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I. INTRODUCTION

The Supreme Court's unanimous decision in the *American Needle* case predictably unleashed a torrent of well-worn football clichés to describe the consequences of the NFL's ill-considered judgment to urge a very "defense" minded Court to "hold that line" on antitrust enforcement one more time. Obviously, I am not immune from that temptation. However, while I am more than willing to penalize the league fifteen yards for roughing the statute, I am less concerned about its poor play calling than I am about the fact that the Court—after declining simply to punt (as the Solicitor General wisely urged it to do)—produced a decision that ended up being stopped for no gain.

While the Court in *American Needle* certainly reached a correct (and wholly predictable) result, it did so in an opinion that is frustratingly unsatisfying. That frustration is compounded by the fact that the Court initially seemed well on its way to providing, at long last, a clear, and sensible, approach to the inaptly named "single entity" doctrine in joint venture cases and because this was the second time in the past five years that it has missed an easy opportunity to provide such a workable rule. The earlier case, of course, was *Texaco, Inc. v. Dagher*—another unanimous opinion reaching an indisputably correct result in an analytically ill-conceived manner.

The final frustration is that both *American Needle* and *Dagher* had, as a starting point, the well-considered and well-articulated guideposts provided by the Supreme Court in *Copperweld*, which not only reached the right result, but did so for the right reasons. That decision should have been all the Court needed in both *Dagher* and *American Needle* to produce a sound approach to what I intend to call not the "single entity," but the "unitary action," principle in cases involving joint ventures.

II. *COPPERWELD* AND THE ESTABLISHMENT OF A FRAMEWORK FOR ANALYZING UNITARY ACTION UNDER § 1 OF THE SHERMAN ACT

The Supreme Court's decision in *Copperweld* contains one of the Court's finest "philosophical" expositions of the structure of the Sherman Act. As almost anyone with even a nodding familiarity with antitrust is aware, the Court in that case held that a parent is incapable of conspiring with its wholly-owned subsidiary and, thus, §1 liability cannot be triggered by agreements made wholly within such a corporate "family."

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Equally famous—and far more important for present purposes—is the explanation that the Court gave for its ruling:

> Concerted action inherently is fraught with anticompetitive risk. *It deprives the marketplace of the independent centers of decision-making that competition assumes and demands*.

By contrast, "it is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not create the antitrust dangers that [§] 1 was designed to police."

Those statements, together with the Court's explicit disavowal of structural formalities as a basis for line-drawing, seem so perfectly clear, and so perfectly sensible, that one wonders why subsequent decisions did not immediately embrace its logic as the basis for determining when the Sherman Act's prerequisite condition of "concerted" action has been met in any context. In fact, the Court in *American Needle* repeatedly invoked the foregoing language from *Copperweld* as at least the ostensible core of its analysis.

However, unlike *Dagher* and *American Needle*, *Copperweld* was not a unanimous decision. Rather, Justice Stevens (writing for himself and for Justices Brennan and Marshall) dissented. Tellingly, his opinion began by restating in—if anything—even clearer terms, the essential rationale for refusing to condemn certain conduct as unlawful under §1:

> A price-fixing or market-allocation agreement between two or more [commonly owned enterprises] does not…eliminate any competition that would otherwise exist. It makes no difference whether such an agreement is labeled a 'contract,' a 'conspiracy,' or merely a policy decision, because it surely does not unreasonably restrain trade within the meaning of the Sherman Act.

Yet having elegantly embraced that central rationale of the majority's opinion, Justice Stevens explained why, in his opinion, that self-evident truth did not imply the need for a rule categorically excluding liability for parent-subsidiary conduct:

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

Justice Stevens, of course, was the author of the Court's single opinion in *American Needle* in what has been referred to as his antitrust "swan song." And, as we will see in a few moments, while that decision nominally may have relied upon the majority opinion in *Copperweld*, Justice Steven actually appears to have used that easy case as an opportunity to attempt to impose the reasoning of his dissent upon joint ventures. The question—yet to be determined—is whether that effort succeeded.

III. *TEXACO V. DAGHER*—THE UNITARY ACTION ARGUMENT RUNS ON EMPTY

Texaco Inc. v. Dagher presented the first opportunity for the Court, post-*Copperweld*, to enunciate a comprehensible unitary action rule in a joint venture case. Instead, the Court explained each of the reasons why the case before it should have been decided on that basis—yet failed even to discuss the issue.

Texaco and Shell formed a joint venture known as Equilon Enterprises in 1998. Equilon combined all of the venturers' refining and marketing operations in the western United States, "thereby ending competition between the two companies in the domestic refining and marketing of gasoline." However, post-formation, Equilon continued to sell gas "under [both] the original Texaco and Shell brand names." A group of Texaco and Shell service station owners accused

Equilon's owners of engaging in horizontal price-fixing when the venture chose to "set a single price for both [the] Texaco and Shell Oil brand gasoline" that it sold. Plaintiffs asserted that that conduct was unlawful *per se*, but explicitly disavowed any claim under the rule of reason.

After the district court dismissed the action because it did not find the conduct alleged sufficient to state a *per se* claim, a divided panel in the Ninth Circuit rejected what it described as Texaco and Shell's request for an "exception to the *per se* prohibition on price fixing." Judge Fernandez dissented, pointing out that the only conduct alleged was that a firm—Equilon—had set a price for gasoline that it produced and sold. The Supreme Court unanimously reversed, though not on the ground that there was no cognizable §1 claim at all, but because the venture's pricing needed to be evaluated under the rule of reason.

That, of course, was the posture in which the case had been presented in the lower courts and Justice Thomas further noted, in footnote 2 of his opinion, that inasmuch as the "Respondents have not put forth a rule of reason claim," the Court had no occasion to "address petitioners' alternative argument that §1 of the Sherman Act is inapplicable to joint ventures." *However,* neither of those reasons is remotely persuasive. As the Court correctly pointed out in both *Copperweld* and, again, in *American Needle*, a court has no occasion to evaluate the legality of an alleged restraint of trade in the absence of concerted action. Moreover, Justice Thomas was equally mistaken in his description of what he referred to as "petitioners' alternative argument." Petitioners never asserted that § 1 did not apply at all to joint ventures. Rather, they—along with several *amici*—urged the Court to hold that, in light of the analysis in *Copperweld*, the venture's *act* of setting a price for its gasoline should be regarded as the act of a single enterprise and, for that reason, did not give rise to a §1 claim.

Whatever issue the Court may have said it was deciding, its opinion did little more than explain why the plaintiffs had failed to allege concerted action. Perhaps Justice Thomas should have realized that fact when—in the most well-known phrase in the decision—he noted that while defendants conduct "may be price fixing in a literal sense" it was not "price fixing in the antitrust sense." But the reason that that statement was true was not because the prices fixed were "reasonable"—a defense that has been rejected repeatedly by the Court—but because there was no price agreement by separate enterprises to begin with.

Further, after noting respondents' concession that they would have no *per se* claim if Equilon had simply sold all of its gas under a single brand the Court observed that:

> [a]s a single entity, a joint venture, like any other firm must have the discretion to determine the prices of the products that it sells.

If that was not enough, the Court tellingly quoted Justice Fernandez's pointed observation that "an entity, which now owns all of the…sales and distribution facilities for engaging in the gasoline business, also prices its own products…. What could be more integral to the running of a business than setting a price for its goods and services?"

This was, in short, an opinion that, in all but name, held that there was no antitrust offense because nothing more was involved that the act of a unitary enterprise. Stated in the language of *Copperweld*, once the venture was established, there no longer were "independent centers of decision-making" with respect to Equilon's gasoline pricing, let alone the "eliminat[ion of] any competition that otherwise would exist." However, instead of addressing the case in those terms, the Court missed an important opportunity by treating the case as a simple question of *per se* vs. rule of reason analysis.

IV. *AMERICAN NEEDLE V. NFL*—ANOTHER INCOMPLETE PASS.

Like *Dagher* before it, the court of appeals' decision in *American Needle* was so plainly ill-considered that the only serious questions it presented was why the NFL made the strategic decision to support petitioner's request for review or why it chose to argue for a rule so extreme that even the antitrust defense bar's All-Pro safety, Justice Scalia, reacted with laughter-inducing bewilderment during oral argument. While petitioner made every effort to match respondents in over-arguing its cause, neither the result, nor the Court's unanimity, should come as a surprise. But, also like *Dagher,* this was an opportunity missed. In this case, the failure was not because of an unwillingness to address the issue or to articulate appropriate governing principles. Rather it stems from a failure to follow those principles where they, rightly, should have led.

In 1963, the NFL teams formed a joint venture, known as National Football League Properties ("NFLP"), to license and market the teams' respective intellectual property. Among the activities that NFLP engaged in was to license vendors "to manufacture and sell apparel bearing team insignias." In 2000, NFLP was authorized to grant exclusive licenses to manufacture head wear for all 32 NFL teams using their respective names and logos. In response to a suit by American Needle challenging this exclusive licensing agreement, the NFL claimed that its owners were incapable of conspiring within the meaning of §1 "because they are a single economic enterprise, at least with respect to the conduct challenged."

That argument prevailed both in the district court and in the Seventh Circuit. In particular, the Seventh Circuit held that because the teams "can function only as one source of economic power when collectively producing NFL football" they also were entitled to act collectively in licensing their intellectual property. The court of appeals further asserted that since the NFL members "share a vital interest in collectively promoting NFL football…it makes little sense to assert that each individual team has the authority…to promote the jointly produced NFL football." Despite being urged by the United States not to grant certiorari, the Court agreed to hear the case and, unsurprisingly, reversed unanimously.

Justice Stevens' opinion started auspiciously enough, pointing out that, whatever the literal language of the Sherman Act, "[n]ot every instance of cooperation between two people is a potential 'contract, combination…or conspiracy in restraint of trade'." Rather, the Court noted, Congress had drawn a distinction between concerted and independent action in order to "avoid[] judicial scrutiny of routine, internal business decisions." Justice Stevens further invoked *Copperweld*'s central thesis that §1 applies only to conduct that eliminates the "independent decision-making that competition assumes and demands."

Having thus framed the issue, the Court also sensibly observed that whether action should be deemed "concerted" behavior did not:

> turn simply on whether the parties involved are legally distinct entities. Instead we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.

The "key" consideration is, thus, "whether the alleged 'contract, combination…or Conspiracy' is concerted action—that is whether it joins together separate decisionmakers."

So far, so good. Indeed, quite splendid. Embracing *Copperweld*'s two essential points—that "substance, not form" should control the inquiry and that the "key" focus is whether there is an "agreement" which "deprives the marketplace of independent centers of decisonmaking"—the

Court appeared to establish an entirely appropriate framework for analysis. However, as the Court turned from thesis to application, the pigskin became slippery and, at the final gun, the Court had produced a decision that may have yielded the correct winner, but plainly failed to cover the spread. The opinion, in short, not only failed to live up to its promise, but may well be interpreted in a way that will eliminate any meaningful role for a unitary action principle in joint venture cases.

The problems surface in §V of the decision. On page 14 of the slip opinion, the Court asserts that "[t]he justification for cooperation is not relevant to whether …cooperation is concerted or independent action." To borrow a phrase from Justice Stevens' opinion, "taken literally" that statement seems to suggest that there is no room at all for unitary action analysis in joint venture cases. However, in the very next sentence, the Court reverts to its earlier functional articulation, observing that a "'contract, combination…or conspiracy' that is necessary or useful to a joint venture is still a 'contract, combination or conspiracy' *if* it 'deprives the market of independent centers of decisionmaking'" (emphasis added). Finally, having confused matters twice, the opinion promptly reverses field once again and asserts in the following sentence that even necessity of cooperation is not a sufficient basis to exempt a joint venture's actions from §1:

> Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. *But that does not mean that necessity of cooperation transforms concerted action into independent action.*

It is hard to know exactly what to make of this bit of broken field writing. If even necessity of cooperation is no basis for avoiding antitrust scrutiny under §1, it is hard to imagine what could be left of a unitary action principle in joint venture cases. The most generous reading is that the Court was intending to say no more than that joint ventures cannot claim blanket immunity (such as that available to a parent and its wholly-owned subsidiary) merely because some forms of cooperation are necessary for the venture to exist. However, particular *actions* of the venture may constitute unilateral activity where there is no elimination of independent economic decision-makers or, to use Justice Stevens' even more felicitous phrase in *Copperweld*, if an action does not "eliminate competition that otherwise would exist."

Other portions of the opinion lend at least implicit support to that latter interpretation. On the very next page of its decision, the Court was careful to say that "NFLP's actions are subject to §1, *at least with regards to its marketing of property owned by the teams.*" It further observes on the following page that it is the "*decisions* by the NFLP regarding the teams' separately owned intellectual property" which constitute concerted action.

It also is difficult to infer an intention to reject the existence of a unitary action principle in light of the Court's ironic observation at the outset of its opinion that "[t]aken literally," §1 would apply to "a single firm's chief executive telling her subordinate how to price their company's product,"— a *reductio ad absurdum* that, it should be noted, is, more or less, a restatement of the facts in *Dagher*. Even more notable is the Court's early statement that "[n]ot every instance of cooperation between two people [will be treated as] a potential 'contract, combination…or conspiracy, in restraint of trade.' Yet those who wish to offer a different interpretation can point to the portion of the decision which directly states that even "necessary" actions by a joint venture are potentially subject to §1 scrutiny, leaving us with no more than the Court's assurance that trivial claims can be weeded out under the Rule of Reason in the "twinkling of an eye." In other words, there is an argument that Justice Stevens' opinion is intended to represent the triumph of his *Copperweld* dissent, cloaked in the language of that case's majority opinion.

The one thing that can be said with some certainty, however, is that *American Needle* was a second missed opportunity for real clarity about the existence and application of a unitary action principle in joint venture cases. What we can anticipate, at best, is that the confusion that reigned in the lower courts before the Court's recent decision will continue. Only the terminology of the confusion will change.

However, whatever his intentions, Justice Stevens and his colleagues have left those of us who believe that there is room for a coherent unitary action principle for joint ventures a path to the end zone or—if one prefers a petitioner-based metaphor—a way for the unitary action camel still to pass through the eye of the *American Needle*.

V. OF NEEDLES' EYES AND FRUSTRATED PLACE-KICKERS—PURSUING A LIMITED UNITARY ACTION PRINCIPLE IN JOINT VENTURE CASES

Under *Copperweld*, actions involving an agreement between a parent and its wholly-owned subsidiary are categorically exempt from §1 of the Sherman Act because they do not involve the elimination of competition that "otherwise would exist." However, where the parent-subsidiary relationship is the result of a merger between previously separate enterprises (as was true in *Copperweld*, itself, as well as in virtually all of the earlier parent-subsidiary conspiracy cases which *Copperweld* disapproved), the merger was what eliminated the potential for future competition. There also is no question that the decision to allow that elimination of competition is subject to antitrust scrutiny, as both *Copperweld* and footnote 1 in *Dagher* were careful to point out. *Ex post* the integration, however, there is but a single enterprise and, *as of that time*, no separate decision-makers and, hence, no §1 liability for internal agreements.

Joint ventures, as has been regularly observed, are partial mergers. That is, they bring together some portion of pre-existing enterprises, either to assume the functions previously performed by the venturers, or to create some entirely new product or service that either could not be produced by the venturers individually, or could not be produced as well. As with mergers, the formation of the venture is subject to challenge under the rule of reason, although in the case of a joint venture that analysis also extends to the question of "scope"—that is, to the particular activities that should be allowed to be part of the integration. Given the general (and appropriate) preference of the antitrust laws for competition over cooperation where feasible, integration only should be allowed to the extent that it produces efficiencies that outweigh any resulting loss of "competition that otherwise would exist."

However, as with mergers, once a venture is formed (with whatever scope is allowed), the actions necessary to allow the venture to carry out the purposes for which it was approved should be considered the act of a single entity in the same way—and for the same reasons—that the Court recognized in *Copperweld* and, for that matter, *American Needle*. In short, the issue is simply a question of time and scope.

There is one further distinction to be drawn between joint ventures and mergers. Whereas we consider a merger essentially a finite act in the sense that it involves the creation of a new enterprise in place of the multiple organizations that previously-existed (and, most often, competed), a joint venture's owners continue to exist (and, thus, have the capacity to take actions independently). The boundaries of joint ventures also may be more fluid in scope, expanding the functions they seek to perform at the venture level. Therefore, it is appropriate to assess particular venture actions not only at the moment of formation, but at any point where it appears that the integration has expanded its scope inappropriately or where it is clear that a particular function can be carried out more effectively by the owners in competition with one another. That means that the unitary action principle that is available to joint ventures is, and should be, less robust than that which applies to a corporation and its wholly-owned affiliates. Nonetheless, with all that said, an action of a joint venture should be considered unitary if it is within the scope of the venture or does not eliminate competition that otherwise would exist.

How would that work? A few examples may be helpful, beginning with *Dagher* and *American Needle*. In the former case, Texaco and Shell once had competed in the sale of gasoline. However, at some point they proposed to integrate a portion of their operations by transferring both their refining and marketing functions to a new entity owned by the two companies. Their request to form that entity was subject to review and challenge under the antitrust laws. A decision might well have been made not to allow the combination or to restrict it to production assets only, with the parties purchasing and then competing to sell the venture's output. However, instead, the Equilon venture was formed and had within its scope the function of selling both Texaco and Shell brands of gas in the western United States. That function necessarily included establishing the price (or multiple prices) for the products it sold and the decision how to price its gas was unitary action that should not be subject to challenge under §1 of the Sherman Act.

Could the NFL not make the same argument? It was a joint venture formed to produce football games for the entertainment of fans. Did the creation of that venture—a new product that the individual teams could not have offered on their own—not necessarily imply, within its scope, the promotion of NFL football through licensing merchandise? No, and for several reasons. First, the separate teams continued to exist and own their own intellectual property. They remained fully capable of promoting their own merchandise in competition with one another. While the decision to provide a blanket license may well turn out to be justified under the rule of reason, there certainly is no basis to argue that that issue did not eliminate competition that could exist. Second, there is no inherent, or even obvious, relationship between the necessarily interdependent production of football games, and the marketing of merchandise. Third, while the NFL certainly had the right to promote a new enterprise—known as NFL football, and with its own name and logo (which exist)--what was being sold here were not "NFL" jerseys, but New Orleans Saints jerseys or Indianapolis Colts jerseys. Or, if you like, Eli Manning or Brett Favre jerseys. (Would that be Green Bay Packers, New York Jets, or Minneapolis Vikings?).

Evaluations under this approach will need to be nuanced, but that is hardly unique to this aspect of antitrust—let alone to the law generally. For example, in the case of Equilon, Shell and Texaco not only integrated their marketing operations in the western United States but agreed that the owners would no longer compete against their venture. That is a separate act and certainly could be the basis for a challenge that, if made, would require rule of reason scrutiny under the ancillary restraint doctrine. In *BMI*, one of the first cases to exempt a "literal" price fix from per se scrutiny, the venture's "blanket license" would seem to be inherent in the scope of what the venture was formed to do. What is more, it is tautological that no individual owner could offer *that* product on its own. However, the Court—pre-*Copperweld*—did not even appear to consider a unitary action analysis. If it had, it would have been important that BMI and

ASCAP allowed their respective members to negotiate individual agreements where licensees preferred to negotiate on that alternative basis.

Finally credit and debit card interchange fees (the subject of competing *amicus* briefs in *American Needle* from retailers, on the one hand, and Visa and MasterCard, on the other) appear to represent unitary action. That is true not only because those ventures produced a new product—the general purpose payment card—that (at least of the time the ventures were formed) could not be offered by individual financial institutions but, because the creation of a payment card transaction, like a football game necessarily contemplates the participation of two separate venture members. That cooperation, in turn, could not exist in the absence of network-level rules governing the terms of their cooperation, or interchange, including an interchange "price" term. Thus, the interchange function eliminates "no competition that otherwise would exist" and, for that reason, should be considered unitary action.

Nothing in *American Needle* contradicts this suggested approach to a unitary action principle for joint ventures. To the contrary, the Court's emphatic endorsement of *Copperweld*'s standard seemingly all but commands it. However, despite its promise of an exhilarating game-winning field goal, the last portion of the Court's opinion brings to mind, instead, Lucy snatching the ball away from Charlie Brown at the last moment. That is unfortunate, since it is not likely that a unitary action case will make its way to the Supreme Court again anytime soon. Thus, perhaps, like the Sisyphean hero of *Peanuts*, we are destined to remain frustrated about an issue that seemed to be so close at hand (or foot). However, as with good old Charlie Brown, there remains hope that the unitary action principle in joint venture cases will live to kick again.