SOME THOUGHTS ON PROFESSOR BRODLEY'S CONTRIBUTIONS TO ANTITRUST THROUGH THE EYE OF *AMERICAN NEEDLE*

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INTRODUCTION

I am pleased to participate in this conference honoring Joe Brodley, who is one of the leading lights and leading gentlemen in the antitrust field. I will offer my own modest thoughts about Professor Brodley's contributions to the "antitrust enterprise," focusing in particular on his analysis of joint ventures. I will also discuss *American Needle, Inc. v. National Football League* decided in the October 2009 term by the Supreme Court, which addressed the question of when a joint venture should be treated as a "single entity" under Section 1 of the Sherman Act, and how Professor Brodley's analysis of joint ventures helped answer that question.[1]

I. PROFESSOR BRODLEY'S CONTRIBUTIONS TO ANTITRUST

Joe Brodley is an enormously successful antitrust scholar. Over several decades he has published articles in the leading law reviews on oligopolies, potential competition mergers, joint ventures, efficiencies, standing, and predatory pricing, among other topics.[2] Widely cited by legal scholars, many

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[1] Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010). The author co-wrote (with Professor Stephen Ross) the amicus brief filed by the American Antitrust Institute and Consumer Federation of America in support of the petitioner. Many of the ideas in this comment on the single-entity issue are drawn from that brief and conversations with Professor Ross, but the views herein are the author's own.

[2] *See, e.g.*, Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000); Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1 (1995); Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020 (1987) [hereinafter Brodley, *Economic Goals*]; Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521 (1981) [hereinafter Brodley, *Joint Ventures*]; Joseph F. Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1 (1977); Joseph F. Brodley, *Oligopoly Power Under the Sherman and Clayton Acts – From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285 (1966).

of these articles became canonical in the field.[3] Professor Brodley also scores quite high on another measure of academic success, perhaps just as important as the number of article citations: the number of times a scholar's name is cited in the acknowledgment footnotes.[4] He has always been generous in his willingness to read and comment on drafts of articles for me and for countless others.

I first got to know Professor Brodley in the early 1990s when I was in private practice in Boston and he was an occasional participant or speaker at brown-bag lunches held by the Boston Bar Association Antitrust Committee. Professor Brodley had a reputation as a brilliant scholar, but what I remember most was his unfailing modesty. He was the Columbo of antitrust – soft-spoken, but always cutting to the heart of the matter. His mingling with practitioners reflected an important truth about his academic work; its goal was always intensely practical.

In 1996, I got to know Professor Brodley somewhat better when I edited an article of his for the *Antitrust Law Journal* that typifies his concern for, and approach to, enforcement policy.[5] Growing out of his testimony at Federal Trade Commission hearings,[6] he developed a proposal for a two-stage procedure for evaluating efficiencies in mergers and joint ventures. The problem, as he saw it, was that while production and innovation efficiencies in merger analysis, as elsewhere, are terribly important – indeed his *NYU Law Review* article is one of the definitive articles on the topic[7] – efficiency claims are very difficult to prove and evaluate ex ante.[8] Merger proponents always claim them, and many, if not most, mergers fail to realize them.

Professor Brodley's solution was a two-stage procedure: when an otherwise problematic merger involved claims of significant, plausible efficiencies, the government could clear the merger subject to an ex post review or audit after some years to confirm that the claimed efficiencies had in fact materialized; if not, then relief – agreed upon in advance by the parties – would be

[3] *See* Professor Joseph Brodley: Selected Publications (Oct. 28, 2009) (on file with the Boston University Law Review). Professor Brodley's article on predatory pricing with Bolton and Riordan, *supra* note 2, received the Jerry S. Cohen Memorial Award for the best antitrust scholarship of the year. *See First Annual Jerry S. Cohen Memorial Writing Award to Be Presented at AAI Conference on July 1, 2002*, AM. ANTITRUST INST. (May 21, 2002), http://www.antitrustinstitute.org/Archives/185.ashx.

[4] Joe's help was gratefully acknowledged in approximately fifty articles in the Lexis law journals database, going back to 1982.

[5] Joseph F. Brodley, *Proof of Efficiencies in Mergers and Joint Ventures*, 64 ANTITRUST L.J. 575, 611 (1995) [hereinafter Brodley, *Proof of Efficiencies*].

[6] *Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age*, Fed. Trade Comm'n (1995) (statement of Joseph F. Brodley, Boston University Law School and Department of Economics), *available at* http://www.ftc.gov/opp/global/brodley.shtm (last visited May 26, 2010).

[7] *See* Brodley, *Economic Goals*, *supra* note 2.

[8] Brodley, *Proof of Efficiencies*, *supra* note 5, at 592-93.

implemented to restore competitive conditions.[9] Other scholars had made similar proposals,[10] but Professor Brodley's piece carefully thought through the analysis. He offered detailed rules for implementation, including a series of preconditions depending on whether the efficiencies involved production or innovation markets, and he proposed several tests for proving efficiencies after the fact. Then he carefully considered all possible objections. He concluded, "The desirability of the proposed procedure rests on the simple truth that actual results are better guides to enforcement policy than future predictions and that in efficiencies determinations, as elsewhere, light is better than darkness."[11]

Professor Brodley has devoted a significant part of his academic career to studying joint ventures.[12] In 1976, he described joint ventures as "one of the darkest corners of antitrust law,"[13] and he has been trying to shine light on the topic ever since. His several articles on joint ventures include his 1981 *Harvard Law Review* article, *Joint Ventures and Antitrust Policy*, which remains a seminal article on the subject.[14] With ninety law review citations, *Joint Ventures* is Brodley's second-most cited article in legal journals, trailing only his 1987 *NYU Law Review* article on efficiencies.[15] *Joint Ventures* has also been cited in eleven cases, including recently by the Supreme Court in *American Needle*,[16] as well as in *Northwest Wholesale Stationers*[17] and *NCAA v. Board of Regents*.[18] Furthermore, Professor Brodley testified before Congress a number of times on joint ventures, including several instances when the National Cooperative Research Act of 1984 was being considered.[19] He was also influential in the development of the Competitor Collaboration

[9] *Id.* at 577-78.

[10] *See, e.g.*, Robert Pitofksy, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 213, 218 (1992).

[11] Brodley, *Proof of Efficiencies*, *supra* note 5, at 611.

[12] He has written, "The joint venture is a subject that has long intrigued me." Joseph F. Brodley, *Analyzing Joint Ventures with Foreign Partners*, 53 ANTITRUST L.J. 73, 73 (1984).

[13] Joseph F. Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 ANTITRUST BULL. 453, 453 (1976).

[14] *See* Brodley, *Joint Ventures*, *supra* note 2.

[15] *See* Professor Joseph Brodley: Selected Publications, *supra* note 3.

[16] Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2213 (2010).

[17] Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294, 296 & n.6 (1985).

[18] 468 U.S. 85, 114-15 n.54 (1984). *Joint Ventures* is Brodley's second-most cited article by courts, after his *Stanford Law Review* article on oligopolies. *See* Professor Joseph Brodley: Selected Publications, *supra* note 3.

[19] *E.g.*, *Joint Research and Development Legislation: National Cooperative Research Act of 1984: Hearings on H.R. 5041 Before the Subcomm. on Monopolies & Commercial Law of the H. Comm. on the Judiciary*, 98th Cong. 133-31 (1983) (statement of Joseph F. Brodley, Professor of Law, Boston University).

Guidelines issued in 2000 by the Justice Department and the Federal Trade Commission.[20]

Professor Brodley's introduction to *Joint Ventures* reflects his pragmatic objectives. He wrote that a per se rule and an unstructured Rule of Reason are both inappropriate for analyzing joint ventures; the former because of its inflexibility, the latter because it "leads to unfocused, protracted litigation that places the party with the burden of proof at a severe disadvantage."[21] That party normally is the plaintiff, he said, and "the result is likely to be a significant underenforcement of the antitrust laws, if not a standard approaching per se legality."[22] He wrote, "As an alternative to either per se rules or the Rule of Reason . . . antitrust analysis increasingly searches for intermediate rules that define the requirements of legal proof in terms of a limited set of relevant variables."[23] *Joint Ventures* thereby sets out to develop a *structured* Rule of Reason for joint ventures, just as many of Professor Brodley's other articles do for other areas of antitrust law, masterfully incorporating case law, sophisticated economic and business theory, and empirical studies.

Joint Ventures is also characteristic of much of Professor Brodley's academic work in its focus on incentives. He explained that "[j]oint ventures raise antitrust problems because they distort competitive incentives among independent firms by making the firms co-owners of a common profit center,"[24] and his goal in the article is to propose legal remedies that are not "prohibitory or regulatory" but rather are "facilitating and corrective" of the incentive distortion "without jeopardizing the social advantages of the joint venture under scrutiny."[25]

I leave to others the task of placing Professor Brodley's work in the context of the historical development of antitrust law and the sea change that occurred in the 1970s and 1980s with the ascent of the Chicago School, followed by the rise of the post-Chicago scholars.[26] However, in the next Part I will explain how Joe's methodology of focusing on distorted incentives was particularly relevant in the Supreme Court's resolution of the appropriate treatment of joint ventures under *Copperweld Corp. v. Independence Tube Corp.*[27]

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[20] *See Interview with Professor Joseph F. Brodley*, ANTITRUST, Fall 1999, at 6, 6.

[21] Brodley, *Joint Ventures*, *supra* note 2, at 1523.

[22] *Id.*

[23] *Id.* at 1523-24.

[24] *Id.* at 1524.

[25] *Id.* at 1524, 1544.

[26] *See* Eleanor Fox, *"Antitrust Welfare" – The Brodley Synthesis*, 90 B.U. L. REV. 1375 1377-79 (2010).

[27] 467 U.S. 752, 768 (1984).

II. JOINT VENTURES AND *AMERICAN NEEDLE*

When, if ever, should a legitimate joint venture be considered a "single entity" so that its post-formation conduct is not subject to Section 1 of the Sherman Act, which requires a plurality of actors?[28] In *Copperweld*, the Supreme Court held that a parent and its wholly owned subsidiary are "incapable of conspiring with each other" for Section 1 purposes.[29] In *American Needle*, the National Football League ("NFL") argued that *Copperweld* should be extended to members of a legitimate joint venture of separately owned and controlled entities, such as a sports league, at least where cooperation is essential for the venture to offer its joint product in the first place.[30] The Supreme Court rejected that proposition in a unanimous decision authored by Justice Stevens, who had dissented in *Copperweld*. It was the Court's first pro-plaintiff antitrust decision since 1993,[31] and Justice Stevens's last antitrust opinion.

It is true that a joint venture often operates *like* a single entity. It may be a business entity in its own right which produces and sells products, purchases supplies, hires employees, and behaves much like other business firms. And a joint venture may compete as a business unit against other businesses, as the NFL competes against other sports leagues and entertainment providers. Indeed, Professor Brodley remarked that one of the distinctive features of a joint venture is that it "constitutes a business entity separate from its parents,

[28] Section 1 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal." Sherman Antitrust Act, 15 U.S.C. § 1 (2006). Holding that a joint venture is a single entity and is therefore immune from liability under Section 1 of the Sherman Act as to its post-formation conduct does not preclude review of its formation under Section 1, *see infra* note 61, nor immunize it from liability for monopolization under Section 2 of the Sherman Act, which applies to "unilateral" conduct. *See* 15 U.S.C. § 2. However, the scope of liability under Section 2 is much narrower than under Section 1, and has been dramatically reduced in recent years by the Supreme Court. *See, e.g.*, Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407, 415 (2004). Moreover, Section 2 is designed to address exclusionary, not collusive conduct. Holding that a joint venture is *not* a single entity means only that the conduct of the venture can be subject to scrutiny as a potential unreasonable restraint of trade.

[29] *Copperweld*, 467 U.S. at 777. The Court abolished the "intra-enterprise conspiracy doctrine" under which a parent and its wholly owned subsidiary had been deemed to have the capacity to conspire because they were separate legal entities. *See id.* at 752-66.

[30] *See* Brief for the NFL Respondents at 20-24, Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010) (No. 08-661), 2009 WL 3865438. The specific issue was whether the NFL teams were a single entity in licensing their separately owned intellectual property through NFL Properties ("NFLP"), which the teams owned and controlled. *See Am. Needle*, 130 S. Ct. at 2204.

[31] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). Except for the partial plaintiff's victory in *Hartford*, antitrust plaintiffs had lost sixteen straight cases in the Supreme Court, including ten cases since 2004.

[which] distinguishes it from both mergers and contractual arrangements."[32] Yet the Supreme Court recognized that the fact that a joint venture often functions *like* a single entity tells us nothing about whether a joint venture and its members should be a single entity for purposes of Section 1.[33]

Professor Brodley's work 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 Section 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.

Quoting from Professor Brodley's observation that joint ventures only "'*partially* unit[e] the economic interests of the parent firms,'"[34] the Court recognized that, accordingly, a joint venture will not necessarily act as a profit-maximizing entity, as we expect of single firms.[35] Rather, its decisionmakers will take into account the effects on the parents' separate interests, as the NFL teams do when they make decisions concerning intellectual property licensing.[36]

This incentive distortion creates one of the principal anticompetitive risks of joint ventures.[37] Professor Brodley focused on the fact that the parents'

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[32] Brodley, *Joint Ventures*, *supra* note 2, at 1525.

[33] Thus, the Court noted that in "organiz[ing] and own[ing] a legally separate entity that centralizes the management of their intellectual property" the NFL teams "may be similar in some sense to a single enterprise that owns several pieces of intellectual property and licenses them jointly, but they are not similar in the relevant functional sense." *Am. Needle*, 130 S. Ct. at 2213; *see also id.* at 2212 ("[N]or is the question whether the parties involved 'seem' like one firm or multiple firms in any metaphysical sense.").

[34] *Id.* at 2213 (alteration in original) (quoting Brodley, *Joint Ventures*, *supra* note 2, at 1526). Thus, "[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and . . . the teams still have distinct, potentially competing interests." *Id.*

[35] The Court explained, "We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits." *Id.* at 2215.

[36] The Court said that the NFL teams operating through NFLP

> are *not* like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. . . . *[E]ach team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits*.

Id. (emphasis added).

[37] Of course, the potential for anticompetitive conduct (or lack thereof) is not dispositive of "single entity" treatment because what constitutes an agreement and what constitutes an unreasonable restraint of trade are entirely different matters. Most of the commerce conducted in the economy is pursuant to agreements that are subject to Section 1 of the

separate interests may temper the joint venture's competitive moves.[38] Professor Hovenkamp, whose article on joint ventures was also cited by the Court,[39] highlighted the ways in which exclusionary membership and product rules may protect the joint venture's incumbent members at the expense of the venture as a whole.[40] And others have pointed out that major professional sports leagues are known to engage in conduct that protects clubs' separate interests at the expense of consumers and the league as a whole.[41] As Hovenkamp puts it, "On its output side, a joint venture often resembles a single firm," but "[o]n its input side . . . a joint venture is an association, or combination, of two or more economic actors" that "often do not have the same incentives as the stated incentives of the joint venture itself."[42]

In an earlier sports league case, Judge Easterbrook rejected the argument that *Copperweld* required firms to have "a complete unity of interest," stating that this was a "silly" proposition of law because "[e]ven a single firm contains many competing interests . . . . Conflicts are endemic in any multi-stage firm, such as General Motors or IBM, but they do not imply that these large firms must justify all of their acts under the Rule of Reason."[43] However, while single entities like General Motors or IBM surely face internal battles between their divisions, internal conflicts – unlike those in most professional sports leagues – are resolved by *Copperweld*'s "single economic driver": senior

Sherman Act, but very few of such agreements "unreasonably" restrain trade, or even arguably do so. *See* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (observing that every commercial agreement restrains trade). At the same time, *Copperweld* held that a potential "gap" in antitrust enforcement was not sufficient to support the intra-enterprise conspiracy doctrine. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 774-77 (1984).

[38] Brodley, *Joint Ventures*, *supra* note 2, at 1531-32; *see also id.* at 1545 (describing a risk that joint ventures might restrict output in order to effectuate parent collusion, or refrain from potentially profitable invasion of the parents' home markets).

[39] *See Am. Needle*, 130 S. Ct. at 2213, 2215.

[40] Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 53; *see also, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509-10 (1988) (finding that the standard setting organization's refusal to certify a product that competed with controlling members' interests was unlawful); Associated Press v. United States, 326 U.S. 1, 19 (1945) (holding that a bylaw allowing members to veto membership of competing newspapers was unlawful).

[41] *See, e.g.*, STEPHEN F. ROSS & STEFAN SYZMANSKI, FANS OF THE WORLD UNITE!: A (CAPITALIST) MANIFESTO FOR SPORTS CONSUMERS 8-9 (2008) (reporting that it took over five years to move a failing baseball franchise from Montreal to Washington, D.C. because of the veto of the Baltimore Orioles owner, who was supported by his fellow owners fearful of facing localized competition themselves).

[42] Hovenkamp, *supra* note 40, at 52. Hovenkamp concluded, "Given the opportunities for collusion, and the differing incentives that motivate joint venture systems and individual members, it is simply not appropriate to treat ventures as single firms." *Id.* at 53.

[43] Chi. Prof. Sports LP v. NBA (*Bulls II*), 95 F.3d 593, 598 (7th Cir. 1996) (citation omitted).

executives or a board of directors with a fiduciary duty to the corporation as a whole.[44] As Judge Cudahy explained in response to Easterbrook, "[W]hen *Copperweld* talks about unity of interests in the single entity context, I think it must be taken to mean unity of *economic* interests of the *decisionmakers*."[45] And that is essentially what the Court held in *American Needle*, namely that independent action is characterized by a quality of "unitary decisionmaking" and a "single aggregation of economic power."[46] Indeed, the Court explained that even "[a]greements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself."[47]

The Court flatly rejected the NFL's argument that the need for clubs to cooperate to produce NFL football justified treating them as a single entity, stating, "The justification for cooperation is not relevant to whether that cooperation is concerted or independent action."[48] For many joint ventures, the Court observed, "the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis."[49] Rather, the Court emphasized that the need for cooperation was relevant to the substantive analysis under the Rule of Reason, observing that "[t]he fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions."[50] Moreover, evidently in response to concerns about sports leagues and other joint ventures getting mired in protracted litigation over meritless litigation, the Court noted that "depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'"[51]

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[44] *See* Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 553.

[45] *Bulls II*, 95 F.3d at 606 (Cudahy, J., concurring).

[46] Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2212 (2010)..

[47] *Id.* at 2215. Arguably, the *Copperweld* issue can be reduced to a question of whether the decisionmakers of a joint enterprise act as exclusively agents of the venture. *See* Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 436 (1998) (explaining that *Copperweld* and its progeny "base their results on the application of traditional, commonly accepted agency principles to the plurality requirement of conspiracy law").

[48] *Am. Needle*, 130 S. Ct. at 2214 (footnote omitted).

[49] *Id.*

[50] *Id.* at 2216. The Court also went out of its way to note that preserving competitive balance is "unquestionably an interest that may well justify a variety of collective decisions made by the teams." *Id.* at 2217.

[51] *Id.* at 2216-17 (quoting NCAA v. Board of Regents, 468 U.S. 85, 109 n.39 (1984)). Ironically, the "twinkling of an eye" reference, which comes from Professor Areeda, was not originally offered to exculpate defendants but rather to suggest that a truncated Rule of

The Court also dismissed the Solicitor General's proposal to adopt a functional test for *Copperweld* that would treat a joint venture as a single entity with respect to operations that had been "effectively merged" and did not pose any risks of competitive harm.[52] While finding "no need to pass upon the Government's position" because the proposal would not change the outcome of the analysis,[53] the Court in fact rejected the Solicitor General's underlying argument that "the critical inquiry is not how the league's owners make decisions, but whether those decisions restrain actual or potential competition among the teams."[54] The Court made clear that the relevant functional considerations go to "how the parties involved in the alleged anticompetitive conduct actually operate,"[55] and that the nature of decisionmaking by the entity is a key operational consideration.[56] "The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade."[57]

The upshot is that a legitimate joint venture controlled by separately owned and controlled businesses is not a single entity because the decisionmakers will not necessarily have the incentives to maximize the profits of the joint venture as an independent business entity.[58] But what if the decision that is challenged is made by independent professional managers of the venture, rather than the

Reason analysis was appropriate to condemn certain obviously anticompetitive conduct that did not merit per se prohibition. *See NCAA*, 468 U.S. at 109-10 n.39 (quoting PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 38 (1981), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/antitrust.pdf/$file/antitrust.pdf). In any event, courts have no trouble concluding that a joint venture's conduct that does not affect the competitive interests of its members (e.g., negotiating prices for office facilities or wages for venture employees) is entirely lawful, without regard to the single-entity doctrine. *See* N. Tex. Specialty Physicians, 140 F.T.C. 715, 738 (2005), *aff'd*, 528 F.3d 346 (5th Cir. 2008).

[52] *Am. Needle*, 130 S. Ct. at 2216 n.9. The Solicitor General took the position that single-entity treatment was appropriate if the members of a joint venture "have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition . . . in that operational sphere," and "the challenged restraint [does] not significantly affect actual or potential competition . . . outside their merged operations." *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 17, *Am. Needle*, 130 S. Ct. 2201 (No. 08-661), 2009 WL 3070863.

[53] *Am. Needle*, 130 S. Ct. at 2216 n.9.

[54] Brief for the United States as Amicus Curiae, *supra* note 52, at 22.

[55] *Am. Needle*, 130 S. Ct. at 2209.

[56] *See id.* at 2216 n.9 (noting that the "choices that the Government might treat as independent action, although nominally made by NFLP, are for all functional purposes choices made by the 32 entities with potentially competing interests").

[57] *Id.* at 2206.

[58] The Court made it clear that sharing profits and losses from the venture is not dispositive, *see id.* at 2215, which makes sense as long as the partners continue to have independent economic interests that may diverge from the venture's, *cf. id.* at 2216 n.9 (noting that NFL teams could decide to license their own trademarks "[a]t any point").

members themselves (for example, by the NFL Commissioner)? The issue would be whether the members – with their partially divergent economic interests – have control over the managers that make the apparently independent decisions.[59] If the venturers are merely passive owners, or otherwise cede control to officers and directors whose fiduciary duties (and economic incentives) run to the venture as a whole, then single-entity treatment may be appropriate under the reasoning of *American Needle*.[60] Of course, the formation of such a venture would always be subject to scrutiny under Section 1.[61]

CONCLUSION

The center of gravity of antitrust jurisprudence may have shifted since Professor Brodley's *Joint Ventures* article due to the Court's increasing skepticism of the benefits of private antitrust enforcement, heightened concern about the chilling effect of "false positives," and the perception that discovery and litigation are imposing excessive burdens on businesses. Yet *American Needle* makes clear that the Court disfavors sweeping per se rules of liability *and non-liability*, and the search continues for "intermediate" rules between an unstructured Rule of Reason and per se rules.[62] It suggests that the simple

[59] *See id.* at 2216 n.9 (emphasizing that teams control the NFLP).

[60] Professor Brodley offered an elegant solution to the incentive distortion problem of joint ventures: add an outside equity owner, which would establish a fiduciary duty requiring the joint venture's officers to maximize profits. *See* Brodley, *Joint Ventures*, *supra* note 2, at 1544-45. If control is still exercised by the parents, however, it is not clear that such a fiduciary duty would be sufficient to ensure the joint venture acts as an economically independent (and hence "single") entity. Notably, the antitrust enforcement agencies "consider the extent to which the collaboration's governance structure enables the collaboration to act as an independent decision maker" as a factor in the competitive analysis of joint ventures. FED. TRADE COMM'N & U.S. DEPT. OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.34(d) (2000). A cartel whose members cede control of their separate operations to independent management would not qualify for single-entity treatment because by definition it is not a legitimate joint venture. *Cf. Am. Needle*, 130 S. Ct. at 2216 ("[A] joint venture with a single management structure is generally a better way to operate a cartel because it decreases the risks of a party to an illegal agreement defecting from that agreement.").

[61] *See* Texaco v. Dagher, 547 U.S. 1, 6 n.1 (2006); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984). Professors Areeda and Hovenkamp suggest that even if a joint venture is judged to be lawful, formation might be subsequently challenged in light of changed circumstances, and that "unacceptable spillovers" can be seen as an aspect of the agreement to create the venture. 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1478b2, at 320-21 (2d ed. 2003).

[62] *See Am. Needle*, 130 S. Ct. at 2216-17; *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 898-99 (2007) (overturning per se rule against resale price maintenance and instructing courts to "devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones"); Cal. Dental Ass'n v. FTC,

teaching of *Joint Ventures* and Professor Brodley's other work remains sound: it is possible to design administrable rules that discourage anticompetitive conduct but do not jeopardize the efficiencies from joint ventures or other business arrangements.

526 U.S. 756, 781 (1999) ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.").