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California ex rel. Harris v. Safeway, Inc.: Mismanaging the Intersection of Antitrust and Labor Law

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Introduction

In *California ex rel. Harris v. Safeway, Inc.*,[1] the United States Court of Appeals for the Ninth Circuit, sitting en banc, considered whether the nonstatutory labor exemption insulated a multiemployer bargaining unit's temporary revenue sharing provision from antitrust scrutiny, and if not, which Sherman Act § 1 standard of review applied.[2] The court held that summary condemnation, whether as a per se violation or on a "quick look" analysis, was improper because the rule of reason standard of review governed the inquiry.[3] By continuing the federal courts' preference for avoiding false positives over formalistic line drawing, the court properly linked antitrust challenges of intricate collective bargaining arrangements to the rule of reason.[4] Applying the rule of reason standard allows courts to sufficiently analyze the complex economics of temporary revenue sharing provisions and avoid condemnation of beneficial business practices.[5]

Despite its liberal application of the rule of reason standard, the court inappropriately declined to broaden the scope of antitrust law's nonstatutory labor exemption.[6] As a result of the court's narrow interpretation, multiemployer bargaining units face unnecessary antitrust liability exposure when using revenue sharing provisions during collective bargaining.[7] Thus, the Ninth Circuit created an imbalance of bargaining power between employer and union, increasing the costs

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1. 651 F.3d 1118 (9th Cir. 2011).
2. *Id.* at 1122.
3. *Id.* at 1134, 1137.
4. *See infra* Part IV.A
5. *See infra* Part IV.A.
6. *See infra* Part IV.B.
7. *See infra* Part IV.B.

of labor negotiations and undermining fair collective bargaining.[8] Alternatively, applying the nonstatutory labor exemption to temporary revenue sharing provisions would further antitrust and labor policy by avoiding false positives, reducing litigation costs, and encouraging mutually beneficial negotiations.[9]

I. The Case

A. Factual Background

With their current collective bargaining agreement expiring in October of 2003, three of Southern California's largest supermarket chains, Ralphs, Albertson's and Vons, formed a multiemployer collective bargaining unit (MEBU)[10] to negotiate a new labor contract (CBA) with the United Food and Commercial Workers labor organization (UCFW).[11] A month before the old labor contract expired, the grocers executed two Mutual Strike Assistant Agreements (collectively the "Agreement")[12] to prepare for the upcoming negotiations.[13] The employers, in anticipation of union whipsaw tactics,[14] agreed to abide by a revenue sharing provision (RSP) and lock out all union employees within forty-eight hours of a strike.[15] In addition, the RSP included Food 4 Less, a supermarket not privy to the disputed contract.[16] Food 4 Less agreed to the RSP because its own labor agreement would expire in the near

8. *See infra* Part IV.B.

9. *See infra* Part IV.B.

10. Multiemployer bargaining units form when several employers in one industry join together to collectively negotiate with a union. Comment, *Employer Withdrawal from Multiemployer Bargaining Units: A Proposal for Self-Regulation*, 130 U. Pa. L. Rev. 689, 689 (1982). Typically, both employers and unions favor the use of multiemployer bargaining units to facilitate efficient negotiations. *Id.* Once the National Labor Relations Board, a federal regulatory agency, certifies a multiemployer bargaining unit with each party's consent, employer and union can begin negotiations. *Id.* at 690.

11. Cal. *ex rel.* Lockyer v. Safeway, Inc., 371 F. Supp. 2d 1179, 1182 (C.D. Cal. 2005), *aff'd in part and rev'd in part by* Cal. *ex rel.* Brown v. Safeway, Inc., 615 F.3d 1171 (9th Cir. 2010), *aff'd in part and rev'd in part by* Cal. *ex rel.* Harris v. Safeway, Inc., 615 F.3d 1118 (9th Cir. 2011) (en banc). As one of the nation's largest labor unions, the UFCW represents over 1.3 million workers in retail food and clothing industries, meatpacking, poultry and other food processing industries, and health care, garment, chemical and distillery industries. Brief of Amici Curiae United Food and Commercial Workers International Union 1, Cal. *ex rel.* Brown v. Safeway, Inc., 615 F.3d 1171 (9th Cir. 2011) (Filed No. 08-55671, No. 08-55708), 2009 WL 2824441, at *1.

12. The two agreements were identical in substance, except each applied to a different labor organization. *Lockyer,* 371 F. Supp. 2d at 1182 & n.1.

13. *Id.* at 1182.

14. Whipsaw tactics are stratagems designed to act as economic weapons by exerting pressure on one employer within a multiemployer bargaining unit. In *California ex rel. Harris v. Safeway, Inc.*, the union employed selective strikes and picketing during the lockout. 651 F.3d 1118, 1140 (9th Cir. 2011) (Kozinski, J., dissenting) (citing Int'l Bhd. of Boilermakers v. NLRB, 858 F.2d 756, 760 (D.C. Cir. 1988)).

15. *Lockyer*, 371 F. Supp. 2d at 1182.

16. *Id.*

future.[17] With negotiations upcoming, Food 4 Less had a strong interest in the current dispute's outcome.[18]

By agreeing to the RSP, the individual grocers were hedged against lost revenues from any targeted whipsaw tactic; if the union picketed a particular grocer, reducing that grocer's revenues, the harmed party would have received compensation from the other benefiting grocers.[19] The RSP employed a fixed formula of limited duration to calculate shared revenues.[20] Essentially, the agreement required any member earning revenues above its historical market share to reimburse fifteen percent of excess revenues to the whipsaw victims.[21] The RSP applied to revenues accrued from the week in which the strike commenced until two full weeks following the end of the strike.[22]

On October 11, 2003, negotiations broke down and the UCFW went on strike, picketing select supermarkets.[23] The impasse lasted over four months, ending in February 2004.[24] As required by the RSP, Ralphs and Food 4 Less paid the other supermarkets approximately $142 million in excess revenue acquired during the strike period and another $4.2 million for the two-week period following the strike.[25]

B. Procedural History

On February 2, 2004, the State of California filed a complaint alleging that the MEBU members violated U.S. antitrust law, specifically Sherman Act § 1, by engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce.[26] The grocers moved for summary judgment on the ground that the RSP was immune from antitrust scrutiny under the nonstatutory labor exemption.[27] The district court denied the motion, holding that the RSP was beyond the scope of the nonstatutory labor exemption.[28] In addition, the district court denied California's motion for summary judgment in which California argued that the RSP

17. *Harris*, 651 F.3d at 1142.

18. *Id.*

19. *Lockyer*, 371 F. Supp. 2d at 1182.

20. *Id.* ("[B]eginning at '12:01 a.m. on the Monday at the start of the week in which the strike or lockout . . . commences and continuing for two . . . full weeks following the week in which each strike or lockout ends.'").

21. *Id.* at 1197.

22. *Id.* at 1182.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 1181. California sought a permanent injunction and attorney's fees. Cal. *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1124 n.5 (9th Cir. 2011).

27. *Harris*, 651 F.3d at 1124.

28. *Id.*

was a per se violation of § 1 or, alternatively, that it was unlawful under the "quick look" analysis.[29]

While preserving the right to appeal, the parties stipulated to the entry of final judgment for the grocers after California agreed not to pursue liability for a violation of § 1 of the Sherman Act under a full rule of reason analysis, and the defendants agreed not to pursue various affirmative defenses except the nonstatutory labor exemption.[30] In accordance with the parties' stipulations, the district court entered judgment in favor of the grocers.[31]

California appealed, arguing that the RSP was per se unlawful under § 1 or, alternatively, under "quick look" analysis.[32] In addition, the MEBU cross-appealed, arguing that the nonstatutory labor exemption applied.[33] On appeal, the Ninth Circuit held that the RSP violated the Sherman Act under a "quick look" analysis and the defendants' actions were not exempt under the nonstatutory labor exemption.[34] Pursuant to Circuit Rule 35-3, a majority of the judges voted to rehear the case en banc.[35]

II. Legal Background

By the late nineteenth century, the Industrial Revolution had brought about significant social and economic changes to the United States.[36] Cooperation and aggregation among large firms threatened to hinder robust economic competition.[37] Thus, in 1890, Congress passed the Sherman Antitrust Act (Sherman Act) to

29. The defendants renewed their motion for summary judgment on the nonstatutory labor exemption, which was denied a second time. *Id.*

30. *Id.* Although unclear in the opinion, the State of California was most likely unwilling to pursue the case under the rule of reason standard due to the extensive resources necessary to fully litigate a case under this standard. *See* Jennifer E. Gladieux, *Towards a Single Standard for Antitrust: The Federal Trade Commission's Evolving Rule of Reason*, 5 GEO. MASON L. REV. 471, 471–72 (1997) ("[A]pplying [the rule of reason] can be difficult because significant judicial costs are entailed in undertaking a complete factual inquiry, including the costs of gathering evidence on varied industries, performing a market analysis, and interpreting business rationales."); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001 (1986) (examining the effect of increased litigation expenses and declining government enforcement on private antitrust litigation).

31. *Harris*, 651 F.3d at 1124.

32. *Id.*

33. *Id.*

34. Cal. *ex rel.* Brown v. Safeway, Inc., 615 F.3d 1171, 1202 (9th Cir. 2010), *aff'd in part and rev'd in part by* Cal. *ex rel.* Harris v. Safeway, Inc., 615 F.3d 1118 (9th Cir. 2011) (en banc).

35. Cal. *ex rel.* Brown v. Safeway, Inc., 633 F.3d 1210, 1211 (9th Cir. 2011).

36. *See* Myron W. Watkins, *The Sherman Act: Its Designs and Its Effects*, 43 Q. J. ECON. 1, 1–3 (1928) ("[T]o realize that the last generation was the first to learn to look upon affairs from this *national* viewpoint *habitually* . . . but reflected the change in the scope of economic intercourse from local and sectional markets to national markets . . . By the Act of July 2, 1890, called the Sherman Act, Congress for the first time exerted its paramount authority so as to make every species of business conducted in the national sphere subject to a common rule. The subject matter of that common rule was the method of organizing trade and industry.").

37. *Id.*

combat the harmful effects of excessive industrial concentration and promote competition.[38] Sherman Act § 1 prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . ."[39] Since the language of § 1 is largely ambiguous, judicial interpretation has guided the law's development.[40] Over the past century, federal courts have developed three different methods for scrutinizing business practices challenged under Sherman Act § 1.[41] An antitrust court will apply a different standard of review depending on the challenged practice's nature.[42] To facilitate healthy labor relations, however, Congress and the Supreme Court have insulated certain aspects of collective bargaining from antitrust scrutiny.[43]

A. The Analytical Framework for Resolving Sherman Act § 1 Disputes

Read strictly, courts could interpret § 1 to ban literally *every* contract, combination, or conspiracy in restraint of trade.[44] To some degree every contract or business combination creates cooperation between potential rivals.[45] However, many of these business arrangements enhance competition.[46] Efficient commodities trading, for example, would not be possible without comprehensive rules regulating traders.[47] These procompetitive practices operate to increase output and reduce price, improving economic conditions for consumers.[48] The goal of antitrust law, therefore, has not been to eliminate all business associations, but "to perfect the operation of competitive markets."[49]

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38. *Id.*

39. 15 U.S.C. § 1 (2006).

40. *See* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute."); Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (noting that the Sherman Act's legislative history makes it clear that the courts have a broad mandate to shape the law by relying on the common-law tradition); Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 98 n.42 (1981) (noting that "[i]n antitrust, the federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute").

41. WILLIAM HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK, §§ 2:9, 10 (2012).

42. Federal courts have struggled to find the appropriate boundaries for these standards. *See infra* Parts II.A.1–3.

43. *See infra* Part II.B.

44. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984) (noting that the NCAA's television contract constitutes a "restraint of trade" because it limits members' freedom to negotiate, but stressing that every contract, in some sense, is a restraint of trade).

45. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984).

46. *Id.*

47. *See id.* (noting that the Chicago Board of Trade has "a sheaf of rules and cooperative arrangements that reduce the cost of competition").

48. *See, e.g.*, *Nat'l Collegiate Athletic Ass'n,* 468 U.S. at 113 (noting that as Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979), indicates, a joint selling arrangement may "mak[e] possible a new product by reaping otherwise unattainable efficiencies" (quoting Arizona v. Maricopa Cnty. Med. Soc'y, 467 U.S. 332, 365 (1982) (Powell, J., dissenting) (footnote omitted))).

49. Easterbrook, *supra* note 45, at 1.

Through the Sherman Act, Congress intended to protect consumers from anticompetitive business practices that suppress competition and reduce economic wealth.[50] Since some arrangements are procompetitive, the Supreme Court has held that the Sherman Act only condemns unreasonable restraints of trade.[51] By eliminating only unreasonable restraints, the Court encourages the efficient allocation of resources such that "consumers are assured competitive price and quality."[52] Given the complexities of modern markets, courts are hard pressed to effectuate this policy and find the appropriate balance between competition and cooperation.[53]

Antitrust judges face two potential errors during the decision-making process.[54] A false positive occurs when the judge mistakenly condemns a procompetitive practice.[55] Conversely, a false negative manifests when a judge errantly permits a competition-harming business practice.[56] The Supreme Court and commentators have noted that false positives are particularly concerning because the practice's benefits may be lost forever.[57] Stare decisis discourages firms from engaging in the condemned practice for fear of antitrust liability.[58] False negatives, by contrast, are self-correcting in the long run.[59] Anticompetitive practices attract new market entry because prices and output are not at equilibrium levels.[60] To address these concerns and assess antitrust challenges efficiently, courts have developed three different standards of review: the per se rule, the rule of reason, and the "quick look" or truncated rule of reason.[61]

50. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting R. BORK, THE ANTITRUST PARADOX 66 (1978))).

51. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911).

52. Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) (citations omitted).

53. *See* Easterbrook, *supra* note 45, at 2 (noting that courts cannot confidently determine an antitrust suit unless it knows the 'right' balance between competition and cooperation).

54. *See id.* (examining the harm from condemning procompetitive restraints and permitting anticompetitive practices).

55. *Id.*

56. *Id.*

57. *See* Chris Bernard, *Shifting and Shrinking Common Ground: Recalibrating the Federal Trade Commission's and Department of Justice's Enforcement Powers of Single-Firm Monopoly Conduct*, 34 DEL. J. CORP. L. 581, 591 (2009) (noting that "[i]n the past, the Court has stressed the need to reduce 'false positives' because 'mistaken inferences . . . chill the very conduct the antitrust laws are designed to protect'" (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986))); Easterbrook, *supra* note 45, at 2.

58. Easterbrook, *supra* note 45, at 2.

59. *Id.*

60. *Id.*

61. The separate categories reflect an attempt by the federal judiciary to limit the costs associated with expensive litigation. Gladieux, *supra* note 30, at 472.

1. The Per Se Rule

When a court finds a business practice plainly anticompetitive and without redeeming procompetitive virtues, the practice is condemned as per se unlawful.[62] If a plaintiff can prove that the defendant engaged in the condemned action, the court will impose liability "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[63] Once the plaintiff makes his prima facie case, the defendant is precluded from proving that the restraint is reasonable.[64] Business practices receive per se classification only after courts are sufficiently familiar with the particular class of restraint to predict with confidence that full analysis will condemn it.[65]

The per se rule is inappropriate where the challenged practice's economic impact is not immediately obvious.[66] The Supreme Court has used Chicago School economic models to analyze business practices and replace per se rules with the rule of reason.[67] Over time, the Court has altered its interpretation of the rule's scope to reflect modern economic thinking.[68] In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[69] the Supreme Court previously held unlawful a manufacturer's policy to sell its products only to distributers agreeing to resell them at predetermined prices.[70] For nearly a century, the Court interpreted *Dr. Miles* to impose the per se rule on agreements between a manufacturer and retailer that set a minimum price for the resale of the manufacturer's goods, known as vertical[71] resale price maintenance.[72] However, in *Leegin Creative Leather Products v. PSKS*,[73] the Supreme Court's new interpretation overturned *Dr. Miles,* holding that the per se rule does not apply to

62. N. Pac. R. Co. v. U.S., 356 U.S. 1, 5 (1958).

63. *Id.*

64. Holmes & Mangiaracina, *supra* note 41, § 2:9.

65. Arizona v. Maricopa Cnty. Med. Soc'y, 475 U.S. 322, 344 (1982).

66. State Oil Co. v. Khan, 522 U.S. 1, 10 (1997) (quoting FTC v. Indiana Federation of Dentists, 476 U.S. 477, 458–59 (1986)) (quotation marks omitted).

67. John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases,* 90 Cornell L. Rev. 617, 620–21 (2005). For a discussion of the economic price theory underpinning the Sherman Act, see Pitofsky, Goldschmid, & Wood, Trade Regulation: Cases and Materials, app. (6th ed. 2010).

68. *See* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007) (rejecting application of the per se rule to vertical minimum resale price maintenance based on economics literature providing procompetitive justifications for the practice).

69. 220 U.S. 373 (1911).

70. *Id.* at 408.

71. Among other factors, federal courts differentiate business practices based on the relationship between firms in the channels of distribution. *See, e.g.*, Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730 (1998) (explaining the difference between horizontal and vertical restraints of trade). A horizontal restraint occurs between two firms competing at the same level of commerce, i.e. manufacturer-to-manufacturer or retail-to-retail agreements. *Id.* A vertical restraint affects firms at different levels of the distribution stream, i.e. manufacturer-to-distributor relationships. *Id.*

72. *Leegin*, 551 U.S. at 887 (citing Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984)).

73. 551 U.S. 877 (2007).

vertical minimum resale price maintenance.[74] The retailer PSKS sued after a leather goods and accessories manufacturer, Leegin Leather Products, ceased selling brand name products to the plaintiff because the retailer refused to follow Leegin's minimum pricing policies.[75] Relying on expert economic analysis, the Court acknowledged that the pricing policy's economic impact was uncertain because it had both pro- and anticompetitive justifications.[76] In some instances, for example, minimum resale price maintenance may give consumers more options by stimulating interbrand competition.[77] Alternatively, illegal monopolies could use resale price maintenance to control price.[78] Since both positive and negative outcomes were possible, the Court held that per se liability was inappropriate for analyzing vertical minimum resale price maintenance agreements.[79]

Actions receiving per se condemnation include a variety of agreements between competitors.[80] For example, horizontal agreements between competitors to fix prices, share profits, or divide territory are per se illegal.[81] The Court determined that these arrangements "reduce[] [the] incentives to compete" and thereby harm competition.[82] These bright line classifications help to reduce litigation expenses and provide certainty for the legality of business practices.[83] If the per se rule does not apply then, depending on circumstances, a court will apply either the rule of reason or "quick look" analysis.[84]

2. The Rule of Reason

Under Sherman Act § 1, the rule of reason is the default standard of review for analyzing the legality of a challenged business practice.[85] A court will apply the rule of reason to every restraint of trade that does not qualify for "quick look" or per se treatment.[86] To prove that the defendant violated § 1 under this standard, a plaintiff

74. *Id.* at 899.

75. *Id.* at 884.

76. *Id.* at 892.

77. *Id.* at 890 (citing Continental T. V. v. GTE Sylvania, Inc., 433 U.S. 36, 51–52 (1977)).

78. *Id.* at 892.

79. *Id.* at 899.

80. *See* HOLMES & MANGIARACINA, *supra* note 41, § 2:9 (identifying practices receiving per se treatment).

81. *See* Citizens Publ'g Co. v. United States, 394 U.S. 131, 133–35 (1969) (invalidating competing newspapers' fifty year contract to, inter alia, fix prices and refrain from engaging in competition); HOLMES & MANGIARACINA, *supra* note 41, § 2:9.

82. *Citizens Publ'g Co.*, 394 U.S. at 135 (citing Northern Securities Co. v. United States, 193 U.S. 197, 328 (1904)).

83. *See* Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 344 (1982) (noting that the Supreme Court has tolerated invalidating some agreements that may otherwise prove reasonable to promote business certainty and litigation efficiency).

84. *See infra* notes 85–118 and accompanying text.

85. Texaco v. Dagher, 547 U.S. 1, 5 (2006) (citing State Oil Co. v. Kahn, 522 U.S. 3, 10–19 (1997)) (noting that the Court presumptively applies the rule of reason analysis).

86. *Id.*

must "demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive."[87] As an initial matter, the plaintiff must prove that the defendant had market power: the ability to raise prevailing market prices and decrease total market output.[88] For the court to assess market power, the plaintiff must delineate the relevant market.[89] A given product or service's relevant market is defined in terms of both available alternatives and geographic region of competition.[90] With the relevant market delineated, the finder of fact must decide whether the questioned practice unreasonably harms competition, taking into account a variety of factors.[91]

The result is a general inquiry into whether, under all the circumstances, the challenged practice "impos[es] an unreasonable restraint on competition."[92] Courts differ on the plaintiff's burden at this stage of the analysis.[93] Some courts require *actual* proof of anticompetitive effects, such as above-market prices or decreased output, while others require a showing of *substantial risk* of anticompetitive effects in light of the circumstances.[94] To determine if a plaintiff met the required standard, courts consider the relevant conditions, including: the defendants' intents and purposes, the structure of and competitive conditions within the affected market, the relative competitive positions and market power of the defendants, the presence of economic or legal barriers inhibiting the ability of actual or potential competitors to respond and offset the challenged practice, and apparent justifications for the restrictions such as enhanced efficiencies.[95] Given the complexities of the inquiry,

87. *Id.* The fact-intensive inquiry necessitates presentation of complex economic expert testimony in most cases. For a discussion of the factual complexity and economic nature of the issues involved in the presentation of economic expert testimony. *See* Lopatka & Page, *supra* note 67.

88. Holmes & Mangiaracina, *supra* note 41, § 2:10.

89. *Id.*

90. *Id.*

91. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("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 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 nature of the restraint and its effect, 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 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.").

92. Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

93. Holmes & Mangiaracina, *supra* note 41, § 2:10.

94. *Id.*

95. *See, e.g.*, State Oil Co. v. Kahn, 522 U.S. 3, 10 (1997) ("[T]he finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." (citations omitted)).

antitrust litigation subject to the rule of reason is a costly endeavor.[96] To address these concerns, federal courts have developed an intermediate standard of review.[97]

3. The Truncated or "Quick Look" Rule of Reason

In certain circumstances, a court will apply an abbreviated rule of reason.[98] The truncated rule of reason analysis, or "quick look," is an intermediate line of reasoning, which employs a burden-shifting framework predicated on a presumption of illegality.[99] Under the truncated rule, "a certain class of restraints . . . may require no more than cursory examination to establish that their principal or only effect is anticompetitive."[100] Once the plaintiff establishes his prima facie case, courts apply a rebuttable presumption of illegality to the challenged constraint.[101] The burden then shifts to the defendant who can rebut the presumption by proving the act's procompetitive nature.[102] The truncated rule simplifies the extensive market analysis typically required, eliminating the plaintiff's need to delineate the relevant market and show market power.[103]

A court applies the truncated rule when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[104] The Supreme Court used the truncated approach in *NCAA v. Board of Regents of the University of Oklahoma*[105] when the University of Oklahoma and the University of Georgia challenged the legality of the National Collegiate Athletic Association's (NCAA) television broadcasting plan.[106] Essentially, the NCAA limited the total number of televised intercollegiate football games that any one team could broadcast.[107] The Court acknowledged that "by restraining the quantity of television rights available for sale, the [NCAA's plan] create[d] a limitation on output."[108] Although the plan likely had anticompetitive effects on the market, limiting output and increasing price, the Court considered the NCAA's procompetitive justifications because college athletics, by their very nature, require some restraints on competition.[109]

96. Gladieux, *supra* note 30, at 471–72.

97. *See infra* notes 98–118 and accompanying text.

98. HOLMES & MANGIARACINA, *supra* note 41, § 2:10.

99. *Id.*

100. Cal. *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1134 (9th Cir. 2011) (en banc) (quoting PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1911a, at 295–96 (2d ed. 2005)).

101. HOLMES & MANGIARACINA, *supra* note 41, § 2:10.

102. *Id.*

103. *Id.*

104. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

105. 468 U.S. 85 (1984).

106. *Id.* at 88.

107. *Id.* at 94.

108. *Id.* at 99.

109. *Id.* at 101.

Inter alia, the NCAA argued that the plan was necessary to protect live attendance and maintain a competitive balance among amateur athletics.[110] Ultimately, the Supreme Court rejected each procompetitive justification, determining that the plan restricted output because it prevented schools from responding to consumer preference.[111]

If, however, an agreement's anticompetitive effects are not immediately obvious and it might plausibly have a net procompetitive effect or possibly no effect at all, the "quick look" form of analysis is inappropriate.[112] In *California Dental Ass'n v. FTC*,[113] the Supreme Court held that truncated analysis was inappropriate for analyzing a dental association's ethics rules that prevented member dentists from advertising quality or offering discounts.[114] Unlike *NCAA v. Board of Regents of the University of Oklahoma,* the Court could not easily ascertain the advertising limitations' competitive effects.[115] The Court reasoned that the rules may enhance competition by protecting uniformed customers from deceptive or confusing advertising claims.[116] As a result, the Court required full development of the record to ensure that the impact of the rules was properly understood.[117] A defendant, however, may avoid the complexities of antitrust litigation if she can convince a court that the challenged practice is exempt from review.[118]

B. The Nonstatutory Labor Exemption

In 1935, Congress signed the National Labor Relations Act (NLRA), which protects unionization and employees' exercise of collective bargaining rights.[119] The NLRA created the National Labor Relations Board to enforce employee rights, protect employees' right to organize, and obligate employers to bargain collectively with unions.[120] Because employee collective action could be perceived as an illegal restraint of trade, Congress passed legislation establishing that unions do not constitute combinations or conspiracies under the Sherman Act.[121] Effectively, Congress exempted certain union activities from antitrust review.[122]

110. *Id.* at 115, 17.

111. *Id.* at 120.

112. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999).

113. 526 U.S. 756 (1999).

114. *Id.* at 781.

115. *Id.* at 770–71.

116. *Id.* at 771.

117. *Id.* at 778.

118. *See infra* Part II.B.

119. In 1937, the Supreme Court upheld the NLRA under the Commerce Clause. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

120. *The 1935 Passage of the Wagner Act*, NLRB, http://www.nlrb.gov/who-we-are/our-history/1935-passage-wagner-act (last visited Apr. 14, 2013).

121. Three sources account for the statutory labor exemption: Section 6 of the Clayton Act, 15 U.S.C. § 17, Section 20 of the Clayton Act, 29 U.S.C. § 52, and Section 4 of the Norris-LaGuarda Act, 29 U.S.C. § 104. *See,*

Congress, however, failed to expressly exempt employers engaged in the collective bargaining process from antitrust scrutiny.[123] To fill this gap, the Supreme Court read an implicit exemption into the labor exemption statutes to shield some potentially competition-suppressing agreements between employers and unions engaged in collective bargaining from antitrust review.[124] The Supreme Court created the exemption because "some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions" to further federal labor policy and to promote meaningful collective bargaining.[125] Courts have applied the nonstatutory labor exemption to promote "good-faith bargaining over wages, hours, and working conditions."[126]

Although the boundaries of the nonstatutory labor exemption are unclear, courts attempt to protect only those agreements that facilitate a competitive and fair bargaining process.[127] In *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*,[128] the Supreme Court declined to apply the nonstatutory labor exemption to agreements between labor and management attempting to monopolize the electrical equipment manufacturing business in New York City.[129] The Supreme Court's decision reflected Congress's intent to prevent unions from gaining, "complete and unreviewable authority to aid business groups to frustrate [antitrust law's] primary objective."[130] In addition, the Court declined to insulate a wage agreement between mineworkers and large coal companies that the Court saw as an attempt to eliminate competition.[131] In these decisions, the Court

e.g., 15 U.S.C. § 17 (1914) ("The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, . . . organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations . . . be held . . . to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.").

122. *See* 15 U.S.C. § 17 (1914) (exempting labor organization from antitrust scrutiny).

123. *See* Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (noting that the explicit exemption does not include agreements between unions and nonlabor parties (citing Mine Workers v. Pennington, 381 U.S. 657, 662 (1962))).

124. Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996) (citations omitted).

125. *Id.* at 237 (citing *Connell*, 421 U.S. at 622; Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 711 (1965); *Pennington*, 381 U.S. at 665 (parentheticals omitted)); *see also The Supreme Court —Leading Cases*, 110 HARV. L. REV. 327, 327 (1996) ("Courts have long struggled to reconcile the federal antitrust laws, which prohibit anticompetitive combinations, with the federal labor laws, which encourage the formation of unions, multiemployer bargaining groups, and other competition-reducing collaborations.").

126. *Brown*, 518 U.S. at 236 (citations omitted).

127. *See* Clarett v. Nat'l Football League, 369 F.3d 124, 131 (2d Cir. 2004) (noting that although the Supreme Court has never delineated the precise boundaries of the exemption, the Court's guidance has come from cases where the employer and union attempted to eliminate a competitor from the market).

128. 325 U.S. 797 (1945).

129. *Id.* at 809.

130. *Id.* at 810.

131. United Mine Workers of America v. Pennington, 381 U.S. 657, 665–66 (1965).

refused to protect collective bargaining agreements that failed to embody good-faith bargaining efforts.[132]

Despite hesitation by lower courts,[133] the Supreme Court broadened the nonstatutory labor exemption to include agreements solely between employers.[134] In *Brown v. Pro Football, Inc.,* the Supreme Court insulated the National Football League's (NFL) unilateral implementation of the developmental squad program despite resistance from the National Football League Players Association.[135] The Court relied on five factors to resolve the issue: (1) whether the action "grew out of, and was directly related to" the collective bargaining process, (2) whether the practice was "unobjectionable as a matter of labor law and policy," (3) whether it concerned only parties to the collective bargaining relationship, (4) whether the conduct involved subject matter that the parties were required to negotiate collectively, and (5) whether the conduct "took place during and immediately after a collective-bargaining negotiation."[136] In holding that the nonstatutory labor exemption applied, the Court emphasized that, for the exemption to be effective, it must apply to both the completed agreement and the bargaining process.[137] Moreover, the Court stressed that some restraints on competition were necessary to protect meaningful collective bargaining.[138] By expanding the nonstatutory labor exemption in *Brown*, the Court showed a willingness to exempt employer-only agreements provided they facilitate a competitive and healthy bargaining process.[139]

III. The Court's Reasoning

In *California ex rel. Harris v. Safeway, Inc.*, the Ninth Circuit narrowly construed the nonstatutory labor exemption, holding that the RSP was not exempt from antitrust scrutiny.[140] The court strictly interpreted *Brown v. Pro Football*, *Inc.*, reasoning that, under the totality of the circumstances, the logic and history of the exemption counseled against applying the nonstatutory labor exemption to the grocers' RSP.[141]

132. *See supra* notes 128–31 and accompanying text.

133. *See* Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 257b2, at 141 (3d ed. 2006) (noting that the courts have been historically reluctant to extend the exemption to an agreement between employers that did not include an employee group).

134. Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996).

135. The NFL sought to create developmental squads, whose players would be paid $1000 per week. *Id.* at 234. The developmental squad players filed suit arguing the NFL had made an agreement in restraint of trade violating § 1 of the Sherman Act. *Id.* at 235.

136. *Id.* at 238, 250.

137. *See id.* at 243 ("One cannot mean the principle literally—that the exemption applies only to understandings embodied in a collective-bargaining agreement—for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired.").

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

139. *See supra* notes 133–38 and accompanying text.

140. Cal. *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1129 (9th Cir. 2011).

141. *Id.*

First, the Ninth Circuit contrasted the unilateral imposition of terms by the NFL in *Brown* with the MEBU's use of the RSP.[142] The court noted that the former was an accepted and extensively regulated practice in labor negotiation, whereas in the present case the defendants' actions lacked the necessary history or endorsement from labor law and policy.[143] Since the parties were unable to identify regulatory or judicial decisions that sanctioned the use of a RSP as an economic weapon during a labor dispute, the court reasoned that the RSP was "on different footing" than the agreement in *Brown*.[144]

The court then concluded that the concerns "central to the history and logic of the exemption" underlying *Brown* were not present.[145] The court reasoned that the RSP was neither significant nor necessary to the collective bargaining process because it did not relate to any core subject matter of bargaining.[146] According to the court, the defendants' assertion of the RSP's relative value and purpose as an economic weapon over a core bargaining subject was insufficient to merit the implicit exemption's application.[147] The court went further, arguing that exempting the RSP would allow multiemployer bargaining units to fix prices while claiming it was simply an economic bargaining tool.[148] The court, however, did not read *Brown* to expand the nonstatutory exemption so broadly.[149]

To support its decision, the court maintained that failure to expand the nonstatutory labor exemption would not "introduce instability and uncertainty into the collective bargaining process."[150] According to the Ninth Circuit, the fear of antitrust liability would not hinder the functioning of the collective bargaining process.[151] Furthermore, the RSP did not concern the labor market.[152] Since the RSP only concerned the "business market," the case for exemption applicability was not strong.[153] The court argued that the grocers' profit-sharing was not directly consequential to the labor market.[154]

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 1129–30.

146. The core subject matter of bargaining includes wages, hours, and working conditions. *Id.* at 1130.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* (quoting Brown v. Pro Football, Inc., 518 U.S. 231, 242(1996)).

151. *Id.*

152. *Id.*

153. *Id.* ("The case for the applicability of the non-statutory exemption is strongest where the alleged restraint operates primarily in the labor market and has only tangential effects on the business market." (quoting Am. Steel Erectors, Inc. v. Local Union No. 7. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68, 79 (1st Cir. 2008))).

154. *Harris*, 651 F.3d at 1131. The court stopped short of "endorsing the concept that as a strict rule the non-statutory labor exemption can only arise in a case involving restraint of terms directly relating to labor." *Id.*

Finally, the court reasoned that the MEBU's inclusion of a nonmember in the revenue sharing scheme "counsel[ed] against application of the exemption."[155] Because the actions in *Brown* concerned only parties to the collective bargaining process, the court was uncomfortable stretching the nonstatutory labor exemption to an agreement including nonmembers.[156] The inclusion of Food 4 Less, a nonbargaining grocer, was evidence that the defendants' actions were not tethered to the collective bargaining process.[157] The defendants failed to convince the court that the nonmember's inclusion in the RSP was necessary because Food 4 Less's future negotiations depended on the current dispute's outcome.[158] Thus, the court held that the nonstatutory labor exemption did not apply.[159]

In dissent, Chief Judge Kozinski criticized the majority's decision as beyond the scope of the court's Article III jurisdiction.[160] Since no antitrust liability could be established, Chief Judge Kozinski maintained, the court's ruling on the nonstatutory labor exemption was unnecessary.[161] The Chief Judge argued that California's stipulated dismissal upon a finding that rule of reason applies made it unlikely that the defendant would appeal the decision.[162] Thus, the court had effectively insulated the ruling from appellate scrutiny.[163]

Moreover, the Chief Judge argued that the majority incorrectly decided the issue by failing to grapple with the complexities of the case.[164] Chief Judge Kozinski contended that every factor the Supreme Court found relevant in *Brown* supported finding the RSP protected by the labor exemption.[165] The dissent argued the first factor was satisfied; the RSP was inextricably intertwined with the collective bargaining process.[166] Moreover, the Supreme Court and NLRB have generally sanctioned the use of economic weapons to combat whipsaw tactics.[167] Thus, the RSP met the second *Brown* factor: the conduct was "unobjectionable as a matter of labor law and policy."[168] Third, the RSP concerned only parties with a direct stake in the outcome of the dispute.[169] Because Food 4 Less was bound to negotiate with the

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 1132.
160. *Id.* at 1140 (Kozinski, J., dissenting) (citing Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *See id.* ("The grocers' agreement was a direct response to the union's anticipated use of whipsaw tactics.").
167. *Id.* at 1141 (citing NLRB v. Brown, 380 U.S. 278 (1965)).
168. *Id.* (quoting Brown v. Pro Football, Inc., 518 U.S. 231, 238 (1996)).
169. *Id.* at 1142 (citing *Brown*, 518 U.S. at 250).

union, it had a strong interest in the current negotiations.[170] The fourth *Brown* factor — whether the conduct involved subject matter that the parties were required to negotiate collectively — did not apply because the RSP was procedural, not substantive, in nature, the dissent argued.[171] Finally, the conduct took place during and immediately after the collective bargaining negotiations because of the RSP's inherently limited duration.[172] Thus, the MEBU's actions met the *Brown* standard for application of the nonstatutory labor exemption.[173]

On the issue of the appropriate antitrust standard of review, however, the majority pivoted its approach, holding that rule of reason analysis applied to the RSP.[174] The court rejected California's argument that the RSP should be per se illegal as either a profit-pooling agreement or a market-allocation agreement.[175] The court distinguished the RSP from a profit-pooling agreement based on the RSP's short-term, temporary nature.[176] Furthermore, since the RSP excluded some grocers operating in the region, it did not constitute a profit-pooling arrangement.[177] Finally, the court argued that the RSP was also not an illegal market-allocation agreement because it did not prevent any defendant from making sales, stop grocers from selling any particular products, or limit the grocers to a particular set of customers or geographic regions.[178] Given these factors, the court reasoned that the RSP did not "facially appear[] to be one that would always or almost always tend to restrict competition and decrease output," making application of the per se rule inappropriate.[179]

The court also rejected the application of "quick look" analysis because the RSP's characteristics made its anticompetitive effects uncertain.[180] The RSP's limited duration and significant external competition in the market made it impossible for the court to determine the RSP's true economic impact on a "quick look."[181] The court argued that a full record must be developed to understand the actual RSP's

170. *Id.* Food 4 Less was required to pay employee benefits at a rate tied to that of Ralphs. *Id.*

171. *Id.* at 1143.

172. *Id.* (quoting *Brown*, 518 U.S. at 250)

173. *Id.* In a separate dissent, Judge Reinhardt, who authored the original Ninth Circuit decision, argued that under "quick look" analysis, the RSP should have been found to violate § 1 of the Sherman Act. *Id.* at 1144–45 (Reinhart, J., dissenting).

174. *Id.* at 1139 (majority opinion).

175. *Id.* at 1134.

176. *See id.* at 1136 (citing Citizen Publishing Co. v. United States, 394 U.S. 131 (1969)) (noting that because only some competitors in the relevant market were a party to the agreement, and because the RSP was of limited duration, the challenged constraint does not fit any "easy label" that can be considered a per se violation of the Sherman Act).

177. *Id.*

178. *Id.* at 1137.

179. *Id.* (quoting Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20 (1979)).

180. *Id.*

181. *Id.*

economic impact.[182] The unique features strongly suggested that the agreement "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[183] Given the inapplicability of the per se rule and truncated rule of reason, the presumptive rule of reason was the appropriate standard of review.[184]

IV. Analysis

In *California ex rel. Harris v. Safeway, Inc.*, the Ninth Circuit declined to apply the nonstatutory labor exemption to the challenged RSP; consequently, multiemployer bargaining units face antitrust liability if they employ a temporary revenue sharing provision to counter union whipsaw tactics.[185] In addition, the court's narrow holding attached the rule of reason standard of review to temporary revenue sharing provisions.[186] The decision reflects federal courts' continued shift from formalistic line drawing to the rule of reason for assessing antitrust claims.[187] Although the court correctly linked the rule of reason to the complex economic nature of the challenged constraint, it unnecessarily limited the nonstatutory labor exemption's scope.[188] The court's restrictive reading grants unions a competitive advantage during collective bargaining, undermining the federal government's policy to encourage fair negotiations.[189] The Supreme Court should overturn the Ninth Circuit and shield temporary revenue sharing provisions between multiemployer bargaining units to further federal labor law's policy promoting equitable labor relations.[190]

A. The Ninth Circuit's Application of the Rule of Reason Continues the Federal Courts' Jurisprudential Shift Away from Formalistic Line Drawing, Protecting Complex Business Practices from Premature Condemnation Under the Sherman Act

In *California ex rel. Harris v. Safeway, Inc.*, the Ninth Circuit properly rejected summary condemnation of the defendants' RSP through either "quick look" or per se analysis.[191] The court's adherence to the rule of reason continues federal courts'

182. *See id.* ("One might want to have an understanding of the market impact of other competitors . . . an understanding whether other competitors were waiting in the wings to exploit any anticompetitive market by their entry . . . .").

183. *Id.* at 1138 (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999)).

184. *Id.* at 1139.

185. *Id.* at 1134–35.

186. *Id.* at 1139.

187. *See infra*, Part V.A.

188. *See infra,* Part V.B.

189. *See infra,* Part V.B.

190. *See infra,* Part V.B.

191. 651 F.3d at 1139.

emphasis on minimizing the use of bright line standards in antitrust litigation.[192] In future antitrust challenges to complex bargaining tactics, applying the rule of reason standard will help further the federal antitrust policy of condemning only unreasonable restraints of trade, promoting the efficient allocation of resources, and avoiding false positives.[193]

The court properly ruled on the issue of whether the per se or "quick look" rules applied to the RSP because it placed the provision in the appropriate context.[194] The unique circumstances surrounding the RSP — its limited duration and the existence of other competitors in the market — suggest that a court cannot determine the agreement to be "anticompetitive on its face."[195] In other words, internal and external factors minimize the risk of anticompetitive effects.[196] With other competitors in the market, appropriate incentives remained to prevent the firms from taking anticompetitive action.[197] In addition, given the agreement's temporary nature, the individual firms within the MEBU are motivated to keep prices at competitive levels during and after collective bargaining.[198] As a result, the internal and external competition would mitigate the MEBU's ability to raise prices or reduce output, preventing anticompetitive outcomes.[199]

Since the Supreme Court has stressed the need to avoid false positives and embraced economic modeling to analyze challenged practices, defaulting to the rule of reason is necessary to ensure that trial courts effectuate those policies.[200] Full development of the record through rule of reason analysis will reduce the occurrence of false positives.[201] By avoiding formalistic rules, federal courts can adequately assess the actual competitive effect of a challenged business practice.[202] In turn, fewer beneficial practices will be condemned.[203] In the instant case, the RSP's

192. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (holding that rule of reason analysis applies to vertical agreements to fix minimum resale prices); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (overruling the per se illegality of vertical territorial restraints in favor of the rule of reason).

193. *See infra* notes 200–08 and accompanying text.

194. *See* Neal R. Stoll & Shepard Goldfein, *Danger of Rudimentary Economics: 'Safeway' Competitive Effects Analysis,* N.Y. L.J., Aug. 9, 2011, *available at* http://www.skadden.com/sites/default/files/publications/Publications2498_0.pdf (noting that judges' risk presuming that a practice is anticompetitive when they fail to analyze the context of the restraint).

195. *See id.* (criticizing Judge Reinhardt's dissenting opinion for failing to consider critical aspects of the RSP, including its effects and temporal limitation).

196. *Id.*

197. Cal. *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1136 (9th Cir. 2011).

198. *See* Stoll & Goldfein, *supra* note 194 ("The temporal limitation, however, is critical to the entire inquiry as it discourages the parties from functioning as a cartel.").

199. *See* Stoll & Goldfein, *supra* note 194.

200. *See* Bernard, *supra* note 57, at 591.

201. *See* Stoll & Goldfein, *supra* note 194.

202. *See* Stoll & Goldfein, *supra* note 194.

203. *See* Stoll & Goldfein, *supra* note 194.

unique circumstances indicate a plausibility of neutral or procompetitive effects.[204] If the RSP allowed the grocers to withstand union pressure, preventing above-market labor costs, consumers would benefit from the corresponding lower prices.[205] Without all the facts on the record, the court could not adequately assess the RSP's impact.[206] Since the RSP's economic impact is uncertain, imposing liability based on a limited record would increase the risk of "mistaken inferences" by the judge.[207] Instead, by applying rule of reason analysis, litigants can establish an appropriate foundation, allowing courts to fully comprehend the challenged agreement's impact on consumer welfare.[208]

B. The Ninth Circuit's Improper Application of the Brown *Factors to the Grocers' RSP Unnecessarily Limits the Scope of the Nonstatutory Labor Exemption, Giving Unions a Competitive Advantage During Collective Bargaining*

Though the Ninth Circuit correctly held that the rule of reason applies to the RSP, the court misapplied the *Brown* factors and consequently failed to insulate the RSP from antitrust scrutiny.[209] As a result, the decision unnecessarily limits the scope of the nonstatutory labor exemption and gives unions a competitive advantage during collective bargaining.[210] The threat of antitrust liability will discourage employers from using revenue sharing provisions during labor negotiations.[211] Alternatively, the nonstatutory labor exemption, if applied, would further equitable collective bargaining by protecting the integrity of multiemployer bargaining units.[212]

The Ninth Circuit errantly constrained the nonstatutory labor exemption by misapplying the Supreme Court precedent in *Brown*.[213] The *Brown* factors and the decision's underlying concerns are satisfied by the defendants' RSP.[214] First, the provision was "inextricably intertwined with the collective bargaining process."[215] The RSP, lasting for a limited period, was intended to mitigate the union's whipsaw

204. Cal. *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1138 (9th Cir. 2011) (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999)).

205. *See* John A. Litwinski, *Regulation of Labor Market Monopsony*, 22 BERKELEY J. EMP. & LAB. L. 49, 58–59 (2001).

206. *See* Stoll & Goldfein, *supra* note 194.

207. *See* Bernard, *supra* note 57, at 591.

208. *See supra* notes 92–95 and accompanying text.

209. *Harris*, 651 F.3d at 1140 (Kozinski, J., dissenting).

210. *See id.* (noting that "the unions would . . . upset the prevailing competitive balance, crippling the target and ruining any chance of bargaining as a group").

211. *Id.* at 1144.

212. *See* Stoll & Goldfein, *supra* note 194 (noting that "whipsaw tactics are intended to force an employer to settle early or split from an MEBU by harming that employer to the benefit of its competitors").

213. *See Harris*, 651 F.3d at 1140 (Kozinski, J., dissenting) (arguing that the majority incorrectly decided the issue because it "fail[ed] to grapple with the complex dynamics of th[e] case").

214. *Id.* at 1140–44.

215. *Id.* at 1140 (citing Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996)).

tactic.[216] The provision, therefore, was directly related to the negotiations.[217] Second, both the Supreme Court and National Labor Relations Board have previously sanctioned the use of economic weapons to combat whipsaw tactics.[218] Since the RSP was designed to maintain group cohesion during collective bargaining, it promoted healthy negotiations.[219] Thus, the RSP provided balance and was "unobjectionable as a matter of labor law and policy."[220] Third, the RSP concerned only parties with a direct stake in the outcome of the collective bargaining agreement.[221] Although Food 4 Less had a separate union contract, its agreement expired the following month.[222] As a practical matter, the current dispute's outcome would determine the nonmember's new contract terms.[223] The fourth *Brown* factor — whether the conduct involved subject matter that the parties were required to negotiate collectively — was irrelevant.[224] In *Harris*, unlike in *Brown*, the challenged practice was a procedural bargaining tactic rather than a substantive contract term.[225] Therefore, asking whether the practice related to "wages, hours, and working conditions" is unnecessary.[226] Finally, the conduct occurred during and immediately after negotiations due to the RSP's temporal limitation.[227] Thus, the majority rested its decision on an improper application of the *Brown* factors, undermining federal labor policy.[228]

As a matter of policy, the federal judiciary should expand the nonstatutory labor exemption to include temporary revenue sharing provisions designed to maintain group cohesion during labor disputes.[229] Liberal application of the exemption would protect balanced negotiations between employer and union during collective bargaining.[230] Without the implicit exemption, the court limits a bargaining unit's

216. *Id.*
217. *Id.*
218. *Id.* at 1141 (citing NLRB v. Brown, 38 U.S. 278 (1965)).
219. *Id.*
220. *Brown*, 518 U.S. at 238.
221. *See Harris*, 651 F.3d, at 1142 (Kozinski, J., dissenting) (citing *Brown*, 518 U.S. at 250).
222. *Id.*
223. *Id.*
224. *Id.* at 1143 (citing *Brown*, 518 U.S. at 250).
225. *Id.*
226. *Id.*
227. *Id.*
228. *See supra* text accompanying notes 215–27.
229. *See supra* notes 230–39 and accompanying text.
230. *See Harris*, 651 F.3d at 1140 (Kozinski, J., dissenting) ("[W]hipsaw tactics are particularly devastating for employers, because 'the union strikes against one member of a multiemployer bargaining unit, but allows the other employers to continue operating in order to maximize the competitive pressure brought to bear upon the struck member . . . ; the idea is thereby to force each employer individually to capitulate through a series of such strikes, thus defeating their attempting to stand together.'" (quoting Int'l Bhd. Of Boilermakers v. NLRB, 858 F.2d 756, 760 (D.C. Cir. 1988))). Previously, courts had upheld revenue sharing provisions, reducing the need for further antitrust scrutiny. *See* Kennedy v. Long Island R.R., 319 F.2d 366, 368 (2d Cir. 1963) (upholding the use of a strike insurance plan where both struck and non-struck railroads paid into a fund that

ability to effectively combat whipsaw tactics.[231] Selective picketing erodes group unity because of the targeted financial pressure.[232] The lone firm's incentives change as pressure to settle or leave the group increases.[233] Because a multiemployer bargaining unit's temporary revenue sharing provision is not insulated from antitrust scrutiny, the potential liability increases the employers' costs of combating whipsaw tactics.[234] Since the threat of antitrust liability remains, the Ninth Circuit has created an imbalance of power favoring labor unions.[235]

The competitive imbalance will encourage unions to increase use of whipsaw tactics and threaten antitrust litigation, possibly affecting the outcome of negotiations and reducing equitable collective bargaining.[236] The court's holding increases labor costs, placing pressure on employers' profit margins, and ultimately raises prices for consumers.[237] Maintaining a balance of power during collective bargaining, however, would promote meaningful negotiations between employer and union and ensure that fair labor contracts are produced.[238] To do otherwise would undermine the "national policy . . . of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.'"[239]

Conclusion

In *California ex rel. Harris v. Safeway, Inc.,* the Ninth Circuit's decision mismanages the intersection of antitrust and labor law.[240] Although, the decision correctly followed federal courts' preference for avoiding false positives over economical litigation, the nonstatutory labor exemption provided a superior path for resolving

supported struck railroads); Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd., 502 F.2d 453, 458 (D.C. Cir. 1974) (upholding a "Mutual Aid Pact" in which any struck bound members received payment from the other members equal to their increase in revenues resulting from the strike).

231. *Harris*, 651 F.3d at 1143–44 (Kozinski, J., dissenting).

232. *See* Stoll & Goldfein, *supra* note 194 (noting that "whipsaw tactics are intended to force an employer to settle early or split from an MEBU by harming that employer to the benefit of its competitors").

233. *Id.*

234. *See supra* note 30.

235. *See Harris*, 651 F.3d at 1140 (Kozinski, J., dissenting) (arguing that without the revenue sharing provision unions "would thereby upset the prevailing competitive balance, crippling the target and ruining any chance of bargaining as a group").

236. *See supra* note 233 and accompanying text.

237. *See* Litwinski, *supra* note 205, at 58–59 (noting that, in competitive markets, unions obtain wages higher than their workers' marginal products, raising costs for consumers).

238. *See Harris*, 651 F.3d at 1140 (Kozinski, J., dissenting) (noting that the revenue sharing provision was narrowly tailored to counter the union's divide-and-conquer strategy with the effect of helping keep all competitors in the market rather than letting one be whipped out by the strike).

239. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 237 (1996) (citing United Mine Workers of America v. Pennington, 381 U.S. 657, 663 (1965) (quoting Fireboard Paper Products Corp. v. NLRB, 379 U.S. 203, 211 (1964))).

240. *See supra* Parts IV.A–B.

the dispute.[241] The *Harris* court's narrow interpretation of the nonstatutory labor exemption created an imbalance of power between employer and union.[242] Failure to insulate efficiency-increasing negotiation practices will undermine equitable negotiations, raising costs for consumers.[243] Because of the case's small likelihood of appeal, congressional action or alternative litigation is necessary to correct the persisting imbalance.[244]

241. *See supra* Part IV.B.
242. *See supra* Part IV.B.
243. *See supra* Part IV.B.
244. *See supra* text accompanying notes 162–63.