



The American Antitrust Institute

**Remarks of Richard Brunell,  
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**at the**

**Antitrust Conference in Honor of  
Joseph Brodley  
Boston University School of Law**

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Let me say how pleased I am to participate in this symposium honoring Joe, who is one of the leading lights and leading gentlemen in the antitrust field. Keith Hylton deserves great credit for organizing the symposium, and I want to thank him for inviting me to speak. It's nice to back at BU. I will offer my own modest thoughts about Joe and his contributions to the "antitrust enterprise" and then speak about an antitrust case that is currently before the Supreme Court – *American Needle v. the National Football League* – which deals with a topic near and dear to Joe's heart, joint ventures.

But first I just want to thank Joe for the kindness he showed me when I was at BU. I shared his office suite and Joe took me under his wing and showed me the ropes. He was always generous with his time, particularly in reading and commenting on drafts of articles, as he has done for many, many others. You know, one measure of academic success is the number of times your articles or books are cited in other academic works, and Keith's data show that Joe scores very high in that category; another measure, at least as important, is the number of times your name is cited in the acknowledgment footnotes. I counted about 50 law review articles in Lexis in which Joe's help was gratefully acknowledged, and that database only goes back to 1982.

I first got to know Joe in the early 1990s when I was in private practice in Boston and Joe was an occasional participant or speaker at brown bag lunches held by the Boston Bar Association Antitrust Committee. Joe had a reputation as a brilliant scholar, but what I remember most was his unfailing modesty. He was a little like the Columbo of antitrust; soft-spoken, but his comments always cut 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 Joe somewhat better when I edited an article of his in the *Antitrust Law Journal*, “Proof of Efficiencies in Mergers and Joint Ventures.” I believe it was the first article I worked on as an editor of the Journal and it gave me a rather false sense of how pleasant and easy antitrust authors were to work with. But the article is classic Joe: growing out of his testimony at the FTC Global Competition Hearings, he developed a proposal for a two-stage procedure for evaluating efficiencies in mergers and joint ventures. The problem, as Joe saw it, was that while efficiencies in merger analysis, as elsewhere, are terribly important – indeed his 1987 NYU law review article is one of the definitive articles on the topic – efficiency claims are very difficult to prove and evaluate ex ante. Merger proponents always claim them, and many, if not most, mergers fail to realize them.

Joe’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 were in fact realized; if not, then relief – agreed to in advance by the parties – would be implemented to restore competitive conditions. Now other scholars, including Bob Pitofsky, had suggested similar proposals, but Joe’s piece carefully thought through the analysis. He offered detailed rules for implementation, including a series of pre-conditions 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 in efficiencies determinations, as elsewhere, light is better than darkness.” Joe is the consummate pragmatist, always seeking better guides to enforcement policy.

Let me turn joint ventures. Joe’s involvement with joint ventures is well known. He has written that, “The joint venture is a subject that has long intrigued [him].” In 1976, he described joint ventures as “one of the darkest corners of antitrust law,” and he has been trying to shine light on the topic ever since. His several articles on joint ventures include his 1982 article in the *Harvard Law Review*, titled simply, “Joint Ventures and Antitrust Policy,” which is perhaps the seminal article on the subject. According to Keith’s data, that article has been cited in 90 law review articles, and is his second-most cited article in legal journals, after his 1987 *NYU* article on efficiencies. It is also his second-most cited article by courts, after his *Stanford* article on oligopolies. It has been cited in 10 cases, including several times by the Supreme Court in *Northwest Wholesale Stationers*, as well as in *NCAA v. Board of Regents*. Joe has testified before Congress a number of times on joint ventures, including several instances when the National Cooperative Research Act of 1984 was being considered. Joe was also influential in the promulgation in 2000 of the “Competitor Collaboration Guidelines” by the Justice Department and the Federal Trade Commission.

Joe’s introduction to his *Harvard Law Review* reflects his pragmatic objectives. He wrote that the per se rule and an unstructured rule of reason are 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.” That party normally is the plaintiff, Joe said, “and the result is likely to be a significant under-enforcement of the antitrust laws, if not a standard approaching per se legality. As an alternative to either per se rules or the Rule of Reason,” Joes wrote, “antitrust analysis increasingly searches for intermediate rules that define the requirements of legal proof in terms of a limited set of variables.” So, Joe’s article sets out to develop a structured rule of reason for joint ventures, just as many of his other articles do for other areas of antitrust law, masterfully incorporating case law, economic theory, and empirical studies.

Joe’s article is also characteristic of much of his academic work in its focus on the incentives of the parties. Joe explained that “joint ventures raise antitrust problems because they distort the competitive incentives among independent firms by making the firms the co-owners of a common profit center,” and his goal in the article is to propose legal remedies that are not “prohibitory or regulatory” but rather are “facilitating and corrective” to correct the incentive distortion “without jeopardizing the social advantages of the joint venture under scrutiny.” I will pick up this theme of distorted incentives in discussing the *American Needle* case, to which I now turn.

I don’t want to overdramatize the point, but for someone who has spent a significant part of his professional lifetime trying to rationalize the antitrust law of joint ventures, the *American Needle* case arguably poses an existential threat that could

make the law of joint ventures a very dark corner indeed. To explain that, I have to provide some background about the case.

American Needle is a company that manufactures and distributes headwear, particularly baseball caps and knit hats with sports teams' logos. It obtained the rights to license NFL teams' logos from NFL Properties, which is owned equally by the NFL teams and holds the exclusive right to license each of the teams' separately owned trademarks and logos. In 2000, NFL Properties decided to grant a single exclusive license to Reebok for use of the team logos on apparel and headwear; American Needle was out and sued the NFL, NFL Properties, and each of the teams alleging that the agreement of the teams to grant an exclusive license to Reebok violated Sections 1 and 2.

Unfortunately for the plaintiff it sued in the Seventh Circuit where a 1996 opinion by Judge Easterbrook in a case brought by the Chicago Bulls had suggested that the NBA *might* be a single entity under *Copperweld*, and therefore immune from liability under Section 1, at least with respect to some activities such as marketing television broadcasts, even though the teams were separately owned and operated and competed economically in other respects. The NFL had been peddling the single-entity defense for decades and no court had ever bought it – until the *American Needle* case. After denying the NFL's motion to dismiss for failure to allege a cognizable relevant market, the trial court invited the NFL to file a summary judgment motion on the single entity issue and, after limited discovery, granted it on the theory that the NFL teams had so integrated their operations with respect to licensing of their trademarks that they

should be considered as a single entity in that regard. The court cited the obvious efficiencies in joint marketing, the fact that it helped the league to compete against other leagues that had integrated trademark marketing, and that the sharing of revenues from trademark licensing promoted competitive balance, although it acknowledged that “supposed efficiencies in economic arrangements are more the stuff of the rule of reason than of distinguishing between single entities and joint ventures.”

The Seventh Circuit affirmed, reasoning that the NFL obviously was a single entity when it produced NFL football games, because such games could not be produced without cooperation. (In a colorful passage, the court said, “Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?”). And since collective marketing of the teams’ trademarks promoted NFL football, and the teams shared a vital interest in promoting NFL football, *ergo* the teams were a single entity in collectively marketing their trademarks. “Most importantly,” the court said, the NFL teams had been acting like a single entity since 1963 when they formed NFL Properties. The court rejected the argument that just because the teams were potential competitors in licensing their trademarks they could not be a single entity, or that *Copperweld* required a “complete unity of interest,” a proposition that Judge Easterbrook had derided in the Chicago Bulls case as “silly”.

Plaintiff sought cert claiming that the appeals court’s decision conflicted directly with the Supreme Court’s 1957 *Radovitch* decision in which the Court had refused to extend baseball’s judicially created antitrust immunity to football – a stretch of an

argument, at best – and conflicted with every other circuit to have considered the application of *Copperweld* to professional sports leagues, which is correct.

So, why is this sports case so important to joint venture analysis? In fact, this case seemed to warrant a quick “cert denied.” The 7th Circuit’s logic was weak, but the plaintiff’s case on the merits seemed weaker; it was hard to see how the NFL’s exclusive license with Reebok could be anticompetitive if the collective licensing itself was legitimate, which the plaintiff had conceded. And if the 7th Circuit had used a mistaken *Copperweld* analysis to get to the right result, well there was little harm because the appeals court emphasized that the *Copperweld* analysis had to be undertaken on a league-by-league basis, and each facet of a league’s operations had to be considered separately. It was essentially for these reasons that the Solicitor General, in her first antitrust brief, recommended that cert be denied.

But what makes the case important is the filing of the NFL in response to the cert petition. The NFL said that it was “taking the unusual step of supporting cert[] in an effort to secure a uniform rule that . . . recognizes the single-entity nature of highly integrated joint ventures . . . . If the petition is granted,” the NFL said, it will “argue that professional sports leagues, which produce a product that no member club could produce on its own, and other joint ventures that involve a similarly high degree of economic integration, should be deemed single entities for Section 1 purposes, at least with respect to core venture functions, notwithstanding that the venture participants are separately owned and may not have a complete unity of interest.”

The NFL relied heavily on the Court’s 2006 opinion in *Texaco v. Dagher*, which involved a joint venture between Shell and Texaco to combine their U.S. operations for refining and marketing gasoline. In *Dagher*, the Court held that a challenge to “the pricing of the . . . goods produced and sold by” the joint venture – what it described as the “core activity of the joint venture itself” – could not be per se illegal, but rather had to be analyzed under the rule of reason. The Court expressly declined to reach the argument that had been pressed by the defendants that their conduct was immune under *Copperweld*, but in dicta the Court said, “the pricing policy challenged here amounts to little more than price setting by a single entity,” and that “[a]s a single entity, a joint venture, like any other firm, must have discretion to determine the prices of the products it sells . . . .”

What are the “core venture functions” of the NFL that it claims should be immune? The Solicitor General noted that the NFL defined core venture functions so broadly that “virtually all aspects of league operations” would be covered, a position that some of its amici expressly advanced. And indeed, the reasoning of the Seventh Circuit – and I use that term generously – suggests that any activity that promotes the joint venture’s products, or in which the joint venturers have a shared interest, should be immune.

After the initial round of cert briefs, American Needle got smart and hired experienced Supreme Court counsel to represent it, and not just any Supreme Court counsel. It hired Glen Nager of Jones Day, who had successfully argued *Dagher* for the defendants. And in a supplemental brief, American Needle changed the focus of its

claim from the exclusive granted to Reebok to the exclusives granted by each of the teams to NFL Properties and in particular the agreement of the teams not to separately license their trademarks outside of NFL Properties.

All of this raises two questions that I will try to answer. First, is this really an existential threat to the enforcement of Section 1 against joint ventures? Second, when, if ever, should *Copperweld* apply to joint ventures?

On the first question, some in the defense bar have suggested that the worry is overblown; the pro-enforcement crowd has been so battered by the Supreme Court in the last several years that they cannot recognize what an easy case this is for the plaintiff, for two reasons. First, a restraint on competing *outside* the joint venture has always been considered potentially actionable under the ancillary restraints doctrine; *Dagher* says that, and it is analogous to an employee's covenant not to compete with his or her employer after the termination of the employment, which has always been subject to the rule of reason, notwithstanding that the employer and employee normally cannot conspire under *Copperweld*.

Second, *Copperweld* and *Dagher* make clear that the *formation* of a joint venture can always be scrutinized under Section 1, and the NFL teams' agreement not to license outside the venture is one that is easily characterized as part of the formation of the venture since it apparently goes back to the creation of NFL Properties in 1963. Which raises another question: maybe the whole issue of single-entity treatment of joint ventures is about timing, not complete immunity. Once the creation of the joint venture is judged to be lawful under Section 1 or Section 7, then arguably it should be

left alone to do what was fairly comprehended within the approval. That seems to be what *Dagher* was all about, and it is the view supported by the Areeda & Hovenkamp treatise. Of course there can be changed circumstances, and any legal rule that offered immunity for post-approval conduct might lead enforcers to be chary about granting approval in the first place. But *American Needle* is hardly a good vehicle to consider the timing issue because neither the government nor anyone else ever passed on the lawfulness of the teams' agreement to deal exclusively with NFL Properties.

I think the NFL and the 7th Circuit opinion are making a different point: namely, that if a joint venture is sufficiently integrated to be characterized as a single entity, then conduct that is related to the venture in some undefined way is per se legal. The effect is to modify the ancillary restraints doctrine to eliminate the requirement that a collateral restraint be reasonably necessary to the functioning of the joint venture, and to eliminate any further review of an ancillary restraint under the rule of reason. Whether this is an existential threat to enforcement against joint ventures probably depends on how integrated a joint venture must be to merit single-entity treatment. Arguably, only joint ventures that produce a product that could not be produced without cooperation would qualify, but this would probably apply to many network joint ventures, such as, for example, multiple listing services. Moreover, if it is the efficiency of integration that is the determining factor, then it is not clear why any procompetitive joint venture should not qualify since, as Joe has pointed out, the premise of lenient treatment of joint ventures is that "a joint venture creates additional productive capacity through the formation of a new producing organization, the development of a

new product or technology, or the entry into a new market,” which the venture partners cannot accomplish as effectively on their own. Indeed, some of the amici expressly take the position that any legitimate joint venture should qualify for single-entity treatment.

On the second question, when *should Copperweld* apply to joint ventures, I think Joe’s work offers a clear answer. As long as the venture partners that control it are independent economic actors with interests that might diverge from the joint venture, then the venture should *never* be a single entity, regardless of the degree of operational or economic integration. Perhaps this is just another way of saying that *Copperweld* requires a complete unity of interests of the decisionmakers of the entity. Joe’s article points out that the difference between a merger and a joint venture is that a joint venture only “partially unites the economic interests of the parent firms,” which means that the venture will not necessarily act as a profit maximizing entity, as we expect of single firms; rather it will take into account its effect on the joint venture partners’ separate interests. And this incentive distortion creates one of the principal anticompetitive risks of a joint venture – Joe focused on the fact that the competitive moves of the venture may be tempered; Herb Hovenkamp subsequently highlighted the ways in which exclusionary rules may protect the venture’s incumbent members at the expense of the venture itself.

Of course, just because decisions of a joint venture are subject to Section 1 doesn’t mean that every, or even many, of its decisions raise antitrust issues, just as most of the agreements in the economy between separate firms do not raise antitrust issues. Even a trade association is not suspect when it decides what to pay its staff. But

using the plurality requirement to distinguish between benign and anticompetitive restraints, if not an existential threat to enforcement against joint ventures, is hardly in the spirit of Joe Brodley's endeavor to develop a structured rule of reason that focuses on the "relevant variables."