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

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***Cato Supreme Court Review*, Forthcoming**

George Mason University Law and Economics Research Paper Series

10-40

Antitrust Formalism Is Dead! Long Live Antitrust Formalism!: Some Implications of *American Needle v. NFL*

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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 football[1]—as *American Needle v. National Football League*.[2] The Court's decision reversed the U.S. Court of Appeals for the Seventh Circuit, which had held that with regard to licensing 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 survive another day, remanded to the district court for evaluation under the Rule of Reason. While unanimous, the Court raised nearly as many questions as it resolved; observers have depicted the opinion as everything from an antitrust sea change[3] to an idiosyncratic application of a niche doctrine with

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[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] Am. Needle, Inc. v. NFL, 560 U.S. ____, 130 S. Ct. 2201 (2010).

[3] See 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 . . . .").

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 competition-chilling error. In contrast, those perplexed over the sound and fury surrounding *American Needle* contend that the doctrine contains 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-deterring versus under-deterring potentially anti-competitive 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, affect credit card companies, franchising firms, sports leagues, and interdependent 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

[4] See 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 use 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.

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 article 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 regard to the theory of the firm and to

[6] See Coke Sues Coke Zero for Infringement, July 26, 2006, available at http://www.youtube.com/watch?v= pv8YgrqUCVU.

[7] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[8] See Herbert Hovenkamp, The Pleading Problem in Antitrust Cases and Beyond, 95 Iowa L. Rev. Bull. 55 (2010), available at http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Hovenkamp.pdf.

corporate organization more broadly. Part IV explains *American Needle* in light of the error-cost framework and how, 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 compete against one another: sister corporations,

[9] Ashcroft v. Iqbal, 556 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] Am. Needle, 130 S. Ct. at 2210. See also Standard Oil Co. v. United States, 221 U.S. 1, 87–88 (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] Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

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, a single firm could as easily constitute a cartel as multiple firms, and the minimal requirement for an anti-competitive 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, on economic grounds, that some set of agreements should nonetheless remain beyond Section 1 scrutiny. The doctrine was severely criticized because its focus on whether a parent and subsidiary had functioned in an integrated fashion was ''unconnected to antitrust policy, [and] hopelessly vague.''[17] While the purely formalistic model of Section 1 embraced by *United States v. 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 anti-competitive effects, intra-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.

[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, 469 (1983).

[18] *Id*. at 462–63 (''The main effects of the intraenterprise conspiracy doctrine have been to confuse litigants and courts and to lengthen and complicate antitrust litigation.'').

With the advancement of economic analysis displacing previously long-standing, 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 to be a vestige discredit of 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 Tube 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 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

[19] See generally Ronald H. Coase, The Nature of the Firm, 4 Economica 386 (1937); 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, 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.

[24] *Id*. at 757–58.

[25] *Id*. at 758–59.

[26] *Id*. at 760–61.

[27] *Id*. at 769.

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 Tube's implausible claim motivated the Supreme Court to reexamine 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 predicating 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-subsidiary corporate groups into a single firm in order to avoid antitrust scrutiny merely subsidized inefficient mergers. Nevertheless, *Copperweld* presented only the narrowest 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 each other. 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 regard 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

[28] *Id*. at 772 n.18.

[29] *Id*.

[30] *Id*. at 769.

[31] See *Id*. at 768.

[32] See Part II, *infra*; Chicago Prof'l Sports Ltd. v. NBA, 95 F.3d 593, 598 (7th Cir. 1996) (''Even a single firm contains many competing interests.'').

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 ''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

[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, 249 (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.'').

[34] Copperweld, 467 U.S. at 772 n. 18.

[35] See Eichorn v. AT&T Corp., 248 F.3d 131, 138 (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, 216 (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, 45 n. 6 (E.D.N.Y. 1993) (an American subsidiary of a foreign corporation immune under Section 1).

[36] See 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. Prod. Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1993) (a group of individuals with joint ownership over a parent company and its two subsidiaries have Section 1 immunity).

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] Regardless, 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 district courts, however, recognized substantially 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. 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*. The District Court for 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.''[40] If applicable corporate law permitted multiple firms to formally arrange themselves 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

[37] See Orson, Inc. v. Miramax Film Corp., 862 F. Supp. 1378, 1386 (E.D. Pa. 1994).

[38] See Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477, 1486 (D. Or. 1987).

[39] See Leaco Enters., Inc. v. Gen. Elec. Co., 737 F. Supp. 605, 608–09 (D. Or. 1990)

[40] Novatel Commc'ns Inc. v. Cellular Tel. Supply, Inc., 1986 U.S. Dist. LEXIS 16017, *25–26 (N.D. Ga.).

to address franchises under the *Copperweld* rubric.[41] In *Fischer*, a terminated Jack-in-the-Box manager brought suit against his former employers, both the franchisee, and the franchisor, premised on a clause in the franchise agreement restricting co-franchisees from hiring terminated employees for six months.[42] 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.''[43] The district court agreed, holding a franchisee and franchisor incapable of a Section 1 conspiracy for several separate reasons. First, though franchisees may exercise independent action on business decisions, such as price, this ability arises from territorial division rather than a competitive relationship.[44] Additionally, separate incorporation could not constitute evidence of a ''conspiracy,'' particularly where the common franchise policies are dictated by an overarching corporate policy.[45] 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*.[46]

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 Seventh Circuit Judge Frank Easterbrook noted in *Chicago Professional Sports v. National Basketball Association*, even a fully integrated single firm contains ''many competing interests.''[47] 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 U.S. car manufacturers to offer lines of hybrid and

[41] Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026 (D. Nev. 1992), aff'd, 999 F.2d 445 (9th Cir. 1993).

[42] *Id*. at 1029.

[43] *Id*.

[44] *Id*. at 1031.

[45] *Id*. at 1031–32.

[46] *Id*. at 1032.

[47] Chicago Prof'l Sports Ltd. v. NBA, 95 F.3d 593, 598 (7th Cir. 1996).

low-emissions cars in order to raise the average fuel efficiency of their fleets—even though these vehicles are not profitable due to expensive manufacturing processes and modest demand.[48] 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.[49] This cross-subsidy alone indicates that General Motors' SUV and 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.[50] First, firms allocate control in order to prevent holdup problems inherent in making asset-specific investments.[51] 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 toward organizational structures that minimize transaction costs in order to maximize these residual profits.[52] It is insufficient for

[48] Holman Jenkins Jr., Yes, Detroit Can Be Fixed: A CAFÉ Tweak Can Bust the UAW labor monopoly, Wall Street J., Nov. 5, 2008, at A21.

[49] *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.'').

[50] See Klein & Lerner, *supra* note 33, at *15.

[51] *Id*. at *5.

[52] See *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).

antitrust purposes, then, to describe a firm by its legal boundaries; instead, contracts can be viewed as firms themselves. 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 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 crafted in *Copperweld* to require an examination of the internal motives of each participant proved more psychologically than economically useful.

Perhaps no case exposed how ultimately unworkable *Copperweld*'s ''unity of interests'' language had become as First Circuit Court of Appeals Judge Michael Boudin's opinion in *Fraser v. Major League Soccer*.[53] 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 players' services in violation of Section 1.[54] While MLS availed itself successfully of *Copperweld* immunity at the trial level, the First Circuit found *Copperweld* unavailing.[55] 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.[56] MLS represented something of ''a hybrid arrangement, somewhere between a single company . . . and a cooperative arrangement between existing competitors.''[57] In declining to apply *Copperweld*, Judge Boudin noted the extreme complexity of interpreting *Copperweld* in light of hybrid business arrangements.[58]

Judge Boudin also presaged the very substitution that would come to pass through *American Needle*.[59] ''The law,'' he wrote, ''could

[53] Fraser v. Major League Soccer, LLC, 284 F.3d 47 (1st Cir. 2002).

[54] *Id*. at 54–55.

[55] *Id*. at 59.

[56] *Id*. at 57–58.

[57] *Id*. at 58.

[58] *Id*. at 56–57.

[59] *Id*. at 58.

develop along either or both of two different lines. One could expand upon *Copperweld* to develop functional tests or criteria for shielding . . . 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.''[60] Judge Boudin noted the heretofore unresolved dilemma in developing intra-enterprise conspiracy immunity: either the substantial expansion of a new layer of analysis was needed 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 but on alternate grounds.[61] Judge Boudin, who periodically teaches antitrust at Harvard Law School, could make little use of *Copperweld*'s ''unity of interest'' requirements in the context of an interdependent sports league—and it turns out the Supreme Court would fare no better.

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

While much is said about the evolution of the single-entity defense in antitrust law, both before and after *Copperweld*, less often discussed 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. The primary role of such a rule is to supply a much-needed method for courts to provide for early resolution of antitrust claims concerning business arrangements that are not likely to trigger the core antitrust concern: consumer harm caused by the creation or exercise of market power. The single-entity defense 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, allowing such cases to proceed to discovery (and beyond) creates the possibility of judicial error, which in turn creates its own social costs.

[60] *Id*.

[61] 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.

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.''[62] 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, render further discovery or trial unproductive.

A. A Brief Primer on the Error-Cost Approach to Antitrust[63]

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 pro-competitive conduct from anti-competitive conduct is an inherently difficult task in the single-firm context.[64] 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 empirical evidence about 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. Legal scholars typically avoid rigorous attempts to work through the available economic theory and evidence when discussing the optimal design of legal rules. Economists, meanwhile, frequently fail to assess their analyses in realistic institutional settings and therefore neglect to incorporate the social costs of erroneous enforcement decisions into their analyses and recommendations

[62] Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1 (1984).

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

[64] Easterbrook, *supra* note 62, at 3, 7.

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 matrix laying out the types of errors that occur in antitrust litigation.[65]

Table 1. Possible Errors in Antitrust Assessment of Business Practices

Competitive Impact	Illegal	Legal
Harmful to Competition	Percentage of cases correctly condemning anti-competitive practices	Percentage of cases falsely absolving anti-competitive practices (''false negatives'')
Not Harmful to Competition	Percentage of cases falsely condemning legitimate practices (''false positives'')	Percentage of cases correctly absolving legitimate practices

From simple legal and economic assumptions, Easterbrook provided a powerful framework for thinking 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 difficulty in distinguishing efficient, pro-competitive business conduct from anti-competitive behavior;[66] (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

[65] Table 1 originally appeared in David S. Evans & Jorge Padilla, Neo-Chicago Approach to Unilateral Practices, 72 U. Chi. L. Rev. 73, 84 (2005).

[66] 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 64, 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 generally Frank H. Easterbrook, Workable Antitrust Policy, 84 Mich. L. Rev. 1696 (1986).

II] errors;''[67] 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.[68]

From those simple assumptions, Easterbrook argued that a number of simple-to-apply rules, or ''filters,'' could be used to minimize the sum of errors 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.[69]

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 economic circumstance or qualification,''[70] shared the view that the real power of economics in antitrust was not found in its ability to improve decisionmaking on a case-by-case basis by making judges more like economists, but in generating simple rules that contained economic content.[71]

[67] Easterbrook, *supra* note 62, at 15.

[68] *Id*.

[69] Easterbrook, *supra* note 64, 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 J. Comp. L. & Econ. 33 (2010).

[70] 915 F.2d 17, 22 (1st Cir. 1990). 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), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1028028; 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, 2008–2009 Cato Sup. Ct. Rev. 111 (2009).

[71] 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

The key point is that the task of distinguishing anti-competitive 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 strength of the error-cost framework is that it allows regulators, judges, and policymakers to harness the power of economics to form simple and sensible filters and safe harbors rather than converting themselves into amateur econometricians, game theorists, or behaviorists.[72]

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 applied to reliably rule out allegations of competitive harm arising out of business activities 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 promote competition.

Yet another error-cost filter that 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

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& 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); 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).

[72] 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), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1319888##.

the single-entity defense, the judicial determination of whether shoes and shoelaces or operating systems and browsers amount to ''single'' products or are truly separate products creates some concern.[73] But note that the substantive economic content of the ''single-product'' defense to a tying claim turns on whether consumers have a separate and distinct demand for the tied good, apart from the tying good. As commentators have pointed out, and the D.C. Circuit Court of Appeals recognized in *United States v. 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.[74] 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 reliable mechanism to identify agreements that are not likely to cause 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

[73] See Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 11–12 (1984).

[74] United States v. Microsoft Corp., 253 F.3d 34, 135 (D.C. Cir. 2001) (''On 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.''); see David S. Evans, A. Jorge Padilla, & Christian Alborn, The Antitrust Economics of Tying: A Farewell to Per Se Illegality, 49 Antitrust Bull. 287 (2004).

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.[75] 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 determined whether the arrangement fell within the scope of Section 1 does not imply this ''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 from ''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

[75] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984).

> 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.[76]

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 to resolve claims unlikely to generate antitrust harms had already been greatly diminished, but not eliminated.[77]

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 these filters within the Rule of Reason, pleading standards provide yet another filter for claims of antitrust conspiracies unlikely to generate competitive harms. The relative attractiveness of applying the *Copperweld* single-entity filter declines as the complexity of the analysis increases.

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

[76] Chicago Prof'l Sports Ltd. v. NBA, 95 F.3d 593, 598 (7th Cir. 1996).

[77] See Transcript of Oral Argument at 60, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010) (No. 08-661) (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.'').

> 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.[78]

Judge Boudin eloquently characterizes the somewhat frustrating state of the 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 antitrust.[79] 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,[80] there is no advantage in a single-entity defense that 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 presented two alternative approaches to the error-cost framework. On the one hand, the Court could develop a more thorough set of simply administrable tests that 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

[78] Fraser v. Major League Soccer, 284 F.3d 47, 59 (1st Cir. 2002).

[79] See Daniel A. Crane, Rules versus Standards in Antitrust Adjudication, 64 Wash. & Lee L. Rev. 49 (2007).

[80] See Baye & Wright, *supra* note 72.

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 expects from a bright-line rule while imposing 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 indeed revised *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

A. American Needle v. NFL

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.[81] In 1963, all the NFL's teams came together to establish National Football League Properties to develop, license, and market the NFL's intellectual property. For nearly 40 years, NFLP granted vendors and manufacturers licenses to create and sell team-branded apparel of all sorts. In 2000, pursuant to NFLP's bylaws, the NFL's constituent teams voted to grant Reebok an exclusive license to manufacture team-branded headwear.[82]

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. While American Needle did not argue the formation of NFLP itself was illegal, the company contended that the agreement by which NFLP conveyed to Reebok an exclusive license was an illegal conspiracy to restrain trade in violation of Section 1. The NFL, as expected, immediately claimed single-entity status in response to these claims. The district court permitted limited discovery on the *Copperweld* question but eventually accepted the NFL's characterization of its business architecture

[81] 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 CST).

[82] *Id*.

and dismissed American Needle's Section 1 claim pursuant to *Copperweld* and a closely related Seventh Circuit case.[83] The NFL, NFLP, and 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. The appellate court held that with regard to licensing of NFL intellectual property, the NFL and its constituent teams constituted a single-entity worthy of *Copperweld* immunity.[84] 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 against them, however, the NFL surprisingly supported American Needle's petition for review, also seeking reversal of the Seventh Circuit—seeking a holding that the NFL (and other professional sports leagues) could not be implicated under Section 1 under any circumstances whatsoever via *Copperweld*.[85] 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, but no further.

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 decisions would, by operation of some screening mechanism, ''escape, entirely, antitrust analysis.''[86] Justice

[83] See Chicago Prof'l Sports Ltd. v. NBA, 95 F.3d 593 (7th Cir. 1996).

[84] See Am. Needle, 130 S. Ct. at 2207–08 (citing Am. Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008)).

[85] Brief for the NFL Respondents at 4, Am. Needle, 130 S. Ct. 2201, No. 08-661 (Jan. 21, 2009) (''NFL Respondents are taking the unusual step of supporting certiorari in an effort to secure a uniform rule.'').

[86] Transcript of Oral Argument at 6, Am. Needle, 130 S. Ct. 2201 (No. 08-661).

Anthony Kennedy immediately followed up by probing the potential costs of subjecting all NFL actions to antitrust scrutiny by posing a hypothetical about the competitive implications of the NFL's changing game rules.[87] 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.''[88] Justice Kennedy accordingly asked American Needle to identify ''a zone where we are sure Rule of Reason inquiry . . . would be inappropriate.''[89] 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.[90]

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.[91] Justice Sonia Sotomayor framed granting the NFL *Copperweld* immunity as ''an absolute bar to an antitrust claim.''[92] Justice Antonin Scalia attempted to pose a question to the NFL's counsel he viewed as ''reduc[ing *Copperweld*] to the absurd,'' only to find the NFL's position demanded that the *Copperweld* screen would permit price fixing on even the sales of NFL teams themselves.[93] 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 as the Rule of Reason and, finding no meaningful limit to the *Copperweld* screen offered by the NFL, appeared prepared to reject the single-entity defense altogether.

And the Court did reject the NFL's construction of *Copperweld*. Writing for the unanimous Court, Justice John Paul Stevens began

[87] *Id*. at 7.

[88] *Id*.

[89] *Id*.

[90] *Id*. at 23.

[91] *Id*. at 44–45.

[92] *Id*. at 49.

[93] *Id*. at 64.

his last antitrust opinion by reiterating two cornerstones of modern antitrust: the non-literality of the Sherman Act and the ''distinction between concerted and independent action.''[94] Though ''concerted activity is [to be] judged more sternly than unilateral activity''[95] under the Sherman Act, Justice Stevens maintained that the Court ''eschewed such formalistic distinctions''[96] as to whether the parties are ''legally distinct entities'' in determining whether behavior constitutes ''concerted action.''[97] 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, beginning with *Yellow Cab* and ending with *Copperweld*.[98] Up until this point in the opinion, one might have reasonably foreseen the Court adopting something similar to the NFL's position or the first option of Judge Boudin's dichotomy: expounding a rule for regarding an 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 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.[99]

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.''[100] He then summarily declared the 32 teams of the NFL to be ''separate corporate consciousnesses'' whose interests were ''not common.''[101] That the NFL had

[94] Am. Needle, 130 S. Ct. at 2208–09.

[95] *Id*. at 2209.

[96] *Id*.

[97] *Id*. at 2212.

[98] *Id*. at 2210–11.

[99] See Wright, *supra* note 70.

[100] Am. Needle, 130 S. Ct. at 2212.

[101] *Id*.

amalgamated its intellectual property into 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.''[102] 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.[103] Even NFLP itself remained subject to Section 1—though this was, admittedly, a closer decision for the Court.[104] While typically the Court heavily presumes that intrafirm decisions are independent and motivated by the maximization of profits, ''in rare cases, that presumption does not hold''—as it did not for NFLP.[105] As the teams retained distinct economic interests despite their equal participation in NFLP, and because NFLP's decisions required more than typical shareholder participation, NFLP merely served as an instrument for the separate team decisionmaking, rather than acting as a single source of economic power itself.[106] The opinion noted in epilogue that there may well have been justifications for the NFL's and NFLP's conduct; indeed, that would be measured by the Rule of Reason, and potentially quite briefly, but only upon remand.[107]

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.[108] The opinion even undermines these faint implications, however, by carefully hedging that formal single-entity status did not guarantee an exemption from Section

[102] *Id.* at 2213.

[103] *Id.*

[104] *Id.* at 2214–15.

[105] *Id.* at 2215.

[106] *Id.*

[107] *Id.* at 2216–17.

[108] *Id.* at 2212.

1.[109] 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.[110] Before *American Needle*, lower courts agreed that complete common ownership was a sufficient condition for single-entity status but not, perhaps, a necessary one.[111] Following *American Needle*, complete common ownership now 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* had foreclosed, in different circuits, suits between parents and wholly owned subsidiaries,[112] co-owned sister corporations,[113] ''unofficially merged'' companies or effective mergers between corporations and unincorporated associations,[114] suits against a franchisor and franchisee,[115] between a hospital and medical staff,[116] and between trade associations and their members.[117] *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 that are short of full common ownership now fall outside 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, because those firms altered ownership structure through initial

[109] *Id*. at 2216–17.

[110] Transcript of Oral Argument at 7, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201 (No. 08-661).

[111] See, e.g., Leaco Enterprises, Inc. v. Gen. Elec. Co., 737 F. Supp. 605, 608–09 (D. Or. 1990) (creating a *de minimis* exception to the single-entity defense).

[112] See Eichorn v. AT&T Corp., 248 F.3d 131, 138 (3d Cir. 2001) (concluding that a subsidiary is incapable of Section 1 conspiracy); Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co., 772 F.2d 214, 216 (6th Cir. 1985) (holding that transfers between a parent company and its subsidiary were not a Section 1 conspiracy).

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

[114] Int'l Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1398 (8th Cir. 1993).

[115] Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026 (D. Nev. 1992), aff'd 999 F.2d 445 (9th Cir. 1993).

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

[117] Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 622 (6th Cir. 1999).

public offerings in order to increase their likelihood of obtaining immunity.[118]

Will shifting these cases from resolution under *Copperweld* to evaluation by the Rule of Reason change litigation outcomes or affect 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.[119] This outcome is unsurprising because plaintiffs rarely win Rule of Reason cases.[120] *Copperweld* immunity served to dismiss relatively implausible cases—such as that a firm and its 91.9 percent owned subsidiary conspired to violate Section 1[121]—before getting into extensive discovery. In short, it is unclear that *American Needle*'s severe cabining of *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.[122] *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 decisionmaking centers would largely depend on the extent to which those centers had ''shared interests'' sufficient to make them effectively constitute a single enterprise, shying away from *Copperweld*'s

[118] 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.

[119] See *supra*, notes 122–127 (all cases in which the defendant's single-entity defense led to summary judgment on plaintiff's antitrust claims).

[120] Michael A. Carrier, The Rule of Reason: An Empirical Update for the 21st Century, 16 Geo. Mason L. Rev. 827, 829–30 (2009).

[121] See Leaco Enterprises, Inc. v. Gen. Elec. Co., 737 F. Supp. 605 (D. Or. 1990).

[122] See, e.g., Am. 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 anti-competitive conduct actually operate . . . ''); *id*. at 2210 (''. . . we now embark on a more functional analysis.''); and *id*. at 2213 (''they are not similar in the relevant functional sense . . . '').

focus on control.[123] On the other hand, that the various teams had assembled themselves into something approaching a single enterprise through NFLP was also not determinative, as they based their decisions for NFLP on their individual, outside agendas.

The Court's decision went so far as to distinguish NFLP from a typical corporation with typical shareholders based on, in part, the fact that NFLP required a supermajority vote in order to grant exclusive licenses like the one in question to Reebok.[124] 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 NFLP's bylaws. 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 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* 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.''[125] 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

[123] The seemingly most important functional ''fact'' is that NFLP had been doing business within this arrangement for 47 years. See Am. Needle, 130 S. Ct. at 2207.

[124] *Id*. at 2215 (''Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders . . . '').

[125] Copperweld, 467 U.S. at 773.

to the NFL teams which, by virtue of their separate incorporation and upon purely appellate review based on 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 do with antitrust claims once barred by *Copperweld*? Judge Boudin's dilemma posed two possibilities: the expansion of *Copperweld* to form rules for 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.''[126] 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 [the case] should be a cautionary tale for defendants that seek to short-cut sound antitrust analysis, as the NFL did.''[127] Tulane law professor Gabriel Feldman wrote that ''for all conceivable purposes, and after decades of litigating the issue, the single-entity

[126] American Antitrust Institute, *supra* note 3.

[127] *Id*.

argument for professional sports leagues is dead.''[128] 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 leagues to Sherman Act liability and asserting that this would be beneficial for consumers.[129] 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 supermajority 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.[130] 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*,[131] *Credit Suisse*,[132] *linkLine Communications*,[133] and *Trinko*[134]—applying error-cost and other filters to exculpate defendants. The interventionist interpretation is flawed due to both the inherent failings of *Copperweld* and 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 toward *Twombly*'s requirement of ''plausibility'' in pleading an antitrust complaint.

[128] 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.

[129] See, e.g., Editorial, Throwing the Rule Book at the N.F.L., N.Y. Times, May 27, 2010 at A34; Steven 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 . . . '').

[130] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

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

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

[133] Pac. Bell Tel. Co. v. linkLine Comm's, Inc., 129 S. Ct. 1109 (2009).

[134] Verizon Comm's, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

A. American Needle *and the Substitution of* Copperweld

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 in 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.[135] 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*.[136]

It bears mention now that the Court's apparent limitation of *Copperweld* to effectively conflict-free enterprises affected a strikingly formalistic mistake. Lower courts understandably struggled with the correct equity stake percentage to deem multiple formal entities a ''single economic unit.'' As Judge Boudin noted, this exercise did not necessarily require *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.

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

[135] See *supra* note 125 and accompanying text .

[136] Fraser v. Major League Soccer, LLC, 284 F.3d 47 (1st Cir. 2002).

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 anti-competitive 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 believe *American Needle* represents, one must first examine the Court's stated attitude toward both *Copperweld* immunity and the progression of an antitrust case more broadly. Several times the justices expressly referred to the potential utility of *Copperweld* as a screen for obviously low-quality antitrust claims. 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.''[137] Similarly, when counsel for American Needle proposed that 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 would instead ''make sense to carve those out at the outset, rather than at the end of the case.''[138] 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

[137] Transcript of Oral Argument at 44, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010) (No. 08-661).

[138] *Id*. at 23–24.

where to allocate the ''inefficiency and confusion'' in the trial court.[139] 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.[140] The two acted as direct substitutes for each other. Indeed, American Needle's counsel specifically suggested that the latter was a more appropriate venue for scrutinizing (and screening out) comparatively weak Section 1 claims.[141] The Court asked counsel about the costly nature of antitrust discovery,[142] 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 concerning economic harms versus benefits of the NFL's challenged contracts.[143] From the Court's inquiry, then, we would expect a 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

[139] *Id*.

[140] *Id*. at 24.

[141] *Id*. at 23–24.

[142] *Id*. at 22.

[143] *Id*. at *51. Some have cited anecdotal evidence in support of the proposition that the price of NFL logo 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 in price and output. A price increase 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 by business arrangements that facilitate promotion, leading to both higher 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 . . . hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act.''). 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.

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 anti-competitive effects in a cognizable market . . . .''[144] *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 anti-competitive 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 concern about lower pleading standards' granting an antitrust plaintiff ''a ticket to conduct discovery,''[145] and *Twombly* itself stated that '' . . . proceeding to antitrust discovery can be expensive.''[146]

Copperweld held the potential to act as a uniform Section 1 screen possessing the virtue of at least some level of economic sophistication with regard 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 to a coherent theory of anti-competitive harm so as to justify the heavy

[144] Reply Brief of Petitioner at 19, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010) (No. 08-661) (internal citations omitted).

[145] Transcript of Oral Argument at 33, Bell Atl. Corp. v. Twombly, 550 U.S. 554 (2007) (No. 05-1126).

[146] Twombly, 550 U.S. at 558.

costs associated with antitrust sanctions.[147] *Twombly* thus can play a similar role to what Justice Breyer envisioned for *Copperweld* immunity, but also more broadly, facilitating dismissals and reducing the chilling effect of false positives by assuring firms that they have at least some latitude to engage in transaction cost-reducing restructuring without necessarily implicating antitrust concerns.[148]

Without defending *Twombly* pleading standards in all contexts, and acknowledging the criticism that *Twombly* and *Iqbal* have received—that they pose problems for notice pleading generally and require information of plaintiffs that would be most easily obtained during discovery[149]—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.[150] The economic literature on the theory

[147] William H. Page, *Twombly* and Communication: The Emerging Definition of Concerted Action under the New Pleading Standards, 5 J. Comp. L. & Econ. 439 (2009) (arguing that *Twombly* should be interpreted in Section 1 context to require actual communication between the parties).

[148] 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), available at http://www.shearman.com/files/upload/AT-041910-Antitrust-Digest.pdf. 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 U.S. Dist. LEXIS 105864 (S.D.N.Y. 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 U.S. Dist. LEXIS 52947 (S.D.W. Va. 2009); Perinatal Med. Group, Inc. v. Children's Hosp. Cent. Cal., No. 09-1273, 2009 U.S. Dist. LEXIS 36694 (E.D. Cal. 2009).

[149] See 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).

[150] See 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).

of the firm teaches us that former *Copperweld*-availing firms typically structure their business architecture in order to minimize transaction costs.[151] 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 the strengthening of the 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 action would presumably lead to a large increase in cases at the margin between, as *Twombly* put it, merely ''conceivable'' versus ''plausible.''[152] 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 ensconced 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 toward 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

[151] See Williamson, *supra* note 19; Klein, Crawford & Alchian, *supra* note 19.

[152] Twombly, 550 U.S. at 569.

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.''[153] This work will almost certainly continue as it has for the last 30 years: motivated by a sincere concern for error costs and consistency with economic learning and empirical data.[154]

[153] Transcript of Oral Argument at 24, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010) (No. 08-661).

[154] See Douglas H. Ginsburg & Leah Brannon, Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007, 3 Comp. Pol'y Int'l 3 (Autumn 2007).