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I. INTRODUCTION

In *American Needle*,[2] the Seventh Circuit affirmed summary judgment in favor of the National Football League on a challenge to the League's group licensing practices based on the holding that the League was effectively a "single entity" incapable of conspiring with itself. Most of the discussion relating to *American Needle* understandably has focused on the "single entity" issue, including whether the Supreme Court will use the case to address how the "single entity" doctrine applies to legitimate joint ventures. Indeed, despite winning the case in the Seventh Circuit, the NFL has taken the unusual step of supporting the petition for a writ of certiorari, and both the National Basketball Association and National Hockey League submitted amicus briefs supporting Supreme Court review. The sports leagues obviously view *American Ne*edle as the right case at the right time to clarify the proper analytical framework for addressing antitrust claims against sports leagues. And the sports leagues may well be correct.

But what if the Supreme Court were to grant the petition, but five justices could not reach agreement that sports leagues should be immune from Section 1 scrutiny as a "single entity"? What alternative analytical framework could and should the Supreme Court adopt if it were to accept the case but reject the NFL's single entity argument? For the past several decades, the default mode of analysis for challenges to restraints by professional sports leagues has been the full rule of reason. Sports leagues have been forced to defend numerous types of business decisions and practices (e.g., league rules relating to scheduling, location of franchises, sharing of revenue, transfers of ownership, licensing of league products) that are integral to the very nature of their business through a full blown rule of reason analysis, including burdensome merits discovery and expert testimony, followed ultimately by a court and/or jury second-guessing the league's decisions. Based upon the Supreme Court's recent antitrust decisions, including *Dagher*,[3] even if the Court were to reject the NFL's single-entity argument, it is almost inconceivable that the current Court would conclude that legitimate joint ventures

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[2] Am. Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3326 (U.S. Nov. 17, 2008) (No. 08-661).

[3] Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

should be forced to defend their everyday business decisions under the full rule of reason.

The question, then, is whether there is an alternative analytical framework the Court could adopt that could cut short or streamline these wasteful litigations but without a finding that sports leagues are a single entity? For many years, in addition to pressing its "single entity" defense, sports leagues have argued for a particular variant of the "ancillary restraints doctrine" that would find a League's internal decisions, rules, and practices are "ancillary" to the joint venture itself and, hence, reasonable as a matter of law. As discussed below, the sports leagues have not had much success in the lower courts with this argument; moreover, the jurisprudence regarding the ancillary restraints doctrine in general has a muddled history and has largely been subsumed within the broader rule of reason. Professor Gary R. Roberts, who has been writing on this subject for decades, once framed the question this way: "The ultimate issue here is not whether leagues are single entities or a collection of independent firms; rather, it is whether or not the internal rules and decisions of leagues ought to be immune from case-by-case rule of reason review under section 1."[4]

American Needle could provide the Supreme Court the opportunity to cut through that confusion over the rule of reason's application to sports leagues and adopt an analytical framework recognizing that legitimate joint ventures should have the discretion to run their businesses based on their own business judgment without being second-guessed by federal courts. For far too long, there has been a schism in the rule of reason framework as applied to sports leagues and other legitimate ventures. Thus, while certain types of restraints can be challenged without any economic analysis at all under the *per se* rule, there has been no analytic device at the other end of the spectrum to immunize from antitrust challenge under Section 1 the types of fundamental decisions that legitimate business collaborations must be allowed to make without continual second-guessing under the guise of Section 1.

In the broader Section 1 context, the Supreme Court has attempted to cut down on the burdens of defending against spurious Section 1 claims by adopting a "plausibility" standard that calls for increased scrutiny at the pleading stage, and it remains to be seen how *Twombly*[5] will impact challenges to business collaborations where the "concerted action" element is more easily satisfied. But what is needed in the sports leagues and other legitimate ventures context is not just increased scrutiny of factual allegations, but rather an overhaul of the underlying analytical framework itself. As discussed below, *American Needle* could provide the Supreme Court with just that.

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[4] Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117, 119 (1989).

[5] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (creating stricter pleading standard for plaintiffs alleging conspiracies in violation of Section 1 of Sherman Act).

II. REVIEW OF THE ANCILLARY RESTRAINTS DOCTRINE

The ancillary restraints doctrine has had a checkered history in American jurisprudence.[6] Prior to the passage of the Sherman Act, the common law recognized two types of restraints on trade: naked restraints—which furthered no lawful business purpose—and ancillary restraints that were incidental to otherwise lawful transactions. The idea of restraints of trade that could be incidental and actually supportive of another underlying agreement that itself was pro-competitive was noted most often in situations with covenants not to compete. If a court decided that the restraint was reasonably related to the business being protected, i.e., that it was truly ancillary, then it was lawful. The Sherman Act set out to codify this accepted common law principle, as was described by Judge Taft in the *Addyston Pipe* decision:

> "[w]hen two men become partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged."[7]

Unfortunately, the establishment of the more general rule of reason made this formerly straightforward ancillary restraints analysis virtually obsolete by requiring that all restraints, naked or ancillary, be tested for reasonableness. Indeed, a significant line of case law, using the rule of reason test outlined in *Standard Oil*,[8] found a number of "ancillary restraints" to be unlawful and even *per se* illegal.[9]

The doctrine has slowly reemerged, however, as courts try to reconcile conflicting case law while accommodating the proliferation of pro-competitive joint ventures as a modern business model and the horizontal restraints that often must be included in these enterprises to make them economically efficient. In *BMI*,[10] CBS challenged the blanket licenses issued by the music company and the American Society of Composers, Authors and Publishers ("ASCAP"). BMI and ASCAP jointly negotiated the price of their licenses, which gave the licensee the right to perform any of the compositions owned by ASCAP members for a specific period of time. The district court agreed with CBS that this jointly negotiated price was illegal *per se* as a horizontal

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[6] An excellent history and discussion of ancillary restraints is found in Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943 (1988).

[7] United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898).

[8] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[9] For example, in *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), the Supreme Court applied the *per se* rule to a decision of a cooperative association to use exclusive territories in the distribution of its products, clearly an ancillary restraint to a legitimate joint venture, without even inquiring into the pro-competitive justifications of the decision. Thus, *Topco* effectively killed any remaining viability of the ancillary restraints doctrine.

[10] BMI v. CBS, Inc, 441 U.S. 1 (1979).

restraint and form of price fixing. The Supreme Court rejected the "literal approach" of the district court's opinion as "overly simplistic and often overbroad."[11] By focusing on the partnership between BMI and ASCAP, the Court stressed that horizontal restraints should be evaluated under the rule of reason when set forth in the context of a legitimate joint venture arrangement.

In *Rothery Storage*,[12] Judge Bork revived the original ancillary versus naked restraint distinction when he addressed the activities of Atlas Van Lines. Atlas, a nationwide provider of interstate moving services, operated by contracting with independent agents to supply training, uniforms, and equipment necessary to facilitate interstate moving under the Atlas brand name. Atlas required its agents to either refrain from providing any intrastate services or, alternatively, create a separate corporation for intrastate moves that did not use any Atlas brand services or equipment. The court held the policy to be "reasonably necessary" to the joint venture as it was designed as "a classic attempt to counter the perceived menace that free riding poses."[13] Referencing *Addyston Pipe*, Judge Bork noted in particular that the "Atlas network involves a union of the parties' enterprise to carry on a useful business" and the "challenged agreements are ancillary in that they enhance the efficiency of that union."[14] What was missing, however, was a clear statement of what would be sufficiently "ancillary" to be viewed as reasonable "as a matter of law."

Use of the ancillary restraints doctrine in the professional sports context has been muddled as well. The Supreme Court had an early opportunity to provide some clarity in *National Football League v. North American Soccer League*,[15] but the Court denied certiorari. In a strong dissent from the denial of certiorari that has been cited often in the "single entity" debate, Justice Rehnquist took exception with the Second Circuit's articulation of the relevant antitrust inquiry. The NASL addressed an NFL rule that prohibited NFL owners from obtaining a controlling interest in another major league professional sports team. The Second Circuit affirmed the district court's finding that the rule violated the rule of reason. Citing *BMI*, Justice Rehnquist found that the lower court had misapplied the rule of reason. He noted that legitimate joint ventures must be allowed to take reasonable steps to protect the fruits of their venture. Citing *Addyston Pipe*, Justice Rehnquist stated:

> "The cross-ownership rule, then, is a covenant by joint venturers who produce a single product not to compete with one another. The rule governing such agreements was set out over 80 years ago by Judge (later Chief Justice) Taft: A covenant not to compete is valid if "it is merely ancillary to the main purpose of a

[11] *Id.* at 9.
[12] Rothery Storage & Van Co. v. Atlas Van Lines, Inc, 792 F.2d 210 (D.C. Cir. 1986).
[13] *Id.* at 223, 227.
[14] *Id.* at 224.
[15] 459 U.S. 1074 (1982).

lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of its fruits by the other party."[16]

Justice Rehnquist also criticized the Court of Appeals for faulting the NFL "for failing to show that its restriction was as narrow as possible."[17] Justice Rehnquist found that the Court of Appeals had improperly adopted "the least restrictive alternative analysis that is sometimes used in constitutional law. The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity."[18]

Justice Rehnquist's views regarding the proper application of the ancillary restraints doctrine and rule of reason have largely been ignored. Instead, most sports league decisions have followed the analytical model suggested in *BMI*—using the doctrine not to identify restraints that should be regarded as reasonable as a matter of law, but rather to identify horizontal restraints that should be taken out of the category of restraints condemned under the *per se* rule and instead subjected to the full rule of reason.

For example, in *Los Angeles Memorial Coliseum Commission v. NFL* ("*Raiders II*"),[19] the Ninth Circuit considered the NFL's territorial restrictions and relocation rules, which the League had applied to attempt to block the Raiders' move to Los Angeles. The Ninth Circuit found the question of whether the League's rules were "ancillary" to be only a "factor" to be considered in applying the rule of reason, even though it acknowledged that it had "no reason to doubt" that "the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose of producing NFL football."[20]

In applying the rule of reason, the Ninth Circuit utilized the same inquiry that Justice Rehnquist had criticized in his dissent from denial of certiorari in *NASL*, including whether the benefits of the restraint "can be achieved by less restrictive means."[21] Completely misinterpreting Justice Rehnquist's dissent, the Ninth Circuit actually cited his opinion as authority for the proposition that the trial court had correctly instructed the jury to take into account the existence of less restrictive alternatives.[22] Thus, despite expressly acknowledging that "territorial allocations are inherent in an agreement among joint venturers to produce a product," the Ninth Circuit

[16] *Id*. at 1077-78 (Reinquist, J., dissenting) (citation omitted).
[17] *Id*. at 1079.
[18] *Id.*
[19] 726 F.2d 1381 (9th Cir. 1984).
[20] *Id*. at 1395 (citing Aydin Corp. v. Loral Corp., 718 F.2d 897, 901 (9th Cir.1983)).
[21] *Id*.
[22] *Id*. at 1396.

held that the jury verdict against the NFL should be affirmed because "there was substantial evidence going to the existence of such alternatives."[23]

Similarly, in *Sullivan v. NFL*,[24] the First Circuit considered an antitrust challenge to the NFL's ban on the public ownership of teams. The First Circuit agreed that the ban was an "ancillary" restraint with pro-competitive justifications. But the court held that such a finding was insufficient to establish "as a matter of law" that the rule did not violate Section 1. The court concluded that you "do not throw the 'rule of reason' out the window merely because one establishes that a given practice among joint venture participants is ancillary to legitimate and efficient activity—the injury to competition must still be weighed against the purported benefits under the rule of reason."[25]

The First Circuit also took the "less restrictive alternatives" holding in *Raiders II* one step further, making it a basic element of the test rather than just a factor to be considered. The court held that "[o]ne basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint."[26]

In what can only be viewed as an aberration (or, perhaps, a moment of judicial lucidity), the NBA scored a victory in the ancillary restraints debate in a case addressing the NBA's prohibition on its players participating in basketball competitions outside the NBA joint venture.[27] A company that wanted to sponsor a one-on-one competition between Michael Jordan and Magic Johnson alleged that the prohibition violated the antitrust laws. Citing Justice Rehnquist's dissent from the denial of certiorari, the court granted summary judgment for the NBA, holding that "it is reasonable as a matter of law for the member teams of a professional sports league to require their player-employees to remain loyal to the team and the league and not work for any competing entity while they remain employed."[28]

In sum, with very little exception, the ancillary restraints doctrine has effectively been turned on its head. Rather than a tool to recognize the lawfulness of restraints that are "ancillary" to a legitimate business collaboration it has, instead, been used as a tool just to save certain types of restraints from *per se* condemnation, while subjecting such "ancillary" restraints to full rule of reason analysis, including an inquiry whether the business collaboration could have achieved its objectives through a "less restrictive alternative."

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[23] *Id*.
[24] 34 F.3d 1091 (1st Cir. 1994).
[25] *Id*. at 1102.
[26] *Id*. at 1103.
[27] Indep. Entm't Group, Inc. v. NBA, 853 F. Supp. 333 (C.D. Cal. 1994).
[28] *Id*. at 338.

III. DAGHER RENEWS THE DEBATE OVER PROPER APPLICATION OF THE ANCILLARY RESTRAINTS DOCTRINE

The proper analytical framework for joint ventures was raised in *Dagher*.[29] There, Texaco Inc. and Shell Oil Co. formed a joint venture called Equilon that integrated their downstream operations in the western United States. Under the terms of the joint venture, Shell and Texaco pooled their resources and agreed to share the risks and profits in connection with Equilon's activities. After investigation by the Federal Trade Commission as well as four state attorneys general, and subject to certain conditions in a consent decree, the formation of the joint ventures was approved.

A class of 23,000 Texaco and Shell service station owners brought suit alleging that by setting common prices for the two brands, Shell and Texaco had engaged in *per se* price fixing under Section 1 of the Sherman Act. The district court awarded summary judgment to Shell and Texaco. The Ninth Circuit reversed the district court's finding in favor of the defendants. Utilizing the same misguided approach it had employed in *Raiders*, the court applied the ancillary restraints doctrine to Equilon's conduct, holding that the gas companies could avoid *per se* condemnation only by proving that the pricing decision was ancillary to the pro-competitive justifications for the venture—i.e., that it was "reasonably necessary" to further the venture's admitted synergies and efficiencies and there were no less restrictive alternatives available to achieve the same objectives.

The Supreme Court granted certiorari "to determine the extent to which the *per se* rule against price-fixing applies to an important and increasingly popular form of business organization, the joint venture."[30] The Court first reiterated that courts must presumptively apply the rule of reason analysis in all Section 1 cases. The Court then found that Equilon's pricing decision did not fall within the *per se* exception for horizontal price fixing agreements "because Texaco and Shell Oil did not compete with one another in the relevant market—namely, the sale of gasoline to service stations in the western United States—but instead participated in that market jointly through . . . Equilon."[31] Because the plaintiffs relied solely on a *per se* theory, there was no need for the Court to address the proper framework for handling a rule of reason claim challenging the same conduct.

IV. COULD *AMERICAN NEEDLE* GIVE THE SUPREME COURT A CHANCE TO EXPAND UPON AN ANALYTICAL FRAMEWORK HINTED AT IN *DAGHER*?

Some of the questions left unanswered in *Dagher* are squarely at issue in *American Needle* and much has already been written regarding the impact *Dagher* could have on the "single entity" debate. The decision mentioned several times that a legitimate joint venture should be treated as a single firm for purposes of antitrust

[29] Texaco, Inc. v. Dagher, 547 U.S. 1 (2006).
[30] *Id*. at 5.
[31] *Id* at 5-6.

scrutiny. Indeed, even though the Seventh Circuit did not cite *Dagher* in its *American Needle* decision, both the NFL in its petition and the NHL in its amicus brief, argued that *Dagher* supports application of the "single entity" doctrine to professional sports leagues. But could American *Needle* also provide the Court the opportunity to essentially revive the original formulation of the ancillary restraints doctrine?

The legal issues presented by *American Needle* are straightforward. In 1963, the NFL established NFL Properties, a separate corporate entity tasked with developing team and league intellectual property. NFL Properties is responsible for granting licenses to vendors who produce consumer products bearing the logos and trademarks of the League and the individual teams. Historically these licenses were awarded to various competing vendors including plaintiff American Needle who produced NFL-related headwear for over 20 years. In 2000, the League authorized NFL Properties to accept bids from various vendors for an exclusive headwear license. Reebok prevailed in the process and was awarded an exclusive license. American Needle's contract was not renewed, and the company challenged its termination under Sections 1 and 2 of the Sherman Act. After limiting discovery to the NFL's single entity defense, the district court granted the NFL's motion for summary judgment on the Section 1 claim, holding that the League was a "single entity" incapable of violating Section 1. The Seventh Circuit affirmed based on the League's "single entity" defense.

Of course, if the Supreme Court grants the petition for certiorari the likely outcome would be a finding that, at least for some purposes, professional sports leagues are "single entities" incapable of violating Section 1. But could the Supreme Court follow a different path to arrive at the same practical result? The ultimate question presented in *American Needle* is whether legitimate joint ventures, such as sports leagues, should have the discretion to make decisions regarding the production, marketing, and distribution of their product without having such decisions second-guessed by courts under a full blown rule of reason analysis.

In addition to its comments about the joint venture acting as a single firm, *Dagher* also addressed the ancillary restraints doctrine. In dicta, the Court found that the Ninth Circuit had misapplied the doctrine, which "governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on non-venture activities."[32] The Court held that "the ancillary restraints doctrine has no application here, where the business practice being challenged involves the core activity of the joint venture itself—namely, the pricing of the very goods produced and sold by Equilon." In applying the doctrine, "courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid."[33]

[32] *Id*. at 7.
[33] *Id*. at 7-8

Thus, although Dagher found that ancillary restraints analysis may apply to outside venture restraints, the Court left open for debate what test should be applied to inside venture restraints. But there are strong hints in *Dagher* that, regardless of the outcome of the single-entity debate, the Court believes that most business practices of legitimate joint ventures should be immune from full rule of reason scrutiny. First, the Court noted that neither the government nor the plaintiffs had challenged the formation of the joint venture, so there was no dispute that Equilon was a legitimate joint venture. Second, the Supreme Court held that "a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price."[34]

Harkening back to the original interpretation of the ancillary restraints doctrine, one possible outcome is a holding that inside venture restraints, i.e., restraints that relate to the business of the venture itself, would be regarded as reasonable as a matter of law.[35] The Supreme Court hinted as much when it noted that the ancillary restraints doctrine has no application to the core activity of the venture itself. Given that the ancillary restraints doctrine has effectively been merged into the rule of reason, the Court's suggestion that inside venture restraints should not be subject to such scrutiny would be meaningless if the full rule of reason also applied to inside venture restraints.

Opponents could still attack the formation of the venture under Section 1 of the Sherman Act and Section 7 of the Clayton Act, and could still attack individual practices under Section 2 of the Sherman Act if the business collaboration possesses market power. But, otherwise, there is no justification for forcing lawful collaborations to defend their everyday decisions relating to the business of the venture itself in a full blown rule of reason analysis when other firms in the same line of business that are not organized as joint ventures are immune from such scrutiny.

For example, what possible basis is there to subject the NFL's decision to grant exclusive licenses to greater antitrust scrutiny than the Walt Disney Company's decision to grant exclusive licenses?[36] In the parlance of *Dagher*, sports leagues and other legitimate joint ventures should be able to operate just as any single firm would. The

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[34] *Id*. at 7.

[35] *See* Transcript of Hearing at 86, Non-Commercial P'ship Hockey Club Lokomotiv Yaroslavl v. NHL, No. 06 CV 9421 (LAP), (S.D.N.Y. Nov. 15, 2006) (Preska, J.) ("[T]he activities here at issue [the NHL's foreign-player acquisition rules] seem to be included within the meaning of the Supreme Court's recent [*Dagher*] case as the core activities of a joint venture. And thus would not constitute a combination in restraint of trade.").

[36] In other contexts, numerous courts have recognized that courts should generally defer to a sports league's governing rules and procedures because courts lack the experience and competence to substitute their judgment for that of the league. *See, e.g.*, Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 539 (7th Cir. 1978) (affirming dismissal of claim by major league baseball team against the commissioner of baseball based on alleged arbitrary and capricious conduct in the interpretation and enforcement of internal baseball rules and procedures because "'[w]hether he was right or wrong is beyond the competence and the jurisdiction of this court to decide'" (alteration in original) (citation omitted)); Chi. Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 597 (7th Cir. 1996) ("Courts must respect a league's disposition of [internal] issues, just as they respect contracts and decisions by a corporation's board of directors.").

possibility of largely foreclosing Section 1 challenges to inside venture restraints also is consistent with the general trends in antitrust jurisprudence—both in bringing greater clarity to what type of conduct is permitted under the antitrust laws, and in making clear that federal courts should not be using the antitrust laws as an excuse to act as regulators of private business.[37]

Conversely, restraints that placed limits on a member of the venture's outside competitive activity (e.g., covenants not to compete) would continue to be analyzed under the current articulation of the ancillary restraints doctrine. An open question that has not been resolved—and which will likely need to wait for another case to resolve—is whether the "necessity" or "less restrictive alternative" inquiries should be elements of the test. The defendants in *Dagher* properly attacked the "necessity" standard, arguing that

> "[t]he manner in which a firm carries out its daily business is a matter of business judgment, and a decision to sell at a particular price—or in a given quantity, or to a particular customer—is generally no more 'necessary' to the venture's efficient operation than selling at some other, slightly different price or quantity or to some different customer."[38]

But the Supreme Court had no occasion to reach that issue in its opinion.

If the Supreme Court were to adopt such a standard of *per se* legality for inside venture restraints, a number of cases involving sports leagues would have to be reimagined, as the majority of professional sports cases have involved challenges to league activities and regulations that would clearly qualify as "inside" the venture. But there is nothing unreasonable or perverse in such a result. After all, as Judge Easterbrook observed, "[t]o say that participants in an organization may cooperate is to say that they may control what they make and how they sell it."[39]

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[37] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004) (observing that courts should not second-guess internal business decisions of legitimate economic actors); Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109, 1124 (2009) (Breyer, J., concurring) ("When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits."); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 283 (2007) (noting that, in a case with both securities law and antitrust claims, the existence of the regulatory body of the SEC "makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior"); *Dagher*, 547 U.S. at 6 (as discussed *supra*, declining to apply Section 1 of the Sherman Act to what "may be price fixing in a literal sense, it is not price fixing in the antitrust sense"); *Bulls II*, 95 F.3d at 597 ("The district court's opinion concerning the fee reads like the ruling of an agency exercising a power to regulate rates. Yet the antitrust laws do not deputize district judges as one-man regulatory agencies.").

[38] *See* Brief for Petitioner Texaco, Inc. at 32-33, Texaco Inc. v. Dagher, 547 U.S. 1 (2006) (No. 04-805).

[39] *Bulls II*, 95 F.3d at 598.