American Needle Ten Years Later

BY MICHAEL A. LINDSAY

ALMOST TEN YEARS AGO THE U.S. Supreme Court revisited the question of distinguishing single-actor conduct from an agreement among multiple actors. The question is obviously critical because by definition there cannot be an agreement in restraint of trade in violation of Section 1 of the Sherman Act unless there are at least two participants whom the law considers separate persons for antitrust purposes. Although answers to some parts of this question have become clearer over the past ten years, other parts remain both vexing and unanswered.

In 2010, the Supreme Court decided *American Needle, Inc. v. National Football League*,[1] its latest decision in this line of jurisprudence. The cover theme of the Fall 2019 issue focuses on how courts have applied *American Needle* over the last decade, and on important issues that *American Needle* did not address.

This article provides an overview of the decision as well as some of the ways in which it has been applied. Mike Cragg, Dan Fanaras, and Daniel Gaynor discuss *American Needle* developments in the sports industry. David Meyer analyzes the functional framework used in *American Needle* and how that framework has been applied to various forms of coordinated conduct challenged under Section 1. Finally, William Kolasky discusses the career of *American Needle*'s author, Justice John Paul Stevens.

The *American Needle* Decision

With *American Needle*, Justice Stevens bid his farewell to antitrust law and to his service on the Court. His opinion began with a historical tour of the Court's "agreement" jurisprudence before arriving at the grounds for the decision.

Rise and Fall of Intra-Enterprise Conspiracy. Justice Stevens's guided tour began with the Court's 1947 *Yellow Cab* decision, which he cited as the root of the "intra-enterprise conspiracy doctrine." In *Yellow Cab*, a vertically integrated taxicab manufacturer also owned taxi-operating companies in Chicago, New York City, Pittsburgh, and Minneapolis. The United States charged that these companies had agreed "to control the operation and purchase of taxicabs by the principal operating companies in Chicago, New York City, Pittsburgh, and Minneapolis, insisting that they purchase their cabs exclusively from" the affiliated manufacturing company.[2]

The Court held that an agreement in restraint of trade "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent" and that "common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act."[3]

Justice Stevens proceeded next to two later cases in which the Court took a less formalist approach, and thus began the decline of the intra-enterprise conspiracy doctrine: *Sunkist*[4] (involving an agricultural cooperative with multiple corporate entities) and *Citizens & Southern*[5] (involving a bank holding company and its "de facto" subsidiaries). Justice Stevens observed that, in both cases, the Court looked to the economic substance of the defendants' relationships and willingly disregarded legal formalities that had no economic significance.[6]

Finally, Justice Stevens arrived at the 1984 *Copperweld* decision,[7] where the Court put the "intra-enterprise" doctrine to rest. In *Copperweld*, the Court concluded that the doctrine was inconsistent with the "basic distinction between concerted and independent action" and that "an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police."[8] The Court found that if (as was generally agreed) "the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor," then the same must be true for a parent and its wholly-owned subsidiary.[9] But the intra-enterprise doctrine instead looked "to the form of an enterprise's structure and ignore[d] the reality." The Court was unwilling to let "[a]ntitrust liability . . . depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary."[10] Consequently, the *Copperweld* Court held that a parent and its wholly-owned subsidiary are incapable of conspiring with each other for purposes of Section 1 of the Sherman Act.

***The Issue and Ruling in* American Needle.** Justice Stevens's discussion of the intra-enterprise doctrine's demise demonstrated the Court's prior willingness to disregard corporate forms to get at the real economic substance of an arrangement. *American Needle* itself, however, represented

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the converse of the fact patterns in the earlier intra-enterprise cases. In those cases, a seeming multiplicity of entities constituted a single economic consciousness and decisionmaker. In *American Needle*, the Court considered whether a seemingly single entity actually consisted of a multiplicity of economic decisionmakers. Just as it was "not determinative that two parties to an alleged § 1 violation are legally distinct entities," it was likewise "not determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture."[11] In both situations, the question is "whether the agreement joins together independent centers of decisionmaking."[12]

Before 1963, each National Football League member team managed its own intellectual property. In 1963, NFL member teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property. Some of the profits from the joint activity were given to charity, and the rest distributed among the teams. After years of granting nonexclusive licenses, in late 2000 the member teams voted to start granting exclusive licenses. Although that change did not affect whether the teams and NFLP were functioning as a single actor, it did give the jilted licensee—American Needle—the incentive to bring an antitrust claim. The district court and the Seventh Circuit both held that the teams were acting as a single actor and thus were shielded under *Copperweld* from Section 1 conspiracy claims.

The Supreme Court reversed. The linchpin of Justice Stevens's analysis was that the NFL teams "do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action."[13] He noted that each team was independently owned and separately managed, that the teams competed to attract fans and gate receipts, that the teams competed for both players and managers, and that they competed in the market for intellectual property. The fact that the teams had centralized their licensing function did not transform them into a single economic consciousness. The Court also held (although this was a closer question) that even though NFLP was a separate corporation, the decisions of NFLP as to the respective intellectual property of each member team were subject to Section 1, because those decisions were actually made by each member team.

The sports industry may be the zenith of "coopetition"—that is, an industry where competitors must cooperate in order to create their product or facilitate a functioning market—but it is not the only one. In the last decade, two other industries have seen significant cases applying *American Needle* principles to the specific facts of their industry: real estate and health care. Both industries require some amount of cooperation among competitors. In the real estate industry, competing brokers cooperate to create a marketplace through their multiple listing service. In health care, competitors can cooperate to improve patient outcomes and achieve other efficiencies.

American Needle in the Real Estate Industry

In the residential real estate market, buyers and sellers will often work through agents (that is, real estate brokerage firms), and somehow buyers and sellers need to communicate. Generally speaking, sellers make known to potential buyers the availability, description, and price of the homes that sellers want to market. That information might best be communicated through a marketplace to which buyers (or at least their agents) have access. Multiple listing services (MLS) have often served this role, and they have faced Section 1 claims both before and after *American Needle*.

In *Robertson v. Sea Pines*,[14] the class plaintiffs alleged that a number of realtor firms and their separate joint venture entity had conspired to limit competition from brokers that offered a larger range of service options as well as alternative pricing structures. The complaints alleged that the agreement was implemented through the adoption of anticompetitive rules governing MLS members' conduct. For example, one rule prohibited members from offering a "fee for service" model, and another required each member to maintain a physical office in the relevant geographic area. The defendants argued that Section 1 did not reach the conduct because the rules had been promulgated by only one firm—the MLS joint venture entity.

The district court and the Fourth Circuit rejected this argument under both *Copperweld* and *American Needle*. The Fourth Circuit described the fact pattern as fitting "squarely within *American Needle*'s definition of concerted conduct."[15] Each of the MLS members was a separately incorporated entity that competed with all the other members in the purchase and sale of real estate (more precisely, competed for the right to serve as agent). Like the NFL member teams, the MLS member brokers did not have a "complete unity of interest" and did not "possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action."[16] Rather, the defendants were using the MLS "to exclude lower cost brokerages from competing in the relevant real estate market and to stabilize prices within that market."[17] This is somewhat different from *American Needle*, where the collective action did not exclude competing firms (that is, rival holders of intellectual property that competed with the NFLP members' intellectual property), but the plaintiff American Needle had still alleged that collective action by member teams reduced competition with respect to licensing/use of intellectual property.

Like the *American Needle* Court, the Fourth Circuit recognized that Section 1 comes into play because there are "separately controlled, potential competitors with economic interests" that were distinct from the financial well-being of the joint venture entity itself.[18] It is possible that the interests of the competitors will coincide with the interests of the joint venture, but that does not change the fact that separate economic persons have come to an agreement—and thus that there is an agreement that can be analyzed under Section1. Nor does it mean that all rules set by the joint venture (that is, all agreements reached by the venture and the member-competitors) violate Section 1.

American Needle in the Health Care Industry

The health care industry presents a variety of fact patterns that illustrate the fact-intensive inquiry that the *Copperweld* and *American Needle* analysis often require. In one case (*Medical Center at Elizabeth Place, LLC v. Atrium Health System*[19]), previously separate health care providers combined into what was said to be a single system. In another (*In re Blue Cross Blue Shield Antitrust Litigation*[20]), insurers that remained actual or potential competitors used a licensing arrangement—allegedly to allocate territories.

Elizabeth Place *District Court Decision.* The *Elizabeth Place* complaint alleged that four larger hospitals had engaged in a group boycott of the plaintiff's smaller (physician-owned) hospital. The defendant hospitals, however, had previously entered into a joint operating agreement, doing business under the name "Premier Health Partners" (PHP), and they asserted that they were a single entity under *American Needle*. The district court denied a motion to dismiss the complaint, but on summary judgment the district court concluded that there was no plurality of persons. In a 2-1 decision, however, the Sixth Circuit reversed. On remand the district court again granted summary judgment because plaintiff failed to demonstrate a per se violation (the only claim that plaintiff had pressed), and this time the Sixth Circuit affirmed.

What drove the district court's denial of the motion to dismiss was a series of allegations of independence among the PHP member hospitals. For example, the complaint alleged that the PHP hospitals "are 'owned, controlled and operated independently'"; that one of the hospitals described the joint operating agreement "as 'separate healthcare systems' operating under the guidance of Premier," while another characterized the agreement "as a 'consolidation of revenue streams'"; that PHP itself has "no assets, no liabilities, no revenue, no income, and no expenses"; that each PHP hospital "has maintained independent ownership of, and responsibilities for, their respective assets, liabilities, equity, revenues, and expenses"; that each PHP hospital "maintains separate governing boards . . . that exercise authority for all business operations and decisions" and "makes material independent decisions concerning their respective operations that are not managed by Premier"; and finally, that the PHP hospitals "remain actual and potential competitors in the relevant markets."[21]

After completion of discovery, however, the district court granted summary judgment for the defendant hospitals, finding:

> Not only is Premier a legitimate joint venture, but the challenged conduct in this case—managed care contracting and physician relations—is a core function of the Premier health system. . . . Since a "single entity" is incapable of conspiring for purposes of the Sherman Act, Plaintiff's claim fails as a matter of law.[22]

The court considered the joint operating agreement to be similar to a merger—the parties had not "technically merge[d]" because two of the hospitals had wanted to retain their Catholic identities—but they had "delegated operational, strategic, and financial control to Premier."[23] The district court held that "contractual control is sufficient to demonstrate that the Defendants are a single entity."[24] The court noted that *American Needle* had held that it is "*not determinative* that two parties to an alleged § 1 violation are legally distinct entities."[25] Thus, the separate legal status of the hospitals was not relevant.

Sixth Circuit Decision. The Sixth Circuit reversed the district court in a 2-1 decision. The court first applied Justice Brandeis's multifactor test to determine whether the joint venture was a "combination" under Section 1. The question as the court saw it was whether "factual determination is required to resolve whether the neutral words of the agreement belie the true aim of defendants' association" to "legitimate the cartel."[26] The dissent criticized this part of the majority opinion because the nature of the alleged misconduct should be irrelevant to the analysis of whether there is a "single economic consciousness" and because the competitive effects of the conduct do not depend on the number of actors involved. To put it differently, if a parent permits its two wholly-owned subsidiaries to compete with each other, an agreement between the presidents of those subsidiaries not to compete would not bring together independent economic decision makers. The presidents may have violated corporate policy, but that is not an antitrust violation.

The majority and dissent analyzed the nature of the defendant hospitals' relationship. The joint operating agreement (JOA) provided for Premier to carry out certain management functions on behalf of the defendant hospitals in order "to achieve efficiencies in billing and collecting payments, managing physicians and physician groups, property management and other similar duties."[27] The JOA also provided for revenue sharing based on an agreed-upon formula. Both the majority and dissent agreed that revenue sharing, in and of itself, was not controlling: in essence, that's what the members of a price-fixing cartel agree to do.

The majority was persuaded that the hospitals should be considered separate entities capable of conspiring under *American Needle* because of several factors: the hospitals' separate legal status (with their own tax returns, corporate boards, and CEOs); their continued competition with each other for physicians and patients; their separate and independent decision making regarding "medical operations that are not managed by Premier, including staffing decisions and medical strategies concerning patient care"; and the absence of collaboration or "act[ing] as a system today," acting instead "as a confederacy that collaborates in a few areas (i.e., supplies, financing/access to capital, electronic medical records)."[28]

The dissent reached the opposite conclusion, and identified factors that showed a sufficiently complete integration to consider the hospitals to be a single person. Despite separate incorporation, the JOA required them to "'take all corporate action . . . as required to implement' PHP's authority" and prohibited them from "modifying corporate documents in a manner inconsistent with the JOA without prior approval."[29] The JOA required PHP to "coordinate" the hospitals' activities and gave it authority to "manage the operations of the health system activities of all defendants." Each PHP hospital's CEO reported to PHP's COO, and PHP's CEO had the authority to remove each hospital's CEO. Some system management functions (such as managed care and legal functions) were integrated into single departments for the entire system. PHP had authority and control over the hospitals' strategic plans, budgets, and business plans. PHP was required to develop and oversee the implementation of a strategic plan for all system activities and to develop capital expenditure and operating budgets for the hospitals. PHP controlled the hospitals' incurrence of material debt and managed their relationships with insurance companies.[30]

District Court on Remand. On remand the district court did not make any further rulings on the single-entity question. The parties filed proposed jury instructions and verdict forms that collectively highlight the fact-based aspects of determining whether there is one actor or multiple actors. For example, the plaintiff asked the court to instruct:

> If the preponderance of the evidence shows that all defendants are performing in the market as single center of decision-making, defendants are to be considered [a] single entity that is not capable of conspiring with one another for purposes of MCEP's claim. But you must look beyond labels to determine if collusion among competitors exists in this case.[31]

The defendants asked the court to instruct:

> The relevant inquiry here is one of substance, not form, and it does not turn on whether the hospitals are part of a legally distinct entity or not. It instead depends on a functional consideration of how the hospitals actually operate and relate to each other. In answering that question, you must determine whether Premier and the Premier hospitals, in providing hospital services, should be viewed as a single enterprise. Answering this question requires you to determine whether the Premier hospitals, through Premier, are controlled by a single aggregation of economic power. If so, they are a single entity. Conversely, the Premier hospitals are not a single entity if they remain as independent centers of decision-making notwithstanding the Joint Operating Agreement.[32]

No jury was ever called upon to answer the factual question of whether the defendants were acting as a single entity. The plaintiff chose to limit itself to a claim of per se illegality. The district court found on summary judgment that there were plausible pro-competitive features that rendered per se analysis inappropriate, and the Sixth Circuit affirmed.[33] In the appeal after remand, the opinion for the court did not revisit the single-entity issue, but in his concurrence Judge Sutton suggested that the court should have done so because the dissent in the previous appeal "got it right."[34] Judge Sutton continued: "Complete unity of interest? Check. . . . Single decisionmaking center? Check again."[35] Judge Sutton thought that the facts showed that each hospital benefited from the other hospitals' performance and that PHP was the system's operator.

***Reliance on* Elizabeth Place.** At least one district court has relied on the Sixth Circuit's *Elizabeth Place* decision reversing the grant of summary judgment. In *State of Washington v. Franciscan Health System*,[36] CHI Franciscan Health System made a series of agreements with The Doctors Clinic (TDC), a multispecialty physician practice group in Silverdale, Washington. Under the agreements, TDC would receive Franciscan's negotiated reimbursement rates with payers. At about the same time, Franciscan had acquired the medical practice of another Silverdale-based practice group (WestSound, a seven-physician orthopedics group). The Washington Attorney General challenged the WestSound acquisition as a violation of Section 7 of the Clayton Act and the agreements between Franciscan and TDC as Section 1 violations (both per se and rule of reason).

The AG later sought partial summary judgment that Franciscan and TDC were separate persons capable of making an agreement (and thus capable of making a price-fixing agreement that would be a per se violation of Section 1). The district court denied this motion. The AG based its motion on the ground that Franciscan and TDC were separately incorporated and had no common ownership. The court rejected this argument, noting that "there is no precedent stating that lack of common-ownership per se deprives two legally separate entities of economic unity."[37] Instead (and citing *Elizabeth Place*), the court conducted the "functional type of analysis" to determine whether Franciscan-TDC "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"—more precisely, whether that question presented a genuine issue of material fact.[38]

The court found that there was conflicting testimony about the degree to which Franciscan "is authorized to or actually does exert control over the operations of TDC through the implementation and enforcement of Franciscan policies and standards."[39] Franciscan had purchased TDC's ambulatory surgical center and lab service and had leased almost all of TDC's remaining assets, and Franciscan had also entered into a management services agreement under which TDC was required to provide "all of the management services necessary to operate the medical clinics in accordance with industry standards, the annual budget, and numerous Franciscan policies and standards."[40] TDC's physicians were also barred from providing similar services to any competitor of Franciscan within a certain geography. Franciscan was given control over TDC's medical-professional hiring decisions, but not over non-medical personnel. Franciscan was given final control over TDC's budget, but apparently the budget (and certain compensation decisions) were "negotiated between the parties."[41]

The court noted evidence that Franciscan "possess[ed] the authority to control the standards surrounding the patients' experience" and "provide[d] TDC with all of its budget and income," but also evidence that Franciscan and TDC continued to compete for patients.[42] The Franciscan-TDC agreement would also permit TDC to compete with Franciscan after termination of the agreement (at least in some circumstances). Moreover, although an increase in TDC's revenues would result in an increase in Franciscan's revenues, the correlation was not perfect, "and at the end of the day, their respective profits 'don't all wind up under the same corporate mattress.'"[43] And notwithstanding Franciscan's formal control of TDC, the court noted evidence that the Franciscan-TDC relationship "allows TDC providers to maintain their identity as TDC, choose who they want to join their group, and take care of their patients the way that they would like. The only concrete downside is that care that they deliver is going to cost their patients and their insurance companies more."[44]

The court concluded that "the functional relationship and economic unity between TDC and Franciscan remains a disputed question of fact that must be resolved at trial."[45] No trial occurred, however, because the parties later settled the case. A key term of the settlement (implemented through a consent judgment) required Franciscan to offer each commercial third-party payer or administrator the option of negotiating the price and other terms of service for TDC physicians separately and independently from the negotiations for Franciscan services.[46]

Blue Cross *Litigation.* The Blue Cross and Blue Shield marks have a complicated ownership and licensing history, but they now reside in a single national association that licenses them to the association's members. The *Blue Cross* litigation involves a challenge to the licensing arrangements, claiming that they operate as a form of market allocation among various insurers operating under the Blue marks. The defendants claimed that the marks are now owned by a single entity that is responsible for protecting and licensing the marks. The plaintiffs claimed that the court should use a function-by-function analysis under *American Needle* and that the facts were inconsistent with the idea that defendants were operating as a single organization.

On cross-motions for summary judgment, the district court held that the Blue trademarks were more analogous to the NFL marks (rather than the individual teams' marks) in *American Needle*. But that was not sufficient for a defense victory because *American Needle* "left open the question of how the case would have been decided if decisions by the NFLP regarding the jointly owned NFL trademarks had been at issue."[47]

The district court found that it could not determine as a matter of law whether defendants should be treated as a single entity. This decision was driven in part by the history of the marks. For example, some of the defendants had "initially developed 'individual' trademark rights" that they then "purposefully integrated" into the association's predecessors, which then licensed the marks back to the defendants for the areas in which they had previously used them.[48] Another factor in the court's decision was evidence as to the validity or enforceability of the marks, as well as evidence that at least some of the defendants seemed to think that the marks could be protected without exclusive service areas (which many of the licenses provided).[49] Finally, the court was persuaded by evidence that, but for the licenses granting exclusive service areas, the defendants "would be competitors under the Blue brand in the health insurance market."[50] The district court concluded that a "trier of fact could determine that Defendants remain separately controlled, potential competitors with economic interests that are distinct from the Association's financial well-being.'"[51]

As the *Elizabeth Place*, *Franciscan Health*, and *Blue Cross* decisions illustrate, *American Needle* presents complex challenges both for parties to business arrangements that fall short of fully integrated joint ventures or mergers and for courts faced with Section 1 claims involving such conduct.

Outside the United States

Both the European Union and the United Kingdom have embraced the "single economic entity" doctrine. Under this doctrine, a parent and its wholly-owned subsidiaries are viewed as a single entity—both for capacity to make agreements and for imposition of liability. The European Commission's Guidelines on Horizontal Cooperation state that "Companies that form part of the same 'undertaking' within the meaning of Article 101(1) are not considered to be competitors for the purposes of these guidelines."[52] Moreover, Article 101 applies only "to agreements between independent undertakings."

Similarly, the UK Office of Fair Trading (predecessor agency to the Competition & Markets Authority) stated that "Article 81 and the Chapter I prohibition do not apply to agreements where there is only one undertaking: that is, between entities which form a single economic unit." More specifically,

> an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence. Whether or not the entities form a single economic unit will depend on the facts of each case.[53]

Conclusion

Businesses like clear rules with predictable outcomes. *American Needle* and *Copperweld* still provide clarity in at least some circumstances. A wholly-owned subsidiary will certainly not be considered a separate "person" for conspiracy purposes, and even majority-owned subsidiaries are still highly likely (absent unusual minority-protection provisions) to be considered the same person.

The situation for joint ventures is less clear. *American Needle* has presented significant challenges for defendants facing Section 1 claims over partially integrated joint venture arrangements among competitors. In these situations, factual allegations in a complaint and disputed issues of fact over the economic interests and decision-making authority of members may prevent defendants from obtaining dismissal of claims at the outset of litigation—or even from winning summary judgment after discovery. Prudent counselors will assume that there is a nontrivial risk that participants in such arrangements (acting directly or through their respective representatives on the governing board) will be considered separate persons capable of making agreements under Section 1. Counselors should consider ways to minimize the direct role of members in decisions that have direct effects on competition in the members' marketplace. ■

1 560 U.S. 183 (2010).

2 United States v. Yellow Cab Co., 332 U.S. 218 (1947).

3 *Id.* at 227.

4 Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19 (1962).

5 United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

6 *American Needle*, 560 U.S. at 193–93.

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

8 *Id.* at 767, 771.

9 *Id.* at 771–72.

10 *Id.* at 772.

11 *American Needle*, 560 U.S. at 196.

12 *Id.* (internal quotation marks omitted).

13 *Id.*

14 679 F.3d 278 (4th Cir. 2012).

15 *Id.* at 285.

16 *Id.* (quoting *American Needle*, 560 U.S. at 196).

17 *Id.* at 285.

18 *Id.* at 285–86.

19 817 F.3d 934 (6th Cir. 2016).

20 308 F. Supp. 3d 1241 (N.D. Ala. 2018) (*Blue Cross Antirust Litigation*), *appeal denied*, 2018 U.S. App. LEXIS 36905 (11th Cir. Dec. 12, 2018) (denying leave for interlocutory appeal).

21 Order Denying Defendants' Motion to Dismiss 13–14, Med. Ctr. at Elizabeth Place, LLC v. Premier Health Partners (*Elizabeth Place*), Case No. 3:12-cv-00026 (S.D. Ohio Aug. 30, 2012) (order denying motion to dismiss).

22 *Elizabeth Place*, 2014 U.S. Dist. LEXIS 169186 at *28–29 (S.D. Ohio Oct. 20, 2014).

23 *Id.* at *10.

24 *Id.*

25 *Id.* at 9 n.5.

26 *Elizabeth Place*, 817 F.3d at 937 n.5.

27 *Id.* at 942.

28 *Id.* at 943.

29 *Id.* at 950 (Griffin, J., dissenting).

30 *Id.*

31 Plaintiff's Proposed Preliminary and Final Jury Instructions and Verdict Form, Proposed Instr. No. 18 at 40–41, *Elizabeth Place*, No. 3:12-cv-00026 (S.D. Ohio July 31, 2017), ECF No. 251.

32 Defendants' Requested Jury Instructions, Verdict Form, and Jury Interrogatories, Prop Instr. No. 24 at 33, *Elizabeth Place*, No. 3:12-cv-00026 (S.D. Ohio July 31, 2017), ECF No. 249. The defendants also argued that the court should decide, as a matter of law, whether PHP was a "legitimate joint venture."

33 Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 922 F.3d 713 (6th Cir. 2019).

34 *Id.* at 734 (Sutton, J. concurring).

35 *Id.*

36 Order Denying Plaintiff's Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiff's Motion to Strike Pleadings [hereinafter *Franciscan Health* SJ Order], State of Washington v. Franciscan Health System (*Franciscan Health*), No. C17-5690 BHS (W.D. Wash. July 24, 2018), ECF No. 132.

37 *Id.* at 6.

38 *Id.* (quoting *Elizabeth Place*, 817 F.3d at 937 (internal quotation marks omitted)).

39 *Id.* at 6–7.

40 *Id.* at 7.

41 *Id.* at 10.

42 *Id.* at 11.

43 *Id.* at 13 (quoting Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1149 (9th Cir. 2003)). *Freeman* was a multiple-listing service case that predates *American Needle*.

44 *Franciscan Health* SJ Order, *supra* note 36, at 14 (brackets in original omitted).

45 *Id.* at 14.

46 Consent Decree ¶ 54, *Franciscan Health*, No. 3:17-cv-05690-BHS (W.D. Wash. June 28, 2019), ECF No. 291.

47 *Blue Cross Antitrust Litigation*, 308 F. Supp. 3d at 1264.

48 *Id.* at 1264–65.

49 *Id.* at 1265.

50 *Id.*

51 *Id.* (internal quotation marks and brackets omitted).

52 European Comm'n, Communication from the Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements (Jan. 11, 2011), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN.

53 Office of Fair Trading, *Agreements and Concerted Practices: Understanding Competition Law* 5–6 (Dec. 2004), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284396/oft401.pdf.