2017

Whatever Happened to Quick Look?

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In California Dental Ass'n v. F.T.C.[1] *(hereafter "Cal Dental"), the Supreme Court observed that there is no sharp divide separating conduct that can be summarily condemned under section one of the Sherman Act*[2] *as per se unlawful from conduct that warrants a more searching factual assessment to ascertain any anticompetitive effect and hence its legality.*[3] *The Court further observed that not every antitrust claim falling outside the narrow ambit of per se illegality warrants the detailed Rule of Reason analysis prescribed in Chicago Board of Trade.*[4] *The Court thereby eschewed any notion that section one analysis is dichotomous, i.e., that restraints of trade fall into one of two categories: per se violations, which are condemned out of hand; or Rule of Reason violations, which are condemned only after a detailed analysis of anticompetitive effects and procompetitive benefits.*[5] *Rather, it suggested that conduct be adjudged on a sliding scale and that "the quality of proof required should vary with the circumstances."*[6]

In so ruling, the Court specifically acknowledged what it had held implicitly in three earlier decisions[7]*: that certain conduct, although falling outside of the narrow parameters of per se illegality, has such anticompetitive potential that absent proof of*

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1 526 U.S. 756 (1999).

2 15 U.S.C. §1.

3 *Cal. Dental*, 526 U.S. at 780–81.

4 *Id.*

5 Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 837 (2016). (describing the "all or nothing character" of the dichotomous approach).

6 *Id.*

7 *See* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

> *procompetitive justification it can be condemned after a "quick look" without a detailed market assessment.*[8] *Accordingly, the Court acknowledged in principle the concept of a truncated Rule of Reason analysis. Ultimately, however, the Court concluded that "quick look" did not apply to the facts of the case and that a "less quick look" was necessary to assess defendant's advertising restrictions because it was not intuitively obvious that these advertising restrictions by themselves would create anticompetitive effect and because the advertising restrictions may have actually promoted competition by eliminating unverifiable and misleading discount and quality of service advertising.*[9]

Quick look is tailor–made for restraints that bear a close family resemblance to price–fixing[10] *but are of the type with which courts have little experience or are idiosyncratic in nature.*[11] *Proponents of quick look argue that quick look "improves upon the traditional dichotomous approach by reducing and enforcement and adjudication costs, enhancing the accuracy of administrative and judicial determinations and improving deterrence of harmful restraints."*[12] *Yet, notwithstanding Cal Dental's ruling that quick look applies "[where] an observer with even rudimentary understanding of economics could conclude that the arrangements in question have anticompetitive effect on customers and markets,"*[13] *quick look has not caught on in the lower courts. Indeed, with the notable exception of the D.C. Circuit's decision in Polygram Holding, Inc. v. F.T.C.*[14] *(hereafter "Three Tenors"), the lower courts appear to have largely abandoned the quick look approach.*[15]

This article analyzes the evolution of the Rule of Reason, the emergence of quick look analysis, and its precipitous decline. It

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8 *Cal. Dental*, 526 U.S. at 770.

9 *Id.* at 781.

10 *See* Polygram Holding, Inc. v. F.T.C., 416 F.3d 29, 37 (D.C. Cir. 2005).

11 *See* XI, Phillip Areeda & Herbert Hovenkamp, Antitrust Law para. 1911 at 335–36 (3d ed. 2011) (hereafter "Areeda & Hovenkamp").

12 *See*, Meese, *supra* note 5, at 881–82 (questioning the benefits of quick look analysis).

13 *Cal. Dental*, 526 at 720.

14 416 F.3d 29 (D.C. Cir.2005).

15 *See* Edward D. Cavanagh, *The Rule of Reason Re–examined*, 67 BUS. LAWYER 435, 459 (2012).

argues that the traditional unstructured Rule of Reason analysis articulated in Chicago Board of Trade is unworkable in that it is costly, unpredictable, and has significant risks of error. This article further argues that the structured, nuanced, fact–specific inquiry utilized in Three Tenors would provide "more clarity, greater predictability, fewer errors and less expense in antitrust litigation"[16] *and that the lower courts should embrace—not shun—quick look. It concludes that widespread adoption of the quick look approach by lower courts is unlikely. In Cal Dental, the Supreme Court missed an opportunity to clarify how the Rule of Reason should be applied in antitrust cases. Moreover, its decisions since Cal Dental have sent mixed signals on quick look.*[17] *As a result, the concept of quick look, outside a narrow range of FTC cases, has largely become a dormant doctrine.*[18]

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16 *Id.* at 437.

17 *See* infra notes 156–59 and accompanying text.

18 *See*, Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L. J. 461, 464 (2000) ("the quick look is an artifact of a bygone Populist era in which courts and enforcement agencies protected the freedom of traders from contractual restraints deemed 'monopolistic' by the applied price theory school of industrial organization").

I. DEVELOPMENT OF THE RULE OF REASON

A. Chicago Board of Trade

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade."[19] Read literally, section one would bar any contract in interstate commerce because, as the Supreme Court has recognized, "[e]very agreement concerning trade, every regulation of trade, restrains"; and in fact, the "very essence" of every contract is "to restrain."[20] Congress made no effort to define the scope of the broad section one prohibition, nor what constitutes restraints of trade. Instead, Congress left it to the courts "to give shape to the statute's broad mandate."[21]

In *Standard Oil Co v. United States*, the Supreme Court rejected the notion that the term "every" in section one must be read literally.[22] Rather, the Court ruled that Congress had drawn the statute in light of the existing common law of trade restraints, which prohibited only unreasonable restraints of trade.[23] Accordingly, section one bars only unreasonable restraints of trade; and thus, the Rule of Reason was born.

Standard Oil, however, made no attempt to provide guidance on how the Rule of Reason would be applied to the facts of a particular case. Over a decade earlier, then–Judge Taft, writing for the Sixth Circuit in *Addyston Pipe*,[24] ruled that the analysis must focus on the character of the restraint in question, not the degree.[25] *Addyston Pipe* involved an action by the United States to prosecute a scheme to fix the price of pipe and to allocate sales territories among defendants.[26] The defendants, focusing on the degree of restraint, argued that the restraints in question were not unreasonable and therefore lawful because they were not oppressive; that is, prices were not "too high."[27] Taft rejected that approach. He noted that at common law courts distinguished between naked restraints of trade and ancillary restraints of trade.[28] Naked restraints—those agreements that had no purpose other than to restrain trade for the benefit of the conspirators—were condemned out of hand by the common law courts.[29] Ancillary

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19 15 U.S.C. § 1.
20 Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
21 Nat'l Soc'y Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).
22 221 U.S. 1, 59–60 (1911).
23 *Id.*
24 United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).
25 *Id.* at 283–84.
26 *Id.* at 278.
27 *Id.* at 279.
28 *Id.* at 284.
29 *Addyston Pipe*, 85 F.271 at 283–84.

restraints—those restraints necessary to carry out the main purpose of the contract—were lawful if reasonable. Price fixing among competitors was a naked restraint and hence illegal per se; no question of reasonableness could be entertained by courts.[30]

In so ruling, Judge Taft criticized those courts that have equated reasonableness with the degree of the restraint as having "set sail on a sea of doubt" and "assumed the power to say, in respect to contracts that have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not."[31] Taft further stated that "[t]he manifest danger in the administration of justice according to so shifting, vague and indeterminate a standard would seem to be a strong reason against adopting it."[32]

The Supreme Court first confronted the question of how to apply the Rule of Reason in *Chicago Board of Trade*.[33] There, the government challenged as price fixing a rule adopted by the Board of Trade which imposed a trading restriction on certain commodities by requiring buyers to freeze their bids from the close of one trading session to the beginning of the next, a period of some twenty hours.[34] The Board of Trade argued that the restraint was reasonable and offered evidence of purported procompetitive benefits of its rule.[35] The trial court struck from the record of evidence purporting to justify the restraint and then condemned the rule as unlawful on its face.[36]

On appeal, the Supreme Court, with Justice Brandeis writing for the majority, reversed.[37] Rejecting the per se approach, Justice Brandeis wrote that alleged restraints under section one had to be viewed in their factual context to determine whether they are reasonable:

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may

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30 *Id.*
31 *Id.* at 284.
32 *Id.*
33 Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).
34 *Id.* at 237–38.
35 *Id.* at 237.
36 *Id.*
37 *Id.* at 241.

> suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed. The history if the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[38]

In applying these principles, Brandeis said that courts should focus on three issues; (1) the nature of the rule; (2) the scope of the rule; and (3) the effects of the rule.[39] Brandeis ruled that a restriction on price making for part of a trading day was not anticompetitive in nature because the Call Rule did not prohibit trading after hours.[40] The Rule only required buyers to decide prior to the close of a trading day the price that they would be willing to pay when trading reopened the next day.[41] As to the scope of the Rule, Brandeis emphasized that the Rule was limited to "to arrive" grain and "applied only to a small part of the grain shipped from day to day to Chicago" and then for only part of the day. Exchange members could buy "to arrive" grain at any price during a trading session and could also buy grain in other markets without any restrictions.[42]

Brandeis also concluded that the Call Rule had no appreciable effect on the market prices for grain because it applied to only a small portion of the grain shipped to Chicago daily and then for only part of the business day and did not apply at all to grain transported to markets outside Chicago.[43] In addition to finding no appreciable anticompetitive effect, Brandeis cited a number of procompetitive benefits in the form of improved market conditions for to arrive grain.[44] After concluding that the procompetitive benefits outweighed any anticompetitive effects, the Court reversed the decision below and directed judgment for the defendant.[45]

The decision in *Chicago Board of Trade* is intriguing from both a substantive and procedural perspective. From a substantive perspective,

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38 *Chicago Board of Trade*, 246 U.S. at 238.
39 *Id.* at 239–40.
40 *Id.* at 239.
41 *Id.*
42 *Id.*
43 *Chicago Board of Trade*, 246 U.S. at 240.
44 *Id.* at 240–241.
45 *Id.* at 241.

the Court clearly rejected the concepts naked restraints of trade and per se illegality suggested by Judge Taft in *Addyston Pipe*.[46] The Court—again contrary to *Addyston Pipe*—focused its analysis on the *degree* of the restraint, thus setting sail on the forbidden "sea of doubt."[47]

Procedurally, the decision is also baffling. Even though the trial court had stricken from the record all evidence of the Call Rule's supposed procompetitive benefits, Brandeis's opinion nonetheless cites a litany of procompetitive benefits.[48] Where did Brandeis get all of these "facts"? They certainly did not come from the trial record. Worse, based on these facts from outside the record, Brandeis not only reversed the judgment below but also ordered that judgment be entered for the defendant.[49] Having found that the trial had improperly excluded evidence of potential procompetitive benefits, the Court should have remanded the case, directed the trial court to admit evidence of procompetitive benefits, and then have the trial court determine whether, on balance, procompetitive benefits outweighed any anticompetitive effects.

Nevertheless, remand would not have cured the errors in the Court's analysis; the analytical framework proposed by Brandeis is itself defective. The Court identifies a laundry list of factors that courts must consider in evaluating the reasonableness of an alleged restraint.[50] Yet, it provides no indication of the importance of any one factor or what weight to assign each factor.[51] Nor does it discuss the kinds of procompetitive benefits that are appropriately considered and weighed to offset anticompetitive effects.[52] In short, *Chicago Board of Trade* provides little meaningful guidance to courts in assessing alleged restraints of trade. In a stinging rebuke, Judge, then–Professor, Easterbrook characterizes the Brandeis formulation as "empty."[53]

> If the economist has a way to approach new practices, a judge today has none. According to the Supreme Court, "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreements is one that promotes competition or one that suppresses competition . . . . [T]he purpose of the analysis is to form a judgment about

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46 *Addyston Pipe*, 85 F.271 at 283–84.

47 *Id.* at 284.

48 *Chicago Board of Trade*, 246 U.S. at 240–41.

49 *Id.* at 241.

50 *Id.* at 238.

51 Areeda & Hovenkamp, *supra* note 11, para.1502 at 389.

52 *See* Robert P. Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 913–14 (1985) ("The balancing process inherent in any [R]ule of [R]eason analysis . . . at least as currently applied . . . produces a hopeless morass").

53 Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11–12 (1984).

> the competitive significance of the restraints . . . ." How does a court tell whether the arrangement promotes or suppresses competition? It must consider the fact peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, or actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be achieved are all relevant facts. These formulations are empty. Judges and justices rightly protest that courts cannot make these judgments. "Courts are of limited utility in examining difficult economic problems . . . . [They are] ill–equipped and ill–suited for such decision making [and cannot] analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions."[54]

Moreover, the weighing process itself is fraught with peril. First, Judge Easterbrook argues that "[i]t is pointless to weigh inter against intra–brand competition because they are not commensurable."[55] Second, the process is likely riddled with mistakes. As Justice Breyer, dissenting in *Leegin*, observed: "One cannot fairly expect judges and juries (in resale price maintenance cases) to apply complex economic criteria without making a considerable number of mistakes."[56] Nowhere is this tendency more apparent than in the *Chicago Board of Trade* case itself. As discussed, Brandeis identified nine procompetitive benefits stemming from the Call Rule. The problem with that analysis is that none of the benefits cited bears any relation to the price–fixing feature of the Call Rule. Put another way, all of these benefits could have been achieved without the price restraint in question.

Even if courts were up to the task of weighing, the Rule of Reason as articulated by Justice Brandeis is unwieldy.[57] The breadth of the inquiry outlined in *Chicago Board of Trade* opens up the litigation to all manner

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54 *Id*. at 12.

55 *Id*. at 13.

56 *See* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 917 (2007) (Breyer, J. dissenting).

57 *See* Easterbrook, *supra* note 53, at 12. (Noting that the Rule of Reason requires courts to take into account numerous market facts and then weigh procompetitive benefits against anticompetitive effects, while giving courts little guidance on how various factors should be weighed).

of evidence challenging or defending the restraints at issue.[58] That, in turn, generates costly pretrial discovery, as well as satellite litigation over discovery disputes, heftier trial records and longer, more complicated trials.[59] All of these add significantly to the cost of antitrust litigation. These added costs have a distributive effect favoring defendants, who have deeper pockets and hence more financial staying power than plaintiffs.[60]

Moreover, the intensively fact–bound nature of the Rule of Reason inquiry, particularly its emphasis on anticompetitive effects rather than unlawful conduct, makes antitrust outcomes less predictable.[61] Analysis under the Rule of Reason is largely an *ex post* exercise. Parties will not know if their conduct is illegal until *after* they engage in it.[62] The *Board of Trade* analysis does not provide the parties with a traffic signal that would let them know that there will be consequences, even if no tangible harm ensues.[63] Lack of certainty not only makes litigation riskier, but also makes business decisions more difficult. Lack of certainty in the business community can have the ironic and wholly unintended effect of chilling potentially procompetitive behavior by risk averse entities.

In short, Justice Brandeis' formulation of the Rule of Reason is riddled with holes. Its shortcomings have become more glaring as business transactions have grown more complex, economic principles have become better understood, and antitrust analysis has grown more sophisticated. Yet, despite its deficiencies, *Chicago Board of Trade* has never been explicitly overruled by the Supreme Court and is still cited by courts today for its description of the Rule of Reason.[64]

B. Per se Rules

Not surprisingly, given the burdensome nature of the Rule of Reason articulated in *Chicago Board of Trade*, courts began to look for shortcuts in its application.[65] Early on, courts, building on Judge Taft's ruling in

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58 *Id.* at 12. (Observing that judges are "ill–equipped and ill–suited" to "analyze, interpret and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decision"). (citation omitted).

59 *See* Cavanagh, *supra* note 15, at 450.

60 *Id.*

61 Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1428–29 (2009).

62 *Id.* at 1426. (Because lack of anticompetitive intent is not a defense, a firm may be held liable even though it could not have predicted the anticompetitive effect of its conduct); *see* Cavanagh, *supra* note 15, at 450.

63 Cavanagh, *supra* note15, at 445.

64 *See, e.g.*, American Needle, Inc., v, NFL, 560 U.S. 183, 203, n. 10 (2010).

65 *See* Meese, *supra* note 5, at 881 ("The indisputable costs of full–blown rule of reason analysis understandably encourages courts, scholars, and enforcement officials to explore

Addyston Pipe, came to realize that certain restraints were so pernicious and so devoid of economic benefit that they can be adjudged and condemned without the elaborate analysis called for in *Chicago Board of Trade*.[66] This insight, supported by both judicial experience and economic theory, led to per se condemnation of certain restraints, including horizontal price fixing[67] and division of markets among competitors.[68] Under the per se analysis, the plaintiff is spared the burden of defining relevant markets and proving the defendant's market power.[69] Once the court finds that the conduct at issue is within the per se category, that conduct is "conclusively presumed to unreasonably restrain competition."[70] Whereas the Rule of Reason is a rule of construction,[71] the per se rule is largely a rule of evidence[72] that prohibits defendants from offering evidence of procompetitive benefits for conduct that the courts have determined is inherently anticompetitive.[73] The per se approach offers several benefits that the *Chicago Board of Trade* approach lacks, including clarity, predictability, administrability, and efficiency.[74] After the *Socony–Vacuum* decision in 1940, per se rules became firmly embedded in antitrust jurisprudence. Courts became enamored of the per se approach in part because of the benefits described above but also because of the widely held perception "that courts are of limited utility in examining difficult economic problems"[75] and therefore should not "ramble through the wilds of economic theory."[76]

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alternative methods for evaluating the numerous restraints that avoid per se condemnation.").

66 *See* United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927); *see also* Northern Pacific Railway Co. v. Unites States, 356 U.S. 1, 5 (1950) ("there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate injury as to the precise harm they have caused or the business excuse for their use.").

67 *Id.*; *see generally* United States v. Socony–Vacuum Oil Co., 310 U.S. 150 (1940).

68 *See* United States v. Topco Assocs., 405 U.S. 596, 614 (1972).

69 *See Northern Pacific Railway*, 356 U.S. at 5.

70 *Id.*

71 Spencer Weber Waller, *Understanding and Appreciating Competition Law*, 61 ANTITRUST L.J. 55, 62 (1992).

72 Edward D. Cavanagh, *Vertical Price Restraints After Leegin*, 21 LOY. CONSUMER L. REV. 1, 29 (2008).

73 United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927).

74 *See* Cavanagh, *supra* note 15, at 445.

75 *Topco*, 405 U.S. at 609.

76 *Id.* at 609–10, n. 10.

C. Emergence of Quick Look

The Supreme Court's 1972 decision in *Topco* represents the high–water mark of per se jurisprudence. Yet, even as courts looked to expand the reach of per se rules in the 1960's and early 1970's, academic criticism of per se analysis became widespread.[77] Although there was virtual unanimity in the antitrust community that price fixing among competitors serves no legitimate economic purpose and should be condemned out of hand, there was substantial disagreement as to whether per se rules were appropriate beyond that narrow band of cases involving horizontal agreement to fix prices or to divide territories. Critics questioned the wisdom of applying per se rules to vertical restraints.[78] The Supreme Court's 1967 decision in *Schwinn*,[79] condemning as per se unlawful the imposition of territorial restraints by a seller where the seller has parted with title, domain, and risk, became a particular target of scholarly venom.[80] *Schwinn*, of course, was overruled a decade later by *Sylvania*,[81] which held that vertically imposed territorial restraints should not be condemned out of hand.[82] Thirty years after *Sylvania*, the Supreme Court in *Leegin*[83] abnegated the per se rule with respect to vertically imposed price restraints.[84]

Moreover, criticism of per se analysis was not confined to its application to vertical restraints. As businesses grew more sophisticated and transactions more complicated, courts began to see that the per se rule could, in certain cases, be too blunt an instrument to use in analyzing transactions involving horizontal restraints that may appear at first blush to be anticompetitive but upon fuller analysis promoted, rather than restrained, competition. Accordingly, courts began to take a more circumspect and nuanced approach to horizontal restraints. *BMI*[85] is a case in point. There, CBS challenged the blanket licenses offered by BMI and ASCAP under which users of copyrighted music would have access to the

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77 *Id.* at 609, n. 10.

78 *See* ROBERT BORK, THE ANTITRUST PARADOX 280–85 (1993).

79 United States v. Arnold Schwinn & Co., 388 U.S. 365, 381 (1967).

80 *See* BORK, *supra* note 78, at 285 ("Antitrust is capable of sustaining meaningless distinctions and state paradoxes but those of *Schwinn* were too many and too obvious to persist for long. The precedent suffered a timely and deserved demise shortly after its tenth anniversary.").

81 Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

82 *Id.* at 49 (With respect to non–price vertical restraint, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.").

83 Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

84 *Id.* at 890.

85 Broadcast Music, Inc., v. CBS, 441 U.S. 1 (1979).

entire BMI or ASCAP libraries for a single fee.[86] The Second Circuit had ruled that the blanket license was "literally" price fixing and should be condemned out of hand.[87] The Supreme Court rejected the per se analysis, ruling that the blanket license was procompetitive because it (1) created a new product; (2) increased rather than decreased output; (3) reduced transactions costs; (4) enhanced consumer choice; and (5) was preferred by consumers.[88] In so ruling, the Court observed that "easy labels do not always supply ready answers."[89] The Court remanded the case for a full analysis under the Rule of Reason, but the Court clearly was of the view that the blanket license would pass muster under that standard.[90]

Similarly, in *National Society of Professional Engineers* ("*NSPE*")[91] the Court was again hesitant to invoke per se condemnation of a horizontal arrangement. At issue was an NSPE ethics rule that prohibited members from discussing pricing on building projects "until after negotiations [had] resulted in the initial selection of an engineer."[92] The government sued alleging that the restrictions on competitive bidding suppressed price competition among rivals.[93] The NSPE defended, arguing that restraints imposed by professional codes of ethics should not be summarily condemned and that the restraints enhanced consumer welfare by promoting safe structures.[94]

The Court rejected those arguments and ruled:

> While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban in competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customers of "the ability to utilize and compare prices in selecting engineering

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86 *Id.* at 4.
87 *Id.* at 8.
88 *Id.* at 19–24.
89 *Id.* at 8.
90 *Id.* at 24–25.
91 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).
92 *Id.* at 682–83.
93 *Id.* at 684.
94 *Id.* at 681, 684–88.

> services . . . ." On its face, this agreement restrains trade within the meaning of §1 of the Sherman Act.[95]

In so holding, the Court considered—and rejected—NSPE defenses and procompetitive justifications.[96] *NSPE* marks a subtle shifting toward more textured approach to per se illegality. Here, we have a case which, while not classic price–fixing, is clearly anticompetitive in character. The Court had no problem condemning the arrangement, but only after taking into account possible justifications.[97]

BMI and *NSPE* laid the foundation for three subsequent Supreme Court cases under section one of the Sherman Act: *NCAA*,[98] *Indiana Federation of Dentists*,[99] and *Cal Dental*.[100] In *NCAA*, plaintiffs, some member schools with football programs, sued the NCAA, alleging that by acting as the exclusive agent of member schools to negotiate with national networks the right to televise college football games and by banning member schools negotiating their own deals for televising their football games, the NCAA violated section one of the Sherman Act.[101] The package negotiated by the NCAA provided for: (1) appearance requirements under which at least 82 different schools would have television exposure during the life of the contract; and (2) appearance limitations, which restricted the number of times a given school could appear over the three year term of the contract.[102] Actual payments for television rights per game would be negotiated with the member schools, but the aggregate payment to all schools had to be at least $131.75 million under the contract.[103]

The arrangement clearly restricted output and artificially inflated the price for rights to televise college football games.[104] Both the Southern District of New York[105] and Second Circuit[106] condemned the NCAA television policy as per se illegal. The Supreme Court agreed that the NCAA conduct was unlawful but declined to apply the per se rule.[107] In so ruling, the Court identified three factors that did *not* underlie its decision

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95 *Id.* at 692–93.
96 *Id.* at 693–94.
97 *Nat'l Soc'y of Prof'l Eng'rs* at 694.
98 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).
99 F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).
100 Cal. Dental Ass'n v. F.T.C., 526 U.S. 752 (1999).
101 Bd. of Regents of Univ. of Okla. v. NCAA, 707 F. 2d 1147, 1149–50 (2d Cir. 1983).
102 *NCAA*, 468 U.S. at 94.
103 *Id.* at 92–93.
104 *Id.* at 107–108.
105 Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1300–01. (S.D.N.Y. 1982).
106 *NCAA*, 707 F.2d at 1153–54.
107 *NCAA*, 468 U.S. at 100.

to eschew per se analysis: (1) lack of experience with this type of restraint; (2) the fact that the NCAA was a not–for–profit entity; and (3) respect for the NCAA's historic function of fostering amateurism in athletes.[108]

Rather, analogizing the NCAA to a professional sports league, the Court held that some horizontal restraints among members were necessary if the product—college athletics—were to exist at all; and therefore, per se analysis was inappropriate in this case.[109] That said, the Court wasted little time in condemning the NCAA television plan. It concluded that the NCAA plan "has a significant potential for anticompetitive effects"[110] and that the "anticompetitive consequences of this arrangement are apparent."[111] The Court rejected out of hand the NCAA's defense that it lacked market power, ruling that "the absence of market power does not justify a naked restraint on price or output."[112] The Court then cut to the chase: "This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."[113] The Court went on to reject all of the NCAA's proffered justifications and affirmed the finding of liability.[114]

The Court took a similar approach in *Indiana Federation of Dentists*.[115] In that case, a group of dentists agreed not to comply with an insurance company protocol that required dentists to submit dental records, x–rays and treatment plans as a prerequisite to insurance company approval of coverage for their patients.[116] The FTC ruled this conduct constituted an unlawful group boycott.[117] The Seventh Circuit reversed, holding that absent proof of a relevant market and market power, no violation had been established.[118]

Reversing the Court of Appeals, the Supreme Court utilized that same analytical framework that it had used in *NSPE* and *NCAA*.[119] First, the court found that defendants' conduct did not fit the mold of a classic group boycott that courts have traditionally condemned out of hand.[120] Nevertheless, the Court found that by refusing to furnish the requested data to insurance companies, defendants denied information to patients and

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108 *Id.* at 100–01.
109 *Id.* at 101–02.
110 *Id.* at 104.
111 *Id.* at 106.
112 *NCAA*, 468 U.S. at 109.
113 *Id.* at 110.
114 *Id.* at 111–20.
115 *See* F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).
116 *Id.* at 451.
117 *Id.* at 451–52.
118 *Id.* at 453.
119 *Id.* at 458–59.
120 *Id.* at 458.

"limited consumer choice by impairing the ordinary give and take of the marketplace."[121] The Court further found that the FTC's proof of detrimental effects on competition obviated any need for a market inquiry.[122] Having found an adverse impact on competition, the court then entertained and summarily rejected defendants' proffered procompetitive justifications.[123]

Thereafter, in *Cal Dental*, the court gave its blessing to the quick look approach.[124] The California Dental Association ("CDA") was a non–profit organization with some 19,000 member dentists.[125] The CDA had a code of ethics that prohibited false advertising with respect to price and quality of service.[126] The FTC contended that these restrictions in themselves were not problematic but that as implemented, CDA barred *any* advertising of discounts (even if truthful) and similarly *any* advertising with respect to quality of services.[127] The FTC concluded that the restrictions on price advertising were per se unlawful and that, alternatively, restrictions on both price advertising on non–price advertising would be unlawful under a quick look analysis.[128]

The Ninth Circuit affirmed but rejected the application of the per se rule and held the conduct in question unlawful under a quick look analysis.[129] The Supreme Court ultimately reversed the Circuit Court.[130] In so ruling, the Court did give its seal of approval to the quick look analysis. The Court for the first time acknowledged that the rulings in *NCAA*, *IFD*, and *NSPE* "formed the basis for what has come to be called abbreviated or 'quick look' analysis under the rule of reason."[131] The Court held that the quick look approach applies where "an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers and markets."[132]

Moreover, the Court stated explicitly what it had hinted at in *NSPE*, *NCAA*, and *IFD:* that there are no bright lines separating per se restraints

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121 *Ind. Fed'n of Dentists*, 476 U.S. at 459.
122 *Id.* at 460.
123 *Id.* at 462–64.
124 Cal. Dental. Ass'n v. F.T.C. 526 U.S. 756, 769–70 (1999).
125 *Id.* at 757.
126 *Id.* at 760.
127 *Id.* at 762.
128 *Id.* at 762–63.
129 *Id.* at 763–64.
130 *Cal Dental*, 526 U.S. at 781 ("Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for fuller consideration of the issue.").
131 *Id.* at 770.
132 *Id.*

from those requiring a more detailed analysis, stating that "[t]he truth is that our categories of analysis of anticompetitive effect are far less fixed than terms like 'per se', 'quick look' and '[R]ule of [R]eason' tend to make them appear."[133] Accordingly, the Court proposed a sliding scale under which "the quality of proof required should vary with the circumstances."[134] Given that "there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for a more detailed treatment,"[135] the Court must engage "in an enquiry meet for the case, looking to the circumstances, details and logic of the restraint."[136]

Having accepted the "quick look" concept in principle, the Court ultimately concluded that a "less quick look" was essential in analyzing CDA's advertising restrictions and reversed the Ninth Circuit because (1) the alleged anticompetitive effect on advertising was not intuitively obvious and (2) the ban on misleading and unverifiable discount advertising may have promoted, rather than restrained, competition.[137] That said, the Court also emphasized that the fact that quick look is found to be inapplicable does not necessarily mean that a full–blown Rule of Reason analysis is required.[138]

Although *Cal Dental* provides some useful insights into the operation of the Rule of Reason, particularly that the Rule of Reason operates on a continuum without a sharp divide between per se and Rule of Reason and that the quantum of proof should be proportional to the nature of the conduct, the decision provides little guidance to the lower courts on how quick look should be implemented. Moreover, the guidance that the court does provide is not particularly useful. For example, as discussed above, the Court states that quick look analysis is appropriate when the anticompetitive nature of the conduct is obvious, even to a person with little understanding of economics.[139] Yet, the Court is silent on the question of why the degree of economic analysis for a particular set of facts should turn on what those with limited understanding of economics perceive. For these reasons, *Cal Dental* must be viewed as a lost opportunity for clarifying the application of the Rule of Reason generally and quick look in particular.

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133 *Id.* at 779.
134 *Id.* at 780.
135 *Id.* at 780–81.
136 *Cal Dental*, 526 U.S. at 781.
137 *Id.* at 774–80.
138 *Id.* at 779 ("[I]t does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination.").
139 *Id.* at 770.

D. Do We Need Quick Look?

Support for the quick look protocol is widespread within the antitrust world.[140] Proponents of quick look view it as an improvement over traditional Rule of Reason analysis for several reasons: (1) it reduces litigation costs; (2) it fosters deterrence by encouraging lawsuits that might otherwise be intimidated by the burdens of a traditional Rule of Reason case; and (3) it achieves cost savings without barring defendants from presenting justifications for their conduct.[141] More importantly, the quick look approach gives antitrust plaintiffs a fighting chance in cases that fall outside the per se ambit. In effect, Rule of Reason equals Judgment for the Defendant.[142]

Antitrust plaintiffs are at a severe disadvantage in traditional Rule of Reason cases for a variety of reasons. First, they are generally outgunned by deep pocket defendants who can afford to retain top law firms and economic consultants and who can always find economic benefits in the challenged conduct. Second, as discussed above,[143] the *Chicago Board of Trade* is indeterminate and provides little guidance to the courts. Third, the courts have difficulty weighing procompetitive benefits against anticompetitive effects.[144] Fourth, in the face of this uncertainty, it is difficult for courts to impose treble damages on defendants. In short, quick look can serve to level the antitrust playing field without arbitrary disadvantaging defendants.

Quick look, however, is not without its detractors. One critic has described quick look as "all pain and no gain."[145] Critics also argue that a quick look analysis adds significant costs to antitrust proceedings without concomitant benefits.[146] In particular, they argue that courts rarely invoke

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140 *See* Meese, *supra* note 5 at 838 ("Support for quick look is universal within the antitrust community; courts, enforcement agencies and numerous scholars have endorsed the approach.").

141 *Id.*

142 *Id.* at 855 ("Plaintiffs almost never prevail in a full–blown rule of reason case. Most importantly, proof of a prima facie case, whether through proof of market power or actual detrimental effects, is difficult. Indeed, one recent study of all rule of reason cases decided between early 1999 and mid–2009 concluded that ninety–seven percent of such cases fail at this first stage because plaintiffs cannot establish a prima facie case of harm. This result was consistent with the result the same author obtained after studying several hundred rule of reason cases decided between 1977 and 1998. Also, in that small subset of cases in which plaintiffs do establish harm and thus a prima facie case, defendants nonetheless prove benefits that outweigh harms in most such cases. The more recent of these two studies found that plaintiffs prevailed in about one percent of full–blown rule of reason cases." (footnotes omitted)).

143 *See supra* notes 48–54 and accompanying text.

144 *See supra* notes 48–52 and accompanying text.

145 *See* Meese, *supra* note 5, at 863.

146 *Id.* at 882.

quick look so that cases are ultimately analyzed under a full Rule of Reason that would apply were there no quick look in the first place.[147] Further, where quick look is applied, the restraint would probably have been condemned under a per se assessment, which is less costly than quick look.[148]

However, critics of quick look also acknowledge that under the Rule of Reason, antitrust defendants are nearly always successful in cases falling outside of the per se spectrum.[149] This fact alone is a strong reason for the courts to develop a workable and robust quick look protocol that would help level the antitrust playing field.

II. POST–*CAL DENTAL* RULINGS ON QUICK LOOK

A. Supreme Court

Unfortunately, the Supreme Court has not taken steps to fill the analytical void left by *Cal Dental* in the nearly two decades since that decision was handed down. Not once has the Court invoked quick look post *Cal Dental*. In *Dagher*, the Court rejected quick look out of hand.[150] In *Leegin*,[151] the Court, reversing a century of precedent, held that resale price maintenance should not be subject of per se condemnation[152]; rather, vertically imposed price restraints must be evaluated under a full–blown Rule of Reason.[153] Thereafter, in *Actavis*,[154] the Court declined to hold that reverse payments made to settle patent infringement cases should be viewed as presumptively unlawful, notwithstanding the anomaly that the victim of the alleged infringement ends up compensating the alleged infringer.[155] The Court concluded that reverse payments failed to meet the criterion for quick look set forth in *Cal Dental*

> because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other

147 *Id.*
148 *Id.*
149 *Id.* at 855.
150 Texaco Inc. v. Dagher, 547 U.S. 1, 7, n. 3 (2010).
151 Leegin Creative Leather Prod., Inc., v. PSKS, Inc., 551 U.S. 877 (2007).
152 *Id.* at 894.
153 *Id.* at 898–99.
154 F.T.C. v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223 (2013).
155 *Id.* at 2237.

> convincing justification. The existence and degree of any anticompetitive consequence may also vary among industries. These complexities lead us to conclude that the FTC must prove its cases as in any other rule–of–reason cases.[156]

Moreover, the Court post *Cal Dental* has sent mixed signals with respect to quick look. For example, in *Leegin*, the Court seems to embrace a dichotomous Rule of Reason/per se approach,[157] stepping back from language in *Cal Dental* that the Rule of Reason must be viewed as a spectrum with "no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for a more detailed treatment."[158] At the same time, the Court in *Leegin* also suggested that as trial courts gain experience with r/p/m cases, the detailed analysis prescribed in *Chicago Board of Trade* may not be necessary and that courts can "devise rules over time for offering proof, or even presumptions, where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[159]

Similarly, the Court in *Actavis* ruled that although reverse payment arrangements should not be viewed as presumptively unlawful, a full–blown Rule of Reason analysis may not be necessary, and that courts may devise a structured Rule of Reason analysis.[160] The court seems to say that there may be a quick look or a not so quick look but nothing more.

Essentially, the Court has left the task of fleshing out the quick look doctrine to the lower courts.[161] While there is surely some wisdom in allowing courts to develop experience with various types of restraints in

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156 *Id.*

157 *Leegin*, 551 U.S. at 886 ("The rule of reason does not govern all restraints. Some types "are deemed unlawful *per se*." The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work[;] . . . and, it must be acknowledged, the *per se* rule can give clear guidance for certain conduct. Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, . . . or to divide markets . . . .") (internal citations omitted).

158 *Cal Dental*, 526 U.S. at 780–81.

159 *Leegin*, 551 U.S. at 898–99.

160 *Actavis*, 133 S. Ct. at 2238 ("As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences. . . . We therefore leave to the lower courts the structuring of the present rule–of–reason antitrust litigation.") (internal citations omitted).

161 *Leegin*, 551 U.S. at 898–99.

order to determine which restraints are likely to have negative impact on competition and which restraints require a detailed assessment before anticompetitive effect can be measured, that approach also creates uncertainty among litigants and adds significantly to the cost of litigation. For example, in the wake of *Cal Dental*, antitrust plaintiffs must still be prepared to present alternative theories of liability—per se, quick look and Rule of Reason.[162] Relying exclusively on a per se theory or a quick look theory would be fatal were the court to conclude that a full blown Rule of Reason analysis would be required.[163] Yet, the higher costs incurred by the preparation and the presentation of the alternative theories is precisely the opposite result intended through use of quick look analysis.[164] The abbreviated Rule of Reason approach is intended as a shortcut to save time and money rather than as an additional burden on antitrust litigants. Put another way, the exigencies of developing a winning trial strategy may defeat the purpose of quick look.

B. Lower Courts

As discussed,[165] the Supreme Court in *Actavis* and *Leegin* left it to the lower courts to shape the antitrust analysis in reverse payment and r/p/m cases. In *Dagher*, the Court found the doctrine to be inappropriate. However, in the nearly two decades since the decision in *Cal Dental*, lower courts have made little progress in developing the parameters of quick look. Indeed, the quick look doctrine appears to be in limbo.

1. FTC

One notable exception is the *Three Tenors*[166] case in the D.C. Circuit. In that case, the FTC challenged certain agreements between Polygram and Warner as part of a joint venture to distribute an album recorded by the Three Tenors in connection with their appearance at the 1998 World

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[162] *See* Stucke, *supra* note 61, at 1413 ("But the Court [in *Cal Dental*] never gave guidance as to where along the continuum the lower courts should evaluate specific kinds of restraints. Absent such guidance, antitrust plaintiffs face a difficult tactical decision: if they litigate only a per se or quick–look theory, they may be prevented from further factfinding if the court opts for a [Rule of Reason] analysis. Risk–averse counsel will ultimately prepare for a full–blown [Rule of Reason], plead their case to include all three standards, and hope that the trial court opts for the quick–look or per se standard in a preliminary hearing. The necessity of a comprehensive trial strategy, however defeats the purpose of the quick–look. And trial courts are likely to opt for [Rule of Reason] to lower the risk of reversal because the lack guidance on the proper legal standard for particular restraints." (footnotes omitted)).

[163] *Id.*

[164] *Id.*

[165] *See supra* notes 150–61 and accompanying text.

[166] Polygram Holding, Inc. v. F.T.C., 416 F.3d 29 (D.C. Cir. 2005).

Cup of Soccer.[167] Warner had exclusive worldwide rights to the album.[168] Warner chose to distribute the album only in the United States and licensed the international rights to Polygram.[169] The Three Tenors had previously released albums in connection with the 1990 and 1994 World Cup championships, both of which had been financial successes.[170] At some point after the joint venture had been established, the parties learned that the repertoire for the 1998 concert would substantially overlap those of the 1990 and 1994 concerts.[171] Thereafter, Polygram and Warner agreed, inter alia, to suspend advertising and discounting of the earlier albums.[172]

The FTC challenged the agreed upon restraints under § 45 of the FTC Act,[173] relying on its earlier decision in *In re Massachusetts Board of Optometry*,[174] ("*Mass. Board*"). The FTC argued that the restraints in question were "inherently suspect", i.e., likely to restrict competition and decrease output, and, absent proof of procompetitive justification, are presumptively unlawful.[175] Applying the *Mass. Board* truncated analysis, the Commission concluded that the restraints in question were unlawful.[176]

Affirming, the D.C. Circuit not only embraced the analytical framework in *Mass. Board* but also clarified its application, harmonizing the *Mass. Board* approach with that taken in *Cal Dental*.[177] The Court of Appeals ruled that a restraint is presumptively unlawful "[i]f, based upon economic learning and the experience of the market, it is obvious that the restraint of trade likely impairs competition".[178] The Court further explained that "the rebuttable presumption of illegality arises not necessarily from anything 'inherent' in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare."[179] Thus, "as economic learning and market experiences evolve, so too will the class of restraints subject to summary adjudication."[180] The Court concluded: "an agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks

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167 *Id.* at 31.
168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.* at 32.
172 *Polygram*, 416 F.3d at 31.
173 15 U.S.C. § 45 (2000).
174 110 F.T.C. 549 (1988), 1988 WL 1025476.
175 *Polygram*, 416 F.3d at 32–33.
176 *Id.* at 33.
177 *Id.* at 35–37.
178 *Id.* at 37.
179 *Id.*
180 *Id.*

suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as *per se* unlawful."[181]

The D.C. Circuit further noted that the "Supreme Court has recognized time and again that agreements restraining autonomy in pricing and advertising impede the 'ordinary give and take of the market place.'"[182] Therefore, in the absence of any plausible explanations to the contrary, the challenged restraints could be summarily condemned.

Thereafter, the FTC successfully invoked the "inherently suspect" framework in *North Texas Specialty Physicians v. F.T.C.*.[183] In that case, the North Texas Specialty Physicians ("NTSP"), an association of doctors, negotiated fee arrangements with payors on behalf of the participating doctors.[184] Once the NTSP was in negotiation with a particular payor, member doctors were barred under Physicians Participation Agreements from separately negotiating their own deals with that payor.[185] As a result, the NTSP effectively eliminated price competition from any member doctor willing to accept lower fees than those negotiated on behalf of the group.[186]

The FTC argued that the collective action by the physicians constituted a form of price fixing.[187] The Administrative Law Judge found that the conduct constituted horizontal price fixing and condemned it out of hand, and the FTC affirmed.[188] Although acknowledging that the restraints might be "characterized as per se unlawful under the antitrust laws and then subject to summary condemnation," the FTC, relying on *Three Tenors*, invoked its inherently suspect analysis.[189] After considering and rejecting the NTSP procompetitive justification arguments, the Commission entered a cease and desist order against NTSP.[190]

The Fifth Circuit, like the FTC, chose not to decide whether the arrangements in question were subject to per se condemnation but also recognized that "some of the NTSP's practices bear a very close resemblance to horizontal price fixing."[191] In applying a truncated analysis, the Court of Appeals underscored the heavy burden of proof on the FTC to condemn NTSP after a quick look.

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181 *Polygram*, 416 F.3d at 37.
182 *Id.* (citations omitted).
183 528 F.3d 346 (5th Cir. 2008).
184 *Id.* at 352.
185 *Id.* at 353.
186 *Id.*
187 *Id.* at 353–54.
188 *Id.* at 353.
189 *North Texas Specialty Physicians*, 528 F.3d at 354.
190 *Id.*
191 *Id.* at 362.

> To justify a quick look analysis, the burden remains on the challenger to demonstrate that the proffered procompetitive effect does not plausibly result in "a net procompetitive effect, or possibly no effect at all on competition." If, after examining the competing claims of anti– and procompetitive effects, it remains plausible that the net effect is procompetitive or that there is no effect on competition, then "[t]he obvious anticompetitive effect triggers abbreviated analysis has not been shown."[192]

The Fifth Circuit found that the anticompetitive effects of the NTSP practices at issue were "obvious" and that the "procompetitive justifications do not plausibly result in a net procompetitive effect or in no effect at all on competition" and concluded that the quick look approach was appropriate on these facts.[193]

The FTC again invoked quick look on *Realcomp II Ltd. v. F.T.C.*.[194] In that case, the FTC challenged the practices of an association of real estate brokers in Michigan which restrained competition among brokers.[195] Realcomp maintained a database of property listings but barred information about exclusive agency and other nontraditional listings in the database from being distributed to public real estate advertising websites through its database feeds.[196] The FTC alleged "that Realcomp's website policy and search function policy injured consumers by explicitly limiting the publication and marketing of non–traditional listing, thereby eliminating certain forms of competition without cognizable and plausible efficiency justifications."[197] The Commission further argued that "Realcomp had adopted restrictive policies in order to restrain competition from limited service brokers."[198] The Administrative Law Judge dismissed the complaint, but the Commission overruled that decision.[199]

In applying the quick look framework, the Commission found Realcomp's "restraints on discounters advertising and on the dissemination of information to consumers regarding discounted services"[200] obviously anticompetitive by analogizing those restraints to (1) music companies' "restrictions on truthful and non–deceptive

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192 *Id.*
193 *Id.* at 362–63.
194 635 F.3d 815 (6th Cir. 2011).
195 *Id.* at 819.
196 *Id.* at 820–22.
197 *Id.* at 822.
198 *Id.*
199 *Id.* at 823.
200 In the Matter of Realcomp II, Ltd., No. 9320, 2007 WL 6936319, at * 22 (F.T.C. Oct. 30, 2009).

advertising"; (2) dentists refusal to provide insurance companies x–rays from patients; (3) exclusion of a rival at a trade–show by marine dealers; and (4) agreement among automobile retailers to limit the hours that showrooms are open.[201] The Commission's use of analogy to establish obviousness is a departure from the *Three Tenors*, which held that courts must be guided by "economic learning and experience of the market." [202] Critics have questioned whether, using analogy as the criteria, it is possible to make a confident judgment about the principal tendency of the restriction.[203] Critics have also argued that the restraints in cases cited by the Commission as analogous to Realcomp's behavior were broader than those in Realcomp and warned of the "slippery slope of argument by analogy."[204]

However, the Commission also ruled in the alternative that the restraints at issue were unreasonable after undertaking a full Rule of Reason analysis.[205] The Court of Appeals affirmed on this ground and did not pass on the Commission's use of quick look.[206]

Despite these successes, the Commission has not always been victorious in urging the quick look analytical framework. As discussed above,[207] in *Actavis*, the Supreme Court specifically rejected the FTC's arguments that reverse payments should be held presumptively unlawful and subject to a quick look analysis. The setback in *Actavis*, however, has not led the FTC to abandon quick look. In *North Carolina State Board of Dental Examiners v. F.T.C.*,[208] the FTC charged that the North Carolina State Board of Dental Examiners had, through a series of administrative procedures, effectively excluded non–dentists from the North Carolina market for teeth whitening.[209] The FTC held that the Board's conduct was unlawful under both a quick look and full Rule of Reason analysis.[210] The

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201 *Id.* at 25–26; *see* generally Geoffrey Oliver, *RX for Health Care: More Antitrust Enforcement?* 24 ANTITRUST 40, 43 (Spring 2010).

202 Polygram Holding Inc., v. F.T.C., 416 F.3d 29, 36 (D.C. Cir. 2005).

203 *See* Timothy J. Muris and Brady P.P. Cummins, *Tools of Reason; Truncation Through Judicial Experience and Economic Learning*, 28 ANTITRUST 46, 48 (Summer 2014).

204 *Id.*

205 *Realcomp*, 635 F.3d at 823. (Alternatively, under a full rule of reason analysis, the Commission further found that Realcomp's substantial market power combined with the likely anticompetitive tendencies of its policies rendered the policies unreasonable due to their likely anticompetitive effects.").

206 *Id.* at 826. ("We uphold the Commission on the basis of the more extended rule of reason analysis without reaching the question of whether to apply quick–look analysis.").

207 *See supra* note 161 and accompanying text.

208 135 S. Ct. 1101 (2015).

209 *Id.* at 1109.

210 In re The N.C. Bd. of Dental Exam'rs, 152 F.T.C. 640, 642 (2011).

Fourth Circuit affirmed,[211] but the Supreme Court, affirming the Court of Appeals, did not address the quick look issue.[212]

Currently, in *Matter of 1–800 Contacts, Inc*., the FTC has alleged that 1–800 Contacts and its rivals agreed to restrain price competition in search advertising auctions.[213] The FTC argues that the bid rigging agreements constitute price restraints as well as advertising restraints and are inherently suspect.[214] Specifically, the FTC complaint alleges:

> As horizontal agreements that restrain price competition and restrain truthful and non–misleading advertising, the Bidding Agreements are inherently suspect. Furthermore, the Bidding Agreements are overboard: they exceed the scope of any property right that 1–800 Contacts may have in its trademarks, and they are not reasonably necessary to achieve any procompetitive benefit. Less restrictive alternatives are available to 1–800 Contacts to safeguard any legitimate interest the company may have under trademark law.[215]

This allegation may well move the notion of quick look well off its moorings. In one paragraph, the Complaint conflates per se, quick look and full–blown Rule of Reason concepts and seems inherently confused about conduct that it asserts is inherently suspect.

2. Department of Justice

Despite promulgation of a structured Rule of Reason analysis that parallels the FTC's "inherently suspect" approach, during the Clinton Administration,[216] the Department of Justice has not actively advocated quick look. The Justice Department did argue quick look in the *Brown University*[217] case decided six years prior to *Cal Dental*. The Justice Department also alleged a quick look theory in the recent "no call" cases involving Silicon Valley executives,[218] but those cases have largely settled without any further development of the quick look doctrine.

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211 N.C. State Bd. of Dental Exam'rs v. F.T.C., 717 F.3d 359, 375 (4th Cir. 2015).

212 *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct at 1117.

213 Complaint at para. 1–3, 31, In re. 1–800 Contacts, Inc., F.T.C. (No. 9372).

214 *Id.* at para. 32.

215 *Id.*

216 *See* Joel Klein, *A Stepwise Approach To Antitrust Review Of Horizontal Agreements*, U.S. DEPARTMENT OF JUSTICE (Nov 7, 1996), https://www.justice.gov/atr/speech/stepwise-approach-antitrust-review-horizontal-agreements.

217 United States v. Brown Univ., 5 F.3d 658, 670 (3d Cir. 1993).

218 *See* Muris & Cummins, *supra* note 203, at 48.

3. Private Litigation

In the post–*Cal Dental* era, the lower courts have been quite reluctant to invoke quick look in private antitrust litigation. Courts have declined to engage in truncated analysis where (1) competitive effects are not "obvious"[219] or are "far from readily apparent"[220]; (2) the challenged arrangement has "unique" features[221]; (3) the circumstances surrounding the alleged restraint are "complex"[222]; and (4) the contours of the market are not sufficiently well–known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition.[223]

This is not to suggest that the courts have *never* utilized quick look. For example, in *Teledoc v. Texas Medical Board*, the district court held that a Texas Medical Board requirement that a doctor must have face to face interaction with a patient before prescribing drugs, thereby prohibiting telephone consultations that result in prescribing drugs for the patient, constitutes an unlawful restraint of trade.[224]

What accounts for the lower courts' inertia with respect to quick look? Part of the explanation surely lies in the lack of guidance from the *Cal Dental* decision[225] and the Supreme Court's subsequent lukewarm attitude to quick look expressed in *Actavis* and *Leegin*.[226] Part of the explanation may be in the growing hostility in the federal courts to private antitrust actions.[227] Neither explanation is complete because neither explanation accounts for the success of the FTC in arguing for the quick look standard

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219 Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1311 n.17 (10th Cir. 2017); Food Lion, LLC v. Dean Foods Co., 2016 WL 1259959 at *4 (E.D. Tenn. Mar. 30, 2016); Major League Baseball Properties v. Salvino, 542 F.3d 290, 334 (2d Cir. 2008) (reasoning anticompetitive effects are not obvious).

220 Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1084 n.3 (11th Cir. 2016).

221 *See, e.g.*, California v. Safeway, Inc., 651 F.3d 1118, 1137–38 (9th Cir. 2011); Continental Airlines, Inc., v. United Airlines, Inc., 277 F.3d 499, 513 (4th Cir. 2002); *Food Lion, LLC*, 2016 WL 1259959 at *4.

222 *See Safeway, Inc.*, 651 F.3d at 1137–38; *see also Food Lion, LLC*, 2016 WL 1259959 at *4.

223 Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 832 (3d Cir. 2010) (quoting Worldwide Basketball and Sport Tours, Inc., v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004)); *See also Food Lion, LLC.*, 2016 WL 1259959 at *3.

224 112 F. Supp. 3d 529, 536–37 (W.D. Tex. 2015) (reasoning anticompetitive effects are obvious).

225 *See supra* note 139 and accompanying text.

226 *See supra* note 155–61 and accompanying text.

227 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) (stressing the need to police antitrust complaints at the motion to dismiss stage "lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" (quoting Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

in the face of failure by private litigants. However, Edith Ramirez, former FTC Chair, has offered an explanation for this anomaly.[228] She argues that "[a]s an expert body, the FTC is well positioned to advance antitrust doctrine . . . ."[229] Indeed "[w]e have often seen the FTC incorporate into its decisions new ideas and modes of analysis that have yet to be accepted widely by the courts."[230] Furthermore, appellate courts have accepted the FTC's quick look framework.[231] Ramirez also observes that "[a]lthough the courts of appeal in each of these [quick look] cases affirmed and adopted the FTC's analysis, federal district courts might well have been reluctant to apply novel approaches had the courts ruled in the first instance given their institutional preference for precedent."[232]

III. PRESUMPTIVE LEGALITY?

The focus of the quick look framework has been to establish shortcuts to finding antitrust liability. However, if we are to view conduct on a spectrum, with one and representing per se liability, then, in theory, the other end of the spectrum should represent per se legality or presumed lawfulness. One perhaps unanticipated development emerging from the quick look approach is that just as certain conduct can be summarily condemned because it is obviously anticompetitive, so, too, certain conduct can be summarily adjudged per se *lawful* because it is obviously procompetitive. Indeed, the Supreme Court in *American Needle* recognized the concept of presumptive legality, noting that where a certain amount of cooperation among competitors is necessary for a product to exist, the agreements among joint venture participants are "likely to survive the Rule of Reason" and therefore do not need a "detailed analysis."[233] Accordingly, the Rule of Reason "can . . . be applied in the

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228 *See* Edith Ramirez, *The FTC: A Framework for Promoting Competition and Protecting Consumers*, 83 GEO. WASH. L. REV. 2049, 2052 (2015).

229 *Id.*

230 *Id.* ("Examples include the novel merger policy issues addressed by the Commission in *Chicago Bridge & Iron*, *Polypore*, and *ProMedica*, as well as the application of the truncated or "quick look" rule of reason analysis in *Polygram, North Texas Specialty Physicians*, and *RealComp*, in which the Commission concluded that the conduct at issue was 'inherently suspect.'" (footnotes omitted)).

231 *See*, e.g., Polygram Holding, Inc. v. F.T.C., 46 F. 3d 29, 36 (D.C. Cir. 205) ("If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.").

232 *Id.*

233 American Needle, Inc., v. NFL, 560 U.S. 183, 203 (2010).

twinkling of an eye" to find no liability.[234] The *American Needle* approach built on the Court's earlier observation in *NCAA* that certain NCAA rules may well be presumptively lawful:

> It is reasonable to assume that most of the regulatory controls of the NCAA are . . . procompetitive because they enhance public interest in intercollegiate athletes. The specific restraints . . . that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.[235]

The Seventh Circuit in *Agnew v. NCAA*,[236] relying on *American Needle*, construed the foregoing language "as a license to find certain NCAA bylaws that 'fit into the same mold' as those discussed in *Board of Regents* to be procompetitive 'in the twinkling of an eye' . . . that is, at the motion to dismiss stage."[237] Ultimately, however, the *Agnew* court declined to apply quick look because it concluded that the scholarship regulations at issue did not "fit into the same mold" as the eligibility regulations in *NCAA* and therefore required a more detailed examination under the Rule of Reason.[238]

In addition, the Supreme Court's decision in *Twombly* may encourage a greater focus on the concept of presumptively reasonable. In *Twombly*, the Court was clearly concerned that legitimate business behavior was being attacked in private treble damage actions,[239] thereby adding significantly to the already high cost of antitrust litigation and creating a significant problem of false positives.[240] The Court then assigned the district courts the task of gatekeepers to filter out unworthy cases at the motion to dismiss stage to contain discovery costs and minimize any issue of false positives.[241] The concept of presumptive reasonableness, which would force antitrust plaintiffs to come forward with strong evidence of wrongdoing at the motion to dismiss stage, would facilitate the weeding out process that *Twombly* demands.

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234 *Id.* (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.39 (1984)).

235 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984).

236 683 F.3d 328 (7th Cir. 2012).

237 *Id.* at 341 (citations omitted).

238 *Id.* at 343–44.

239 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007).

240 *See id.* at 554, 558.

241 *See id.* at 559–60.

IV. CONCLUSION

In the two decades since the *Cal Dental* ruling, the decision stands as a lost opportunity to provide a detailed framework for the quick look concept. The lower courts have been reluctant to embrace quick look analysis. Among plaintiffs, only the FTC has actively (and effectively) advocated for the concept of presumptive illegality. Quick look languishes in limbo. Ironically, the legacy of *Cal Dental* may turn out to be that it led courts to develop rules of presumptive legality rather than presumptive illegality.