Joint Ventures And Other Competitor Collaborations As Single Entity—What Did American Needle Do To Copperweld And What About Dagher?

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I. INTRODUCTION

A. Section 1 of the Sherman Act and the Single Entity Rule

The principal U.S. antitrust law is the Sherman Act. Section 1 is the portion of the Act that outlaws anti-competitive agreements between competitors. It prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . .” Section 2 of the Act is directed, not against joint conduct, but against single firm conduct that amounts to monopolization or attempts to monopolize.

Violations of the Sherman Act are felonies. The maximum prison sentence for violation of the Act is ten years. In addition to allowing federal and state government agencies to bring civil and criminal suits against violators, the antitrust laws also permit lawsuits by private individuals and firms who have been injured by the violation. Successful plaintiffs are allowed to

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2 Since Section 1 cannot be read literally because it would make illegal almost every contract, the courts have interpreted the law to apply only to agreements that unreasonably restrain trade or commerce. In determining whether a restraint is unreasonable, courts have divided challenged activities into two separate categories. The first category includes certain anti-competitive conduct which is considered “illegal per se”; these are transgressions the courts have concluded are always unreasonable because they have no redeeming value, such as price fixing agreements or agreements to divide territories or allocate customers. This rule was set down by the U.S. Supreme Court in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) and vigorously reaffirmed through the years in cases such as N.Pac. Ry. Co. v. United States 365 U.S. 1, 5 (1958) and United States v. Topco Associates 405 U.S. 596, 608 (1972).

The second category is a review under the “rule of reason,” which means that the courts will analyze the facts in great detail and determine whether or not the conduct amounts to an unreasonable restraint of trade. Standard Oil Co. v. United States 221 U.S. 1, 60 (1911); Bd. of Trade v. United States 246 U.S. 231 (1918). Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1977); Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977).

As a further refinement of the rule of reason, there are sub-doctrines such as: (i) the “quick look analysis” pertaining to restraints that are not clearly per se illegal, but may not require a full rule of reason analysis to determine their legality (see NCAA v. Bd. of Regents 468 U.S. 85 (1984)); and (ii) the “ancillary restraints” doctrine under which collateral restraints on competition in connection with a legitimate collaboration are judged under the rule of reason. United States v. Addyston Pipe & Steel Co., 85 F. 271, 281-82 (6 Cir. 1898); Texaco Inc. v. Dagher, 547 U.S. 1, 7 (2006).

3 Criminal fines may be as much as $1,000,000 per violation for an individual and $100,000,000 per violation for a corporation. Each act or occasion can be a separate violation. The Sentencing Reform Act (18 U.S.C. § 3571) further increases fines for criminal activities to the greater of twice the ill-gotten gains or twice the loss others may suffer as a result of a company’s antitrust violation. The fine is not deductible against taxes and may not be in any way reimbursed to the individual by his or her corporate employer.
recover “treble damages” (three times their actual damages) as well as attorneys’ fees and the costs of litigation.

Litigating a Section 1 rule of reason case can be extremely time-consuming, unpredictable and expensive. Therefore, one of the first questions in any Sherman Act Section 1 case should be whether or not the matter is actually subject to Section 1.

The practical implications of this distinction for the defendant charged with a Sherman Act violation are profound. A finding that a charged entity acted as a single person immunizes that defendant from prosecution under Section 1, leaving it subject only to Section 2. Establishing a violation of the latter provision is famously difficult: unless the defendant enjoys a dominant position in a properly defined market, its prospects for liability under Section 2 are de minimis.4

Three U.S. Supreme Court decisions are principally relevant regarding the non-applicability of Section 1 to competitor collaborations that are found to be single or unitary actors and thus completely outside of Section 1. They are Copperweld Corp. v. Independence Tube Corp.5 and the more recent cases of Texaco, Inc. v. Dagher6 and American Needle v. National Football League.7

Although one might suppose that the question of whether there is more than one entity before the court is intuitively obvious, the Supreme Court disagrees: “[N]or is the question whether the parties involved ‘seem’ like one firm or multiple firms in any metaphysical sense.”8

The fountainhead single entity case was Copperweld. It resulted in what came to be known as the “Copperweld doctrine” or “Copperweld rule” that a parent corporation and its

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7 130 S. Ct. 2201 (2010).
8 American Needle, Id. at 2212.
wholly owned subsidiary are legally incapable of conspiring for purposes of Section 1 of the Act because the two were but a single entity for antitrust purposes. In 2006, the Dagher case seemed to build on the Copperweld single entity analysis in holding that an integrated joint venture’s pricing activities were not per se illegal under Section 1 of the Sherman Act.

American Needle was the Supreme Court’s first direct return to the single entity doctrine in the twenty-six years since Copperweld. The Court held that the National Football League was not a single entity under the Copperweld rule or otherwise. In so holding, the Court did not elucidate any comprehensive rule of unitary conduct. To the contrary, it simply mentioned several indicia of single or separate entities, such as whether the members of the venture nevertheless retained some “potentially competing interests.” The Court did not clarify the analysis by providing any easily discernible guide posts.

It is the thesis of this article that the failure to promulgate a “single entity rule” was no oversight by the American Needle Court. Rather, it was an integral part of: (i) a limitation of the “Copperweld doctrine”; (ii) a vigorous reemergence of the dissent in Copperweld that has significantly confined Copperweld; (iii) an expanding use of the rule of reason when examining most, if not all, joint activities by competitors; and (iv) a continuation of the movement away from antitrust “rules” toward antitrust “standards” governing collaborative conduct.

B. Competitor Collaborations and Section 1

Some joint ventures and other collaborations have been condemned under the per se rule because they lacked integration; they amounted to shams for price fixing; or they spawned collaborative anti-competitive behavior outside the boundaries of the joint venture. See Timken Roller Bearing Co. v. United States9 (allocation of territories outside the purpose of the joint venture).

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9 341 U.S. 593 (1951).
venture held *per se* illegal); *United States v. Sealy, Inc.* 10 (licensor/licensee allocation of territories *per se* illegal); *United States v. Topco Associates* 11 (purchasing cooperative formed by competitive supermarket chains that included divisions of markets and agreements not to compete in sales were *per se* illegal); *Arizona v. Maricopa County Med. Soc.* 12 (price fixing agreements by competing doctors).

Nevertheless, cooperative business efforts—joint ventures—have often been recognized as pro-competitive and inappropriate for *per se* analysis. Joint ventures and collaborations with at least some “integration” (i.e.: a combination of management, capital contribution, production, distribution and/or other business activity which is not unduly transitory or a sham) are usually covered by Section 1 and are reviewed under the rule of reason, particularly when they involve arrangements that enhance efficiency or allow the parties to sell a new product or enter a new market so as to achieve pro-competitive benefits. 13 The courts generally have been willing to examine whether there is plausible integration and potential efficiency. *See Broadcast Music, Inc. v. Columbia Broadcasting Co.* 14 in which a complex joint venture with potentially redeeming qualities would be judged under the rule of reason even though it involved a blanket license that might literally be called price fixing because it was accomplished by the “integration

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13 See *N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985) (competitors’ purchasing cooperative judged under rule of reason because it allowed smaller retailers to compete more efficiently with larger retailers through economies of scale and better access to suppliers); *Arizona v. Maricopa County Med. Soc, supra*, 457 U.S. at 356-57, (doctors’ price fixing might have been allowable if there had been pooling of capital and shared profits and risk so that the doctors were, in effect, competing as a single entity). See also, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7 Cir. 1985); *Broadcast Music Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984).
14 441 U.S. 1, 20 (1979).
of sales, monitoring, and enforcement against unauthorized copyright use.” Likewise in the post-

*Copperweld* case of *Polk Bros. Inc. v. Forest City Enterprises, Inc.*\(^{15}\) the court stated:

Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production. Joint ventures, mergers, systems of distribution—all these and more require extensive cooperation, and all are assessed under a Rule of Reason that focuses on market power and the ability of the cooperators to raise price by restricting output . . . When cooperation contributes to productivity through integration of efforts, the Rule of Reason is the norm. [citations omitted].

II. **WHAT DID COPPERWELD DO?**

A. **The Holding**

In *Copperweld*, the Supreme Court abolished the intraenterprise conspiracy doctrine\(^{16}\) with respect to a parent corporation and its wholly owned subsidiary. The Court held that, even though these companies were two separately incorporated and legally distinct entities, they could not, as a matter of law, conspire with each other for purposes of Section 1 of the Sherman Act:

> [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise . . . . [They] have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal “agreement,” the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do “agree” to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.\(^{17}\)

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\(^{15}\) 776 F.2d 185, 188 (7th Cir. 1985).

\(^{16}\) See *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *Kiefer-Stewart Co. v. Joseph E. Seagram Sons’, Inc.*, 340 U.S. 211 (1951) and other cases cited by *Copperweld* at 467 U.S. 759-767.

\(^{17}\) 467 U.S. at 771.
In the context of this form (100% ownership of the subsidiary), *Copperweld* itself is a narrow decision. “*Copperweld* actually answered only the narrowest conceivable question in this inherently difficult area, and gave no consideration to the fact that in most cases except that very narrow one, the issues would get much more complex and uncertain.”18

B. The “*Copperweld Rule*” or “*Copperweld Doctrine*”

The *Copperweld* rule or doctrine is that a parent company and its wholly owned subsidiary are incapable of conspiring for purposes of Section 1 because these two corporations are not two antitrust actors—only one, and Section 1 requires at least two actors. The logic behind the *Copperweld* rule is that agreements between certain entities (i.e., parent and wholly owned subsidiaries) cannot, as a matter of law, be the kinds of agreements Section 1 of the Sherman Act was directed toward because they are, in essence, conduct by a single firm. *Copperweld* sought to provide a rule whereby such agreements (even though between two legally distinct entities) could be summarily removed from Section 1 coverage.

The Supreme Court referred to various tests that the lower courts had used to apply the “single entity” test.19 Many of these indicia of “separateness” of the two companies are akin to the 2010 *American Needle* criteria of “separate decision makers” or “independent centers of decision making.” But in *Copperweld*, the Court did not rely on a detailed analysis of the application of these factors to the facts at hand: “[Such factors] cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.”20 Since parents and their wholly owned

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19 467 U.S. 772, n.18.

20 *Id.*
subsidiaries are legally incapable of conspiring, a court’s task becomes a very objective, short and discrete inquiry. In other words: “The so-called ‘Copperweld doctrine’ operated without regard to whether the parent actually exercises control over the subsidiary, and without regard to whether the two entities hold themselves out as competitors.”21

Notwithstanding the crucial role played by the form of the corporate entities before the Court in Copperweld, subsequent courts and commentators began to refer to the “Copperweld rule” or the “Copperweld doctrine” as being based on the Supreme Court’s admonition to look to the substance—not to the form. But what exactly was this “substance”? It seemed to be found somewhere in the Court’s language about “unity of interest” and the like. Many took this to be the “Rule.” But was it really?

Copperweld held the potential to act as a uniform Section 1 screen possessing the virtue of at least some level of economic sophistication with regard to the theory of the firm. By the time American Needle came before the Court, however, judicial application of Copperweld had largely devolved into a psychological and metaphysical inquiry.22

American Needle would prompt renewed scrutiny of this inquiry by its reminder that Copperweld was really about the status of being a wholly owned corporate subsidiary.

C. Justice Stevens’ Copperweld Dissent

Justice Stevens’ Copperweld dissent opposed categorical advance exemptions from Section 1 of the Sherman Act. Justice Stevens (joined by Justices Brennan and Marshall) argued that all business arrangements (even those between parents and wholly owned subsidiaries)

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ought to be subject to rule of reason review because it is risky to establish any categorical
Section 1 carve-outs in advance of knowing the particular facts of the case:

The Rule of Reason has always given the courts adequate latitude to examine the substance rather than the form of an arrangement when answering the question whether collective action has restrained competition within the meaning of § 1.

Today the Court announces a new per se rule: a wholly owned subsidiary is incapable of conspiring with its parent under § 1 of the Sherman Act. Instead of redefining the word “conspiracy,” the Court would be better advised to continue to rely on the Rule of Reason. Precisely because they do not eliminate competition that would otherwise exist but rather enhance the ability to compete, restraints which enable effective integration between a corporate parent and its subsidiary—the type of arrangement the Court is properly concerned with protecting—are not prohibited by § 1. 23

The dissent complained that the majority “does not even attempt to assess the competitive significance of the conduct under challenge here . . . ” and questioned why two separate companies who engage in predatory conduct should be “immunized” from Section 1 liability simply “because they are controlled by the same godfather.” 24 Some two and a half decades later, Justice Stevens would author the unanimous American Needle decision, and, in many ways, the Copperweld dissent served as a first draft of the American Needle opinion.

D. Substance Over Form or Form Over Substance?

Despite its language about “substance over form” 25, Copperweld should be characterized as “form over substance.” While the Court did indeed use the rubric of substance over form, the rule of the case is that a parent and its wholly owned subsidiary are but a single entity for Sherman Act purposes. If so, substance no longer matters. This Copperweld rule becomes simple

23 467 U.S. at 778.
24 Id. at 796.
25 Id. 773, n.21.
and objectively verifiable. As Justice Stevens noted in dissent, *Copperweld* created a particular “status” that is exempt from Section 1 of Sherman Act. This “status” concept is key.

To be sure, *Copperweld* considered competitive effects in drawing the boundary between unilateral and concerted conduct, but that did not change the fact that the Court was defining a *status*—whether a parent and its wholly owned-subsidiary are one entity or two for purposes of the threshold plurality-of-actors requirement of section 1—and doing so on the ground that the subsidiary is *always* incapable of independent action. Appreciating the rationale for turning this status question into an inquiry for which the answer will vary from case to case for a single joint venture is difficult.26

*Copperweld* took an objective determination of corporate structure and status (parent/wholly owned subsidiary) and then clouded its own analysis (and the subsequent reasoning of the cases that tried to follow the “*Copperweld* rule”) with phrases that sound judicious, unarguable, and persuasive (“substance over form”) because *Copperweld* was very much a form decision even as it was proclaiming itself as a substance decision. *Copperweld* involved a particular and specific corporate form that logically had to carry with it the “substance” that led to the holding, *i.e.*, a parent and wholly owned subsidiary cannot legally conspire because they are legally but one actor. But the “substance over form” discussion is not necessary to the holding. The case holds that, under the facts of a parent and wholly owned subsidiary, Section 1 is simply inapplicable as a matter of law. If so, any discussion of substance was unnecessary to the holding, although it did serve to amplify the holding.

The *Copperweld* Court created “a rule of *per se* legality under Section 1 for the corporation and its wholly owned subsidiary.”27 This *per se* legality applies “regardless of

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whether that conduct restrained market competition and hurt other firms.”

Under Copperweld, the parent wholly owned subsidiary form ends the inquiry, even though there may be other indicia of independence or separateness between the two legally distinct entities. Issues such as “unity of interest,” severity of the restraint, and efficiencies become irrelevant. Such appears to be the case even though there may be other indicia of independence or separateness between the two legally distinct entities.

E. Subsequent Cases

1. Applying the Copperweld Rule to Non-Copperweld Facts

Cases since Copperweld expanded the rule of Copperweld beyond wholly owned subsidiaries and began applying the Copperweld doctrine to situations involving less than 100% subsidiary ownership. The result was that most majority-owned subsidiaries and brother-sister companies were usually found to be outside the scope of Section 1.

The Copperweld doctrine or rule was applied to various other collaborative arrangements as well as to trade and professional associations, hospitals and their medical staffs, franchisors

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29 By way of comparison, similar issues of unitary conduct exist under the European Union Competition Law. Article 81(1) (now Article 101(1)) of the EU law is roughly comparable to Section 1 of the Sherman Act and applies to agreements between two or more “undertakings,” which, in a broad sense, means entities engaging in economic activity, thereby becoming subject to the jurisdiction of Article 101(1). With respect to the single entity issue, the EU Court appears closer to the Copperweld dissent in that it has said that the fact that a parent company owns all of the shares of its subsidiary means that the parent has the ability to exert influence over the subsidiary, but (contrary to Copperweld), this does not automatically mean that the parent actually exerts that influence. Rather, it creates a rebuttable presumption that such influence was actually exercised. In the absence of such influence, a parent and a subsidiary can be multiple entities. See Case C-73/95, Viho Europe BV v. Commission ECR 1-5457 (1996) (the “Parker Pen” case). For a more detailed review see Jones/Surfin, EU Competition Law (4th Ed. 2011) 134-139; Whish, Competition Law (6th Ed. 2009) 91-95; Roth/Rose, European Community, Law of Competition (6th Ed. 2008) 103-104.

See also Case C-97/09P, Akzo Nobel v. Commission, judgment of 10 September 2009, which raises this issue in the context of when a parent is liable for the antitrust violations of its subsidiary because the two have become a single undertaking or economic unit. Accord: Case C-520/09P Arkoma SA v. Commission, judgment of 29 September 2011; and Case C-521/09P Elf Aquitaine SA v. Commission, judgment of 29 September 2011.

30 See ABA Section of Antitrust Law, Antitrust Law Developments (7th ed. 2012) at 32-35 (hereinafter “ABA Antitrust Law”).
and franchisees, and in the patent area. The results have been a mixed bag which have not produced any uniform, objective, or agreed-upon test to determine whether a court had before it one, two, or more actors. See Grow\textsuperscript{31} and Stone & Wright\textsuperscript{32} describing the difficulties and varying results in the lower courts as the “unity of interest” rationale began to separate from the “common control” rationale. Economists and the lower courts tended to focus on \textit{Copperweld}'s “unity of interest” language without the control factors inherent in, and inseparable from, the facts of \textit{Copperweld} itself. Thus, the results were all over the map.\textsuperscript{33} Or as more colloquially put: “\textit{Copperweld} was a mess, though, in terms of its direction on how to identify literal combinations that should be immune from section 1 scrutiny.”\textsuperscript{34}

The \textit{Copperweld} rule was also applied to joint ventures among separately owned entities. In some cases, single entity status was found when the participants were engaged in common interests and were no longer independent decision makers in the market. \textit{Freeman v. San Diego Assn. of Realtors}\textsuperscript{35}; \textit{Chicago Prof. Sports Ltd. Pt. v. NBA}\textsuperscript{36}; \textit{City of Mt. Pleasant v. Assoc. Elec. Coop., Inc.}\textsuperscript{37} Other cases refused to find that the joint activity of competitors amounted to a single joint venture enterprise. See \textit{Rothery Storage & Van Co. v. Atlas Van Lines, Inc.}\textsuperscript{38}


\textsuperscript{32} Stone & Wright, supra, n.22 at 375-377


\textsuperscript{34} Id. at 923.

\textsuperscript{35} 322 F.3d, 1133 (9th Cir. 2003).

\textsuperscript{36} 95 F.3d 593 (7th Cir. 1996).

\textsuperscript{37} 838 F.2d 268 (8th Cir. 1988).

\textsuperscript{38} 792 F.2d 210 (DC Cir. 1986); see generally ABA Section of Antitrust Law, \textit{Joint Ventures: Antitrust Analysis of Collaboration Among Competitors} (2006) at 54-57 (hereinafter “ABA Joint Ventures”).
balance, joint ventures were mostly found to involve multiple actors and thus were subject to Section 1.\(^\text{39}\)

These courts were required to apply what they perceived to be the *Copperweld* rule through all sorts of varied factual situations differing from the objectively determinable corporate structure (or status) underlying *Copperweld*. In other words, the *Copperweld* rule can never exactly fit non-*Copperweld* facts. Most, if not all, of such subsequent efforts by necessity became case-specific, factually intense and unique situations, which by definition eluded any easily discernable “one size fits all” rule. These decisions took the *Copperweld* “unity” reasoning and detached it from the *Copperweld* facts.

*Copperweld* removed certain cases from Section 1 altogether. Any rule that supports categorical exemptions cannot, by definition, place primary emphasis on the particular facts but rather on the particular category. That works well enough so long as the category can be adequately defined and discovered. It becomes muddled when such objectivity is unavailable as in many post-*Copperweld* decisions that applied the “*Copperweld* rule.” Subsequent cases, relying on *Copperweld*, but with different facts, necessarily tended to become unpredictable.

2. **The Theory of the Firm**

In effect, the courts were using *Copperweld* to attempt to develop a “theory of the firm,” which might bring some predictability to these single entity questions. Such a theory would be (if successful) a practical definition or guide as to whether a particular collaboration that found itself before the court was or was not a single entity. The result would be that a single entity would be outside the scope of Section 1; anything else would be subject to review under Section 1.

In the years since *Copperweld Corp. v. Independence Tube Corp.*, it had come to seem that antitrust really needs a “theory of the

\(^{39}\) See Grow, *supra*, n.31 at 464.
firm.” *Copperweld* seemed pretty plainly to direct the lower courts to develop some theory of the firm, and their efforts had been disappointing.\(^40\)

However, these subsequent decisions, dealing with less than 100% parent subsidiary ownership, did not fashion a uniform rule or an antitrust “theory of the firm” that might guide single entity determinations. “In fact, such a theory of the firm as there has come to be in either economics or law is, more powerfully than anything, an argument that the boundaries of the firm are a non-existent illusion.”\(^41\)

Likewise, a United States Department of Justice analysis noted that:

> Both efforts in economics to sort out what constitutes a "firm" and efforts in the law to sort out what constitutes a "single entity" have focused on "control." A difficulty is that neither the law nor economics--nor any other field--offer a concept of control that can enable analysis\(^42\).

See also Grow, *supra*, n.31 at 483 regarding the eighty-year futile struggle by economists “to precisely define the boundaries of the ‘firm . . . ’”\(^43\) The difficulty of the “theory of the firm” (like the difficulty of any “*Copperweld* rule”) is that much depends on the particular facts such as

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\(^41\) Sagers, *supra*, n.18 at 388.


\(^43\) For example, in *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316,1317 (5th Cir. 1984) the court found the parties were a “single entity” so long as they shared a “unity of purpose or a common design,” and it did not seem to matter whether they were parent-subsidiary or in another form of common ownership. See also *Williams v. Nevada*, 794 F. Supp. 1026, 1030-32 (D. Nev. 1992): “For two separate companies to act as a single entity, it is not necessary that one be owned, wholly or in part, by the other corporation,” and see *City of Mt. Pleasant v. Assoc. Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988) (fifty separate electrical cooperatives were found to be a single entity under *Copperweld*). But see *Polk Bros., Inc. v. Forest City*, *supra*, (*Copperweld* “single entity” defense rejected with respect to a joint venture because the participants were competitors of the venture and were restraining competition; however, this multiple actor joint venture was then upheld under Section 1 rule of reason analysis because the competitive restraints were ancillary and reasonable to facilitate the venture’s efficiencies).
legal structure, contracts, control devices, allocation of profit, loss and risk and many other factors so as to determine when a business is conducting its own activity or is conducting business jointly with others.\footnote{44}

Using the language of \textit{Copperweld}, how many and which entities are in the same “multiple team of horses drawing a vehicle under the control of a single driver”?\footnote{45} The answer, of course, is it depends on the facts of the case, \textit{i.e.}, on the particulars of the company in question, the relevant markets and product, the scope of the competitor collaborations to which the company may be party, and many other unique particulars. Thus, “it all depends” may be (and often is) the correct answer, but such answer is the antithesis of a predictive theory of the firm, which might be useful in identifying single entity status.

Simply stated, \textit{Copperweld} would not serve as a sturdy platform. It was unique and different because the parent/wholly owned subsidiary form, in effect, subsumed the reasoning (notwithstanding the Court’s claims to the contrary), and the reasoning was not easily transportable to a new set of facts. As the \textit{Copperweld} doctrine expanded, \textit{Copperweld} predictability diminished. “[T]he Court’s ‘conduct’—focused language, along with its use of the terms ‘independence’ and ‘centrality’—proved puzzling and ultimately misleading.”\footnote{46}

III. WHAT DID DAGHER DO?

A. The Holding

\textit{Texaco v. Dagher}\footnote{47} dealt with a joint venture between Texaco, Inc. and Shell Oil Co. to refine and sell gasoline in the western United States. The Court held that it is not \textit{per se} illegal

\footnote{45}{\textit{Supra}, n.17.}
\footnote{46}{Devlin & Jacobs, \textit{supra}, n.4 at 554.}
\footnote{47}{547 U.S. 1 (2006).}
under Section 1 of Sherman Act “for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products.” Some saw Dagher as a major step forward for the single entity doctrine, which might take many integrated ventures entirely outside of Section 1.

B. **Dagher Was Not a Single Entity Case**

Notwithstanding Dagher’s language about the Texaco/Shell arrangement being a “single entity” joint venture, Dagher was not a single entity decision. It was a Section 1 case, which means that the Court decided the case as if there were two actors before it. A close reading of the case shows that the single entity language was not necessary to the Court’s result, and in fact was not presented by the facts before the Court. Rather, all of the Court’s analysis (including its allusion to the rule of reason) makes it clear that the Court assumed it had before it two actors and not a single entity. The Court expressly said it was not addressing the argument that Section 1 of the Sherman Act was inapplicable (presumably on a single entity theory) although the Court did indicate that it might have addressed the single entity question had a rule of reason claim been made.

Upon a first reading, Dagher’s single entity discussion made it appear as if the Court could be breaking major new ground in suggesting that at least the “core activities” of legitimate, integrated joint ventures might be outside the scope of Section 1.

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48 *Id.* at 3.
49 *Id.* at 7 n.2.
50 At 547 U.S. 6 the Dagher Court cites Arizona v. Maricopa County Medical Soc. 457 U.S. 332, 336 (1982) for the proposition that 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.” However, a review of Maricopa County shows that the Court made that statement in *dicta* and was not saying that all joint ventures that involve pooling of capital and sharing of risk of loss and sharing of profit were single entities and thus wholly outside of Section 1 of the Sherman Act.
Together, the Court’s repeated assertion that a bona fide joint venture is equivalent to a single entity, coupled with its ruling that the ancillary-restraints doctrine does not apply to the “core activity” of a bona fide joint venture, seemed powerfully to suggest that the decisions of a legitimate joint venture involving its “core activity”—whatever that might be—are effectively immune from Section 1 liability.  

But the split personality of the case is highlighted in two consecutive sentences:

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. If [the joint venture’s] price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason.

The first sentence suggests that the Texaco/Shell joint venture that was before the court was a “single entity,” but the second sentence refers to a challenge under the rule of reason. “Single entity” suggests conduct outside of Section 1; “rule of reason” suggests activity within Section 1. Which is it? Perhaps this is why American Needle hardly cites, and certainly does not rely upon, Dagher even though the two cases were decided within four years of each other.

Dagher did not even cite Copperweld in its single entity discussion, which was mostly dicta, and “an analogy simultaneously unnecessary, confusing and inapposite.”53 In other words, while American Needle would be a “Copperweld doctrine” case, Dagher was something else. While it may be correct that Dagher exempts certain “core activity” of a joint venture from being deemed per se illegal under the Sherman Act, dicta aside, nothing in the case suggests that such conduct is also completely outside of the Sherman Act and thus not subject to rule of reason review. Dagher simply held that a legitimate integrated joint venture that was “akin to a merger”

51 Devlin & Jacobs, supra, n.4 at 556.
52 547 U.S. at 7.
53 Devlin & Jacobs, supra, n.4 at 555.
is not going to face *per se* liability under Section 1 of the Sherman Act with respect to the way it conducts pricing of its product.\(^{54}\)

If there was any doubt about whether *Dagher* had removed all integrated joint ventures from the ambit of Section 1, *American Needle* made it quite clear that it had not. *American Needle* was not merely a sports league case. It was the Supreme Court’s first look at unitary conduct and Section 1 of the Sherman Act since *Copperweld*.

**IV. WHAT DID AMERICAN NEEDLE DO?**

**A. The Holding**

*American Needle* held that the teams of the National Football League (NFL) were not a single entity with respect to the joint venture they formed to license their separately owned intellectual property (team logos and the like) for merchandizing purposes. Therefore, Section 1 applied. The Court noted that a single actor for purposes of Section 1 is one who exhibits “unitary decision-making” amounting to a “single aggregate of economic power.”\(^{55}\) The Court focused on the fact that, although the NFL joint venture had a degree of integration, the participant teams remained “separate profit maximizing entities” with “distinct, potentially competing interests.”\(^{56}\)

The *American Needle* Court reaffirmed (if not relied upon) *Copperweld*. However, it did so in almost a lip service manner and then quickly turned to discussing whether there were separate centers of economic interest, power and decision making. *American Needle*, not *Copperweld*, was a case of substance trumping form. The *American Needle* Court in no way

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\(^{55}\) 130 S. Ct. at 2212.

\(^{56}\) *Id.* at 2213.
suggested that the law concerning parent and wholly owned subsidiaries had returned to the “intraenterprise” conspiracy of the pre-*Copperweld* days. Nevertheless, *American Needle* made it clear that everything else was potentially on the table because, other than the 100% parent/subsidiary ownership situation, there are few, if any, business structures that can be categorically carved out of Section 1 in advance.

B. **The Lessons of *American Needle***

An initial lesson may be that Supreme Court Justices have long memories. It took twenty-six years, but, in *American Needle*, Justice Stevens got much of what he wanted in his *Copperweld* dissent and took a unanimous Supreme Court with him in 2010. This was done only four years after the Court unanimously expanded antitrust protection in *Dagher*. *Copperweld* itself is still good law but appears to have been significantly limited to its own particular facts. As a result, relationships involving less than 100 percent ownership structures may well be questioned in light of actual circumstances, as Justice Stevens’ *Copperweld* dissent has now become closer to being the current law.57

*American Needle* teaches that entities are separate, and thus capable of conspiring for purposes of Section 1, if they amount to “separate economic actors” or “separate decision

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57 *Copperweld* was decided at a time when the *per se* rule was in ascendancy and served as an avenue of escape from the sometimes harsh application of the *per se* rule. 467 U.S. at 777. Such considerations are very important to the context of the judicial time in which *Copperweld* was decided. “Today, however, courts are much less likely to apply the *per se* rule to anything except naked horizontal conduct.” Hovenkamp & Leslie, *supra*, n.54 at 815. The Supreme Court has said on more than one recent occasion that the rule of reason is the starting point for assessments of restraints under Section 1 and a “‘departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.’” *Leggin Creative Leather Products, Inc. v. PSKS, Inc.* 551 U.S. 877, 887 (2007).
makers” or “independent centers of decision making.” If Section 1 applies, the arrangement is reviewed under the rule of reason (although often by means of “quick look”).

Despite Dagher, American Needle refused to extend Copperweld immunity further to cover all integrated joint ventures. The Court may have been uncomfortable that this particular area of the law should be expanded, given its lack of symmetry with the traditional common law, that generally recognizes the separateness of parent and subsidiary companies i.e., that a parent and subsidiary are a single entity for Section 1 purposes, but, in the context of a common law business tort claim, are legally separate so as to insulate the parent from liability. This flavor of disharmony clearly bothered Justice Stevens in Copperweld. He appears to have raised the issue again (albeit without expressly criticizing Copperweld) in the American Needle opinion.

C. Is There an American Needle Doctrine?

1. Justice Stevens Returned to His Copperweld Dissent

American Needle begins its single entity analysis (130 S.Ct. at 2210) by referring to the “now-defunct” intraenterprise conspiracy doctrine which held that all legally distinct entities (even parent and subsidiary corporations) were covered by Section 1. The Court continues:

“[W]e now embark on a more functional analysis.” In the next sentence, the Court explains that

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58 130 S. Ct. at 2217, quoting NCAA v. Bd. of Regents, 468 U.S. 109 n.39 (1984). The Court commented that this quick look “can sometimes be applied in the twinkling of an eye.” According to Professor Hovenkamp, this American Needle dicta may have re-invigorated the quick look doctrine. Hovenkamp, supra, n.44, at p. 9.

59 “Under the common law, the question whether affiliated corporations constitute a plurality of actors within the meaning of [Section 1] is easily answered. The well-settled rule is that a corporation is a separate legal entity; the separate corporate form cannot be disregarded.” Copperweld (dissent) 467 U.S. at 785-786. The dissent would have retained the intraenterprise conspiracy doctrine, and it based its argument, in part, on this variance from common law.

See also Areeda, Kaplow and Edlin, Antitrust Analysis (6th Ed. 2004), at 240-241 (hereinafter “Areeda, Kaplow & Edlin”):

[T]he law allows the presumption of separate existence to be overridden only upon strong contrary evidence. Might one argue from this that the intraenterprise conspiracy doctrine is consistent with this overall approach, whereas its rejection essentially permits corporations to benefit from the application of inconsistent presumptions in different contexts?
the “roots of this functional analysis” are to be found in the pre-
Copperweld intraenterprise conspiracy doctrine cases of United States v Yellow Cab Co. and Kiefer-Stewart Co. v. Joseph E. Seagram Sons’, Inc. (supra, n.16). It is telling to note that, while the American Needle Court referred to the “decline of the intraenterprise conspiracy doctrine”, it nevertheless looked to that very doctrine and to these two cases that were “disapproved and overruled” by Copperweld as providing the roots or underpinning of the “functional analysis” it employed in American Needle. Hence, both the Copperweld dissent and the American Needle opinion convey the same fundamental message, which is to apply the rule of reason in almost all cases involving integrated competitor collaborations.

While not overturning Copperweld, Justice Stevens, in American Needle, succeeded in avoiding a result that might have been expected to flow naturally from Dagher and in significantly questioning almost all of the progeny of Copperweld. The “theory of the firm” appears to offer little guidance, and, in this instance at least, American Needle may represent a bit of a retreat from the Supreme Court’s trend to increase its reliance on so-called “law and economics” literature seen in cases such as Leegin Creative Leather Products, Inc. v. PSKS, Inc. In particular, decisions finding that franchisors and franchisees, patent holders and their licensees, or hospitals and affiliated medical providers are single entities may be ripe for re-examination.

60 Copperweld, 467 U.S. at 777.
61 130 S. Ct. at 2210.
62 American Needle also did an end run around Copperweld when it noted that in “rare cases” even agreements within a single firm “can constitute concerted action covered by § 1” (citing as good, current authority the pre-Copperweld cases of Topco and Sealy, supra, n.10 and 11). 130 S.Ct. at 2215.
Instead of attempting to promulgate any uniform rule supported by sophisticated economic analysis, the American Needle Court, while acknowledging the Copperweld carve-out for parent/wholly owned subsidiaries, is echoing what Justice Stevens said long ago in his Copperweld dissent, i.e., when two entities “can be easily fit within the language of § 1” their agreements that restrain competition should be reviewed under Section 1.  

2. There is No Rule or Doctrine

American Needle comes close to stating that the only substantive exemption from Section 1 scrutiny of a competitor collaboration would be an integration that was so complete as to amount to a de facto merger. Perhaps something less would suffice for a finding of a single entity, but the Court does not explain what that might be. The criteria are stated in generalities and subjective terms. The Court tells us to look for the joining together of “separate decision makers” or “separate economic actors pursuing separate economic interests” or “diversity of entrepreneurial interests” or “independent centers of decision making.” What exactly do these phrases mean? Are two companies with any common stock ownership or interlocking directors “independent”? What about a landlord and tenant who are parties to a 30-year lease with a rental based on a percentage of net income? Or what about any two entities that are parties to any contract wherein payment is measured by a percentage of revenue or profits? These criteria mentioned by the Court seem at odds with the American Needle Court’s warning against analyzing the issue “in any metaphysical sense.” Indeed, several of these American Needle phrases come right out of Copperweld, and it is remarkable how easily the American Needle Court used them to cut Copperweld back.

65 467 U.S. at 796.
66 130 S. Ct. at 2212.
67 Id.
American Needle has been criticized for a failure to provide precise guidelines with respect to when, if ever, joint ventures and other horizontal collaborations might clearly be found to be on one side or another of the single entity/multiple entity divide. “[T]he American Needle opinion is weakly reasoned, plagued by internal contradictions, notable for its logical gaps, and, above all else, confused and confusing.”

Critics complain that the Supreme Court has not given better guidance in American Needle. “[T]he American Needle decision was unnecessarily and unjustifiably vague.” “[T]he decision does not provide any real guidance on how courts should review joint activities generally . . . .”

What does “real guidance” mean? Grow argues for a “control” test whereby entities that are controlled or are under common control with other entities should be viewed together as one antitrust actor. Likewise, Lambert cites Stone & Wright to argue that a “common control” approach to the single entity status question would be a more economically sensible approach than the one taken by the American Needle Court with its Copperweld-like references back to “unity of interests.”

But what is “control”? Is it a majority of the board of directors? Or a majority of equity ownership? Is it influence through shareholder agreements, options, and other even more sophisticated devices of infinite creation? Is it derivative control? Is it a veto power, a super-majority for “major decisions,” de facto control, or something else? See also the varying approaches in the detailed regulations defining “person” and “control” for purposes of the Hart-
Scott-Rodino Pre-Merger Notification Act and the “controlled group” definitions found in the Internal Revenue Code. Notwithstanding such efforts, insofar as antitrust single entity questions are concerned: “[A] problem is that the law does not have a crisp concept of ‘control’...neither does economics.”


Although it did not establish a “rule” or a “doctrine,” *American Needle* did more than string a series of phrases together, and the absence of a concrete “*American Needle* rule” was not an oversight. Rather, it was a recognition that in the area of single versus dual actors under Section 1, labels, status, rules, or doctrines are simply not that helpful.

The *American Needle* Court, in effect, rejected the U.S. Solicitor General’s proposed test, that would have removed competitors’ operations that have been “effectively merged” from the ambit of Section 1, while leaving their non-merged operations subject to the rule of reason. As Devlin & Jacobs note, this “hybrid test” would require an expensive, fact-intensive exercise with “precious little predictability.” By declining to follow the Solicitor General’s suggestion, the Court appeared disinterested in allowing broad dealings between competitors to be thrust outside

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74 16 C.F.R. 801.1(a)(1), 801.1(b).
75 26 U.S.C. 1563. It is not necessarily easier to grapple with “control” than it will be to determine whether, under *American Needle*, there are “independent centers of decision making” as applied to the facts at hand. See Williamson, supra, n. 42. In any event, the control test was not followed by the Supreme Court in *American Needle* because the Copperweld test of control simply did not work when applied in a context which lacked a wholly-owned subsidiary relationship and instead involved separate economic decision makers.
76 Williamson, supra, n. 42 at 2.
77 130 S.Ct. at 2216, n.9.
78 Devlin & Jacobs, supra, n.4 at 546.
of Section 1, at least in any categorical manner, via Copperweld extension or otherwise. But American Needle does not represent a great new expansion of antitrust liability.

American Needle is the latest example of a general movement away from rules and towards standards. “Rules” tend to be fairly precise “specifications of liability” that can be known before individuals act (examples are the tax laws usually and the per se rule of antitrust). “Standards” are a “multi-factor, ex post approach to antitrust adjudication,” as in most rule of reason cases. The “phrases” of American Needle are standards to be applied to the facts at hand in the particular case and are consistent with the movement away from the rule of Copperweld. Accordingly, less Copperweld-style gate-keeping and a greater role for economists may be anticipated in the post-American Needle antitrust world. See Crane, supra, n. 81 at 77-80, noting these impacts as courts shift from rules to standards.

D. Where Will American Needle Take Us?

Most future competitor collaborations will continue to be judged on a case-by-case basis under the rule of reason (albeit a quick look). The great middle ground of joint venture jurisprudence has been made even wider because most joint ventures consist of dual actors whose conduct is subject to the rule of reason. American Needle does this by requiring a “functional analysis.”

American Needle, in contrast to an applied “Copperweld doctrine,” teaches that virtually all agreements between actual or potential competitors are subject to being tested under Section


80 Although, in interesting contrast to Leegin Creative Products Inc. V. PSKS, Inc., 551 U.S. 877 (2007), American Needle moved away from a liability exemption, while Leegin moved away from a per se liability rule.


82 130 S. Ct. at 2210.
I—some may be illegal per se, some may be illegal or not following a full rule of reason analysis, yet others may be upheld or not under the rule of reason “in the twinkling of an eye.”

Given the strong preference for rule of reason analysis in American Needle, the case is unlikely to spawn a host of Section 1 exemptions as did Copperweld. Rather, most competitor collaborations will continue to be judged under the rule of reason, on a case-by-case basis.

V. COMBINED IMPACT OF COPPERWELD, DAGHER, AND AMERICAN NEEDLE ON JOINT VENTURES AND OTHER COMPETITOR COLLABORATIONS

American Needle forcefully reminds all parties to joint ventures or other horizontal collaborations that they must always be mindful of Section 1. Other than those of a parent and its wholly owned subsidiary, competitor collaborations, short of a complete merger, may never be outside Section 1, and single entity status will be difficult to confidently know or achieve in advance. The American Needle Court suggests that such an entity may exist, but the Court offers no specific description of it.83

Following are a few observations.

A. There is Still a Single Entity Defense

Despite American Needle, the single entity or unitary actor issue has not been removed from American jurisprudence.84 After all, both American Needle and Dagher were unanimous decisions of the Supreme Court, within four years of each other. When the Supreme Court reversed the Seventh Circuit in American Needle, the Court showed that Section 1 retained its vitality; however it did not repudiate Dagher or erase it from the books. Perhaps the Texaco/Shell joint venture in Dagher may serve as an example of the sort of “integrated” or

83 Id.
84 There have been post-American Needle cases finding a single entity or acknowledging the continued availability of the defense. Gonzales-Maldonado v. MMM Healthcare, Inc. 2011 U.S. Dist. LEXIS 7248 (D. Puerto Rico 2011); Stanislaus Food Products Co. v. USS-Posco Industries 2010 U.S. Dist. LEXIS 92236 (E.D. Ca. 2010); Minn. Made Hockey, Inc. v. Minn. Hockey, Inc. et al., 789 F. Supp.2d 1133 (D. Minn. 2011).
“legitimate” joint venture that might, in the proper case, be found to be a unitary actor exempt from Section 1, at least if its parents or partners are no longer competing with each other. “American Needle did not reject single-entity treatment for all actions by all joint ventures. When participants in a joint venture do not have interests separate from those of the venture, American Needle suggests that the venture acts as a single economic entity.”

Finally, it is well to remember that the single entity defense, if found, applies only to post-formation conduct and decisions of a legitimate, highly integrated joint venture or other competitor collaboration. The initial agreement between the parties whereby the arrangement was formed will still be subject to Section 1.

B. Market Definition and Market Power

Arrangements between competitors who have “market power” will be subject to the highest scrutiny. Market power is defined as the ability to raise prices above competitive levels or exclude competition for a significant period of time. NCAA vs. Board of Regents.

The Supreme Court’s most recent rule of reason summary includes the following allusion to market power: “Appropriate factors to take into account include ‘specific information about the relevant business’ and ‘the restraint’s history, nature, and effect.’ [cite omm.]. Whether the businesses involved have market power is a further significant consideration.” Leegin Creative Leather Prods. v. PSKS, Inc.

However, there is no generally recognized threshold market share that equals market power in part because market shares, by definition, can only be established retroactively and are not infallible guides to future market impacts. Courts do look at other

86 Texaco v. Dagher, 547 U.S. at 6, n.1; Grow, supra, n.30 at 485 n.216.
market factors as well, such as the identities of other competitors, ease of entry, elasticity, ability to substitute, and more.  

*American Needle* will mean more rule of reason trials, which will require proof of market shares, market analysis of trends and other factors, ease of entry into the market, and more. Invariably expert testimony from economists and others will be required. In even a “simple” case, the volume of documents is large, and the interpretations of those documents can be numerous and conflicting. In other words, such trials will be expensive.

Antitrust adjudication is thus exceedingly, and inevitably, costly. Most obviously, there are significant costs involved in simply reaching a decision. The parties themselves, with the aid of lawyers and, in most cases, economic experts, must gather, process, and present a large amount of complex data. The fact finder must then deliberate over the information presented and reach conclusions on both subsidiary issues (e.g., the contours of the relevant market) and the outcome-determinative question (e.g., whether the challenged trade restraint is “unreasonable” because it reduces overall market output). Taken together, these costs constitute the decision costs of an antitrust adjudication.

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89 There is some debate as to whether or not proof of market power must always be an essential element of a rule of reason case. “Substantial market power is an indispensable ingredient of every claim under the Rule of Reason.” *Chi. Prof. Sports Ltd. Part v. NBA*, 95 F. 3d 593, 600 (7th Cir. 1996). Professor Meese states that “courts that make a showing of market power a necessary condition in proof of a Rule of Reason claim are swimming against the tide.” A. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. Ill. L. Rev. 77,102 (2003) (hereinafter “Meese”); See J. Markham, *Sailing on a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, U. of S.F. Law Research Papers No. 2011-25 (available at: [http://ssrn.com/abstract=1916223](http://ssrn.com/abstract=1916223)) (hereinafter “Markham”) at 33-40 arguing that the above language from *Leegin* may signal that proof of market power may not always be necessary. In *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447 (1986), the government was not required to prove market power as a condition of proceeding. Nevertheless, “Courts have generally held that proof of a defendant’s market power is a prerequisite for a plaintiff seeking to satisfy its burden of proving likely anticompetitive effect [in a rule of reason case].” ABA *Antitrust Law*, supra, n. 30 at 71. See also, ABA *Joint Ventures, supra*, n. 37 at 95-100. What is clear is that the market power issue plays a role in virtually all rule of reason cases one way or the other and that resolving this issue “is often the single most complex and expensive part of an antitrust case.” Markham, *supra*, at 34.

90 Lambert, *supra*, n.33 at 877.
C. The Guidelines No Longer Provide Quite As Much Guidance

The *Antitrust Guidelines for Collaborations Among Competitors* issued by the Federal Trade Commission and the U.S. Justice Department in April 2000 (hereinafter “Guidelines”) contain certain “safety zones” for arrangements that do not fall in the *per se* category and in which the participants together hold 20% or less of the relevant market (Guideline 4.2) and certain research and development cooperative endeavors. (Guideline 4.3). They indicate that the government will tend not to challenge collaborations that allow participants in capital intensive industries to share risk that neither could reasonably shoulder alone or to bring new and innovative products to market or enter new markets, increase efficiency, eliminate redundant costs, or allow competition against a larger entrenched competitor.

While the Guidelines still provide a useful reference point, they have not been updated since they were promulgated in 2000, i.e., well prior to both *Dagher* and *American Needle*, and there have been recent calls for an updating. Furthermore, the Guidelines may conflict with both *Dagher* and *American Needle* to the extent that both of these recent Supreme Court cases suggest that an integrated joint venture should now receive “more permissive treatment than implied by the current Collaboration Guidelines.” The Guidelines were not mentioned by the Supreme Court in either *Dagher* or *American Needle*. It is no doubt good practice to revisit and reconsider guidance in light of evolving case law and experience.

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93 *Id.* at 58.
D. Summary

The Supreme Court appears to have taken the single entity antitrust analysis of joint ventures and other competitor collaborations back to where it was immediately following Copperweld but with an expanded rule of reason zone because the per se rule has receded. Broadly speaking, these arrangements fall into one of three categories: (i) sham for price fixing or market allocations; (ii) fully integrated to the extent they become a single antitrust actor; or (iii) somewhere in the middle, i.e., integrated and efficient but neither sham nor sufficiently integrated to be a single entity. The first category is per se illegal, the second is outside of Section 1 of the Sherman Act; and the third will be analyzed under the rule of reason and will be found unlawful or not depending on whether the arrangements harm competition. Careful business planners of good faith who are honest with themselves will usually be able to discern in advance if the proposal they are considering is a mere sham. Since category (ii) will be rare, these planners had better not assume it lightly. Therefore, most activity (like so much else) will be in the gray middle zone. The principal impact of American Needle is not to offer guideposts but to warn that the gray zone has widened.

VI. PUBLIC POLICY IMPACT

A. Antitrust Filters

1. Copperweld as Filter

Copperweld, properly read, was not an immunity case, even though it did abolish the intraenterprise conspiracy doctrine. It was actually a “filter” or “screening” case against “unworthy” lawsuits (i.e., those that are brought against conduct that is unlikely to ultimately result in a finding of competitive harm. On the day it was decided, Copperweld was meant to eliminate one kind of case (parent/wholly owned subsidiary), which, while nominally involving two actors, did not present dual actors as contemplated by the conspiracy provisions of the
Sherman Act. Its “doctrine” or “rule” applies only “in the absence of any potential for competition.”

This filter protected certain corporate defendants from state business tort lawsuits recast as federal treble damage actions (with recoverable attorneys’ fees), which left these corporate defendants with the unpalatable choice of: (i) settling quickly, although they had really worked no harm to competition; or (ii) litigating expensively (even if they won) and even more expensively risking a huge treble-damage judgment (plus attorneys’ fees) if they lost the case.

The primary role of such a rule is to supply a much-needed method for courts to provide for early resolution of antitrust claims concerning business arrangements that are not likely to trigger the core antitrust concern: consumer harm caused by the creation or exercise of market power. The single-entity defense provides courts an instrument to efficiently dismiss these cases while avoiding the host of social costs associated with engaging in discovery, motions, and trial for such claims. And of course, allowing such cases to proceed to discovery (and beyond) creates the possibility of judicial error, which in turn creates its own social costs.

One of the results of American Needle may be to reduce Copperweld’s utility as such a filter. Lambert reports that, at the Supreme Court oral argument in American Needle, much of the Court’s inquiry seemed to focus on the use of the Copperweld case as a screen or filter against meritless antitrust suits. Significantly, the Court also alluded to the screening function of the rule of reason itself. While Copperweld might seem “theoretically simpler”, the Supreme Court apparently did not see it that way: “In the end, the Court surmised that Copperweld, which had generated tremendous confusion among the lower courts and had led to extensive and costly disputes over single-entity status, was not a very cost-effective screening mechanism.”

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94 Feder, supra, n.26 at 418, n.59; Freeman v. San Diego Ass’n of Realtors, 322 F.3d 1133, 1149 (9th Cir. 2003).
95 Stone & Wright, supra, n.22 at 381.
96 Lambert, supra, n.33 at 926-928.
2. Other Filters

Absence of a single-entity defense does not mean that a defendant is automatically doomed to suffer expensive and lengthy litigation.

The single-entity defense, of course, is not the only error-cost filter available to judges in cases involving horizontal restraints otherwise reviewable under the Rule of Reason. The Rule of Reason itself requires plaintiffs to define a relevant market, demonstrate competitive harm, and offer proof that efficiencies do not dominate anti-competitive effects. In addition to these filters within the Rule of Reason, pleading standards provide yet another filter for claims of antitrust conspiracies unlikely to generate competitive harms.97

Lambert notes that the rule of reason is itself an effective screening device that “may acquit joint actions that appear to be output-enhancing.” He concurs with Hovenkamp (supra, n.58) that Copperweld was decided in a world of much broader per se illegality, whereas today Section 1 is more flexible and per se rules have become more relaxed.

[T]oday, there is less need to rely on expansive applications of Copperweld to permit procompetitive activity to continue, and there’s more freedom to let the rule of reason distinguish the lawful from the unlawful.98

97 Stone & Wright, supra, n.22 at 388.

98 Lambert, supra, n.33, at 928 (n.321) [quotation marks omitted]. As an example of the evolution of the per se rule in the context of competitor collaborations, see the earlier case of Citizen Publishing Co. v. United States, 394 U.S. 131, 134 (1969). The United States Supreme Court was faced with the situation where two competing newspapers entered into a joint operating agreement that provided that each paper would retain its own news and editorial department and corporate identity but combined all other aspects of operations. Pursuant to this arrangement, there was an agreement as to the prices to be charged for advertising and subscriptions. Also profits were pooled, and areas of marketing were agreed upon. The Court held that it was a violation of the antitrust laws to enter into an agreement in such a form. However, the Court indicated that the aspects of the joint operation that were objectionable were those that dealt with price fixing, market control, and profit pooling. In other words, the physical combination of the production and distribution equipment of each paper was not illegal per se.

Profit pooling was also discussed in American Needle (130 S. Ct. 2215) when the NFL urged that the fact of profit pooling went to show that the venture was a single, unified entity. The Court rejected this argument by noting that the parties not only had an interest in the joint venture’s profits but retained an interest in their own individual profits. Therefore the decisions that they made for the joint venture and the decisions they made for themselves individually were inextricably linked.

The evolutionary recession of the per se rule in the Supreme Court can be seen from Citizen Publishing to American Needle. In 1969, the Court appeared to treat profit pooling as almost per se illegal. In 2010, the Court was (Footnote continued on next page)
Finally, Lambert comments that a flexible rule of reason together with, when appropriate, “quick look” review and Twombly-type dismissals\(^99\) can provide “a workable substitute for Copperweld immunity . . . . [T]he advent of a structured, more predictable, and ‘cheaper’ rule of reason, coupled with more stringent pleading standards, enabled the Court to jettison another costly screening mechanism.”\(^100\) See also Stone & Wright: “[M]uch of the work of the Copperweld doctrine has been subsumed by the ‘plausibility’ pleading requirement [of Twombly].”\(^101\)

3. A Filter is Not an Exemption

If, indeed, the Supreme Court’s current view of Copperweld is that it was essentially a filter, then it is not particularly surprising that the Court took the occasion of American Needle to reach out and undercut those post-Copperweld decisions and arguments that would have turned the “Copperweld doctrine” into an antitrust exemption or immunity. A substantive exemption from the Sherman Act, which is the “constitution” of U.S. antitrust law, is not to be readily inferred from a case the Supreme Court views as a pleading screen or filter to be employed with other similar quasi-procedural devices.

The American Needle Court appears to have been motivated, in part at least, by a concern that the Copperweld doctrine was evolving into a rule of applicability beyond the context of parent/subsidiary, which seemed an inappropriate development in view of the fact that the

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\(^100\) Lambert, supra, n. 33 at 928.

\(^101\) Stone & Wright, supra, n. 22 at 371.
Copperweld’s true origin was more of a pleading-type filter or standard. In the words of Hovenkamp & Leslie:

But the last twenty-five years has seen a considerable contraction of per se rules and broad expansion of the rule of reason. In cases such as American Needle, Topco, and Seely, which involve both corporate restraints imposed on independent firms and joint ventures with significant integrative potential, the soundest approach is to view them as involving both collaborative activity and ancillary restraints—situations for which antitrust’s rule of reason is appropriate. Courts should evaluate the anticompetitive effects of resulting restraints, not immunize them from antitrust liability through the intraenterprise doctrine.\(^\text{102}\)

B. The “Antitrust Gap”

Copperweld acknowledged that: “It cannot be denied that §1’s focus on concerted behavior leaves a ‘gap’ in the Act’s proscription against unreasonable restraints of trade.”\(^\text{103}\) As explained by Devlin Jacobs:

Antitrust law affords the single firm much greater freedom of action than it allows independent collaborators. If the single company is not a monopolist, it is free to do almost anything. If it is or might be a monopolist, then the law may constrain its behavior, but only upon a showing that the behavior wrongfully excludes actual or potential rivals. Collaborators, by contrast, are viewed with beady-eyed suspicion: only they can commit per se violations of the antitrust laws; and they must justify challenged collaborative conduct falling outside the scope of per se analysis by reference to plausible consumer benefits and a showing that the concerted conduct is no greater than necessary to achieve those gains.\(^\text{104}\)

This “antitrust gap” results because a single firm may be acting in an anticompetitive manner (a refusal to deal or the setting of a price or a decision as to which market to sell into or an output reduction), but the conduct in question is not that of a monopolist or, even if by a

\(^{102}\) Hovenkamp & Leslie, supra, n.54 at 873.

\(^{103}\) 467 U.S. at 774-775.

\(^{104}\) Devlin & Jacobs, supra, n.4 at 544.
monopolist, not otherwise sufficient to invoke Section 2. Since it is the act of only a single actor, it is not covered by Section 1. The Copperweld majority did not appear unduly concerned about this gap when it eliminated conspiracies between parent and subsidiaries from Section 1: “It will simply eliminate treble damages from private tort suits masquerading as antitrust actions.”

Professor Areeda et al., noted that Justice Stevens and the other Copperweld dissenters appeared sympathetic to narrowing the gap:

The Copperweld dissenters would retain the intraenterprise conspiracy doctrine in order to fill the gap between unilateral conduct by actual or prospective monopolies reached under Sherman Act § 2 and multiparty conduct reached under § 1. Is it necessary or wise to use Sherman Act § 1 to reach potentially anticompetitive conduct by a single enterprise that lacks the actual or prospective monopoly power required for liability under § 2 but that happens to include several separately incorporated units? Is it the purpose of the statute to do so?

This gap appears to have grown in recent years with the narrowing of liability under Section 2. Brunell cites, by way of example, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP and notes, “Section 2 is designed to address exclusionary, not collusive, conduct.” Likewise, the American Needle Court affirmed that Section 2 covers only conduct that “‘monopolize[s]’ . . . or ‘threatens actual monopolization’ . . . a category that is narrower than restraint of trade [under Section 1].”

Justice Stevens, in the Copperweld dissent, spends considerable time analyzing the “antitrust gap” and is bothered that the Copperweld majority “leaves a significant gap in the enforcement of §1 with respect to anticompetitive conduct that is entirely unrelated to

\[105\] 467 U.S. at 777.
\[106\] Areeda, Kaplow and Edlin, supra, n.59 at 241
\[108\] Brunell, supra, n.79 at 1389 (n.28).
\[109\] 130 S.Ct. at 2208 (citing Copperweld 467 U.S. at 767).
efficiencies associated with integration.”¹¹⁰ The dissent argues that Section 1 should be available to deal with anticompetitive restraints imposed by affiliated corporations even though those entities do not possess sufficient power to be monopolist under Section 2.¹¹¹ The dissent concludes by objecting to the majority’s creation of “a per se rule of antitrust immunity.”¹¹² To the extent that Justice Stevens, the Copperweld dissenter, became Justice Stevens, the American Needle author, American Needle could be read as an indicator that the Court is in the process of narrowing the gap by expanding Section 1.¹¹³

Nevertheless, on balance, such an expansion of Section 1 seems unlikely in the present judicial climate, and it would be an over-reading of American Needle to think otherwise. The “antitrust gap” was created by Congress in the way it structured the Sherman Act with Section 1 applying to joint activities and Section 2 applying to unitary activities. In the absence of congressional action, courts are unlikely to use American Needle to consider Copperweld as having been effectively reversed and then proceed to ignore the admonition of Copperweld about not allowing state court business lawsuits to turn into federal suits with remedies of treble damages and attorney’s fees. The American Needle Court signaled that, while Section 1 may have been expanded, a major course change with respect to the antitrust gap was not intended: “[If every unilateral action that restrained trade were subject to antitrust scrutiny, then courts would be forced to judge almost every internal business decision.”¹¹⁴ Justice Stevens has left the

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¹¹⁰ 467 U.S. at 789.
¹¹¹ Id. at 790-791.
¹¹² Id. at 796.
¹¹³ Another route to narrowing the gap would be a renewed emphasis on Section 2: “The extended tolerance for anticompetitive conduct resulting from the [Copperweld] majority’s tight statutory construction would not inhibit effective enforcement if the attempted monopoly offense under Section 2 was construed to forbid all blatantly anticompetitive single firm conduct.” Sullivan & Grimes, supra, n. 28 at 185.
¹¹⁴ American Needle, 130 S.Ct. 2209 at n.2
Court, and, for the present, it is enough to compare the substance over form in *American Needle* to the form over substance in *Copperweld* as discussed above.

C. **Rule of Reason in Ascendancy**

While *Dagher* seemed to suggest that a “fully integrated” joint venture might be outside of Section 1 altogether, *American Needle* provided a course correction to that suggestion. But *American Needle* itself did not change rule of reason analysis applicable to joint ventures. Even in today’s post-*American Needle* world, a joint venture or other competitor collaboration will be upheld under the rule of reason if it can be shown that the arrangement: (1) will result in an integration of support services and produces some efficiencies;\(^{115}\) (2) is a reasonable device for eliminating over-capacity; (3) is not a sham to allow the parties to increase the price, or allocate customers and markets; (4) does not result in prices being significantly raised in the market; and (5) allows the parties to continue competing for business outside the venture as vigorously as before.\(^{116}\)

The *Copperweld* majority expressed concern for corporate “efficiency of control [and] economy of operations.”\(^{117}\) However, there was no explanation of why the rule of reason was insufficient to address such concerns.\(^{118}\) In his *Copperweld* dissent, Justice Stevens stated: “The Rule of Reason has always given the courts adequate latitude to examine the substance rather

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\(^{115}\) It has been observed, however, claims about expected efficiency gains are “easier to allege than to prove.” U.S. Dept. of Justice Merger Guidelines (1982), Section V(A); See also L. Sullivan, *Handbook of the Law of Antitrust* § 204 at 631 (1977). “Efficiencies are difficult to verify and quantify . . . .” Guidelines, *supra*, n.91 Sec. 3.36(a).


\(^{117}\) 467 U.S. at 773.

\(^{118}\) *See* Areeda, Kaplow & Edlin, *supra*, n.59, at 240.
than the form of an arrangement when answering the question whether collective action has 
restrained competition within the meaning of § 1.”¹¹⁹

This has proved prescient. The primary impact on the rule of reason of the recession of 
both the *per se* rule and the *Copperweld* doctrine is that more cases are going to be decided under 
the rule of reason. The extent to which the rule of reason may efficiently function will depend, to 
an extent, on how often devices such as “quick look,” ancillary restraints, and other “filters” are 
employed. On balance, litigation of joint venture and other competitor collaboration issues will 
become more expensive and comprehensive.

A related question of course is whether the rule of reason is structured so as to be able to 
perform the task at hand. There are those who have expressed concerns. Professor Markham 
argues that the Supreme Court has “obscured the meaning and proper application of the rule” to 
the extent that “the rule of reason is no rule at all . . . ” and urges instead “a scheme of 
presumptions” to shift back toward a structural approach to decision making.¹²⁰ Professor Meese 
believes that “[T]he present structure of Rule of Reason analysis, as articulated by the courts, the 
enforcement agencies, and most leading scholars, rests on an outmoded model of competition 
and is thus inherently biased against contractual integration that produces nontechnological 
efficiencies.”¹²¹ However, the Supreme Court’s reference to the rule of reason is not an 
overconfidence in the capacity of that rule (or the courts that must apply it) to adjudicate the 
matter at hand. Rather it reflects the reality that “status” and “labels” constructed ahead of an

¹¹⁹ 467 U.S. at 778.
¹²⁰ Markham, *supra*, n.89 at 3 and 53.
¹²¹ Meese, *supra*, n.89 at 80. See F. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 12, 27 (Aug. 1984); 
see also Brown & Robison, *supra*, n.70 (at n.21-23).
actual case and controversy are apt to be harder to define, easier to circumvent, and generally more inconsistent and quickly irrelevant than will be case-by-case rule of reason analysis.

As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.

*Leegin Creative Leather Products.*

**VII. CONCLUSION**

“When *American Needle* is read, not in isolation but in light of the Court’s entire section 1 jurisprudence, it appears to be consistent with an effort to minimize the sum of decision and error costs related to antitrust adjudication.”

To the extent anyone was looking to *American Needle* for clear, objectively discernable guideposts, there must be disappointment. However, it is the argument of this article that such a search was doomed from the outset, and to criticize the Supreme Court for failure to lay down such a road map is wide of the mark because the Court was not intending to do so.

Concluding comments: (i) *Copperweld* was not a rule or a doctrine—it was a case and, as such, must always be read in conjunction with its facts; (ii) the subsequent “*Copperweld* doctrine” was infinitely looser and less structured than the case from which it sprang because it was untethered from the facts of that case; (iii) lower courts thought that *Copperweld* directed them to look at substance not form—after all, that is what the case said, and the results were many and varied with no agreed rule or antitrust theory of the firm; (iv) *Dagher* did not have

122 551 U.S. at 898-99.

123 Lambert, *supra*, n.33 at 928.
much to do with *Copperweld* and was not a single entity case; (v) *Dagher*’s “single entity” reference cannot be joined with a version of the “*Copperweld* doctrine” so as to create a broad carve-out of joint ventures and other competitor collaborations from Section 1 because *American Needle* failed to support such a reading by basically ignoring *Dagher* and reviving the dissent in *Copperweld*; (vi) there is no *American Needle* “rule” or “doctrine,” and this was not oversight or lack of purpose by the Court—it was intentional (see *Copperweld* dissent); and (vii) as a result of the foregoing, we have all been referred back to the rule of reason, which is premised on the Court’s confidence that the rule is able to deal with the matters at hand.

To those urging more objective criteria, this state of the law is no doubt far from being theoretically ideal but, on balance, is reflective of the practical reality of the moment.