

# American Needle, Dagher, and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1?

**Chris Sagers**

This summer, on the last regularly scheduled sitting of its October 2008 Term, the Supreme Court granted certiorari in a case that could have far-reaching consequences throughout the law of Sherman Act Section 1. In the case under review, *American Needle, Inc. v. NFL*,<sup>1</sup> the Seventh Circuit, by unanimous panel decision, entered a striking ruling in the long-running debate over whether professional sports leagues can be “single entities” under *Copperweld*.<sup>2</sup> The court not only said yes, but did so in what is possibly the most likely context in which the member teams could have competed with one another—the licensing of their trademarked logos to makers of sports memorabilia. The Supreme Court granted certiorari on the question whether defendant National Football League acts as a single entity as to this conduct.

Among the decision’s most important consequences will be what it has to say about another recent decision, the underappreciated 2006 ruling in *Texaco Inc. v. Dagher*.<sup>3</sup> If the Court reverses in *American Needle*, it may signal that *Dagher* is to be a narrow decision, limited to a fairly peculiar set of facts. If the Court affirms, and particularly if it does so in explicit reliance on *Dagher*, then *American Needle* could, as a practical matter, do significant damage to the enforceability of Section 1 of the Sherman Act; it could in effect immunize significant swaths of concerted conduct among competitors. It would imply that comparatively unintegrated arrangements, like trademark licensing agreements among the NFL member teams, are just as “economically integrated” as the defendants’ joint venture in *Dagher*. In short order we would see horizontal arrangements throughout the economy purporting to have “integrated” around some shared common purpose.

Currently, no Supreme Court case gives very clear guidance as to how courts are to distinguish the actions of “integrated” joint ventures from those subject to at least rule of reason analysis under Section 1, and as will be suggested below, it is hard to imagine how those lines could be drawn. So as a worst-case scenario, the effect of affirmance of the Seventh Circuit’s decision in reliance on *Dagher* could be something like repeal of Section 1 as to wide-ranging horizontal conduct, other than the hardest-core, naked price fixing and market allocations.

■ **Chris Sagers is**

Associate Professor of Law at the Cleveland-Marshall College of Law, Cleveland State University. The author thanks Peter Carstensen for feedback on this article.

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<sup>1</sup> 538 F.3d 736 (7th Cir. 2008), cert. granted, 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-661).

<sup>2</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), held that a corporation cannot conspire for purposes of Sherman Act Section 1 with its wholly owned subsidiary. Technically, the Court ruled only on that narrow issue, but it also made clear its intent that “substance, not form, should determine” all conspiracy issues, *id.* at 773 n.21. The Court implied that Section 1 should be inapplicable to the potentially many contexts in which some integration “does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests,” *id.* at 771, but rather represent “a business enterprise [that has] . . . structure[d] itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment,” *id.* at 773. Lower courts have expanded *Copperweld* “single entity” treatment to a variety of contexts beyond the wholly owned subsidiary situation at issue in *Copperweld*. See *infra* notes 47–48 and accompanying text.

<sup>3</sup> 547 U.S. 1 (2006).

### In the Background: *Texaco Inc. v. Dagher*

When the Court decided it, *Dagher* did not attract very much interest. Apparently, it just did not seem that significant for the Court to reject per se analysis as to the pricing decisions of a manufacturing joint venture that had already been formed. The Court's opinion was unanimous, after all (the newly appointed Justice Alito not participating), and creation of the venture at stake had even received Federal Trade Commission approval.<sup>4</sup> At least in the academic literature and trade press, *Dagher* received little sustained analysis. Among those who noticed it, some welcomed it as a useful clarification or a comparatively small and desirable step toward freeing joint ventures from litigation burdens,<sup>5</sup> and there was some suggestion it might have special relevance to energy industries.<sup>6</sup> The exception, though, was one article that now seems eerily on target: James Keyte, a defense-side practitioner representing sports leagues and with an admitted interest in advocating their treatment as "single entities," observed the decision's broad potential to restrain the scope of Section 1. As he put it, "the days when one of the best Supreme Court cites for single-entity treatment of joint ventures was Justice Rehnquist's dissent from denial of certiorari in [a 1982 case] are long gone."<sup>7</sup>

*Dagher* is, in fact, a big deal. At a minimum it was a striking change of course, or at least of emphasis, in the Court's treatment of joint venture activity. *Dagher* seemed to take the outcome of the case before it as obviously determined by the defendants' formal relationship. Prior Supreme Court case law, even aside from the "intra-enterprise conspiracy" cases disavowed in *Copperweld*, contained stern authority opposing evasions of Section 1 through formal arrangements or by labeling an arrangement a "joint venture."<sup>8</sup> In the mid-1970s and 1980s, although the Court's sympathy for "economic integrations" of all sorts began growing dramatically, it never suggested that the potential synergies of some arrangement, or the fact that it might be "an important and

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<sup>4</sup> The Commission settled an earlier Section 7 challenge to the venture with a consent decree permitting the venture in question, subject only to a handful of limited divestitures. The decree did not mention the pricing decisions (or any other conduct) that would follow consummation. Defendants settled parallel challenges with several state attorneys general under similar terms. See *Shell Oil Co.*, 125 F.T.C. 769 (1998).

<sup>5</sup> See, e.g., Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court's Dagher Decision*, 57 EMORY L.J. 735 (2008); James H. "Hart" Holden, *Joint Ventures and the Supreme Court's Decision in Texaco, Inc. v. Dagher: A Win for Substance over Form*, 62 BUS. LAW. 1467 (2007).

<sup>6</sup> See, e.g., Peter C. Carstensen, *Using Dagher to Refine the Analysis of Mergers and Joint Ventures in Petroleum Industries and Beyond*, 19 LOY. CONSUMER L. REV. 447 (2007). Cf. James A. Keyte, *Dagher and "Inside" Joint Venture Restraints*, ANTITRUST, Summer 2006, at 44, 44:

The precise holding in . . . *Dagher* was not unanticipated by the antitrust community: for most practitioners, it made perfect sense for the Court to hold that it is not per se illegal for a lawful, economically integrated joint venture to set the prices of the venture's own products, even if those products included two formerly competing brands (Texaco and Shell). For others, *Dagher* merely confirms that so-called structural joint ventures—in which all the relevant competitive assets of the joint venture parents are placed in the venture—should be treated essentially as mergers. From both perspectives, in reversing the court of appeals, *Dagher* could be viewed as a *sui generis* correction of another Ninth Circuit aberration.

<sup>7</sup> Keyte, *supra* note 6. Mr. Keyte represents the National Hockey League as amicus before the Supreme Court in *American Needle*, and he recently reiterated his views of *Dagher* in James A. Keyte, *American Needle Reinvents the Single-Entity Debate*, ANTITRUST, Summer 2009, at 48.

<sup>8</sup> In the frequently cited *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), for example, the government sued a U.S. corporation that had entered into horizontal market allocation agreements with two foreign affiliates in which it owned stock, but with control of neither. Justice Black famously wrote that he could "find [no] support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.'" *Id.* at 598. *Timken* remains at least nominally good law, as even *Copperweld* merely distinguished it on its facts, implying that a shareholder with something less than controlling ownership could conspire with its corporation. 467 U.S. at 764–65. At least some lower courts and newest Justice consider *Timken* to have been overruled only to the extent that it endorsed the intra-enterprise conspira-

increasingly popular” one,<sup>9</sup> should exempt it entirely from Section 1 scrutiny.<sup>10</sup> *NCAA v. Board of Regents* went so far as to say that while “a joint selling arrangement may make possible a new product by reaping otherwise unattainable efficiencies,” it remained the case that “joint ventures have no immunity from the antitrust laws.”<sup>11</sup> Even *Copperweld* observed that “joint ventures,” despite their potential efficiencies, “are judged under a rule of reason . . . .”<sup>12</sup>

But, admittedly, a seed was planted as early as 1982, when the *Maricopa County* Court offhandedly observed (in incautious dicta) that “partnerships [and] other joint arrangements” are ordinarily “regarded as . . . single firm[s] . . . .”<sup>13</sup> Even though the integration that the Court considered in *Dagher* was probably not quite so “integrated” as the Court said it was,<sup>14</sup> and even though the Court arguably reversed *sub silentio* a fair body of learning on the ancillary doctrine,<sup>15</sup> the Court relied heavily on that dictum from *Maricopa County* to rule in *Dagher* that the pricing

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cy rule as to wholly owned subsidiaries. See *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 336 (2d Cir. 2008) (Sotomayor, J., concurring); *infra* notes 56–61 and accompanying text. Likewise, it seems clear that *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), both finding per se liability for some internal decisions of joint ventures, would be decided differently now and will eventually be overturned as to the issue of per se treatment. And yet they remain nominally good law.

<sup>9</sup> *Dagher*, 547 U.S. at 5.

<sup>10</sup> During the late 1970s, and in particular in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and *Broadcast Music, Inc. v. CBS.*, 441 U.S. 1 (1979), a majority of the Court began to express concern that its traditional per se rules might be prohibiting innovation and beneficial private arrangements. Those cases inaugurated the present period during which the Court has fairly often refused to apply per se treatment to arrangements that under its prior precedents could be classified as per se illegal. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999) (requiring attenuated rule of reason review of professional organizations’ restrictions on price and quality advertising); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986) (refusing to judge horizontal group refusal to provide information to insurers under per se rule, though admitting it could be characterized as a boycott); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.*, 472 U.S. 284 (1985) (refusing to judge the membership rules of a purchasing cooperative under the per se rule, while noting that under many of its prior decisions the rules could be labeled a horizontal boycott); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (refusing to apply per se rule to horizontal output restraint so that Court could consider possible efficiencies); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978) (refusing to apply per se rule to group refusal to engage in price negotiation). While many of these cases have been called “quick look” or “abbreviated rule of reason” cases, and while they have caused a lot of confusion, see, e.g., Stephen Calkins, *California Dental Association: Not a Quick Look, But Not the Full Monty*, 67 ANTITRUST L.J. 495 (2000) (lamenting the confusion), some courts and commentators have come to believe that they are really best understood as simply applications of the “ancillary restraints” doctrine. The Court has never explicitly adopted that doctrine, but it explains most of the quick look cases nicely. See, e.g., *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985) (citing *NCAA* and *BMI* as authority for ancillary analysis); Thomas A. Piraino, *A Proposed Antitrust Approach to Buyers’ Competitive Conduct*, 56 HASTINGS L.J. 1121, 1153 n.148 (2005).

<sup>11</sup> *NCAA*, 468 U.S. at 113 (internal quotation omitted).

<sup>12</sup> 467 U.S. at 768.

<sup>13</sup> *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 356 (1982) (emphasis added) (“[In] partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. . . . the partnership is regarded as a single firm competing with other sellers in the market.”).

<sup>14</sup> Specifically at issue in *Dagher* was one of two arrangements the parties established, this one constituting an agreement not to compete with respect to about 25 percent of gasoline sold in the Western United States. The venture, despite the inevitably presumed productive synergies, also managed to produce a substantial price increase despite evidence of falling costs. See Carstensen, *supra* note 6, at 448. Moreover, while it is true that the parties did not compete as to refining and distribution in the territory covered by their two agreements, they did compete in markets around the world in exploration and drilling, and oversees they competed in refining and distribution. Perhaps most significant is that their agreement was created only for a five-year duration and in fact it terminated after four. See *id.*

<sup>15</sup> *Dagher* applied an approach that was arguably at odds with a body of lower court case law and agency interpretation. Previously, even very tightly integrated joint ventures could be addressed under the ancillary rule. That is, even where a restraint was part of the venture’s basic work it still had to be “reasonable” (even if, were it a naked restraint, it would be per se illegal). See, e.g., *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995); *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981); *Fed. Trade Comm’n & U.S. Dep’t of Justice., Antitrust Guidelines for Collaborations Among Competitors* (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (setting out

decisions of an “economically integrated” joint venture that was not a “sham” could not be per se illegal. While technically the Court left open the question whether those decisions might violate the rule of reason,<sup>16</sup> 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. This follows from repeated dicta, as when the Court characterized the conduct challenged by the plaintiff as internal decision making by “little more than . . . a single entity . . . .”<sup>17</sup>

### Sports and the Single-Entity Problem

Quite a long time before *Dagher*, and even well before *Copperweld*, the courts grappled with the entity status of professional league sports, and their analysis has been driven by what are thought to be that industry’s asserted economic idiosyncrasies.<sup>18</sup> A lot has been said about these matters,<sup>19</sup> and at least two special economic features bear on the leagues’ antitrust treatment. One familiar to all antitrust watchers is that competitive sports require (or at least benefit substantially) from some centralized decision making in order for the product to be produced. Specifically, teams need some means by which to schedule games and they need some agreement on the rules by which games will be played. It also became apparent as long ago as the 19th century that fans desire play to be organized in some way to ensure that teams are appropriately matched by skill and that there be some systematic means to judge their performance (as by holding a regular season with playoffs and a championship).<sup>20</sup> This may call for seemingly anticompetitive league rules, which for example constrain recruiting, limit some expenditures, or equalize rev-

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agencies’ view of the ancillarity doctrine). But, in one fairly surprising portion of the opinion, the *Dagher* Court reversed the Ninth Circuit for applying ancillarity, holding that “the . . . doctrine has no application . . . where the business practice being challenged involves the core activity of the joint venture itself—namely, the pricing of the very goods produced and sold by [the joint venture].” 547 U.S. at 7–8. Moreover, this new ancillarity approach introduces a metaphysical distinction that seems likely to generate a lot of uncertainty. *Dagher* seems to imply that some conduct might be “outside” or other than “core” venture activity, and yet still enjoy the protection of the ancillary restraints rule. But that could only be if the conduct is “reasonably necessary” to the venture’s procompetitive purposes. When will it be the case that a restraint is not an “inside” activity, but is nevertheless “reasonably necessary” to a venture’s purposes?

<sup>16</sup> See 547 U.S. at 7 n.2 (noting that the Court considered only whether defendants’ conduct could be per se illegal because plaintiff failed to plead any rule of reason theory; though defendants briefed the argument “that Section 1 of the Sherman Act is inapplicable to joint ventures,” *id.*, the Court refused to reach it).

<sup>17</sup> *Dagher*, 547 U.S. at 6.

<sup>18</sup> The single-entity argument has never been taken as seriously in the case of college sports, and most of the case law and academic discussion of the single-entity issue has concerned professional sports. Even though universities collaborate in athletic conferences, and though it is generally thought that their collaboration there should be judged with some deference, universities are less integrated than the member teams of a professional sports league. Thus, the argument goes, single-entity treatment may or may not be appropriate for professional leagues but it would not be for college athletic conferences. In any case, any hope for single-entity treatment of college sports seems plainly foreclosed by *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).

<sup>19</sup> See, e.g., MARK CONRAD, *THE BUSINESS OF SPORTS* 1–20, 261–76 (2006); PAUL DOWNWARD & ALISTAIR DAWSON, *THE ECONOMICS OF PROFESSIONAL TEAM SPORTS* 11–40 (2000); STEFAN KÉSENNE, *THE ECONOMIC THEORY OF PROFESSIONAL TEAM SPORTS: AN ANALYTICAL TREATMENT* 1–29, 101–24 (2007); Marc Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 *FORD. INT. PROP., MEDIA & ENT. L.J.* 891 (2008); Franklin M. Fisher et al., *The Economics of Sports Leagues—The Chicago Bulls Case*, 10 *MARQ. SPORTS L.J.* 1 (1999); Nathaniel Grow, Note, *There’s No “I” in “League”*: *Professional Sports Leagues and the Single Entity Defense*, 105 *MICH. L. REV.* 183, 191–94 (2006).

<sup>20</sup> Strictly speaking, sports play can occur without this kind of centralization. Various sports have existed at different times without league control; in particular during the 19th century “barnstorming” play took place, and was rather commercially successful in professional baseball. It ultimately proved problematic, though, and rationalization by leagues evolved in one way or another in all major amateur and professional sports. See generally Edelman, *supra* note 19, at 897–99.

venues (as by pooling them).<sup>21</sup> But a second and much less noticed phenomenon is that an economic tension inheres in commercial sports, and it presents the leagues with an externality or collective action problem, because team owners have interests at odds with parity. An individual team's greater athletic success, other things equal, usually means greater profitability in gate receipts, broadcast revenues, and the sale of ancillary products like memorabilia and sponsorship rights.

The latter fact seems largely to explain why successful leagues have in every case been organized as tightly integrated pools of separately owned teams. True single-entity organization has been attempted several times in professional sports, mostly during the mid-1990s (it seems generally acknowledged that the attempts of this period were aimed at securing *Copperweld* immunity<sup>22</sup>). So far such attempts have not worked well financially, and those that have survived have done so only following organizational changes to permit separate team ownership. Though their problems probably have more than one explanation,<sup>23</sup> it appears that the single-entity form's chief weakness as a business model is that investors oppose it.<sup>24</sup> While much of the single-entity rhetoric has been based on the teams' purportedly shared interests, their interests are actually in fairly direct pecuniary conflict, even as to the activity that is allegedly least commercial: on-field play. This fact has some significance to the problem in *American Needle*.

Throughout about thirty years or so of case law, leagues of all shapes and sizes have worked to convince everyone that, in light of their economic peculiarities, they are antitrust single entities. Though the effort got a boost from an early suggestion by Robert Bork,<sup>25</sup> an early trial court opin-

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<sup>21</sup> See CONRAD, *supra* note 19, at 11–15.

<sup>22</sup> While there had been true single-entity organizations well into the past, *see, e.g.*, David Fintz, *Note, The Women's Right to Participate in the Game of Baseball*, 15 CARDOZO J.L. & GENDER 641, 647–51 (2009) (discussing the history of one such league, the All-American Girls Professional Baseball League, founded by Cubs owner Phillip Wrigley in 1943 as a single non-profit corporation; the AAGPBL was the league featured in the film *A League of Their Own*), a new wave of several of them emerged in the mid-1990s. While their centralized organization was also said to promise scale economy, a chief purpose of these new leagues' single-entity form was antitrust strategy. See CONRAD, *supra* note 19, at 15–17; Edelman, *supra* note 19, at 900–03.

<sup>23</sup> It is often argued that without separate ownership fans will not believe that competition among the teams is honest. *See, e.g.*, *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1251 (2d Cir. 1982); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 605 (7th Cir. 1996) (*Bulls II*) (Cudahy, J., concurring); Fisher et al., *supra* note 19, at 5–6; Grow, *supra* note 19, at 194. The claim seems at least incomplete. It is belied by the experience of the MLS and the WNBA, *see infra* note 24, and it also seems that the concern for honest competition could be addressed by a visible, strong, and fully independent Commissioner, a fixture that all of the major leagues have adopted. *See* Edelman, *supra* note 19, at 906–07.

<sup>24</sup> The best evidence on point was the creation of Major League Soccer (MLS) and the creation of the Women's National Basketball Association (WNBA). The MLS was initially conceived as literally a single entity—one corporation that would own all the teams as well as the facilities, the referees, and the central administration. What is so interesting is that it did not work. The league in that structure could not attract sufficient capital, and the general explanation has been that individual investors desire to own a team with better prospects than others, and hope to outperform the others, for the sake of greater profitability. So the MLS settled on a fairly complex hybrid structure combining a strong central hierarchy with some individual autonomy for team “investor-operators.” *See* Edelman, *supra* note 19, at 900–03. At the moment, in fact, there is agitation to make the MLS teams even more independent. *See* Grahame L. Jones, *MLS Looks Way Down the Field*, L.A. TIMES, Mar. 29, 2006, at D8. The WNBA's experience was similar. Originally conceived as a single entity wholly owned by the existing NBA teams, the league foundered financially and its governing board decided in 2002 that the only way to attract sufficient new capital was to allow individual team ownership. *See* CONRAD, *supra* note 19, at 18–20.

<sup>25</sup> ROBERT BORK, *THE ANTITRUST PARADOX* 278–79 (1978) (“[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams. . . . In this case, the league is best viewed as being the firm . . .”).

ion,<sup>26</sup> and a few tidbits of ambiguous but much-cited support from Supreme Court opinions,<sup>27</sup> the many federal opinions to address the question have almost unanimously disagreed. It is probably not fair to say that the circuits have categorically ruled it out, since most of the opinions describe the issue as fact-sensitive. However, the First,<sup>28</sup> Second,<sup>29</sup> Third,<sup>30</sup> Sixth,<sup>31</sup> and Ninth Circuits<sup>32</sup> have ruled against single entity status for sports leagues. Somewhat less clear authority can be found in the Eighth and D.C. Circuits.<sup>33</sup> There is also the problem that the Supreme Court itself once opened the door for Section 1 liability as against the NFL, though admittedly it did not directly address the single-entity issue.<sup>34</sup> The only authority supporting single-entity treatment had been from the Seventh Circuit, and prior to *American Needle* it had remained dicta.<sup>35</sup> Notably, sev-

<sup>26</sup> *San Francisco Seals, Ltd. v. NHL*, 379 F. Supp. 966 (C.D. Cal. 1974).

<sup>27</sup> Justice Rehnquist gave the idea some support in *NFL v. North American Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J. dissenting from denial of cert.). The Second Circuit in that case had reversed a bench trial verdict finding the NFL immune from Section 1 as a single entity. *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982). While Justice Rehnquist did not argue that defendant NFL was immune under a single-entity theory, and argued in favor of applying an ancillarity standard to the league's conduct, he noted as part of his reasoning that "[a]lthough individual NFL teams compete with one another on the playing field, they rarely compete in the marketplace." 459 U.S. at 1077. Furthermore he analogized the NFL to a law firm that might impose non-compete rules on its own partners. *Id.* at 1078. Likewise, in dicta in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), the Court discussed certain aspects in which the NFL is more like one firm than several competitors. *Id.* at 248–49. Finally, the idea was given some support in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), which based its rule of reason treatment of a horizontal output restraint on the fact that defendant NCAA had the need for internal cooperation in order to produce its product.

<sup>28</sup> *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002); *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994).

<sup>29</sup> *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982).

<sup>30</sup> *Mid-South Grizzlies v. NFL*, 720 F.2d 722, 786–87 (3d Cir. 1983).

<sup>31</sup> *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005).

<sup>32</sup> *L.A. Mem. Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir. 1984).

<sup>33</sup> In both *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), and *Smith v. Pro Football, Inc.*, 593 F.2d 173 (D.C. Cir. 1978), the courts upheld judgments against the NFL and member teams for Section 1 violations. This seemingly confirms that at least sometimes the league and its teams are not single entities, though neither opinion explicitly addressed the single entity issue. It might also be relevant that both opinions involved labor relations with players, an area that even strong proponents of single-entity treatment believe should be an exception to the single-entity finding. *See, e.g., Bulls II*, 95 F.3d at 600; *Grow, supra* note 19.

Much of the authority against single-entity treatment predates *Copperweld*, and it has been argued that *Copperweld* overruled or modified it. *See, e.g., Grow, supra* note 19, at 199–201. But the courts to have considered that argument have disagreed. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 n.17 (9th Cir. 2003); *St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851, 856 (8th Cir. 1998) (noting lower court's finding that NFL's single-entity defense was barred by collateral estoppel, following *L.A. Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984), and further that that decision remained good law even though it predated *Copperweld* and the Eighth Circuit's own ruling in *City of Mt. Pleasant v. Associated Electric Cooperative*, 838 F.2d 268 (8th Cir. 1988). However, because the appeal was resolved on other grounds the court did not actually reach that question itself.).

<sup>34</sup> In *Radovich v. NFL*, 352 U.S. 445 (1957), the Court reversed dismissal of a player's antitrust claim against the league, which had been granted on the district court's view that the "baseball exception" of *Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200 (1922), should apply to football as well. The Court did not explicitly address the single entity issue. However, as the petitioner observed before the Court in *American Needle*, the Court did purport to find all of the defendant NFL's "remaining contentions" to be "lacking in merit," and the NFL's briefing before the *Radovich* Court included an argument that the teams were "quasi partners" and that "to refer to a conspiracy among the member teams of the [NFL] is to disregard the nature of the enterprise." *American Needle, Inc. v. NFL*, No. 08-661 (U.S. Nov. 17, 2008) (petition for certiorari).

<sup>35</sup> *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667 (7th Cir. 1992); *Bulls II*, 95 F.3d at 593. There is one other peculiar and much more limited bit of support for single-entity status from the Fifth Circuit. In *Eleven Line, Inc. v. North Texas State Soccer Association*, 213 F.3d 198 (5th Cir. 2000), a panel found that a conspiracy could not be alleged against the "[m]oms and dads" who volunteered as coaches and in other capacities in a non-profit amateur soccer league for school-age children, despite their league's adoption of allegedly anticompetitive eligibility rules promulgated by state and national soccer organizations. Judge Jones' reasoning is fairly unclear on this point, but appears to have been at least partially driven by the fact that the "[m]oms and dads . . . [were] not economically motivated . . ." 213 F.3d at 205.

eral circuits have explicitly found or noted in dicta that member teams compete in various ways “off the field,”<sup>36</sup> and even the Seventh Circuit opinions acknowledge that leagues should be considered multiple entities for some purposes.<sup>37</sup>

### ***American Needle***

***The Seventh Circuit Opinion.*** Then came Judge Kanne’s opinion in *American Needle*. In late 2000 the teams of the NFL voted collectively to enter into a ten-year exclusive license with Reebok to produce headwear bearing the teams’ trademarked logos. Thus ended what had been a long period of some competition among headwear manufacturers. Prior to 1963 the teams had individually licensed their own marks directly to manufacturers or through agents, and in many cases a team would license more than one manufacturer to make products bearing its mark. In 1963, some of the teams established a California corporation to act as their licensing agent. In 1982 a successor entity was given the exclusive right to license all the teams’ marks. Even after that the agent continued to license more than one maker to use its marks. Interestingly, each of the major league sports organizations in the United States have created wholly owned licensing arms with some exclusive rights to license the teams’ marks, and these arrangements all date to about the same time—the early 1980s.<sup>38</sup> There also was a boom in licensing revenues beginning shortly thereafter, during the 1980s and 1990s, and some league officials have fairly frankly attributed it to the consolidation of league-wide licensing in these entities.<sup>39</sup>

We cannot yet know quite what plaintiff American Needle’s theory of harm will be, given the early stage of the proceedings. But there is some reason to believe that this pattern of the collectivization of the NFL teams’ licensing, and in particular the NFL’s Reebok contract, has had bad effects already. Even with no discovery at all as to the question of the exclusive deal’s purpose or effect, plaintiff American Needle was able to adduce evidence of substantial and persistent price increases for the products now exclusively made by Reebok.

Judge Kanne’s opinion affirming summary judgment for the defendant dutifully quotes portions of *Copperweld* and summarizes existing Section 1 case law on sports leagues, but it only offers two actual rationales for the ruling. First, Judge Kanne notes that the teams had been collectively licensing their trademarks for a long time (since 1963).<sup>40</sup> What really seems much more important was his rejection of the idea that the question should depend to any extent on whether the teams could have competed with one another. He writes first that the panel “[was] not convinced that the NFL’s single-entity status . . . turns *entirely* on whether the league’s member teams can compete with one another . . . .”<sup>41</sup> Then, with virtually no analysis of whether their ability to com-

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Likewise, the Central District of California’s 1974 ruling in *San Francisco Seals*, 379 F. Supp. at 966, was never explicitly overturned but is presumably no longer good law under *L.A. Coliseum Commission*, 726 F.2d at 1381.

<sup>36</sup> See, e.g., *Sullivan v. NFL*, 34 F.3d 1091, 1098 (1st Cir. 1994); *L.A. Mem. Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1389–90 (9th Cir. 1984); *Mid-South Grizzlies v. NFL*, 720 F.2d 722, 786–87 (3d Cir. 1983).

<sup>37</sup> *Bulls II*, 95 F.3d at 600 (“Sports are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld*’s functional question one league at a time—and perhaps one facet of a league at a time, for we do not rule out the possibility that an organization such as the NBA is best understood as one firm [in some cases] . . . , but is best understood as a joint venture [in others]”).

<sup>38</sup> See CONRAD, *supra* note 19, at 268–76.

<sup>39</sup> See Stuart B. Chris, *Sports Logo Licensing Boom Keeps Growing*, DAILY NEWS REC., June 9, 1988, 2 (quoting official of Major League Baseball Properties, MLB’s licensing unit, as attributing rise in license revenue to “taking control of licensing from the 26 individual clubs”).

<sup>40</sup> 538 F.3d at 744. Though he characterized this point as the “most important[.]” it actually seems irrelevant. As a few of the parties have pointed out in briefing to the Supreme Court, that a conspiracy has succeeded for a long time cannot determine its legality.

<sup>41</sup> 538 F.3d at 743 (emphasis added).

pete *could* be relevant to their entity status, he writes that “with that said, American Needle’s assertion that the NFL teams have deprived the market of independent sources of economic power unravels.”<sup>42</sup> The brief analysis following that claim boils down to the panel’s view that “the NFL teams share a vital economic interest in collectively promoting NFL football.”<sup>43</sup>

In other words, a unanimous panel of a federal court of appeals has now held the following conduct to be categorically exempt from Section 1 liability: a collection of business firms that happened to share an “economic interest in collectively promoting” one product (league-sanctioned football games) could establish a horizontal conspiracy fixing the price of a different product (team-sanctioned, team-specific hats), having quite different economic characteristics and as to which they have competed even in the recent past. They may also boycott all but one downstream distributor of that product with the purpose of maximizing revenue from sales of that different product.

**Consequences.** The conjunction of *Dagher* and an affirmance in *American Needle* could be corrosive to antitrust enforcement. A major open question under *Dagher* is just how broadly it should be read. While many have taken *Dagher* to mean simply that the conduct of joint ventures displaying some significant integration cannot violate Section 1 per se, another possible reading is that all “internal” decisions concerning the venture’s “core” conduct should be immune from Section 1. If the *American Needle* Court frames the question before it as how to resolve that open question, and then the Court affirms, there would remain the important job of identifying the class of entities that are sufficiently “economically integrated” so that their internal conduct is immune from Section 1.

This would create at least two very hard problems. First, there would remain no meaningful line between single- and multiple-entity conduct.<sup>44</sup> The courts are uninterested in any “complete unity of interest test” that might be borrowed directly from *Copperweld*,<sup>45</sup> and less demanding “unity of interest”<sup>46</sup> tests tend to be extremely amorphous and give really no guidance at all.<sup>47</sup> The underlying problem is that, though the courts and most commentators use the phrase with a lot of confidence, “joint venture” is no term of art, and is not, contrary to the *Dagher* Court’s view, even

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<sup>42</sup> *Id.* Importantly, plaintiffs were afforded no discovery as to whether the NFL teams did or could compete with respect to trademark licenses to headwear manufacturers, and in fact the panel ruled against American Needle on a Rule 56(f) discovery dispute on that point, which was also on appeal. *Id.* at 740–41.

<sup>43</sup> *Id.*

<sup>44</sup> One of the best analyses of the problem, by a former Deputy Assistant Attorney General in the Antitrust Division, was Judge Boudin’s theoretical digression in *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002), discussed *supra* notes 28 and accompanying text. Having worked through a careful analysis of the problems that single-entity distinctions pose, he concluded that “[o]nce one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases.” *Id.* at 59.

<sup>45</sup> See, e.g., *Bulls II*, 95 F.3d at 598 (characterizing a proposed test for single-entity status requiring “complete unity of interest” as “silly” because even corporate parents and their wholly owned subsidiaries can have internal conflicts of various kinds).

<sup>46</sup> A “unity of interest” test is simply one that determines whether two formally distinct defendants are an antitrust single entity by asking whether they have sufficiently shared interests. See, e.g., *Oksanen v. Page Mem. Hosp.*, 945 F.2d 696, 703 (4th Cir. 1991) (characterizing the relevant test under *Copperweld* to be whether defendants share a “unity of interest,” and finding such a unity between a hospital and the medical staff board charged with making its personnel decisions).

<sup>47</sup> This was true, for example, in the Seventh Circuit *American Needle* ruling, which was based almost entirely on a finding, supported by no citation to record evidence, that the member teams of the NFL share a collective interest in “promoting” their main product of live “NFL Football.” See also *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2005) (non-profit group and an umbrella group with which it was affiliated cannot conspire); *City of Mt. Pleasant v. Assoc. Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988) (supplier members of electricity cooperative cannot conspire, even though they are legally separate and have no overlapping ownership).

really a “form of business organization” at all. It is more an offhand, colloquial generalization; it is like colloquial use of the word “partnership,” which can mean anything from a loose grouping of community activists, to an agreement in principle among world leaders, to a marriage of man and wife. The second hard problem follows from the first. An immunity so powerful and so malleable as the one seemingly adopted in *American Needle* will create a very big loophole in Section 1 that business will quickly exploit. Problems like these have actually already manifested themselves, even prior to *Dagher*; ever since *Copperweld*, the range of relationships that lower courts have found to be single entities has spread substantially beyond the wholly owned subsidiary situation.<sup>48</sup>

***The Solicitor General’s Brief and Reading the Tea Leaves.*** *American Needle* was a blockbuster when the Seventh Circuit decided it, and yet it managed to get even more interesting this summer. Just after the new President’s inauguration and the assembly of his antitrust team, the Court invited the views of the Solicitor General (SG) on the question of certiorari.<sup>49</sup> The SG’s brief urged the Court to deny it.<sup>50</sup>

*American Needle was a blockbuster when the Seventh Circuit decided it, and yet it managed to get even more interesting this summer.*

The SG’s brief is a puzzle, both for why it was requested and for what it says. First, it is intriguing that the Court sought the SG’s involvement. The request only requires four votes, and neither the number of votes nor their identities are made public, but one must wonder why exactly the Court was interested in the administration’s views of this case. While it is possible that the Court merely meant to offer the administration a courtesy as to this area of enforcement policy that would likely change following the election,<sup>51</sup> it is tantalizing to speculate whether there were some more practical, and perhaps cynical, motives. A bloc of four and perhaps five of the Justices presumably would be pleased to affirm in the case, two probably pretty firmly favor reversal, and the final one is more mysterious.<sup>52</sup> So who sought the SG’s views, and why? We will likely never know, of course, but one interesting possibility presents itself. None of the Justices presumably would expect the new administration to favor affirmance. So Justices who would support affirmance, or at least frown on antitrust scrutiny of joint ventures, presumably would not favor giving the new antitrust enforcers such a prominent chance to state their views of the case. Perhaps some group of four Justices who favor broad antitrust enforcement thought that a way to keep the case from

<sup>48</sup> See, e.g., *Jack Russell Terrier Network*, 407 F.3d at 1027; *Day v. Taylor*, 400 F.3d 1272 (11th Cir. 2005) (a manufacturer and its distributor-agents cannot conspire, and the “vastness” of the network of agents is irrelevant); *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) (franchisor and its nationwide chain of retail franchisees cannot conspire); *Oksanen v. Page Mem. Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc) (hospital and its medical staff are single entity, even with respect to medical staff peer review decisions); *City of Mt. Pleasant*, 838 F.2d at 268.

<sup>49</sup> The Court made the request one month after President Obama’s inauguration, just after the confirmation of his new Solicitor General and just before the new AAG’s confirmation vote. He had already designated a new FTC Chairman.

<sup>50</sup> Brief of United States as Amicus Curiae Opposing Certiorari, *American Needle, Inc. v. NFL*, No. 08-661 (U.S. May 28, 2009), available at <http://www.usdoj.gov/atr/cases/f246500/246555.htm>.

<sup>51</sup> EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 516–17 (9th ed. 2007) (noting that requests for the SG’s views on certiorari ordinarily indicate that a case either raises important government interests not represented by the parties or is of unusual public significance).

<sup>52</sup> While it goes without saying that this speculation is hazardous, it seems likely that there are four votes for affirmance, based on the authorship and make-up of antitrust opinions in the last several years: Chief Justice Roberts and Justices Alito, Scalia, and Thomas. Justice Kennedy seems likely to favor affirmance as well, given his authorship of such opinions as *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), and *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Presumably Justice Stevens will vote for reversal, given his frequent dissents in the Court’s pro-defendant decisions of the past few decades (including, importantly, in *Copperweld*, though not in *Dagher*, from which no one dissented). Justice Ginsburg too seems a likely vote for reversal, as she has joined some Stevens dissents. One might expect Justice Breyer, the Court’s strongest antitrust expert, to oppose a decision so logically flawed and so damaging to antitrust enforcement, but one might also have expected him not to join in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), for the same reasons.

the Court was to solicit the SG's likely opposition to certiorari. If so, that might shed some light on the ultimate line-up of votes in the case. It would imply at least four votes for reversal, and if one of them was departing Justice Souter, his likely replacement is a judge who also will probably vote to reverse.<sup>53</sup>

Even though the signatories to the SG's brief opposing certiorari include top Supreme Court lawyers, a recent dean of the Harvard Law School, and a handful of antitrust powerhouses,<sup>54</sup> the brief is substantively quite weak. It begins by stressing that the opinion below is incorrect and could have major, negative consequences. Then it works through a handful of quite strained and unpersuasive arguments that the case is not well suited for review under the Court's certiorari standards.

While it is probably wise that we mortals mostly stay out of the Court's procedural arcana and the special politics surrounding the SG,<sup>55</sup> the sense on reading the SG's brief is that the signatories did not really doubt that certiorari would be appropriate. Rather, one suspects that they did not want to see this Court decide this case. One must guess that neither the new President, nor his top antitrust enforcers, nor SG Kagan could desire to watch as, following a denial of certiorari, the courts of the Seventh Circuit apply the *American Needle* ruling to ever wider classes of conduct once thought to satisfy the Section 1 multiplicity requirement easily. Yet they view affirmance as much worse.

**Two Bright Spots.** For those of us who would like to see Section 1 of the Sherman Act survive without sub silentio judicial repeal, there are at least two bright spots in these matters. The first is also quite intriguing, and possibly ironic. American Needle's able trial counsel, who developed a persuasive fact case at pretrial even with very limited discovery, is joined on the Supreme Court appeal by the same team that argued for defendant Texaco in the *Dagher* case. American Needle's side will be argued by Glen Nager, the head of Jones Day's appellate practice and among the country's most accomplished Supreme Court advocates. Among the other stellar Jones Day lawyers who join him on the briefs is Joe Sims, a chief figure in the firm's antitrust practice and one of the country's leading antitrust practitioners. Mr. Sims in particular brings a gravitas, such that the Court is unlikely to perceive him as just some pro-plaintiff populist; not only was he on the defendant's brief in *Dagher*, he was a Deputy Assistant Attorney General for antitrust first appointed in the Ford administration.

The other bright spot is that the line-up of likely votes in the case<sup>56</sup> would be made substantially stronger for reversal now that Judge Sotomayor has been elevated to the Court as Justice Sotomayor. In her very recent concurrence in *Major League Baseball Properties v. Salvino, Inc.*,<sup>57</sup> she implicitly disagreed with the reasoning in Judge Kanne's *American Needle* opinion. The facts in *Salvino* were nearly on all fours with *American Needle*.<sup>58</sup> While the court did not address any

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<sup>53</sup> See *infra* notes 56–61 and accompanying text.

<sup>54</sup> Specifically, the signatories were SG Kagan and two deputies from her office, as well as the acting General Counsel of the Federal Trade Commission, the Assistant Attorney General for Antitrust, the head of the Antitrust Division's Appellate Section, and another Antitrust Division attorney.

<sup>55</sup> Cf. GRESSMAN ET AL., *supra* note 51, at 237 (arguing that the main reason the Court grants the SG's certiorari petitions so much more frequently than any others is simply that the SG understands the Court's certiorari standards so well).

<sup>56</sup> See *supra* note 52.

<sup>57</sup> 542 F.3d 290 (2d Cir. 2008).

<sup>58</sup> Plaintiff Major League Baseball Properties (MLBP) was an entity substantially identical to the exclusive licensing agent in *American Needle*, NFL Properties, Inc. MLBP brought infringement claims against defendant Salvino, a maker of sports memorabilia. Salvino alleged in antitrust counterclaims that the exclusive license arrangement was in effect a price-fixing conspiracy in violation of Section 1.

single-entity issue,<sup>59</sup> it did find that a professional sports league's joint licensing arrangement could be challenged only under the rule of reason and that it was legal under that standard. In her concurrence then-Judge Sotomayor took the majority sternly to task for its view that the licensing arrangement did not involving any actual agreement on price, finding that view in conflict with prevailing law.<sup>60</sup> Critically, she cited *Dagher* for the view that the court "must decide . . . whether the [licensing arrangement], which is price fixing in a literal sense, should nevertheless be reviewed under a rule of reason in light of [its] other efficiency-enhancing benefits."<sup>61</sup> This seems important, again, because the Court in *American Needle* may frame the question before it as whether *Dagher* can be read to hold all "internal" joint venture decisions as to "core" conduct simply immune from Section 1. Her citation to *Dagher* seems to reject that reading.

With any luck, at least one of the seemingly likely votes for affirmance will be convinced of the danger and implausibility of the *American Needle* ruling. And then with real luck, Justice Sotomayor will write for the resulting majority, and will recap her excellent analysis from *Salvino*. If she does, here's hoping, for the sake of meaningful future antitrust enforcement, that she will cite to *Dagher* in exactly the same way. ●

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<sup>59</sup> This is presumably because a single-entity finding would be precluded under Second Circuit precedent. *See* *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982).

<sup>60</sup> She attacked the majority's "flawed view that the Clubs have made no agreement on price," and wrote that "[a]n agreement to eliminate price competition from the market is the essence of price fixing." 542 F.3d at 334–35. "Were the majority correct," she added, "competing companies could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products. So long as no agreement explicitly listed the prices to be charged, the companies could act as monopolists through the 'joint venture,' setting prices together for their competing products . . ." *Id.* at 335. Also encouraging is her reliance on *Timken* and on the Collaboration Guidelines' observation that "labeling an arrangement a 'joint venture' will not protect what is merely a device to raise price or restrict output . . ." *Id.* at 336 (citing Collaboration Guidelines, *supra* note 15, at 9).

<sup>61</sup> *Id.* at 337 (citing *Dagher*, 547 U.S. at 5).