treated as single economic entities.

This reasoning implies that a joint venture is treated as a single economic entity if its participants have no competitively significant interests outside the venture. Such joint ventures include professional services partnerships in which no partner practices outside the partnership. Under such circumstances, the partners can be expected to maximize the partnership's profits. The reasoning of *American Needle* thus suggests that the partners do not engage in concerted action when they agree on fees.

This reasoning also implies that a joint venture acts as a single economic entity if it is set up and operated as an ordinary profit-maximizing business. The Court did not suggest that the mere existence of joint venture participants' interests separate from those of the venture were dispositive, but rather focused on whether the participants act on their separate interests and thus do not maximize the venture's profits. A useful example from antitrust history is Penn-Olin Chemical Co., formed in 1960 by Pennsalt Chemicals Corp. and Olin Mathieson Chemical Corp. to produce sodium chlorate.[27] Penn-Olin was organized as a stock company, with each owner contributing half the capital and holding half of the stock.[28] Penn-Olin apparently was operated to maximize its profits; neither

22 Transcript of Oral Argument, *supra* note 5, at 16
23 *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010).
24 *Id.* at 2217.
25 Declaration of Gary M. Gertzog (General Counsel of NFLP) Paragraph 8, Joint Appendix, *supra* note 16, at 139.
26 *Id.* at 2215.
27 *See generally United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964). Other examples are the two joint ventures involved in *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). *See infra* notes 41–56 and accompanying text.
28 *See Penn-Olin*, 378 U.S. at 163.

parent competed in the relevant market,[29] and thus neither had an outside interest directly affected by the venture. The same might be true for existing companies such as Dow Corning, Sony Ericsson, and Verizon Wireless. All are joint ventures yet presumably are operated as ordinary profit-maximizing companies.

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 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.[30]

A useful way to identify a joint venture acting as single economic entity was proposed by the Solicitor General. Consistent with Section 1 principles articulated by the Court in *American Needle*, 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.[31]

The Supreme Court recited these conditions in *American Needle* but found "no need to pass upon the Government's position that entities are incapable of conspiring under Section 1" if, and only if, these conditions are met.[32] The Court asserted that the case involved "agreements amongst potential competitors and would constitute concerted action under the Government's own standard" because, "[a]t any point, the teams could decide to license their own trademarks."[33] The Court also suggested that test was not satisfied because the NFL teams, which have "potentially competing interests," were ultimately responsible for the decisions of NFLP.[34] A lower court could apply the Solicitor General's test, while paying close attention to the Supreme Court's determination that the NFL teams did not meet the test.

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29 The Supreme Court viewed the venture as "a new competitive force" in the relevant market. *Id.* at 170. Olin Mathieson had never produced sodium chlorate; Pennsalt produced sodium chlorate but only far outside the relevant geographic market. *See id.* at 161–64. 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 commerce" and that the progeny will not go "into competition with the parents." *Id.* at 169.

30 For a more detailed 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).

31 Brief for the United States as Amicus Curiae Supporting Petitioner at 17, *American Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010) (No. 08-661).

32 *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 n.9 (2010).

33 *Id.* This assertion is difficult to square with documents relating to the NFL's intellectual property licensing. Through a trust formed in 1982, the NFL teams pooled their intellectual property rights. Trust Agreement, Joint Appendix, *supra* note 16, at 350–68; *see also* Partial Answer to Amended Complaint Paragraphs 32-33, *Dallas Cowboys Football Club, Ltd. v. NFL*, No. 95 Civ. 9426 (S.D.N.Y. filed Jan. 11, 1996), Joint Appendix, *supra*, at 464. The Dolphins and Raiders did not participate in the trust but granted their rights directly to NFLP. *See id.*; NFL Defendants' Response to Plaintiff's Statement of Additional Facts in Support of Its Response to the Motion of the NFL Defendants for Summary Judgment (Single Entity), Joint Appendix, *supra*, at 238, 247-48. The trust granted "to NFLP the exclusive right to license the use of the [teams' intellectual property] on all types of articles of merchandise." License Agreement Art. I, Joint Appendix, *supra*, at 387. Amending or dissolving the trust required consent of three-quarters of the participating teams. Trust Agreement Sections 6.01, 6.02, Joint Appendix, *supra*, at 360.

34 *American Needle*, 130 S. Ct. at 2216 n.9.

Participants in joint ventures often compete with each other outside the ventures, and when that is true, it is important to ask whether the particular circumstances lead the participants to "act on interests separate from those" of the venture and thus to act as separate economic entities.[35] As suggested by the *American Needle*, a court could pose the question in just that way. Alternatively, a court could pose the two questions suggested by the Solicitor General. The court first 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, the court could ask whether the particular actions at issue "significantly affect actual or potential competition among the" participants in some related market.

When the Solicitor General's test concludes that a joint venture acts as a single economic entity, the venture undoubtedly acts in its own interest and not as "an instrumentality" of its participants. *American Needle*, therefore, lends substantial support to the use of the Solicitor General's test for a wide variety of joint ventures outside professional sports leagues.

IV. *DAGHER* AND *MARICOPA COUNTY* IN RETROSPECT

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. The argument got a boost from the 1982 *Maricopa County* decision, which observed 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."[36] This observation was made to contrast the defendant in that case—an organization created by many competing doctors to promote their common interests.[37] A divided Court held that an agreement among the doctors on maximum fees schedules violated the per se rule against price fixing.[38]

The defendant in *Maricopa County* was not cited in *American Needle* as an example of a single legal entity that acted as "an instrumentality" for a group of competitors, nor did *American Needle* explain the *Maricopa County* dictum. *American Needle*, however, did reject a possible reading of the dictum, observing that "the fact that potential competitors shared in profits or losses from a venture" could not imply that "the venture was immune from Section 1," else cartels easily could evade Section 1.[39]

The single-entity argument also was encouraged by the Court's much more recent decision in *Dagher*.[40] The backdrop for that case was formation by Shell and Texaco of two regional ventures "ending competition between the two companies in the domestic refining and marketing of gasoline."[41] The Court's description of the western venture, Equilon Enterprises, harkened back to the *Maricopa County* dictum in describing its formation as an agreement between Shell and Texaco "to pool their resources and share the risks of and profits from Equilon's activities."[42]

35 *Id.* at 2215.
36 *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982).
37 *See id.* at 339, 356.
38 *See id.* at 357.
39 *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2215 (2010). A few appeals court decisions had suggested that mere pooling of profits and losses was sufficient to make a competitor collaboration into a single economic entity. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147–48 (9th Cir. 2003); *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605, 615–16 (6th Cir. 1990).
40 *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).
41 *Id.* at 4.
42 *Id.*

The holding of *Dagher*, however, was only that the per se rule did not apply to the price equalization policy.[43] The Court observed that the policy had not been challenged under the rule of reason and expressly declined to address petitioners' single-entity argument.[44] Nevertheless, the Court's rationale for declining to apply the ancillary restraints doctrine was a variation on the single entity theme. The Court declared that the doctrine had "no application" because the pricing policy involved "core activity of the joint venture itself,"[45] suggesting that the policy could be challenged only as an integral part of Equilon's formation.[46] This rationale made sense only if Equilon acted as a single economic entity in setting the prices.[47]

Moreover, in explaining why a policy of charging equal prices for the Shell and Texaco brands was not per se illegal price fixing, the Court observed that the policy "amounts to little more than price setting by a single entity" and characterized Shell and Texaco as acting "in their role as investors, not competitors."[48] The Court then quoted the *Maricopa County* dictum,[49] implying that Equilon was the sort of joint venture treated as a single economic entity. In what appeared to be a reference to Equilon, the Court also declared: "As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price."[50]

Seven justices joined in the unanimous opinions in both *Dagher* and *American Needle*, including both authors, so *American Needle* will not be seen to be in significant tension with *Dagher*. Forced to harmonize the two decisions, a court could focus on differences in the salient facts, and those differences could be conceptualized using the effective merger test advocated by the Solicitor General. The Court specifically stated in *American Needle* that the NFL teams had not effectively merged their licensing operations, and it implicitly found in *Dagher* that the formation of Equilon was an effective merger.

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43 *Id.* at 8.

44 *Id.* at 7 & n.2. Petitioners' single-entity argument had as its premise that the price equalization policy was adopted by Equilon after its formation. In advising the Court not address the single-entity argument, the Solicitor General explained that the court of appeals had "based its decision on the disputed factual premise" that Shell and Texaco adopted the price equalization policy "at or before the joint venture's formation." Brief for the United States as Amicus Curiae Supporting Petitioners at 11 & n.6, *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (Nos. 04-805 & 04-814). Under the appeals court's premise, the policy was the product of concerted conduct even if Equilon always acted as a single economic entity.

45 *Dagher*, 547 U.S. at 7.

46 *See* Chris Sagers, American Needle, Dagher, *and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1*, ANTITRUST SOURCE, August 2009, at 4 ("the opinion could be taken to imply that the 'internal' decisions of a joint venture as to its 'core' functions are immune from Section 1 on a single-entity rationale"), http://www.abanet.org/antitrust/at-source/09/08/Aug09-Sagers8-12f.pdf.

47 *Cf. 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 . . . ."); Stephen V. Bomse, *Threading the* American Needle: *Is There Still Room for Unitary Action in Antitrust Cases Involving Joint Ventures*, CPI ANTITRUST JOURNAL, June 2010 (hot tub), at 4 (*Dagher*, "in all but name, held that there was no antitrust offense because nothing more was involved than the act of a single enterprise."), https://www.competitionpolicy international.com/assets/Free/BomseJune-10HotTub.pdf; Herbert Hovenkamp, American Needle *and the Boundaries of the Firm in Antitrust Law* at 15 ("Once [Equilon] was found to be lawfully created, the legality of its prices was not a matter of conspiracy law."), available at http://papers.ssrn.com/abstract=1616625; Jeffrey L. Kessler, David G. Feher & Robin L. Moore, *The Supreme Court's Decision 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 ("Ultimately, 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" with respect to venture activities—here, pricing the venture's products.").

48 *Dagher*, 547 U.S. at 6.

49 *Id.*

50 *Id.* at 7.

The formation of Equilon (and the eastern venture, Motiva Enterprises) was treated as a merger by the FTC,[51] following a long line of Section 7 cases.[52] The FTC also followed guidelines issued by the federal enforcement agencies setting out conditions under which the agencies treat the formation of a joint venture as a merger.[53] The conditions address the venture's degree of permanence as reflected in the joint venture agreement, but they focus primarily on whether the formation of the venture has the competition-eliminating effect long associated with a horizontal merger.[54] "Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated."[55] And if the formation of a joint venture is treated as a merger with respect to a relevant market, it should follow that joint venture participants no longer act as separate economic entities in that market. This reasoning reconciles *American Needle* and *Dagher* by applying the test advocated by the Solicitor General.

V. WHAT EVER HAPPENED TO *CITIZEN PUBLISHING*?

For decades the Supreme Court has been limiting the application of the per se rule, often by overruling prior decisions, and with the current makeup of the court, this trend can be expected to continue.[56] *American Needle* did nothing to alter this trend, but did extensively and approvingly cite the *Sealy* and *Topco* decisions which applied the per se rule to joint ventures.[57] That is significant because some commentators presumed these decisions had been overruled *sub silentio.*[58] Also significant is the Court's election not to cite a third per se decision—*Citizen Publishing.*[59]

In 1940 the only daily newspapers in Tucson entered into a joint operating agreement (JOA). Under the JOA, the newspapers retained separate ownership of their mastheads and maintained separate news and editorial operations, but the JOA resulted in joint ownership of nearly all the physical assets of the newspapers as well as joint production and distribution. The JOA was specifically designed to eliminate all economic competition between the newspapers: Subscription and advertising rates were set jointly, costs and revenues were pooled with profits distributed in a fixed ratio, and each newspaper committed not to engage in any competing publishing activity in the area.[60]

Nearly a quarter century after the formation of the JOA, the Justice Department filed suit, alleging that three provisions of the JOA designed to eliminate economic competition were per se violations of Section 1. The district court agreed and enjoined the

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51 Brief for the United States, *supra* note 45, at 4, 13 & n.8.
52 *See, e.g.*, *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 167–72 (1964); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1159, 1163–65 (9th Cir. 1984); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 974, 976 (8th Cir. 1981); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1414 (W.D. Mich. 1989).
53 *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors Section 1.3 (2000).
54 The criteria are: "(a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period by its own specific and express terms." *Id.*
55 *Brown Shoe Co. v. United States*, 370 U.S. 294, 335 (1962). All subsequent horizontal merger cases have reasoned from the premise that merging parties permanently cease to compete in any meaningful sense because the merged firm maximizes joint profits. Two years after *Brown Shoe*, the Supreme Court treated the formation of the Penn-Olin joint venture as a merger partly because it eliminated actual or potential competition between the two participants in the relevant market. *See supra* notes 28–30 and accompanying text.
56 Gregory J. Werden, *Next Steps in the Evolution of Antitrust Law: What to Expect Next from the Roberts Court*, 5 J. COMPETITION L. & ECON. 49, 50–60 (2009).
57 *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2209–10, 2214–15 (2010) (citing *United States v. Topco Assocs.*, 405 U.S. 596 (1972) and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967)).
58 *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW 189 n.62 (2d ed. 2001) ("*Sealy* and *Topco* are dead as dodos").
59 *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969).
60 *United States v. Citizen Publ'g Co.*, 280 F. Supp. 978, 980–82 (D. Ariz. 1968).

challenged provisions.[61] The Department did not challenge the JOA as a whole, and the district court found that it was efficient.[62] The injunction, therefore, permitted continued joint production and distribution.[63] On direct appeal, the Supreme Court affirmed the judgment, declaring that the per se violations were "plain beyond peradventure."[64] Most of the opinion was devoted to the failing company defense advanced by the newspapers, and the Court held that the newspapers could not carry the "burden of proving that the conditions of the failing company doctrine have been satisfied."[65]

Congress promptly overruled *Citizen Publishing* as it applied to newspaper JOAs,[66] and the decision was only occasionally, and briefly, mentioned in joint venture cases until it was discussed extensively by the court of appeals in *Dagher*.[67] Similarities between the two cases led the *Dagher* plaintiffs to rely heavily on *Citizen Publishing*, and the Supreme Court's *Dagher* decision did not explain why that reliance was misplaced. One may infer that the *Dagher* Court did not view *Citizen Publishing* as good law, but the reason is not apparent. The most plausible reason is that the sort of JOA at issue in the case would be treated as a merger today rather than as continuing concerted conduct between separate economic entities.

In briefing and arguing *Citizen Publishing* before the Supreme Court, the newspapers argued that their JOA was, in substance, a merger and should be treated as such under the antitrust laws, so the per se rule should not apply but the failing firm defense should.[68] The Solicitor General disagreed, arguing that a merger was a "unitary transaction" while a joint venture could be stripped of particular anticompetitive provisions.[69] The Court avoided this dispute. Although the district court had held that the failing company defense was inapplicable because the JOA was not a merger,[70] the Supreme Court did not affirm on that basis, but rather held that the newspapers could not show that the requirements of the defense were met. Comments by the Justices at oral argument suggested that evaluating the formation of the JOA under Section 7 rather than Section 1 would not have altered the conclusion that the JOA was unlawful.[71]

The distinction urged by the Justice Department in *Citizen Publishing* is not supported by more recent case law. In summarizing the current approach to joint ventures, Judge Sotomayor remarked: "Joint ventures are typically evaluated *as a whole* under the rule of reason because the competitive effects of an individual restraint are intertwined with the effects of the remainder of the venture."[72] Although the cases on which she relied did not explicitly articulate this notion, I think it is correct and have dubbed it the "indivisibility

61 *Id.* at 993–94.
62 *Id.* at 982.
63 The Tucson JOA continued to operate until 2009, when the *Tucson Citizen*, owned since 1976 by Gannett (the largest newspaper chain in the United States and publisher of *USA Today*) ceased publication. The *Arizona Daily Star* continues to be published. In 2005, it was acquired by Lee Enterprises, which owns 54 daily newspapers and over 300 weeklies.
64 *Citizen Publ'g*, 394 U.S. at 135.
65 *Id.* at 136–39.
66 Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466 (codified at 15 U.S.C. Sections 1801–04). Subsequent JOAs also eliminated all economic competition between the newspapers involved while retaining separate ownership of the mastheads as well as separate news and editorial operations.
67 *Dagher v. Saudi Refining Inc.*, 369 F.3d 1108, 1118–20, 1124 (9th Cir. 2004), *rev'd*, 547 U.S. 1 (2006).
68 *See* Brief of Appellants at 37–41, *United States v. Citizen Publ'g Co.*, 394 U.S. 131 (1969) (No. 68-243); Transcript of Oral Argument at 6, 28, *in* ANTITRUST LAW: MAJOR BRIEFS AND ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, 1955 TERM–1975 TERM (Philip B. Kurland & Gerhard Casper eds., 1979).
69 *See* Brief for the United States at 35–37, *United States v. Citizen Publ'g Co.*, 394 U.S. 131 (1969) (No. 68-243); Transcript of Oral Argument, *supra* note 69, at 23–24.
70 *Citizens Publ'g*, 394 U.S. at 145 (Stewart, J., dissenting).
71 *See* Transcript of Oral Argument, *supra* note 69, at 6, 28–29.
72 *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring) (emphasis added) (*citing* several cases and Werden, *supra* note 31).

principle."[73] In my view, a joint venture's formation agreements and its ancillary restraints form an indivisible whole for antitrust purposes, so the government's theory in *Citizen Publishing* is invalid.

VI. CONCLUSION

American Needle held that the NFL's intellectual property licensing was concerted conduct and strongly suggested that most activities of the major professional sports leagues also entail concerted conduct. But the Supreme Court neither broadly rejected the single-entity argument for joint ventures nor endorsed any specific test for determining when that argument should be accepted. Nor did the Court harmonize several of its prior decisions. But the effective merger test put forward by the Solicitor General harmonizes *Dagher* with *American Needle*, explains why *Dagher* ignored *Citizen Publishing*, and can be useful to courts in future joint venture cases raising the single-entity issue.

73 Gregory J. Werden, *When Does a Joint Venture Act as a Single Economic Entity?*, CPI ANTITRUST J., Mar. 2010 (2), https://www.competitionpolicyinternational.com/file/view/6264.