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Is There Life after Death for Sports League Immunity - American Needle and Beyond

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IS THERE LIFE AFTER DEATH FOR SPORTS LEAGUE IMMUNITY? *AMERICAN NEEDLE* AND BEYOND

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I. INTRODUCTION

For all of the occasional complexity of antitrust law, section 1 of the Sherman Antitrust Act is, in important ways, extraordinary in its simplicity. Section 1 broadly applies to all concerted activity, prohibiting all agreements—"[e]very contract, combination . . . or conspiracy"[1]—that fail a single ultimate test: "whether the challenged agreement is one that promotes competition or one that suppresses competition."[2] While that question may sometimes be answered quickly, such as through *per se* rules or quick look analysis, it is an inquiry to which (but for a narrow set of statutory exceptions) all concerted conduct is subject—as the Supreme Court has underscored by rejecting arguments that the special characteristics of one industry or another exempt it from section 1 scrutiny.[3]

For decades prior to *American Needle, Inc. v. National Football League*,[4] various professional sports leagues and their members doggedly pursued a variation on this "special characteristics" argument for antitrust immunity. These leagues argued that the inherent

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1. 15 U.S.C. § 1 (1890).

2. Nat'l Soc. of Prof'l Engineers v. U.S., 435 U.S. 679, 691-92 (1978) ("*Engineers*") (holding that the Rule of Reason requires courts to determine whether the challenged restraint promotes or suppresses competition "by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed," without regard to arguments that competition in a particular industry is inimical to public interest).

3. *See Engineers*, 435 U.S. at 689-90 (rejecting exemption argument based on public safety considerations); Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-87 (1975) (holding that Congress did not intend to exclude learned professions from Sherman Act regulation, finding exclusions based on "[t]he nature of an occupation" alone to be contrary to Congressional intent); *but cf. id.* at 792 n.17 ("[t]he fact that a restraint operates upon a profession as distinguished from a business" may be relevant to *how* the Sherman Act is applied).

4. 130 S. Ct. 2201 (2010).

need for cooperation to produce league sports made league members (unlike the members of other, presumably less special, joint ventures) effectively a "single entity"—and therefore not subject to section 1, which addresses only agreements among multiple actors. This argument persisted for decades despite a consistent lack of success in the lower courts,[5] until, in *American Needle*, the Supreme Court appeared to put it to rest. Unanimously rejecting any special sports league exemption from antitrust scrutiny, the court held that an agreement among separately owned and controlled sports teams, like all other concerted conduct, must be judged by its competitive effects.[6] In short, *American Needle* appeared to be the end of the line for what one commentator aptly termed the "holy grail" of professional sports leagues—the prospect of immunity from section 1 scrutiny.[7]

Or so, at least, one could be excused for thinking. The immunity argument had barely been interred by *American Needle* before it was reincarnated in new and—I will argue—equally meritless forms.[8] Gregory Werden suggests in this volume both that *American Needle* left room for a sports league to be treated as a single entity for certain purposes, and that *Texaco Inc. v. Dagher*[9]—an earlier case that expressly declined to address arguments for section 1 immunity—carves out a new zone of "core functions" of sports leagues and other joint ventures that are exempt from antitrust scrutiny.[10] And James Keyte, an antitrust litigator who represents professional

5. *See* Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues:* American Needle *and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 846-47 (2009) (citing L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d. 1381 (9th Cir. 1984) (rejecting single entity status); Sullivan v. Nat'l Football League, 34 F.3d 1091 (1st Cir. 1994)) (noting lower court decisions that rejected single-entity argument).

6. *See Am. Needle*, 130 S. Ct. at 2212-14 (rejecting NFL's single entity arguments); *see also id.* at 2216-17 (holding Rule of Reason applicable to NFL and other joint ventures whose products require some level of cooperation); *id.* at 2217 n.10 ("The true test of legality is whether the restraint imposed . . . merely regulates . . . competition or whether it . . . may suppress or even destroy competition.").

7. *See* Feldman, *supra* note 5, at 836, 851 (terming single-entity immunity the "holy grail" for sports leagues because it would exempt them from most antitrust regulation). Exemption from section 1 scrutiny would leave league members subject only to the considerably less demanding anti-monopolization provisions of section 2 of the Sherman Act. *See* 15 U.S.C. § 2.

8. Or perhaps, if I may push the "holy grail" concept beyond the breaking point, these new arguments treat the seemingly mortal blow inflicted by *American Needle* as in fact "just a flesh wound." MONTY PYTHON AND THE HOLY GRAIL (Twickenham Film Studios 1975).

9. 547 U.S. 1 (2006).

10. *See* Gregory J. Werden, *American Needle and the Application of the Sherman Act to Professional Sports Leagues*, 18 VILL. SPORTS & ENT. L.J. 395, 404-06 (2011).

sports leagues, has argued for a *Dagher*-based "core functions" immunity so broad as to occupy much of the space previously filled by the now-discredited "single entity" argument.[11]

This Essay argues that these new theories of sports league immunity—the "B Team" of immunity arguments, one might call them—are no more persuasive than the "A Team" arguments unanimously routed in *American Needle.* Part I summarizes the *American Needle* case. Part II explores what was at stake in the case and its implications for future sports league immunity arguments. Part III addresses, and takes issue with, Werden's and Keyte's arguments that a zone of immunity for sports leagues survives *American Needle.*

II. AMERICAN NEEDLE

Prior to 2000, the National Football League ("NFL") teams had jointly licensed the individual teams' trademarks—primarily through an entity they controlled known as National Football League Properties, Inc. ("NFLP")—to multiple licensees. In 2000, the teams voted to enter into an exclusive contract with Reebok to make, among other things, trademarked headwear. When American Needle, which had been one of the nonexclusive licensees, challenged this action as a violation of section 1, the NFL teams argued that they were a "single entity" immune from section 1 scrutiny under *Copperweld Corp. v. Independent Tube Corp.*,[12] which held that a parent corporation and its wholly-owned subsidiary are effectively a single enterprise whose components are incapable of an "agreement" subject to section 1.[13] American Needle responded that *Copperweld* was an intentionally narrow decision premised on, and limited to, the intrinsic unity of a parent and wholly-owned subsidiary: an "agreement" between such entities cannot meaningfully limit competition, according to *Copperweld,* because "[w]ith or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder."[14] The District Court took the defendants' view and entered summary judgment in their favor.

The Seventh Circuit affirmed. Notwithstanding *Copperweld*'s reasoning emphasizing that "a parent and a wholly owned subsidiary always have a 'unity of purpose or a common design'"[15]—such

11. *See* James A. Keyte, *American Needle: A New Quick Look for Joint Ventures,* 25 ANTITRUST 48, 51-52 (2010).

12. 467 U.S. 752 (1984)

13. *See id.* (holding that parent and subsidiary corporation were single enterprise whose members cannot "agree" for purposes of section 1).

14. *Id.* at 771-72.

15. *Id.* at 772 (citation omitted).

that an agreement between them could not eliminate any independence that would otherwise exist—the Seventh Circuit held that the potentially divergent interests of the NFL teams did not prevent them from being a single entity under *Copperweld.*[16] The key question, to the Seventh Circuit, was not whether the teams were capable of independence, but whether they were "one source of economic power."[17] The court did not define what constitutes a single "source of economic power," but concluded that the need for a degree of cooperation to produce football games meant that "the NFL teams can function only as one source of economic power when collectively producing NFL football." Positing that trademarks are used to promote football, the court further concluded that "only one source of economic power controls the promotion of NFL football."[18]

On appeal to the Supreme Court, the parties again joined issue on the scope of the *Copperweld* doctrine. In addition, the Court was presented by the Department of Justice with a compromise position of sorts, which the Government labeled an "effective merger" analysis. The Government proposed that joint ventures like sports leagues could be treated as single entities when two conditions were met:

> First, the teams and the league must have effectively merged the relevant aspect of their potential operations, thereby eliminating actual or potential competition among the teams and between the teams and the league in that operational sphere. Second, the challenged restraint must not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations.[19]

Where both prongs are satisfied, under this approach, the venture's actions would be treated as those of a single entity. However,

16. *See* Am. Needle Inc. v. Nat'l Football League, 538 F.3d 736, 743 (7th Cir. 2008).

17. *Id.* at 743.

> It thus follows that only one source of economic power controls the promotion of NFL football; it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football . . . [t]he NFL teams share a vital economic interest in collectively promoting NFL football.

Id.

18. *Id.*

19. Brief of United States as Amici Curiae Supporting Petitioner, Am. Needle v. Nat'l Football League, 130 S. Ct. 2201 (2010) (No. 08-661), *available at* http://www.justice.gov/atr/cases/f250300/250316.htm [Hereinafter Brief of U.S.].

the Government added—seemingly negating much of the practical effect of this test—that even in such cases, the plaintiff would ordinarily be able to challenge the "effective merger" itself, i.e., the original "eliminat[ion of] actual or potential competition" that created the effective merger in the first place.[20]

The Supreme Court unanimously reversed, in an opinion by Justice Stevens that reiterated the applicability of section 1 to *all* agreements between independently owned and controlled entities.[21] The Court framed the key question as whether the alleged agreement "joins together separate decisionmakers" capable of making independent decisions—that is, whether the parties to the agreement are "separate economic actors pursuing separate economic interests," such that the agreement "deprives the marketplace of independent centers of decisionmaking . . . and thus of actual or potential competition."[22] The Court—citing cases like *United States v. Sealy, Inc.*,[23] in which even a single corporation was held subject to section 1 because the corporation was "controlled by a group of competitors"[24]—emphasized that this question turns on substance (whether entities with distinct interests are involved) rather than the form of the entity.[25]

Under this analysis, the Court held that the separate interests of the NFL teams precluded their treatment as a single enterprise immune from section 1: "NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power," and each team has a "separate corporate consciousness."[26] The Court dismissed the relevance of the argument that cooperation is necessary to form a sports league, observing that "[t]he justification for cooperation is not relevant to whether the cooperation is concerted or independent action."[27] So long as the NFL teams were independent actors with independent interests, their agreement to license collectively "deprive[d] the marketplace of independent centers of decisionmaking" and fell within section 1.[28]

20. *Id.*

21. *See* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2206-16 (2010).

22. *Id.* at 2207-08.

23. 388 U.S. 350 (1967).

24. *Am. Needle*, 130 S. Ct. at 2209.

25. *Id.* at 2209-10.

26. *Id.* at 2212 (identifying NFL teams as "substantial, independently owned, independently managed businesses").

27. *Id.* at 2214.

28. *See id.* (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).

Nor, the Court held, did it matter that the teams had formed a nominally unitary entity in NFLP, because "competitors 'cannot simply get around' antitrust liability by acting 'through a third-party intermediary or joint venture.'"[29]

The Court likewise gave short shrift to the "effective merger" theory presented by the Solicitor General, observing in a footnote that even under "the Government's own standard" the agreements at issue "would constitute concerted action," and that in any event the decisions of NFLP "are for all functional purposes choices made by the 32 entities with potentially competing interests."[30]

Finally, the Court observed that the applicability of section 1 hardly portends disaster for sports leagues like the NFL, because simply subjecting them to antitrust scrutiny does not mean their agreements are necessarily unlawful: "Football teams that need to cooperate are not trapped by antitrust law."[31] The Court noted that special characteristics of a sports league may justify certain agreements as procompetitive rather than anticompetitive under the Rule of Reason. Further, borrowing language associated with its so-called "quick look" cases, the Court observed that the Rule of Reason analysis "'can sometimes be applied in the twinkling of an eye'"[32]—signaling that in appropriate cases legality under the Rule of Reason might be easily demonstrated. At the same time, the Court cautioned, the "the conduct at issue . . . is still concerted activity under the Sherman Act that is subject to §1 analysis."[33]

III. UNDERSTANDING *AMERICAN NEEDLE*, AND ITS IMPLICATIONS FOR ANTITRUST IMMUNITIES

American Needle was, at bottom, a battle between two views of *Copperweld*. American Needle argued, in essence, that *Copperweld* was a narrow case about entities that are incapable of meaningful independent action. From an antitrust standpoint, no meaningful "contract, combination . . . or conspiracy"[34] between such entities is possible, because with or without an agreement the entities are owned and controlled by a single decisionmaker. In this view, *Copperweld* is limited to entities that, like a parent and wholly-owned

29. *See id.* at 2215-16 (quoting Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 336 (2d Cir. 2008)) (Sotomayor, J., concurring) (addressing use of third-party intermediaries or joint ventures).

30. *Id.* at 2216 n.9.

31. *Id.* at 2216.

32. *Id.* at 2217 (quoting *NCAA*, 468 U. S. at 109 n.39).

33. *Id.* at 2216.

34. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (1890).

subsidiary, inherently have "a complete unity of interest."[35] All other entities are capable of independent action, and their agreements are therefore subject to section 1 scrutiny to determine whether the agreements unreasonably eliminate that independent action.

The Seventh Circuit, and the NFL, took a much broader view of *Copperweld*, interpreting the decision as applying even to entities that are capable of competing with each other. *Copperweld*, under this approach, requires a somewhat metaphysical inquiry into whether the multiple entities at issue can be understood as a "single source of economic power." In this view, the need for cooperation to play football games—the NFL argued that "the member clubs of a professional sports league are inherently unable to compete at all" without collaboration—was enough to make the NFL teams "one source of economic power," and therefore exempt from section 1 under *Copperweld* even in areas (like trademark licensing) where they were capable of competing.[36]

The Supreme Court definitively resolved this tug-of-war in favor of the narrow interpretation of *Copperweld*, expressly disapproving any "metaphysical" inquiry into "whether the parties involved 'seem' like one firm or multiple firms."[37] Rather, so long as an "agreement joins together 'independent centers of decisionmaking,' . . . the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one."[38] In short, the Court held that the joint conduct of "substantial, independently owned, and independently managed business[es]" with distinct interests simply is not single entity conduct under *Copperweld*.[39]

This holding is an important one, but there is nothing about the decision that should be seen as surprising. Indeed, much as I would like to portray *American Needle* as a startling upset that resulted solely from my firm's brilliant lawyering, it would be more accurate to say that the decision was (or at least should have been)

35. *Copperweld*, 467 U.S. at 771.

36. *See* Brief of Respondent, American Needle, Inc. v. National Football League, 130 S. Ct. 2201 (2010) (No. 08-661), 2009 WL 3865438. *See also* Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 743 (7th Cir. 2008) ("Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?").

37. *Am. Needle*, 130 S. Ct. at 2211-12.

38. *Id.* at 2211-12 (quoting *Copperweld*, 467 U.S. 752 (1984)).

39. *See id.* at 2212 (discussing decision-making of NFL teams).

a predictable one.[40] Understanding what made it predictable, moreover, goes a long way toward demonstrating the flaws of the next generation of arguments for sports league immunity. It is for this reason that it is worth exploring why the Court had to decide the case as it did—not to relitigate it, but rather to lay a foundation for spotting the ways in which the same issues recur in the newly-crafted immunity arguments.

First, one of the enduring puzzles of the NFL's (and the Seventh Circuit's) argument—that sports leagues are exempt from section 1 because such leagues inherently require some degree of cooperation—is that it always seemed flatly inconsistent with *National Collegiate Athletic Association v. Board of Regents*[41] (*NCAA*) (a case decided within days of *Copperweld*). In *NCAA*, the Court squarely addressed the need for cooperation among members of a sports league, and how that need affects antitrust analysis.[42] The consequence of that need, the Court explained, is that agreements within such leagues are subject to Rule of Reason, rather than *per se*, scrutiny.[43] The Court did not say such leagues should be immune under section 1; to the contrary, the Court emphasized that, notwithstanding any need for cooperation, "joint ventures have no immunity from the antitrust laws."[44] It is hard to see how the Court

40. There was no shortage of predictions that the Supreme Court would affirm the Seventh Circuit. Sixty percent of the respondents at the FantasySCOTUS website predicted an affirmance. *See* Josh Blackman, *Fantasy SCOTUS: Predictions for* Bilski, American Needle, Stop the Beach, PCAOB, Black, *and* Graham, ABOVETHE LAW.COM (March 26, 2010, 4:05 PM), http://abovethelaw.com/2010/03/fantasy scotus-predictions-for-bilski-american-needle-stop-the-beach-pcaob-black-and-graham/#. *See also* Chrisopher Sagers, *American Needle, Dagher, and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1?*, ANTITRUST SOURCE, Aug. 2009 (online publication of ABA Section of Antitrust Law), available at http://www.abanet.org/antitrust/at-source/09/08/Aug09-Sagers8-12f.pdf. To be sure, this probably tells us more about the heuristics used in predicting the outcome of Supreme Court cases—e.g., looking to the Court's recent trend of ruling for antitrust defendants, or characterizations of the Court as "pro-business"—than it does about whether the decision was predictable as a matter of antitrust law.

To be clear, I am not suggesting that advocacy played no role in the case—to the contrary, I am (unsurprisingly) quite proud of my firm's work in the case, and I firmly believe that effective advocacy can be critical to making clear why a particular result is necessarily correct. But by the same token I think it is important to be clear that the Court's decision was far more consistent with established antitrust law, properly understood, than was the alternative.

41. 468 U.S. 85 (1984).

42. *See NCAA*, 486 U.S. at 117.

43. *See id.* at 100-01.

44. *Id.* at 113.

could have accepted the NFL's "need to cooperate" argument as a basis for immunity without effectively overruling *NCAA*.[45]

More generally, *NCAA* is but one example of the Court's consistent refusal to carve out specific industries or types of conduct as antitrust-free zones. Even where the Court has recognized that potential procompetitive justifications make *per se* liability inappropriate, the Court has consistently refrained from taking the further step of immunizing the conduct entirely. In addition to *NCAA*, examples include *Broadcast Music Inc. v. Columbia Broadcast System, Inc.* (*Broadcast Music*),[46] *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.* (*Northwest Wholesale Stationers*),[47] and (at least if read literally, as I believe it should be) *Dagher*. Simply put, the Court has consistently refused to turn potential justifications for collaboration among potential competitors into blanket immunities.[48]

Second, and not unrelated, whether leagues members need to cooperate in some respects—or may in some metaphysical sense constitute a "single source of power"—has strikingly little to do with the lodestar of all antitrust doctrine: whether the conduct at issue "promotes competition or . . . suppresses competition."[49] The NFL's argument, in other words, was not an argument that the conduct it sought to immunize would never be anticompetitive. Rather, it was an argument that the conduct should be immune from scrutiny even if the conduct is overtly anticompetitive, i.e., that *Copperweld* creates a zone of immunity broad enough to apply even to agreements that overtly eliminate competition from the marketplace. The Seventh Circuit, it is worth recalling, applied sin-

45. The NFL argued that *NCAA* could be distinguished as dealing with college rather than professional leagues, but it is hard to see why this should make a difference. Moreover, *NCAA* itself made clear that it regarded the NCAA as indistinguishable from other sports leagues. See *NCAA*, 468 U.S. at 100-01.

46. 441 U.S. 1 (1979).

47. 472 U.S. 284 (1985).

48. *Copperweld*, as will be seen, is fully consistent with this assertion. As American Needle argued, and as I briefly address in further detail, the key to *Copperweld* is that a parent and its wholly owned subsidiary have no potential for meaningful independence or competition. The case did not immunize any conduct restraining competition that (but for the restraint) would otherwise exist.

49. Nat'l Soc'y of Prof'l Eng'rs. v. United States, 435 U.S. 679, 691 (1978) [*Engineers*]. The "need to cooperate" argument also, as Justice Stevens observed, does not speak to the distinction between unilateral and concerted action: "[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action." Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2214 (2010).

gle-entity immunity despite recognizing that trademark licensing was an area in which the teams were capable of competing.[50]

It should have been clear (as it was to most courts that addressed sports league single-entity arguments prior to *American Needle*) that this was an untenable reading of *Copperweld*, both in view of the *Copperweld* opinion itself and even more importantly—particularly for the next generation of arguments for sports league immunity—because the notion of an immunity without regard to competitive effects is so foreign to the entire sweep of antitrust law. Absent a constitutional imperative[51] or specific congressional intent, the Supreme Court has consistently insisted that antitrust questions be analyzed—and antitrust doctrines justified—solely by reference to competitive effects. The Court has repeatedly rejected arguments that other considerations should override this focus on competitive effects, to the point that even public safety considerations cannot justify an exemption from this "basic policy of the Sherman Act."[52]

Copperweld, even though not articulated as a doctrine of competitive effects, nicely illustrates the primacy of such effects even in drawing the boundary between concerted and unilateral conduct. It is here that I part company with Professor Sagers, who apparently sees *Copperweld* as (at least at some level) indifferent to competitive effects, indeed as "pretty plainly" inviting the lower courts to push

50. *See* Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 737-38 (7th Cir. 2008) (explaining court's analysis). To be sure, the NFL and the Seventh Circuit both suggested that the NFL's licensing restraints could be procompetitive, arguing primarily that they made the NFL a more effective competitor against other forms of entertainment. *See id.* at 742-43 (stating court's reasoning). But neither seriously argued that these effects were so plainly procompetitive as to satisfy the usual standards for determining the competitive effects of a particular type of agreement on a *per se* basis. And in the absence of such a showing, NFL team agreements could not properly be declared automatically lawful on the basis of their procompetitive effects.

51. For example, the *Noerr-Pennington* doctrine, which immunizes actions seeking to influence the passage or enforcement of laws, is based on First Amendment considerations, including the right to petition the government for the redress of grievances. *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991) (quoting *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961)).

52. *Engineers*, 435 U.S. at 695. Likewise, even when procompetitive benefits are held to justify a degree of cooperation among competitors, such exceptions to the "otherwise inflexible prohibition of agreements eliminating rivalry" are "confin[ed] . . . to the . . . reason for [their] existence." ROBERT H. BORK, THE ANTITRUST PARADOX 267 (1978). As Judge Posner has written, "[i]t does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition." Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 594 (7th Cir. 1984).

the single entity concept beyond the parent-subsidiary context by "develop[ing] some theory of the firm" that may or may not have a clear relationship to competitive effects.[53] While there is much common ground between us—as a normative matter, I fully agree with him that a single-entity immunity extending to anticompetitive agreements cannot be justified—I do not think *Copperweld* could fairly be read, even before *American Needle*, as creating or inviting any such competition-indifferent immunity.

The core of *Copperweld* is its (intrinsically narrow) reasoning that an "agreement" between a parent and wholly owned subsidiary—just like coordination between a company and its unincorporated division—cannot possibly eliminate independent action from the marketplace.[54] In each case, regardless of whether there is any formal agreement, there is inherently a "complete unity of interest" that precludes meaningful independence.[55] The "agreement," as the Court carefully emphasized, therefore eliminates no competition or independent conduct that might otherwise exist:

> For similar reasons [to those applicable to an unincorporated division], the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action,

53. Prof. Sagers was a panelist at the same symposium that resulted in this article and also wrote an article published in Volume 18, Issue 2 of this law journal. *See* Chris Sagers, *Why* Copperweld *Was Actually Kind of Dumb: Sound, Fury, and the Once and Still Missing Antitrust Theory of the Firm*, 18 VILL. SPORTS & ENT. L.J. 377 (2011).

54. The *Copperweld* Court explained at length that a wholly-owned subsidiary was not meaningfully different from an unincorporated division. *See Copperweld*, 467 U.S. at 770-71 (noting "general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions"). Notably, the entire argument of the petitioner in *Copperweld* was that there was no basis in antitrust policy for treating a wholly-owned subsidiary differently from an unincorporated division. *See* Brief of Petitioner, Copperweld v. Independence Tube Corp., 467 U.S. 752 (1984) No. 82-1260.

55. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

> there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning . . . . [I]n reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.[56]

I do not think this reasoning can fairly be read as permitting an open-ended quest for a "theory of the firm"—or, indeed, as supporting single-entity immunity for any agreement between entities that are capable of competing with each other (or otherwise acting independently). That is, the *Copperweld* Court was quite clear that the absence of any potential for competition was essential to its holding that "there is no justification for § 1 scrutiny."[57]

In seeing *Copperweld*—notwithstanding this reasoning—as inviting a broad and open-ended "theory of the firm," Professor Sagers may be taking his cue from a few broad lower court interpretations of *Copperweld* rather than from *Copperweld* itself.[58] Even in the lower courts, moreover, I am far from convinced that there has been a systematic problem with courts seeing *Copperweld* as malleable enough to justify immunity for agreements between entities that are capable of competing with each other. To the contrary, I think Judge Kozinski was correct in observing that most courts presented with single-entity arguments "have required . . . that the constituent entities be neither actual nor potential competitors."[59] That is not

56. *Id.* at 771-72 (emphasis added).

57. *Id.* at 772.

58. My disagreement with Professor Sagers, to be clear, is limited to our respective views of *Copperweld.* I think we are largely in agreement on what I see as the more important issue: that a broad immunity defined without regard to competitive effects is inconsistent with the goals of antitrust law.

59. Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1149 (9th Cir. 2003). Judge Boudin, in his thoughtful opinion in *Fraser,* made the related observation that there is "not a lot" of circuit court case law expanding *Copperweld* beyond its factual setting. *See* Fraser v. Major League Soccer, LLC, 284 F.3d 47, 58 n.6 (1st Cir. 2002). His opinion also suggested that any attempt to do so would be fraught with difficulty and inferior to straightforward analysis under the Rule of Reason. *See id.* at 59. Once one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases. To the extent the criteria reflect judgments that a particular practice in context is defensible, assessment under section 1 is more straightforward and draws on developed law. *Id.*

to deny that there are marginal cases in which the result required by *Copperweld* is less than completely clear.[60] But to say that such close-to-the-line cases exist is a far cry from saying that the lower courts have seen *Copperweld* as inviting an open-ended "theory of the firm" inquiry so broad as to authorize immunity even for agreements to restrict competition.

More importantly, even if certain lower courts may have perceived such an invitation in *Copperweld*, that hardly establishes that these courts were reading *Copperweld* correctly. Indeed, the prime example of such a broad reading of *Copperweld*—Judge Easterbrook's opinion in *Chicago Professional Sports, LP v. NBA*[61] (*Bulls II*)—fairly obviously makes little effort to parse the opinion in *Copperweld*.[62] This is unsurprising in light of how carefully *Copperweld* itself emphasized that its parent-subsidiary immunity resulted from the conclusion that truly independent action by a wholly-owned subsidiary was inherently impossible.[63]

60. *Copperweld's* implications for majority-but-less-than-100%-owned subsidiaries, for example, have not been free from doubt.

61. 95 F.3d 593 (7th Cir. 1996).

62. *See id.* at 598. Judge Easterbrook declined to accept that *Copperweld* required a "complete unity of interest," based not on any analysis of *Copperweld*, but on the ground that he deemed such a criterion "silly," since "even a single firm contains many competing interests." *Id.* This refusal to accept *Copperweld's* stated reasoning is far from persuasive evidence of what *Copperweld* actually said.
It is also worth noting one obvious response to Judge Easterbrook's observation: the entire point of *Copperweld* is that potentially competing interests at lower levels of a firm are irrelevant when there is unitary control of the firm's actions in the marketplace. *See Copperweld*, 467 U.S. at 769-72 (discussing irrelevance of competing interest at lower levels of firm); *see also, e.g.*, Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1 COLUM. BUS. L. REV. 1, 54 (1995) ("[N]eoclassical price theory regards the firm as a profit-maximizing entity and does not give any special consideration to the conflicting preferences of its managers or other employees."). That individual *employees* within a firm may have competing interests hardly makes it "silly" to draw a distinction (as *Copperweld* plainly does), between *entities* that have a complete unity of interest—because they are unitarily owned and controlled—and those that do not. As *Copperweld* emphasizes, only the former are incapable of meaningful independent action, and therefore only as to the former is there "no justification for § 1 scrutiny." *Copperweld*, 467 U.S. at 772.

63. None of this is to suggest that *Copperweld* was a flawlessly-written opinion. In particular, the opinion courts confusion by framing its analysis as one that favored "substance" or "reality" over "form." *Copperweld*, 467 U.S. at 772. This framing was unfortunate, because substance-over-form, at least in the abstract, can be read to suggest an open-ended, standard-based rather than rule-based, inquiry. (It is doubly unfortunate that *American Needle* perpetuated this substance versus form framing. *See* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2211 (2010).) But this would be a misunderstanding, because in the *Copperweld* taxonomy a parent's one-hundred percent ownership of a subsidiary is a matter of "substance," not one of "form." What the Court meant by "reality" and "substance" was the reality that a wholly-owned subsidiary is not meaningfully distinct from its parent, as contrasted with the "form" of treating the subsidiary as separate merely because of the formality of separate incorporation. *See, e.g. Copperweld*, 467 U.S. at

From this perspective, it was always hard to imagine the Supreme Court adopting an understanding of *Copperweld* that would create a section 1 exemption for agreements among potential competitors—whether based on a "theory of the firm" or on some metaphysical notion of a single "source of economic power"—and it can hardly be surprising that the Court decisively rejected that option. *American Needle* reminds us that there is little room in antitrust law for arguments that diverge from a focus on whether competition is being unreasonably restrained. That inquiry, as the Court emphasized, need not be a painful one for antitrust defendants: "the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye'[—and, indeed, restraints that] 'are essential if the product is to be available at all,'" like sports league agreements on the rules of play, are "likely to survive the Rule of Reason."[64] But the Court's willingness to entertain such arguments remains confined to applications of competitive effects analysis, not arguments for avoiding it.

IV. LIFE AFTER DEATH?

On its face, *American Needle* broadly ruled out "single entity" status for sports leagues and other joint ventures of "substantial, independently owned, and independently managed business[es]."[65] Where a venture is controlled by independent entities with potentially distinct interests, any agreement among them represents the joining together of potentially independent economic forces and, therefore, constitutes concerted action subject to section 1. The Court's opinion therefore appears to leave little room for ongoing efforts to apply single-entity immunity to such joint ventures of entities lacking what *Copperweld* described as a "complete unity of interest."[66]

771-73 (illustrating this distinction). As the Government's amicus brief in *American Needle* noted, in the relevant sense separate ownership "is not just a matter of form, but creates 'functional differences' that are 'significant for antitrust policy.'" Brief of U.S., *supra* note 19, at 23.

64. *Am. Needle*, 130 S. Ct. at 2217 (quoting *NCAA*, 468 U. S. at 109 n. 39).

65. *Id.* at 2212.

66. The one area in which a modest expansion of *Copperweld* appears possible is one consistent with this "complete unity of interest" criterion, exemplified by the question the Court declined to reach in *Dagher*. *Dagher* involved a fully integrated joint venture in which the participants—while independent entities in other markets—completely eliminated any distinct interests in the conduct of the joint venture, such that the venture was arguably a fully independent entity to which the participants related solely "as investors, not competitors." Texaco Inc. v. Dagher, 547 U.S. 1, 6 (2006). The *Dagher* Court declined to address this fact-specific single entity argument, *see id.* at 7 n.2, and the argument has little relevance to more

Not everyone, however, has accepted that *American Needle* forecloses arguments for sports league immunity. Gregory Werden and James Keyte, in particular, have articulated theories under which significant areas of immunity for sports leagues remain viable even after *American Needle.* This Section identifies and addresses those theories, which I believe to be fundamentally flawed.

A. The Case-By-Case "Effective Merger" Theory

Gregory Werden reads *American Needle*'s rejection of single entity immunity for sports leagues like the NFL as only partial. In particular, he sees the case as suggesting approval of single-entity treatment for joint ventures, including sports leagues, in a variety of circumstances, such as "when [the venture's] participants have no material interests outside the venture" and "when its participants can be expected to maximize the venture's profits rather than act on interests they do have outside the venture."[67] In this view, *American Needle* invites a case-by-case inquiry into whether the venture participants have interests that are identical or divergent with respect to the restraint at issue, and the same joint venture can be a collective (and therefore subject to section 1) in one case and a single entity (and therefore exempt) in another.[68] Mr. Werden, who is Senior Economic Counsel for the Antitrust Division of the Department of Justice, goes on to suggest that this case-by-case analysis be performed by applying the "effective merger" test proposed by the Solicitor General in *American Needle.*[69] That test would ask:

typical joint ventures (including sports leagues) in which the participants retain distinct interests that go beyond those of mere investors.

67. Werden, *supra* note 10. Mr. Werden cites the example of a professional services partnership, believing that "*American Needle* suggests that the partners do not engage in concerted action when they set a schedule of fees for the firm." *Id.* It is worth noting that the assumption that law firm partnerships (for example) do not engage in concerted conduct is not universally shared. *See, e.g.*, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 n.10 (D.C. Cir. 1986) (*dicta*) (treating law firms as subject to section 1 scrutiny); BORK, *supra* note 52, at 265-67 (same). Moreover, some firms have compensation structures under which individual partners' interests may be served by a course of conduct that does not maximize the firm's overall profits. *See* Hovenkamp, *supra* note 62, at 64 ("[T]he individual members of joint ventures often have incentives that diverge from those of the venture as a whole."). The question is, in any event, of little practical significance: for a variety of reasons—including but not limited to lack of market power—the decisions of a single law firm will rarely be subject to any plausible antitrust challenge.

68. *See* Werden, *supra* note 10 (discussing *American Needle* opinion).

69. *See id.* at 402-03. (advocating application of "effective merger" test in such cases).

> [W]hether the joint venture's participants had "effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition" in the relevant market. If so, the court could ask whether the particular actions at issue nevertheless "significantly affect actual or potential competition among" the participants in some related market.[70]

This suggestion is problematic in a number of ways. As an initial matter, the notion that a joint venture should be treated as a single entity whenever its members "can be expected to maximize the venture's profits rather than act on interests they do have outside the venture,"[71] is troubling, and seemingly inconsistent with *American Needle* itself. As the Court observed, a shared interest in maximizing profitability is as typical of cartels as of legitimate joint ventures: "If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products."[72]

Second, the "effective merger" notion turns what is more properly treated as essentially a status determination—whether the entities at issue are distinct actors or (as in *Copperweld*) inherently unitary—into a case-by-case examination of the effects of particular agreements. To be sure, *Copperweld* considered competitive effects in drawing the boundary between unilateral and concerted conduct, but that did not change the fact that the Court was defining a *status*—whether a parent and its wholly-owned subsidiary are one entity or two for purposes of the threshold plurality-of-actors requirement of section 1—and doing so on the ground that the subsidiary is *always* incapable of independent action.[73] Appreciating the rationale for turning this status question into an inquiry for which the answer will vary from case to case for a single joint venture is difficult. Equally difficult is understanding why—in cases in which it can be determined at the threshold that no actual or potential competition is at issue—the case could not readily be dis-

70. *Id.* at 403.

71. *Id.* at 401.

72. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2215 (2010) (citation omitted).

73. *See supra* notes 13-20 and accompanying text.

missed under traditional antitrust principles rather than requiring the crafting of an entirely new "effective merger" defense.[74]

Third, as the Court apparently recognized when it dismissed the Solicitor General's proposal in a footnote,[75] it is not evident what the proposed effective merger test—with all of the complication inherent in litigating this additional issue—would accomplish. As the Solicitor General conceded, even if the defendants can show that they had "effectively merged" by eliminating competition among themselves, *a plaintiff would generally be permitted to challenge that earlier elimination of competition under the Rule of Reason.*[76] Indeed, in such a case, it is precisely that prior elimination of competition that normally will be the focus of the antitrust case. In *American Needle*, for example, the putative "effective merger" was the NFL teams' original agreement to cease competing in trademark licensing and license only through NFLP—but that very agreement not to compete was at the core of the antitrust challenge to the teams' conduct.

B. The *Dagher* "Core Activity" Argument

Mr. Werden also addresses another potential argument for partial sports league immunity, suggesting that a statement in *Texaco, Inc. v. Dagher*—the Court's observation that antitrust's ancillary restraints doctrine "has no application" when "the business practice being challenged involves the core activity of the joint venture itself"—can be read to immunize the "core activity" of a joint venture like a sports league.[77] Putting aside for the moment the merit of this suggestion—and I believe it to be a misreading of *Dagher*—Mr. Werden at least takes a modest view of what might be such a "core activity," using the example of a hypothetical Major League Baseball decision to move from a 162-game to a 154-game schedule.[78] Here, too, it is difficult to see any need for the creation of such an immunity—if there has been a plague of antitrust litigation over league scheduling decisions, I am unaware of it—but at least the

74. This is particularly true in the aftermath of Bell Atlantic Corp. v. Twombly, which sanctioned the dismissal of implausible claims. *See* Bell Atlantic v. Twombly, 550 U.S. 544 (2007) (requiring "enough facts to state a claim to relief that is plausible on its face.").

75. *See Am. Needle*, 130 S.Ct. at 2216 n.9.

76. *See* Brief for U.S., *supra* note 19, at 16, 28, 32 (conceding potential for Rule of Reason challenge).

77. *See* Werden, *supra* note 10, at 404-05 (discussing *Dagher*, 547 U.S. at 7).

78. *See id.*

harm from such a narrow immunity, however unsound, would likely be inconsequential.

The problem, however, is the ancient one of the camel's nose in the tent, particularly in light of the inherent vagueness of the phrase "core activity." Indeed, the camel may already be in the tent: James Keyte (an antitrust litigator who represents professional sports leagues) has argued that, combining *American Needle*'s "quick look" language with *Dagher*'s discussion of "core" activities, even such far-reaching restraints as broadcast restrictions and salary caps are essentially immune from antitrust scrutiny.[79] Mr. Keyte's argument runs as follows: (1) *American Needle*, in noting that the Rule of Reason "'can sometimes be applied in the twinkling of an eye,'" approved the application of a "quick look" determination in favor of antitrust defendants in appropriate cases; (2) "*American Needle* arguably indicates" that the "'core' venture activities" of which *Dagher* spoke "could be approved on a 'quick look;'" and (3) a host of sports league restraints—indeed, a veritable owners' wish list—can be termed "core," and as such approved without detailed antitrust analysis.[80]

Before addressing in detail why neither *Dagher* nor *American Needle* can be read to support this ambitious argument, it is worth pausing to observe that—notwithstanding the superficial differences between this argument and the one rejected in *American Needle*—the argument's essence is yet another attempt to exempt sports leagues from the single, universally-applicable question that must be asked under section 1: "whether the challenged agreement is one that promotes competition or one that suppresses competition."[81] Unlike traditional "quick look" scrutiny—which is merely a means of applying the Rule of Reason *quickly* when the result of such scrutiny is obvious[82]—the question of whether something may be deemed a "core activity" of a sports league (or other joint venture) simply does not speak to whether it is procompetitive or anticompetitive; it is yet another attempt to substitute a quasi-metaphysical concept—with "core activity" replacing "one source of economic power" as the metaphysical concept of choice—for the

79. *See* Keyte, *supra* note 11, at 51-52 (arguing that "core" activities of professional sports leagues do not fall within purview of antitrust scrutiny).

80. *Id.* at 51-52.

81. *Engineers*, 435 U.S. at 691.

82. *See* Cal. Dental Ass'n v. F.T.C, 526 U.S. 756, 770 (1999) (holding that more thorough analysis not required when anticompetitive effects are obvious).

competitive effects analysis required by section 1.[83] As described earlier, such efforts to define a zone of antitrust immunity without regard to competitive effects have, with good reason, been rejected by the Supreme Court.

In any event, the "core activity" argument misreads *Dagher* and *American Needle* as thoroughly as the single entity argument misread *Copperweld.* As an initial matter, the notion that *Dagher* supports *any* sort of immunity for joint ventures is refuted by *Dagher* itself. *Dagher* unanimously reversed a Ninth Circuit decision holding that a joint venture's setting of a price for its product was a *per se* price-fixing violation.[84] The plaintiffs in *Dagher* waived any Rule of Reason claim; as a result, the only issue before the Court concerned the applicability of *per se* liability.[85] Not only did the Court have no occasion to address the application of the Rule of Reason—or of any immunity from Rule of Reason scrutiny—but the Court expressly *declined* to address an argument for single-entity immunity, and expressly indicated that the antitrust plaintiffs there *could* have "challenged [the price-setting policy] pursuant to the rule of reason."[86] The single sentence in *Dagher* referring to "core activity" of the joint venture said only that such activities were not within the scope of the *ancillary restraints* doctrine, not that they were exempt from Rule of Reason scrutiny.[87]

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83. Mr. Keyte's example of agreement on a player salary cap, for instance, hardly qualifies as obviously satisfying the Rule of Reason. Indeed, player restraints have previously been held to violate the Rule of Reason. *See e.g.*, McNeil v. Nat'l Football League, 790 F. Supp. 871 (D. Minn 1992).

84. 547 U.S. at 8 (holding that no per se violation existed when integrated joint venture set the price of the venture's product).

85. *See id.* at 4 (discussing procedural posture of case).

86. *Id.* at 3. Some litigants have pointed to language in *Dagher* that draws an analogy to price-setting by a single firm; however the language at issue related to why a *per se* rule was inapplicable, not to the creation of any immunity. *See, e.g., id.* at 5 ("Price fixing agreements between two or more competitors . . . are per se unlawful. These cases do not present such an agreement . . . ."). The Court merely equated the price-setting in *Dagher* with the price-setting in *Broadcast Music, see id.* at 5-8—and the Court in *Broadcast Music* made clear that that price-setting "plainly involve[d] concerted action" subject to section 1 scrutiny. Broad. Music, Inc. v. Columbia Broad. System, Inc., 441 U.S. 1, 10 (1979) (discussing alleged price-setting by seller of aggregated music rights).

87. *See Dagher*, 547 U.S. at 7-8 (clarifying ancillary restraints doctrine in relation to a venture's setting of price for its product). The Court described the ancillary restraints doctrine as addressing the validity of a joint venture's restrictions on the activities of individual members of the venture, indicating that the "courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid." *Id.* at 7.

In addition, the notion that restraints like salary caps and broadcasting restrictions can be deemed "core activities" demonstrably misconstrues what *Dagher* meant by that phrase. When *Dagher* referred to "the core activity *of the joint venture itself*," the Court was distinguishing between the activities of the collective venture entity and the individual activities (or restraints on the activities) of the separate members of that entity—with only the activities of the former even potentially being "core."[88] Specifically, the Court contrasted "restrictions . . . on nonventure activities" with challenges to the "core activity of the joint venture itself," and it used examples that made clear that "nonventure activities" meant *any* activities of the individual members, no matter how closely related to the venture.[89] In particular, the Court cited *NCAA* as an example of "restrictions . . . on nonventure activities," and the restrictions at issue in *NCAA* were restrictions on NCAA members' broadcasting of their NCAA college football games.[90] In short, *Dagher*'s notion of "core activity" by definition excludes all restraints on the individual conduct of joint venture members.[91]

Finally, the suggestion that "*American Needle* indicates that any such core restrictions could be approved on a 'quick look,'"[92] cannot withstand scrutiny. *American Needle*'s approval of "quick look" scrutiny is limited to the traditional circumstances in which such scrutiny is applicable: those in which the Rule of Reason can "'be applied in the twinkling of an eye.'"[93] Nothing in *American Needle* suggests that "quick look" might be extended to other circumstances, in which—rather than being a shortcut used where the proper result under the Rule of Reason is obvious without need for extended analysis—"quick look" is cited as a means to avoid applying the Rule of Reason at all.

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88. *See id.* at 7 (emphasis added) (distinguishing core activity of collective venture entity from separate members of such entity).

89. *See id.* at 7-8 (2005) (discussing nonventure activities).

90. *Id.* at 7. Notably, this categorization of the broadcast restrictions in *NCAA* as "restrictions . . . on nonventure activities" rather than "core activity of the joint venture itself" is inconsistent with Mr. Keyte's suggestion that "broadcast restrictions" can be deemed immune "core functions" under *Dagher*. *Id.*

91. Even were *Dagher* not so clear on this point, it is hard to conceive of a justification for a broad definition of "core activity" that would make a large category of joint venture restraints—independent of any apparent economic justification—*per se* lawful under the antitrust laws. *Dagher* itself certainly does not articulate any theory under which anything that might be labeled as "core" should automatically be deemed permissible.

92. *See* Keyte, *supra* note 11, at 51-52.

93. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2217 (2010) (quoting *NCAA*, 468 U.S. at 109 n.39).

Indeed, the notion that there is something particularly noteworthy in *American Needle*'s suggestion that defendants can win a "quick look" victory—or that this language heralds any departure from established, competition-centric doctrine—is puzzling. Defendants have always been able to obtain the equivalent of a "quick look" victory when a plaintiff raises no plausible claim of an antitrust violation; indeed, many cases in which motions to dismiss antitrust complaints are granted can fairly be described as ones in which the Rule of Reason was applied "'in the twinkling of an eye.'" And *American Needle*'s related observation that restraints that "'are essential if the product is to be available at all'" are "likely to survive the Rule of Reason"[94] says nothing new. As long ago as *Broadcast Music* and *NCAA*, the Court clearly stated that restraints of this sort, such as sports league "rules defining the conditions of the contest," were presumptively "procompetitive."[95]

In short, *American Needle*'s discussion of why "[f]ootball teams that need to cooperate are not trapped by antitrust law"[96] merely demonstrates—using well-settled principles—that the applicability of the Rule of Reason does not portend a dystopia in which the Monday Night Football schedule and the standard of review for instant-replay challenges are governed by antitrust consent decrees. Absent an argument that all "core activities" of joint ventures are so inherently procompetitive as to pass Rule of Reason muster "in the twinkling of an eye"—an argument I have yet to see attempted, probably for good reason[97]—there is simply no support in *American Needle* for Mr. Keyte's notion that "core activities" of joint ventures are automatically valid.

C. The Argument For Immunizing Restraints On Competition With The Venture

I should also briefly address yet another subversive idea offered by Mr. Keyte: the suggestion that *Dagher* has created another immunity, making it *per se* legal for a joint venture to adopt restraints "preclud[ing] a venture member from competing against the venture."[98] While *Dagher* does contain language suggesting that ancil-

94. *Id.* at 2216 (quoting *NCAA*, 468 U.S. at 101).

95. *NCAA*, 468 U.S. at 117. *See Broad. Music*, 441 U.S. at 23 ("Joint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all.").

96. *Am. Needle*, 130 S. Ct. at 2216.

97. A persuasive version of such an argument is hard to imagine, particularly if "core" is defined so elastically as to include such matters as player salary caps.

98. Keyte, *supra* note 11, at 53.

lary restraints are automatically legal, the case does *not* say that a restraint against competing with the venture is necessarily an ancillary restraint.[99] In fact, the law is authoritatively to the contrary: absent convincing justification, venture members must be left free to compete with the venture.[100] As the Court stated in *NCAA*, "[e]nsuring that individual members of a joint venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures."[101] To be sure, there are undoubtedly situations in which preventing venture members from competing with the venture can be justified as procompetitive, but this—as always—is a matter for proof, not for an *a priori* immunity exempting such restraints without regard to their competitive effects.

V. CONCLUSION

American Needle should put an end to the argument that a sports league is a single entity immune from antitrust scrutiny. More generally, *American Needle* reinforces the need to view skeptically any argument purporting to define a zone of conduct as automatically lawful without regard to its competitive effects.

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99. The correctness of the proposition that ancillary restraints are automatically lawful is dubious, but the Court's statement to that effect is, at worst, dicta.

100. *See, e.g.* United States v. Visa U.S.A., Inc., 344 F.3d 229, 242 (2d Cir. 2003) ("Far from being 'presumptively legal,' such arrangements [not to compete with the venture] are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act.").

101. *NCAA*, 468 U.S. 85, 115 (1984). In *Broadcast Music* "each individual remained free to sell his own music without restraint." *Id.* at 114.