2012

The Supreme Court's Renewed Focus on Inefficiently Structured Joint Ventures

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THE SUPREME COURT'S RENEWED FOCUS ON INEFFICIENTLY STRUCTURED JOINT VENTURES

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Antitrust courts and commentators have long appreciated that joint ventures among rival firms have the potential to provide benefits to consumers and the economy through synergies and economies of scale, but also raise the potential of lessening competition among the venture principals. The case law and academic literature have often ignored, however, the potential harm that befalls consumers when joint ventures with market power are structured in a manner that gives the principals the ability to direct policy and a strategy in a manner that advances their parochial self-interest, rather than the interests of the venture-as-a-whole. The Supreme Court's recent decision in American Needle, Inc., v. NFL *properly focused on the difference between a single economic entity (like a corporation) and the typical sports league, which is governed by club owners who act in the interests of their own clubs. It suggests a renewed opportunity for antitrust enforcers to consider the structure of joint ventures that do not face rigorous competition from other providers of similar goods and services, when analyzing antitrust challenges to either specific venture decisions, or to the structure of the venture itself. In this regard, this Essay proposes a workable standard for evaluating joint ventures, focusing on whether decision makers have a fiduciary duty to,*

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and economic incentives aligned with, the profitability of the venture-as-a-whole.

INTRODUCTION

In markets that do not feature vigorous competition among many independent firms, two discrete anticompetitive problems can arise when separate economic actors agree to cooperate with each other. The foremost concern is that consumers will be harmed by the elimination of competition among the parties to the agreement. But, when the parties' agreement is not a complete integration of economic activities through merger, consumers also face the risk that the parties' partial integration (usually labeled as a 'joint venture') will be inefficiently structured, allowing individual firms' independent self-interests to block welfare-maximizing initiatives that may benefit consumers and the firm-as-a-whole. Indeed, successful joint ventures are rare because, among other reasons, companies with different interests, management styles, and goals find it difficult to cooperate on a practical level as business partners.[1] Inefficient decision-making by firms that face vigorous rivals do not harm consumers, who can switch their patronage to substitute goods and services. But when the venture offers goods or services for which there are no reasonable substitutes, consumers may find themselves victimized to a greater degree than those subject to Standard Oil or Microsoft's monopolistic practices: not only suffer from the price increases or quality unresponsiveness that follows from the elimination of competition, but also from the peculiar inefficiencies of cartel-like behavior.

The Supreme Court's recent decision in *American Needle, Inc., v. NFL* reaffirms the Sherman Act's potency in protecting consumers against both these harms.[2] The Court explicitly held that § 1 of the Sherman Act, which bans unreasonable agreements in restraint of trade,[3] applies to decisions of a putative 'single entity' when that entity is governed by economically separate entities and "when the parties to the agreement act on interests separate from those of the firm itself."[4] American Needle, Inc., a sporting goods manufacturer, could therefore challenge, as an unreasonable conspiracy in restraint of trade, the decision by the club owners who govern National Football League Properties (NFLP)—the

1. Zenichi Shishido, *Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture*, 39 HASTINGS L.J. 63, 63 n.3 (1987).

2. Am. Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010).

3. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal").

4. *Am. Needle, Inc.*, 130 S. Ct. at 2215.

NFL's marketing subsidiary—to grant a license for each NFL club's logos and trademarks to a single merchandise manufacturer.[5] This was because, as Justice Stevens explained for the unanimous Court in the final antitrust opinion of his illustrious career, "each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits."[6] Thus, consistent with the approach announced in the Court's prior decision in *Copperweld Corp. v. Independence Tube Corp.*,[7] the league's licensing policies were *unlike* "a multiple team of horses drawing a vehicle under the control of a single driver,"[8] but rather were properly characterized as an agreement between competing clubs, such that the agreement "deprive[d] the marketplace of independent centers of decision-making."[9]

Although earlier work has discussed the importance of the way in which decision-making occurs in joint ventures,[10] and how individual principals within ventures may prefer inefficient, output-reducing decisions that are nonetheless profitable for their particular firm,[11] this Essay explores how *American Needle* can be implemented. This Essay also suggests opportunities for new scrutiny of the inefficient structure of joint ventures with market power. First, the Essay explicitly distinguishes two discrete antitrust problems arising from joint ventures: Competition can be reduced by the elimination of rivalry between the venture parties; consumer welfare can also be reduced when the structure of an otherwise welfare-enhancing joint venture is too likely to result in inefficient business decisions based on the parochial self-interest of the venture's principals. Second, the Essay discusses how antitrust law should deal with these discrete problems, by focusing first on the formation of a venture and next on its structure. Although antitrust analysis of whether a joint venture's formation is anticompetitive has attracted significant judicial and scholarly discussion,[12] proper analysis of a venture's structure has been relatively ignored.[13]

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5. *Id.*

6. *Id.*

7. 467 U.S. 752 (1984).

8. *Id.* at 771.

9. *Am. Needle, Inc.*, 130 S. Ct. at 2212, quoting *Copperweld,* 467 U.S. at 769.

10. *See, e.g.*, Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1 (1995) [hereinafter Hovenkamp, *Exclusive Joint Ventures*].

11. *Id.* at 50. *See also id.* at 54 ("[T]he structure and nature of joint ventures is such that they can often make decision in ways that do not maximize the profits of the venture as a whole.").

12. *See generally* A.B.A. Section of Antitrust Law, 1 ANTITRUST L. DEV. (6th ed. 2007), ch. 4 (discussing antitrust analysis of joint ventures); Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605 (1986); Joseph Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521 (1981); Hovenkamp, *Exclusive Joint Ventures*, *supra* note 10, at 53.

13. Even Professor Brodley's seminal work devotes minimal attention to the harm that

This Essay argues that courts should not limit their inquiry to the reduction of rivalry between the parties, but should consider structural issues related to the venture as well. Courts should ascertain a venture's market power and then demarcate a clear line between those ventures governed by decision-makers whose only incentives are to benefit the venture-as-a-whole, and those ventures governed by decision-makers with divergent economic and legal incentives. This focus tracks, although is not identical to, the inquiry familiar to corporate lawyers with regard to related-party transactions.[14] Where substance may not follow form, courts should

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is the focus of this Essay. Brodley identifies collusion, loss of potential competition, and market exclusion as three "anticompetitive risks" about which antitrust policy ought to be concerned. Brodley, *supra* note 12, at 1530–34, and mentions only in passing the transactions costs problems that joint ventures encounter when serving "two masters." *Id.* at 1529. Likewise, Pitofsky's important work expresses concern about lessened competition between the principals, and between the joint venture and one or more principals, and particular problems with rights of access. Pitofsky, *supra* note 12, at 1608–14. Even with regard to access rights issues (which raise problems similar to those addressed in this Essay, in that independently owned essential facilities would usually be happy to allow access to as many firms willing to pay the monopoly price as possible), which typically arise where the facility is controlled by one or more of the plaintiff's rivals, the Pitofsky article does not discuss the structure of the venture as a critical variable warranting close antitrust scrutiny. The leading study to address this is Hovenkamp, *Exclusive Joint Ventures*, *supra* note 10, although the issue is not the principal focus of his article. Hovenkamp returns to this issue in Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813 (2011) [hereinafter Hovenkamp & Leslie].

In the wake of the Supreme Court's decision in *American Needle*, a veteran Antitrust Division economist has addressed this issue, observing, consistent with the conclusions of this Essay, that "a joint venture is treated as a single economic entity when its participants can be expected to maximize the venture's profits rather than act on the interests they have outside the venture." Gregory J. Werden, *Two Propositions on the Application of the Sherman Act to Joint Ventures after* Dagher *and* American Needle (May 2011) (on file with author). The decision in *American Needle* is thoughtfully reviewed in PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1478d, at 350–67 (3d ed. 2010) [hereinafter AREEDA & HOVENKAMP].

14. With regard to conflicts of interest in joint ventures, the prime focus of corporate law literature is on acts of *commission*, typically the seizing of a corporate opportunity by a venture party that allegedly should have been taken by the joint venture. Another sort of conflict is also problematic: acts of *omission* where individual venture partners block initiatives that will enhance the venture's overall profitability, but not in a uniform way. Suppose Steve, Marco, and Sam create the SMS commercial real estate venture with unanimous consent required for major decisions. The question of Steve's liability if he were to individually secure a good bargain to develop a new shopping mall, instead of allowing SMS to make the investment, is discussed in detail in Shishido, *supra* note 1, at 91–112, building upon the framework articulated in Victor Brudney & Robert C. Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997, 1047 (1981) and A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 5, 1986). Far less attention is paid if Marco were to veto SMS's lucrative investment because he did not want a new mall to compete with an existing shopping mall in which he individually had a large investment. Professor Shishido sensibly observes that the problem of minority oppression is less acute in joint ventures than in closely held corporations,

inquire whether there is a possibility that the joint venture's governance is structured in a manner that creates a significant risk that the decision will be *inconsistent* with the interests of the entity as a whole. This approach draws on the Supreme Court's doctrine of distinguishing agreements from parallel independent behavior.[15] In reviewing challenges to decisions made by joint ventures with market power that are controlled by self-interested principals, courts should closely scrutinize the challenged decision for reasonableness. Additionally, in cases of persistent unreasonableness, courts should evaluate whether consumer welfare would be enhanced by structural relief requiring that the venture be governed by those solely concerned with the venture-as-a-whole.

Finally, the Essay applies this approach to a structural variation on *American Needle*, to an earlier sports broadcasting decision that was settled, and to non-sports antitrust litigation involving credit card processing ventures. These cases illustrate how close scrutiny, and in some cases structural relief, can more effectively protect consumers against welfare-reducing, parochially self-interested decisions by firms that control joint ventures with market power.[16]

I. TWO DISCRETE PROBLEMS

When competition is not so vigorous that firms who disserve consumers face swift retribution,[17] two discrete anticompetitive problems may arise from a joint venture in that market. The first is the well-recognized *formation* problem: Consumer welfare may be significantly reduced by eliminating competition between the parties in the relevant

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because the parties tend to be sophisticated economic actors who each contribute to the venture, giving each party negotiating leverage. Shishido, *supra* note 1, at 72. Although these factors may well allow venture parties to protect their *own* interests, the venture cannot be relied upon to protect the *public* interest in the efficient operation of a venture with market power.

15. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (stating that conspiracy requires evidence that "tends to exclude the possibility" that the defendants' conduct was independent).

16. There may well be situations where (i) a joint venture's benefits outweigh harms; (ii) centralized control limits competition; and (iii) allocating governance rights to individual principals actually benefits consumers, in the same way that consumers benefit when a member of a cartel 'cheats' on an anti-competitive agreement. *See* Hovenkamp & Leslie, *supra* note 13 (providing an analysis of cartel management). Consistent with the approach advocated in this Essay, these situations are best identified by antitrust courts' holding that the venture in question is not a single entity, but under § 1, a decentralized governance structure is the lawful approach for the venture to adopt.

17. Valley Liquors, Inc. v. Redfield Imp., Ltd., 678 F.2d 742, 745 (7th Cir. 1982) (Posner, J.) ("A firm that has no market power is unlikely to adopt policies that disserve its consumers; it cannot afford to. And if it blunders and does adopt such a policy, market retribution will be swift.").

market, in which case the appropriate antitrust result is to bar collaboration and restore rivalry between the joint venture principals. Alternatively, and beyond the scope of this Essay, the formation of a joint venture may be problematic because the agreement forming the venture includes unnecessary collateral restraints on the parties' non-venture behavior, in which case the appropriate antitrust result is to invalidate those restraints while permitting the pro-competitive aspects of the venture to proceed. The second is a *structural* problem: Consumer welfare may be enhanced by *some* form of collaboration among the parties, but policies or agreements that flow from the self-interest of the individual parties may reduce consumer welfare. Moreover, a venture structured to vest decision-making authority in those solely interested in enhancing the venture-as-a-whole may be more likely to produce a welfare-enhancing result that offsets any harm to competition caused by the limitation on rivalry of the venture partners. An inefficiently structured joint venture with market power is likely to produce a result akin to a problem economists have identified as one of double monopoly, where consumers are harmed by monopoly profits and further harmed if a second monopolist handles distribution.[18]

The Second Circuit recognized this second structural problem in an early sports antitrust decision.[19] Rebuffing the same single entity argument that the Supreme Court rejected in *American Needle*, the court expressed its concern about two different types of harms that might occur if the antitrust laws did not constrain sports team owners' decisions. First, the Second Circuit noted that sports leagues could enter into agreements that would benefit the league, but that anticompetitive effects would outweigh these benefits. Second, the court observed that sports leagues might adopt the restraint more for their own protection from competition, than for the welfare of the league itself.[20]

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18. *See, e.g.*, Richard J. Gilbert, *Antitrust for Patent Pools: A Century of Policy Evolution*, 2004 STAN. TECH. L. REV. 3, 7 (2004) (citing DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 398 (3d ed. 1999)); *see generally* Roger D. Blair, David L. Kaserman, & Richard E. Romano, *A Pedagogical Treatment of Bilateral Monopoly*, 55 SO. ECON. J. 831, 831 (1989) (explaining the theory's foundation as developed in AUGUSTIN COURNOT, RESERCHES SUR LES PRINCIPLES MATHEMATIQUES DE LA THEORIE DES RICHESSES (1838) (Nathaniel T. Bacon trans., RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH (1927)).

19. N. Am. Soccer League v. NFL, 670 F.2d 1249, 1257 (2d Cir. 1982).

20. *Id.*

> The characterization of the NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition. To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint

The concurring opinion in an earlier single entity case clearly expressed the point. Judge Richard Cudahy, disagreeing with the panel majority's suggestion that the National Basketball Association might be considered a single entity with respect to broadcasting rules,[21] believed the league was more like a joint venture whose agreements should be subject to analysis under § 1. According to Judge Cudahy, joint ventures warrant antitrust scrutiny

> for at least two reasons—(1) the venture could possess market power with respect to the jointly produced product (essentially act like a single firm with monopoly power) or (2) *the fact that the venturers remain competitors in other arenas might either distort the way the joint product is managed* or allow the ventures to use the joint product as a smokescreen behind which to cut deals to reduce competition in other areas.[22]

> might be one adopted more for the protection of individual league members from competition than to help the league.

Id. (emphasis added). Suggesting that sports league owners might be subject to antitrust liability for an agreement that enhanced the league's ability to compete, because the agreement might be outweighed by anticompetitive effects, has been characterized as "nonsense" by the leading academic advocate of the now-rejected view that sports leagues should be treated as single entities. *See* Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 943 n.4 (1988). Dean Roberts perhaps exaggerates, but agreements among competitors that enhanced the league's ability to compete by increasing consumer appeal would typically be questioned only under the monopolization precedents of § 2 of the Sherman Act. *See, e.g.*, Steven C. Salop & Craig R. Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617 (1999). Roberts's concern is overstated, though, as there does not appear to be any precedent where a court actually held that a sports league agreement found to be reasonably necessary to enable the league to more effectively compete in a broader market was nonetheless struck down because of some overall balancing of effects. Dean Roberts accurately states that the "concepts of competition and consumer welfare demand that every producer act vigorously to make itself optimally efficient." However, he overlooks the fact that sports leagues governed by self-interested club owners often do *not* act in ways that are efficient. Roberts, *supra*, at 943 n.4. *See generally* STEPHEN F. ROSS & STEFAN SZYMANSKI, FANS OF THE WORLD, UNITE! A (CAPITALIST) MANIFESTO FOR SPORTS CONSUMERS 7–9, 14–22 (2008) (providing a catalogue of examples).

21. This suggestion has been reversed by the Supreme Court's decision in *American Needle*. Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2217 (2010).

22. Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 603 (7th Cir. 1996) (Cudahy, J., concurring) (emphasis added). Once a court has determined that a joint venture's decisions will not be checked by marketplace rivalry, the significant risk to consumers means that finding club-run sports leagues to be single entities would result in a high chance of false negatives (dismissing cases where anti-competitive conduct exists), and thus the time and expense of antitrust litigation to closely scrutinize the decisions of conflict-ridden leagues would be justified. Thus, this argument is also consistent with the view that courts maximize consumer welfare by adopting rules that account for error costs and administrative costs. Judd E. Stone & Joshua D. Wright, *Antitrust Formalism Is Dead!*

An illustration of "distortion" in league management arguably occurred concerning the sale of broadcast rights by the clubs in soccer's English Premier League (EPL). In the early 1990s, EPL clubs agreed to bar individual clubs from negotiating broadcast rights arrangements, and to collectively sell the rights to 60 of the 380 games each year to Sky Sports, a satellite programmer. In doing so, the EPL clubs precluded competition that would have resulted in many more games being telecast, which would have driven down the per game rights fees.[23] More curiously, the EPL clubs rejected an offer from Sky Sports to televise an additional thirty games for a commensurately higher fee, because the clubs could not agree on how to divide the additional profits.[24] Consumers thus suffered doubly: first, by the reduction of output from that which would occur if clubs sold their rights individually, and second, by the reduction of output below a monopolist's profit-maximizing level, because of inefficiencies in market structure.

II. FORMATION V. STRUCTURE

Antitrust courts should evaluate challenges to joint venture decisions with a clear focus on formation and structure. First, courts should determine if consumers can readily protect themselves against exploitation by shifting their patronage to substitute goods and services; if so, there is no cause for competitive concern and the inquiry ends.[25] Second, courts should review the venture's *formation*: if the venture should be dissolved and the principals required to compete, rather than collaborate, then further inquiry is required.[26] Third, if the venture carries the potential for pro-competitive benefits, notwithstanding the absence of vigorous rivalry from competitors, the court should examine whether the venture's *structure*

Long Live Antitrust Formalism! Some Implications of American Needle v. NFL, 2010 CATO SUP. CT. REV. 369, 398 (2010).

23. A natural experiment of this phenomenon occurred in the 1980s in American college football. Annual rights fees in excess of $75 million dropped sharply in value after the Supreme Court outlawed the NCAA's strict output limiting rules in *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984). The result was a reduction in prices per game from just under $1 million per game to $250,000, a slight increase in total game attendance, and the televising of nearly three times as many games. PAUL C. WEILER, GARY R. ROBERTS, ROGER I. ABRAMS & STEPHEN F. ROSS, SPORTS AND THE LAW 887–88 (4th ed. 2011).

24. ROSS & SZYMANSKI, *supra* note 20, at 8.

25. *Cf.* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977) (stating that "when interbrand competition exists . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product").

26. *See, e.g.*, United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412, 434 (S.D.N.Y. 1980) (enjoining a joint venture to create a pay television network among the four major motion picture studios).

poses significant risks of competitive harm.

Antitrust resolution of *formation* issues closely resembles merger analysis about which enforcers and practitioners have developed significant expertise. Courts and agencies focus on the relevant markets in which the joint venture is likely to compete, and on whether the resulting reduction or elimination of competition among the parties to the venture presents too great a risk of consumer exploitation. Even if there is a significant risk that rivals will not constrain the venture's ability to impose higher prices, lower output, or output unresponsive to consumer demand,[27] the venture may promise sufficient efficiencies to enhance overall consumer welfare. For example, a venture may prove necessary to create new and distinct products.

Potential efficiencies from a joint venture may therefore justify competitor collaboration despite the lack of swift market retribution from rivals. Thus, the federal government's *Competitor Collaboration Guidelines* provide that antitrust agencies will examine the markets in which joint ventures will operate and, even if such an examination indicates anticompetitive harms, the investigation will turn to "whether the relevant agreement is reasonably necessary to achieve pro-competitive benefits that likely would offset anticompetitive harms."[28]

Certainly, the National Football League would claim that this is true of their league. In these cases, *American Needle* signals the importance of considering the *structure* of the venture. The Court's analysis requires newfound emphasis on the likely effect of price, output, and consumer choice, and on whether decisions by a joint venture are being made by those solely interested in the success of the venture, or by those with interests separate from the firm.[29] Where the structure of a venture allows the management to be solely concerned about the profitability of the overall firm, the venture's post-formation decisions should be considered those of a single entity. When management decisions reflect not only an interest in the venture's profits, but also an interest in the parties' individual profits, further antitrust scrutiny is required.[30] In the latter case, decisions of a joint

27. This is the test articulated by the Court in *NCAA*, 468 U.S. at 107. The focus on responsiveness to consumer demand is emphasized and expounded upon in Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 230 (2007).

28. FED. TRADE COMM'N & DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.2 (2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf [hereinafter COMPETITOR COLLABORATION GUIDELINES].

29. *See, e.g.*, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2215 (2010) (reversing judgment for summary judgment for respondents' Sherman Act § 1 claim of antitrust violations due to the collective decision-making regarding their individual enterprises that thereby prevented market choices).

30. *Id.*

venture with conflicting interests should be independently assessed under the rule of reason to determine their impact on price, output, and consumer responsiveness. A government or private complaint may seek equitable relief to restructure the venture so that control is not vested in those with parochial interests.[31]

This approach parallels corporate law's business judgment rule. The rule states that if a single corporation's decisions are made by executives or boards of directors whose economic interests lie solely in the profitability of the corporation, courts should not second guess their judgment.[32] If decisions are made by those who can economically benefit, either from

31. *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 16 (1945) (striking down a by-law giving member newspapers a veto over applications to join the collaboration by local rivals). Somewhat inconsistent with this approach is that followed by the antitrust enforcement agencies, as set forth in the COMPETITOR COLLABORATION GUIDELINES, *supra* note 28, § 1.3. According to the Guidelines, when firms form a venture to eliminate entirely all competition between themselves in a relevant market, the federal antitrust agencies state that the venture will be analyzed as a merger. This does not raise concerns where vigorous competition exists in the market, or when the elimination of competition itself lessens competition so that the venture's formation would constitute a substantial lessening of competition in violation of § 7 of the Clayton Act. 15 U.S.C. § 18 (2006). The agencies' approach is problematic if a merger analysis results in the conclusion that vigorous competition will not remain in the market, but that the venture should be permitted to go forward because any potential harms from the venture's ability to exercise market power are outweighed by demonstrable efficiencies. *See also* FED. TRADE COMM'N & DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES § 4 (2010), http://ftc.gov/os/2010/08/100819hmg.pdf (illustrating a set of guidelines pertaining to the federal antitrust laws that outline the set forms of analysis and applications of policy of the Department of Justice and the Federal Trade Commission regarding mergers and acquisitions of possible competitors). In this instance, there is a risk that the venture's structure could lead the principals to reduce output or render output unresponsive to consumer demand in the relevant market, not for the purpose of achieving monopoly profits in that market, but to protect some strategic parochial advantage for one of the principals in *another* market. For example, in *American Needle*, the NFL clubs agreed to eliminate competition between themselves in the licensed merchandise market. Suppose the reviewing agency were to conclude that this gave NFL Properties market power, but the efficiencies of joint licensing outweighed the harms. Because NFL Properties is governed by the member clubs acting in their own parochial interests, there is a risk that consumers of licensed hats and jerseys may suffer because the owners would forego business initiatives that would hurt their ability to compete in the labor market. A literal reading of the COMPETITOR COLLABORATION GUIDELINES would preclude an evaluation of that risk, or the possibility of requiring NFL Properties to structure its venture so as to place decision-making in the hands of those solely concerned with the overall welfare of NFL Properties. In contrast, in a real merger, this risk is absent because the merged company will have a single governance structure. Absent § 1.3, the typical joint venture approach would apply to the creation of NFL Properties; thus, where there is a likelihood of anticompetitive harm, the COMPETITOR COLLABORATION GUIDELINES direct the agency staff to focus on "Control of the Collaboration's Competitively significant Decision Making," and "the extent to which the collaboration's governance structure enables the collaboration to act as an independent decision maker." *Id.* § 3.34(d).

32. Shlensky v. Wrigley, 237 N.E.2d 776, 783 (Ill. App. Ct. 1968).

enhancing corporate profitability or from a decision that fails to optimize corporate wealth but allows individual profit, the court should review, with care, the details of the transaction to assure that the result is in the best interests of the corporation.[33]

This approach is also consistent with the long-standing antitrust treatment of potentially anticompetitive practices arising in the context of franchise relationships. Decisions that lessen competition among franchisees, resulting from agreements by self-interest rival franchisees, are subject to close antitrust scrutiny. However, the very same decision that demonstrably comes from the unilateral decision of a franchisor motivated by maximizing profits for the enterprise is evaluated differently.[34] A typical franchise policy is not the product of a conspiracy among franchisees, because the decision is not a joint one made by them but a unilateral one made by the franchisor.[35]

There are a wide variety of joint ventures—sports leagues being among the most well-known—where the elimination of some competition between rivals creates market power, but also results in significant efficiencies and consumer benefits through the ability of the parties to offer products that inherently require collaboration. Other examples recognized by courts include the collaboration among holders of musical copyrights for blanket licenses of all music in their repertoire,[36] and various standard-

33. *Compare id.* at 780 ("we do not mean to say that we have decided that the decision of the directors was a correct one . . . . the decision is one properly before directors and the motives alleged in the amended complaint showed no fraud, illegality or conflict of interest in their making of that decision"), *with* Croton River Club v. Half Moon Bay Homeowners Ass'n, Inc., 52 F.3d 41, 44 (2d Cir. 1995) (noting a decision made by a corporate director with interest in the decision renders the business judgment rule inapplicable and the burden is on board to "demonstrate that its actions were reasonable and/or fair") (citing Alpert v. 28 Williams St. Corp., 473 N.E.2d 19, 26 (N.Y. 1984)).

34. United States v. Gen. Motors Corp., 384 U.S. 127, 140 (1966); *see also* Brief for the United States at 22, United States v. Sealy, Inc., 388 U.S. 350 (1967) (No. 9) ("the source of the territorial restriction is not an independent third party but the very sellers whom the restriction is designed to shield from competition").

35. *See* Barry M. Block & Matthew D. Ridings, *Antitrust Conspiracies in Franchise Systems after* American Needle, 30 FRANCHISE L.J. 216, 220 (2011) ("Franchise systems generally are much more likely than the NFL and NFLP arrangements to pass the critical test that the arrangement does not bring together separate decision makers. NFLP was controlled by the NFL teams, which were potential economic competitors; the decision to grant exclusive licenses was made by a vote of the teams. In contrast, numerous operational decisions in many franchise systems are made by (or, at least, are subject to approval by) one decision maker, i.e., the franchisor."). *See also* Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026, 1032 (D. Nev. 1992) (emphasizing the degree of control exercised by the dominant corporation), *aff'd*, 999 F.2d 445 (9th Cir. 1993).

36. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 24 (1979) (holding that blanket licenses, created by music companies that act as clearinghouses for copyright owners, were not *per se* violations of price fixing under antitrust law).

setting organizations.[37] When a venture with market power is structured so that its decisions are distorted by the parochial self-interest of individual principals, consumers are likely to suffer. To successfully protect consumers, *American Needle* will hopefully facilitate a renewed focus on the governance of the venture, perhaps even mandating that parties structure the venture so that it operates efficiently, and that initiatives that are both welfare-enhancing and profit-maximizing are not thwarted by the parochial self-interest of individual principals.

There are several ways for courts or enforcers to determine whether a decision reflects the interests of the firm as a whole or parochial self-interest. Where the formal structure of a joint venture vests effective decision-making authority in persons whose legal and economic incentives lie exclusively with the promotion of the profitability of the venture as a whole, then absent a showing of sham, pretext, or other evidence that the decision reflects parochial interests, the venture's subsequent decisions should be considered as those of a single entity. Where the structure is more ambiguous, courts can borrow from the antitrust test for the existence of multi-party conspiracies: is there evidence that the decision is *inconsistent* with that of the venture as a whole, but *consistent* with the interests of individual members? Since this is a threshold question, the lack of evidence of any conflict between the venture as a whole and individual members should result in summary dismissal of a complaint challenging particular venture decisions. However, to avoid summary dismissal, it should be sufficient for the plaintiff to demonstrate that a conflict-ridden decision is plausible. A rule of reason analysis is appropriate to determine if indeed the challenged decision is inefficient and welfare-reducing.

The proposed two-part test requires defendants seeking to dismiss Sherman Act § 1 claims on single entity grounds to demonstrate that the challenged decision was made by those with both a legal *and* economic duty to act for the venture as a whole. This is superior to language in some pre-*Needle* lower court decisions that suggest a disjunctive test. For example, an otherwise insightful Ninth Circuit decision recognized the significant collaborative benefits of a multiple listing service for real estate brokers.[38] However, the court rejected a claim that a corporation set up by potential competitor associations was a single entity with regard to the challenged policy because the decision was made by those with independent economic interests.[39] In doing so, the court observed that "[w]here there is substantial common ownership, a fiduciary obligation to

37. *See, e.g.*, HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 35.2d (2002) (describing the legal treatment of standard-setting organizations).

38. Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1140 (9th Cir. 2003).

39. *Id.* at 1151.

act for another entity's economic benefit *or* an agreement to divide profits and losses, individual firms function as an economic unit and are generally treated as a single entity."[40] This language is a bit imprecise. Firms with market power that have substantial common ownership could well disserve consumers if the degree of unshared profits is sufficient to lead a significant shareholder minority to block a welfare-enhancing, venture-profiting innovation. A fiduciary duty to act for the interests of the venture as a whole, in theory, should be sufficient to allow antitrust courts to presume that actions do in fact reflect venture-maximizing conduct. However, fiduciary duty is a private law remedy and there are a variety of reasons why parties could flaunt this duty, with resulting public harm.[41] Finally, a division of profits and losses with regard to joint venture activities is insufficient by itself to remove the likelihood that firms might have outside competitive interests that would lead them to distort the venture's operations to further parochial self-interest.[42]

Sports antitrust cases litigated prior to *American Needle* are consistent with this approach. In the landmark *Raiders* case,[43] the jury's verdict against the NFL was upheld based on evidence that the relocation of the Raiders' home site from Oakland to Los Angeles posed no demonstrable harm to the league, but was rejected by league owners in order to protect the Los Angeles Rams (and, by way of precedent, their own clubs in future cases) from the threat of new local competition.[44] The plaintiffs' evidence—having two teams in the Los Angeles metropolitan area and only one in the San Francisco Bay Area was no less attractive for fans than the reverse—showed that the NFL's decision was inconsistent with that of the venture as a whole.[45] If a single shareholder owned the NFL, then if the

40. *Id.* at 1148 (emphasis added).

41. The ability of private investors with reasonable foresight to adequately protect their own interests is a topic for corporate law, not this Essay. Reliance on private litigation for breach of fiduciary duty or to challenge self-dealings that fall outside the business judgment rule is insufficient to protect the *public* interest in the efficient operation of a venture with market power. For this reason, sound antitrust policy requires that firms not be treated as single-entities unless directors have both a legal and an economic interest in maximizing the value of the venture as a whole. *See also* N.C. Bd. of Dental Exam'rs, No. 9343, 2011 LEXIS 137, at 118–122 (F.T.C. July 14, 2011) (rejecting the claim that ethical and legal duties for self-interested dentists-regulators to enact regulations contrary to their own economic interests precluded a finding that the adopted regulation constituted concerted action among competing dentists).

42. *See* Block & Ridings, *supra* note 35, discussing how NFL teams that equally share licensing income might block initiatives that increase overall league income if it resulted in disproportionate benefits to other clubs that could lead those clubs to gain a competitive advantage in labor markets.

43. Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1394 (9th Cir. 1984).

44. *Id.* at 1395–97.

45. *Id.* at 1399.

plaintiffs' evidence is to be believed, she would have decreed that there should be two teams in Los Angeles.[46]

Sullivan v. National Football League is another case where the structure of a league's governance may have affected league policy. The case involved a challenge to the NFL's unique rule barring club ownership by corporations.[47] The league observed that the policy actually *reduced* the potential market value of clubs. (For this reason, the NFL argued unsuccessfully that, as matter of antitrust doctrine, ownership interests in sports clubs did not constitute a relevant market for antitrust purposes.) However, the jury also heard evidence by prominent sports economist Roger Noll that the rule's effect was to preclude competition by more efficient organizational structures. If believed, this evidence showed that the owners had adopted a policy inconsistent with the best interests of the NFL as a whole. That is to say, if a single shareholder owned the league (like the France family owns NASCAR, a private corporation that organizes the premier stock car auto racing competition in North America),[48] she would presumably prefer the most efficient mix of club structures.

Labor market issues provide another illustration of how the structure of a league can affect league policies. All sports leagues have an interest in allocating athletic talent among the clubs in a manner designed to provide a sporting competition that maximizes fan appeal (and thus revenue). Club-run leagues, however, have a conflicting interest in holding down labor costs, even at the expense of an appeal-maximizing competition. Whether or not any particular club-adopted league policy is anticompetitive depends on the individual facts. Several examples, however, illustrate this point. Major League Baseball's attendance and competitive balance improved substantially after the strict "reserve clause" was lifted in 1976. MLB owners were not foolish to have maintained a scheme that rendered output unresponsive to consumer demand, however, because while attendance indeed rose 57 percent in the seven-year period following the end of the reserve clause, salaries during that period skyrocketed by 316 percent.[49] Similarly, the National Hockey League enjoyed admirable competitive balance at the turn of the century, with twelve different teams playing in the Stanley Cup semi-finals over the 2002–04 seasons, but the clubs locked players out for an entire season to secure a salary cap that prevents under-performing teams in major markets from improving to a level that their fans demand.[50] In contrast, consider the labor rules in two highly

46. *Id.*
47. Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994).
48. NASCAR's structure is detailed in ROSS & SZYMANSKI, *supra* note 20, at 70–108.
49. Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 676 (1989).
50. Stephen F. Ross, *The NHL Labour Dispute and the Common Law, the Competition*

successful leagues where labor rules are *not* controlled by the clubs. Although NASCAR has voluminous engineering rules designed to promote competitive balance among competing race car teams, there are *no* rules that prohibit star drivers or talented crew chiefs or engineers from switching employers at the end of their existing contracts.[51] An independent board of directors who are concerned solely with the interests of the overall league adopted a salary cap for the Indian Premier League. Unlike North American sports leagues, the rules permit clubs who have signed overpaid, underperforming players to buy out their contracts, release them, and then bring in new talent, with any buyout payments not counted against the cap.[52] Thus, unlike under-performing NHL teams, inferior Indian cricket teams can quickly improve by investing in better talent.

In sum, a workable standard to implement the Court's renewed focus on inefficiently structured joint ventures proceeds as follows. First, a plaintiff would need to establish that a particular venture's inefficiencies will not be swiftly corrected by marketplace competition. Second, a defendant would win summary dismissal of a § 1 claim where the venture's structure is such that the challenged decision was made by those whose legal (i.e. fiduciary duty) *and* economic incentives were to maximize the interests of the venture-as-a-whole. Where a venture's structure was more ambiguous, to survive summary dismissal the plaintiff would need to present plausible evidence that the challenged decision(s) reflected parochial self-interest of the venture's principals.[53]

In a rapid-reaction "post-game commentary" on *American Needle*, Professor Herbert Hovenkamp foreswears a categorical line-drawing test such as the one I have proposed.[54] Instead, he suggests that a critical

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Act, and Public Policy, 37 U.B.C. L. REV. 343 (2004).

51. ROSS & SZYMANSKI, *supra* note 20 at 100–02.

52. Interview with Sean Morris, Chief Executive Officer, Rajasthan Royals (June 2, 2010).

53. A plaintiff can always challenge the formation of the venture itself.

54. Herbert Hovenkamp, *American Needle and the Boundaries of the Firm in Antitrust Law* June 1, 2010, http://ssrn.com/abstract=1616625 [hereinafter Hovenkamp, *Firm Boundaries*]; AREEDA & HOVENKAMP, *supra* note 13, at 365. Another advocate of a categorical approach, Richard Brunell, has written, in regard to joint venture maven Joseph Brodley's work:

> [it] suggests a straightforward answer to the question of when *Copperweld* should apply to joint ventures: as long as the members that control the venture are independent economic actors with interests that might diverge from the joint venture as an independent business unit, then the venture should not be treated as a single entity under § 1, regardless of the degree of functional integration or economic interdependence of the members (short of a merger). While the Court did not expressly adopt this test, the Court's reasoning is consistent with it.

Richard M. Brunell, *Professor Brodley's General Contributions to Antitrust Scholarship: Some Thoughts on Professor Brodley's Contributions to Antitrust Through the Eye of* criterion is whether the venture is conducting its *own* business rather than being involved in the separate businesses of its individual team members.[55] For example, he suggests that a league's decision to fire an executive in the commissioner's office would not be subject to antitrust challenge. Certainly, if the issue was the executive's competence, it would be difficult for the fired official to demonstrate that the decision was inconsistent with the interests of the league as a whole. But suppose the league's chief marketing officer had advocated giving teams more of an entrepreneurial incentive to innovate, and was then dismissed under pressure by club owners who did not want to compete with each other in marketing?[56]

A league's decision as to the schedule for regular season games is another example that might be characterized as a league conducting "its own business." Typically, one would expect league schedules to be designed to advance the overall welfare of the league, but not always. For example, several years ago, the National Hockey League staff proposed a schedule that increased the games played against clubs in the other conference, which was designed to display the talent of stars like Pittsburgh Penguin Sidney Crosby and Washington Capital Alex Ovechkin in west coast venues. However, because schedules have to be approved by owners, the east coast owners reportedly vetoed the schedule to reduce their own travel costs.[57] To be clear, not every single schedule dispute would be subjected to a full-fledge rule of reason analysis under my approach. To survive summary dismissal of a § 1 claim, the plaintiff would have to provide plausible evidence that could lead a fact-finder to conclude that the challenged decision was made by those with distinctive competitive

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American Needle, 90 B. U. L. REV. 1385, 1390 (2010).

55. Hovenkamp, *Firm Boundaries, supra* note 54, at 13.

56. This analysis is consistent with the second look at this case in AREEDA & HOVENKAMP, *supra* note 13, at 357 (stating that league operations "should be regarded as unilateral because, *unless deeper probing shows otherwise*, these decisions have no impact on the market behavior of the individual teams") (emphasis added).

57. At the owners' meeting in January, 2007, a proposal to increase the number of inter-conference games on the NHL schedule was defeated on a 19–11 ownership vote, with two-thirds required for passage. *See* Jody Vance, *The Schedule Needs to be Fixed*, Toronto Sun, Jan. 25, 2007, at 38; Tarik El-Bashir, *Live Online: The Washington Capitals*, washingtonpost.com, Jan. 26, 2007, 2:00PM), http://www.washingtonpost.com/wp-dyn/content/discussion/2007/01/18/DI2007011801285.html.

There is one reported case suggesting that, contrary to the assumption made by all parties in other sports league litigation, club owners who control league decisions indeed owe a fiduciary duty to their fellow owners in making important league decisions. Prof'l Hockey Corp. v. World Hockey Ass'n, 143 Cal. App. 3d 410, 415 (Cal. Ct. App. 1983) (noting that when owners "sit on the board of directors of [the league], to the extent they have common corporate goals, they have a duty to make decisions for the benefit of the corporation, the hockey league as a whole"). There are no reported judicial or internal league decisions suggesting that the owners in the four major North American professional sports leagues perceive that they incur such a duty.

interests (*i.e.*, the owners) and that the decision was not likely one that would have been made by those solely concerned with the profitability of the league as a whole.[58]

The categorical approach's clarity is exemplified by a post-*Needle* sports decision, *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*[59] The court of appeals properly rejected a challenge to a rule adopted by the sanctioning body for motorsports dirt track racing that required all competitors to use a single tire.[60] The court emphasized that the plaintiffs' own expert acknowledged that the decision to adopt the challenged rule was made by the sanctioning body in its own best interest.[61] Yet the court went on in dicta to offer general commentary about the need to accord "sports organizations a certain deference and freedom" with regard to contracts with suppliers.[62] Such deference is certainly justified when, as in the case *sub judice*, the decision was made by an independent body. But

58. This result is not inconsistent with an alternative test suggested by the Justice Department's Antitrust Division in its *amicus* brief in *American Needle*: "teams act as a single entity only with respect to aspects of their operations that have been effectively merged, and only when the restraint does not affect competition among the teams, or the teams and the league, outside their merged operations." Brief for the United States as Amicus Curiae Supporting Petitioner at 16, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010) (No. 08-661). The NHL scheduling controversy arose because individual east coast club owners did not merge their operations with regard to local broadcast rights, and continued to compete on the ice, so that these owners were motivated to block a proposed schedule that might optimize overall league revenues or league appeal. The Essay's test is superior, and indeed somewhat more favorable to leagues, in the instance where a league's owners may not have effectively merged all operations, but have vested decision-making authority in those without parochial self-interest. *See* text accompanying note 60, *infra*, discussing Major League Baseball Advanced Media.

The Justice Department's *amicus* brief likewise glosses over this problem in a blanket statement that "teams do not compete in establishing the rule of on-field play, but rather have effectively merged their operation with respect to such decisions." To use another hockey example, consider the important rules changes adopted by the NHL after the 2005 lockout, designed to speed up the game, increase scoring, and increase the game's attractiveness to fans. NHL, OFFICIAL RULES 1, 21, 31, 65, 89 (2005–06), http://www.nhlofficials.com/images/Rules001-084.pdf.; NHL, *NHL Enacts Rules Changes, Creates Competition Committee*, NHL.COM (July 22, 2005), http://www.nhl.com/nhlhq/cba/ruleschanges072205.html. The new rules were not optimal for all teams: most notably, the Minnesota Wild under legendary coach Jacques Lemaire used the old rules to prevail in boring, defense-oriented contests. *Minnesota Wild Historical Moments*, SPORTS ECYCLOPEDIA (June 17, 2011, 12:15 AM), http://www.sportsecyclopedia.com/nhl/minnesota/minwild.html. If a plaintiff could show that a conflicted Board of Governors, acting in their own parochial commercial self-interest, blocked a welfare-enhancing rule for on-ice play, that should be a legitimate basis for antitrust review.

59. Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57 (7th Cir. 2010).

60. *Id.* at 78.

61. *Id.*

62. *Id.* at 80.

suppose the exact same rule had been adopted by a board consisting entirely of existing racing teams, and that the plaintiff had credible evidence that the rule was adopted to preclude innovative competition by new drivers at the expense of established incumbents? A categorical approach properly distinguishes, not on the basis of the substance of a rule, but on the conflict-free nature of the decision to adopt the rule.

A prime focus on the incentives of decision-makers is fully consistent with the Court's earlier decision in *Texaco, Inc. v. Dagher*.[63] In that case, rival oil companies Shell and Texaco combined all their retail marketing in the western United States into a joint venture, Equilon. The Court held that the complete integration of all economic activity in the relevant geographic and product markets meant that the agreement was not *per se* illegal price fixing.[64] A challenge to the pricing scheme based on the elimination of rivalry between Shell and Texaco could have been brought, but was not, under the rule of reason.[65] If, however, the venture's formation was not challenged, and the only challenge was to a post-formation decision by Equilon to charge identical prices for Shell- and Texaco-brand products, the decision would have been immune from § 1 scrutiny unless the plaintiff could present evidence that the decision was not in the best interests of Equilon, but rather was furthering some parochial interest of one or both parties.[66]

III. APPLYING THE CATEGORICAL APPROACH: THREE SCENARIOS

A review of three scenarios will hopefully demonstrate the value of a categorical approach to the single entity issue, focusing on conflict-free governance. Such an approach provides clear guidance in a manner

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63. 547 U.S. 1 (2006).

64. *Id.* at 7.

65. *Id.*

66. *See, e.g.*, James A. Keyte, American Needle*: A New Quick Look for Joint Ventures*, 25 ANTITRUST 48, 50 (2010) (suggesting a wide range of unitary behavior (and, hence, no § 1 scrutiny for ongoing operations) for joint ventures structured like Equilon). Keyte mistakenly concludes, *id.*, that *Dagher* suggests that NFL Properties' ongoing decisions would be immune from § 1 scrutiny if NFL clubs' intellectual property were lawfully assigned to the league subsidiary. In *Dagher*, the principals structured the Equilon joint venture so that Shell and Texaco were passive investors. *See* Brief for Petitioner at 3–4, Texaco, Inc. v. Dagher, 547 U.S. 1 (2006) No. (04-805, 04-814), 2005 WL 2229874. (describing joint venture principals' gains and losses dependent on overall profitability of the venture, so that the principals "stood in the same relation to the new [joint venture] as do shareholders to a corporation"). Although not pursued by the plaintiffs, the Equilon venture was most vulnerable to a rule of reason challenge (there was evidence that prices in some local markets had increased post-venture) because the decision to price Shell- and Texaco-brand gasoline identically was *not* a decision made by the Equilon joint venture after formation, but a pre-venture requirement negotiated by Shell and Texaco in their own parochial self-interest.

consistent with the purposes for which the Court in *Copperweld* and *American Needle* has drawn the distinction between collaborative and unilateral conduct under the antitrust laws.

As the Court explained, decisions resulting from an agreement between two or more economic actors require closer examination because of their potential to harm consumers, while decisions of a single economic actor (far more common in the economy) are less likely to harm consumers absent a specific threat of monopolization.[67] Justice Stevens noted that the central evil addressed by § 1 is the elimination of competition that would otherwise exist.[68] When a decision is made by a joint venture controlled by self-interested parties who retain some competitive relationship with one another, there is a risk that the decision is not efficient, but rather designed to stifle *remaining* competition between the principals. In contrast, when a decision is made by a joint venture controlled by those solely concerned with the interests of the venture-as-a-whole, this risk presumptively is eliminated, and the sole question should be whether the venture's *initial* elimination of competition is lawful, and whether any subsequent decisions risk monopolization.

First, a useful contrast *might* be drawn between NFL Properties, which the Supreme Court concluded was an agreement among the thirty-two NFL club owners, and Major League Baseball Advanced Media (MLBAM).[69] Unlike NFL Properties, which is governed by all NFL club owners, MLBAM was established in 2000 as a business entity governed by a Board of Directors including the MLB President (an executive working under the Commissioner) and some but not all owners.[70] Assuming that MLBAM's governing documents do not contain bizarre terms that would allow this subset of owners to put their own club's interests over those of the other owners who are shareholders in the venture, decisions by MLBAM of how to license properties assigned to it would presumptively be considered the decision of a single entity. Under the categorical approach, because MLBAM is governed by a board of directors whose members have a legal obligation to act only in the best interests of MLBAM as a whole, a plaintiff seeking to challenge a specific board decision would have to show that the directors' economic interests were sufficiently parochial as to

67. Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2209 (2010).

68. *Id.* at 2212.

69. Because Major League Baseball and its Advanced Media subsidiary are private entities, they have not publicly revealed their Articles of Association or other documents relating to corporate governance, and MLB officials declined to provide the author with sufficient information on which to authoritatively base this analysis. Thus, the discussion that follows is based on logical deductions from the limited publicly available information about the relationship between MLB owners and MLB Advanced Media.

70. *MLB Announces CEO For New Internet Initiative; Robert Bowman to Take The Helm of MLB Advanced Media*, BUS. WIRE, Nov. 17, 2000.

trump their fiduciary duties. Absent such a showing, decisions should be considered to be those of a single economic actor. Thus, the only legitimate antitrust challenge to an MLBAM decision[71] would be to attack the *initial* assignment of club assets for the purpose of collective licensing.

A hypothetical marketing initiative exposing the conflict between the individual clubs' interests and those of the league as a whole illustrates why *American Needle* properly found an NFL Properties' decision to be an agreement among member clubs, while a similar decision by MLBAM may well be characterized as the decision of a single entity. Most American sports leagues centralize virtually all marketing activities, although European sports league merchandise is marketed almost exclusively by each club. Suppose NFLP and MLBAM executives independently reached the conclusion that neither extreme made sense, and that revenues could be enhanced significantly by permitting clubs to license certain properties themselves, keeping a small percent of the revenue and sharing the remainder with NFLP or MLBAM. Suppose further that the league executives concluded that the likely result of this initiative would not be to enrich already wealthy clubs to such a degree that the fan appeal of the game would decline due to undue competitive imbalance. In each case, although this initiative would enrich the league as a whole, and make all club owners better off collectively, some owners might do better than others; owners whose clubs are under-performing, or whose club-level marketing staff is below average, might perceive that their own interests would be better served foregoing this business opportunity, lest their rivals gain a competitive advantage. In the case of NFLP, a substantial minority of owners, acting in their own self-interest, could (and likely would) block the initiative. In the case of my stylized version of MLBAM, however, the Board would likely approve it; more specifically, an owner who felt that his own team was unlikely to be able to take advantage of this opportunity would nonetheless have a fiduciary duty to support the initiative if there was no question that it enriched MLBAM as a whole.

The second scenario is less hypothetical: how would *American Needle* affect the Seventh Circuit's analysis of the NBA broadcast litigation in *Chicago Prof'l Sports Ltd. P'ship v. NBA*?[72] Although Professor Hovenkamp ultimately concludes that an NBA rule limiting individual

71. This assumes the inapplicability of the antitrust exemption created by the Supreme Court in *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922), and reaffirmed in *Flood v. Kuhn*, 407 U.S. 258 (1972).

72. Chi. Prof'l Sports Ltd. v. NBA, 95 F.3d 593 (7th Cir. 1996). For a pre-*American Needle* critique, see Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 552–54 (1997) (describing the performance of owners of major professional sports league to be inconsistent with notion of fiduciary duty to other sports owners or to the league as a whole).

clubs' ability to sell broadcast rights nationally should be considered an agreement among the club owners rather than the unilateral decision of the NBA as a single entity, he finds this to be a closer and more difficult question than I do.[73] Whether one looks at the structure of the joint venture, which is what Hovenkamp suggests Judge Easterbrook's majority opinion did, or looks to the nature of the challenged restraint and the extent to which it may reflect independent and potentially competitive incentives, which is how Hovenkamp characterizes Justice Stevens' approach in *American Needle*,[74] the result is the same: the decision was made by the NBA Board of Governors, who had no fiduciary duty or economic incentive to act to maximize profitability for the league as a whole.

It may be true that, in some abstract sense, the NBA had an interest in maximizing the revenue of the NBA as a whole,[75] but as Judge Richard Cudahy observed in his concurring opinion in the case,[76] that interest is not necessarily shared by the NBA Board of Governors, which is comprised of each club's owner or his designee. Per the Coase Theorem, NBA rules would be irrelevant and the profit-maximizing result achieved *in the presence of perfect information and the absence of transactions costs.*[77] Neither condition exists with regard to sports licensing issues. Ascertaining the economic impact of the Chicago Bulls broadcasting their games nationally was uncertain and contested. Throughout the litigation, the Bulls vigorously disputed the NBA's claim that the telecasting of their games on the WGN cable superstation had a significant adverse impact either on the value of the NBA's over-the-air network contract with NBC or on the value of individual club's local rights sales.[78] As with other

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73. Hovenkamp, *Firm Boundaries*, *supra* note 54, at 18. The actual holding of the Seventh Circuit in *Chi. Prof'l Sports Ltd.* reversed the district court's holding that the agreement was sufficiently anticompetitive that it could be barred on a quick look. Instead, the court of appeals remanded the case for a full rule of reason analysis. 95 F.3d at 600. The parties then settled the case.

74. Hovenkamp, *Firm Boundaries*, *supra* note 54, at 15.

75. *Id.* at 18.

76. *Chi. Prof'l Sports Ltd.*, 95 F.3d at 601.

77. Roger G. Noll, *Sports Economics after Fifty Years*, SPORTS ECONOMICS AFTER FIFTY YEARS: ESSAYS IN HONOUR OF SIMON ROTTENBERG 17, 25 (Plácido Rodríguez, Stefan Késenne & Jaume García eds. 2006) (emphasizing the importance of the assumption of perfect information and costless bargaining with regard to the Nobel Prize-winning insight set forth in Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)).

78. Precise market research was not introduced, but the district court found no evidence that the WGN deal affected the value of the rights agreements with over-the-air network NBC and another cable superstation, TBS (games shown on those stations were not shown at the same time as Bulls games on WGN). *See* Chi. Prof'l Sports Ltd. v. NBA, 874 F. Supp. 844, 852 (N.D. Ill. 1994), *rev'd in part and remanded*, 95 F.3d 593 (7th Cir. 1996).

Although this claim may appear superficially counter-intuitive, more careful consideration provides the underlying business logic. Bidding for rights sales is highly competitive among networks, and involves imperfect predictions of the economic value of sports leagues, significant transactions costs, that is, the inability of the clubs to agree among themselves how to divide up the profits, appear to have precluded an efficient arrangement here.[79]

Suppose, however, that the NBA were governed as is NASCAR and the Indian Premier League (cricket) by an independent board of directors responsible *only* to maximize profitability for the league as a whole. Transaction costs problems would be solved: if selling Bulls games on WGN produced more additional revenue than potential revenue losses from other rights sales, the NBA would surely allow these games to be seen nationally.

This case illustrates why a categorical approach is more appropriate for antitrust litigation challenging sports league policies agreed to by self-interested club owners. Since the Sherman Act is a consumer welfare prescription,[80] the antitrust laws ought to reflect a concern when consumers are deprived of desired sports broadcasts because of bargaining inefficiencies in a joint venture with market power. In such a case, the hallmarks of an unreasonable trade restraint—an anti-consumer effect on price, output, or responsiveness to consumer choice—would be present.[81]

A non-sports example provides the final illustration of how the categorical approach assists courts in fulfilling the goals of § 1: the ongoing litigation over fees charged to retailers to process credit card purchases. A full examination of the myriad allegations of anticompetitive conduct in this market is of course beyond the scope of this essay. To grossly summarize, Visa and Mastercard originated as associations of competing banks offering credit card processing services (in addition to the actual provision of credit to consumers, for which consumers are directly charged fees and interest on credit extended). Two distinct processing

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the rights being acquired. Absent a strong likelihood that WGN superstation broadcast would significantly hurt ratings for other games, bidders for those games are not likely to take the WGN broadcasts into account. Bulls' games shown on a local cable channel in Chicago averaged 350,000 viewers, while Bulls' games shown on WGN averaged 650,000 nationwide. Chi. Prof'l Sports Ltd. P'ship. v. NBA, 754 F. Supp. 1336, 1349 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992). The trial court estimated that the viewership outside Chicago after 1990 was 336,000, and WGN's general manager estimated that at least half of these viewers are in cities that do not have NBA teams. *Id.* Thus, an average of less than 6000 viewers in each NBA city were watching each Bulls' game. Even so, of these fans, some were likely Bulls fans who would not have watched any other game in any event. Many others were likely avid NBA fans, who likely watched the Bulls/WGN broadcast in addition to watching their favorite local team. Thus, it is quite plausible that the substitution effect of Bulls' games for those sold by the NBA or other teams was minimal.

79. *See* Stefan Szymanski & Stephen F. Ross, *Necessary Restraints and Inefficient Monopoly Sports Leagues*, 1 INT'L SPORTS L. REV. 27 (2000) (discussing the English Premier League example discussed in text accompanying *supra* note 23).

80. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

81. NCAA v. Bd. of Regents, 468 U.S. 85, 107 (1984).

services are offered by banks: "acquiring banks" settle accounts with merchants, and then are reimbursed by "issuing banks," who have a direct relationship with the card-holding consumer. The "merchant discount" (the amount less than the price charged to the consumer's credit card actually received by the merchant) reflects a variety of fees, including ones charged by the acquiring bank, Visa or Mastercard, and the issuing bank.[82]

According to merchants and other critics of this process, a variety of factors distort free market forces in this industry, resulting in claims that these fees, and in particular the "interchange fee" charged by issuing banks, are far too high in the United States.[83] Visa and Mastercard control a huge share of the market, dominance developed in part by exclusionary practices that prevented rival card brands from developing relationships with banks.[84] Both credit card companies require merchants to honor all cards carrying their brand, even if the fees charged to the merchants vary widely. Most significantly, both insert clauses in contracts with merchants that significantly limit merchants' ability to pass-on to consumers any reduced fees that might induce them to use a particular bank's credit card.[85]

Merchants have filed antitrust challenges to the interchange fees that historically were fixed by competing banks participating in what were structured as joint ventures. To avoid charges of price fixing, both Visa and Mastercard restructured through initial public offerings, so that the interchange fee is now fixed by separate corporate entities, rather than competing banks. Are the defendants now a "single entity," so that the interchange fee, allegedly set at artificially high levels, is immune from antitrust scrutiny?[86]

Professor Hovenkamp claims that *American Needle* should not prevent courts from examining interchange fees under § 1.[87] He argues that

82. *See* Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1045–46 (9th Cir. 2008) (providing a full background on the mechanics of the processing services offered and interactions between banks). Many of these issues are currently pending in *In re* Payment Card Interchange Fee and Merch. Disc. Antitrust Litig., 562 F.Supp. 2d 392 (E.D.N.Y. 2008) (concerning Sherman Act violations arising from processing fees charged by providers of payment network services).

83. *See Credit Card Fair Fee Act of 2008: Hearing on H.R. 5546, Before the H. Comm. on the Judiciary, Antitrust Task Force*, 110th Cong. 98–100 (2008) [hereinafter *Hearings*] (statement of W. Stephen Cannon on Behalf of the Merchants Payments Coalition, Inc. discussing the anti-competitive nature of interchange fees).

84. United States v. Visa U.S.A., Inc., 344 F.3d 229, 237 (2d Cir. 2003).

85. *Hearings*, *supra* note 83.

86. If the interchange fee is set by a single entity, it is not an agreement among rival banks subject to challenge under § 1; the high fees themselves cannot be the basis of proving a violation of § 2, which focuses on unlawful acquisition or maintenance of monopoly power, not the "mere possession" of that power by a monopolist. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

87. Hovenkamp, *Firm Boundaries*, *supra* note 54, at 13–14. For a similar conclusion, see Hovenkamp & Leslie, *supra* note 13, at 871.

rules that limit the independent businesses of participating banks should not be treated any differently now that Visa and MasterCard are supposedly independently owned.[88] Governance is irrelevant because "the corporation's directors are obliged to maximize the corporation's value, which occurs when it achieves the cartel-like output."[89]

My approach likely yields the same result, but via a different path. If the Visa and MasterCard IPOs did nothing more than transfer cartel management from competing banks to a separate entity whose economic incentives were aligned with the desires of participating "issuing banks" to charge excessive interchange fees, then the IPO itself should likely be struck down, or at least the "veil" of independence pierced as a sham.[90] But, according to MasterCard's securities filings, the corporation's revenues are not based on a percentage of interchange fees or bank profits, but rather "from the fees that we charge our customers for providing transaction processing and other payment-related services (operations fees) and by assessing our customers based *primarily on the dollar volume of activity on the cards that carry our brands* (assessments)."[91]

If, as critics claim, there is evidence that the interchange fee is not at a competitive level,[92] then banks issuing MasterCard credit cards could reduce their fee and permit merchants to pass on the savings to consumers, which would result in more consumers using MasterCard credit cards. This would increase the dollar volume of activity on MasterCard-branded cards, and thus increase the profits for MasterCard. This analysis suggests that the corporation's value is not maximized by a cartel-like output, absent collusion with its rival Visa. Rather, if the revenue model for the corporation is primarily based on maximizing the dollar volume of card activity, this puts the corporation in a typical arms-length, quasi-

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88. Hovenkamp, *Firm Boundaries*, *supra* note 54, at 13–14.

89. *Id.*

90. *Cf.* United States v. Sealy, Inc., 388 U.S. 350, 352 (1967) (holding that the territorial limitations by licensees of the parent company should be treated as horizontal violations of the Sherman Act). Hovenkamp & Leslie, *supra* note 13, at 824, make the important point that if parties structure their economic activity as a joint venture vesting complete control in an independent board, it does not necessarily mean that the conduct is legal. They note that if rival firms simply formed a new corporation to control independent firms' output, the structure of the Board of Directors would be irrelevant. The tests proposed in this Essay are appropriate only for agreements reflecting a genuine economic integration that would otherwise be subject to the rule of reason.

91. MasterCard Worldwide, *MasterCard Annual Report 2008*, at 3 (2008), http://www.mastercard.com/us/company/en/newsroom/annual_report/MasterCard_Annual_Report_2008.pdf.

92. These claims are seriously contested by those who claim either that the interchange fee is not exploitive or that any regulation is worse than the harm. Sources on either side are listed in Hovenkamp & Leslie, *supra* note 13, at 869 n.278.

adversarial, vertical relationship with the issuing banks.[93] But it suggests that Hovenkamp is correct in his conclusion that MasterCard should not be immune from § 1 scrutiny, because MasterCard has not made the slightest effort to force banks to lower interchange fees. Assuming, *arguendo*, evidence that the fees are not priced at competitive levels, although the Board of Directors may formally be independent of the banks, the evidence is inconsistent with the way we would expect a truly independent entity to behave.

In addition to claiming that the fees are actually at competitive levels (an issue to be resolved under a rule of a reason, given the plaintiffs' plausible claim that the defendant is not a single entity), there remains another potential reply from MasterCard: there is no reason to insist that banks issuing MasterCards lower their interchange fees because both MasterCard and Visa have contract provisions that prohibit merchants from passing on reduced fees for their own cards *or competing cards*. Thus, even if Bank of America lowered its fees on its Penn State affinity MasterCard, the Nittany Lion Inn could not pass that fee savings on to customers because of its contract with Visa. If this is true, then the competitive problem is not with the fixing of interchange fees, but with this tacit collusion between the two dominant credit card brands about highly restrictive and anticompetitive terms. The bar on passing discounts onto consumers should be independently challenged under § 1[94] or challenged by the Federal Trade Commission as an unfair method of competition.

93. *Cf.* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56 (1977) (discussing the similar relationship between manufacturers, who seek to maximize output of their products given the wholesale price and retailers, whose margins manufacturers prefer to narrow).

94. *See, e.g.*, United States v. Gen. Elec. Co., 1977-2 Trade Cas. (CCH) ¶ 61,659-60 (E.D. Pa. 1977) (concerning government ordering modifications for company price books to avoid antitrust violations and remarking that private suits should be brought independently).

CONCLUSION

In *American Needle*, the Supreme Court drew a clear distinction between business entities whose key decisions are controlled by a single economic actor concerned solely with the profitability of the firm, and entities whose key decisions are controlled by those with their own individual profits apart from the venture's economic welfare.[95] Future antitrust analysis should resolve defendants' claims that a decision was not an agreement subject to challenge under § 1 of the Sherman Act by focusing on whether the decision was made by those with legal (fiduciary duty) and economic incentives to advance the venture-as-a-whole. Evidence that the decision is inconsistent with the best interests of the venture-as-a-whole should lead courts to reject the single-entity defense.

The Court's decision will hopefully draw renewed attention to structural governance issues with regard to competitor collaborations where inefficient governance will not lead to swift market retribution. Where there is evidence that such a joint venture's decisions are guided by parochial self-interest of principals, courts should closely scrutinize challenged decisions for their effect on price, output, quality, and responsiveness to consumer demand.[96] Where there is evidence of persistent inefficiency, courts should consider structural relief.[97]

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95. Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2209 (2010).

96. This approach sharply contrasts with what seems likely to be the latest strategy that the clubs controlling the major sports leagues will adopt in the wake of their defeat on the single entity defense in *American Needle.* Keyte, *supra* note 66, draws upon language in several sports antitrust decisions to argue that many antitrust challenges to club owners' decisions ought to be subject to a "quick look" review in favor of the defendant. Unfortunately, his analysis fails to draw the critical distinction between agreements that further the interests of the leagues as a whole (either by improving competition with other sporting competitions or by increasing internal operational efficiency to the benefit of its fans) and agreements that actually harm both consumers and the league as a whole but are adopted in the parochial self-interest of owners. *Cf.* Sullivan v. NFL, 34 F.3d 1091, 1096–97 (discussing the NFL's ownership restrictions and their effect on trade). Although a quick look rejection of a challenge might be appropriate if the dispute was solely about whether a particular owner would be an acceptable steward of a major franchise, *see Levin v. NBA*, 385 F. Supp. 149 (S.D.N.Y. 1974), and indeed a single entity defense ought to apply if the decision was made by a wholly disinterested board of directors of an independent competition organizer, *see* Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213, 243–44 (2006), *Sullivan* properly allowed a jury to resolve the argument as to whether the rule's primary effect was to further the league's interest in long-term growth or, as the plaintiff's expert claimed, to shelter family-run clubs from more efficient competition.

97. Werden, *supra* note 13, at 8, writes that when "the formation of a joint venture yields obvious and substantial competitive benefits, only minimal antitrust analysis should be required to conclude that the venture does not violate Section 1." Similarly, the Justice

This approach advances the Sherman Act's goal of promoting consumer welfare. It recognizes that, where consumers cannot easily shift their patronage to substitute goods or services, a joint venture structured to protect the parochial self-interest of its principals can reduce output and render output unresponsive to consumer choice.

Department's *amicus* brief in *American Needle*, *supra* note 58, at 16, opines that "where teams have effectively merged an aspect of their operations"—that is, where they have completely eliminated competition among themselves in that activity—post-"merger" decisions that affect only that activity do not "raise the antitrust dangers that [Section] 1 was designed to police." (*citing Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769). These somewhat blanket statements overlook the possibility that a venture's *formation* could be on balance welfare enhancing, but the venture may be structured in a way that will significantly reduce the quantity or quality of output from the venture, compared to "what would otherwise be." *Cf.* NCAA v. Board of Regents, 468 U.S. 85, 107 (1984). If a plaintiff can show that it is not reasonably necessary for the venture's framers to vest governance in those with parochial self-interest, and that such a structure is demonstrably welfare-reducing compared to a venture structured to maximize the interests of the venture as a whole, this showing should preclude any quick-look victory for the defendant. And where rivals effectively merge an aspect of their operations subject to "post-merger" decisions based on demonstrably output-reducing governance rules, these rules do indeed raise the precise antitrust dangers that § 1 was designed to protect.