Chapter 13

Collaboration Without Sin?—Health Care Mergers, Joint Ventures, and the Changing Antitrust Landscape[1]

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[1]"Every sin is the result of a collaboration." Stephen Crane.

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§ 13:1 Introduction

Whatever federal and state health care reform initiatives may mean for providers and suppliers in the long run, one of the short-term consequences is renewed exploration of collaborative arrangements and business combinations. A number of motivations fuel these explorations, including the formation of systems or networks that can deliver comprehensive health services, positioning providers to accept the financial risks of payment reform, and preserving access to capital in an era of constrained reimbursement.[1]

The possibility of greater consolidation and alignment has not gone unnoticed by antitrust regulators. The Assistant Attorney General for Antitrust has observed that antitrust enforcement is critical to the success of health care reform, stating that "[t]he [Antitrust] Division is committed to vigorously, but responsibly, scrutinizing mergers in the health care industry that appear to present a competitive concern. If we determine that our initial concerns were well founded, we will not hesitate to block the merger or to require the

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[1]A recent report by Moody's Investors Service identifies strong strategic and contingency planning capabilities as among the factors that drive ratings upgrades for hospitals in the current environment. Top Ten Factors Driving Not-For-Profit Hospital Upgrades and Downgrades (Moody's Investors Service Nov. 5, 2010). Examples given include balance sheet recovery plans and "single-payer analysis"—i.e., contingency planning based on the assumption that all payors will pay Medicare rates in the future. See also Kaufman Hall, The Rise of the Regional Superpowers: Will One Be Coming to a Market Near You?, Presentation to the Healthcare Financial Management Association 2010 Healthcare Finance Conference (June 23, 2010) (discussing the success of regional health care systems in responding to changing market conditions and maintaining access to capital), available at http://www.softconference.com/hfma2/sessionDetail.asp?SID=180307.

settlement concessions necessary to protect consumers."[2] The Director of the FTC's Bureau of Competition has stated, in a similar vein, "More broadly, I would say that . . . the goals of health reform are fundamentally consistent with the goals of the antitrust laws and the goals of competition with respect to the delivery of health care products and services . . .. I view our role as making sure that the value of competition in serving the goals of health reform isn't overlooked."[3]

The enforcement agencies are not the only source of interest in antitrust scrutiny of provider responses to health reform. For example, America's Health Insurance Plans, an insurance trade organization, issued a white paper warning that "provider aggregation [through Accountable Care Organizations] could result in undue market power, leading to higher prices for consumers with little or no quality-enhancing or cost-savings benefits, thereby undermining the intent of this program."[4]

This chapter explores three recent developments germane to the interests of health care organizations in future combinations and collaborations: (1) the 2010 revision of the federal Horizontal Merger Guidelines; (2) the Federal Trade Commission's efforts to reinvigorate section 5 of the FTC Act; and (3) the Supreme Court's 2010 decision in American Needle, Inc. v. National Football League.

§ 13:2 Revision of the Federal Merger Guidelines

In August 2010 the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) (collectively, the "Agencies") published a comprehen-

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[2]C. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Antitrust and Healthcare, Remarks as Prepared for the ABA/AHLA Antitrust in Healthcare Conference (May 24, 2010), available at http://www.justice.gov/atr/public/speeches/258898.htm.

[3]Interview with Richard A. Feinstein, Director, FTC Bureau of Competition, The Antitrust Source (Apr. 2010), available at http://www.ftc.gov/speeches/feinstein/1004-feinstein-invw.pdf.

[4]Accountable Care Organizations and Market Power Issues (America's Health Insurance Plans Oct. 2010), available at http://www.americanhealthsolution.org/assets/Uploads/Blog/ACO-White-Paper.pdf.

sive revision of their Horizontal Merger Guidelines.[1] The Merger Guidelines had not previously been updated since 1992.

Whereas the 1992 Guidelines were quite formulaic—describing an analytical process that began with market definition and proceeded sequentially through an analysis of market concentration, competitive effects, competitor responses, and efficiencies—the New Guidelines are more like a Chinese menu of analytical approaches that de-emphasizes both market definition and market concentration in favor of competitive effects. Indeed, as discussed in the following sections, the 2010 Guidelines are far more focused on economic models of merger-related price effects than its predecessor document. This is not surprising in light of the fact that revision process was spearheaded by the chief economists of the FTC and the Antitrust Division, and those individuals had worked together in academia to develop such economic models.[2]

§ 13:3 Revision of the Federal Merger Guidelines—The significance of the Merger Guidelines

The original Merger Guidelines were published in 1968 and were in large measure a response to the Supreme Court's decision in Von's Grocery,[1] in which the High Court upheld a Justice Department challenge to a merger between two firms with a combined market share of just 8%. In the aftermath of that decision, there was widespread concern among businesses and the antirust bar that literally any merger was

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[1]U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010), available at http://www.ftc.gov/os/2010/08/100819hmg.pdf. In this chapter, the 2010 revision will be referred to as the "2010 Guidelines" or the "New Guidelines" and the document in its current and prior versions will be referred to generically as the "Merger Guidelines."

[2]Joseph Farrell & Carl Shapiro, Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition, 10 B.E.J. Theoretical Econ.: Policies & Perspectives, art. 9 (2010), available at http://www.bepress.com/bejte/vol10/iss1/art9.

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[1]U. S. v. Von's Grocery Co., 384 U.S. 270, 86 S. Ct. 1478, 16 L. Ed. 2d 555 (1966).

fair game for an enforcement action. The 1968 Guidelines responded to that concern by defining statistical market share and other thresholds for federal merger enforcement.

The 2010 Guidelines continue a purpose and intent to "describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition. They are . . . intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context."[2]

The role of the Guidelines as advice to merging parties and their counsel is critically important and, particularly in health care provider mergers, more important than any role the document may play in informing the judiciary.[3] Merger investigations (whether in the form of a "second request" under the Hart-Scott-Rodino Act or otherwise) are highly intrusive, time-consuming, and very expensive. In an era of electronic documents and outsourced document production, it is no longer uncommon for the cost of an investigation to exceed $1 million for each party, and an investigation typically extends the time required to complete a transaction anywhere from six months to a year. Accordingly, the agencies understand well that the commencement of an investigation itself is sometimes sufficient to deter parties from moving forward with a proposed transaction.

Thus, the Guidelines—at least in theory—should give parties a reasonable ability both to predict the likelihood that their transaction will raise issues for the Agencies and to marshall evidence that will persuade the Agencies that competitive concerns are not present. While it is fair to say that the 2010 revision of the Guidelines reflects the recent evolution of merger enforcement and is more consistent with the Agencies' current practices in evaluating the possible com-

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[2]2010 Guidelines, § 1.

[3]The term "merger" will be used in this chapter generically to mean all forms of business combination, including mergers, acquisitions, consolidations, member substitutions, and (to the extent treated as mergers) joint ventures.

petitive implications of a horizontal business combination, the New Guidelines do not necessarily give better guidance to parties or their lawyers as to whether any particular transaction is likely to be investigated or challenged. For reasons discussed in this article, the New Guidelines arguably provide very little help with respect to *any* transaction in which there is a potential competitive overlap between the merging parties.

§ 13:4 Revision of the Federal Merger Guidelines—Noteworthy changes in the 2010 Guidelines

Historically, the Merger Guidelines were premised on structural concerns—the number and relative size of the firms competing in the relevant market (or markets) before and after the transaction in question. In that sense, the Guidelines were concerned mainly with "coordinated interaction"—the possibility that, as the number of competing firms decreased and their relative market shares increased, the market would become more susceptible to cartel-like behavior, if not outright collusion. This approach reflected the fact that, historically, the mergers of greatest concern arose in commodity and heavy industry markets—in which buyers tend to be largely indifferent as to the seller from which they purchase (because one seller's product is indistinguishable from another seller's product), and the main differentiator between sellers is price. As the number of independent sellers decreases, price competition in those markets may become less vigorous.

Increasingly over the last several decades, antitrust economics and merger enforcement have become focused on markets in which products having similar uses nonetheless are differentiated on brand name, quality, and other dimensions. In such markets, the principal antitrust issue is not coordinated interaction but "unilateral effects"—the possibility that a merger or acquisition will substantially increase the market power of the merging firms, allowing them to raise prices (or reduce output or quality) notwithstanding that the market, structurally, may still be populated by a number of other firms and that cartel-like behavior is unlikely.

Health care markets involve differentiated products.[1] That is, a patient may be able to have the same surgical procedure at any number of hospitals. However, the consumer's preference for a particular hospital in many cases is a function of the hospital's reputation, its location, the physicians on the medical staff, perhaps its religious affiliation, and its participation in the patient's insurance plan. Price is not necessarily a distinguishing factor, particularly in the presence of comprehensive health insurance.[2]

The 1992 Guidelines contained a relatively limited discussion of unilateral effects;[3] the document was constructed fundamentally around market definition and structural analysis. The 2010 Guidelines have been described as the result of "a growing belief that in markets where product differentiation is minimal competition tends to be robust, and the structural presumptions stated in the [1992] Guidelines were too harsh. By contrast, where product differentiation is substantial the [1992] Guidelines' approach tended to define markets too broadly, overlooking significantly anticompetitive possibilities."[4]

The New Guidelines more prominently and more extensively discuss of the Agencies' analysis of differentiated product markets and unilateral effects. In this area, the Guidelines state that the Agencies may rely on "any reasonably available information to evaluate the extent of direct competition" between the merging parties. Implicit in this statement is the abandonment of any presumption that a merger resulting in a small market share would not raise concerns

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[1]The term "product" used in this chapter is inclusive of both products and services. Either category can define a "product market."

[2]To be sure, health insurers care about price, but insurers (at least historically) are also sensitive to consumer preferences and, all things being equal, insurers will contract with every provider that meets minimum quality standards, i.e., because that will make their plans more attractive to consumers and allow them to sell more insurance.

[3]See U.S. v. Oracle Corp., 331 F. Supp. 2d 1098, 1117, 2004-2 Trade Cas. (CCH) ¶ 74542 (N.D. Cal. 2004) (describing 1992 Guidelines' discussion of unilateral effects as "helpful" but "not sufficient to describe a unilateral effects claim").

[4]Herbert Hovenkamp, Harm to Competition Under the 2010 Horizontal Merger Guidelines (Nov. 2010) (available at http://ssrn.com/abstract=1702843).

about unilateral effects. The New Guidelines identify some of the sources of information that the Agencies may consider, including:

- Actual price effects observed in consummated mergers.
- Effects of analogous mergers in similar markets.
- Evidence—particularly evidence drawn from the parties' own documents—as to whether substantial head-to-head competition exists (or is perceived to exist) between the merging parties, including evidence demonstrating that a party's business decisions were premised on the actions of its merger partner.
- Evidence—again including evidence drawn from the parties' own documents—as to whether the parties expect to raise prices, reduce output or capacity, or curtail innovation in consequence of the merger.
- Customer opinions regarding the likely effect of the merger.
- Evidence that the merging parties successfully charge different prices to different customers.
- Evidence that the parties earn high margins.
- Evidence of direct competition between the products sold by the merging parties, including "win-loss" reports, consumer and customer surveys, and customer switching patterns.
- Economic models of price effects such as merger simulation and "upward pricing pressure" models.

None of these sources is new to merger investigations, but the heightened focus on unilateral effects and direct competition between the merging parties is significant. The notable omission from the discussion of competitive effects is any identification of when and how the Agencies would favor one source of information over another or the relative weight that any one category of evidence might have in a particular type of merger—an omission that significantly hinders the ability of merging parties to anticipate and respond to Agency concerns.

§ 13:5 Revision of the Federal Merger Guidelines—Noteworthy changes in the 2010 Guidelines—The HHI doesn't really matter, if it ever did

The historical focus of the Guidelines on structural issues made the "Herfindahl-Hischmann Index" (HHI) the appar-

ent centerpiece of analysis. The HHI is a measure of market concentration calculated by summing the squares of the market shares of the firms competing in a relevant market. Higher HHI values are associated with greater market share being concentrated in a smaller number of firms. Assuming that the relevant market can be appropriately delineated, it requires no special talent to calculate the "before" and "after" HHI values associated with a proposed merger.

The 1992 Merger Guidelines set out thresholds for identifying transactions of potential concern based on the HHI. Somewhat simplified, if the postmerger HHI was under 1,000, the market would be deemed unconcentrated and a merger in that market ordinarily would present no competitive concerns. If the HHI was between 1,000 and 1,800, the market would be deemed moderately concentrated, and a merger would present concerns if it raised the HHI by at least 100 points. If the HHI was above 1,800, the market would be deemed highly concentrated and a merger would present competitive concerns if it raised the HHI by at least 50 points.

Unsurprisingly, therefore, lawyers, consultants, clients, and (to some degree) the courts found the HHI to be a convenient and understandable way to identify situations in which a presumption of an antitrust problem might exist. In reality (and in health care transactions particularly), the HHI was not a useful differentiator of transactions that were likely to be scrutinized by the Agencies. Many hospital markets, for example, are "highly concentrated" under the standards of the 1992 Guidelines, and the transactions that the Agencies elected to oppose could not be defined predictably based on the HHI.[1]

The 2010 Guidelines retain the HHI and in fact raise the market concentration thresholds for identifying transactions of concern.[2] However, the New Guidelines significantly deemphasize the role of the HHI and the focus on market

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[1]A market with an HHI under 1,800 would require a minimum of six competing firms (bearing in mind that firms under common ownership are counted as one firm). Relatively few hospital markets have that many independent competitors.

[2]The New Guidelines state that mergers will not raise concerns if either the increase in the HHI is less than 100 points or the postmerger

concentration generally, particularly for transactions in differentiated markets. The 2010 Guidelines describe market concentration as "one useful indicator of likely competitive effects of a merger" and describe the HHI as "one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration."

For health care provider transactions, the HHI and market concentration analysis may be helpful if the parties can conclude with certainty that a properly defined market is unconcentrated (HHI < 1,500).[3] However, as discussed below, it is a reasonable conclusion that the Agencies nonetheless are reserving the right to question a merger in an unconcentrated market if other forms of analysis suggest that competitive concerns may be present, so the raised HHI thresholds under the New Guidelines may have little practical significance. More generally, in light of the numerous evidentiary factors cited in the Guidelines, there is little information to be gained about the Agencies' enforcement intentions from computing the HHI.

§ 13:6 Revision of the Federal Merger Guidelines—Noteworthy changes in the 2010 Guidelines—The "UPP" is the new HHI

Although the New Guidelines do not explicitly adopt a measure of "upward pricing pressure" (UPP) as a methodology (or screening test) for merger analysis, the endorsement of the approach is unmistakable. The Guidelines discuss concepts that appear in the work of Farrell and Shapiro (the

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HHI is less than 1,500. Transactions occurring in markets with a postmerger HHI between 1,500 and 2,500 will raise concerns if the increase in the HHI is at least 100 points. Transactions occurring in markets with a postmerger HHI greater than 2,500 will raise concerns if the increase in the HHI is greater than 100 points and will be presumed to raise serious concerns if the increase in the HHI is greater than 200 points. 2010 Guidelines § 5.3. In reality, even these thresholds are below the level at which most Agency challenges occur.

[3]A postmerger HHI under 1,500 would require that the market contain at least seven independent competitors with approximately equal market shares. To the extent that the firms' market shares were materially unequal, the required number of firms would be greater.

Guidelines' principal authors) on the subject and which also has been discussed by other well-known economists.[1]

In simple terms, "upward pricing pressure" refers to the ability of a merger to make profitable a price increase that would not be profitable in the absence of the merger. The approach is derived from microeconomic theory that many health care providers and lawyers have happily relegated to a box of college textbooks. It is a more involved calculation than the HHI and requires party-specific financial information. However, the basic premise of UPP analysis is simple to understand.

Economic theory holds that if Firm A operates in a competitive market and raises the price of its services, some customers will switch their purchases to a competing provider. If enough customers switch, the price increase will be unprofitable (i.e., because the profit on the sales lost to competitors is greater than the incremental revenue earned from the price increase imposed on customers who do not switch), and Firm A (if behaving rationally) will rescind the price increase.

However, if Firm A's price increase follows a merger between Firm A and one of its competitors, Firm B, some portion of the sales "lost" by Firm A will be captured by Firm B (which Firm A now "owns"). If the margin earned by Firm B on those diverted sales is large enough, the formerly unprofitable price increase may now be profitable for Firm A (i.e., because Firm A's lost profits are partly offset by the additional profits earned by Firm B). Stated differently, the

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[1]Joseph Farrell & Carl Shapiro, Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition, 10 B.E.J. Theoretical Econ.: Policies & Perspectives, art. 9 (2010), available at http://www.bepress.com/bejte/vol10/iss1/art9; see also, e.g., Steven C. Salop & Serge Moresi, Updating the Merger Guidelines: Comments, Horizontal Merger Guidelines Review Project, November 2009, available at http://www.ftc.gov/os/comments/horizontalmergerguides/545095-00032.pdf; Moresi, The Use of Upward Price Pressure Indices in Merger Analysis, The Antitrust Source (Feb. 2010).

merger with Firm B may permit Firm A to exercise market power in the form of a price increase.[2]

The closer the competition between Firm A and Firm B (in the sense of being each other's next-best substitutes), the greater the predicted upward pricing pressure. However, the mathematics of the UPP are such that the exercise will predict at least *some* upward pricing pressure in *every* case involving a merger between direct competitors, no matter how big or small the competitors may be (assuming that the competitors are both earning positive margins). Thus, to the extent that UPP analysis is applied as a screen by the Agencies, any merger between providers that have common zip codes in their service areas may be flagged for closer consideration.

One important implication is that any increased focus on UPP analysis by the Agencies is likely to increase the prevalence of formal and informal information requests to the merging parties. UPP analysis requires information on contribution margins that ordinarily is not publicly available and cannot be reliably derived from publicly available financial statements. Rather, the necessary information will be in the possession of the parties, and the Agencies can be expected to request this information in cases where they believe that the UPP may provide relevant information about the effects of the transaction.[3]

However, reliance on the UPP has inherent limitations, mainly due to the static (i.e., point in time) nature of the analysis. For example, the historical profit margins of the merging firms may not be a reliable predictor of postmerger profit margins in a dynamic market. Many recent health care mergers are motivated by a belief that declining reimbursement will drive margins down significantly in the foreseeable future. Similarly, when competition involves multiple "products" (as is true for hospitals), patient origin

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[2]Note that this analysis itself does not predict the amount of a potential price increase, which would be a function of multiple firm-specific and market-specific factors. Rather, it predicts (at least in theory) the propensity for a price increase to occur. Merger simulation models, in contrast, are intended to predict the level of a price increase that is likely to result from a merger.

[3]In fact, the Agencies have routinely requested contribution margin information in second requests to health care providers for a number of years.

data may overstate the degree of competition between the parties across all products.

In addition, UPP analysis examines the price effects for just one product at a time, without considering the simultaneous implications for (and from) other products of the merging firms. Actual price changes are more likely to be interdependent among products. The analysis likewise does not capture the potential competitive responses of other firms if the merger were to result in price increases. If other market participants make a competitive response to the merger, upward pricing pressure will be reduced.

Finally and significantly, UPP analysis does not factor cost efficiencies that may be gained from the merger into the equation. Efficiencies would tend to drive down pricing pressure (by lowering marginal costs) and that may be passed through to consumers.

All of those factors could mitigate adverse conclusions drawn from UPP analysis,[4] but the 2010 Guidelines provide little assurance that those factors will be credited. For example, the New Guidelines require "reliable evidence" that competitive responses by other firms in the market will be "rapid enough" to make any exercise of market power unprofitable or otherwise ensure that "consumers are not significantly harmed" by the merger.[5] This is difficult information to acquire as the Guidelines recognize. Moreover, the ability of firms to reposition in the market, and the likelihood of any such occurrence, is rarely susceptible (unlike price effects) to empirical evaluation.[6] More generally, the Guidelines raise a significant concern that dynamic market

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[4]Because the UPP does not account for any of the factors discussed here, some sources refer to the calculation as a "Gross Upward Pricing Pressure Index" or "GUPPI."

[5]2010 Guidelines § 9.

[6]See John Harkrider, A Return to Von's Grocery?, The Antitrust Source (Oct. 2010). As the author also notes, competing firms have every incentive to downplay their ability to mount a competitive response to a proposed merger.

considerations will be relegated to an afterthought in the analytical process.[7]

The New Guidelines provide no specific indication as to how the Agencies may use economic modeling in any particular case—only that it is one of the "tools" that they may use. In that respect, the document is not particularly informative, particularly since economic models like the UPP are not part of day-to-day decision-making for businesses. However, given the new emphasis on economic modeling, parties to a prospective combination that involves any competitive overlap will be hard-pressed not to engage an economist early on to better understand the UPP implications of the transaction and prepare to engage the Agencies in a discussion of those implications.

§ 13:7 Revision of the Federal Merger Guidelines—Noteworthy changes in the 2010 Guidelines—Market definition is becoming a second-tier issue

The 2010 Guidelines state that market definition becomes relevant only at the point at which the Agencies "identify a potential competitive concern."[1] In light of the Guidelines' emphasis on economic modeling, this statement leaves a clear implication that market definition may be unnecessary in analyzing mergers among firms with differentiated products.[2] Examination of the types of evidence identified in the 2010 Guidelines as relevant to analysis of unilateral effects indicates that the Agencies' focus is on the "closeness"

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[7]See Jay Ezrielev and Janusz Ordover, The 2010 Horizontal Merger Guidelines: A Static Compass in a Dynamic World?, The Antitrust Source (Oct. 2010).

[Section 13:7]

[1]2010 Guidelines, § 4.

[2]However, the DOJ's chief economist has stated that this criticism is "off the mark." "The Division recognizes the necessity of defining a relevant market as part of any merger challenge we bring. It is true that we often do not start our merger investigations with market definition." Carl Shapiro, Deputy Assistant Attorney General for Economics, Update from the Antitrust Division, Remarks as Prepared for the American Bar Association Section on Antitrust Law Fall Forum (Nov. 18, 2010), available at http://www.justice.gov/atr/public/speeches/264295.pdf. However, one could surmise that the Agencies will define markets mainly because the courts require it. See § 13:12, infra.

of competition between the products of the merging parties and *not* (at least in the first instance) on the availability of other substitutes. In effect, this means that the presumptive "relevant market" in many mergers will consist only of the merging parties.

UPP analysis, for example, is not concerned with whether there are firms that *could* supply a substitute product. It is concerned only with the relative loyalty of existing customers to the products of the two firms vis-à-vis *each other*. Thus, a merger between two small firms could be deemed to raise competitive issues if a large proportion of their particular customers view the two firms' products as next-best substitutes—even if a majority of customers in the market prefer the products of nonmerging firms.

This is a significant departure from existing merger theory, which holds that a relevant market is defined by "practicable" substitutes.[3] It is therefore uncertain whether courts will accept the New Guidelines' approach, but of course, parties to a merger would prefer to resolve their antitrust issues before the reviewing Agency and not before a court. The prospects of doing so in any case involving close competitors are now quite unclear.

§ 13:8 Revision of the Federal Merger Guidelines—Noteworthy changes in the 2010 Guidelines—An unclear view of nonprice effects

Nonprice competition (i.e., competition based on quality, technology, convenience, etc.) plays an important role in health care due in large measure to the price insensitivities created by health insurance. In that regard, one motivation for mergers and other combinations in the current environment is to provide a more stable economic platform for the provision of advanced clinical services.

The UPP and economic modeling focus mainly, if not exclusively, on the anticipated price effects of a merger. However, nonprice effects (e.g., changes—positive or negative—in the quality and variety of the products and services of the merging parties or effects on service levels or innovation) should be equally significant considerations in deciding whether a merger creates risks or benefits for consumers.

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[3]F.T.C. v. Freeman Hosp., 69 F.3d 260, 268, 1995-2 Trade Cas. (CCH) ¶ 71167 (8th Cir. 1995).

The 2010 Guidelines recognize but provide little discussion of these nonprice effects.[1] Several observations may be made in this regard:

- The Guidelines state that the Agencies "employ an approach analogous to that used to evaluate price competition" in evaluating nonprice effects.[2] This statement, which is in no way intuitive, is not further explained.
- Similarly, the New Guidelines do not explain how the Agencies will resolve cases in which economic analysis predicts upward price effects, but evidence indicates that the merger nonetheless may have benefits in the areas of product quality or innovation.
- Of related significance, to the extent that the 2010 Guidelines discuss nonprice effects at all, the discussion is largely directed to the potential *adverse* consequences of a merger on incentives for innovation and improved product quality, with almost no discussion of how the Agencies might view the positive effects of a merger on such matters.
- Quality improvements are a form of efficiency. The New Guidelines state that "the agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential harm . . ., e.g., by preventing price increases . . .."[3] This approach gives little credence to new services or improved quality as it is typically difficult to argue that such nonprice benefits would *prevent* a price increase.
- The New Guidelines identify a loss of product variety as a specific and independent source of harm to consumers.[4] The Agencies' interest in this issue is sometimes observed in hospital mergers where one

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[1]This fact led one FTC commissioner to strongly criticize the 2010 Guidelines' over-reliance on economic evidence and predicted price effects and its lack of guidance for the analysis of nonprice effects. Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines, Project No. P092900 (Aug. 19, 2010), available at http://ftc.gov/os/2010/08/100819/hmgrosch.pdf (hereinafter "Rosch Statement").

[2]2010 Guidelines § 1.

[3]2010 Guidelines § 10.

[4]2010 Guidelines § 6.4.

party is a "high-touch" provider and the other party is a "high-tech" provider—the implication being that a diminishment of (usually) the high-touch services may make consumers worse off even if no services actually are eliminated or prices do not increase. Certainly, parties to a merger that anticipate the elimination or reduction of services (e.g., the consolidation of a service at one of two merging hospitals) should be prepared to identify the offsetting consumer benefits of that decision (or demonstrate that the existing service variety offers little value to consumers) in light of the New Guidelines' interest in consumer choice.

§ 13:9 Revision of the Federal Merger Guidelines—Noteworthy changes in the 2010 Guidelines—Efficiency arguments will remain challenging

The Agencies have always been skeptical of arguments that a merger will result in significant operating or capital efficiencies. The 2010 Guidelines largely confirm that skepticism, stating that "efficiencies projected reasonably and in good faith by the merging firms may not be realized" and indicate that the Agencies will require evidence that any savings will be passed through to consumers.[1] Nonetheless, the New Guidelines signal a degree of greater acceptance of fixed cost efficiencies than may have been the case in the past but emphasize that greater weight will be given to short-term effects than effects occurring over a longer horizon.[2]

A new and significant caution arises from the Guidelines' expressed skepticism about "projections of efficiencies . . . generated outside of the usual business planning process."[3] In other words, the Agencies are disinclined to credit any efficiencies that have been identified after the commencement of merger discussions. Although one can understand that the Agencies may believe that such projections may be an effort to strategically position the merger for antitrust review, the fact remains that parties in most mergers have no reason to

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[Section 13:9]

[1]2010 Guidelines § 10.

[2]2010 Guidelines § 10, n.15.

[3]2010 Guidelines § 10.

project efficiencies (at least at a credible level of detail) until they have entered into serious discussions, and in any event, bona fide efficiencies are no less tangible or achievable based on the point in time at which they are identified.

§ 13:10 Revision of the Federal Merger Guidelines—Noteworthy changes in the 2010 Guidelines—The Merger Guidelines and "partial acquisitions"

The 2010 Guidelines contain a new discussion of how the Agencies will analyze acquisitions by one firm of a partial (minority) interest in another firm.[1] In such cases, the Agencies will consider (1) whether the partial acquisition results in an ability to influence the target firm's conduct, e.g., through governance rights; (2) whether the acquiring firm's economic incentives to compete against the target will diminish, e.g., because the acquiring firm will share in the target's losses; and (3) whether the partial acquisition is likely to result in coordinated behavior between the two firms, e.g., because the acquiring firm has access to the target's competitive information.

Beyond the mere fact that the addition of this discussion indicates a strong level of interest in partial acquisitions by the Agencies, this discussion is of interest because it adds analytical dimensions that are different than those of the Agencies' Competitor Collaboration Guidelines[2] and has implications for analysis of joint ventures under the antitrust laws—including the question of when a joint venture should be treated as a merger for analytical purposes. The implications are particularly interesting in light of recent Supreme Court decisions, including *American Needle* (discussed in Part IV of this chapter).[3] However, the 2010 Guidelines do not speak to these implications.

[Section 13:10]

[1]2010 Guidelines § 13.

[2]U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaboration Among Competitors (2000). Available at http://www.ftc.gov/os/2000/ftcdojguidelines.pdf.

[3]For a thoughtful and more detailed discussion of these issues, see Robert Skitol, Are the Competitor Collaboration Guidelines Ripe for Revision? 25 Antitrust 55 (Fall 2010).

§ 13:11 Revision of the Federal Merger Guidelines—Noteworthy changes in the 2010 Guidelines—Additions of note in the 2010 Guidelines

The New Guidelines add discussions of several topics not covered in prior versions, and these items are consistent with the more expansive enforcement view taken by the new document.

- ***Power Buyers.*** The 2010 Guidelines contain a discussion of "power buyers" and the Agencies' views of arguments that the presence of large buyers in the market will constrain any attempted post-merger exercise of market power.[1] This topic is highly relevant to health care provider mergers in markets where a single health plan dominates the commercial insurance market. The Guidelines note that the Agencies will not "presume that the presence of powerful buyers alone [will] forestall adverse competitive effects" and further note that the Agencies will consider whether market power can be exercised against some buyers even if others are large enough to protect themselves.[2]
- ***Price Discrimination.*** The Guidelines contain a separate discussion of targeted customers and price discrimination.[3] They indicate that the ability of the merging parties to charge different prices to different customers may result in narrower market definitions and may suggest a greater likelihood that the merger will enhance the firms' market power. Health care providers, of course, routinely price-discriminate in the sense that they negotiate different prices with different payors, typically based on volume.
- ***Exclusionary Conduct.*** The 2010 Guidelines introduce a new discussion of section 2 of the Sherman Act (the

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[Section 13:11]

[1]2010 Guidelines § 8.

[2]Empirically, one may observe that the FTC's post-merger challenge to Evanston Northwestern Healthcare's acquisition of Highland Park Hospital relied exclusively on the testimony of relatively small payors and not at all on evidence from the dominant health plan in the Chicago area (Blue Cross). See In re Evanston Northwestern Healthcare Corporation, No. 9315 (Initial Decision, FTC Oct. 20, 2005) at 52–59.

[3]2010 Guidelines § 3.

principal federal antimonopolization statute) into the merger context. The Guidelines state that "[e]nhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct."[4] "Exclusionary conduct" generally refers to conduct that results (or may result) in harm to competitors and that does not otherwise result in lower prices, enhanced efficiency, higher output, or product innovation, i.e., conduct that makes sense only because it will drive actual or potential competitors out of the market.[5] The inclusion of this topic in the Merger Guidelines apparently is intended to signal that the Agencies may challenge a merger on grounds beyond those cognizable under section 7 of the Clayton Act—i.e., on grounds other than likely increases in price or reductions in output. Given that the federal courts have developed a cautious approach to section 2 enforcement to avoid chilling aggressive competition (see discussion at § 13:15 of this chapter), one can only wonder how the Agencies expect to make credible *prospective* determinations that a merger that otherwise does not violate section 7 portends exclusionary conduct.

§ 13:12 Revision of the Federal Merger guidelines—The courts and the new guidelines

Without a doubt, parties to a merger would rather resolve any concerns about their transaction before the reviewing Agency and not before a court. The Agencies understand this fact and the uncertainties introduced by the 2010 Guidelines may well result in more transactions being abandoned in the face of a protracted investigation or an ultimate Agency decision to challenge.

Nonetheless, the Agencies cannot make enforcement decisions in a vacuum and must consider their ability to defend

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[4]2010 Guidelines § 1.

[5]See, e.g., Morgan v. Ponder, 892 F.2d 1355, 17 Media L. Rep. (BNA) 1465, 1989-2 Trade Cas. (CCH) ¶ 68881 (8th Cir. 1989).

a challenge in court.[1] Federal courts have constructed a well-established body of case law under section 7 and, notwithstanding that the courts have been generally responsive to the Merger Guidelines historically,[2] it remains to be seen how the courts will react to the new directions and emphasis of the 2010 Guidelines.

There can be little question that one objective of the 2010 Guidelines is to ease the Agencies' burden of proof in court, particularly with respect to market definition. In a wide range of cases, including many health care mergers, the Agencies have failed to block a merger because the courts would not adopt the Agencies' narrow product and/or geographic market definitions.[3] The New Guidelines seem clearly intended to shift the court's thinking away from a formulaic approach involving market definition and market

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[Section 13:12]

[1]The FTC, which reviews most health care provider mergers, does not face the judiciary until the appellate stage (unless the FTC is seeking temporary injunctive relief), and appellate review of FTC decisions occurs under the more deferential "substantial evidence" standard. See 15 U.S.C.A. § 45. The FTC's role as prosecutor, judge, and jury in its own case continues to be a source of controversy. See So I Serve as Both a Prosecutor and a Judge — What's the Big Deal?, Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, before the American Bar Association Annual Meeting (Aug. 5, 2010), available at http://www.ftc.gov/speeches/rosch/100805abaspeech.pdf.

[2]For Example, in 1990, the D.C. Circuit held that defendants in a merger case could not be charged with the burden of showing that the entry of new competitors into the market would be timely and effective. U.S. v. Baker Hughes Inc., 908 F.2d 981, 1990-1 Trade Cas. (CCH) ¶ 69084 (D.C. Cir. 1990). In 1992, the Merger Guidelines were revised to make new entry an affirmative defense. In 1998, the District Court for the District of Columbia adopted the approach of the 1992 Guidelines notwithstanding the contrary precedent of Baker Hughes. Federal Trade Com'n v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 1998-2 Trade Cas. (CCH) ¶ 72226 (D.D.C. 1998).

[3]See, e.g., F.T.C. v. Tenet Health Care Corp., 186 F.3d 1045, 1999-2 Trade Cas. (CCH) ¶ 72578 (8th Cir. 1999); U.S. v. Long Island Jewish Medical Center, 983 F. Supp. 121, 1997-2 Trade Cas. (CCH) ¶ 71960 (E.D. N.Y. 1997); F.T.C. v. Freeman Hosp., 69 F.3d 260, 1995-2 Trade Cas. (CCH) ¶ 71167 (8th Cir. 1995); U.S. v. Mercy Health Services, 902 F. Supp. 968, 1995-2 Trade Cas. (CCH) ¶ 71162 (N.D. Iowa 1995), decision vacated on other grounds, 107 F.3d 632, 1997-1 Trade Cas. (CCH) ¶ 71729 (8th Cir. 1997); U.S. v. Carilion Health System, 707 F. Supp. 840, 1989-1 Trade Cas. (CCH) ¶ 68451 (W.D. Va. 1989), judgment aff'd, 892 F.2d 1042, 1989-2 Trade Cas. (CCH) ¶ 68859 (4th Cir. 1989) (unpublished); see also

concentration to a more sophisticated economic analysis of competition.[4] However, it is quite unclear that courts will be receptive, at least in the near term, to greater reliance on economic modeling.

The requirement to prove a relevant market predates any version of the Merger Guidelines.[5] Courts have strongly adhered to this precept for more than five decades. In *Tenet Health Care Corp.*, for example, the Eighth Circuit stated that market definition is the "starting point for any merger analysis . . .. Without a well-defined relevant market, a merger's effect on competition cannot be evaluated."[6] The case law is replete with similar statements.

Notably, a 2010 decision by a New York federal court calls into question both the "targeted purchaser" and UPP aspects of market definition under the 2010 Guidelines.[7] In granting summary judgment to the defendants in a section 7 merger challenge brought by the City of New York, the court held that a relevant product market defined as "the low-cost municipal health benefits market"—in which the City was the only purchaser—was deficient as a matter of law. The court held that "it is . . . clear that the preferences of a single purchaser cannot define a product market."[8] The court also rejected the use of a UPP analysis to support an amended product market definition, stating, "The Court notes that its

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California v. Sutter Health System, 130 F. Supp. 2d 1109, 1113, 2001-1 Trade Cas. (CCH) ¶ 73255 (N.D. Cal. 2001).

[4]It also seems apparent that the more amorphous "toolbox" (Chinese menu) approach of the 2010 Guidelines is intended to prevent defendants in a merger action from challenging the Agency's failure to follow its own Guidelines. See Thomas Catan and Brent Kendall, Antitrust Regulators Unveil Merger Guidelines Wall Street Journal (Apr. 21 2010) (quoting former FTC attorney), available at http://online.wsj.com/article/SB10001424052748704448304575196080981338808.html.

[5]E.g., U.S. v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957) (market definition is "necessary predicate" to section 7 claim; Brown Shoe Co. v. U.S., 370 U.S. 294, 362, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) (market definition required by language of section 7).

[6]F.T.C. v. Tenet Health Care Corp., 186 F.3d 1045, 1051, 1999-2 Trade Cas. (CCH) ¶ 72578 (8th Cir. 1999).

[7]City of New York v. Group Health Inc., 2010-1 Trade Cas. (CCH) ¶ 77053, 2010 WL 2132246 (S.D. N.Y. 2010).

[8]City of New York v. Group Health Inc., 2010-1 Trade Cas. (CCH) ¶ 77053, 2010 WL 2132246 (S.D. N.Y. 2010).

research has not revealed a single decision of a federal court adopting this test. In light of the case law's clear requirement that a Plaintiff allege a particular product market in which competition will be impaired, this absence of authority is hardly surprising."[9]

In order to gain judicial acceptance of a more effects-oriented merger analysis, the Agencies will have to convince the courts that economic models are rational and reliable bases for decision. At this point in time, there is little research validating the models through post hoc merger studies. Likewise, as the New York court's commentary illustrates, courts have been unwilling to rely on such economic evidence when the contours of a traditionally defined market are unclear.[10] As Commissioner Rosch noted in his Statement on the 2010 Guidelines, "many, if not most, courts have relied on empirical evidence instead of economic evidence, and have considered economic evidence as corroborative of that empirical evidence, if they have considered it at all."[11]

§ 13:13 Expanded enforcement under section 5 of the FTC Act

The FTC and the DOJ have differing, but relatively congruent, authority to enforce the antitrust laws. The two Agencies share authority to challenge mergers under section 7 of the Clayton Act. Enforcement of the Sherman Act is the province of DOJ. The FTC's antitrust enforcement authority arises under the Federal Trade Commission Act ("FTC Act"), section 5 of which declares unlawful "unfair methods of competition" and authorizes the FTC to "prevent persons, partnerships, or corporations" from "using unfair methods of competition in or affecting commerce."[1] This grant of author-

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[9]City of New York v. Group Health Inc., 2010-1 Trade Cas. (CCH) ¶ 77053, 2010 WL 2132246 (S.D. N.Y. 2010).

[10]See, e.g., U.S. v. Oracle Corp., 331 F. Supp. 2d 1098, 2004-2 Trade Cas. (CCH) ¶ 74542 (N.D. Cal. 2004).

[11]Rosch Statement, citing F.T.C. v. Staples, Inc., 970 F. Supp. 1066, 1997-2 Trade Cas. (CCH) ¶ 71867 (D.D.C. 1997); F.T.C. v. CCC Holdings Inc., 605 F. Supp. 2d 26, 2009-1 Trade Cas. (CCH) ¶ 76544 (D.D.C. 2009).

[Section 13:13]

[1]15 U.S.C.A. § 41(a).

ity is understood to be at least coextensive with the body of federal antitrust laws, including the Sherman Act.[2] However, a long-standing legal debate exists as to the extent to which the FTC's authority to prevent "unfair methods of competition" enables the FTC to prosecute conduct that would *not* violate the Sherman Act or the Clayton Act—i.e., "freestanding" violations of section 5.

The use of section 5 for broader enforcement purposes has ebbed and flowed over time, but the current FTC seems to be moving purposefully to cut a broader swath under the statute. This direction is of interest to the health care industry because, in more recent years, the FTC has emerged as the lead Agency in the review of transactions involving health care providers.

§ 13:14 Expanded enforcement under section 5 of the FTC Act—A brief history of section 5 enforcement

The FTC Act was passed (in 1914) in consequence of Congress's fear that the Sherman Act would be undermined by the courts' adoption of the "rule of reason" standard as well as a general distrust of the economic and social views perceived to be held by the federal judges of that period.[1] Thus, Congress intentionally used the broad "unfair methods" language to define the FTC's authority.

The Supreme Court has recognized on several occasions that section 5 is broader in scope than the Sherman Act. For example, in FTC v. Brown Shoe Co.,[2] the Court held that section 5 provided authority to enjoin *incipient* violations of the Sherman Act and Clayton Act—conduct not technically

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[2]See, e.g., Federal Trade Commission v. Motion Picture Advertising Service Co., 49 F.T.C. 1730, 344 U.S. 392, 73 S. Ct. 361, 97 L. Ed. 426 (1953).

[Section 13:14]

[1]See Tales from the Crypt: The Return of Section 5, Remarks of Commissioner Leibowitz, Section 5 Workshop (Oct. 17, 2008), available at http://222.ftc.gov/bc/workshops/section5/docs/jleibowitz.pdf; William Kovacic and Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 Antitrust L. J. 930–32 (2010).

[2]F.T.C. v. Brown Shoe Co., 384 U.S. 316, 86 S. Ct. 1501, 16 L. Ed. 2d 587 (1966).

in restraint of trade but presenting a risk of that result. In FTC v. Sperry & Hutchinson Co., the Court went somewhat farther, stating that, in measuring a practice against the "elusive" standard of fairness, the FTC may consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[3]

Notwithstanding this broad dictum, lower courts historically have been less excited about the prospect of having the FTC arbitrate public values. In a series of cases during the 1980s, the federal appeals courts overturned Commission decisions under section 5 that purported to depart from Sherman Act jurisprudence.[4] The Commission itself apparently pulled back its enforcement horns in response, stating in a 1984 decision: "While Section 5 may empower the Commission to pursue those activities that offend the 'basic policies' of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed."[5]

It bears noting that a more recent Supreme Court decision casts a large shadow on the idea that "unfairness" in and of itself can be the source of an antitrust violation. In Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., the Court stated that:

> [e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair

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[3]F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 244, 92 S. Ct. 898, 31 L. Ed. 2d 170, 1972 Trade Cas. (CCH) ¶ 73861 (1972).

[4]See Official Airline Guides, Inc. v. F. T. C., 630 F.2d 920, 1980-2 Trade Cas. (CCH) ¶ 63544 (2d Cir. 1980) (rejecting section 5 challenge to arbitrary but unilateral refusal to deal); Boise Cascade Corp. v. F.T.C., 637 F.2d 573, 1980-2 Trade Cas. (CCH) ¶ 63323 (9th Cir. 1980) (overturning finding of unfairness where Commission failed to show evidence of actual collusion in challenge to parallel pricing); E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 1984-1 Trade Cas. (CCH) ¶ 65881 (2d Cir. 1984) (unfairness standard does not prohibit otherwise legal and unilaterally adopted price signaling by competitors).

[5]General Foods Corp., Trade Reg. Rep. (CCH) Transfer Binder ¶ 22,142 at 22,987 (FTC 1984).

competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."[6]

§ 13:15 Expanded enforcement under section 5 of the FTC Act—Recent FTC enforcement under section 5

Since 2008, the FTC has reinvigorated its focus on "freestanding" section 5 cases challenging conduct that almost certainly would not be reached by the Sherman Act. The Commission's concern seems directed particularly toward single firm conduct that may be injurious to rivals but would not rise to the level of monopolization or attempted monopolization under the Sherman Act's section 2. One FTC commissioner has suggested that the Commission's enforcement of section 5 need not raise the types of "intellectual" concerns that "have propelled Section 2 doctrine in progressively more permissive directions." He argues that, "Compared to the typical federal court, the FTC offers a superior platform for elaborating competition policy, and particularly for policy toward dominant firms."[1]

N-Data. The Commission's section 5 complaint in 2008 against Negotiated Data Solutions ("N-Data") challenged the company's enforcement of certain patents against makers of equipment employing a proprietary computer networking ("Ethernet") standard.[2] The standard had been adopted by a national standards setting organization (the "IEEE") based on licensing commitments from N-Data's predecessor, which N-Data determined it could no longer honor. There was no allegation that N-Data or its predecessor engaged in improper or exclusionary conduct to induce IEEE to adopt the Ethernet technology as the industry standard. However, the Commission asserted that "the FTC's authority to stop anticompetitive conduct that does not rise to the level of a Sherman Act violation is unique among federal agencies"—

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[6]Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168, 1993-1 Trade Cas. (CCH) ¶ 70277 (1993) (citation omitted).

[Section 13:15]

[1]See William Kovacic and Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 Antitrust L. J. 937–39 (2010).

[2]In re Negotiated Data Solutions LLC, No. C-4324 (Complaint, FTC Sept. 22, 2008).

and "the cost of ignoring this particularly pernicious problem is too high. Using our statutory authority to its fullest extent is not only consistent with the Commission's obligations, but also essential to preserving a free and dynamic marketplace."[3] The FTC's complaint was issued simultaneously with a consent order settling the matter and so the Commission's view of its authority was not tested in court.[4]

Intel. The FTC's 2009 complaint against Intel Corporation garnered more significant attention. The complaint alleged that the company had engaged in unfair methods of competition by, among other things, using market share-based discounts that prevented customers from buying more than a set percentage of their microprocessors from Intel's rivals and using bundled discounts that amounted to below-cost pricing.[5] Although the complaint was framed in terms familiar to section 2 cases, the extensive technological competition and aggressive marketing practices in the industry made a successful section 2 claim questionable, and the FTC's reliance on section 5 alone seemed clearly a decision to evade section 2's strict requirements for proof of competitive harm.

The Commission's statement upon issuance of the Intel complaint included the following argument:

> [C]oncern over class actions, treble damage awards, and costly jury trials has caused many courts in recent decades to limit the reach of antitrust. The result has been that some conduct harmful to consumers may be given a "free pass" under antitrust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement.

This is a remarkable statement. The Commission has taken the position that the courts' reluctance to condemn conduct that may be—but is not clearly—anticompetitive is a defect in the legal system. The FTC apparently believes that a relaxed burden of proof is acceptable in such cases, at least as long as the Commission itself is the plaintiff. In the Intel case, the Commission acknowledged that it was pursu-

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[3]Statement of the Federal Trade Commission, In re Negotiated Data Solutions LLC, No. 0510094 (Jan. 23, 2008).

[4]In re Negotiated Data Solutions LLC, No. C-4324 (Decision and Order, FTC Sept. 22, 2008).

[5]In re Intel Corporation, No. 9341 (Complaint, FTC Dec. 16, 2009).

ing conduct that arguably resulted in a restraint on consumer choice but did not demonstrably result in reduced output or higher prices.[6] In other words, the Commission was rejecting the Supreme Court's oft-repeated view that the antitrust laws protect "competition, not competitors."[7]

The Intel case was settled in 2010 without judicial review, pursuant to a consent order requiring Intel to take affirmative steps to assist its competitors.[8]

U-Haul. A wholly different but no less interesting application of section 5 arose in the FTC's challenge to what it believed to be an "invitation to collude" extended by U-Haul International, Inc. ("U-Haul") to its main competitor, Avis Budget Group, Inc ("Budget").[9] The FTC's complaint alleged that U-Haul adopted two strategies to eliminate competition and raise prices in the market for one-way truck rentals. The first strategy involved instructions purportedly given to U-Haul managers to raise their one-way rental rates and then to encourage their counterparts at Budget to follow suit. In the second strategy, the managers were instructed to drop their prices below Budget's rates and then to inform the Budget managers of their reductions, which allegedly was intended to demonstrate to Budget that U-Haul's collusive strategy would be more attractive. The complaint also alleged that U-Haul's chairman made an overt public invitation to collude during a 2008 earnings call that he knew Budget representatives would be monitoring. The alleged invitation took the form of a reference to U-Haul's "price leadership," a statement that U-Haul recently had raised its prices and a suggestion that competitors should do the same. The FTC's charges in this case also were settled by consent order.[10]

In this matter, the FTC did *not* allege that Budget agreed

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[6]Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, In the Matter of Intel Corporation, No. 9341 (Dec. 16, 2009).

[7]Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701, 1977-1 Trade Cas. (CCH) ¶ 61255 (1977).

[8]In re Intel Corporation, No. 9341 (Decision and Order, FTC Oct. 29, 2010).

[9]In re U-Haul International, Inc., No. C-4294 (Complaint, FTC July 14, 2010).

[10]In re U-Haul International, Inc., No. C-4294 (Decision and Order, FTC July 14, 2010).

to collude with U-Haul. Nor did the FTC allege that U-Haul had any market power. By definition, therefore, the FTC did not allege that U-Haul's actions caused any reduction in competition.[11] Indeed, the FTC found none of those traditional allegations necessary to its section 5 claim. "It is not essential that the Commission find repeated misconduct attributable to senior executives, or define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision."[12]

If U-Haul means that entirely unilateral conduct having *no impact* on competition can violate section 5 of the FTC Act, one is left to wonder how the FTC will draw lines between incipient antitrust violations (probably the most generous reading of the U-Haul complaint) and merely disagreeable behavior.[13] The emerging section 5 interpretations stand to pose great challenges for businesses (in health care or any industry) to distinguish vigorous competition from unlawful restraints.

The FTC's interest in challenging conduct outside the Sherman Act under section 5 has two different implications for enforcement of the antitrust laws against health care providers. First, section 5 challenges against some providers will be limited by the FTC Act's jurisdictional limitation. Specifically, the FTC's jurisdiction over corporations and associations extends only to such entities "organized to carry

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[11]There is no precedent under which a unilateral invitation to collude, without more, constitutes an antitrust violation. Rather, courts have required a "dangerous probability" that such collusion would result in monopoly power, a requirement that presupposes the definition of a relevant market and evidence of significant market power. See, e.g., U.S. v. American Airlines, Inc., 743 F.2d 1114, 1984-2 Trade Cas. (CCH) ¶ 66232 (5th Cir. 1984).

[12]Analysis of Agreement Containing Consent Order to Aid Public Comment, In re U-Haul International, Inc. and AMERCO, File No. 081 0157 (June 9, 2010).

[13]Beyond Justice Stewart's famous observation about pornography in Jacobellis v. State of Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring), "I know it when I see it" has not been widely embraced as a legal standard.

on business for [their] own profit or that of [their] members."[14] This limitation is understood to require, as to any organization, that there be a sufficient nexus between the conduct in question and the organization's public purpose and that the profits earned must be devoted to public, rather than private, interests.[15] This is not always as clear a line as it may appear.[16] However, there is little question that the FTC's jurisdiction under section 5 does not extend to the conduct of nonprofit charitable hospitals. However, joint ventures, partnerships, and associations between nonprofit hospitals and private individuals (e.g., physicians) or for-profit organizations are another matter, and the FTC has exerted jurisdiction over, for example, PHOs on many occasions. Accordingly, there is a foreseeable possibility that provider collaborations could be challenged under a freestanding "unfairness" theory under section 5 even in cases where harm to competition may not be apparent.

More broadly, one could also speculate that persistent FTC enforcement under section 5's unfairness standard eventually could influence the courts' interpretations of the Sherman Act. It is clear that a majority of the current Commission believes that the courts have become too lenient toward ambiguous conduct by dominant firms (i.e., firms with large market shares), and the FTC can be expected to continue pressing theories similar to the European Commission's "abuse of dominant position" standard. Because Sherman Act enforcement in the United States has had pendulum-like qualities, a shift in the FTC's current enforcement position may have longer-term implications.[17]

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[14]15 U.S.C.A. § 44. This limitation does not extend to the FTC's ability to enforce section 7 of the Clayton Act against nonprofit organizations. See F.T.C. v. University Health, Inc., 938 F.2d 1206, 1991-2 Trade Cas. (CCH) ¶ 69508 (11th Cir. 1991).

[15]Matter of College Football Association, 117 F.T.C. 971, 1994 WL 16011007 (1994).

[16]See California Dental Ass'n v. F.T.C., 526 U.S. 756, 766–68, 119 S. Ct. 1604, 143 L. Ed. 2d 935, 1999-1 Trade Cas. (CCH) ¶ 72529 (1999) (application of the jurisdictional requirement is not formulaic nor is there a substantiality requirement).

[17]See William Kovacic and Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 Antitrust L. J. 933–39 (2010) (comparing section 2 decisions from the

§ 13:16 The *American Needle* decision

The Supreme Court's 2010 opinion in American Needle, Inc. v. National Football League,[1] is the Court's first direct consideration of whether and how the so-called Copperweld Doctrine should apply to joint ventures. The case arose from the National Football League's (NFL) decision to award an exclusive contract to Reebok to produce NFL team-logo headwear and to terminate its relationship with all other suppliers of those products, including American Needle. The decision is directly relevant to health care joint ventures.

§ 13:17 The *American Needle* decision—Background

The NFL is a joint venture of its teams, which are independent firms, created to provide a form of entertainment—professional football. In 1963, the NFL teams formed a parallel enterprise called National Football League Properties (NFLP) through which the teams collectively license manufacturers to make team-logo merchandise, including jerseys, sweatshirts, hats, and other apparel bearing the names and colors of the various teams. NFLP acts as the agent of the various teams to exploit their respective intellectual property; however, each team individually continues to own its intellectual property. NFLP also is responsible for most marketing and distribution of NFL team items. Through NFLP, the teams share, on an equal basis, almost all of the revenue earned from NFLP-licensed merchandise.

American Needle produced team-logo caps and hats for NFL clubs for the better part of five decades. In 2000, however, by vote of the teams, NFLP decided to bid an exclusive contract to make all headwear for all 32 teams.

1970s with more recent cases and suggesting that the decision in Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 1979-1 Trade Cas. (CCH) ¶ 62718, 53 A.L.R. Fed. 768 (2d Cir. 1979) (rejected by, Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 1991-2 Trade Cas. (CCH) ¶ 69624 (9th Cir. 1991)) and (rejected by, General Cigar Holdings, Inc. v. Altadis, S.A., 205 F. Supp. 2d 1335, 2002-2 Trade Cas. (CCH) ¶ 73750 (S.D. Fla. 2002)) demarcates the change in the direction of section 2 enforcement).

[Section 13:16]

[1]American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

The contract was awarded to Reebok, and American Needle's license was then terminated. American Needle filed suit against the NFL, alleging that the exclusive contract with Reebok violated both sections 1 and 2 of the Sherman Act. It was the section 1 claim that became the focus of the litigation.

The NFL contended that American Needle's section 1 claim could not be maintained because the NFL functions as a single economic actor and not as a mere combination of its member teams. Because section 1 addresses only restraints of trade arising from concerted conduct, the NFL took the position that the award of the exclusive contract to Reebok was beyond the reach of section 1.

In support of its argument for single-entity treatment, the NFL relied on the tenets of Copperweld Corp. v. Independence Tube Corp.[1] In Copperweld, the Supreme Court held that a parent corporation and its wholly owned subsidiary are incapable of conspiring in violation of section 1. The Court reasoned that this was so because a parent and its wholly owned subsidiary always have a complete "unity of interest," their objectives are "common, not disparate," and their actions are guided by a "single corporate consciousness." The parent and subsidiary thus function as a single economic actor in the marketplace, and accordingly, their joint conduct does not deprive the marketplace of erstwhile competition.

Following the Copperweld decision, lower courts were called upon to apply those principles in contexts involving less-than-complete ownership or control, including partly owned subsidiaries, corporations (both related and unrelated) under common control, joint operating agreements, associations, and joint ventures.[2] In the context of sports leagues, lower courts almost unanimously have declined to hold that concerted labor actions are outside of section 1 but

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[Section 13:17]

[1]Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628, 1984-2 Trade Cas. (CCH) ¶ 66065 (1984).

[2]For a more comprehensive discussion of the lower courts' interpretations of Copperweld, see Robert McCann and Fatema Zanzi, In Necessary Things, Unity — Conspiracies, Copperweld, and Health Care Joint Ventures in A. Gosfield, ed., Health Law Handbook 2008 Edition (Thomson West 2008).

have reached differing conclusions when it comes to the various nonlabor functions of a league, including licensing and marketing of team merchandise.

For some purposes, the NFL clearly functions as a single entity. For example, the NFL can only create a football season and establish the rules of play by acting as one. No individual team can act alone to create the competition of a football season, and competition would be amusing, but not practical, if each team made up its own rules. Although the teams compete on the football field, they are not competitors when it comes to creating the mode of competition itself. However, the question in *American Needle* was whether, given that basic premise, NFL teams then have a unity of interest in conducting all of their activities or, at least, in the licensing of team merchandise.[3]

The NFL argued that the relevant economic objective should be viewed globally—promoting professional football as a form of entertainment in competition with a wide range and variety of other forms of entertainment. American Needle argued that the relevant concern is "local"—that the intellectual property of some franchises is more valuable (because of greater fan support and loyalty) and that the interests of the "big name" teams in profiting from their intellectual property are not necessarily aligned with the interests of less esteemed teams. Thus, individual teams do, or certainly could, compete with each other to sell teamwear licenses.

§ 13:18 The *American Needle* decision—The global view in the lower courts

The federal trial court granted the NFL's motion for summary judgment, holding that the NFL teams "clearly are" acting as a single economic entity with regard to the exploita-

[3]By the time that the case reached the Supreme Court, the NFL (which joined American Needle in urging the Court to hear the case) made the go-for-broke argument that essentially everything the NFL does relating to the provision of professional football should be beyond the reach of section 1.

tion of their intellectual property rights.[1] The court concluded that the NFL teams "have so integrated their operations that they should be deemed to be a single entity rather than joint ventures [sic] cooperating for a common purpose."[2]

The court suggested that a proper reading of Copperweld might lead to the conclusion that sports leagues should be accorded single-entity treatment for all matters other than labor disputes, observing that "[d]elegated decision-making [over licensing of intellectual property] does not deprive the marketplace of independent centers of decision-making." The court concluded that licensing procedures should be viewed as an internal governance matter for the league and gave apparent weight to the fact that the plaintiff had never dealt with any of the teams as independent organizations.[3]

[Section 13:18]

[1]American Needle, Inc. v. New Orleans Louisiana Saints, 496 F. Supp. 2d 941, 943, 2007-2 Trade Cas. (CCH) ¶ 75813 (N.D. Ill. 2007), aff'd, 538 F.3d 736, 88 U.S.P.Q.2d 1358, 2008-2 Trade Cas. (CCH) ¶ 76259 (7th Cir. 2008), cert. granted, 129 S. Ct. 2859, 174 L. Ed. 2d 575 (2009) and judgment rev'd, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

[2]American Needle, Inc. v. New Orleans Louisiana Saints, 496 F. Supp. 2d 941, 943, 2007-2 Trade Cas. (CCH) ¶ 75813 (N.D. Ill. 2007), aff'd, 538 F.3d 736, 88 U.S.P.Q.2d 1358, 2008-2 Trade Cas. (CCH) ¶ 76259 (7th Cir. 2008), cert. granted, 129 S. Ct. 2859, 174 L. Ed. 2d 575 (2009) and judgment rev'd, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010), citing Texaco Inc. v. Dagher, 547 U.S. 1, 6, 126 S. Ct. 1276, 164 L. Ed. 2d 1, 2006-1 Trade Cas. (CCH) ¶ 75143 (2006). It should be noted that the section 1 claim was always in a strained posture because the plaintiff did not directly allege that the NFL acted improperly by adopting a common scheme to license intellectual property. Rather, the plaintiff's complaint alleged only that the act of awarding an exclusive contract to Reebok violated section 1.

[3]American Needle, Inc. v. New Orleans Louisiana Saints, 496 F. Supp. 2d 941, 944, 2007-2 Trade Cas. (CCH) ¶ 75813 (N.D. Ill. 2007), aff'd, 538 F.3d 736, 88 U.S.P.Q.2d 1358, 2008-2 Trade Cas. (CCH) ¶ 76259 (7th Cir. 2008), cert. granted, 129 S. Ct. 2859, 174 L. Ed. 2d 575 (2009) and judgment rev'd, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010). The court concluded that the fact that the teams individually continued to own their intellectual property was irrelevant, citing cases in which single-entity treatment was given to cooperatives. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962); City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc., 838 F.2d 268, 1988-1 Trade Cas. (CCH) ¶ 67871 (8th Cir. 1988).

The court subsequently dismissed the section 2 claim as well, finding that it was doomed by the antecedent determination that the NFL acted as a single entity and as such, the NFL could contract with whom it pleased.[4]

The dismissal of the section 1 claim was affirmed by the Seventh Circuit.[5] While citing its previously stated opinion that whether a sports league is a single entity is a question that should be addressed not only "one league at a time" but also "one facet of a league at a time," the court stated that it was not convinced that the NFL's single-entity status turned—as American Needle contended—on whether the league's member teams theoretically *could* compete with each other when licensing and marketing their intellectual property.[6] Recognizing that post-Copperweld decisions have concluded that a "unity of interest" does not require a complete absence of conflicting objectives, and viewing the licensing of intellectual property as a means to promote the league as an enterprise (i.e., the "global" view), the court concluded that "it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football."[7] The Circuit concluded that "nothing in § 1 prohibits the NFL teams from

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[4]American Needle, Inc. v. New Orleans La. Saints, 533 F. Supp. 2d 7901, 2007-2 Trade Cas. (CCH) ¶ 75973, 69 Fed. R. Serv. 3d 1418 (N.D. Ill. 2007), aff'd, 538 F.3d 736, 88 U.S.P.Q.2d 1358, 2008-2 Trade Cas. (CCH) ¶ 76259 (7th Cir. 2008), cert. granted, 129 S. Ct. 2859, 174 L. Ed. 2d 575 (2009) and judgment rev'd, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

[5]American Needle Inc. v. National Football League, 538 F.3d 736, 88 U.S.P.Q.2d 1358, 2008-2 Trade Cas. (CCH) ¶ 76259 (7th Cir. 2008), cert. granted, 129 S. Ct. 2859, 174 L. Ed. 2d 575 (2009) and judgment rev'd, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

[6]American Needle Inc. v. National Football League, 538 F.3d 736, 742–43, 88 U.S.P.Q.2d 1358, 2008-2 Trade Cas. (CCH) ¶ 76259 (7th Cir. 2008), cert. granted, 129 S. Ct. 2859, 174 L. Ed. 2d 575 (2009) and judgment rev'd, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010), citing Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 95 F.3d 593, 600, 1996-2 Trade Cas. (CCH) ¶ 71554 (7th Cir. 1996).

[7]American Needle Inc. v. National Football League, 538 F.3d 736, 743, 88 U.S.P.Q.2d 1358, 2008-2 Trade Cas. (CCH) ¶ 76259 (7th Cir. 2008), cert. granted, 129 S. Ct. 2859, 174 L. Ed. 2d 575 (2009) and judgment rev'd, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010). The court cited, among other sources,

cooperating so the league can compete against other entertainment providers . . .. Viewed in this light, the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property . . .."[8]

§ 13:19 The *American Needle* decision—The Supreme Court's local view

The Supreme Court unanimously reversed. Focusing on the same question that defined the lower courts' decisions—whether the concerted activity of the NFL teams "deprives the marketplace of independent centers of decisionmaking" on which competition depends, the Court opined that the answer does not depend on whether the parties are participants in a single legal entity or even whether they seem like one firm or multiple firms in any metaphysical sense.[1] If the conduct in question joins together separate actors pursuing separate economic interests, then there is concerted action within the scope of section 1, and the courts must determine whether the restraint is unreasonable.[2]

Accordingly, the Court found that the conduct of the NFL teams through NFLP was not "categorically" beyond the reach of section 1. Observing that each of the teams is a "substantial, independently owned, and independently managed business," the Court concluded that their general corporate actions are guided by separate, not single,

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the dissent in National Football League v. North American Soccer League, 459 U.S. 1074, 1077, 103 S. Ct. 499, 74 L. Ed. 2d 639, 1982–83 Trade Cas. (CCH) ¶ 65074 (1982) (Rehnquist, J., dissenting) for the proposition that "[a]lthough individual NFL teams compete with one another on the playing field, they rarely compete in the market place."

[8]American Needle Inc. v. National Football League, 538 F.3d 736, 744, 88 U.S.P.Q.2d 1358, 2008-2 Trade Cas. (CCH) ¶ 76259 (7th Cir. 2008), cert. granted, 129 S. Ct. 2859, 174 L. Ed. 2d 575 (2009) and judgment rev'd, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

[Section 13:19]

[1]American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 2212, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

[2]American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 2212, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

corporate consciousnesses.[3] The teams compete "not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel."[4] As relevant to American Needle's complaint, the Court (taking the "local" view) found that the teams are potentially competing suppliers in the market for intellectual property: "While teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."[5]

The Court went on to observe that its conclusion does not mean that the NFL teams are "trapped" by antitrust law: "The fact that the NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate to produce games, provides a perfectly sensible justification for making a host of collective decisions."[6] On that basis, the Court remanded the case for further proceedings as to the legality of the joint conduct under the rule of reason.

§ 13:20 The *American Needle* decision—Implications for health care joint ventures

There are two sets of relationships in joint ventures that potentially raise Copperweld questions: (1) the vertical "parent-subsidiary" relationship between the joint venture and each of the joint venture partners and (2) the horizontal relationship *among* the joint venture partners.

The vertical parent-subsidiary dimension was not directly at issue in *American Needle*. Nonetheless, the Supreme Court's decision should be understood to reemphasize that

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[3]American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 2212, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

[4]American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 2212, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

[5]American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 2213, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

[6]American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 2216, 176 L. Ed. 2d 947, 94 U.S.P.Q.2d 1673, 2010-1 Trade Cas. (CCH) ¶ 77019 (2010).

two parties will be "Copperweld-ed" only if, in the final analysis, there is sufficient common control to preclude the possibility that the parties *could* pursue separate economic interests regardless of whether they do so in practice.

In health care joint venture relationships, to avoid section 1 liability in cases where (for example) payor contracts are to be negotiated on behalf of a joint venture by one of the owners, the owner must be in a position to assert control over the business and affairs of the joint venture whether or not that authority is exercised.[1] Certainly, the attributes of control may differ in specific situations. However, the facts in their totality should support a conclusion that the "parent" joint venture partner has the ability to cause the "subsidiary" joint venture to serve the parent's competitive interest.[2]

The relationship of direct concern in *American Needle* was that among the joint venture partners acting through the joint venture (where those partners are actual or potential competitors). The NFL teams wanted their collective licensing decisions to be treated as the unitary decisions of the NFL, a position that the Supreme Court rejected.

In health care, a similar question might arise, for example, when two competing hospitals joint venture a cancer center. There foreseeably would be decisions (e.g., concerning the provision of ancillary services) that the two hospitals would make jointly that would be considered so intertwined with the cancer center that they should viewed as the unitary decisions of the joint venture (and analyzed under section 2) instead of as agreements between the venture partners (and analyzed under section 1). However, in rejecting the NFL's position on this question, the Supreme Court seems to have precluded reliance on Copperweld to place *any* acts of a joint venture beyond the reach of section 1.

[Section 13:20]

[1]See Robert McCann and Fatema Zanzi, In Necessary Things, Unity — Conspiracies, Copperweld, and Health Care Joint Ventures in A. Gosfield, ed., Health Law Handbook 2008 Edition (Thomson West 2008), for a fuller discussion of these issues.

[2]Of course, the section 1 concern only exists in the first instance if the owner and the joint venture serve the same relevant product and geographic markets or at least are potential entrants in each other's markets.

In general, the antitrust laws require joint ventures to defend both their formation and their ongoing actions under section 1. This is a higher standard than that to which other forms of business combination are held. For example, a merged company does not face section 1 scrutiny of its postmerger business decisions. This approach reflects a philosophical view that incomplete combinations of competitors present risks to competition than more integrated combinations, although in practice it also means that the law holds joint ventures to higher expectations of postcreation behavior (in terms of enhancing consumer welfare) than it does a combination effected through merger or acquisition.[3]

The NFL's argument, at root, was that there are "core" business activities of the league (i.e., of the joint venture) that should enjoy relief from section 1 scrutiny. This is not an illogical argument as the football context aptly illustrates. If entertainment in the form of a professional football league can only exist by agreement of the independent clubs, it arguably stands to reason that there is a set of activities that are so interrelated with the creation and operation of a league that decisions concerning those activities are effectively unitary and not concerted. The problem with this argument—which the Supreme Court seemed to acknowledge—is that there is no easy or reliable means to define the "core" activities of a joint venture and distinguish them from closely related but "noncore" pursuits. In declining to extend Copperweld protection to NFLP licensing activities, the Court effectively acknowledged that to do so would require

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[3]However, joint ventures are not as vulnerable as purely independent actors, as joint conduct in pursuit of legitimate joint venture activities categorically is not subject to per se condemnation, as the Supreme Court has affirmed in a trilogy of cases: Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1, 201 U.S.P.Q. 497, 1979-1 Trade Cas. (CCH) ¶ 62558 (1979) (concerted pricing exempt from per se scrutiny where necessary to the joint venture's creation of a new product); Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 356–57, 102 S. Ct. 2466, 73 L. Ed. 2d 48, 1982-2 Trade Cas. (CCH) ¶ 64792 (1982) (per se scrutiny of joint price-setting appropriate in the absence of integrative efficiencies or pooling of risks through the joint venture); and Texaco Inc. v. Dagher, 547 U.S. 1, 126 S. Ct. 1276, 164 L. Ed. 2d 1, 2006-1 Trade Cas. (CCH) ¶ 75143 (2006) (joint price-setting not subject to per se review where the partners had combined their assets through the joint venture and ceased independent competition).

difficult and imprecise line-drawing—a task that is avoided by maintaining section 1 scrutiny of all joint venture activities.

In the final analysis, *American Needle* simply reaffirms the well-understood legal principle that agreements among competitors are judged by their effects and not by their form. All agreements in the form of a joint venture are subject section 1 scrutiny, and Copperweld does not transform the independent interests of the competitors acting through the joint venture, no matter how closely related to the joint venture's purposes, into a single corporate consciousness.

§ 13:21 Concluding observations

Antitrust practitioners sometimes seem to portray their labors as a type of Talmudic search for revealed truth. However, the notion that there is a discernable and perfect paradigm for competition and the regulation of competition in the U.S. economy is unrealistic. The notion that such a paradigm exists for a market with as many distorted incentives as health care is absurd.

Antitrust enforcement, like all law enforcement, is part of a political system. In the Obama administration, the enforcement pendulum is swinging toward greater regulation. Those who hold out hope for broad legislative relief from the antitrust laws for health care providers (e.g., exemptions for ACOs) have not been paying attention to the repeated and bipartisan failure of such efforts over the past 25 years.

Recent developments, including those described in this chapter, suggest that many proposed combinations and collaborations among health care providers and other industry participants will face more demanding scrutiny. Because there is no paradigm on which all can agree, some antitrust enforcement decisions will be "right" and some will be debatable. The apparent challenge to providers and their counsel is to create more sophisticated and supportable definitions of the benefits that accrue to consumers from combination or joint action.

As clinical alignment and integration becomes a greater imperative in the health reform context, one would expect that exercise to entail the definition of "efficiencies" founded on improved access and higher quality services and not just the consolidation of, e.g., the laundries. The description and

quantification of those efficiencies will be challenging, as will convincing the Agencies to credit them, particularly if economic models point in a different direction. Yet, demonstrable planning for such objectives may well differentiate those collaborations among "close" competitors that survive antitrust scrutiny in the political environment of health reform.