

A Matter of Perspective: Joint Ventures and the Competitor Collaboration Guidelines

BY MICHAEL A. LINDSAY

HOW SHOULD ANTITRUST COUNSEL ANALYZE joint ventures and the restraints on competition that they may entail? This issue of *ANTITRUST* features several articles offering a divergent variety of answers to this question. Complementing these articles is a collection of short essays, each of which focuses on a selection from a list of prompts prepared by the magazine's editors.

Michael Lindsay and Erik Ruda discuss some of the fundamental issues that joint ventures can raise, particularly where the joint venture involves competing firms. For example, how is a legitimate joint venture distinguished from a sham? What kinds of restraints are likely to create potential antitrust risks, and what are the guiding principles for evaluating these risks? When is a joint venture considered to be making its own decisions (protected under the single-actor rule of *Copperweld*¹), and when are the decisions evaluated under the *American Needle*² rule?

Steven Salop provides a 20-item economic checklist for analyzing joint ventures, using the familiar method of identifying potential anticompetitive harms, potential procompetitive benefits, and comparing the harms and benefits.

James Keyte presents a checklist of truncated inquiries that can be used to uphold legitimate collaborations or their restraints without full rule of reason balancing of pro- and anticompetitive effects. Former FTC Chair Timothy Muris also considers the appropriate framework for truncating the rule of reason analysis. Willard Tom and Gregory Wells discuss the significance of intellectual property in evaluating a variety of joint ventures.

Sixteen years ago, the Antitrust Division and the Federal Trade Commission issued their Competitor Collaboration Guidelines,³ and several authors discuss the Guidelines. Kellie Lerner explores how the Guidelines use the combined market share of the venture and its participants to analyze potential competitive effects of the venture. Kelly Smith Fayne considers the utility of the Guidelines for emerging technology ventures.

Robert Skitol renews his call, first issued in this magazine six years ago, for an update of the Guidelines to take account of

recent Supreme Court decisions, including *Dagher*, *American Needle*, *California Dental*, and *Actavis*.⁴ Skitol also highlights the need for more guidance on when to analyze a joint venture as a merger, using the agencies' Horizontal Merger Guidelines.⁵

W. Stephen Smith, Mark Whitener, and Marcie Brimer agree with the general need for revision, and they propose three specific areas: (1) adding guidance on the circumstances in which the single-entity doctrine will be applied to collaboration agreements, (2) clarifying the kinds of collaboration agreements that will not be subject to antitrust scrutiny, and (3) describing more clearly the circumstances in which the per se rule will be applied to collaboration agreements.

In contrast, William Blumenthal is far less sanguine about the possibility (or at least the probability) of useful guidance through broadly applicable guidelines. He describes the current Collaboration Guidelines as "a snare for the uninformed, gullible, and unwary." He offers the Healthcare Guidelines as an example of how the agencies can provide useful guidance in a way that is faithful to the case law while still filling important gaps. Gregory Werden explores two instances where the Collaboration Guidelines did not influence the development of the law—in one instance (when to treat a joint venture as a merger) because the Supreme Court did not use the Collaboration Guidelines' principles in the Court's own analysis, and in the other instance (how to use the rule of reason in evaluating ancillary restraints) because the Guidelines do not provide sufficient guidance.

Whether or not the agencies update their formal guidance, this collection of articles and essays should assist practitioners in understanding the current treatment of joint ventures, as well as the areas where the law is less certain—and where it may develop further. ■

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¹ *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

² *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010).

³ U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors*, Preamble, at 1 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

⁴ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999); *FTC v. Actavis*, 133 S. Ct. 2223 (2013).

⁵ U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

Antitrust Analysis of Joint Ventures: A Simple Progression

BY MICHAEL A. LINDSAY AND ERIK D. RUDA

TWO HEADS ARE BETTER THAN ONE, and many hands make light work. These proverbs capture the concept that coordinated activity—at least properly-directed coordinated activity—can be socially useful. Of course, every business firm involves coordination of the activities of its employees, managers, owners, and creditors. But what about socially beneficial coordination between or among firms that might otherwise compete with each other? If antitrust laws prohibit agreements in restraint of trade, how can independent competitors coordinate genuinely productive and procompetitive activity?

Antitrust law recognizes circumstances in “which two or more firms agree to cooperate in producing some input that they would otherwise have produced individually, acquired on the market, or perhaps would have done without.”¹ This is commonly called a “joint venture” (though not necessarily in the common-law sense²) or “competitor collaboration.” A joint venture can be purely contractual or can be housed in a separate legal entity (a partnership, LLC, or corporation, for example). The joint venture’s business can cross a broad range of possibilities depending on the participants’ needs: information-sharing (e.g., creditworthiness of potential customers); research and development; input-purchasing; common ownership and use of capital equipment; manufacturing; sales; and marketing.

Antitrust analysis of joint ventures follows a simple progression. First, what is the joint venture doing and is there a productive purpose? Second, does the joint venture in and of itself affect competition, and if so how? Third, does the joint venture involve any restraints on competition between or among the members or between the members and the venture? Antitrust also asks a preliminary “process” question—can the competitive analysis be addressed through a “quick look,” or is a fuller rule of reason analysis required?

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Is There Really a Joint Venture?

A joint venture typically allows two or more firms to use their respective resources more efficiently, resulting in increased production, development of new products or services, lower costs, synergies from complementary assets, creation of valuable networks, or the like. Indeed, the federal antitrust agencies acknowledge that “competitors sometimes need to collaborate” because “[c]ompetitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.”³

Is There a True Joint Venture? The first question to ask is whether there really is a joint venture, recognizing that simply using that label does not make it so. As the Supreme Court has observed, it cannot be the case that “agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a ‘joint venture.’”⁴ Where “the dominant purpose of the restrictive agreements” is “to avoid all competition either among [the parties] or with others,” then there isn’t really a joint venture.⁵

What Effects Does the Joint Venture Have on Competition? Even if the joint venture has a legitimate and productive purpose, its formation is still subject to antitrust review.⁶ A joint venture might reduce the incentive (or legal ability) of competitors to compete with one another, potentially reducing output, raising prices, or decreasing innovation in ways that would not be possible absent the venture.⁷ The Supreme Court described this concept long ago in *Penn-Olin*, evaluating a joint venture based on the probability that one or both of the parties to it might have entered the market independently (or remained at the fringes as a potential entrant).⁸ In its more recent *Dagher* decision, the Court described the basic analysis of joint venture formation:

We presume for purposes of these cases that Equilon is a lawful joint venture. Its formation has been approved by federal and state regulators, and there is no contention here that it is a sham. As the court below noted: “There is a voluminous record documenting the economic justifications for creating the joint ventures. [T]he defendants concluded that numerous synergies and cost efficiencies would result” by cre-

ating Equilon as well as a parallel venture, Motiva Enterprises, in the eastern United States, and “that nationwide there would be up to \$800 million in cost savings annually.” Had respondents challenged Equilon itself, they would have been required to show that its creation was anticompetitive under the rule of reason.⁹

In other words, the Court continues to direct that joint ventures be evaluated based on their effects on competition even though the method of doing so has evolved in the half-century since *Penn-Olin*.

The Supreme Court’s other joint venture cases have followed a similar approach. For example, in *Broadcast Music*, the Court embraced the Justice Department’s formulation that “[t]here are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created.”¹⁰ The Court also observed that “[j]oint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.”¹¹ Indeed, the Court concluded that this particular joint venture was not so much a true joint sales agency (that is, selling each venturer’s products) as it was a “a separate seller offering its blanket license, of which the individual compositions are raw material[,]” a “market in which individual composers are inherently unable to compete fully effectively.”¹² All of this led to evaluating the joint venture and its blanket licensing under the rule of reason.

The Justice Department followed this effects-based approach in its recent challenge of a joint venture formed in the New York City “hop-on, hop-off bus tours” market. Before the formation of a joint venture, the venture’s two members were head-to-head competitors, and they held a combined 99 percent market share.¹³ They combined their businesses in a joint venture LLC, and from the beginning the parties “consistently planned for and assumed that the merged firm would implement a 10 percent fare increase,” which they implemented when the joint venture was formed.¹⁴ Not surprisingly, the Justice Department focused on the actual competitive effects of this consummated transaction:

In years prior to the joint venture, Coach and City Sights were each other’s main rival and consumers benefited from the improved products and services that resulted from the fierce and direct competition between them. This head-to-head competition, which intensified over time, was eliminated when Defendants merged their hop-on, hop-off bus tour operations.¹⁵

The Justice Department also noted the market concentration, the absence of new entry (and existence of significant entry barriers), and the lack of any efficiencies resulting from the venture.¹⁶

The Collaboration Guidelines (issued by the Justice Department and Federal Trade Commission 16 years ago)¹⁷

are consistent with this effects-based approach. The Guidelines continue to provide a general (and somewhat conservative) analytical framework for antitrust counselors. In particular, the Guidelines’ discussion of when to use a per se rule versus the rule of reason is on the whole consistent with the law as applied by the courts,¹⁸ although the Guidelines omit discussion of the “quick look” approach or any other, more flexible approach.¹⁹ The Guidelines recognize that procompetitive efficiencies can arise from the combination of complementary assets that are needed to produce a product or from the attainment of scale or scope economies that may be beyond the reach of any single venture participant.²⁰

The Joint Venture and Restraints on Competition

The *Penn-Olin* Court suggested that a joint venture’s parents will never compete with the joint venture (and vice-versa) or with each other within the joint venture’s business scope.²¹ That is probably an overstatement, but an agreement to refrain from competing with the joint venture in at least some respects is certainly a common feature of joint venture agreements. Another common provision in joint venture agreements is a limitation on the scope of the joint venture so that it does not compete with its members in their respective non-venture businesses.

Whatever the nature of the noncompete agreement, the basic question is the same (although different authorities might phrase it differently): is the restraint “necessary to (or, in certain formulations, ‘reasonably ancillary to’) the achievement of the joint venture’s procompetitive benefits”?²² This requires a fact-based analysis. Following are several examples of how this kind of analysis has been applied to specific kinds of restraints.²³

Agreements on Pricing. Ordinarily an agreement on prices is a per se violation of the antitrust laws.²⁴ The Supreme Court has stated clearly, however, that a joint venture’s decisions on pricing of its own services cannot constitute price fixing (and thus be illegal per se).²⁵ In *BMI*, the Court stated that the joint venture’s blanket license was “a necessary consequence of the integration necessary to achieve these efficiencies” and that “a necessary consequence of an aggregate license is that its price must be established.”²⁶ Obviously, someone has to set the price. In *Dagher*, the Court made clear that the “someone” can certainly be the joint venture itself: “As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.”²⁷ A plaintiff can still challenge a joint venture’s pricing activity, but *Dagher* tells us that this kind of challenge will require a rule of reason review, not a per se approach.²⁸ Moreover, since pricing is a core function of a joint venture that sells products, the “ancillary restraints doctrine has no application” (or, if it has any application, the ancillary element is clearly satisfied).²⁹ Agreements on the prices of the joint venturers’ products outside the venture would be far more difficult to justify.³⁰

Agreements on Territories. Like horizontal price-fixing agreements, horizontal territorial allocations are per se illegal.³¹ In *Topco*, the Supreme Court applied that rule to condemn a joint venture's assignment of geographic territories to its members.³² *Topco* was a cooperative association owned by about 25 small and medium-sized regional supermarket chains that operated stores in over 30 states.³³ *Topco* sought to provide high quality merchandise under private labels to facilitate its members' competition against larger national and regional chains.³⁴ Members' local market shares averaged six percent, none was higher than 16 percent, and the member stores' collective sales made *Topco* the fourth largest chain (or, for *Topco*, cooperative) nationally.³⁵ The group distributed over 1,000 different products under *Topco* brand names, but none of the members did business under the "Topco" name as such.³⁶ The membership agreement prohibited members from selling *Topco*-branded products outside their assigned territories, which the Supreme Court ruled was a per se illegal horizontal agreement to divide territories.³⁷

Topco has been criticized for its application of the per se rule rather than the rule of reason, and some courts have described it as effectively overruled by later cases.³⁸ The Court, however, has never explicitly overruled *Topco*, and later Supreme Court decisions still cite it.³⁹ Accordingly, one cannot assume that the per se illegal treatment of horizontal territorial allocations is a thing of the past. Indeed, in the pending *Blue Cross Blue Shield Antitrust Litigation*, the district court denied a motion to dismiss the plaintiffs' per se Section 1 challenge of the geographic restraints on the member insurance companies' ability to compete outside their assigned territories.⁴⁰ The court decided that it was too early in the proceedings to determine whether to use the per se rule, the rule of reason, or the quick look doctrine.⁴¹

Agreements on Membership Rules and Decisions. In *Northwest Wholesale*, the Supreme Court considered the membership rules of a purchasing cooperative in connection with the expulsion of a member.⁴² The Court recognized that this was "joint activity that is susceptible of being characterized as a concerted refusal to deal"⁴³ but determined that the rule of reason should apply.⁴⁴ The Court acknowledged that "[w]holesale purchasing cooperatives . . . are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects" and that they can produce scale economies and other cost-savings.⁴⁵ Like other joint ventures, a purchasing cooperative "must establish and enforce reasonable rules in order to function effectively"; a decision to act on those rules "does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect."⁴⁶ The Court thus rejected the per se rule for membership decisions.⁴⁷ Moreover, a claim under the rule of reason would require some showing "that the cooperative possesses market power or unique access to a business element necessary for effective competition."⁴⁸

Agreements on Output Restraints. In *NCAA v. Board of Regents*, the Supreme Court considered an agreement with

restraints on joint venturers' output.⁴⁹ The NCAA adopted a policy restricting the parties with which universities could negotiate broadcast rights and limiting the number of games that any university could agree to broadcast.⁵⁰ (The policy also set a minimum aggregate price that the chosen networks had to pay.)⁵¹ Recognizing that this was "an industry in which horizontal restraints on competition are essential if the product is to be available at all[.]"⁵² the Court rejected a per se condemnation of the output restrictions.⁵³ Nevertheless, the Court identified clear anticompetitive harms from the restraints: limits on the number of games available to broadcasters and consumers, and a pricing mechanism that was not responsive to consumer demand.⁵⁴ The Court sustained, under the rule of reason, a finding that the claimed procompetitive benefits outweighed the anticompetitive harms of other restrictions.⁵⁵

Agreements Not to Compete with Venture. In *Polygram Holding, Inc.*,⁵⁶ the D.C. Circuit considered a restraint related to a joint venture for marketing a "Three Tenors" recording. The three tenors (Pavarotti, Carreras, and Domingo) had put on very successful concerts coinciding with the World Cup soccer finals in 1990 and 1994, and they were performing another in 1998. PolyGram distributed the 1990 recording, and Warner distributed the 1994 recording. Both recordings were highly successful and continued to be sold through the 1990s. Warner and Polygram agreed to jointly distribute the 1998 recording (and any other Three Tenors albums through 2002), but each was free to pursue its own marketing strategy for its earlier Three Tenors recording.⁵⁷ The parties later realized that the earlier recordings were near-substitutes for the upcoming recording, leading them to agree not to advertise or discount their respective pre-1998 recordings.⁵⁸ The Federal Trade Commission held that this restraint was inherently suspect. The D.C. Circuit affirmed, noting that "[a]n agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as per se unlawful."⁵⁹

Whose Decision Is It?

Copperweld held that a parent corporation and its wholly-owned subsidiary are incapable of conspiring in violation of Section 1.⁶⁰ As the Court later elaborated, "although the entities may be 'separate' for purposes of incorporation or formal title, if they are controlled by a single center of decision-making and they control a single aggregation of economic power, an agreement between them does not constitute a 'contract, combination . . . , or conspiracy.'"⁶¹ Lower courts then extended this principle to subsidiaries that were less than wholly owned⁶² and sometimes to other entities.⁶³

But where no one party controls a joint venture through majority ownership, determining whether conduct is that of a "single entity" (and therefore not itself subject to Section 1) or is the agreed conduct of two or more joint venturers

becomes more difficult.⁶⁴ In *Dagher*, the Supreme Court reviewed the conduct of a joint venture that had combined the refining and marketing activities of two oil companies.⁶⁵ The venturers' agreement required the joint venture to maintain the venturers' respective separate brands, but the joint venture set the prices at which gasoline was sold under those brands.⁶⁶ The Court held that it is not illegal for "a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products[.]"⁶⁷ and the fact that the joint venture sold products under two brands instead of one did not change the result.⁶⁸ The Court viewed this as the decision-making of a single entity under *Copperweld*.⁶⁹

American Needle, however, created some tension with *Dagher*. NFL teams had licensed their trademarks (such as team logos) to NFLP, which was then the exclusive licensor to merchandisers who wanted to use those trademarks.⁷⁰ The conduct at issue was NFLP's decision to grant an exclusive license for certain products to the competitor of an existing licensee.⁷¹ The Court held that it was not determinative that "two legally distinct entities have organized themselves . . . into a structured joint venture."⁷² Rather, what mattered was "whether the agreement joins together 'independent centers of decisionmaking'" because if it did, "the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one."⁷³ But the Court also acknowledged that *the joint venture's own* decision-making was conceptually distinct and was a "closer [question] than whether decisions made directly by the 32 teams are covered by § 1."⁷⁴ Although the Court held the joint venture's decision-making to be subject to Section 1, it is difficult to tease out the exact decisional factors. The Court recognized that the joint venture had separate management but also observed that "NFLP's licensing decisions are made by the 32 potential competitors,"⁷⁵ apparently because "[u]nlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders."⁷⁶

Lower courts have applied the *American Needle* principles to a number of joint ventures. For example, in *Robertson v. Sea Pines Real Estate*,⁷⁷ the Fourth Circuit considered whether a decision of a real estate multiple listing service (MLS) made by the MLS's governing board was protected as single-entity conduct. The court said "no" because the board members were "licensed real estate brokerages that served" on the board "via their employees."⁷⁸ The court reasoned that "the nature of defendants' alleged participation in the MLS joint venture fits squarely within *American Needle's* definition of concerted conduct" because each of the brokerage firm defendants was an independent firm competing with the others, and the claim was that they used their positions on the board to cause the MLS to exclude lower-cost rivals from the real estate market.⁷⁹ "The MLS enabled the individual brokerages to make collective decisions about pricing and services that they otherwise would have made independently."⁸⁰

In contrast, in *Abraham & Veneklasen*,⁸¹ the Fifth Circuit expressed uncertainty as to whether *American Needle* applied to the American Quarter Horse Association (AQHA). AQHA is a nonprofit association with a general membership of more than 280,000 worldwide. It was founded to collect and register the pedigrees and protect the breed of the American Quarter Horse and since, its founding AQHA has listed millions of horses. The plaintiff alleged that "members of the SBRC and the SBRC conspired with AQHA to prevent cloned horses from being registered" through the adoption in 2003 and subsequent reaffirmation of a rule that declared cloned horses ineligible for registration.⁸² The court said that AQHA was "more than a sports league, it is not a trade association, and its quarter million members are involved in ranching, horse training, pleasure riding and many other activities besides the 'elite Quarter Horse' market."⁸³ Less than 0.5% of the yearlings sold each year fell within the plaintiff's "proposed sub-market of AQHA-registered elite Quarter Horses,"⁸⁴ making it difficult to infer any inference of conspiracy between AQHA and a very small minority of its members—particularly since rules are determined by the AQHA's Board of Directors, "with around 300 annually rotating members."⁸⁵ Moreover, "whenever an organization devoted to the preservation of an animal breed revises its standards, exclusion from the relevant 'market' will occur."⁸⁶ The Fifth Circuit observed that "[a] functional analysis of an organization's ability to conspire with legally distinct members ought to take these facts into account," but the court was able to dispose of the case without reaching a final conclusion on *American Needle's* applicability, due to insufficient evidence of the alleged conspiracy.⁸⁷

More recently, in *Medical Center at Elizabeth Place*, the Sixth Circuit considered the case of four hospitals that formed a joint venture to provide a variety of management, financial, and strategic-planning services.⁸⁸ Citing *American Needle*, the court (by a 2–1 majority) observed that "[t]he question cannot be answered in the abstract as to whether a joint venture like the one here constitutes a single entity incapable of conspiring with itself in an anticompetitive manner, or whether, instead, it becomes a vehicle to facilitate separate entities to conspire illegally to restrain trade."⁸⁹ The majority found sufficient evidence to create a fact dispute on the status of the joint venture members' status as separately controlled entities with distinct (and potentially competitive) economic interests—and thus whether the members are capable of conspiring.⁹⁰ (The dissent, in contrast, concluded that "the functional reality is that the JOA unifies defendant hospitals under [the joint venture's] flagship."⁹¹) More notably, the majority opinion indicates that the issue of the degree of independence may be a jury question.⁹²

Some commentary has suggested that Section 1 should not apply when all the joint venturers have put all of their competitive assets into the joint venture and participate in the relevant market solely through the venture.⁹³ For example, the NFL teams could contribute their trademarks to

NFLP, remove any requirement for team consent to use of marks, and otherwise integrate NFLP trademark licensing operations as a purely NFLP activity.⁹⁴ If the asset contributions otherwise passed antitrust muster, NFLP could then make decisions as to further licensing as a single entity free of Section 1.⁹⁵ Others, however, have suggested that there are compelling economic rationales for treating joint ventures differently than single firms.⁹⁶

How Much and What Kind of Scrutiny?

The nature and degree of antitrust scrutiny of joint ventures and their activities will depend on the nature of the decision-making process and the kind of decision at issue. Some restraints (such as the territorial allocation in *Topco*) have been invalidated under the per se rule, although *American Needle* casts doubt on whether this approach will continue because, in at least some wholly legitimate joint ventures, “restraints on competition are essential if the product is to be available at all,” and “per se rules of illegality are inapplicable.”⁹⁷

In other cases, the restraints (such as the membership decisions in *Northwest Wholesalers*) have been evaluated under the rule of reason. Still other cases have used something like the “quick look” approach to review the restraints (such as the restrictions on non-venture sales in *Polygram*). *NCAA* is nominally a rule of reason case, although it may also have marked the beginning of the “quick look” or “abbreviated” approach to the rule of reason.⁹⁸ In any event, *American Needle* suggests that the retreat from the per se approach will continue, with restraints “judged according to the flexible Rule of Reason.”⁹⁹ The review need not “require a detailed analysis” and “can sometimes be applied in the twinkling of an eye.”¹⁰⁰

Some Practical Considerations

Joint ventures unquestionably can create procompetitive efficiencies, allowing participants to improve production, distribution, marketing, purchasing, or R&D, with resulting benefits to consumers. Counsel for companies considering participation in a joint venture, however, should be attentive to antitrust risks:

- Ensure that the joint venture is real and that it is designed to achieve one or more procompetitive business objectives, as opposed to being a mere shell for naked restraint of competition.
- Consider the industry in which the joint venture participates. A joint venture in an industry that has had antitrust problems (or special attention from antitrust regulators) in the past warrants closer scrutiny.
- Identify any restraints on competition and test the business justifications offered for them. Consider whether the business reasons for a restraint can be served by less restrictive provisions.
- Avoid the appearance of concerted conduct against joint venture members’ competitors, particularly where the conduct protects joint venture members from competition in

their own markets without delivering a benefit to the joint venture’s business.

- Adopt appropriate antitrust compliance policies for the joint venture, including safeguards against members’ use of the joint venture for actions or communications outside the joint venture’s scope. ■

- ¹ 13 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2100a, at 3 (3d ed. 2012).
- ² Antitrust law is concerned with a different array of cooperative arrangements than state common law or statutes, which frequently impose quasi-partnership restrictions on their formation and conduct. See, e.g., *Total Holdings USA, Inc. v. Curran Composites, Inc.*, 999 A.2d 873, 875–76 (Del. Ch. 2009); see also *Joint Venture*, BLACK’S LAW DICTIONARY (10th ed. 2014) (joint venture “necessary elements are (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member’s equal voice in controlling the project.”).
- ³ Fed. Trade Comm’n & U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors Preamble, at 1 (2000) [hereinafter *Collaboration Guidelines*], https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.
- ⁴ *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), overruled on other grounds by *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 777 (1984).
- ⁵ *Id.* at 597–58.
- ⁶ *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 199 (2010) (“[j]oint ventures have no immunity from antitrust laws”) (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 113 (1984) (footnote omitted)).
- ⁷ *Collaboration Guidelines*, *supra* note 3, § 2.2, at 6.
- ⁸ *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 175–76 (1964).
- ⁹ *Texaco Inc. v. Dagher*, 547 U.S. 1, 6 n.1 (2006) (citations omitted).
- ¹⁰ *Broad. Music, Inc. v. CBS, Inc. (BMI)*, 441 U.S. 1, 14 (1979) (quoting Memorandum for United States as Amicus Curiae on Petition for Cert. in *K-91, Inc. v. Gershwin Pub. Corp.*, 372 F.2d 1 (9th Cir. 1967), O. T. 1967, No. 147, at 10–11 (citation omitted)).
- ¹¹ *Id.* at 23. The Court’s observation marked a significant departure from the *Penn-Olin* Court’s deeper skepticism about joint ventures. *Penn-Olin*, 378 U.S. at 169 (“The joint venture, like the ‘merger’ and the ‘conglomeration,’ often creates anticompetitive dangers. It is the chosen competitive instrument of two or more corporations previously acting independently and usually competitively with one another. The result is a ‘triumvirate of associated corporations.’” (footnote omitted)).
- ¹² *BMI*, 441 U.S. at 22–23 (footnotes omitted).
- ¹³ Competitive Impact Statement at 7, *United States v. Twin Am., LLC*, No. 12-cv-8989(ALC)(GWG) (S.D.N.Y. Mar. 16, 2015), 2015 WL 1413074, <https://www.justice.gov/atr/case-document/file/513781/download>.
- ¹⁴ *Id.* at 6.
- ¹⁵ *Id.* at 7.
- ¹⁶ *Id.* at 7–9.
- ¹⁷ See *Collaboration Guidelines*, *supra* note 3. The Guidelines also distinguish the agencies’ approach to joint ventures as compared to horizontal mergers. *Id.* § 1.3, at 4–5. However, some commentary has noted ambiguity in the agencies’ treatment of certain joint ventures under the *Collaboration Guidelines* as opposed to Section 7 and the Horizontal Merger Guidelines. See Robert A. Skitol, *Are the Competitor Collaboration Guidelines Ripe for Revision?*, ANTITRUST, Fall 2010, at 55, 57–58.
- ¹⁸ *Collaboration Guidelines*, *supra* note 3, § 3.1–3.3, at 7–11.
- ¹⁹ *Id.* § 1.2, at 3 (“Two types of analysis are used by the Supreme Court to determine the lawfulness of an agreement among competitors: per se and rule of reason.” (footnote omitted)).

- ²⁰ *Id.* § 2.1, at 5–6.
- ²¹ *Penn-Olin*, 378 U.S. at 169 (“If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce. Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture’s market.”).
- ²² *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1135 (N.D. Cal. 2005); see also *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 237, 243 (2d Cir. 2003); *Nat’l Bankcard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 599 (11th Cir. 1986) (citing *BMI* for the proposition that courts should look to whether the restraint is ancillary to an efficiency enhancing integration).
- ²³ See 13 HOVENKAMP, *supra* note 1, ¶ 2100f, at 15 (noting that in “many antitrust challenges the existence of the venture itself is not challenged; rather, one or more individual joint venture provisions are disputed”).
- ²⁴ See, e.g., *BMI*, 441 U.S. at 8.
- ²⁵ See *id.*
- ²⁶ *Id.* at 21.
- ²⁷ *Dagher*, 547 U.S. at 7.
- ²⁸ *Id.* at 8.
- ²⁹ *Id.* at 7.
- ³⁰ *BMI*, 441 U.S. at 23–24 (“The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets.” (footnote omitted)).
- ³¹ See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972).
- ³² *Id.*
- ³³ *Id.* at 598.
- ³⁴ *Id.* at 599.
- ³⁵ *Id.* at 600.
- ³⁶ *Id.* at 598.
- ³⁷ *Id.* at 608. To the same effect, see *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). Approximately 30 Sealy “licensees” owned substantially all of Sealy’s stock, and the directors who managed and controlled Sealy’s business were stockholders or stockholder-licensees’ nominees. *Id.* at 352–53. Sealy assigned an exclusive territory to each licensee, and each licensee agreed not to sell Sealy-branded products outside its territory. *Id.* at 352. Sealy also involved allegations of price fixing, so it was a more difficult case in any event, but the Court also held that the licensing arrangement was per se unlawful. *Id.* at 355–56.
- ³⁸ *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (D.C. Cir. 1986) (“If *Topco* and *Sealy*, rather than *Addyston Pipe & Steel*, state the law of horizontal restraints, the restraints imposed by Atlas would appear to be a per se violation of the Sherman Act. An examination of more recent Supreme Court decisions, however, demonstrates that, to the extent that *Topco* and *Sealy* stand for the proposition that all horizontal restraints are illegal per se, they must be regarded as effectively overruled.”).
- ³⁹ *American Needle*, 560 U.S. at 200–01 (“But in rare cases . . . [a]greements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.” (citing *Topco*, 405 U.S. at 609; *Sealy*, 388 U.S. at 352–54 (footnote omitted)); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (holding that agreement between test preparation companies to allocate territories was per se unlawful under Section 1).
- ⁴⁰ *In re Blue Cross Blue Shield Antitrust Litig.*, 26 F. Supp. 3d 1172, 1186 (N.D. Ala. 2014). The geographic components of the claim were “Prohibit[ing] individual Blue Plans from competing against each other using the Blue name by allocating territories among the individual Blues,” “Limit[ing] individual Blue Plans from competing against each other, even when they are not using the Blue trade name, by mandating the percentage of their business that they may conduct under the Blue name, both inside and outside each Plan’s territory,” and “Plac[ing] severe territorial limitations upon the individual Blue Plans’ ability to compete outside of their geographic areas, even when using their non-Blue brands.” *Id.* at 1180–81.
- ⁴¹ *Id.* at 1186.
- ⁴² *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985).
- ⁴³ *Id.* at 286.
- ⁴⁴ *Id.* at 297.
- ⁴⁵ *Id.* at 295.
- ⁴⁶ *Id.* at 296.
- ⁴⁷ *Id.* at 298.
- ⁴⁸ *Id.*
- ⁴⁹ *Board of Regents*, 468 U.S. at 88.
- ⁵⁰ *Id.* at 94.
- ⁵¹ *Id.* at 92–93.
- ⁵² *Id.* at 101.
- ⁵³ *Id.* at 117.
- ⁵⁴ *Id.* at 99–100.
- ⁵⁵ *Id.* at 120.
- ⁵⁶ *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 38 (D.C. Cir. 2005) (parties’ joint venture to distribute Three Tenors recording was not at issue, but subsequent “advertising moratorium” agreement concerning the first two Three Tenors records to prevent competition with the joint venture product was unlawful restraint under Section 1).
- ⁵⁷ *Id.* at 31.
- ⁵⁸ *Id.* at 32. Every practicing lawyer will appreciate what happened next: “About a week later, however, PolyGram’s Senior Marketing Director, who had passed on the details of the agreement to PolyGram’s General Counsel, sent a memorandum around the company stating, ‘Contrary to any previous suggestion, there has been no agreement with [Warner] in relation to the pricing and marketing of the previous Three Tenors albums.’ Warner followed suit on August 10, sending a letter to PolyGram repudiating any pricing or advertising restrictions relative to its 1994 album. At the same time, however, PolyGram and Warner executives privately assured one another their respective companies intended to honor the agreement, and in fact the companies did substantially comply with the agreement through October 15, 1998.” *Id.*
- ⁵⁹ *Id.* at 37.
- ⁶⁰ *Copperweld*, 467 U.S. at 777.
- ⁶¹ *American Needle*, 560 U.S. at 184 (quoting *id.* at 769).
- ⁶² *Coast Cities Truck Sales, Inc. v. Navistar Int’l Transp. Co.*, 912 F. Supp. 747, 765 (D.N.J. 1995) (extending *Copperweld* to parent and 70% owned dealerships).
- ⁶³ *Day v. Taylor*, 400 F.3d 1272, 1278 (11th Cir. 2005) (extending *Copperweld* to rental truck company and independent dealers); *Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1317 (8th Cir. 1986) (extending *Copperweld* to manufacturer and four sales representatives).
- ⁶⁴ Even if the majority owner and the joint venture are not capable of conspiring with each other, however, they may be capable of conspiring with the minority members of the joint venture.
- ⁶⁵ *Dagher*, 547 U.S. at 3.
- ⁶⁶ *Id.* at 4.
- ⁶⁷ *Id.* at 3.
- ⁶⁸ *Id.* at 7 (the “ancillary restraints” doctrine did not apply to the core business activity of the joint venture of setting its prices).
- ⁶⁹ *Id.* at 6 (“[T]he pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products.”).
- ⁷⁰ *American Needle*, 560 U.S. at 183.
- ⁷¹ *Id.*
- ⁷² *Id.* at 196.
- ⁷³ *Id.* (quoting *Copperweld*, 467 U.S. at 769).

- ⁷⁴ *Id.* at 200.
- ⁷⁵ *Id.*
- ⁷⁶ *Id.* at 201.
- ⁷⁷ *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 284 (4th Cir. 2012). The appeal involved two different MLSs, but that is not material.
- ⁷⁸ *Id.* at 283.
- ⁷⁹ *Id.* at 285.
- ⁸⁰ *Id.*
- ⁸¹ *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 328 (5th Cir. 2015).
- ⁸² *Id.* at 326.
- ⁸³ *Id.* at 328.
- ⁸⁴ *Id.*
- ⁸⁵ *Id.* at 329.
- ⁸⁶ *Id.*
- ⁸⁷ *Id.* at 330.
- ⁸⁸ *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, No 14-4166, 2016 WL 1105023, at *1 (6th Cir. Mar. 22, 2016). The majority opinion provides relatively little information about the scope of the services that the joint venture offered, but the dissenting opinion provides a more detailed description of the joint venture's control over members (including for example, the joint venture CEO's ability to fire the CEO of any member hospital). *Id.* at *15 (Griffin, J., dissenting).
- ⁸⁹ *Id.* at *2.
- ⁹⁰ *Id.* at *9.
- ⁹¹ *Id.* at *15 (Griffin, J., dissenting).
- ⁹² *Id.* at *9 (stating that "a reasonable juror might conclude that, aside from a business relationship pursuant to the joint operating agreement, defendant hospitals maintained separate identities and acted more like competitors than one unit" (citation omitted)).
- ⁹³ See James A. Keyte, *American Needle: A New Quick Look for Joint Ventures*, ANTITRUST, Fall 2010, at 48, 49–50.
- ⁹⁴ *Cf. Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 53 (1st Cir. 2002) ("MLS has, to say the least, a unique structure, even for a sports league. MLS retains significant centralized control over both league and individual team operations. MLS owns all of the teams that play in the league (a total of 12 prior to the start of 2002), as well as all intellectual property rights, tickets, supplied equipment, and broadcast rights." (emphasis added)). *Fraser*, however, dealt with restraints on player compensation and did not address the joint ownership of intellectual property.
- ⁹⁵ Keyte, *supra* note 93, at 50.
- ⁹⁶ See HOVENKAMP, *supra* note 1, ¶ 2101, at 21–24.
- ⁹⁷ *American Needle*, 560 U.S. at 203 (quoting *Board of Regents*, 468 U.S. at 101).
- ⁹⁸ See, e.g., Geoffrey D. Oliver, *Of Tenors, Real Estate Brokers and Golf Clubs: A Quick Look at Truncated Rule of Reason Analysis*, ANTITRUST, Spring 2010, at 40.
- ⁹⁹ *American Needle*, 560 U.S. at 203 (footnote omitted).
- ¹⁰⁰ *Id.*; see also *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999) ("our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear. We have recognized, for example, that 'there is often no bright line separating per se from Rule of Reason analysis,' since 'considerable inquiry into market conditions' may be required before the application of any so-called 'per se' condemnation is justified." (quoting *Board of Regents*, 468 U.S. at 104 n.26)); *FTC v. Actavis*, 133 S. Ct. 2223, 2237–38 (2013) (rule of reason does not require presenting "every possible supporting fact or refut[ing] every possible pro-defense theory"; "the quality of proof required should vary with the circumstances") (quoting *California Dental*, 526 U.S. at 780 (citation omitted)).



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