

American Needle and the Single-Entity Defense

George A. Hay

Edward Cornell Professor of Law and Professor of Economics
Cornell University
and
Senior Consultant, CRA

CRA Charles River
Associates

Summary of Conclusions

1. *American Needle* is consistent with the economic theme of *Copperweld*
2. *American Needle* is consistent with other Supreme Court decisions regarding joint ventures, such as *NCAA* and *BMI*
3. *American Needle* and *Dagher* are probably reconcilable. If there is a problem, it is with *Dagher*, not *American Needle*
4. *American Needle* does not create any **new** problems for joint ventures such as sports leagues

Copperweld

- Section 1 does not apply if two legally distinct entities constitute an economically single enterprise
- If, due to a unity of interests or common control, two legally distinct entities will not act independently anyway, they constitute a single enterprise and Section 1 does not apply

Unity of Interests as the Dominant Theme of *Copperweld*

- “The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.”
- “A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants §1 scrutiny.”
- “A parent and its wholly owned subsidiary have a complete unity of interests; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal “agreement,” the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do “agree” to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for §1 scrutiny.”

Unity of Interests as the Dominant Theme of *Copperweld*

- “But in reality a parent and a wholly owned subsidiary always have a ‘unity of purpose or a common design.’ They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent’s best interests.”
- “They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so that the parent and the subsidiary must be viewed as a single economic unity.”
- “There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions” because “[a] division within a corporate structure pursues the common interests of the whole,” and therefore “coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests.”

References to *Copperweld in American Needle*

- “Nor, for the same reason, is ‘the coordinated activity of a parent and its wholly owned subsidiary’ covered. See *id.*, at 771. They ‘have a complete unity of interest’ and thus ‘[w]ith or without a formal ‘agreement,’ the subsidiary acts for the benefit of the parent, its sole shareholder.”
- Referring to the NFL, “[t]heir general corporate actions are guided or determined’ by ‘separate corporate consciousnesses,’ and ‘[t]heir objectives are’ not ‘common.’”
- “When each NFL team licenses its intellectual property, it is not pursuing the ‘common interests of the whole’ league but is instead pursuing interests of each ‘corporation itself,’ *Copperweld*, 467 U.S., at 770; teams are acting as ‘separate economic actors pursuing separate economic interests,’ and each team therefore is a potential ‘independent center[] of decisionmaking,’ *id.*, at 769.”

Is there a Unity of Interests?

- The teams comprising the NFL do not have a complete unity of interests, despite the fact that the end product of the NFL can be accomplished only through joint activity.
- In particular, the Court believed that, at the time of the formation of NFLP, the teams did not have a unity of interests with respect to licensing of intellectual property. Therefore the agreement to create NFLP was an agreement among distinct legal and economic entities.
- While the creation of NFLP may have created a unity of interests, that is not a defense. The same can be said of many cartels.

Rule of Reason Standard Should Apply

- The challenged agreement in *American Needle* occurs in the context of a sports league and is to be evaluated under the rule of reason.
- The result in *American Needle* is consistent with *NCAA* and with *BMI*.

Contrast with *Dagher*

- *Dagher* is more of a puzzle than *American Needle*.
- Arguably, the *Dagher* Court missed an opportunity to clarify when the single entity defense might apply to joint ventures (including sports leagues).
- The *Dagher* Court apparently believed that the joint venture extinguished any meaningful competition between Shell and Texaco in the downstream market. Therefore the price equalization agreement could not have adversely affected competition.

Contrast with *Dagher*

- The Court said: “not the kind of agreement that is almost certainly likely to reduce competition.” Therefore the plaintiffs’ per se claim fails and since that was the only claim the case is over.
- Could the Court have said: “not the kind of agreement that can possibly reduce competition (because the joint venture created a unity of interests)?” Therefore it is not an agreement at all for Sherman Act purposes.

Does a Safe Harbor Exist?

Reading *Copperweld*, *Dagher*, and *American Needle* together, is there any single-enterprise “safe harbor” for sports leagues or other joint ventures?

Possibly “yes” – when the creation of the joint venture creates a complete unity of interests with respect to the subsequent decisions of the joint venture. In that case, plaintiffs’ only option may be to challenge the joint venture formation.

Final Thought

Final thought to critics of *American Needle*:
Be careful what you wish for!