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**ANTITRUST FORMALISM IS DEAD! LONG LIVE
ANTITRUST FORMALISM!: SOME IMPLICATIONS
OF AMERICAN NEEDLE V. NFL**

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**Antitrust Formalism is Dead! Long Live Antitrust Formalism!:
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Abstract

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Antitrust observers and football fans alike awaited the Supreme Court's decision in *American Needle* for months – inspiring over a dozen articles, and even one from the quarterback of the defending champion New Orleans Saints. Yet the implications of the Court's decision, effectively narrowing the scope of the “intra-enterprise immunity” doctrine to firms with a complete “unity of interests,” are unclear. While some depict the decision as a schism from the last several decades of antitrust law, we explain why this interpretation is meritless and discuss the practical impact of the Court's holding. The Court's antitrust jurisprudence over the past several decades, including that of the Roberts Court and *American Needle*, has broadly embraced rules that are both relatively easy to administer as well as conscious of the error costs of deterring pro-competitive conduct. Intra-enterprise immunity potentially provided such a “filter” that enabled judges to dismiss a non-trivial subset of meritless claims prior to costly discovery. The doctrine, however, proved notoriously difficult to consistently apply in situations involving common organizational structures. Consistent with error-cost principles that have been the lodestar of the Court's recent antitrust output, *American Needle* gave the Court an opportunity to effectively abandon intra-enterprise immunity in favor of the Twombly “plausibility” standard. Rather than marking a drastic change in antitrust jurisprudence, therefore, *American Needle* should be viewed as the Supreme Court substituting an unreliable screening mechanism in favor of a more cost-effective alternative.

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Introduction

Few cases before the Supreme Court have been preceded by so many rival interpretations and grand predictions—from the death of modern antitrust policy to the end of professional football¹—as *American Needle v. NFL*.² The Court’s decision reversed the appellate court, which had held that with regards to licensing of NFL intellectual property, the NFL and its constituent teams constituted a single entity outside the reach of Section 1 of the Sherman Act. Thus, the Court held, American Needle’s claims would be survive another day, remanded to the district court for evaluation under the Rule of Reason. While unanimous, raised nearly as many questions as it resolved; observers have depicted the opinion as everything from an antitrust sea-change³ to an idiosyncratic application of a niche doctrine with little practical relevance.⁴ Advocates of a more interventionist competition policy accurately note that *American Needle* represented the first plaintiff’s victory in an antitrust suit before the Supreme Court in several years. Accordingly, one line of reasoning goes, the Court’s unanimous narrowing of the “intra-enterprise conspiracy immunity,” or *Copperweld* immunity,⁵ portends a break from several decades of antitrust excessively concerned with over-deterrence and a newfound confidence in judicial application of the rule of reason without potentially

¹ Drew Brees, Saints’ Quarterback Drew Brees Weighs In On NFL’s Supreme Court Case, Wash. Post, January 10, 2010 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/07/AR2010010702947.html?sid=ST2010052401943>) (“The gains we fought for and won as players over the years could be lost, while the competition that runs through all aspects of the sport could be undermined.”).

² *American Needle, Inc. v. NFL*, 560 U.S. ___, 130 S. Ct. 2201 (2010).

³ Press Release, American Antitrust Institute, AAI Applauds Supreme Court’s Decision in *American Needle* (May 24, 2010) (available at http://www.antitrustinstitute.org/Archives/Needle_Decision.ashx) (“This decision shows that the Supreme Court is still capable of rejecting extreme pro-defendant positions, and should be a cautionary tale for defendants that seek to short-cut sound antitrust analysis . . .”).

⁴ Posting of Ted Frank to Point of Law, <http://www.pointoflaw.com/archives/2010/05/american-needle.php> (May 24, 2010, 12:21 EST) (“*American Needle* . . . isn’t a tenth as important as everyone is going to be telling you over the next few days.”).

⁵ In this paper, we utilize the terms “intra-enterprise conspiracy immunity,” “*Copperweld* immunity,” and “single-entity defense” interchangeably. All three terms refer to prohibiting antitrust suits under Section 1 based on intra-firm arrangements.

competition-chilling error. In contrast, those perplexed over the sound and fury surrounding *American Needle* postulate the doctrine to contain virtually no practical importance at all. Under this construction, *American Needle* narrowed a doctrine with roots preceding the modern architecture of mergers and acquisitions. By this line of logic, the few firms that might have availed themselves of *Copperweld* immunity can obviate Sherman Act Section 1 liability (anti-competitive agreements by rival firms) by consolidating diffuse operations into a formal single entity.

Both polar interpretations of *American Needle*, however, are premature. Depicting the case as a seismic shift in competition policy ignores two major components of the Court's antitrust jurisprudence: first, a respect for the relative costs of over-detering versus under-detering potentially anticompetitive conduct, referred to as "error costs," and second, a history of preferring readily administrable antitrust rules. That it was of little practical consequence, however, understates the increasing complexity of businesses and entrepreneurial arrangements and the critical importance of screening mechanisms to the error-cost framework. The *American Needle* decision will, at minimum, impact credit card companies, franchising firms, sports leagues, and inter-dependent combinations of all kinds; to the extent it represents a greater reliance on alternate screening methods, it could affect all antitrust litigation.

We offer an explanation of *American Needle* simultaneously more modest yet less dismissive. Rather than a wholesale rejection of error-cost concerns, *American Needle* represents the Supreme Court's understandable decision to abandon an antitrust "filter" that proved perennially problematic in its practical application. The role of this filter is to allow judges a doctrinal basis for dismissing at early stages, including prior to substantial discovery, claims alleging agreements that simply do not raise antitrust concerns. For example, consider the

hypothetical price-fixing claim alleging that separate but not wholly-owned subsidiaries of Coca-Cola Enterprises, Coca-Cola and Coke Zero, are engaged in an illegal price-fixing scheme.⁶ In light of the Court's recent decision in *Bell Atlantic v. Twombly*,⁷ much of the work of the *Copperweld* doctrine has been subsumed by the "plausibility" pleading requirement, consistently applied at the earliest stages of an antitrust case.⁸ Read in a vacuum, the Court's misguided emphasis on the unmanageable "unity of interests" test harkens to earlier days of antitrust formalism despite its protestations otherwise. The choice to narrow the intra-enterprise immunity doctrine in light of *Twombly*, however, is completely consistent with the error-cost principle of employing relatively low-cost screens to dismiss meritless antitrust claims in order to maximize consumer welfare. *American Needle* unraveled *Copperweld* immunity from two pressures: first, the unmanageable vagaries of the "unity of interests" language raised the costs of maintaining *Copperweld*, and second, *Twombly* dismissals for lack of economic plausibility at the pleading stage reduced *Copperweld's* necessity.

This paper proceeds in five parts. Part I discusses the legal history of *Copperweld* immunity from claims under Section 1 of the Sherman Act. Part II explains the error-cost framework and the economic justification for *Copperweld* immunity as a screen to reduce the error costs of Section 1 liability. Part III demonstrates how *American Needle* was the product of error-cost analysis of the relative merits of *Copperweld* immunity as a tool to remove comparatively marginal antitrust claims. Nonetheless, the stated logic of the Court's opinion reflects a perverse formalism with regards to the theory of the firm and to corporate organization more broadly. Part IV explains *American Needle* in light of the error-cost framework and how,

⁶ See *Coke Sues Coke Zero for Infringement*, July 26, 2006 (available at <http://www.youtube.com/watch?v=pv8YgrqUCVU>).
Bell Atlantic Corp. v. Twombly, ⁷ 550 U.S. 544 (2007).

⁸ See Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 *Iowa L. Rev. Bull.* 55 (2010).

in light of the “plausibility” pleading requirements presented in *Twombly* and *Iqbal*,⁹ the Court’s opinion reflects an imperfect attempt to substitute away from *Copperweld* immunity in favor of increased reliance on *Twombly* pleading and the Rule of Reason as screening mechanisms. We conclude with a review of *American Needle*’s broader implications.

I. The Law and History of *Copperweld* Immunity

A. The Historical Origin of *Copperweld*

The Supreme Court has long held that Section 1 of the Sherman Act is impossible to construe literally; Justice Sandra Day O’Connor noted that “[a]lthough the Sherman Act, by its terms, prohibits every agreement ‘in restraint of trade,’ this Court has long recognized that Congress intended to outlaw only unreasonable restraints.”¹⁰ Indeed, the text of the Act criminalizes every “contract, combination . . . , or conspiracy, in restraint of trade”.¹¹ By necessity, of course, every contract restrains trade—that is precisely the purpose of a contract. The Supreme Court first narrowed the scope of the Act by declaring that only contracts, combinations, or conspiracies in “unreasonable” restraint of trade violated it.¹² Subsequent statutes and cases extracted other conspiracies on various grounds. Unions and collective bargaining agreements were exempted for expressly political reasons,¹³ while Major League Baseball retained immunity from Section 1 scrutiny for reasons expressly historical.¹⁴ Some of the most vexing of these agreements involved entities that commonly would not be expected to

⁹ *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937 (2009).

¹⁰ *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

¹¹ Sherman Antitrust Act, 15 U.S.C. § 1 (2004).

¹² *American Needle*, 130 S. Ct. at 2210. See also *Standard Oil Co. v. United States*, 221 U.S. 1, 87 (1911).

¹³ Clayton Act § 6, 15 U.S.C. § 17 (1914) (“Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor...organizations...”).

¹⁴ *Federal Baseball Club v. National League*, 259 U.S. 200 (1922).

compete against one another: sister corporations, franchisor/franchisee relationships, and multiple divisions of an overarching business.

Before antitrust law became moored to economic analysis in the mid-1970s, intra-enterprise agreements were adjudicated under Section 1 formally by the statute's terms: individuals could conspire in violation of Section 1 despite being "affiliated or integrated under common ownership."¹⁵ That multiple "instrumentalities of a single manufacturing merchandising unit" existed under "common ownership and control"¹⁶ did not immunize the single unit from Section 1 scrutiny. Taken at face value, Section 1 called on courts to adjudicate not only the contracts between businesses, but interactions entirely within firms. Under this antiquated, formalistic conception of Section 1, then, a single firm could as easily constitute a cartel as multiple firms, and the minimal requirement for an anticompetitive agreement was two entities of any sort—regardless of common ownership, control, or interests.

As economic analysis increasingly informed antitrust law and policy, however, both courts and enforcement agencies began to recognize that some set of agreements should nonetheless on economic grounds remain beyond Section 1 scrutiny. The doctrine was "severely criticized . . . because its focus on whether a parent and subsidiary had functioned in an 'integrat[ed]' fashion was 'unconnected to antitrust policy, [and] hopelessly vague.'¹⁷ While the purely formalistic model of Section 1 embraced by *Yellow Cab* required courts to make such examinations, enforcement agencies and academics increasingly recognized the condemnation of intra-enterprise conspiracies as fundamentally orthogonal to the central antitrust mission.¹⁸ With Section 2 available to target unilateral decisions with anticompetitive effects, intra-

¹⁵ *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947).

¹⁶ *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951).

¹⁷ Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. 451, 462 (1983).

¹⁸ *Id.* at 462 ("The main effects of the intraenterprise conspiracy doctrine have been to confuse litigants and courts and to lengthen and complicate antitrust litigation.").

enterprise conspiracy claims represented the triumph of formalism over economic substance. The availability of such claims enabled competitors to wield antitrust scrutiny against rivals and deter behavior with competitively neutral or pro-competitive implications.

With the advancement of economic analysis jettisoning previously longstanding, formalistic models in antitrust ranging from merger analysis to the use of vertical restraints and vertical integration,¹⁹ the intra-enterprise conspiracy doctrine thus appeared a vestigial relic of long-vanquished formalism. Less than a year after Professor Phillip Areeda predicted the doctrine's collapse, the Supreme Court granted certiorari in *Copperweld v. Independence Tube*.²⁰

B. Copperweld Corp. v. Independence Tube Corp.

In *Copperweld*, a defendant pipe corporation, Copperweld, purchased a freestanding division from a separate conglomerate, Lear Siegler.²¹ Lear Siegler agreed not to compete with Copperweld in pipe manufacturing for five years after the purchase.²² After an employee of the acquired division left to form the plaintiff corporation (Independence Tube), Copperweld and its subsidiary contacted pipe customers and suppliers to discourage their dealing with Independence.²³ Independence claimed that Copperweld and its subsidiary “conspired . . . in restraint of trade” within the meaning of Section 1, and a jury agreed at trial, awarding treble

¹⁹ Ronald H. Coase, *The Nature of the Firm*, 4 *Economica* 384 (1937); Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21(2) *J.L. & Econ* 297 (1978); Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (The Free Press, 1975).

²⁰ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

²¹ *Id.* at 756.

²² *Id.*

²³ *Id.* at 756-57.

damages against both the parent and subsidiary.²⁴ The Seventh Circuit affirmed as to both the parent and subsidiary corporations.²⁵

The Supreme Court reversed, rejecting the awkward formalism exemplified by *Yellow Cab*.²⁶ The Sherman Act made a fundamental distinction between “unilateral” and “concerted” conduct, and refused to condemn “coordinated conduct among officers or employees of the same company.”²⁷ The Court noted that because parent and subsidiary corporations constituted a “single economic unit”²⁸ that enjoyed “ultimate interests . . . [that] are identical,”²⁹ the officers of each firm were not “separate economic actors,”³⁰ rendering Section 1 inapplicable.³¹ Independence’s implausible claim motivated the Supreme Court to re-examine the formalism of *Yellow Cab* in a manner that would enable future judges to summarily dismiss similar claims without requiring extensive discovery or the strictures of the Rule of Reason. *Copperweld* immunity provided an easily articulated rationale that mapped onto straightforward economic intuition: a parent and wholly-owned subsidiary neither could nor should be expected to behave as potential competitors might. Rival firms predicated Section 1 claims on wholly internal behavior are therefore unlikely to increase net consumer welfare by doing so, and courts should be unwilling to entertain these claims.

The contours of *Copperweld*’s exemption from Section 1 scrutiny, however, remained uncertain—as did the exact grounds for the Supreme Court’s justification. Forcing parent-subsidary corporate groups into a single firm in order to avoid antitrust scrutiny merely subsidized inefficient mergers. Nonetheless, *Copperweld* presented only the narrowest

²⁴ *Id.* at 757.

²⁵ *Id.* at 758.

²⁶ *Id.* at 760.

²⁷ *Id.* at 769.

²⁸ *Id.* at 772, n.18.

²⁹ *Id.*

³⁰ *Id.* at 769.

³¹ *Id.* at 768.

circumstance where a parent corporation entirely owned a subsidiary division, permitting the Court to alternatively declare the origin of the exemption to be the firms' "unity of interests" and their status as commonly controlled actors. While these two factors were interchangeably cited in *Copperweld*, they need not appear simultaneously. Indeed, in nearly any other business arrangement, a "unity of interests" and common control would not necessarily follow one another. Members of an oligopolistic cartel certainly enjoy a "unity of interests" at least in the short-run; various directors of divisions within a single corporation hold at least partially divergent interests with regards to future business strategies for their divisions and the company as a whole.³² Similarly, franchisees, companies owned partially in common, and members of a league or overarching business organization may be subject to great or even total common control while enjoying divergent economic interests. The irreconcilable tension between unified interests and common control as bases for *Copperweld* immunity sprang into existence no sooner than the publication of the opinion validating it.³³

C. Post-Copperweld and Major League Soccer

The Supreme Court had the luxury of dismissing Independence Tube's meritless claim on the cryptic grounds that *Copperweld* and its subsidiary acted as a "single economic unit" under a

³² See Part II, *infra*; *Chicago Prof'l Sports Ltd. v. Nat'l Basketball Ass'n*, 95 F.3d 593, 598 (1996) ("Even a single firm contains many competing interests.").

³³ As Benjamin Klein and Andres Lerner point out, *Copperweld*'s "unity of interest" language is best interpreted as measuring indicia of control rather than incentive alignment. That interpretation also has the benefit of being consistent with at least one strand of the modern economic theory of the firm. Benjamin Klein & Andres Lerner, "The Firm in Economics and Antitrust Law," *Issues in Competition Law and Policy* 1 (W. Collins, ed., American Bar Association Antitrust Section, 2008) ("[T]he economic definition of the firm that corresponds most closely with the legal definition and common usage focuses on control rights. . . . Whether one places the label of a firm on these various contractual arrangements is less important to an economist than an understanding of the economic motivation and effects of the particular contractual arrangement. However, classifications of alternative contractual arrangements are important for antitrust law.").

“unity of interests.”³⁴ Subsequent lower courts, however, wrestled with consistently implementing this excessively vague language. Wholly owned subsidiaries and their parent companies routinely mapped their firm structures directly onto the facts of *Copperweld* so as to avail themselves of *Copperweld* immunity.³⁵ Similarly, several Circuit Courts of Appeals granted wholly owned sister corporations—subsidiaries subject to a common parent’s control—*Copperweld* immunity.³⁶ A handful of courts slightly broadened or narrowed this structure: at least one case extended *Copperweld* immunity to a chain of separately owned theaters on the grounds that the “economic reality” of their common franchise rendered Section 1 inapplicable.³⁷ Conversely, one federal court strictly limited *Copperweld* to the parent-subsidiary structure, even excluding sister corporations.³⁸ Nonetheless, the implementation of *Copperweld* to wholly-owned companies proved relatively straightforward.

Smaller equity stakes in a subsidiary, however, began to separate *Copperweld*’s “unity of interests” rationale from its “common control” rationale. Some district courts implemented a “complete common ownership” interpretation of *Copperweld*, allowing immunity only for total common ownership, subject only to a *de minimis* exception. This exception generally allowed firms with extremely high equity stakes in another entity, ranging from 90 percent to 95 percent, to avail themselves of *Copperweld*.³⁹ Most districts courts, however, recognized substantially

³⁴ *Copperweld*, 467 U.S. at 772.

³⁵ *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001) (Lucent held to be a subsidiary of AT&T, and thus incapable of Section 1 conspiracy); *Russ’ Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214 (6th Cir. 1985) (transfer of products between a parent and subsidiary granted Section 1 immunity under *Copperweld*); *Rosen v. Hyundai Group*, 829 F. Supp. 41 (E.D.N.Y. 1993) (an American subsidiary of a foreign corporation immune under Section 1).

³⁶ *Davidson Schaaf, Inc. v. Liberty Nat. Fire Ins.*, 69 F.3d 868, 871 (8th Cir. 1995) (two wholly-owned subsidiaries of the same parent cannot conspire under Section 1); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316 (5th Cir. 1993) (a group of individuals with joint ownership over a parent company and its two subsidiaries have Section 1 immunity); *Coastal Transfer Co. v. Toyota Motor Sales USA*, 833 F.2d 211, 214 (9th Cir. 1987) (two sister corporations cannot conspire under Section 1).

³⁷ *Orson, Inc. v. Miramax Film Corp.*, 862 F. Supp. 1378, 1385 (E.D. Pa. 1994).

³⁸ *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 702, 705 (D. Or. 1987).

³⁹ *Leaco Enterprises, Inc. v. General Elec. Co.*, 737 F. Supp. 605 (D. Or. 1990).

lower ownership stakes to provide the requisite common control necessary for *Copperweld* immunity, ranging from 70 percent down to a bare minimum of majority common ownership.⁴⁰ These decisions generally cited the parent company or common owner's ability to exercise great control over its subsidiary as the economic purpose grounding *Copperweld*.⁴¹ The Northern District of Georgia, for example, held that "[t]he 51% ownership retained by [a parent company] assured it of full control over [a partially-owned subsidiary] and assured it could intervene at any time that [the subsidiary] ceased to act in its best interests."⁴² If applicable corporate law permitted multiple firms to arrange themselves formally separately, yet to subject one (or more) to a single parent's control, antitrust sanctions for "coordinated action" of these firms merely served to encourage consolidation under a formal single entity.

Courts handled more esoteric business arrangements somewhat less predictably, fashioning different rationales to ascertain common control absent a sufficient ownership stake to render common control obvious. *Williams v. I.B. Fischer Nevada* was one of the first attempts to address franchises under the *Copperweld* rubric.⁴³ In *Fischer*, a terminated Jack-in-the-Box manager brought suit against his employer, the franchisee, and the franchisor, premised on a clause in the franchise agreement restricting co-franchisees from hiring terminated employees for six months.⁴⁴ The defendant franchisor justified the clause as "prevent[ing] franchises from 'raiding' one another's management employees after time and expense have been incurred in training them."⁴⁵ The district court agreed, holding a franchisee and franchisor incapable of a Section 1 conspiracy for several separate reasons. First, though franchisees may exercise

⁴⁰ *Novatel Commc'ns Inc. v. Cellular Tel. Supply, Inc.*, 1986 WL 798475 (N.D. Ga.).

⁴¹ *Id.* at *9.

⁴² *Id.*

⁴³ *Williams v. I.B. Fischer Nevada*, 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (1993).

⁴⁴ *Id.* at 1029.

⁴⁵ *Id.*

independent action on business decisions such as price, this ability arises from territorial division rather than a competitive relationship.⁴⁶ Additionally, separate incorporation could not constitute evidence of a “conspiracy,” particularly where the common franchise policies are dictated by an overarching corporate policy.⁴⁷ Ultimately, the court held that despite the declared “independent contractor” relationship between franchisor and franchisee, the degree of control exerted by the franchisor corporation—including opening hours, insurance requirements, and processes by which retail goods would be made—rendered the franchisor and franchisee a “single enterprise” within the meaning of *Copperweld*.⁴⁸

Courts ultimately relied on proxies for control, such as ownership and restrictive covenants, because the “unity of interests” test as frequently applied proved not only unwieldy, but economically irrelevant. As Judge Frank Easterbrook noted in *Chicago Professional Sports v. NBA*, even a fully integrated single firm contains “many competing interests.”⁴⁹ Rival divisions within a single firm pursue broadly different agendas, especially when one or more of these divisions are regulated or mandated by another dictate of federal law. For example, environmental regulations compel American car manufacturers to offer lines of hybrid and low-emissions cars in order to raise the average fuel efficiency of their fleets.⁵⁰ For years, however, these vehicles failed to turn a profit due to expensive manufacturing processes and modest demand. By contrast, sport-utility vehicles and light trucks remained popular throughout the 1990s and 2000s, allowing carmakers to reap a profit sufficient to support their otherwise flagging hybrid divisions.⁵¹ This cross-subsidy alone indicates that General Motors’ SUV and

⁴⁶ *Id.* at 1031.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1032.

⁴⁹ *Chicago Prof'l Sports Ltd. P'ship v. NBA* 95 F.3d 593, 598 (7th Cir. 1996).

⁵⁰ Holman Jenkins, Jr., Yes, Detroit Can Be Fixed, *Wall Street J.*, Nov. 5, 2008, at A21.

⁵¹ *Id.* (“For 30 years, to make and sell the large vehicles that earn their profits, the Detroit Three have been effectively required to build small cars in high-wage, UAW factories, though it means losing money on every car.”).

hybrid car divisions hardly enjoy a perfect “unity of interests” under *Copperweld*—yet a plaintiff that sought to bring suit under Section 1 claiming a conspiracy to inflate the price of sport-utility vehicles would rightly be summarily dismissed even prior to discovery. This is the main economic advantage of *Copperweld* immunity: to provide a low-cost screen by which judges may dismiss claims of collusive behavior that are, in fact, the product of wholly firm-internal decisionmaking.

Economists Benjamin Klein and Andres Lerner demonstrated that *Copperweld*'s reliance on a “unity of interests,” and lower court applications of the “unity of interest” test that have focused on complete alignment of incentives rather than control, reflected a basic ignorance as to the modern economic theory of the firm. A firm was not simply the formal boundaries dictated by articles of incorporation or various partnership agreements; rather, a firm existed in order to serve two economic purposes.⁵² First, firms allocate control in order to prevent holdup problems inherent in making asset-specific investments.⁵³ Second, firms allocate residual profits as incentives for performance. The precise legal relationships within a firm follow, rather than lead, the economic relationships; firms will tend to gravitate towards organizational structures that minimize transaction costs in order to maximize these residual profits.⁵⁴ It is insufficient for antitrust purposes, then, to describe a firm by its legal boundaries; instead, contracts are merely more or less firm-like. Where multiple businesses or parties organized themselves with centralized control in order to reduce transaction costs, those actors operated as a “single economic unit” deserving of, and generally receiving, immunity from Section 1 sanctions. Yet

⁵² Benjamin Klein & Andres Lerner, “The Firm in Economics and Antitrust Law,” *Issues in Competition Law and Policy* 1, 15 (W. Collins, ed., American Bar Association Antitrust Section, 2008).

⁵³ *Id.* at 5.

⁵⁴ *Id.*; Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 *J. L. & Econ.* 297 (1978); Oliver E. Williamson, Transaction Cost Economics: The Governance of Contractual Relations, 22 *J. L. & Econ.* 233 (1979).

multiple firms could enter into such an arrangement despite thoroughly heterogeneous interests, similar to how multiple divisions within a single corporation might have wildly divergent incentives, despite clearly existing as part of the same firm. That many lower courts interpreted the “unity of interests” test initially crafted in *Copperweld* to require an examination of the internal motives of each participant proved more psychological than economic.

Perhaps no case exposed how ultimately unworkable the *Copperweld*’s “unity of interests” language had become as Judge Michael Boudin’s opinion in *Fraser v. Major League Soccer*.⁵⁵ In *Major League Soccer*, the plaintiff players sued the defendant franchisee/investors claiming that Major League Soccer entered into an unlawful conspiracy not to compete for one another’s services in violation of Section 1.⁵⁶ While MLS availed itself successfully of *Copperweld* immunity at the trial level, the First Circuit found *Copperweld* unavailing.⁵⁷ The court struggled with the unusual structure of MLS in applying *Copperweld*, as the league consisted of owner/investors, while MLS proper retained formal “ownership” over all the teams.⁵⁸ MLS represented something of “a hybrid arrangement, somewhere between a single company . . . and a cooperative arrangement between existing competitors.”⁵⁹ In declining to apply *Copperweld*, Judge Boudin noted both the extreme complexity in interpreting *Copperweld* in light of hybrid business arrangements.⁶⁰

Judge Boudin also presaged the very substitution that would come to pass through *American Needle*.⁶¹ “The law,” he wrote, “could develop along either or both of two different lines. One could expand upon *Copperweld* to develop functional tests or criteria for shielding . .

⁵⁵ *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002).

⁵⁶ *Id.* at 54-55.

⁵⁷ *Id.* at 59.

⁵⁸ *Id.* at 58.

⁵⁹ *Id.*

⁶⁰ *Id.* at 56-57.

⁶¹ *Id.* at 58.

. such hybrids . . . it would also prevent claims, clearly inappropriate in our view The other course is to reshape Section 1's Rule of Reason toward a body of more flexible rules for interdependent multi-party enterprises."⁶² In other words, Judge Boudin noted that the heretofore unresolved decision in developing intra-enterprise conspiracy immunity: either the substantial expansion of a new layer of analysis in order to determine the propriety of *Copperweld*, or an alternative screen based on Rule of Reason analysis. Frustrated with the vagaries of a "complete unity of interests," the First Circuit nonetheless ruled in favor of MLS instead on alternate grounds.⁶³ If Judge Boudin, who had taught antitrust at Harvard, could make little use of *Copperweld's* "unity of interest" requirements in the context of an interdependent sports league, it turns out the Supreme Court would fare no better.

II. Error Costs and the Economic Rationale for the Single-Entity Defense

While much has been said about the evolution of the single-entity defense in antitrust law both before and after *Copperweld*, less often is the function of such a defense in antitrust, a system of rules aimed at protecting consumers from the creation and exercise of market power. A proper evaluation of the implications of *American Needle* requires an understanding of how the single entity defense "fits" in the antitrust framework. We contend that the primary role of such a rule is to provide a much-needed method for courts to provide for early resolution of antitrust claims concerning business arrangements that are not likely to trigger core antitrust concerns: consumer harm caused by the creation or exercise of market power. Such a rule provides courts an instrument to efficiently dismiss these cases while avoiding the host of social costs associated with engaging in discovery, motions, and trial for such claims. And of course,

⁶² *Id.*

⁶³ Specifically, the court held that Fraser's appeal was barred as a matter of law by the jury's special verdict on Fraser's alternate, Section 2 claim. *Id.* at 71.

allowing such cases to proceed to discovery and beyond creates the possibility of judicial error, which in turn, creates its own social costs.

The optimal system of antitrust rules would balance the benefits of their application with the error and administrative costs of their implementation. This approach to evaluating antitrust rules is often described as “the error cost” approach, and as discussed below, is frequently associated with Frank Easterbrook’s seminal article, “The Limits of Antitrust.”⁶⁴ In this part, we discuss the role of the single entity doctrine in modern antitrust as an efficient filter for claims involving business activity sufficiently unlikely to cause antitrust harms that the investment in judicial and societal resources, and the risk of judicial error, rendered further discovery or trial unproductive.

A. A Brief Primer on the Error-Cost Approach to Antitrust⁶⁵

The error-cost framework is one of the most influential contributions to antitrust law and economics in large part because it paved the way for the incorporation of the powerful tools of decision-theory, or error-cost analysis, into the optimal design of antitrust rules. The error-cost framework in antitrust originates with Easterbrook’s seminal analysis, itself built on twin premises: first, that false positives are more costly than false negatives, because self-correction mechanisms mitigate the latter but not the former, and second, that errors of both types are inevitable, because distinguishing procompetitive conduct from anticompetitive conduct is an inherently difficult task in the single-firm context.⁶⁶ At its core, the error-cost framework is a simple but powerful analytical tool that requires inputs from state of the art economic theory and

⁶⁴ Frank H. Easterbrook, *The Limits of Antitrust*, 63 *Tex. L. Rev.* 1 (1984).

⁶⁵ For a more complete discussion of the error-cost approach to modern antitrust, upon which Part II relies, see Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6(1) *J. Comp. L. & Econ.* 153 (2010). See also Fred S. McChesney, *Easterbrook on Errors*, 6(1) *J. Comp. L. & Econ.* 11 (2010).

⁶⁶ Frank H. Easterbrook, *The Limits of Antitrust*, 63 *Tex. L. Rev.* 1 (1984).

empirical evidence regarding the competitive consequences of various types of business conduct and produces outputs in the form of legal rules.

The error-cost approach is one borne out of a true melding of law and economics. While legal scholars typically avoid rigorous attempts to work through the available economic theory and evidence when discussing the optimal design of legal rules, economists frequently fail to assess their analyses in a realistic institutional setting and avoid incorporating the social costs of erroneous enforcement decisions into their analyses and recommendations for legal rules. Thus, it is unsurprising that the error-cost framework lies at the heart of modern economic and legal debates surrounding antitrust analysis of business arrangements. The key policy tradeoff, Easterbrook explained, was that between Type I (“false positive”) and Type II (“false negative”) errors. Table 1 presents a two by two matrix laying out the types of errors that occur in antitrust litigation.⁶⁷

Table 1. Possible Errors in the Antitrust Assessment of Business Practices

Competitive Impact	Illegal	Legal
Harmful to Competition	Percent of cases correctly condemning anticompetitive practices	Percent of cases falsely absolving anticompetitive practices (“false negatives”)
Not Harmful to Competition	Percent of cases falsely condemning legitimate practices (“false positives”)	Percent of cases correctly absolving legitimate practices

From simple legal and economic assumptions, Easterbrook provided a powerful framework to think about the optimal design of antitrust rules in the face of expected errors. The assumptions were as follows: (1) both types of errors were inevitable in antitrust cases, because of the

⁶⁷ Table 1 originally appears in David S. Evans & Jorge Padilla, Neo-Chicago Approach to Unilateral Practices, 72 U. Chi. L. Rev. 73 (2005).

difficulty in distinguishing efficient, procompetitive business conduct from anticompetitive behavior;⁶⁸ (2) the social costs associated with Type I errors would generally be greater than the social costs of Type II errors because market forces offer at least some corrective with respect to Type II errors and none with regard to Type I errors, or as Easterbrook articulated it, “the economist’s system corrects monopoly more readily than it corrects judicial [Type II] errors;”⁶⁹ and (3) optimal antitrust rules will minimize the expected sum of error costs subject to the constraint that the rules be relatively simple and reasonably administrable.⁷⁰

From those simple presumptions Easterbrook argued that a number of simple to apply rules, or “filters,” could be used to minimize the sum of error and administration costs. Among those error-cost filters that Easterbrook discussed were requirements that a plaintiff demonstrate that the firm at issue had market power, that the practices could harm consumers, whether firms in the industry used different methods of production and distribution, whether the evidence was consistent with a reduction in output, and whether the complaining firm was a rival in the relevant market.⁷¹

The notion that antitrust rules must be sensitive to both error costs and the costs of administering them was not exclusive to Easterbrook, or even Chicago. Then-Judge Stephen Breyer’s well known admonition in *Town of Concord v. Boston Edison Co.* that antitrust rules “must be administratively workable and therefore cannot always take account of every complex

⁶⁸ These are two separate components of the error-cost approach. The first is the inevitability of errors with decision by legal rule generally. See Easterbrook, *supra* note 65, at 14-15 (reiterating that “one cannot have the savings of decision by rule without accepting the costs of mistakes.”). The second point is that the likelihood of antitrust error depends crucially on the development of economic science to produce techniques and methods by which we can successfully identify conduct that harms consumers. See also Frank H. Easterbrook, Workable Antitrust Policy, 84 Mich. L. Rev. 1696 (1986).

⁶⁹ Easterbrook, *supra* note 65, at 15.

⁷⁰ *Id.*

⁷¹ Easterbrook, *supra* note 65, at 18. For a discussion of these filters as applied to the Microsoft litigation, see William H. Page, Microsoft and the Limits of Antitrust, 6(1) J. Comp. L. & Econ. 33 (2010).

economic circumstance or qualification,⁷² shared the view that the real power of economics in antitrust was not found its ability to improve decision-making on a case by case basis by making judges more like economists, but in generating simple rules that contained economic content.⁷³

The key point is that the task of distinguishing anticompetitive behavior from pro-competitive behavior is a Herculean one imposed on enforcers and judges, and that even when economists get it right before the practice is litigated, some error is inevitable. The power of the error-cost framework is that it allows regulators, judges and policy makers to harness the power of economics, and the state of the art theory and evidence, into the formulation of simple and sensible filters and safe harbors rather than to convert themselves into amateur econometricians, game-theorists, or behaviorists.⁷⁴

Within the error-cost framework, the promise of any bright-line rule depends on its qualities as a filter that can reliably distinguish claims involving business activities that are not likely to generate antitrust harms from those that might upon further inspection and analysis. The market power requirement in Section 2 of the Sherman Act, for example, is the signature error-cost filter because, while there are close and complex cases on the margins, it can be

⁷² 915 F.2d 17, 22 (1st Cir. 1990). But the Chicago School of antitrust has traditionally shared with Breyer's Harvard School a preference for using economics to generate simple and administrable rules rather than overly sophisticated economic tests. See Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: the 2006 Term and Beyond*, 3 *Competition Pol'y Int'l* 25, 27 (2007); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: the Chicago/Harvard Double Helix*, 2007 *Colum. Bus. L. Rev.* 1, 32-35 (2007). For further discussion of the Chicago and Harvard Schools in the context of modern antitrust jurisprudence, see Daniel A. Crane, *linkLine's Institutional Suspicions*, 2009 *Cato Sup. Ct. Rev.* 111 (2008-2009).

⁷³ The error-cost framework has been applied to identify optimal rules for a host of business arrangements ranging from vertical restraints to horizontal mergers. See generally Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, 5 *Competition Pol'y Int'l* 179 (2009); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision Theoretic Approach*, 69 *Antitrust L.J.* 469 (2001); C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 *Antitrust L.J.* 41 (1999). See generally James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 *Int'l J. Indus. Org.* 639 (2005). See also Keith N. Hylton, *The Law and Economics of Monopolization Standards*, in *Antitrust Law and Economics* 82 (Edward Elgar Publishing, Hylton ed., 2010).

⁷⁴ For empirical evidence that basic economic training improves judicial decision-making in relatively simple antitrust cases, lowering appeal and reversal rates for district court judges, see Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals*, 54 *J. L. & Econ.* (forthcoming 2010).

applied to reliably rule out allegations of competitive harm arising out of business activities engaged in by firms with small market shares. The filter is linked closely to economic theory and empirical evidence which tells us that non-standard contractual arrangements such as exclusive dealing, tying, and vertical restraints involving firms without market power are highly unlikely to result in consumer losses, and likely pro-competitive.

Yet another error-cost filter which is less obvious, but more interesting for the purposes of discussing *Copperweld* immunity, is the two product requirement in tying cases under Section 2 of the Sherman Act. Of course, much like the one half-economic and one half-metaphysical inquiry concerning the boundaries of the firm undergirding the single entity defense, the judicial determination of whether shoes and shoelaces or operating systems and browsers amount to a “single” product or are truly separate products creates some concern.⁷⁵ But note that the substantive economic content of the “single product” defense to a tying claim turns on whether consumers have separate and distinct demand for the tied good apart from the tying good. As commentators have pointed out, and the D.C. Circuit recognized in *Microsoft*, the “single product” test is a proxy for the net efficiencies: when consumers demand the two products bundled together, there are likely efficiencies to the bundling.⁷⁶ Looking to consumer demand for evidence of efficiencies can be a low cost alternative to the fact-specific inquiry involved in understanding how a particular bundle reduces distribution costs, or the effects of integrating browser code into an operating system. Thus, while the simple rule has its imperfections, as rules must, it provides a mechanism to identify agreements that are not likely to cause

⁷⁵ *Jefferson Parish Hospital No. 2 v. Hyde*, 466 U.S. 2 (1984).

⁷⁶ See David S. Evans, A. Jorge Padilla, & Christian Alborn, *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, *Antitrust Bulletin* 287 (2004); *United States v. Microsoft Corp.*, 253 F.3d 34, 135 (D.C. Cir. 2001) (“[o]n the supply side, firms without market power will bundle two goods only when cost savings from joint sale outweigh the value consumers place on separate choice. So bundling by all firms implies strong net efficiencies.”).

competitive harm at relatively low cost and in a manner that is linked to economic theory and empirical learning.

The single entity defense as an error-cost filter has the potential to operate much the same way. Indeed, as we explain below before turning to the implications of *American Needle* for the single entity defense and antitrust more generally, the error-cost approach discussed above illuminates the potentially productive and efficient role the single entity defense plays in antitrust.

B. The Single Entity Defense as an Error-Cost Consistent Filter for Meritless Claims

The role of the single entity defense embodied in *Copperweld* is to provide a relatively efficient mechanism for terminating Section 1 claims involving business arrangements that are highly unlikely to enable the creation or exercise of market power. The test has a functional origin based on the critical distinction in antitrust law between unilateral and concerted conduct, with the latter class of conduct treated with greater suspicion because it “deprives the marketplace of independent centers of decisionmaking,” reduces the “diversity of entrepreneurial interests,” and therefore “actual or potential competition.”⁷⁷ This economic distinction lies at the very core of antitrust law and economics. The challenge for the law has been whether it is capable of developing a rule that leverages the economic theory of the firm in a way that allows courts to move beyond corporate “form” and consistently identify those business arrangements that “functionally” are associated with negative welfare consequences of cartels rather than the generally welfare neutral or positive actions of the single firm.

Alone, *Copperweld*'s instruction that the substance and not the form of an economic arrangement would determine whether it fell within the scope of Section 1 does not imply this

⁷⁷ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

“filtering” role for the single entity defense. But when the Supreme Court elaborates on the type of functional inquiry it has in mind, the promise of the single entity defense as a bright-line rule that fits within the “error-cost” framework of modern antitrust, in other words, a rule that minimizes the sum of the social cost of judicial errors and administrative costs becomes apparent.

As discussed above, *Copperweld’s* focus on control provides an analytical basis consistent with the economic theory of the firm upon which to base such a rule. Before *American Needle*, however, the single entity jurisprudence was in disarray, with lower courts applying different versions of *Copperweld’s* unity of interest test, some in a manner consistent with the “control” notion of the firm and others with a less economically sound rule that focused on incentive conflicts between entities. The “unity of interest” standard applied in a fashion untethered “control” leads to absurd results. As Judge Easterbrook has pointed out:

Although the [unity of interest] phrase appears in *Copperweld* . . . [a]s a proposition of law, it would be silly. Even a single firm contains many competing interests. One division may make inputs for another’s finished goods. The first division might want to sell its products directly to the market, to maximize income (and thus the salary and bonus of the division’s managers); the second division might want to get its inputs from the first at a low transfer price, which would maximize the second division’s paper profits. 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. . . . *Copperweld* does not hold that only conflict-free enterprises may be treated as single entities.⁷⁸

Given the disarray in the lower courts applying *Copperweld* concepts, hopes that the single entity doctrine could evolve to provide a useful method for courts to apply a filter resolve claims unlikely to generate antitrust harms had already been greatly diminished, but not eliminated.⁷⁹

⁷⁸ Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593 (7th Cir. 1996).

⁷⁹ See Transcript of Oral Argument at *57-8, *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010) (the respondent NFL’s counsel argued that the single entity defense was important because under the modern rule of reason, “defending a claim like [American Needle’s] on the merits involves an investment of tens of millions of dollars, thousands of hours of executive time, hours and hours of court time.”).

The single-entity defense, of course, is not the only error-cost filter available to judges in cases involving horizontal restraints otherwise reviewable under the Rule of Reason. The Rule of Reason itself requires plaintiffs to define a relevant market, demonstrate competitive harm, and offer proof that efficiencies do not dominate anticompetitive effects. In addition to filters within the Rule of Reason, pleading standards provide yet another filter for claims of antitrust conspiracies unlikely to generate competitive harms. But the relative attractiveness of applying the *Copperweld*, single entity filter declined as the complexity of the analysis increased.

Consider, for example, Judge Boudin's discussion of the tradeoff between the single entity analysis and the Rule of Reason in *Major League Soccer*:

Once one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases. To the extent the criteria reflect judgments that a particular practice in context is defensible, assessment under section 1 is more straightforward and draws on developed law. Indeed, the best arguments for upholding MLS's restrictions--that it is a new and risky venture, constrained in some (perhaps great) measure by foreign and domestic competition for players, that unquestionably creates a new enterprise without combining existing competitors--have little to do with its structure.⁸⁰

Judge Boudin eloquently characterizes the somewhat frustrating state of single entity doctrine prior to *American Needle*. The purpose of the doctrine as a tool to prevent claims for which further discovery is unlikely to unearth evidence of antitrust harms, coupled with the imprecise "unity of interest" standard, allowed the single entity defense to be exported into cases involving hybrid organizational forms such as leagues and franchises. However, as Judge Boudin pointed out, reliable and functional criteria for those cases remained elusive and, thus, *Copperweld* remained a less comfortable ground for decision than Section 1 Rule of Reason precedent.

The tradeoff between these two courses for antitrust jurisprudence concerning hybrid organizations with apparent efficiencies invokes the choice between rules and standards in

⁸⁰ *Major League Soccer*, 284 F.3d at 59.

antitrust.⁸¹ The single entity defense offers the hope of a bright-line, low administrative cost safe haven for these arrangements contrasted with the fact-intensive Rule of Reason which offers the hope of reduced error at the cost of higher cost of application. But whatever the uncertainty of the Rule of Reason approach in resolving complex economic issues,⁸² there is no hope for advantage at all concerning a single entity defense which is equally fact-intensive, though focused on functional criteria with a less certain relationship to whether the business activity at issue is likely to generate competitive harms.

As we discussed above, in *Major League Soccer*, Judge Boudin essentially presented two alternatives in light of the error-cost framework. On the one hand, the Court could develop a more thorough set of simply administrable tests which could serve as a prefatory examination to Section 1 liability under *Copperweld*. Alternatively, the Court could instead expand Rule of Reason treatment to take account of the economic realities surrounding complicated, interdependent enterprises. These broadly mapped onto the advantages and disadvantages of employing bright-line rules versus flexible standards in antitrust suits. As *Major League Soccer* showed, however, *Copperweld* provided the untailored and occasionally arbitrary results one can expect from a bright-line rule while inflicting nearly all the costs of an exploratory standard. Aptly describable as neither rule nor standard, *Copperweld* immunity begged for stark revision. As we discuss below, in *American Needle* the Supreme Court did indeed revise *Copperweld*—but along narrow lines that echo antitrust formalism harkening back to the days of *Yellow Cab*.

III. Antitrust Formalism is Dead! Long Live Antitrust Formalism: *American Needle* and *Copperweld* Immunity

⁸¹ Daniel A. Crane, Rules versus Standards In Antitrust Adjudication, 64 Wash. & Lee L. Rev. 49 (2007).

⁸² Michael R. Baye & Joshua D. Wright, Is Antitrust Too Complicated for Generalist Judges?, 54 J. L. & Econ. (forthcoming 2010) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319888##).

A. American Needle, Inc. v. National Football League

If the dominant interpretation of the holding in *American Needle* is amiss, the conventional wisdom that the case ultimately punished the NFL's hubris is surprisingly reasonable.⁸³ In 1963, the thirty-two NFL teams (and their predecessors) established the National Football League Properties to develop, license, and market the NFL's intellectual property.⁸⁴ For nearly forty years, NFLP granted vendors and manufacturers licenses to create and sell team-branded apparel of all sorts.⁸⁵ In 2000, pursuant to the NFLP's by-laws, the NFL's constituent teams voted to grant Reebok an exclusive license to manufacture team-branded headwear.⁸⁶

Seven years into Reebok's 10-year agreement, American Needle brought suit in the Northern District of Illinois, claiming violations of both Sections 1 and 2 of the Sherman Act.⁸⁷ While American Needle did not argue the formation of the NFLP itself was illegal, the company contended that the agreement by which the NFLP conveyed to Reebok an exclusive license was an illegal conspiracy to restrain trade in violation of Section 1.⁸⁸ The NFL, as expected, immediately claimed single-entity status in response to these claims.⁸⁹ The district court permitted limited discovery on the *Copperweld* question but eventually accepted the NFL's characterization of its business architecture and dismissed American Needle's Section 1 claim pursuant to *Copperweld* and a closely-related Seventh Circuit case.⁹⁰ The NFL, NFLP, and

⁸³ Posting of Randy Picker to The University of Chicago Law School Faculty Blog, Supreme Court Blitzes NFL in American Needle, <http://uchicagolaw.typepad.com/faculty/2010/05/supreme-court-blitzes-nfl-in-american-needle.html> (May 24, 2010, 17:13 CT).

⁸⁴ *American Needle*, 130 S. Ct. at 2207.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* See *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1992).

respective NFL teams qualified as a “single entity,” and were therefore incapable of conspiring in violation of Section 1.

American Needle appealed to the Seventh Circuit, which affirmed the district court, albeit somewhat more modestly.⁹¹ The appellate court held that with regards to licensing of NFL intellectual property, the NFL and its constituent teams constituted a single entity worthy of *Copperweld* immunity.⁹² Accordingly, the NFL prevailed on all of American Needle’s claims. In the vast majority of such cases—and in several similar cases against other professional sports leagues—the story of American Needle would have ended before the Seventh Circuit panel. Predictably, American Needle petitioned the Supreme Court for certiorari. Despite winning on all claims before them, however, the NFL surprisingly supported American Needle’s petition for review, also seeking reversal of the Seventh Circuit—and instead a holding that the NFL (and other professional sports leagues) could not be implicated under Section 1 under any circumstances whatsoever via *Copperweld*.⁹³ The solicitor general, whose advice on such matters the Court conventionally follows, recommended denial. The Court obliged the NFL so far as the petition for certiorari, and no farther.

At oral argument, the Court repeatedly stressed its concerns with the relative efficiency and utility of Rule of Reason analysis, including various filters that might apply to screen out low quality claims, versus the theoretically simpler—but heretofore unpredictable—*Copperweld* screen. The Court began by exploring American Needle’s proposed Rule of Reason inquiry. Justice Ruth Bader Ginsburg’s first question pressed American Needle’s counsel as to whether everything the NFL did was necessarily subject to the Rule of Reason, or whether some internal

⁹¹ See 130 S. Ct. at 2207.

⁹² *Id.* at 2207-8.

⁹³ Brief for the NFL Respondents, *American Needle, Inc. v. National Football League*, 2009 WL 164245 *4 (“NFL Respondents are taking the unusual step of supporting certiorari in an effort to secure a uniform rule.”).

decisions would, by operation of some screening mechanism, “escape, entirely, antitrust analysis.”⁹⁴ Justice Anthony Kennedy immediately followed up by probing the potential costs of subjecting all NFL actions to antitrust scrutiny by posing a hypothetical as to the competitive implications of the NFL changing game rules.⁹⁵ He emphasized error-cost concerns in so doing: “the owners sit around the room [for a rule change], they are liable for a conspiracy. I mean, this is serious stuff. Triple damages.”⁹⁶ Justice Kennedy accordingly asked American Needle to identify “a zone where we are sure Rule of Reason inquiry . . . would be inappropriate.”⁹⁷ The Chief Justice expressed yet further concern over the expensive nature of an expansive Rule of Reason treatment, and struck at the heart of the matter from an error-cost perspective, questioning where the Court should “rest the inefficiency and confusion” of an antitrust case between a prefatory *Copperweld* analysis and a Rule of Reason examination under Section 1.⁹⁸

Copperweld immunity fared no better with the Court at oral argument. Justice Breyer questioned its usefulness as applied to the NFL, construing the doctrine as applying to a relatively narrow set of circumstances.⁹⁹ Justice Sonia Sotomayor framed granting the NFL *Copperweld* immunity as “an absolute bar to an antitrust claim.”¹⁰⁰ Justice Antonin Scalia attempted to pose a question to the NFL’s counsel he viewed as “reduce[ing *Copperweld*] to the absurd,” only to find the NFL’s position demanded that the *Copperweld* screen would permit price-fixing amongst even the sales of NFL teams themselves.¹⁰¹ Whatever dissatisfaction it found with the Rule of Reason, the Court to its credit was very much focused on the “compared to what” question. In the end, it surmised that *Copperweld* analysis was nearly as expensive the

⁹⁴ Transcript of Oral Argument at *5, American Needle, 130 S. Ct. 2201.

⁹⁵ *Id.* at *6.

⁹⁶ *Id.* at *7.

⁹⁷ *Id.*

⁹⁸ *Id.* at *23.

⁹⁹ *Id.* at *46.

¹⁰⁰ *Id.* at *49.

¹⁰¹ *Id.* at *64.

Rule of Reason—and, finding no meaningful limit to the *Copperweld* screen offered by the NFL, appeared prepared to reject the single-entity defense part and parcel.

And reject the NFL's construction of *Copperweld* the Court did. Writing for the unanimous Court, Justice John Paul Stevens began his last antitrust opinion by reiterating two cornerstones of modern antitrust: the non-literality of the Sherman Act¹⁰² and the “distinction between concerted and independent action.”¹⁰³ Though “concerted activity is [to be] judged more sternly than unilateral activity”¹⁰⁴ under the Sherman Act, the Court, Justice Stevens maintained, “eschewed such formalistic distinctions”¹⁰⁵ as to whether the parties are “legally distinct entities”¹⁰⁶ in determining whether behavior constitutes “concerted action.”¹⁰⁷ In reiterating the Court's functional test, Justice Stevens traced the long and somewhat ignominious history of the intra-enterprise theory of liability under Section 1 of the Sherman Act, beginning with *Yellow Cab* and ending with *Copperweld*.¹⁰⁸ Up until this point in the opinion, one might have reasonably foreseen the Court adopting something similar to the NFL's position or to the first course of Judge Boudin's dilemma: expounding a rule for regarding integrated multi-component firm as a single actor for purposes of Section 1 and perhaps shifting the “unity of interest” inquiry away from incentive alignment and toward control rights, consistent with the modern economic theory of the firm. The latter strategy in particular would have been consistent with the Roberts Court's antitrust jurisprudence thus far, much of which has been in the spirit of “updating” the law to reflect modern economics and empirical learning.¹⁰⁹

¹⁰² *American Needle*, 130 S. Ct. at 2206.

¹⁰³ *Id.* at 2209.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2210.

¹⁰⁷ *Id.* at 2212.

¹⁰⁸ *Id.* at 2210.

¹⁰⁹ Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 *Competition Policy Int'l* 24 (Autumn 2007).

The Court proceeded, however, in nearly the opposite way. Reiterating the functionality of the test, Justice Stevens wrote that while it was not determinative to the concerted conduct inquiry that two or more entities had maintained legal separation, it was similarly not dispositive that they had “organized themselves under a single umbrella or into a structured joint venture.”¹¹⁰ He then summarily declared the thirty-two teams of the NFL to be “separate corporate consciousnesses” whose interests were “not common.”¹¹¹ That the NFL had amalgamated its intellectual property into the NFLP was “not dispositive,” despite being “similar in some sense to a single enterprise that owns several pieces of intellectual property and licenses them jointly.”¹¹² As the teams’ “interests [were] not necessarily aligned”—that they did not completely unite the teams’ economic interests, in the parlance of *Copperweld*—the NFL’s teams remained independent centers of decisionmaking, subject to Section 1.¹¹³ Even the NFLP itself remained subject to Section 1, though this was, admittedly, a closer decision for the Court.¹¹⁴ While typically the Court heavily presumes intra-firm decisions are independent and motivated by the maximization of profits, “in rare circumstances, that presumption does not hold”—as it did not for the NFLP.¹¹⁵ As the teams retained distinct economic interests despite their equal participation in the NFLP, and because the NFLP’s decisions required more than typical shareholder participation, the NFLP merely served as an instrumentality for the separate team decision-making, rather than acting as a single source of economic power itself.¹¹⁶ The opinion noted in epilogue that there may well have been justifications for the NFL and NFLP’s

¹¹⁰ *Id.* at 2212.

¹¹¹ *Id.*

¹¹² *Id.* at 2213.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2215.

¹¹⁶ *Id.*

conduct; indeed, that would be measured by the Rule of Reason, and potentially quite briefly, but only upon remand.¹¹⁷

B. *American Needle*: Some Practical Implications

As an initial observation, *American Needle*—and the justices’ questioning during oral argument—leave open the extent to which *Copperweld* immunity itself remains at all. The opinion extensively cited *Copperweld*’s reliance on a “complete unity of interests” in order to combine multiple entities into a single economic unit and noted approvingly that wholly-owned sub-entities could not conspire under the meaning of Section 1.¹¹⁸ The opinion even undermines these faint implications, however, by carefully hedging that formal single entity status did not guarantee an exemption from Section 1.¹¹⁹ During oral argument, Justice Kennedy went so far as to remark that the case appeared to call for abandoning the entire strain of *Copperweld* and the “single-entity theory” in the first place vis-à-vis Section 1.¹²⁰ Before *American Needle*, lower courts agreed that complete common ownership was a sufficient condition for single-entity status but not, perhaps, a necessary one.¹²¹ Following *American Needle*, complete common ownership now minimally appears to be a necessary condition for single-entity status, but not a sufficient one.

A key question is what types of cases will be more likely to occur due to the Court’s decision. In other words, does *American Needle* change anything? Consider that *Copperweld* has foreclosed, in different circuits, suits between parents and wholly owned subsidiaries,¹²² co-

¹¹⁷ *Id.* at 2216.

¹¹⁸ *Id.* at 2212.

¹¹⁹ *Id.* at 2216, 2217.

¹²⁰ Transcript of Oral Argument at *7, *American Needle*, 130 S. Ct. 2201.

¹²¹ See, e.g., *Leaco Enterprises, Inc. v. General Elec. Co.*, 737 F. Supp. 605 (D. Or. 1990).

¹²² See *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001); *Russ’ Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214 (6th Cir. 1985).

owned sister corporations,¹²³ “unofficially merged” companies or effective mergers between corporations and unincorporated associations,¹²⁴ suits against a franchisor and franchisee,¹²⁵ between a hospital and medical staff,¹²⁶ and among trade associations.¹²⁷ *American Needle* presents the first decision in some time that effectively broadens, rather than reduces, the scope of the Sherman Act. These types of cases involving organizational structures short of full common ownership now fall outside of the protection of *Copperweld* immunity and will be resolved under the Rule of Reason. One obvious and high-profile subset of such cases involves the credit card networks, and in particular MasterCard and Visa, especially because those firms altered ownership structure through initial public offerings in order to increase their likelihood of obtaining immunity.¹²⁸

But will shifting these cases from resolution under *Copperweld* to finding their fate under the Rule of Reason change litigation outcomes or impact consumer welfare? Even where the single-entity defense is rejected, plaintiffs appear to generally lose cases in which a single-entity defense is credibly raised.¹²⁹ This is unsurprising because plaintiffs rarely win Rule of Reason cases.¹³⁰ *Copperweld* immunity served to dismiss relatively implausible cases—such as that a firm and its 91.9 percent-owned subsidiary conspired to violate Section 1¹³¹—before getting into extensive discovery. In short, it is unclear that *American Needle*’s severe cabining of

¹²³ Orson, Inc. v. Miramax Film Corp., 862 F. Supp. 1378, 1385 (E.D. Pa. 1994).

¹²⁴ Int’l Travel Arrangers v. NWA, Inc., 991 F.2d 1389 (8th Cir. 1993).

¹²⁵ Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026 (D. Nev. 1992), aff’d 999 F.2d 445.

¹²⁶ Levi Case Co. v. ATS Products, Inc., 788 F. Supp. 428, 432 (N.D. Cal. 1992).

¹²⁷ American Council of Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc., 185 F.3d 606 (6th Cir. 1999).

¹²⁸ See generally, Joshua D. Wright, Mastercard’s Single Entity Strategy 12 Harv. Negot. L. Rev. 225 (2007); Herbert Hovenkamp, American Needle and the Boundaries of the Firm in Antitrust Law (Working Paper, June 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616625.

¹²⁹ See *supra*, notes 123-128 (all cases in which the defendant’s single entity defense leads to summary judgment on plaintiff’s antitrust claims).

¹³⁰ Michael A. Carrier, The Rule of Reason: An Empirical Update for the 21st Century, 16 Geo. Mason L. Rev. 827 (2009).

¹³¹ Leaco Enterprises, Inc. v. General Elec. Co., 737 F. Supp. 605 (D. Or. 1990).

Copperweld will encourage successful cases, but it is likely that it will encourage substantially more discovery by plaintiffs. That outcome is probably not a positive development.

Perhaps the great contradiction of *American Needle* is the decision's repeated protestations—predicated on adherence to *Copperweld*—that its analysis was functional when the heart of *American Needle*'s construction of *Copperweld* is relentlessly formal.¹³² *American Needle* simultaneously embraces *Copperweld*'s “unity of interest” rhetoric while pinioning the NFL in a seemingly impossible situation. On the one hand, the Court notes that its functional analysis as to whether the various teams consisted of one or more economic decision-making centers would largely depend on the extent to which those centers had “shared interests” such to make them effectively constitute a single enterprise, shying away from *Copperweld*'s focus on control.¹³³ On the other hand, however, that the various teams had assembled themselves into something approaching a single enterprise through the NFLP was also not determinative, as they based their decisions for the NFLP on their individual, outside agendas.

The Court's decision went so far as to distinguish the NFLP from a typical corporation with typical shareholders based on, in part, the fact that the NFLP required a super-majority vote in order to grant exclusive licenses like the one in question to Reebok.¹³⁴ The opinion fails to make clear, either through an articulated theory of the firm or any economic analysis whatsoever, why such a detail reflects anything but a basic formalistic suspicion of a specific term of the NFLP's by-laws. This line of reasoning regrettably ignores in its functional analysis that, as noticed by the trial court, *American Needle* at no point attempted to deal with any of the NFL

¹³² See, e.g., *American Needle*, 130 S. Ct. at 2209 (“...we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate...”); at 2210 (“...we now embark on a more functional analysis.”); and at 2213 (“they are not similar in the relevant functional sense...”).

¹³³ The seemingly most important functional “fact” is that the NFLP had been doing business within this arrangement for 63 years. See 130 S. Ct. at 2207.

¹³⁴ *Id.* at 2215 (“Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders...”).

teams as individual, independent organizations. The irony of this inversion must not be lost on the NFL: in pursuit of being declared a single entity as a matter of law in the face of a plaintiff that had dealt with its constituent teams effectively as a single entity, the Supreme Court not only reversed the Seventh Circuit's declaration for a determination as to whether the NFL enjoyed single-entity status as a matter of fact, but declared the NFL not a single entity as a matter of law.

It is ultimately difficult to avoid the conclusion that the Court redefined the single-entity defense to Judge Easterbrook's dystopian scenario, immunizing conflict-free organizations and inadvertently subsidizing full mergers and internal unanimity out of reverence for the single-entity form. *American Needle* thus serves as a perverted end of *Copperweld*, given that *Copperweld* itself held that "separate incorporation does not necessarily imply a capacity to conspire" and that "a business enterprise should be free to structure itself in ways that serve efficiency of control."¹³⁵ An acute observer might respond that *Copperweld* also said that separate incorporation does not necessarily imply a capacity to conspire, but that integrated incorporation did not deny it as well. This notation, while true, is of small consolation to the NFL, who, by virtue of their separate incorporation, upon purely appellate review and an exceptionally limited record, were declared multiple entities ipso facto.

Antitrust's central goal, though, is not the preservation of the single-entity defense or *Copperweld*; instead, it is the maximization of consumer welfare through rules that account for error costs and administrative costs. The elimination or limitation of the single-entity defense is neither necessarily positive nor negative for antitrust law. While it is true that it is the first decision in some time that expands the scope of the Sherman Act, the critical question is also a broader one: what will judges will do with antitrust claims once barred by *Copperweld*? Judge Boudin's dilemma posed two possibilities: the expansion of *Copperweld* to form rules with

¹³⁵ *Copperweld*, 467 U.S. at 773.

regards to hybrid entities or an increased lenience of the Rule of Reason to recognize the interdependent and complicated nature of many modern firms. To the extent that *Copperweld* and its progeny proved maladapted for implementation in the vast spectrum of cases involving anything short of complete common ownership or a complete subsidiary structure, the implications of *American Needle* for consumer welfare are generally more complex than has been assumed by much of the antitrust community.

IV. Explaining *American Needle* Within the Error-Cost Framework

If the Court's dismantling of the single-entity defense was somewhat equivocal, then reactions from the interventionist sphere of antitrust commentators were anything but. The American Antitrust Institute described the Court's decision as a "solid touchdown not only for sports fans, but all consumers" as Justice Stevens "sought to ensure the antitrust laws remain[ed] vibrant."¹³⁶ Dissatisfied with the Court's consistent support for the error-cost framework, the AAI heralded *American Needle* as a "reject[ion of] extreme pro-defendant positions, and should be a cautionary tale for defendants that seek to short-cut sound antitrust analysis, as the NFL did."¹³⁷ Tulane law professor Gabriel Feldman wrote that "for all conceivable purposes, and after decades of litigating the issue, the single entity argument for professional sports leagues is dead."¹³⁸ The *New York Times*, *Sports Illustrated*, and the *Washington Post* similarly ran editorials before and after the decision noting that *American Needle* exposed professional sports

¹³⁶ Press Release, American Antitrust Institute, AAI Applauds Supreme Court's Decision in *American Needle* (May 24, 2010) (available at http://www.antitrustinstitute.org/Archives/Needle_Decision.ashx).

¹³⁷ *Id.*

¹³⁸ Gabriel A. Feldman, The Supreme Court Puts to Rest the NFL's Single Entity Defense in *American Needle*, *Huffington Post* (May 24, 2010) (available at http://www.huffingtonpost.com/gabriel-a-feldman/the-supreme-court-puts-to_b_588086.html).

leagues to Sherman Act liability and asserting this would be beneficial for consumers.¹³⁹ The common thrust of these responses is twofold: that *American Needle* represents a rejection of the “extreme pro-defendant” positions of the last decade—largely associated with error-cost protections enjoying super-majority Supreme Court support—and that a wider reach of the Sherman Act will increase consumer welfare. While the latter is ultimately an empirical question, the former is certainly premature.

The interventionist hypothesis only holds at a superficial level. *American Needle* was the first case since 1992 that the Supreme Court resolved in favor of a private antitrust plaintiff.¹⁴⁰ Furthermore, the Court decided the case unanimously, and in so doing exposed more, rather than fewer, business arrangements to Sherman Act scrutiny. This does in fact contrast with a long line of recent cases—such as *Brooke Group*,¹⁴¹ *Credit Suisse*,¹⁴² *linkline Communications*,¹⁴³ and *Trinko*¹⁴⁴—applying error-cost and other filters to exculpate defendants. The interventionist interpretation is flawed both due to the inherent failings of *Copperweld* as well as the justices’ articulated administrative cost concerns in oral argument and the final opinion. In this part, we explain the error-cost function of *Copperweld*, how its administrative costs ultimately led to its displacement, and how *American Needle* reflects a substitution away from *Copperweld* and towards *Twombly*’s requirement of “plausibility” in pleading an antitrust complaint.

A. *American Needle* and the Substitution of *Copperweld*

¹³⁹ See, e.g., Editorial, Throwing the Rule Book at the NFL, N.Y. Times, May 27, 2010 at A34; Steve Pearlstein, Trust-Busting the NFL, Wash. Post, Oct. 21, 2009 (“Americans would be better off if professional sports leagues and their teams were forced to compete -- on the field and off...”).

¹⁴⁰ Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 45 (1992).

¹⁴¹ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

¹⁴² Credit Suisse Sec. (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).

¹⁴³ Pacific Bell Tel. Co. v. linkLine Comm’s, Inc., 129 S. Ct. 1109 (2009).

¹⁴⁴ Verizon Comm’s, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

Interpreting *American Needle*'s limitation of *Copperweld* to only wholly-owned entities as a fundamental philosophical change ignores the Supreme Court's recognition of the fundamental problems lower courts encountered applying *Copperweld*. *Copperweld*'s conceptual comparative advantage was as a low-cost, pre-discovery screening device. As increasingly complicated businesses attempted to avail themselves of *Copperweld*, however, no uniform rule arose that proved capable of consistent judicial application in addressing even partial equity stakes, much less patent licensees, franchisees, and so on.¹⁴⁵ As courts wildly diverged from one another in the application of *Copperweld*, the single-entity defense's value as a quick, inexpensive proxy for filtering meritless claims necessarily declined. Rather than permitting parties to dismiss cases of dubious merit before expensive discovery disputes, parties unpredictably litigated a precursor stage to Section 1 litigation, embodied by *Major League Soccer*.¹⁴⁶

It bears mention now that the Court's apparent limitation of *Copperweld* to effectively conflict-free enterprises effected a strikingly formalistic mistake. Lower courts understandably struggled with the correct equity stake percentage to deem multiple formal entities a "single economic unit."¹⁴⁷ As Judge Boudin noted, this exercise did not necessarily require that *Copperweld*'s marginalization: instead, the Court could have laid out a clear if imperfect test for single-entity status in interconnected franchises or leagues. Alternatively, the Court could have established a multifaceted set of factors that informed Rule of Reason treatment specifically with regards to interdependent enterprises. Instead, the Court retained *Copperweld* immunity, but only at the strictest of margins, seemingly refusing an even *de minimis* exception as many courts had allowed.

¹⁴⁵ See *supra* note 130.

¹⁴⁶ *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002).

¹⁴⁷ See generally, *supra* note 130 and accompanying text.

This approach is questionable. Before *American Needle*, complete common ownership was a sufficient condition for *Copperweld* immunity, but not a necessary one; after *American Needle*, it is at least necessary, and possibly not sufficient. It is not at all obvious that two enterprises under 99 percent common ownership would be able to engage in conduct in violation of Section 1 the prosecution of which would increase total consumer welfare. The same could likely be said for 98 percent common ownership. There is certainly some percentage of common ownership at which point another marginal amount might seriously call into question anticompetitive effects; this would be the point at which *Copperweld* immunity ought no longer apply as a matter of law (though it potentially could as a question of fact). The “all-or-nothing” retention of *Copperweld* echoes *Yellow Cab*-like formalism, in which the structure of the firm—and nothing else—can be completely dispositive as to the propriety of Section 1 liability. Yet such an error hardly suggests a willing ignorance as to comparative administrative costs, much less error costs.

In order to appreciate the intended substitution we hypothesize *American Needle* represents, one must first examine the Court’s stated attitude towards both *Copperweld* immunity and the progression of an antitrust case more broadly. The justices referred to the potential utility of *Copperweld* as a screen for obviously low-quality antitrust claims expressly several times. During oral argument, Justice Breyer admitted that though he found both sides’ arguments “very confusing” on the points raised, his understanding was that “we have *Copperweld* to deal with the case that we don’t make booths in department stores compete in price against each other.”¹⁴⁸ Similarly, when counsel for *American Needle* proposed a number of Section 1 inquiries could be disposed of summarily under the Rule of Reason, Chief Justice Roberts said that if a given arrangement “would be an easy case under the Rule of Reason,” it

¹⁴⁸ Transcript of Oral Argument at *44, *American Needle*, 130 S. Ct. 2201.

would instead “make sense to carve those out at the outset, rather than at the end of the case.”¹⁴⁹

This is, in other words, a Court that certainly understands the economics of judicial decisionmaking in the context of complex commercial litigation.

The Court also correctly and insightfully viewed its decision as involving a trade-off between submitting marginal single-entity defense claims to scrutiny under the Rule of Reason versus dismissing them out of hand. The Chief Justice remarked that the difficulty of the Rule of Reason versus *Copperweld* vis-à-vis Section 1 was where to allocate the “inefficiency and confusion” in the trial court.¹⁵⁰ Accordingly, an analysis of the interdependence of businesses engaging in challenged conduct could occur as a part of the “concerted conduct inquiry” or within a conventional Rule of Reason application.¹⁵¹ The two acted as direct substitutes for one another. Indeed, American Needle’s counsel specifically suggested the latter a more appropriate venue for scrutinizing (and screening out) comparatively weak Section 1 claims.¹⁵² The Court asked counsel about the costly nature of antitrust discovery,¹⁵³ the economic consequences of potentially condemning certain combinations among firms, and whether the plaintiff’s claims as to the NFL’s business structure were based on actual empirical data as to economic harms versus benefits of the NFL’s challenged contracts.¹⁵⁴ From the Court’s inquiry, then, we would expect a

¹⁴⁹ Transcript of Oral Argument at *23, American Needle, 130 S. Ct. 2201.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at *22.

¹⁵⁴ Transcript of Oral Argument at *51, American Needle, Inc. v. National Football League, 130 S. Ct. 2201 (2010). The empirical claims are weak. Some have cited anecdotal evidence in support of the proposition that the price of NFL logo NFL hats increased after the Reebok exclusive dealing arrangement. See, e.g., Brees, *supra* note 1 (“If you want to show support for your team by buying an official hat, it now costs \$10 more than before the exclusive arrangement”). Even assuming prices have increased, such evidence must be read in conjunction with A simultaneous increase of price and output after an exclusive dealing contract is consistent with the role of exclusives in facilitating the supply of promotional investments and preventing free-riding. See Benjamin Klein & Andres V. Lerner, The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty, 74 Antitrust L.J. 473 (2007). The Supreme Court has recently affirmed its recognition of the fundamental antitrust principle that consumer welfare can be enhanced both by reduced prices holding quality constant, and by business arrangements that facilitate promotion and thus stimulate demand, leading to both higher

close substitute for *Copperweld* immunity to both 1) be designed to allow judges to summarily dismiss claims that do not meaningfully articulate a substantial threat to consumer welfare and 2) be grounded in economic theory backed by empirical data when possible. As it turns out, counsel—for the plaintiffs, no less—suggested such a substitute.

B. Implications for *Twombly* as an Antitrust Filter

As American Needle pointed out in its briefs, “antitrust plaintiffs seeking to challenge ‘ordinary business decisions’ . . . have to surmount . . . the need, under *Bell Atlantic Corp. v. Twombly*, to allege a ‘plausible’ Rule of Reason claim, including anticompetitive effects in a cognizable market”¹⁵⁵ *Twombly* dismissals indeed satisfy both components of a workable substitute for *Copperweld* immunity—they both allow for an early dismissal of marginal antitrust cases and force antitrust plaintiffs to articulate theories of anticompetitive harm solidly grounded in economics. *Twombly* partially subsumes both of Judge Boudin’s alternatives presented in *Major League Soccer* by forcing a plaintiff to articulate a theory of competitive harm that nonetheless accounts for hybrid enterprise arrangements with more sophistication than an unsubstantiated presumption of consumer harm. Moreover, *Twombly* analysis takes place at the pleading stage, prior to potentially years of costly discovery, thereby addressing several of the justices’ concerns. During the *Twombly* oral arguments, for example, Justice Breyer expressed

prices and increased output. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 896-97 (2007) (“[m]any decisions a manufacturer makes . . . can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. . . . Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices.”). Indeed, there is some evidence that Reebok’s exclusive deal with the NFL increased sales by 21 percent by the end of 2002. See John Gibeaut, *A League of Their Own: The NFL Wants to Run Up the Score on its Antitrust Exemption*, ABA Journal (January 1, 2010), available at http://www.abajournal.com/magazine/article/a_league_of_their_own.

¹⁵⁵ Reply Brief of Petitioner American Needle, *American Needle, Inc. v. National Football League*, 2009 WL 4919362 *19 (internal citations omitted).

concern about lower pleading standards granting an antitrust plaintiff “a ticket to conduct discovery,”¹⁵⁶ and *Twombly* itself stated that “...proceeding to antitrust discovery can be expensive.”¹⁵⁷

Copperweld held the potential to act as a uniform Section 1 screen possessing the virtue of at least some level of economic sophistication with regards to the theory of the firm. By the time *American Needle* came before the Court, however, judicial application of *Copperweld* had largely devolved into a psychological and metaphysical inquiry. The *Twombly* pleading filter, by contrast, is much broader and enables the early dismissal of cases by putting the court and defendants on notice not just to the challenged conduct at hand, but as to a coherent theory of anticompetitive harm so as to justify the heavy costs associated with antitrust sanctions.¹⁵⁸ *Twombly* thus can play a similar role to that Justice Breyer envisioned for *Copperweld* immunity, but also more broadly, facilitating dismissals and reducing the chilling effect of false positives by ensuring firms that they have at least some latitude to engage in transaction cost-reducing restructuring without necessarily implicating antitrust concerns.¹⁵⁹

Without defending *Twombly* pleading standards in all contexts, and acknowledging the criticism that *Twombly* and *Iqbal* have received problems they pose for notice pleading generally

¹⁵⁶ Transcript of Oral Argument at *33, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007).

¹⁵⁷ *Twombly*, 550 U.S. at 558.

¹⁵⁸ William H. Page, *Twombly and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, *J. Comp. L. & Econ.* 439 (Sept. 2009) (arguing, consistent with this analysis, that *Twombly* should be interpreted in Section 1 context to require actual communication between the parties).

¹⁵⁹ As discussed above, *Copperweld* could nonetheless have acted as a complement to *Twombly*. Indeed, according to one source, 111 of 170 (nearly two-thirds) post-*Twombly* motions to dismiss antitrust claims have been successful. See Heather Lamberg Kafaele & Mario M. Meeks, *Antitrust Digest: Developing Trends and Patterns in Federal Antitrust Cases After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal* (April 2010). Consistent with our analysis, district court judges have made liberal usage of *Twombly* to dismiss antitrust claims at the pleading stage, including several on the grounds that the complaint did not adequately plead facts that rendered plausible an agreement between two separate entities. See, e.g., *Williams v. Citigroup*, No. 08-CV-9208, 2009 WL 3682536 (S.D.N.Y. Nov. 2, 2009); *Nichols v. Mahoney*, 608 F. Supp. 2d 526 (S.D.N.Y. 2009); *Westmoreland D.O. v. Pleasant Valley Hosp., Inc.*, No. 3:08-1444, 2009 WL 1659835 (S.D.W. Va. June 12, 2009); *Perinatal Med. Group, Inc. v. Children’s Hosp. Cent. Cal.*, No. 09-1273, 2009 WL 3756367 (E.D. Cal. Nov. 6, 2009).

and requiring information of plaintiffs that would be most easily obtained during discovery,¹⁶⁰ in the antitrust context the plausibility requirement creates value by preventing unwarranted judicial intrusion into business enterprises without at least a cursory presentation of economically coherent harm.¹⁶¹ The economic literature on the theory of the firm teaches us that former *Copperweld*-availing firms typically structure their business architecture in order to minimize transaction costs.¹⁶² By discouraging antitrust suits targeting nominal agreements between such firms that, in reality, represent unilateral action, *Twombly* allows these firms to pass on welfare gains through lower prices and increased innovation. We suggest that strengthening of pleading-stage antitrust filter in *Twombly* enabled the Court to provide a reasonable answer to Chief Justice Roberts’s inquiry about where the Court should allocate antitrust’s “inefficiency.” In other words, *Twombly* allowed the Court to expand the scope of the Sherman Act for the first time in nearly two decades without fear of a large increase in the marginal cost of operating the “antitrust system” in the form of the error and administrative costs associated with the Rule of Reason.

But what of *Twombly* itself? One potential response to *Twombly* already proposed in multiple circles is simple legislation codifying the previous pleading requirements. This would presumably lead to a large increase in cases at the margin between, as *Twombly* put it, merely

¹⁶⁰ Adam M. Steinman, *The Pleading Problem*, 62 *Stan. L. Rev.* 1293 (2010); A. Benjamin Spencer, *Plausibility Pleading*, 49 *B.C. L. Rev.* 431, 433, 446–47 (2008); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 *Va. L. Rev.* In Brief 135, 137–41 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>.

¹⁶¹ Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 *Wash U. J. L. & Pol’y* 61, 81–92 (2007); Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 *Sup. Ct. Econ. Rev.* 39, 41 (2008) (“[E]arly dismissals, by eliminating low-merit claims before they become costly, offer benefits to society in comparison to late dismissals.”); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 *Iowa L. Rev.* 873 (2009).

¹⁶² See Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (The Free Press, 1975); Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 *J. L. & Econ.* 297 (1978).

“conceivable” versus “plausible.”¹⁶³ These cases would be by necessity among the weakest antitrust suits present, requiring the most extensive discovery in order to vindicate the least obvious consumer harms. Antitrust has seen this pattern play out before, however; it was due to the massive proliferation of private actions that inspired much of the error-cost protections not only enshrined in the consumer harm requirements of Section 2, but narrowing Section 2’s scope altogether. To borrow a phrase, the cautionary tale for repealing *Twombly* is that opening the floodgates to all conceivable antitrust claims is a strategic maneuver that will favor plaintiffs in only the very shortest of temporal horizons—before the antitrust “system” of rules reacts accordingly.

The expectation that *American Needle* represents a permanent shift towards more expansive antitrust enforcement is thus misguided. The narrowing of *Copperweld* was made possible by the successful implementation of the *Twombly* filter, and necessitated by *Copperweld*’s failure in application. The Court’s decision to broadly scuttle the single-entity defense was heavily informed by error-cost principles, if unfortunately implemented in a particularly formalistic way, and does not insinuate sweeping pro-plaintiff changes to Section 1 for the foreseeable future. Indeed, even as *American Needle* was argued, Chief Justice Roberts maintained substantial hesitancy over even the use of the Rule of Reason, which remained “a continuing project of [the] Court.”¹⁶⁴ This work will almost certainly continue as it has for the last thirty years: motivated by a sincere concern over error costs and consistent with economic learning and empirical data.¹⁶⁵

¹⁶³ *Twombly*, 550 U.S. at 569.

¹⁶⁴ Transcript of Oral Argument at *24, *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010).

¹⁶⁵ See Douglas H. Ginsburg & Leah Brannon, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, 3(2) *Comp. Pol’y Int’l J* 3 (Autumn 2007).