A CONSIDERATION OF *DAGHER* AND THE ANTITRUST STANDARD FOR JOINT VENTURES

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The term "joint venture" has no single definition under the antitrust laws, or in business. It may encompass any degree of collaboration, short of a merger, in which independent entities pool resources and share risks to pursue a common objective, such as the production of goods or services, or the purchase of needed inputs. Where the joint venturers are actual or potential competitors, the venture could also be characterized as a "competitor collaboration." In the majority of cases, joint ventures serve clearly beneficial purposes. From the antitrust perspective, joint ventures may enable efficiency-enhancing integration of economic activity in developing, manufacturing or marketing products; reduction of costs; or the reduction or diversification of risks. On the other hand, they may also reduce competition in the marketplace.

Regardless of form or label, the antitrust laws consider the substance of the activity to determine its competitive impact. While all collaborations are subject to Section 1 of the Sherman Act, prohibiting "[e]very contract, combination. . .or conspiracy, in restraint of trade or commerce,"[1] those involving competitors are subject to particular scrutiny for the risk of a cartel in the guise of a joint venture. Depending on the particular facts, Section 2 of the Sherman Act, Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act may also determine the legality of a joint venture and its activities.[2]

The recent Ninth Circuit opinion in *Dagher v. Saudi Refining Inc.*[3] represents an application of the antitrust laws to a joint venture between competitors that reflects the importance

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1. 15 U.S.C. § 1.
2. 15 U.S.C. §§ 2, 18, 45.
3. 369 F.3d 1108 (9th Cir. 2004).

of this fact-based analysis and the distinction between the efficiency-enhancing activities of a joint venture that are unobjectionable and the activities of a legitimate joint venture that constitute antitrust violations. This article reviews the basic antitrust standards applicable to joint ventures, considers the facts and ruling in *Dagher*, and concludes with some lessons that one may take from the case.

I. THE GENERAL ANTITRUST PRINCIPLES APPLICABLE TO JOINT VENTURES

The Need for Integration of Resources and Sharing of Risks

The threshold issue for a joint venture among competitors is whether it involves sufficient integration of the parties' resources to avoid being considered merely a cartel in violation of Section 1 of the Sherman Act. The crucial factor in this determination is the actual substance of the joint venture. The Supreme Court made it clear in *Timken Roller Bearing Co. v. United States* that there is no "support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling a project a 'joint venture.'"[4] However, in *Copperweld Corp. v. Independence Tube Corp.*, the Court clarified that if the joint venture integrates assets in a way that "hold[s] the promise of increasing a firm's efficiency and enabl[es] it to compete more effectively," then the venture is judged under the more forgiving antitrust rule of reason.[5]

Applying these basic principles, the Supreme Court in *Broadcast Music, Inc. v. CBS* held that the rule of reason applied to the blanket license offered by BMI and the American Society of Composers, Authors, and Publishers ("ASCAP").[6] In *BMI*, 40,000 authors and composers granted non-exclusive rights to BMI and ASCAP to offer a blanket license to all their musical compositions. The Court concluded that the blanket license was not an illegal price-fixing agreement that fixed the

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4. 341 U.S. 593, 598 (1951), *modified by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
5. 467 U.S. 752, 768 (1984).
6. 441 U.S. 1 (1979).

royalty charged for all the works under license, and was not subject to the *per se* rule. It decided that the blanket license was "not a 'naked restrain[t] of trade with no purpose except stifling of competition,' but rather accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use [that was] potentially beneficial to both sellers and buyers."[7] Moreover, the licenses granted to BMI and ASCAP were non-exclusive, so that the grantors remained free to grant individual licenses, and the blanket license was "to some extent, a different product" from those individual licenses.[8] Similarly, the Supreme Court applied the rule of reason to the restrictions of the National Collegiate Athletic Association on telecasts of football games by member schools in *NCAA v. Board of Regents*, because the "case involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all,"[9] although the Court ultimately condemned the restrictions.[10]

In contrast, in *Arizona v. Maricopa County Medical Society*, the Court concluded that an agreement by competing doctors to create a maximum fee schedule for services performed under health plans was a *per se* illegal price fix.[11] The crucial factor was the lack of any integrative efficiencies in the arrangement:

> The foundations [in the case] are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. . .If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price-fixing agreement among the doctors would be perfectly proper. But the fee arrangements

7. *Id.* at 20 (*quoting* White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

8. *Id.* at 22-24.

9. 468 U.S. 85, 101 (1984).

10. The Court found the restraints unreasonable, because "by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life." *Id.* at 120.

11. 457 U.S. 332 (1982).

disclosed by the record in this case are among independent competing entrepreneurs.[12]

Thus, the basic rule regarding antitrust acceptability of a joint venture is whether it involves the potential for efficiency-enhancing integration of the parties' resources and the sharing of risk. This is the approach followed by the federal antitrust enforcement agencies and summarized in the Federal Trade Commission and Department of Justice 2000 Antitrust Guidelines for Collaborations Among Competitors,[13] and discussed in their 1992 Horizontal Merger Guidelines,[14] 1995 Antitrust Guidelines for the Licensing of Intellectual Property,[15] and their 1996 Statements of Antitrust Enforcement Policy in Health Care.[16]

The JV Guidelines generally outline the enforcement agencies' analytic framework for antitrust review of collaborations among competitors that do not reach the degree of integration so as to be considered mergers. The Guidelines set out the key inquiries the agencies make in such analyses. First, the agencies consider whether the type of collaboration is of a type that would be considered so likely to be anticompetitive and without offsetting benefits that it should be barred without any detailed study.[17] Agreements not to compete on price or output, such as those to fix prices or output, rig bids, or allocate markets fall into this category.[18]

12. *Id.* at 356-57.

13. Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), *at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf [hereinafter *JV Guidelines*].

14. U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (issued April 2, 1992, revised April 8, 1997), *at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm [hereinafter *Merger Guidelines*].

15. U.S. Department of Justice and the Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* (April 6, 1995), *at* http://www.usdoj.gov/atr/public/guidelines/ipguide.htm [hereinafter *IP Guidelines*].

16. U.S. Department of Justice and the Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* (August 1996), *at* http://www.usdoj.gov/atr/public/guidelines/1791.htm [hereinafter *Health Care Statements*].

17. *JV Guidelines*, *supra* note 13, § 3.2.

18. *Id.*

On the other hand, if the parties to "an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration, and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered *per se* illegal."[19] In making a rule of reason analysis, the enforcement agencies consider the agreement's potential to harm competition by raising the incentive or ability of the parties to raise prices or lower output, quality, or innovation more than would likely occur without the agreement.[20]

This analysis is a very fact-specific one, encompassing the nature and purpose of the agreement, the market positions of the parties, as well as overall market conditions. This initial review may indicate no further need for concern, or on the other hand, that the agreement is objectionable without any further analysis.[21] If the review is inconclusive, the agencies will conduct an in-depth analysis. They will typically define the relevant markets, market shares, and market concentrations, and consider the likely competitive impact of the arrangement, such as the abilities and incentives for the participants to continue to compete independently, and the likelihood of new entry into the market to mitigate any potential anticompetitive effects.[22] If this detailed review indicates a potential for anticompetitive effects, the agencies will then consider whether the aspect of the arrangement that is likely to cause the competitive harm is necessary to achieve the benefits of the arrangement, and whether "the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means."[23]

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19. *Id.*

20. *Id.* § 3.3.

21. *Id.*

22. *Id.* §§ 3.32-.35.

23. *Id.* § 3.36. The JV Guidelines, along with the IP Guidelines and the Health Care Statements, provide safety zones. The JV Guidelines establish a safe harbor for collaborations that do not involve *per se* illegal terms and where the market shares of the collaboration and its participants, together account for no more than 20% of any relevant market. *Id.* §§ 4.1-.2. Where the agreement is not one that is *per se* illegal, and is based on IPR and research and development so that market shares are not easily determined, the JV Guidelines provide a safe harbor where the innovation market involved has at least three independent competitors with the specialized assets or

The Need for Restraints to be Ancillary and Not Unreasonable

Even if a joint venture's purpose and structure satisfy these antitrust standards, its activities must also be "appropriate." In many cases, a joint venture will contain or may later develop restrictions on competition between the joint venturers and the joint venture, and/or among the joint-venturers themselves. They may also include or later incorporate restrictions on the activities of the joint venture, such as its pricing and output levels, or the geographic area or customer groups that it may target. Challenges to joint ventures often arise from these collateral restraints, rather than from the formation of the joint venture itself. The key distinction in whether a restraint is acceptable under the antitrust laws is whether the restraints are considered "naked"—"that is, "lacking any redeeming virtue"; or "ancillary"—that is, "an essential or at least important part of some arrangement that has potentially redeeming virtues."[24] Those restraints that are naked are subject to the *per se* rule, while those that are ancillary are scrutinized under the rule of reason.

The seminal case addressing the legality of joint venture restrictions is *United States v. Addyston Pipe & Steel Co.*, where six companies were involved in a complex arrangement to fix prices in the cast-iron pipe industry.[25] Judge (later President and Chief Justice) Taft rejected the defendants' justifications for the agreement, namely that the restraints involved were only partial and allowed the defendants to avoid "ruinous competition", and that the defendants accounted for only 30 per-

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characteristics, and the incentives to engage in R&D that are alternatives to the R&D of the collaboration. *Id.* § 4.3. With respect to restrictive terms in IP licenses generally, including those in joint ventures, the IP Guidelines also provide a safety zone. A restriction will not be challenged by the federal antitrust authorities if it is not one that is "facially anticompetitive" and therefore *per se* violative of the antitrust laws, and either (a) the parties collectively hold less than 20% of each of the markets that are affected by the restriction, or (b) where no meaningful market share data can be obtained, and there are at least four other independent competitors in the technology or innovation markets involved. *IP Guidelines, supra* note 15, § 4.3. The Health Care Statements contain similar market share safety zones. *See Health Care Statements, supra* note 16, §§ 7.A, 8.A.

24. Herbert Hovenkamp, Antitrust Law ¶ 1904, at 227 (2005).

25. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

cent of the country's capacity. Judge Taft reasoned that, in joint ventures:

> when two men [become] partners in a business, although their union might reduce competition, this effect [is] 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 the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, [a]re, of course, only ancillary to the main end of the union, and [a]re to be encouraged.[26]

An ancillary restraint that is judged by the rule of reason and may be acceptable under the antitrust laws is one that is "reasonably necessary" to allow an arrangement to achieve its procompetitive objective. Judge Taft listed examples of such ancillary restraints, such as agreements by the seller of property or business not to compete so as not to detract from the value of the property or business sold.[27] The key factor is whether the restraint was "merely ancillary to the main purpose of a 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 those fruits by another party."[28]

Since *Addyston Pipe,* the courts and the enforcement agencies have applied the ancillary standard to determine whether the activities or conduct of an unobjectionable joint venture passes muster under the antitrust laws. Thus, in *BMI* the Court accepted the blanket licenses that BMI developed after investigations by the Department of Justice, even though they were literally agreements to fix the royalties charged by the grantors, taking into consideration the justifications for the licenses and their likely effects.[29] Likewise, in *NCAA*, the Court considered whether agreements that fixed competitors' prices and restricted output—normally forbidden under the antitrust laws—were "essential" to make college football available on

26. *Id.* at 280.
27. *See generally id.* at 280-82.
28. *Id.* at 282.
29. *BMI,* 441 U.S. at 24.

television (and found that they were not).[30] The JV Guidelines accept restraints connected with a joint venture that are "reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits."[31]

It is not uncommon that an ancillary restraint is found to be reasonable if the joint venture does not have market power.[32] On the other hand, lack of proof of a relevant market or of market power does not save an ancillary restraint that is found to have actual anticompetitive impact and where there is insufficient justification for the restraint.[33] In such situations, a detailed, fact-specific analysis is generally required under the rule of reason.[34] Courts that have performed such analyses have held that a restriction that limits the potential for free-riding on the joint venture's efforts by the joint venturers in other areas is acceptable if there are no less restrictive alternatives to prevent free-riding.[35] On the other hand, agreements by the joint venturers not to compete in a market separate from the joint venture's market have generally been found to violate antitrust law.[36]

Recent cases continue to reflect the fact-specific analysis required to determine the acceptability of joint venture activity under the antitrust laws. The recent *"Three Tenors"* case is particularly noteworthy in addressing the extent to which joint venturers may be restricted from competing with the ven-

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30. *NCAA*, 468 U.S. at 114-15.

31. *JV Guidelines*, *supra* note 13, at § 3.2.

32. *See, e.g.*, L.A.P.D., Inc. v. General Electric Co., 132 F.3d 402, 405 (7th Cir. 1997); Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 600-01 (7th Cir. 1996); SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965, 969 (10th Cir. 1994); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 217, 229-30 (D.C. Cir. 1986); General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 596 (7th Cir. 1984).

33. *See, e.g.*, *NCAA*, 468 U.S. at 109-10; K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 128-29 (2d Cir. 1995).

34. *See, e.g.*, *NCAA*, 468 U.S. at 109-10.

35. *See, e.g.*, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d at 217, 221, 230; Chicago Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 674-76 (7th Cir. 1992); General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d at 592.

36. *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. at 597-98.

ture.[37] In that case, the Federal Trade Commission found that the defendants' legitimate joint venture developed into impermissible collusion. PolyGram and Warner Records separately acquired the rights to distribute two recordings of the "Three Tenors," Jose Carreras, Placido Domingo, and Luciano Pavarotti. They collaborated in the distribution of a third recording, which was an unobjectionable joint venture. However, the parties later also agreed to a "moratorium"—a period in which the parties would refrain from advertising or reducing prices of the earlier recordings, planned around the time the third recording was released.

The FTC found that the moratorium was not properly ancillary to the joint venture, and arose merely from a fear that the third recording would not be as attractive to consumers as the earlier recordings. The FTC explained that, in order to be ancillary, the restraint must be "reasonably necessary to permit the parties to achieve a particular efficiency."[38] It found that the moratorium "could not be considered 'ancillary'. . .as a matter of law, because it was not related to the efficiencies the joint venture was created to produce."[39] The Commission noted that restrictions on discounts and advertising generally lead, and did lead, to higher prices and less competition,[40] and found that the moratorium was unnecessary, legally and factually, for the efficient marketing of the third recording or to prevent free-riding by the earlier recordings that might hurt sales of the joint venture product.[41] The Commission reasoned that the parties should have produced a stronger product, rather than relying on restricting competition from the earlier recordings to succeed.[42]

The Commission's *Three Tenors* decision is currently on appeal to the D.C. Circuit Court of Appeals. A decision by the

37. *In re* Matter of Polygram Holding, Inc., FTC Docket No. 9298, 2003 WL 21770765 (July 24, 2003), *appeal pending* (D.C. Cir.), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf.

38. *Id.* at *47.

39. *Id.* at *48.

40. *Id.* at *36-40, *50-54.

41. *Id.* at *40-49, *54-58.

42. The Commission reasoned that "[i]f a 'new' product can succeed in a free marketplace only if it is shielded from competitive forces by a facially anticompetitive agreement between existing competitors, then it is likely no loss to consumers if it is not introduced." *Id.* at *45.

Court of Appeals may clarify the permissible limits of restrictions on competition from its parents to a joint venture. It is noteworthy that the Commission commented that it would have conducted a different analysis and may have reached a different result if the parties had instead created a single entity with the rights to all three recordings.[43] It viewed "the issue here [as] whether a joint venture can claim the 'efficiency' of limiting 'free-riding' from competing products the joint venture neither owns nor otherwise legally controls."[44] The Commission equated the moratorium to the hypothetical of such an agreement among three independent entities that separately held the rights to the three recordings.[45]

Another recent case, *United States v. Visa International Corp.*,[46] further demonstrates the need for a legitimate joint venture to be appropriately integrated and to implement well-defined restrictions. In *Visa*, both Visa and MasterCard were long-established joint venture associations whose members had the right to issue Visa or MasterCard credit cards and to process transactions from merchants who accepted those cards. Members achieved benefits that would have been very difficult to obtain individually, including brands with global recognition and complex computer networks to process transactions. The formation and existence of the joint ventures were not challenged.

However, while Visa members could also issue MasterCards, and vice versa, they were prohibited by Visa and MasterCard rules from issuing or processing American Express or Discover cards, on penalty of forfeiture of the right to issue such credit cards. The Second Circuit applied the rule of reason and affirmed the trial court's findings after a bench trial, that the restriction injured competition in the provision of network services to card issuers and "acquirers"[47] to process credit card and charge card transactions. The restriction also had the effect of excluding American Express and Discover from expanding beyond issuing cards directly to consumers, to issuing

43. *Id.* at *42 n.56.

44. *Id.* at *43.

45. *Id.* at *44.

46. 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004).

47. The entities which contract with merchants to accept transactions from those merchants are designated "acquirers". *Id.* at 235.

cards through other entities, and from providing network services to card issuers.[48] It concluded that there was no procompetitive justification that outweighed the anti-competitive impact of the restriction. The court rested on these grounds, pointing out that Visa and MasterCard were thriving, competition was robust outside the continental United States—where the restriction was not in effect, and neither company suffered in the continental U.S. by permitting their members to issue each other's cards.[49] In reaching that conclusion, the court rejected the argument that the restriction was analogous to an exclusive arrangement between Coca Cola and its truckers, finding it inapplicable because Visa and MasterCard were both consortia, and not single entities imposing a restriction on suppliers. It characterized the restriction as "a horizontal restraint adopted by 20,000 competitors."[50]

The *Visa* decision indicates that a restriction that might have been acceptable if undertaken by a fully integrated entity is questionable when undertaken by members of a consortium. Moreover, a restriction by a consortium that is properly delineated may be acceptable, but one that is targeted to exclude specific competitors of the consortium is unacceptable.

The unifying theme from all these cases is that the "devil is in the details" of the conduct of these legitimate joint ventures. Thus, both the NCAA[51] and Visa,[52] for example, continue to be challenged regarding various aspects of their operations. The *Dagher* case reinforces this unifying theme.

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48. *Id.* at 239-41.

49. *Id.* at 243.

50. *Id.* at 242.

51. *See, e.g.*, Metropolitan Intercollegiate Basketball Ass'n v. NCAA, No. 01 Civ. 0071, 2004 WL 2296324 (S.D.N.Y. 2004) (denying NCAA motion for summary judgment on claim that rules regulating college basketball games reduced competition in non-association-sponsored tournaments); Law v. NCAA,134 F.3d 1010 (10th Cir. 1988) (condemning NCAA rule limiting annual compensation of assistant basketball coaches).

52. *See, e.g.*, *In re* Currency Conversion Fee Antitrust Litigation, No. MDL 1409, M 21-95, 2004 WL 2327938 (S.D.N.Y. 2004) (challenging Visa and MasterCard currency conversion fees); *In re* Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001) (challenging Visa's and MasterCard's "honor all cards" policy).

II. DAGHER

Dagher v. Saudi Refining Inc. underscores the importance of ensuring that a legitimate joint venture is continuously operated in a competitive manner.[53] In particular, the case demonstrates that the methods by which a joint venture handles pricing remains a key factor in determining the legality of its activities. In *Dagher*, the United States Court of Appeals for the Ninth Circuit considered whether the pricing activities of two joint ventures—the formation of which were cleared by federal and state antitrust enforcers—were properly ancillary or *per se* illegal. The Ninth Circuit held that plaintiffs, representing a class of Texaco and Shell service station owners, were entitled to go to trial on their claim that the unified pricing scheme of joint ventures formed by Texaco and Shell Oil was a *per se* violation of Section 1 of the Sherman Act.

In 1998, Shell Oil Company and Texaco, Inc., formed a nationwide alliance consisting of two joint ventures. One joint venture combined the downstream operations of both companies in the western United States. On the East Coast, Saudi Refining Inc. (SRI) joined Shell and Texaco in a second joint venture. The two joint ventures controlled the refining assets of their parents in their respective geographic areas and marketed Shell and Texaco branded gasoline to gas stations in those areas under licensing agreements. Each brand had chemical compositions differentiated by additives, and the marketing of each brand continued to target different customers. The formations of the joint ventures were approved by the Federal Trade Commission and several state attorneys general, subject to some modifications demanded by the enforcers.[54]

Before creating the two joint ventures, Shell, Texaco, and Star (a joint venture between Texaco and SRI) all independently set prices for their wholesale and retail sales. However,

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53. 369 F.3d 1108 (9th Cir. 2004).

54. For instance, Shell and Texaco agreed to divest a package of assets, including Shell's Anacortes, Washington, refinery, a Hawaiian terminal, and retail gasoline stations in Hawaii and in California, to resolve Federal Trade Commission concerns that their proposed joint venture could raise gasoline prices by tens of millions of dollars and would violate federal antitrust laws. *In re* Shell Oil Co. & Texaco Inc., FTC File No. 971-0026 (Dec. 19, 1997) ("Agreement Containing Consent Order"), *available at* http://www.ftc.gov/os/1997/12/shelltex.pdf.

it was decided that the joint ventures should set unified prices for the Shell and Texaco brands in each market area. A single individual at each joint venture was responsible for setting a single price in each geographic area for the two brands. The pricing was consolidated even though Texaco and Shell maintained each brand as a distinct product and continued to compete for customers. Retail gas station owners sued in a class action in the Central District of California, claiming that the ventures' activities were really price fixing by competitors in violation of the antitrust laws. According to the plaintiffs, this pricing approach allowed the joint ventures to raise prices to gas stations at a time when the price of crude oil was low and stable. The trial court granted the defendants' motion for judgment without a trial.

The Ninth Circuit's Decision

On appeal, the key question was whether this conduct—setting one, unified price for the Texaco and Shell brands of gasoline instead of setting each brand's price independently—was reasonably necessary to further the legitimate aims of the joint venture.

The court analyzed the relationship between the joint ventures' pricing actions and legitimate business objectives, highlighting several important elements. First, the court noted that the defendants did not simply consolidate pricing decisions within the joint ventures, but rather *unified* the pricing of the two brands by designating one individual in each joint venture to set a single price for both brands. In this instance, where the products were different and marketed to different consumers, it was likely that independent price analyses would result, at least in some circumstances, in the decision to sell the two brands at different, unlinked prices. But the defendants fixed those prices uniformly instead.

In addition, the defendants did not explain how their unified pricing of the Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies. In fact, the defendants apparently never considered unified pricing to be relevant to product improvement or efficiency gains. The lack of a legitimate business justification for the price setting, when viewed in conjunction with plaintiffs' evidence showing anticompeti-

tive effects, convinced the court that the plaintiffs had sufficiently shown that the *per se* standard could apply to the price setting arrangement.Defendants argued that a joint venture must be able to set whatever price it chooses for its products, but the court held that if this were true, companies could create sham joint ventures solely for the purpose of price-fixing.

The court also rejected defendants' claim that *per se* treatment here would mean that joint ventures could not set prices for their products. The court emphasized that the question was not whether JVs could price their products, but rather whether two competitors could create a joint venture in which they unified, and therefore fixed, the prices of their distinct product brands. The court reminded the defendants that *per se* treatment applies when there is no legitimate business justification for such a price-setting scheme, and the defendants had to date provided no evidence regarding the proper ancillary nature of this arrangement.

Thus, the Ninth Circuit reversed the district court's grant of judgment for defendants, finding that the plaintiffs had presented sufficient evidence to send the case to trial on whether the joint ventures' unified pricing scheme was a *per se* violation of Section 1 of the Sherman Act.

III. LESSONS FROM DAGHER

From *Dagher*, it remains clear that a joint venture among competitors can be a legitimate business venture that offers real efficiencies. Nonetheless, joint collaborations between competitors carry antitrust risks. A joint venture among competitors must be a sufficiently integrated entity to avoid *per se* illegal condemnation and to be subject to the rule of reason. It is also important for a joint venture among competitors to offer cognizable efficiencies to its parent companies. Thus, calling a collaboration between competitors a joint venture will not save it from *per se* illegality if it has no mechanism for sharing risks, and offers no resulting efficiencies to its parent companies.

Moreover, even if structurally formed correctly, a joint venture can still run afoul of the antitrust laws through its actions. If its activities restrict competition and are not properly ancillary to its valid purposes, the joint venture may violate the

antitrust laws. In the case of joint venture pricing activities that are not properly ancillary to the venture's legitimate purposes, *per se* illegality may result. From this perspective, *Dagher* is in the mainstream of antitrust jurisprudence and breaks no new ground. The result in *Dagher* represents an unsurprising application of generally accepted antitrust standards to competitor joint ventures.

These generally accepted antitrust standards represent an appropriate balancing of the clear benefits that the overwhelming majority of collaborations bring, with the risk that some ventures or their activities may impose costs that outweigh the benefits. The two litmus tests that have evolved are a practical approach to the challenge, first by determining whether the joint venture, short of a merger, creates a product or service that would be difficult or impossible to achieve otherwise (such as BMI, the NCAA and Visa/MasterCard) and second, by determining whether the specific activities of the venture are, realistically, essential to achieve its benefits in a way that outweighs potential costs. This reliance on fact-specific analysis in the overwhelming majority of cases ensures that beneficial economic activity is unlikely to be deterred by rigid rules of thumb.

As a case that applies these appropriate generally accepted standards, *Dagher* was correctly decided on its current record and should not be considered controversial. It provides helpful guideposts as to the types of joint venture activities that trigger antitrust concerns. In comparison, the FTC's decision in the *Three Tenors* case raises questions regarding the appropriate scope of restrictions on competition by venturers with the venture, which may benefit from clarification by the D.C. Circuit.

Dagher reinforces several lessons. First, all joint ventures among competitors must be carefully structured—and then carefully monitored—from the antitrust perspective. Second, the fact that the creation of the joint venture has been reviewed by antitrust enforcement agencies does not protect the manner in which the venture operates from antitrust scrutiny. There must be constant vigilance to ensure that the joint venture's evolving activities remain appropriate under the antitrust laws. Third, pricing remains a sensitive area even in the joint venture context. Finally, "efficient" in the antitrust context is not the same as "efficient" in the business environ-

ment—the efficiency must have a traceable, positive impact on consumers. The proper application of these lessons requires close attention to the specific facts of the situation.