American Needle's Legacy Ten Years On: Darning the Section 1 Tapestry

BY DAVID L. MEYER

THE LEGACY OF *AMERICAN NEEDLE, Inc. v. National Football League*,[1] viewed with the benefit of ten years of hindsight, reveals Justice John Paul Stevens's decision for a unanimous U.S. Supreme Court as a modest yet important stitch in the fabric of Section 1 of the Sherman Act. The Court examined whether the NFL's coordination of intellectual property licensing on behalf of the league and its member teams should be treated as single-entity conduct exempt from a Section 1 claim.

American Needle, a manufacturer of headwear (e.g., baseball caps bearing company logos) challenged an agreement between NFL Properties (NFLP) and Reebok (a competing headwear company) respecting access to NFL and team logos. NFLP—the entity to which the NFL's teams ceded authority over licensing of league and team intellectual property—granted Reebok a ten-year exclusive license to use both league and team marks on headwear and thereby declined to give American Needle the right to use those marks. The court of appeals affirmed the lower court's grant of summary judgment in NFLP's favor. It held that the league and its teams acted as a single "source of economic power" under the Court's seminal decision in *Copperweld Corp. v. Independence Tube Corp.*[2] such that coordination among them did not violate Section 1.[3] The Supreme Court reversed, holding that the conduct involved an agreement among multiple distinct economic entities subject to Section 1 scrutiny.

Even though the *American Needle* decision stood out as a victory for antitrust plaintiffs against the backdrop of defense victories in Section 1 cases like *Texaco Inc. v. Dagher*,[4] *Bell Atlantic Corp. v. Twombly*,[5] and *Credit Suisse v. Billing*,[6] it has not proven a boon to litigants' efforts to prove antitrust liability. Nor has it fundamentally changed how restraints in the specific context of sports leagues are analyzed.

The decision's importance lies in the disruption it did not cause and how it weaved pre-existing principles into a fabric that both avoided new loopholes in the reach of Section 1 while simultaneously confirming that the statute should be applied with tolerance of procompetitive collaboration.

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American Needle stands first and foremost for the arguably simple proposition that firms possessing the tools necessary to compete may not by contract exempt themselves from Section 1. While contracts may well be necessary to achieve procompetitive objectives, *American Needle* emphasized that the proper locus of the inquiry is, generally, about *how—not whether*—Section 1 applies to them.

The Decision

The decision's legacy begins with the text of *American Needle* itself, and is reinforced by ten years of lower court decisions applying it. Justice Stevens's opinion is a play in three acts, none of which sought to be remotely pathbreaking. Each component instead reinforced the basic fabric of Section 1 principles established by modern Supreme Court antitrust decisions—especially *Copperweld*, *Dagher*, *NCAA v. Board of Regents*,[7] and *Broadcast Music, Inc. v. CBS*[8]—and cited liberally to lower court decisions that applied those principles in the sports league and joint-venture setting.

American Needle began with a recitation of the crucial distinctions between Sections 1 and 2 of the Sherman Act. Here, it echoed *Copperweld* in reminding us that Congress treated the conspiratorial conduct reached by Section 1 (at least in the horizontal setting) significantly more harshly than the unilateral conduct covered by Section 2.[9] This part of the decision broke no new ground when viewed in conjunction with Section 2 cases of the era like *Pacific Bell Telephone Co. v. linkLine Communications, Inc.* in 2009[10] and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* in 2004[11]—cases that seemed eager to impose sharper limits on the reach of antitrust law to single-firm conduct.

The Court next discussed the importance, in determining whether Section 1 applies, of "eschew[ing] . . . formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."[12] Such an analysis does "not necessarily" turn on whether there are multiple "legally distinct" entities involved.[13] Nor does it consider "justification[s]" for coordination as indicative of a "'unity of interest'"—even when the resulting product or service might not be possible absent some collaboration.[14] Instead, the analysis is a "functional" one that asks how the entities actually interrelate with one another in practice, the touchstone of which is whether the

alleged agreement "joins together separate decisionmakers."[15] Here again the Court was not breaking new ground. It relied directly on *Copperweld* to explain that the coordination required by Section 1 demands only "'separate economic actors pursuing separate economic interests.'"[16]

In applying his functional analysis to the conduct at issue, Justice Stevens again paid heed to earlier Sherman Act precedents—namely, the ones revealing the myriad ways creative cartelists might conspire if the Court carelessly created exemptions from the Sherman Act's reach. In deciding whether Section 1 applies, one cannot focus on whether the participants share a common purpose—no matter how laudable—as that is just as much the hallmark of conspiracy. Justice Stevens explained that "illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties."[17] And "'commonality of interests exists in every cartel."[18] Nor can appointing a single entity to act "unilaterally" on the group's behalf avoid Section 1's reach, for that would allow any cartel to "'evade the antitrust laws simply by creating a joint venture to serve as the exclusive seller of their combined products."[19]

With these cautions, the Court made short work of deciding that Section 1 applied to the facts before it. The NFL teams had "common interests such as promoting the NFL brand," but those interests only "'partially unit[ed]" the clubs' economic interests.[20] The clubs remained "separate, profit-maximizing entities" whose "interests in licensing team trademarks [were] not necessarily aligned."[21] And the clubs' history of acting jointly when licensing their separately owned trademarks made no difference: "'Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself.'"[22]

The Court acknowledged that a different analysis was required to determine whether NFLP's decisions constituted a Section 1 agreement. But here too the answer was "clear." Had the clubs not formed this entity, "there would be nothing to prevent each" from making its own separate decisions.[23] As such, NFLP could be seen as merely the "instrumentality" of the separate teams and their distinct economic interests, and as such subject to Section 1.[24]

Having concluded that Section 1 applied—and in the process invoking analogies to naked cartel activity—Justice Stevens quickly dampened any fear that the Court took a jaundiced view of the kind of collaboration at issue. Although the question of *how* Section 1 ought to be applied was not among the issues presented, the Court offered a reassuring admonition that despite Section 1's long reach, it should not be an obstacle to procompetitive collaborations. Justice Stevens began by asserting that sports teams needing to cooperate were not "trapped by antitrust law."[25] Resting on the pantheon of Supreme Court decisions applying Section 1 with tolerance of the potential benefits of competitor collaborations—*Dagher*, *NCAA*, and *Broadcast Music*—the Court observed that cooperation shown to be "'essential if the product is to be available at all'" (a) will not be treated as per se unlawful, (b) will "likely . . . survive the Rule of Reason," and (c) may even do so without need for "detailed analysis"—i.e., with only the proverbial "'twinkling of an eye'" referenced in *NCAA*.[26]

At each stage in its opinion, the Court can be seen as stitching together a vision of Section 1 that is simultaneously sensitive to the need to accommodate procompetitive collaborative activity and alert to the need to avoid creating loopholes for anticompetitive cartelization. In the process, *American Needle* paid deep reverence to longstanding precedent and analytical principles and thus darned the tapestry of Section 1 jurisprudence.[27]

Perhaps because Justice Stevens was building on the foundation of prior cases, lower courts that have applied *American Needle* over the past decade generally have not seen it as breaking new ground.

American Needle's Impact on Single-Entity Determinations

American Needle's legacy of continuity rather than disruption is seen most clearly in the single-entity context, where the decision has supplemented rather than supplanted the reasoning of *Copperweld*. Lower courts have treated the decision as a narrow one and relied on it to support outcomes that likely would have seemed obvious in light of prior jurisprudence.

Perhaps most authoritatively, Judge Michael Boudin of the U.S. Court of Appeals for the First Circuit described *American Needle* as merely "follow[ing] conventional doctrine by refusing to expand *Copperweld* to treat a sports league—an agglomeration of independently owned and managed teams—as immune from section 1 in the marketing of intellectual property."[28] As the author of the First Circuit's opinion in *Fraser v. Major League Soccer L.L.C.*[29]—one of the appellate decisions the *American Needle* Court cited approvingly—Judge Boudin's observation seems particularly well grounded.

Other courts have emphasized that *American Needle* "reiterated *Copperweld*'s central holding that 'substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1 [of the Sherman Act].'"[30] Again, nothing new here.

Canvassing the array of decisions that have relied on *American Needle* in the single-entity context, one finds a rather slender roster of mostly unremarkable outcomes. Competing real estate agents do not avoid Section 1 scrutiny when they join a multiple listing association that enables them to "make collective decisions about pricing and services that they otherwise would have made independently."[31] Competing dentists remain capable of violating Section 1 despite their participation in a board of dental examiners because those dentists remain "actively engaged in dentistry" during their tenure on the board.[32] And competing tennis tournaments that "traditionally compete for player talent" do not become "immune from Section 1 scrutiny merely because

[they] cooperate in various respects in producing" a "tour" comprising many different tournaments.[33]

In cases rejecting single-entity defenses after *American Needle*, the alleged "conspirators" all retained the tools necessary to compete with one another, at least absent their alleged agreements to limit that competition. One district court articulated the test this way: "[W]ithout [the venture in which the competitors participated], each [competing entity would] decide individually how to operate and whether, when, how, and with whom to share [information relating to its offerings]."[34]

In light of decisions like these, it is not a stretch to read *American Needle*'s core holding as reaffirming the uncontroversial proposition that legally distinct economic actors may not exempt themselves from the Sherman Act by entering a contract with one another. Something more is required.

On the question of what "more" might suffice, *American Needle*'s teachings are less tightly woven and less well developed by subsequent decisions. Real corporate control—taking account of the realities and not just the form—remains sufficient to avoid Section 1 scrutiny under *Copperweld*. The only appellate decision applying *American Needle* to find entities incapable of conspiring involved sister corporations each owned 100 percent by a common parent, just like the corporate subsidiary at issue in *Copperweld*.[35] *American Needle* plays out this string a bit more, noting that the *Copperweld* principle likely extends (at least "generally") to coordination among officers of a single firm.[36] And at least one lower court further suggested that *American Needle*'s focus on substance over form may call for the extension of *Copperweld* to all situations where one entity controls another.[37]

But outside of this core, there is little certainty given *American Needle*'s call for a "functional" analysis. As NFLP discovered, such an analysis can find that a single entity in control of the relevant levers of economic activity is merely an "instrumentality" of its members (the NFL teams) and their potentially divergent economic interests (relating to the granting of team trademark licenses).

The Sixth Circuit's struggle to apply *American Needle* to a hospital consortium in *Medical Center at Elizabeth Place, LLC v. Atrium Health System*[38] illustrates how a "functional" analysis can sometimes turn on the eye of the beholder. Four independent hospitals in the Dayton, Ohio area came together to form Premier Health Partners (PHP). Pursuant to a joint operating agreement (JOA), the hospitals merged some of their health care functions, but retained control of others. The PHP hospitals continued to hold their assets separately and—perhaps, more importantly—marketed some services independently. Another Dayton hospital complained that the PHP hospitals conspired to exclude it from the market in violation of Section 1. The district court granted summary judgment for the PHP hospitals on the basis that PHP engaged in single-entity conduct outside Section 1's reach. The Sixth Circuit reversed. As the panel's majority saw these facts, Section 1 applied because there was ample evidence for a jury to conclude that "the hospitals are actually competitors attempting to eliminate another competitor through concerted action."[39]

But this was not a unanimous view. The dissent took the majority to task for "misappl[ying]" *American Needle* by overemphasizing issues of "form"—most significantly the hospitals' retention of title to their assets—and failing to conduct a truly functional analysis of how the "defendants 'actually operate' amongst each other."[40] From the dissent's perspective, the PHP venture represented a "single center of decision-making."[41] The dissent saw the JOA as giving PHP "significant operational authority" over each hospital and achieving a sharing of profits and losses (with any profits distributed in accord with the performance of the group as a whole), such that "no single hospital has any incentive to become more profitable by attracting more patients than the other."[42] The fact that the hospitals retained their own assets was not dispositive for the dissent since the JOA restricted how each hospital could deploy those assets. As a result, they "own[ed] their assets in name only."[43]

These different perspectives likely will persist when competitors come together to form an enterprise to which they cede significant control over what were formerly independent competitive activities. Will relinquishing control of a subset of their decisions to the joint enterprise convert subsequent decision-making into a "unitary" phenomenon, as the dissent posits? Or, as the majority perceives, is a venture like this one just an opportunity for firms that own competitively relevant assets to avoid competition?

For cases presenting murky facts in the joint-venture setting, perhaps the clearest legacy of *American Needle*—and one previewed in Justice Stevens's closing remarks—may be that analytical angst is best directed to whether a collaboration presents a real substantive Section 1 concern rather than whether the parties are "capable of conspiring within the meaning of Section 1."

Where Does This Leave Us?

The practical takeaways from *American Needle* and its legacy suggest the following:

Copperweld *has not unraveled in the corporate context.* For entities whose interrelationships are determined by well-defined corporate governance structures, the protections of *Copperweld* are likely as robust as ever. This means that wholly-owned subsidiaries cannot conspire with their parents within the meaning of Section 1, or with sister affiliates that are wholly owned by the same parent.[44] It also should mean that other structural permutations giving a single parent real equity and voting control of another entity will be equally effective at insulating the firms from Section 1 scrutiny for their communications and collective decision-making. *American Needle*'s cautionary reminder here—though not real news—is that the presence of strong minority stakeholders who possess levers of influence and competitive interests that potentially diverge from the majority and affect

markets of concern will create doubts about *Copperweld*'s applicability.

Joint ventures face a high hurdle to satisfy* American Needle*'s functional analysis. Outside of the formal corporate governance setting, *American Needle* is a sharp reminder that joint ventures and other looser amalgamations of actual or potential competitors likely cannot avoid scrutiny under Section 1. *American Needle* constructs a preciously slender needle's eye for venturers to thread in order to avoid Section 1 scrutiny altogether, and no lower court has seemed interested in attempting the exercise:[45]

- If the members of the joint venture hold their own productive assets outside the venture and coordinate among themselves in stewarding the venture's affairs, Section 1 likely will apply.
- If the members cede their in-market assets to the venture and appoint it the exclusive decision maker on their behalf, the *American Needle*'s analysis of NFLP's decision making indicates that Section 1 likely will apply, particularly if there is any prospect of the venture being dissolved with its members reasserting autonomy over their own productive assets. This is so even where, as with NFLP, profits from the in-market activity are shared equally rather than in proportion to each firm's role or contribution. The venture likely would be seen as an "instrumentality" in this context.
- And as Justice Stewart was keen to remind us, Section 1 likely will apply even where collaboration is proven to be essential to the development and sale of an entirely new product.

Different aspects of a collaboration must be analyzed separately. *American Needle* also reminds us that the application of its functional analysis may hinge on the particular aspect of alleged coordination at issue. Not all activity of a given joint venture or other collaboration will necessarily be treated the same way. Consider the NFL: In light of *American Needle*, we know that coordination among the NFL teams and NFLP as to the licensing of the teams' separate marks is subject to Section 1, and we know from an earlier Supreme Court ruling that the league's coordination of employment matters is assumed to be subject to Section 1.[46] But would the same result obtain were the only issue the licensing of the league's own unique mark, or its establishment of rules governing the on-field conduct of games? These matters would require their own functional analyses as to whether there are separate centers of economic power with respect to the matter at hand.[47]

Spend your time on steps to reduce Section 1 risks, rather than positioning to secure single-entity treatment. Joint venturers have an understandable desire to avoid ongoing Section 1 scrutiny of their day-to-day business decision making. And they yearn for a viable path to dismiss spurious antitrust claims at the threshold without the need for significant discovery. But *American Needle* shows that single-entity treatment may well be out of reach in most cases where competitors collaborate to foster procompetitive outcomes.[48] In this light, seeking to avoid the application of Section 1 altogether may not be the path warranting the most attention and creative thought. A more promising one likely will be to design the venture to avoid adverse substantive outcomes, in line with Justice Stevens's comments at the very end of his opinion suggesting that well-structured and procompetitive ventures can garner tolerant treatment by antitrust decision makers.

A catalog of how to manage substantive Section 1 risk in the joint-venture setting is beyond the scope of this article, but with advance planning and attention, collaborations should:

- Minimize the risk of per se treatment by carefully considering and documenting in contemporaneous records the procompetitive objectives of the venture as a whole, as well as why restraints on venture members' competitive freedoms (if any) are needed to facilitate the venture's success. Memorialize the linkage between such restraints and the procompetitive objectives of the venture, and build those restrictions directly and organically into the venture at formation.
- To the extent the venture's structure preserves the possibility of real competition between the venture and its members (or among the venturers), insulate the venture entity's decision making from influence by competitive decision makers at the member competitors. This will minimize the prospect of inferences that the venture's own decisions were the product of a conspiracy with the members (or that the members conspired among one another).[49]
- Maximize the prospect of quick-look approval, as outlined by Justice Stevens, by focusing the venture's activities on the production of an entirely new product or service—or an entirely new output-enhancing investment—that would not have been undertaken without collaboration. Leave members free to compete with respect to that product or service to the maximum extent possible consistent with the venture's creation.

Conclusion

Had *American Needle* gone the other way and extended single-entity treatment to the conduct at issue in the case, it might well have caused a fraying of Section 1's fabric. Venturers of all kinds likely would assert that their pursuit of a shared objective puts them out of reach of Section 1 scrutiny—except perhaps as to the venture's formation in the first place. In that world, antitrust analysis of joint-venture activity would often begin with the need to categorize joint conduct as falling inside or outside the scope of Section 1 scrutiny—an inquiry extrinsic to the core question of whether competition was harmed. Such a regime might come to resemble how antitrust addressed vertical restraints under the now-rescinded per se rules of the past, when significant effort was devoted to analyzing whether those rules applied

rather than determining whether the underlying conduct was in fact likely to cause harm. Thankfully, *American Needle* preserved a world where ventures are analyzed within rather than outside the framework of Section 1 analysis—albeit with an added dose of sensitivity to the procompetitive potential of competitor collaborations. That is not a bad legacy. ■

[1] 560 U.S. 183 (2010).

[2] 467 U.S. 752 (1984) (overturning "intraenterprise conspiracy" doctrine and holding that legally separate but wholly-owned subsidiaries are incapable of conspiring with their parent under antitrust laws).

[3] Am. Needle, Inc. v. NFL, 538 F.3d 736, 744 (7th Cir. 2008), *rev'd*, 560 U.S. 183 (2010).

[4] 547 U.S. 1 (2006) (rejecting Section 1 per se challenge to integrated joint venture's pricing determinations for venture's own products).

[5] 550 U.S. 544 (2007) (rejecting allegations of market allocation agreement among telecommunications providers as insufficiently plausible to state claim).

[6] 551 U.S. 264 (2007) (rejecting Section 1 challenge to alleged conspiracy among IPO underwriters as foreclosed by comprehensive regime of regulation under securities laws).

[7] 468 U.S. 85 (1984) (Stevens, J.) (holding that broadcasting restrictions imposed by NCAA on member teams were not appropriately subject to per se condemnation under Section 1, but nonetheless invalidated restrictions under rule of reason).

[8] 441 U.S. 1 (1979) (holding that agreements among competing composers regarding terms for blanket license encompassing their works were not subject to per se condemnation under Section 1 because of potential efficiencies and enhancements to competition as compared to individual licensing).

[9] 560 U.S. at 190–91.

[10] 555 U.S. 438 (2009) (holding that price squeeze allegations will not support Section 2 liability where alleged monopolist has no antitrust duty to deal at wholesale or there is no allegation that it priced below cost at retail).

[11] 540 U.S. 398 (2004) (holding that regulatory interconnection obligation under Telecommunications Act of 1996 did not give rise to separate antitrust duty of alleged monopolist owner of communications network to aid competitor).

[12] *American Needle*, 560 U.S. at 191.

[13] *Id.* at 192.

[14] *Id.* at 196 (quoting *Copperweld*, 467 U.S. at 771), 199.

[15] *Id.* at 195.

[16] *Id.* (quoting *Copperweld*, 467 U.S. at 773).

[17] *Id.* at 198.

[18] *Id.* at 201 (quoting Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1389 (9th Cir. 1984)).

[19] *Id.* at 201 (quoting Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring in judgment)).

[20] *Id.* at 198 (quoting Jospeh F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521, 1526 (1982)).

[21] *Id.* at 198.

[22] *Id.* at 198 (quoting Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1149 (9th Cir. 2003)).

[23] *Id.* at 200.

[24] *Id.* at 201 (quoting United States v. Sealy, Inc., 388 U.S. 350, 352–54 (1967)).

[25] *Id.* at 202.

[26] *Id.* at 203 (quoting *NCAA*, 468 U.S. at 101, 110 n.39).

[27] This view is in line with contemporaneous commentary. Supreme Court observer Lyle Denniston opined on *American Needle*:

> While the *American Needle* case always had the potential to produce a significant new statement from the Court on the Sherman Act's application to commercial "joint ventures" in general, in the end it did not do so. Much of Justice Stevens' opinion is simply a reiteration of past rulings on such collective activity, and, indeed, did not mark any deviation from the main precedent on the subject, the Court's 1984 decision in *Copperweld Corp. v. Independence Tube Corp.* Stevens was an entirely faithful follower of that decision—even though he had dissented when it was issued.

Lyle Denniston, *Analysis: No Antitrust 'Trojan Horse'* (May 24, 2010), https://www.scotusblog.com/2010/05/analysis-no-antitrust-trojan-horse/.

[28] Gonzalez-Maldonado v. MMM Healthcare, Inc., 693 F.3d 244, 249 (1st Cir. 2012). Applying *Copperweld*, Judge Boudin held—unremarkably—that two sister corporations, each of which was 100 percent owned by the same parent, were incapable of conspiring. *Id.*

[29] 284 F.3d 47, *cert. denied*, 537 U.S. 885 (2002) (emphasis added).

[30] *In re* Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382, 387 (E.D. Pa. 2014).

[31] Robertson v. Sea Pines Real Estate Cos., 679 F.3d 278, 285 (4th Cir. 2012).

[32] FTC v. North Carolina State Bd. of Dental Exam'rs, 717 F.3d 359, 371 (4th Cir. 2013).

[33] Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010) (declining to decide whether single-entity instruction was error in light of plaintiffs' failure to prove relevant antitrust market).

[34] Boland v. Consolidated Multiple Listing Serv., Inc., 868 F. Supp. 2d 506, 511 (D.S.C. 2011) (addressing assertion that real estate brokerages could not conspire for purposes of Section 1 based on their participation in real estate multiple listing services), *aff'd sub nom*. Robertson v. Sea Pines Real Estate Cos., 679 F.3d 278 (4th Cir. 2013).

[35] *See, e.g.*, *Gonzalez-Maldonado*, 693 F.3d 244.

[36] 560 U.S. at 195 (even though "the president and a vice president of a firm could (and regularly do) act in combination, their joint action generally is not the sort of 'combination' that § 1 is intended to cover"). Justice Stevens's use of the word "generally" here (*American Needle*, 560 U.S. at 195) reminds us of the potential that even corporate officers or directors conceivably could have an independent competitive stake in the corporation's decision that would bring into play the possibility of Section 1 scrutiny.

[37] *See* Wesley Health Sys., LLC v. Forrest Cty. Bd. of Supervisors, No. 2:12-CV-59-KS-MTP (S.D. Miss. Oct. 9. 2012) ("AAA may be merely 'owned in part' by Forrest General without any substantial control exerted upon it, or it may be 'controlled by' Forrest General").

[38] 817 F.3d 934 (6th Cir. 2016).

[39] *Id.* at 945.

[40] *Id.* at 946–49.

[41] *Id.* at 946, 953.

[42] *Id.* at 949–50 (Griffin, J., dissenting) (noting, somewhat ironically, that *American Needle* expressly cautioned that "[c]ompetitors cannot side-step antitrust liability merely by sharing revenue through a joint venture").

[43] *Id.* at 951–52. The dissent did not explain how these features avoided *American Needle*'s characterization of NFLP as merely an "instrumentality" subject to Section 1.

[44] *See Gonzalez-Maldonado*, 693 F.3d at 249.

[45] In *Abraham & Veneklasen Venture v. Quarter Horse Ass'n*, 776 F.3d 321 (5th Cir. 2015), the Fifth Circuit suggested that *American Needle* might not require the application of Section 1 to the rules of an industry self-regulatory body where competitors made up a small fraction of members, but it did not decide the issue, opting instead to assume that Section 1 applied in disposing of the case.

[46] Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

[47] Needless to say, the context of joint venture activity will also have substantial bearing on how Section 1 is applied if a venture and its members are treated as separate entities for Section 1 purposes. In some cases, the

decision making by a venture may be deemed a core function of the venture as to which per se condemnation would be inappropriate, and perhaps quick-look validation would. *See Dagher*, 547 U.S. at 7 ("As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single unified price."); *American Needle*, 560 U.S. at 203.

[48] Even in *American Needle*, where the NFL and its clubs won in the lower court, prevailing on the single-entity argument required discovery concerning the structure and history of the league's licensing activities. 538 F.3d at 739. There seems little doubt that a serious "functional" analysis supporting single-entity treatment after *American Needle* would likewise generally call for a nontrivial degree of discovery.

[49] Some post-*American Needle* decisions, seemingly animated by the spirit of Justice Stevens, rely on *American Needle* to find that venturers are not immune from Section 1 but then rely on *Twombly* and other cases to conclude that there was no evidence of actual agreement. *E.g.*, *Abraham & Veneklasen Venture*, 776 F.3d at 330–35 (expressing doubts about *American Needle*'s application to breed qualifications adopted by breed registry organization of which only small fraction of members had distinct economic interests, but proceeding to assume organization could conspire with members; insufficient evidence, however, to exclude possibility that organization had conspired to foreclose plaintiffs' cloned horses from market because it was not controlled by self-interested members); Elite Rodeo Ass'n v. Professional Rodeo Cowboys Ass'n, 159 F. Supp. 3d 738, 750 (N.D. Tex. 2016) (where majority of venture's board members were not potential competitors and did not stand to profit from board action, passage of bylaws not sufficient to establish cognizable Section 1 conspiracy: "Court will assume concerted action could legally have occurred, but the evidence Plaintiffs presented does not make a 'clear showing' of a conspiracy or concerted action.").