

Antitrust Conspiracies in Franchise Systems After *American Needle*

BARRY M. BLOCK & MATTHEW D. RIDINGS

Successful franchise systems require extensive collaboration between the franchisor and its franchisees and among franchisees themselves. Some of these collaborative activities have successfully been challenged as contracts, combinations, or conspiracies in restraint of trade in violation of basic antitrust law stated in Section 1 of the Sherman Act.¹ Certain organizations, such as sports leagues or franchise systems, have argued, sometimes successfully, that their collaborative activities should not be subject to Section 1 challenges. Their argument is that the league or a franchise system should be regarded as a “single economic enterprise” and thus “incapable of conspiring within the meaning of [Section] 1.”²

The U.S. Supreme Court’s May 2010 decision of *American Needle, Inc. v. National Football League*³ rejected single economic enterprise treatment for certain licensing activities of the National Football League. This article considers whether franchise systems may still be treated as single economic enterprises incapable of conspiring in light of the *American Needle* decision and, if so, how franchise system activities should be evaluated under the single economic enterprise theory as compared to more traditional modes of antitrust analysis.

A PRIMER IN ANTITRUST LAW

Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade.⁴ A contract, combination, or conspiracy (sometimes referred to as an “agreement”) is a requirement for a violation of Section 1. If two companies offer to sell their competing products or services at the same price, there is no violation as long as the competitors set their prices independently, i.e., without an agreement. If the competitors set their prices based on an agreement, there is a clear violation of the antitrust laws, which could subject the companies (and those who reached



Barry M. Block



Matthew D. Ridings

the agreement) to both criminal penalties and civil liability.

The courts have interpreted *restraint of trade* to mean “unreasonable” restraint of trade.⁵ For instance, a contract to sell certain goods at a certain price restrains trade: the seller is restrained from selling the products covered by the contract at a different price. But that would not be illegal. Some restraints of trade are regarded as so clearly unreasonable that they are illegal per se, i.e., illegal without the need to consider the actual impact on competition. Other restraints are judged under the rule of reason, which means that the restraint may be legal or illegal depending upon its actual effect on competition.

DOES AN AGREEMENT EXIST?

Whether there is an agreement and whether it is illegal under Section 1 depends on a variety of factors. One of these factors is whether the alleged agreement is between parties with a horizontal or a vertical relationship. A horizontal agreement is an agreement between companies at the same level of the chain of distribution. This could include, for instance, an agreement between two franchisors or between two franchisees. A vertical agreement is an agreement between companies at different distribution levels, such as one between a franchisor and a franchisee.

Horizontal restraints such as price fixing or allocation of territories or customers are illegal per se and may be subject to criminal prosecution. At one time, certain vertical restraints, including vertical price fixing or airtight restrictions on territories or customers, were also illegal per se.⁶ Now, at least under federal antitrust law, both of these are analyzed under the rule of reason.⁷

An agreement can be a tacit agreement or understanding.⁸ An agreement also can be implied by circumstantial evidence. In regard to horizontal restraints such as price fixing, circumstantial evidence could include the exchange of price information between competitors,⁹ conscious parallel conduct,¹⁰ or meetings or other communications between competitors.¹¹ But none of these, by itself, is sufficient to prove an agreement.¹² A plaintiff relying on circumstantial evidence to prove an agreement in restraint of trade “must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.”¹³

In regard to vertical price fixing, also known as resale price maintenance, there is no agreement if a seller merely announces its resale price policy and refuses to deal with resellers who do not follow it.¹⁴ Also, there is no agreement if a seller merely recommends a resale price, and a reseller unilaterally decides to follow it.¹⁵ However, if the seller or

Barry M. Block is a partner with Thompson Hine LLP in Dayton. Matthew D. Ridings is an associate with the firm in Cleveland.

reseller actually agrees on a resale price,¹⁶ if a reseller follows the price set by the seller after being coerced to do so,¹⁷ or if a reseller is terminated as a reseller pursuant to a price agreement between the seller and competing resellers, there is an agreement and thus vertical price fixing.¹⁸

In certain limited circumstances, horizontal agreements on price or other restraints may be judged under the rule of reason rather than being found illegal per se. This includes restraints that arise out of a joint venture and that were necessary to create a product¹⁹ or to market a product.²⁰

DEFINING A SINGLE ECONOMIC ENTERPRISE

COPPERWELD CORP. V. INDEPENDENCE TUBE CORP.

Before 1984, the intraenterprise conspiracy doctrine allowed a court to find an illegal contract, combination, or conspiracy for purposes of Section 1 between a parent company and its wholly owned subsidiary, between two wholly owned subsidiaries, and among other commonly owned and controlled companies under appropriate circumstances.²¹ An intraenterprise conspiracy could be found where “there [was] enough separation between the [conspiring] entities to make treating them as two independent actors sensible.”²²

However, in *Copperweld Corp. v. Independence Tube Corp.*,²³ the U.S. Supreme Court decided that there could be no agreement under Section 1 between a corporation and its wholly owned subsidiaries.²⁴ The Court also reiterated that no contract, combination, or conspiracy under Section 1 could result from “coordinated conduct among officers or employees of the same company” or the “internally coordinated conduct of a corporation and . . . its unincorporated divisions.”²⁵

According to the Court, “Congress treated concerted behavior more [harshly] than unilateral [conduct]” because “[c]oncerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of independent centers of decisionmaking that competition assumes and demands.”²⁶ However,

the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. . . . A division within a corporate structure pursues the common interests of the whole. . . . [A] rule that punishes coordinated conduct . . . because a corporation delegated certain responsibilities to autonomous units [could] discourage [a] corporation[] from creating divisions with their presumed benefits.²⁷

This could “deprive consumers of the efficiencies” and other benefits that may arise from decentralized management and would serve no antitrust purpose.²⁸ For similar reasons, a company and its wholly owned subsidiaries should be viewed as a single enterprise having a complete unity of interest.²⁹

Since 1984, the *Copperweld* doctrine has been expanded by the lower courts to provide that there can be no contract, combination, or conspiracy under Section 1 between wholly owned subsidiaries of the same parent corporation or between two corporations with common ownership. The

courts have applied the *Copperweld* doctrine to a corporation and its partially owned subsidiaries in some cases and rejected it in others.³⁰

In the 2006 case of *Texaco, Inc. v. Dagher*,³¹ the Supreme Court considered whether it is per se illegal for two companies to agree to set prices charged by a joint venture. In *Dagher*, Texaco and Shell Oil “consolidate[d] their operations in the western United States,” forming a joint venture, Equilon, and “ending competition between the two companies in the domestic refining and marketing of gasoline.”³² “Equilon’s board of directors would [be] comprise[d] [of] representatives of Texaco and Shell Oil, and Equilon gasoline would [continue to] be sold to downstream purchasers under the original Texaco and Shell Oil brand names.”³³ “Equilon set a single price for both Texaco and Shell Oil brand gasoline.” A class of Texaco and Shell Oil service station owners claimed that this was per se unlawful price fixing.³⁴ The Court rejected this claim, holding that the policy “amount[ed] to little more than price setting by a single entity . . . and [was] not a pricing agreement between competing entities” because Texaco and Shell no longer competed in the relevant market.³⁵

In other cases, defendants have also sought to have the courts treat various forms of organizations, such as sports leagues, health care systems, and franchise systems, as single economic enterprises. The results have been mixed.³⁶ Some decisions have concluded that an organization can be treated as a single economic enterprise for some facets of its operation but not for others.³⁷ This significantly enlarges the number of organizations that can make use of the single economic enterprise doctrine.

FRANCHISE CASES UNDER COPPERWELD

A number of franchisors have asserted that a franchisor and its franchisees should be treated as a single economic enterprise and thus incapable of conspiring.³⁸ But in some cases, courts have found that franchisors and franchisees are capable of conspiring. In the 1968 pre-*Copperweld* case of *Perma Life Mufflers, Inc. v. International Parts Corp.*,³⁹ plaintiffs, a group of franchisees, claimed that the franchisor and its parent corporation violated Section 1 by, among other things, “preventing them from selling outside the[ir] . . . territory, tying the sale of mufflers to the sale of other products in the [franchisor’s] line, and requiring them to sell at fixed . . . prices.”⁴⁰ The Supreme Court rejected the single economic enterprise defense asserted by defendants on the basis that the franchisor was capable of conspiring with its parent companies and two other subsidiaries.⁴¹ This position has been overruled by *Copperweld*.⁴² The *Perma Life* Court further provided an alternative reason for rejecting the single economic enterprise defense: plaintiff could “clearly charge a combination” between itself and the franchisor if the franchisee “unwillingly complied with the restrictive franchise agreements” or between the franchisor and other franchisees “whose acquiescence in [the franchisor’s] firmly enforced restraints was induced by” threats of termination.⁴³

Two post-*Copperweld* decisions⁴⁴ have followed this

alternative holding from *Perma Life* and found that franchisors and franchisees are capable of conspiring in violation of Section 1. These cases arose from complaints by franchisees that the franchisor was forcing them to buy a product or service (the tied product) to maintain their franchise (the tying product). In both cases, the single economic enterprise defense was denied, but plaintiffs' antitrust claims failed on other grounds. In a third post-*Copperweld* case,⁴⁵ the court found that a franchisor and its prospective franchisees were capable of conspiring in regard to prices charged to warehouse distributors that would be competing with the franchisees.

Notwithstanding these decisions, a number of post-*Copperweld* cases, particularly in the U.S. Court of Appeals and certain district courts located in the Ninth Circuit, have applied the single economic enterprise defense to franchise systems. In the 1993 case of *Williams v. I.B. Fischer Nevada*,⁴⁶ plaintiff (Williams) asserted that Section 1 was violated by the no-switching clause in a franchise agreement between the franchisor of Jack-in-the-Box restaurants and the franchisee (Fischer), which was Williams's former employer. The no-switching clause provided that the parties agreed "not to offer employment to a manager of another Jack-in-the-Box within six months of termination from employment" at a previous Jack-in-the-Box restaurant without a written waiver from the previous owner.⁴⁷

The district court dismissed the Section 1 claim on the basis that the franchisor and the franchisee were a single enterprise incapable of conspiring for purposes of Section 1.⁴⁸ The court emphasized that "[f]or two separate corporations to act as a single entity, it [was] not necessary that one be owned, wholly or in part, by the other."⁴⁹ Instead, "[t]he emphasis is properly placed upon the commonality of interest of the corporations and the degree of control exercised by the dominant corporation."⁵⁰

Examining the commonality of interest, the court found that the franchisor had done "everything in its power to minimize competition and promote uniformity [among the] franchises"⁵¹: it provided for exclusive territories,

each franchise[e] serve[d] substantially the same products; the products [were] serve[d] . . . in the same manner; the franchisor develop[ed] products and services for all franchise[es]; the employees dress[ed] alike; the decor of each franchise [was] similar; [and] the franchises [were] advertised as a single enterprise with a single logo.⁵²

This structure benefited both the franchisees and the franchisor: the franchisees "prosper[ed] because of the uniformity of quality food and service" and because of "an enhanced reputation."⁵³

At the same time, it benefited the franchisor, which was

"able to sell more franchises at a higher price[]" and collect royalties.⁵⁴ Notably, the court rejected the claim that the franchisees were in competition because they could vary their prices. According to the *Williams* court, consumers are unlikely to travel from one exclusive territory to another to obtain a lower price on relatively inexpensive items.⁵⁵ The commonality of interest was also supported by the fact that the franchisor continued to receive "a royalty fee and a marketing fee based upon a percentage of the [franchisee's] gross sales."⁵⁶

Examining the degree of control, the court found that the franchisor exercised almost complete control over all the decisions affecting the operation of the franchise, including the hours of operation, the type of equipment that

could be used, the insurance that the franchisee carried, and a requirement that the franchisee "comply with all of the specifications . . . in detailed manuals supplied by [the franchisor]."⁵⁷

*Hall v. Burger King Corp.*⁵⁸ concerned an antitrust claim by a former franchisee that alleged that the franchisor had "conspired with . . . majority [(white)] franchisees to limit the opportunities of minority franchisees."⁵⁹ Although the court found no evidence of conspiracy, it also stated that the conspiracy claim nonetheless "would fail because [the franchisor] and its franchisees are incapable of conspiring with each other."⁶⁰

In *Search International, Inc. v. Snelling & Snelling, Inc.*,⁶¹ a Texas district court found that a franchisor of career and temporary personnel staffing businesses was incapable of conspiring with its franchisees under the single economic enterprise doctrine.⁶² The court examined other franchise cases and noted that whether a conspiracy was possible hinged on "the facts of the particular relationship at issue [and] . . . whether a 'unity of interests' existed such that concerted activity was not possible."⁶³ In *Search International*, the franchise agreement

inextricably link[ed] the economic interest[] of [the franchisor] and its franchisees and creat[ed] a relationship in which [the franchisor] maintain[ed] almost complete control. For [instance], [the franchisor] own[ed] all of the improvements, . . . advertising, . . . [and] inventions developed by [the] franchisees as well as all goodwill associated with [the franchisor]'s proprietary marks.⁶⁴

"Although the franchise agreement allow[ed] solicitation of clients without territorial restrictions," the court found that this "clause [did] not create a conflict of interest[] between [the franchisor] and its franchisees that would negate the common interest[] . . . created by the rest of the franchise agreement."⁶⁵ Also, plaintiff "offer[ed] no evidence . . . that the corporate stores actually compete[d] with the franchises."⁶⁶

American Needle will make it more difficult for a franchisor to argue that the franchise system is a single economic enterprise.

In *Abbouds' McDonald's, LLC v. McDonald's Corp.*,⁶⁷ the district court considered a claim alleging a Section 1 conspiracy between the franchisor and other franchisees to exclude plaintiff franchisee from bidding on certain promising stores. The court found that plaintiff lacked standing because, among other reasons, it is impossible under law for franchisees and franchisors to conspire in restraint of trade since they are considered to be a single economic entity.⁶⁸ Although McDonald's does not contract with its franchisees for geographic exclusivity, the rest of the factors that the *Williams* court took into account were present.⁶⁹

The 2007 Alaska district court case of *Alaska Rent-A-Car, Inc. v. Cendant Corp.*⁷⁰ concerned a company (CCRG) that owned the licensor of Avis car rental businesses that subsequently acquired the Budget rental car business. A franchisee of Avis claimed "that the agreements between CCRG and the Avis and Budget licensees [under which] the licensees [could] 'opt into' participation in the national corporate accounts constitute[d] a horizontal restraint on competition."⁷¹ The court rejected this claim on a number of grounds, including that the franchise system constituted a single economic enterprise.⁷² In support of this finding, the court noted that the Avis and Budget operations were "indistinguishable" from those described in the *Williams* decision: "the economic interests of [the franchisor] and [the franchisee] [were] not divergent," both sought to increase the market share for Avis, and neither Avis nor Budget was a competitor of the franchisee in its exclusive territory.⁷³

In a 2011 Washington district court case, *Danforth & Associates, Inc. v. Coldwell Banker Real Estate, LLC*,⁷⁴ plaintiff franchisee alleged that the franchisor and another franchisee conspired in violation of Section 1 to prevent plaintiff from opening another franchise. The court dismissed this claim on the grounds, among others, that under the *Copperweld* doctrine as applied in the Ninth Circuit, the franchisor and the other franchisee were not capable of conspiring.⁷⁵

AMERICAN NEEDLE

In *American Needle, Inc. v. National Football League*,⁷⁶ which was handed down in May 2010, the Supreme Court considered whether the National Football League (NFL) and its licensing affiliates should be treated under the *Copperweld* doctrine as a single economic enterprise incapable of conspiring with respect to the licensing program being challenged. The Court concluded that the *Copperweld* doctrine did not apply and that NFL's licensing activities were "not categorically beyond the coverage of § 1." Rather, "[t]he legality of th[e] concerted action [by the NFL teams and the licensing entity] must be judged under the Rule of Reason," and the Court remanded the case to the lower courts for further consideration.⁷⁷

"[T]he NFL is an unincorporated association [of] 32 separately owned professional football teams." "In 1963, the teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property."⁷⁸ "Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, [including American Needle, Inc.]

permitting them to manufacture and sell apparel bearing team insignias."⁷⁹ "In . . . 2000, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked [hats] for all 32 teams."⁸⁰ American Needle filed suit, claiming "that the agreements between the NFL, its teams, NFLP, and Reebok violated" Section 1 (and also Section 2 prohibiting monopolization).⁸¹

The Court stated a number of reasons that the *Copperweld* doctrine did not apply to NFL's licensing activities. First, although NFLP was a limited liability company and legally distinct from NFL and its teams, the Court "eschewed . . . formalistic distinctions [such as whether the alleged conspirators are legally distinct entities] in favor of a functional consideration of how [they] actually operate."⁸² Thus, the Court has "repeatedly found instances in which members of a legally [distinct] entity violated § 1 when the entity was controlled by a group of competitors."⁸³

Second, the

key is whether the alleged "contract, combination or . . . , conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry . . . is whether there is a "contract, combination . . . or conspiracy" amongst "separate economic actors pursuing separate economic interests" . . . such that the agreement "deprives the marketplace of independent centers of decisionmaking."⁸⁴

NFL and NFLP did not qualify as a single economic enterprise under these tests. Each of the NFL teams is independently owned and managed. The teams compete "to attract fans, for gate receipts and for contracts with managerial and playing personnel."⁸⁵ The teams also compete in the market for intellectual property, such as licensing trademarks to apparel companies.⁸⁶ A collective decision by the NFL teams to license their separately owned trademarks "deprives the marketplace of independent centers of decisionmaking" and therefore of actual or potential competition.⁸⁷

The Court cited certain factors that made the decision closer: NFLP was a separate corporation, NFLP had its own management, and "most of the revenues generated by NFLP are shared by the teams on an equal basis."⁸⁸ At least with respect to the marketing of property owned by teams, these were outweighed by other factors.⁸⁹ "NFLP's licensing decisions are made by the 32 potential competitors"; each of the thirty-two teams "owns its share of the jointly managed assets"; and "[a]part from their agreement to cooperate in exploiting those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating . . . to the granting of licenses to use its trademarks."⁹⁰ Though not cited as a factor in *American Needle*, the Court noted elsewhere that "the teams are able to and have at times sought to withdraw from this arrangement."⁹¹ Also, notwithstanding the form of organization of NFLP, "[t]he teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being."⁹²

It is difficult to discern whether the Court would have allowed single common enterprise treatment if the facts were slightly different. For instance, if NFLP had been authorized to grant exclusive licenses without a vote of the teams, would that have been enough to allow *Copperweld* treatment for at least this facet of its operations? If the Court is weighing factors, there is an implication that the factors could result in single economic enterprise treatment in some circumstances.

The Court also seems to leave open the possibility that NFLP could be a single economic enterprise for some facets of its operations, even if not all. NFL and NFLP had argued that they “were incapable of conspiring, . . . at least with respect to the conduct challenged” by American Needle.⁹³ The district court in this case found that NFL and NFLP had so integrated their operations “respecting the exploitation of intellectual property” that they should be treated as a single entity “in that facet of their operations.”⁹⁴ The appellate court agreed, stating that the “question of whether a professional sports league is a single entity should be addressed not only ‘one league at a time,’ but also ‘one facet of a league at a time.’”⁹⁵ The Supreme Court reversed the Seventh Circuit’s holding but said that “NFLP’s actions are subject to § 1, at least with regards to the marketing of property owned by the separate teams.”⁹⁶

Although the Court in *American Needle* found the NFL teams to be potential competitors, it did not find the marketing arrangement for trademarked items to be illegal per se. Rather, the Court remanded the matter to the lower courts to judge the legality of the concerted action under the rule of reason.⁹⁷

IS THE COPPERWELD DEFENSE STILL VIABLE?

American Needle will make it more difficult for a franchisor to argue that the franchise system is a single economic enterprise. However, franchise systems differ significantly in many relevant respects from the NFL and NFLP arrangements considered in *American Needle*. Therefore, *American Needle* does not completely foreclose the argument that a franchise system should be treated as a single economic enterprise for at least some facets of its operations.

There are post-*American Needle* cases allowing or describing favorably single economic enterprise treatment for a variety of nonfranchise organizations not under common ownership.⁹⁸ Also, in the post-*American Needle* case of *Danforth & Associates*,⁹⁹ discussed above, the *Copperweld* doctrine was applied to the effect that a franchisor and a franchisee are incapable of conspiring, but without any reference to the *American Needle* decision.

Franchise systems generally are much more likely than the NFL and NFLP arrangements to pass the critical test that

the arrangement does not bring together separate decision makers. NFLP was controlled by the NFL teams, which were potential economic competitors; the decision to grant exclusive licenses was made by a vote of the teams.¹⁰⁰ In contrast, numerous operational decisions in many franchise systems are made by (or, at least, are subject to approval by) one decision maker, i.e., the franchisor. These decisions may include the location of an operation, granting of exclusive territories, advertising, restrictions on products or services sold, restrictions on where sales may be made or solicited, specifications for product ingredients and processing, and requirements for building specifications or leasehold improvements. Although

franchisees can make some separate decisions such as the hiring of personnel, these decisions are often subject to parameters set by the franchisor (e.g., sources of supply) or subject to approval by the franchisor (e.g., advertising).

It is more difficult to distinguish franchise systems from NFL and NFLP on the second test: whether there are “separate economic actors pursuing separate economic interests.”¹⁰¹ The *American Needle* Court said that NFLP and the NFL teams had separate economic interests. NFL and NFLP have some common interest in promoting professional football, but, on other matters, their interests are separate. They are separately owned companies competing in many facets of their operations, including recruitment of players and management personnel, fan support, and sales of trademarked apparel.

Much of the same thing can be said about many franchise systems. The franchisors and the franchisees have a common interest in promoting the franchise system; but, like NFLP, the franchise outlets are separately owned and often, at least to some extent, compete for customers. However, the separate economic interests for franchise systems are much less pronounced than for NFL and NFLP. Franchise systems, particularly business format franchise systems, are generally designed to promote uniformity in logos, methods of operation, products and services provided, and the quality of those products and services. The franchisees present themselves to the public as one system; a publicized quality control problem at one outlet is likely to harm all outlets. In contrast, the NFL teams may seek to differentiate themselves on and off the field with different logos, different team quality and traditions, distinct stadiums, and different marketing and public relations programs. As an example, one team may have a famous cheerleading squad, and other teams may have none.

The *American Needle* Court cited competition among the teams as a factor indicating separate economic interests.¹⁰² In *Dagher*,¹⁰³ the lack of competition between the joint venture parties was cited as a factor allowing the joint venture to be treated as a single entity under *Copperweld*.¹⁰⁴ In *Williams*¹⁰⁵ and other earlier cases described above finding

American Needle still leaves room for advocating the single economic entity defense for some facets of franchise systems.

franchise systems to be a single economic enterprise, the lack of competition between the franchisor and the franchisees or among the franchisees was often cited as a factor.¹⁰⁶

In *Search International*,¹⁰⁷ furthermore, the court stated that there was no evidence that company stores competed with franchised operations. Although franchisees could solicit customers “without territorial restrictions, this one clause [did] not create a conflict of interest[] between Snelling and its franchisees that would negate the common interests . . . created by the rest of the franchise agreement.”¹⁰⁸ In *Abbouds*,¹⁰⁹ the court found the franchise system to be a single economic enterprise even though McDonald’s did not give the franchisees geographic exclusivity.¹¹⁰

The scope of competition between a franchisor and its franchisees and among franchisees in the same franchise system will vary from one franchise system to another depending on whether the franchisor operates company outlets, whether the franchisees are granted exclusive territories, and the geographic locations of the various outlets. Even if the franchisees are granted exclusive territories, there may still be competition among them because customers can travel to different geographic areas to shop for the franchisees’ products or services.¹¹¹

However, even when franchisees do compete, the parameters of that competition are generally set by one entity—the franchisor. In *American Needle*, the parameters for competing and pursuing the “common interests of the whole”¹¹² were determined by the teams. The presence of competition within a franchise system would be a factor tending to push a franchise system away from being treated as a single economic unit, but, based on *Search International* and *Abbouds*, not necessarily a fatal one.

Some of the other factors considered by the *American Needle* Court that favored single economic enterprise treatment for NFLP are present in most franchise systems, while others are not. Unlike NFLP, a franchisor and its franchisees do not act through a single separate corporation. However, in a franchise system, the franchisor chooses the owners to which it grants franchises. Although the franchisor may not choose the management of the franchisees, it generally will establish standards for management and train some of the franchisee’s managers.

The fact that most of the revenues of NFLP are shared by the teams on an equal basis tended to show a single economic enterprise. A franchisor and franchisees do not share revenues on an equal basis, but they usually share revenues from royalties paid to the franchisor based on the revenues of the franchisees.

Finally, according to the *American Needle* Court, “[a] part from the[] agreement [of the NFL teams] to cooperate in exploiting [their trademarks and logos], there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks.”¹¹³ In contrast, in a franchise system, the franchisees are dependent on the franchisor for the trademarks, operating know-how, and the franchise system, among other things.

This comparison of franchise systems to NFL and NFLP does not apply to the usual relationship between a seller and its dealers or distributors. Franchise systems are different from most distribution systems because the franchisor generally will have more control over what a franchisee does than a seller will have over its distributors. In fact, the amount of control maintained by the franchisor is one of the factors distinguishing a franchise system from a distribution system. This is particularly true where, as is often the case, the distributors carry products of a variety of suppliers, as opposed to a franchisee that operates its franchise business solely as part of the franchise system.

APPLICATION OF THE COPPERWELD DEFENSE TO CERTAIN FRANCHISE ISSUES

The advantage of the single economic enterprise defense is that, if sustained, it eliminates the conspiracy, combination, or contract element of a Section 1 claim and defeats the Section 1 claim altogether. It also has the additional advantage of requiring simpler and less expensive proof than a defense under the rule of reason, which potentially requires significant economic analysis.

There is no certainty if and when the *Copperweld* doctrine will be successful in defending a franchisor from claims under Section 1,¹¹⁴ but *American Needle* still leaves room for advocating the single economic entity defense for some facets of franchise systems, as described below.

CONDITIONS TO APPLICATION OF THE COPPERWELD DEFENSE

In order for a court to apply the *Copperweld* defense to a franchise system, it must be willing to apply that defense to certain facets of the operations of an organization while not applying the defense to all of the operations of a franchise system. As explained below, this is because there are only certain facets of a franchise operation for which the *Copperweld* defense would be appropriate.

Second, the availability of the *Copperweld* defense may vary from one franchise system to another. In particular, the greater the amount of control of the franchise system that the franchisor exercises and the more the franchisor limits competition between the franchisor and the franchisees and among franchisees, the more likely it is that the *Copperweld* defense will apply.

Third, if the *Copperweld* defense were to apply, a court would have to accept that an organization, such as a franchise system, may have only one significant decision maker on some facets of its operations even though the organization consists of a number of different actors that act independently on other matters. If so, *Copperweld* would be available only to operations where there are not separate decision makers.

Fourth, if the *Copperweld* defense were to apply, a court would have to accept that there can be a single economic enterprise if there is only one decision maker but separate

economic actors who sometimes pursue common economic interests and sometimes pursue separate ones. Accordingly, in many cases, a court would also have to accept that a franchisor and franchisees can have common economic interests even though they may compete in some circumstances.

VERTICAL TERRITORIAL RESTRAINTS

Since 1977, territorial limitations and location requirements have been judged under the rule of reason¹¹⁵ and have rarely been challenged successfully.¹¹⁶ Nonetheless, the *Copperweld* doctrine might be particularly useful in these circumstances. If the geographic restraints are imposed by the unilateral decision of the franchisor, as is often the case, there are not separate decision makers. Also, the geographic restraints will generally indicate that the franchisees and perhaps the franchisor will not compete with each other, and this will support the claim of a common economic interest.¹¹⁷

RESALE PRICE MAINTENANCE

The *Copperweld* doctrine may be even more useful in response to a resale price maintenance claim. Resale price maintenance was once regarded as illegal per se.¹¹⁸ However, since 1997, maximum resale price maintenance has been judged by the rule of reason;¹¹⁹ and under the 2007 case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹²⁰ minimum resale price maintenance is now judged under the rule of reason. As a result, it has become much more difficult for a plaintiff to sustain a resale price maintenance case, though not impossible.¹²¹

The single economic enterprise defense should make it even more difficult because, if it succeeds, the plaintiff would not be able to sustain its Section 1 claim even if it could otherwise prevail on the basis of the rule of reason. To succeed in that defense, the franchisor would have to argue that there are not separate decision makers in the franchise system because it maintains sufficient control of the franchise system and that the franchisor and the franchisees have common economic interests. If the franchisor dictated minimum resale prices prior to *Leegin*, it would likely have faced per se liability under federal law and still may face per se liability under state law. However, if the franchisor merely recommends resale prices, the franchisees remain free to sell at different prices, and the franchisees follow the recommended resale prices voluntarily, there is no agreement on resale prices and thus no agreement in violation of Section 1.¹²²

If a franchisor does not dictate prices but merely recommends them, it seems more likely that there are separate decision makers. However, under *Williams*,¹²³ the fact that franchisees could vary their prices was not enough to prevent single economic enterprise treatment.¹²⁴ Furthermore, if most franchisees follow the franchisor's recommendations on prices most of the time, the franchisor would still appear to have enough significant control to argue that it is the sole decision maker in the franchise system. In light of the ambiguity of the *Copperweld* defense, using recommended prices is still the safer cause of action.

STATE RESALE PRICE MAINTENANCE CASES

The single economic enterprise doctrine may be even more helpful in considering resale price maintenance claims under state antitrust laws. *Leegin* has generated a lot of opposition among the states.¹²⁵ Although most states interpret their own antitrust laws in accordance with federal antitrust precedent, in many states that is not mandatory. Some states continue to treat minimum resale price maintenance as illegal per se and have brought cases on that basis.¹²⁶

Most states, however, follow the *Copperweld* doctrine,¹²⁷ even some of those that have been opposed to *Leegin*.¹²⁸ In the latter case, a defendant should be able to argue that even if resale price maintenance is illegal per se as an agreement in restraint of trade under state law, it should not be illegal for a franchise system that is treated as a single economic enterprise. That is, resale price maintenance requires an agreement; and if the franchise system is a single economic enterprise, the franchisor and its franchisees are incapable of conspiring.

RESTRICTIONS INITIATED BY FRANCHISEES

Agreements on restricted territories or resale prices that are initiated by franchisees could be construed as horizontal agreements, and the *Leegin* decision cited this as a factor that could support a claim that a resale price maintenance agreement is illegal under the rule of reason.¹²⁹ However, if a franchisor makes a decision on exclusive territories or resale prices independently, even after responding to comments or suggestions from franchisees, there should be no illegal agreement because the decision was made vertically, not as a result of a horizontal conspiracy.¹³⁰ If the franchisees pressured or coerced the franchisor's decision, the pricing or territorial restrictions are more likely to be considered horizontal and illegal¹³¹ and are more likely to be illegal under the rule of reason.¹³²

Similarly, under the single economic enterprise doctrine, if the franchisor is making pricing and territorial decisions independently (even after responding to comments or suggestions from franchisees), the franchise system would seem to have one decision maker making decisions for the common interest of the franchise system, and the single economic interest defense is more likely to apply. If the franchisees pressured or coerced the franchisor's decision, it seems less likely that the franchisor is the single decision maker and less likely that the single economic enterprise defense would apply.

JOINT ACTIONS BY FRANCHISEES

If a franchise system were treated as a single common enterprise in all facets of its operations, even a horizontal agreement among franchisees (which are not commonly owned) to fix prices would be immune from challenge.¹³³ This result, however, is foreclosed by *American Needle* because the franchisees are separate decision makers. Accordingly, collaborative actions by franchisees or dealers have resulted in antitrust violations in a number of situations, including collusion among dealers to prevent the franchisor from granting

a new franchise¹³⁴ or to exclude a dealer from a trade show,¹³⁵ collusion of “dealers not to compete with each other”,¹³⁶ or collusion of dealers to force the franchisor to take action against a discounting dealer.¹³⁷ The *Copperweld* doctrine, as interpreted in *American Needle*, would not be useful in defending any of these actions. In each of them, there are separate decision makers consisting of the franchisees and, in some cases, the franchisor. Also, in each of them, there are separate economic interests among the franchisees because a group of franchisees is acting against the interests of another current or potential franchisee and, perhaps, against the interests of the franchisor, which may wish to have additional franchisees and to support all of its franchisees.

Similarly, if a group of franchisees act together to try to negotiate over prices or royalties, there is a risk of horizontal price-fixing allegations.¹³⁸ The single economic enterprise doctrine will undoubtedly be of no benefit in this situation because not only are there separate decision makers, but the franchisor and franchisees are each pursuing separate interests.

INDEPENDENT FRANCHISEE ASSOCIATIONS

Nevertheless, in many franchise systems, the franchisees act together in independent franchisee associations that conduct various activities for the benefit of the franchise system.

Activities of an independent franchisee association may include joint purchasing, joint information collection and dissemination, and joint advertising. None of these activities necessarily violates Section 1 but could under certain circumstances.¹³⁹

Even if the independent franchisee association is organized as a distinct entity, such as a corporation, this would not prevent its actions from being treated as a contract, combination, or conspiracy under Section 1. If the competitor franchisees, rather than the franchisor, are making the decisions for the independent franchisee association, such an association would be similar to NFLP as considered under *American Needle*.

However, some activities of an independent franchisee association may be able to take advantage of the *Copperweld* doctrine. This would require franchisor involvement as the sole decision maker and would have to include activities where the franchisors and the franchisees have a common economic interest. The discussion below of joint price advertising is an example of this.

JOINT PRICE ADVERTISING

Joint advertising by franchisees should not usually present an antitrust problem. If the joint advertising is merely promoting the brand and not unfairly excluding any franchisee, it is merely providing procompetitive promotion and would not have any anticompetitive impact.

However, joint price advertising by franchisees poses Section 1 risks, both for the horizontal aspects (an agreement among the franchisees as to price) and the vertical aspects (an agreement by the franchisees with the franchisor).

If the franchisees were to develop a price themselves and provide for joint advertising by themselves, there would be a significant risk of a horizontal price-fixing claim.¹⁴⁰ It would be difficult to argue that the franchisees only agreed on the advertising but not on the price. A tacit agreement can be enough to state an agreement on price, but agreeing to participate in price advertising seems to go beyond a tacit agreement because the joint advertisement implies that each franchisee is agreeing to the price and may be required to sell at no more than the advertised price. The single economic enterprise doctrine would be of no help here because the joint advertising involves joint activity by a number of separate decision makers.

Joint advertising at prices suggested by the franchisor is more defensible. If the franchisees are advertising at a certain price based on an agreement with the franchisor, it is a vertical agreement subject to the rule of reason and not a horizontal agreement subject to per se illegality. For antitrust purposes, the joint advertising should be structured so that the franchisees can participate or not participate voluntarily, and the advertising would generally make clear that these prices are available at participating stores only. Although an agreement by a franchisee to participate in joint price advertising seems very much like an agreement to sell at the advertised price, the price agreement under federal law is judged under the rule of reason if it is vertical.

The single economic enterprise defense could apply because there is only one decision maker, the franchisor, on the advertised price, and the franchisor and the franchisees have substantially the same interest in selling the advertised products and services. Unlike the NFL teams and NFLP apparel, those would be the same products or services regardless of which franchisee makes any particular sale.

If the franchisees are allowed to participate at their own discretion, that would make the single economic enterprise defense more difficult because there would be separate decision makers, but only as to whether to opt in. However, if most franchisees opt in most of the time, the franchisor would still appear to have enough significant control to argue that it is the sole decision maker in the franchise system.

CONCLUSION

American Needle does not completely foreclose the argument that a franchise system should be treated as a single economic enterprise for some facets of its operations. The success of that defense will depend on how a specific franchise system is operated. The single economic enterprise defense is more likely to be applicable as the franchisor exercises greater control over the operations of the franchisees and as the intrasystem competition decreases between the franchisor and the franchisees and among the franchisees. If the single economic defense is available, it should be of particular help to franchisors defending vertical restraints because these restraints are imposed by the franchisor itself.

The single economic enterprise defense has been applied differently by different federal courts, may be applied differently by

different states (particularly where the underlying state antitrust interpretations may vary from federal interpretations, such as in resale price maintenance cases), and remains open to interpretation and further development by the courts. Because of these variances and the need for further development, this doctrine at present is most useful for defending the franchise system in active litigation rather than for prospective counseling.

ENDNOTES

1. 15 U.S.C. § 1.
2. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2207 (2010).
3. 130 S. Ct. 2201.
4. 15 U.S.C. § 1 provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”
5. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).
6. *See, e.g., Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 384–85 (1911) (holding that an agreement between a supplier and a distributor to fix a minimum resale price is illegal per se), *overruled by* *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967) (declaring that a manufacturer’s territorial restrictions on its distributor’s sales are illegal per se), *overruled by* *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).
7. *See, e.g., Cont’l T.V.*, 433 U.S. at 58–59 (1977) (overruling *Schwinn* and stating that vertical restrictions on sales are subject to the rule of reason standard); *State Oil*, 522 U.S. at 18 (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and holding that vertical maximum price-fixing is governed by the rule of reason); *Leegin*, 551 U.S. at 907 (overruling *Dr. Miles* and declaring that vertical price restraints are to be governed by the rule of reason). At least one state has expressly retained the per se rule for minimum resale price maintenance. MD. CODE ANN., COM. LAW § 11-204.
8. *Norfolk Monument Co. v. Woodlawn Mem’l Gardens, Inc.*, 394 U.S. 700, 704 (1969).
9. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004).
10. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 805 (1946).
11. *United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008).
12. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (holding that an allegation of parallel conduct, without more, is insufficient to state a claim for relief under the antitrust laws); *Theatre Enters, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (stating that parallel pricing, without more, does not establish an antitrust violation); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 133 (3d Cir. 1999) (holding that exchanges of information by persons with no pricing authority could be mere “chit chat”); *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999) (finding that attendance at trade association meeting could not imply an agreement without more details); ABA SECTION OF ANTITRUST LAW, ANTITRUST HANDBOOK FOR FRANCHISE AND DISTRIBUTION PRACTITIONERS (2008); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 9–17 (6th ed. 2007).
13. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).
14. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).
15. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).
16. *Id.* at 45.
17. *See, e.g., Bender v. Southland Corp.*, 749 F.2d 1205, 1213–14 (6th Cir. 1984) (holding that actual or threatened action, beyond suggestion, in order to induce a reseller to adhere to the manufacturer’s prices, states a claim for relief under Section 1 of the Sherman Act).
18. *See generally Monsanto*, 465 U.S. 752.
19. *See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99–101 (1984) (holding that the per se rule would not be appropriate to NCAA rules limiting broadcasting by college football teams because certain horizontal restraints on competition in league sports are essential if the product is to be available at all).
20. *E.g., Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20–21 (1979) (The issuance of blanket licenses by defendants ASCAP and BMI of copyrighted musical compositions of thousands of copyright holders at fees negotiated by ASCAP and BMI was not price fixing that was illegal per se but should be judged under the rule of reason. Joint ventures and other cooperative ventures are not usually unlawful as price fixing schemes “where the agreement on price is necessary to market the product at all.”); *see also* U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000).
21. *See, e.g., United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 116 (1975) (“[E]ven commonly owned firms must compete against each other, if they hold themselves out as distinct entities.”).
22. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 759 (1984) (quoting *Indep. Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 318 (7th Cir. 1982)). Factors to consider in determining the amount of separation included whether the parent and subsidiary had separate management staffs, separate corporate offices, separate clients, separate records and bank accounts, separate corporate offices, and autonomy in setting policy. *Copperweld*, 467 U.S. at 759 n.2.
23. 467 U.S. 752.
24. *Id.* at 771.
25. *Id.* at 769–70.
26. *Id.* at 768–69.
27. *Id.* at 771.
28. *Id.* at 770–71.
29. *Id.* at 771.
30. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 27–29 (6th ed. 2007) (citing cases).
31. 547 U.S. 1 (2006).
32. *Id.* at 4.
33. *Id.*
34. *Id.* at 3.
35. *Id.* at 5–6. Notably, the Court left open the question of whether the joint venture’s conduct was subject to the rule of reason and did not reach the question of whether the Sherman Act is inapplicable to joint ventures. *Id.* at 7 n.2.
36. *See, e.g., Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201 (2010) (holding that the National Football League (NFL) and its teams are not a single entity for the purpose of licensing intellectual property); *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005) (stating that when

adopting playing eligibility rules, the member teams are multiple actors acting in concert); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (finding that competition between the member clubs precludes application of the *Copperweld* doctrine); *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 819 (11th Cir. 1990) (en banc) (holding that a hospital could conspire with members of its staff because they are legally separate entities); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 669–70 (7th Cir. 1985) (refusing to apply *Copperweld* to franchised accounting company); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1387 (9th Cir. 1984) (rejecting argument, prior to the *Copperweld* decision, that NFL is a single entity and thus immune from antitrust scrutiny); *Perinatal Med. Group, Inc. v. Children's Hosp. Cent. Cal.*, 2010 U.S. Dist. LEXIS 36694, at *17 (E.D. Cal. 2010) (deciding that hospital and medical group providing services at the hospital were capable of conspiring). *But see* *Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005) (finding single economic enterprise for a national dog breeding club and its affiliates); *Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 271 (8th Cir. 1988) (holding that a rural electric cooperative is a single economic enterprise); *Calculators Haw., Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1336 (9th Cir. 1983) (finding a principal and the principal's agent to be a single economic enterprise); *Rowell v. Valleycare Health Sys.*, 2010 U.S. Dist. LEXIS 113213, at *12 (C.D. Cal. 2010) (hospital and doctor acting in his role as chief of staff were a single economic enterprise in connection with plaintiff's challenge to suspension of hospital privileges).

37. *See* *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (noting that sports leagues are sufficiently diverse that it may be necessary to consider *Copperweld* “one facet of a league at a time”); *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 943 (N.D. Ill. (2007), *aff'd sub nom.*, *Am. Needle*, 538 F.3d 736 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2201 (2010); *Weiss v. York Hosp.*, 745 F.2d 786, 814–15 (3d Cir. 1984) (finding that individual members of a hospital's medical staff were capable of conspiring among themselves because they were in competition in practicing medicine but could not conspire on hospital staff privilege decisions because they were acting as officers of the hospital); *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 2010 U.S. Dist. LEXIS 92236, at *68 (E.D. Cal. 2010) (“There are no allegations that defendants are ‘independent centers of decision making,’ as it pertains to the alleged wrongful conduct, which permit concerted conduct under the *American Needle* functional evaluation.”); *cf.* *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248–49 (1996) (stating, in dicta, that for purposes of labor negotiations, the National Football League is “more like a single bargaining employer”).

38. *See generally* Suzanne E. Wachstock & Erica L. Amarante, *Antitrust and Franchising: Conspiracies Between Franchisors and Franchisees Under Section 1*, 23 *FRANCHISE L.J.* 7 (2003).

39. 392 U.S. 134 (1968).

40. *Id.* at 137.

41. *Id.* at 141–42.

42. *See* *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771–72, 772 n.2 (1984) (disavowing *Perma Life*).

43. 392 U.S. at 142.

44. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985); *Arno Park, Inc. v. Yogurt Adventures U.S.A., Inc.*, 1994-2 Trade Cas. (CCH) ¶ 70,825 (W.D. Mo. 1994). A third tying case

that followed the alternative reasoning in *Perma Life* was *Western Duplicating, Inc. v. Riso Kagaku Corp.*, 2001-1 Trade Cas. (CCH) ¶ 73,135 (E.D. Cal. 2000), which involved a manufacturer and a dealer rather than a franchise.

45. *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 387–88 (10th Cir. 1985).

46. 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993).

47. *Id.* at 1029.

48. *Id.* at 1032.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1031.

53. *Id.* at 1032.

54. *Id.*

55. *Id.* at 1031.

56. *Id.* at 1032.

57. *Id.*

58. 912 F. Supp. 1509 (S.D. Fla. 1995).

59. *Id.* at 1548.

60. *Id.*

61. 168 F. Supp. 2d 621 (N.D. Tex. 2001).

62. *Id.* at 627.

63. *Id.* at 626.

64. *Id.*

65. *Id.*

66. *Id.*

67. 2005 U.S. Dist. LEXIS 30053 (W.D. Wash. 2005), *aff'd*, 2006 U.S. App. LEXIS 17187 (9th Cir. 2006).

68. *Id.* at *11.

69. *Id.* at *11–12.

70. 2007 U.S. Dist. LEXIS 55474 (D. Alaska 2007).

71. *Id.* at *73.

72. *Id.* at *74–75.

73. *Id.* at *75–78.

74. 2011 U.S. Dist. LEXIS 10882 (W.D. Wash. 2011).

75. *Id.* at *5–7.

76. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010).

77. *Id.* at 2206–07.

78. *Id.* at 2207.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 2209.

83. *Id.*

84. *Id.* at 2212.

85. *Id.* at 2212–13.

86. *Id.* at 2212.

87. *Id.*

88. *Id.* at 2214.

89. *Id.*

90. *Id.* at 2214–15.

91. *Id.* at 2207.

92. *Id.* at 2215.

93. *Id.* at 2207.

94. *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007), *aff'd sub nom.*, *Am. Needle*, 538 F.3d 736 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2201 (2010).

95. *Am. Needle*, 538 F.3d at 742.

96. *Am. Needle*, 130 S. Ct. at 2214.

97. *Id.* at 2207, 2217.

98. *See, e.g.*, *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 837 (3d Cir. 2010) (affirming jury verdict that an association of tennis professionals and organizers of men's tennis tournaments did not violate Section 1 and discussing but not making a decision on the single economic entity defense); *Rowell v. Valleycare Health Sys.*, 2010 U.S. Dist. LEXIS 113213, at *12 (C.D. Cal. 2010) (finding that hospital and doctor acting in his role as chief of staff were a single economic enterprise in connection with plaintiff's challenge to suspension of hospital privileges); *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 2010 U.S. Dist. LEXIS 92236, at *68 (E.D. Cal. 2010) (holding that joint venture and its owners are a single economic enterprise).

99. 2011 U.S. Dist. LEXIS 10882 (W.D. Wash. 2011).

100. *Am. Needle*, 130 S. Ct. at 2207.

101. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984).

102. *Am. Needle*, 130 S. Ct. at 2212–13.

103. *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5–6 (2006).

104. *Id.*

105. 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993).

106. The court in *Williams* cited as a factor in support of the common interest of the franchisors and the franchisees that the franchisor sought to minimize competition among the franchisees. *Id.* at 1031–32; *see also* *Search Int'l, Inc. v. Snelling & Snelling, Inc.*, 168 F. Supp. 2d 621, 626 (N.D. Tex. 2001) (holding that plaintiffs failed to offer any evidence that the company stores compete with the franchisees); *Alaska Rent-A-Car, Inc. v. Cendant Corp.*, 2007 U.S. Dist. LEXIS 55474, at *78 (D. Alaska 2007) (noting that none of defendants was a competitor of plaintiff in its exclusive territory).

107. 168 F. Supp. 2d 621.

108. *Id.* at 626.

109. 2005 U.S. Dist. LEXIS 30053 (W.D. Wash. 2005), *aff'd*, 2006 U.S. App. LEXIS 17187 (9th Cir. 2006).

110. *Id.* at *11–12.

111. ANTITRUST HANDBOOK, *supra* note 12, at 72.

112. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2212 (2010) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770 (1984)).

113. *Id.* at 2214–15.

114. *See generally* Quentin R. Wittrock & Jeremy L. Johnson, *Can American Needle Be Applied to Poke Holes in Franchise and Distribution Practices?*, 14 DISTRIBUTION 3 (Sept. 2010) (analyzing *American Needle* in franchising and distribution practice); Suzanne E. Wachstock & Erica L. Amarante, *Antitrust and Franchising: Conspiracies Between Franchisors and Franchisees Under Section 1*, 23 FRANCHISE L.J. 7, 13 (2003) (discussing the application of *Copperweld* to franchise systems).

115. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977).

116. *See, e.g.*, *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1578 (11th Cir. 1983) (affirming jury verdict finding that manufacturer's territorial restraints violated Section 1 of the

Sherman Act).

117. *Williams v. I.B. Fischer Nev.*, 794 F. Supp. 1026, 1031–32 (D. Nev. 1992).

118. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 384–85 (1911) (holding that an agreement between a supplier and a distributor to fix a minimum resale price is illegal per se), *overruled by* *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), *overruled by* *State Oil Co. v. Khan*, 522 U.S. 3, 18 (1997).

119. *State Oil*, 522 U.S. at 18.

120. 551 U.S. at 907.

121. *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225–26 (3d Cir. 2008) (reversing directed verdict on resale price maintenance claim); *cf.* *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1336–38 (11th Cir. 2010) (dismissing plaintiff's complaint for failing to properly allege a relevant market). *See generally* Steven B. Feirman & Allen P. Hillman, *Antitrust Issues Back in Vogue*, ABA FORUM ON FRANCHISING 9–14 (2010).

122. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

123. 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993).

124. *Id.* at 1031.

125. *See, e.g.*, *Feirman & Hillman, supra* note 121, at 14. For instance, subsequent to *Leegin*, Maryland adopted a statute that specifically provides that minimum resale price maintenance is illegal per se in that state. MD. CODE ANN., COM. LAW § 11-204.

126. *See* Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, THE ANTITRUST SOURCE 4 (Oct. 2009); Feirman & Hillman, *supra* note 121, at 14 (discussing cases).

127. *E.g.*, *Freeman v. San Diego Ass'n of Realtors*, 91 Cal. Rptr. 2d 534, 547 (Cal. Ct. App. 1999); *Am. Credit Card Tel. Co. v. Nat'l Pay Tel. Corp.*, 504 So. 2d 486, 488 (Fla. Dist. Ct. App. 1987); *N. Atl. Utils, Inc. v. Keyspan Corp.*, 762 N.Y.S.2d. 820, 821 (N.Y. App. Div. 2003); *Puentes v. Spohn Health Network*, 2009 Tex. App. LEXIS 4131, at *13 (Corpus Christi, Tex. App. 2009) (petition denied).

128. *See* *Verma v. Giancarlo*, 2000 Mich. App. LEXIS 1139, at *25 (Mich. Ct. App. 2000) (citing *Copperweld* favorably for the proposition that Section 1 does not extend to unilateral conduct); *Natural Design, Inc. v. Rouse Co.*, 485 A.2d 663, 669 (Md. 1984) (affirming that federal law applies to Maryland's antitrust statute and stating that the Sherman Act does not reach unilateral conduct). Federal antitrust precedent is binding on the antitrust laws of some states and is merely persuasive in others. *See* James A. Wilson, *State Antitrust Law*, CORPORATE PRACTICE SERIES PORTFOLIO No. 52-3d, at A-13, A-14 (BNA) (2010).

129. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 897–98 (2007); *see also* *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 223 (3d Cir. 2008) (stating that plaintiff must prove more than that other dealers complained to defendant about price cutting; plaintiff must prove that there was a “meeting of the minds”).

130. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

131. *See* ANTITRUST HANDBOOK, *supra* note 12, at 104–05.

132. *Leegin*, 551 U.S. at 897–98.

133. *Wachstock & Amarante, supra* note 114.

134. *E.g.*, *Am. Motor Inns v. Holiday Inns, Inc.*, 521 F.2d 1230,

continued on page 238

1254 (3d Cir. 1975); *see also* Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1364–65 (3d Cir. 1992) (denying motion for summary judgment where plaintiff alleged that automobile manufacturer colluded with other dealers to terminate plaintiff).

135. *Denny's Marina v. Renfro Prods.*, 8 F.3d 1217, 1220–22 (7th Cir. 1993).

136. *See Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 211 (3d Cir. 2008) (reversing directed verdict for defendant in antitrust action).

137. *In re Fair Allocation Sys., Inc.*, 126 F.T.C. 626 (1998).

138. *See Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 435–36 (1990) (holding that an economic boycott is per se illegal).

139. *See* ANTITRUST HANDBOOK, *supra* note 12 (discussing

activities of franchisee associations that could be considered to violate the Sherman Act).

140. *See, e.g., Plymouth Dealers Ass'n v. United States*, 279 F.2d 128, 131 (9th Cir. 1960) (offering of a uniform trade-in allowance by a dealer association was illegal per se as price fixing); *United States v. Pittsburgh Area Pontiac Dealers, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,233 (W.D. Pa. 1978); 43 Fed. Reg. 10,641 (Mar. 14, 1978) (The Department of Justice brought an antitrust action that resulted in a consent decree against an association of Pontiac automobile dealers in the Pittsburgh area who published and/or broadcast advertisements for a given Pontiac model for a price that was developed by “price letters” that were circulated among the dealers.). *See generally* ANTITRUST HANDBOOK, *supra* note 12, at 182.