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American Needle, Inc. v. National Football League: Justice Stevens' Last Twinkling of an Eye

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**AMERICAN NEEDLE, INC. V.
NATIONAL FOOTBALL LEAGUE:
JUSTICE STEVENS' LAST
TWINKLING OF AN EYE**

*Katherine Kaso-Howard**

I. INTRODUCTION

*American Needle, Inc. v. National Football League*¹ was deemed to be the most important sports case in history.² Sports lawyers and commentators alike worried that a win for the National Football League (NFL) would further erode antitrust laws and greatly change the business of professional football.³ If the U.S. Supreme Court affirmed the Seventh Circuit decision, holding that the NFL, National Football League Properties (NFLP), and the thirty-two NFL teams constituted a single entity for purposes of Section 1 of the Sherman Act⁴ (“Section 1”⁵), the NFL would essentially become

* J.D. 2011, Loyola Law School Los Angeles; M.A., California State University Dominguez Hills; B.A., University of Southern California. First, I would like to thank Professor David W. Kesselman for his guidance and support, as well as for teaching a great Antitrust course. Second, I would like to thank Elena De Coste Grieco, Brigitte Mills, and all the members of the *Loyola of Los Angeles Law Review* for their input on this Comment. Last, I am grateful to my family, especially my husband, for keeping me motivated.

1. 130 S. Ct. 2201 (2010).

2. See, e.g., Zach Lowe, *American Needle: Expect a Draw*, AMLAW DAILY (Jan. 13, 2010), <http://amlawdaily.typepad.com/amlawdaily/2010/01/needleargument.html>; Michael McCann, *Why American Needle–NFL Is Most Important Case in Sports History*, SI.COM (Jan. 12, 2010), http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/12/americanneedlev.nfl/index.html.

3. Drew Brees, *The NFL Shouldn't Call All the Plays*, WASH. POST, Jan. 10, 2010, at B02 (“The gains we fought for and won as players over the years could be lost, while the competition that runs through all aspects of the sport could be undermined.”).

4. Ch. 647, 29 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2006)).

5. Section 1 of the Sherman Act prohibits “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations” 15 U.S.C. § 1. Section 2 of the act makes it illegal for any “person [to] monopolize, or attempt to monopolize, or combine with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations” *Id.* § 2.

immune from Section 1 enforcement, and anyone attempting to negotiate with the giant entity would have little bargaining ability.⁶

Fortunately for the players and others who must deal with the NFL, the Supreme Court denied Section 1 immunity and remanded the case to the lower court for application of the rule of reason: an evaluation of factors to determine whether the NFL's challenged conduct was anticompetitive or procompetitive.⁷ This was not remarkable because courts favor applying the rule of reason in most cases, particularly those related to sports.⁸ What is remarkable, however, is the introduction of what this author deems the "procompetitive quick look" analysis. Under the Court's prior quick-look analysis, full balancing of competitive and anticompetitive effects is unnecessary when the challenged activity presents such an obvious anticompetitive effect that anyone with a "rudimentary understanding of economics"⁹ can identify the negative impact.¹⁰ When a plaintiff can show anticompetitive effects, quick-look analysis tends to favor the plaintiff because the court presumes the restraint is unreasonable unless and until the defendant shows procompetitive justifications for the restraint.¹¹ Currently, the courts have not explicitly employed a comparable presumption for defendants. However, in *American Needle*, Justice Stevens planted the seed for the development of a procompetitive quick-look analysis, which could lead to an antitrust-enforcement paradigm that is more favorable to defendants.

6. See Brees, *supra* note 3. From broadcasting deals alone, the NFL earns more revenue than the gross domestic product of more than fifty countries. Ross C. Paolino, *Upon Further Review: How NFL Network Is Violating the Sherman Act*, 16 SPORTS LAW. J. 1, 3 (2009).

7. Under the rule of reason, courts assess whether the challenged conduct unreasonably restrains trade or "merely regulates and . . . thereby promotes competition." *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

8. See, e.g., *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis . . ."); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99–100 (1984); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 833 (3d Cir. 2010) ("The jury was properly instructed to analyze the alleged restraints under the rule of reason . . ."); *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 957 (6th Cir. 2004) (applying rule of reason).

9. *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 770 (1999).

10. *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 99–100; Fara Daun, Comment, *The Content Shop: Toward an Economic Legal Structure for Clearing and Licensing Multimedia Content*, 30 LOY. L.A. L. REV. 215, 261 (1996).

11. *United States v. Brown Univ.*, 5 F.3d 658, 668–69 (3d Cir. 1993).

Part II of this Comment presents the facts, procedural history, and reasoning of the Court's opinion in *American Needle*. Part III provides an overview of the traditional standards to evaluate antitrust claims under the Sherman Act. Part IV then argues that Justice Stevens suggested an even more deferential evaluation standard—the procompetitive quick look—and examines how this standard could be applied to antitrust enforcement under Section 1.

II. *AMERICAN NEEDLE, INC. V. NATIONAL FOOTBALL LEAGUE*

A. *The Facts*

The NFL is an unincorporated association of thirty-two professional football teams.¹² Each team is individually owned and operated with its own name, logo, and colors.¹³ For the first forty-three years of the NFL's existence, each individual team made its own arrangements for intellectual property licensing.¹⁴ In 1963, the NFL formed the NFLP to collectively develop, license, and market the individual teams' intellectual property.¹⁵ Between 1963 and 2000, a variety of vendors had nonexclusive licenses with NFLP to manufacture and sell apparel with team names, colors, and logos.¹⁶ American Needle, Inc. (ANI) was one such manufacturer. In 2000, team owners voted to allow the NFLP the power to grant *exclusive* licenses, in the hopes of increasing then-waning merchandise revenue.¹⁷ In 2001, Reebok won a ten-year exclusive license to manufacture and sell trademarked apparel, including headwear, for all thirty-two teams; as a result, the NFLP did not renew ANI's nonexclusive license.¹⁸

12. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2207 (2010).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. John Gibeaut, *A League of Their Own: The NFL Wants to Run Up the Score on Its Antitrust Exemption*, 96 A.B.A. J. 19, 20 (2010).

18. *Am. Needle*, 130 S. Ct. at 2207; *see also* Gibeaut, *supra* note 17, at 20 ("By the end of 2002, sales had increased 21 percent, to \$1.1 billion. . . . [F]itted caps that sold for \$19.99 before the deal rose to \$30 by 2006.").

B. The Lower Courts' Decisions

ANI filed suit in the Northern District of Illinois, alleging that the agreements between the thirty-two teams, the NFL, the NFLP, and Reebok, Inc. (collectively “the defendants”) violated both Section 1 and Section 2 of the Sherman Act.¹⁹ ANI only challenged the 2000 agreement between the NFL and Reebok and did not dispute the NFLP’s legitimacy as a joint venture.²⁰

At the district court, the NFL argued that Section 1’s threshold requirement—the existence of an arrangement that is a contract, combination, or conspiracy between two or more actors—was not met because the defendants were essentially one entity, and thus could not conspire.²¹ Single-entity status would grant complete immunity from Section 1 enforcement to agreements between the teams and the NFL.²² Ultimately, the defendants’ arguments persuaded the district court, which granted summary judgment for the defendants because the teams had “so integrated their operations that they should be deemed to be a single entity rather than joint ventures cooperating for a common purpose.”²³

On appeal, the Seventh Circuit affirmed the district court.²⁴ Acknowledging that a sports league can constitute a single entity for antitrust purposes in some contexts but not in others, the court focused on the conduct at issue—licensing of teams’ intellectual property.²⁵ The Seventh Circuit found that through the NFLP “only one source of economic power controls the promotion of NFL football; it makes little sense to assert that each individual team has

19. *Am. Needle*, 130 S. Ct. at 2207. Section 2 of the Sherman Act makes it illegal for any “person [to] monopolize . . . any part of the trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 2 (2006).

20. Brief for the NFL Respondents at 10–11, *Am. Needle*, 130 S. Ct. 2201 (No. 08-661). Independently owned franchises in a professional sports league can be separate entities engaged in a joint venture. See 46 AM. JUR. 2D *Joint Ventures* § 1 (2009). A “joint venture” is an association of independent entities that collaborate in a single business venture for joint profit. *Id.* Joint ventures are subject to Section 1 and are often analyzed under the rule of reason. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1388–90 (9th Cir. 1984).

21. *Am. Needle*, 130 S. Ct. at 2204; Brief for the NFL Respondents, *supra* note 20, at 8.

22. *Am. Needle*, 130 S. Ct. at 2207.

23. *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007).

24. *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736, 741 (7th Cir. 2008), *rev’d* 130 S. Ct. 2201 (2010).

25. *Id.*

the authority, if not the responsibility, to promote the jointly produced NFL football.”²⁶ The Seventh Circuit affirmed the district court’s finding that the defendants should be deemed a single entity for Section 1 purposes.²⁷

C. *Holding and Reasoning*

The Supreme Court granted certiorari and in a unanimous opinion reversed the Seventh Circuit. The Supreme Court found that the agreement to grant an exclusive license for all thirty-two teams’ intellectual property necessarily required a combination of independent decision makers and, therefore, the defendants did not constitute a single entity for Section 1 purposes.²⁸ On review, the Supreme Court limited the issue to

whether the NFL respondents are capable of engaging in a “contract, combination . . . , or conspiracy” as defined by § 1 of the Sherman Act, 15 U.S.C. § 1, or, as we have sometimes phrased it, whether the alleged activity by the NFL respondents “must be viewed as that of a single enterprise for purposes of § 1.”²⁹

Writing for a unanimous court, Justice Stevens first noted that whether concerted action exists is a “functional consideration” of how the parties actually operate, instead of a consideration of whether the parties are legally distinct entities.³⁰ The courts must look to the nature of the concerted action and its practical impacts on business.³¹ Justice Stevens further explained that the term “single entity” is somewhat misleading because the inquiry is not simply whether the defendant “is a legally single entity or has a single name.”³² Rather a joint venture’s ability to defend its arrangement depends on whether, through the venture, “separate economic actors pursu[e] separate economic interests” such that the agreement “deprives the marketplace of independent centers of decision

26. *Id.* at 743.

27. *Id.* at 744.

28. *Am. Needle*, 130 S. Ct. at 2214–16.

29. *Id.* at 2208 (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984)).

30. *Id.* at 2209.

31. *Id.*

32. *Id.* at 2211.

making . . . and thus of actual or potential competition.”³³ The substance of a given joint venture or agreement determines the answer to this question, not its form or legal status.³⁴

In rejecting the Seventh Circuit’s holding that joint decisions regarding the licensing of intellectual property were immune from Section 1, the Court first noted that each team is independently owned and managed with necessarily separate corporate motivations.³⁵ Although it acknowledged that some cooperation is necessary to produce professional football, it recognized that the teams still compete “not only on the playing field” but also for fans, players, and coaches.³⁶ Specifically at issue in *American Needle*, teams compete in the intellectual property market because a team’s profit-maximizing goal, and not the NFL’s common interest, motivates each team to license its property.³⁷ Unlike scheduling games or coordinating the annual draft, the teams did not need to abrogate their independent power to license intellectual property in order for the league to function.³⁸ As such, this cooperation did not warrant treatment as a single entity’s independent action.³⁹

Next, the Court rejected the defendants’ argument that NFLP was immune from Section 1 just because of NFLP’s independent legal status and separate management.⁴⁰ Although agreements within a single firm warrant a presumption that divisions of the firm all work toward one goal—the firm’s profit maximization—NFLP presented a “close[] question” and ultimately a “rare case” in which the presumption did not hold.⁴¹ When entering licensing agreements, NFLP was a mere instrumentality of the teams because thirty-two different teams, each competing for individual profit maximization and not collective profit, controlled NFLP’s conduct.⁴² Because the agreement between NFLP and Reebok prevented each team from

33. *Id.* at 2212 (citations omitted).

34. *Id.*

35. *Id.*

36. *Id.* at 2212–13.

37. *Id.*

38. *Id.* at 2214.

39. *Id.*

40. *Id.*

41. *Id.* at 2215.

42. *Id.*

negotiating its own licenses, the Court found that the agreement clearly denied the market of independent decision makers.⁴³ Therefore, the Court ruled that the teams' joint decision to grant exclusive licenses to Reebok constituted concerted action subject to Section 1.⁴⁴

In closing, Justice Stevens noted that the special nature of the professional sports industry provides some justification for agreements between the teams and the league.⁴⁵ If restraints on trade are necessary to make a product available, the per se rules of illegality do not apply.⁴⁶ Instead the conduct will be analyzed under the "flexible Rule of Reason."⁴⁷

III. ANTITRUST ENFORCEMENT

A. *Standards of Evaluation Under the Sherman Act*

Section 1 prohibits "[e]very contract . . . in restraint of trade"⁴⁸ This language, however, cannot be interpreted literally because all contracts or combinations restrain trade to some degree.⁴⁹ Accordingly, Section 1 prohibits only those contracts or combinations that are "unreasonably restrictive of competitive conditions."⁵⁰ To determine whether a restraint of trade is unreasonably restrictive under Section 1, courts use three main types of analyses: the rule of reason, per se, and quick look.⁵¹

1. Rule of Reason

Absent horizontal price-fixing or group boycotts,⁵² the default analysis courts use is the rule of reason.⁵³ Under the rule of reason,

43. *Id.* at 2214–15.

44. *Id.* at 2216.

45. *Id.*

46. *Id.*

47. *Id.*

48. 15 U.S.C. § 1 (2006).

49. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

50. *Id.*

51. *United States v. Brown Univ.*, 5 F.3d 658, 668–69 (3d Cir. 1993).

52. Horizontal price-fixing occurs when competitors agree to tamper with the prices of goods or services. 1 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 13.01 (2d ed. 2010). Horizontal group boycotts, also known as concerted refusals to deal, are combinations of companies at the same level of distribution whose purpose is to exclude a direct competitor from the market. *Id.* § 12.02(d).

courts inquire whether the restraint at issue promotes or suppresses competition.⁵⁴ Initially, the plaintiff must show that the alleged combination or agreement produces adverse, anticompetitive effects within the relevant product and geographic markets.⁵⁵ The plaintiff may satisfy this burden by providing direct evidence of actual anticompetitive effects, such as reduced output or increased prices, or evidence of the defendant's market power that leads to an inference of anticompetitive effects.⁵⁶ If the plaintiff can meet this initial burden, the defendant must then show that the challenged conduct promotes a sufficiently procompetitive objective.⁵⁷ To rebut, the plaintiff must prove that the restraint is not reasonably necessary to achieve the stated objective or that there are less restrictive alternatives available to the defendant.⁵⁸

2. Per Se Illegality

Under Section 1, some restraints—such as horizontal price-fixing and market-allocation agreements among competitors—are presumed unreasonable restraints on trade “because of their pernicious effect on competition and lack of any redeeming virtue.”⁵⁹ These patently anticompetitive practices are considered illegal *per se*, without the need to consider the possible procompetitive business motivations behind them.⁶⁰ Examples of such restraints include horizontal agreements to boycott competitors or deny essential services, horizontal agreements between competitors to divide territories, and agreements between competitors to fix prices.⁶¹

53. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“[T]his Court presumptively applies rule of reason analysis”); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

54. *Nat'l Soc'y Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978).

55. *Brown Univ.*, 5 F.3d at 668. “The relevant product market is defined as ‘those commodities reasonably interchangeable by consumers for the same purposes’ and may be used as substitutes.” *Korkala v. Allpro Imaging, Inc.*, No. 08-2712, 2009 U.S. Dist. LEXIS 70727, at *15–16, (D. N.J. Aug. 10, 2009). The geographic market is that area in which a firm produces or sells. U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* §1.2 (2010).

56. *Brown Univ.*, 5 F.3d at 668.

57. *Id.* at 669.

58. *Id.*

59. *Id.*

60. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“*Per se* liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.” (internal quotation marks omitted)).

61. VON KALINOWSKI ET AL., *supra* note 52, at § 12.02.

Beyond these plainly naked restraints, courts are reluctant “to adopt *per se* rules . . . where the economic impact of certain practices is not immediately obvious.”⁶²

3. Quick-Look analysis

In addition to the rule of reason and *per se* rule, courts apply an abbreviated or quick-look rule-of-reason analysis.⁶³ This is an “intermediate standard” that “applies in cases where *per se* condemnation is inappropriate, but where no elaborate industry analysis is required.”⁶⁴ In such cases, “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.”⁶⁵

Quick-look analysis developed, particularly in sports cases, to address restraints that might have otherwise served legitimate competitive purposes or been necessary for the product to get to the market at all.⁶⁶ Due to the suspect nature of horizontal agreements, however, even a legitimate purpose does not necessitate full rule-of-reason analysis if the agreement constitutes a naked restraint on price or output.⁶⁷

From a policy perspective, quick-look analysis strikes a balance between competing concerns. It moves away from *per se* rules that are no longer appropriate for modern, dynamic markets and commercial relationships,⁶⁸ but it also promotes judicial efficiency by

62. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (internal quotation marks omitted).

63. *Brown Univ.*, 5 F.3d at 669; see *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 n.39 (1984).

64. *Brown Univ.*, 5 F.3d at 669 (internal quotation marks omitted); accord *Fed. Trade Comm’n v. Ind. Fed’n Dentists*, 476 U.S. 447, 459 (1986); *Nat’l Collegiate Athletic Ass’n*, 468 U.S. at 109; *Nat’l Soc’y Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

65. *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 770 (1999).

66. *Nat’l Collegiate Athletic Ass’n*, 468 U.S. at 101–04, 109–13 (holding that the power and effect of the agreement did not need to be ascertained in excruciating detail and, importantly, that there was no need to define the relevant market and determine the relevant market percentages).

67. *Cal. Dental Ass’n*, 526 U.S. at 770 (“[Q]uick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained.”).

68. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007) (“[T]he *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. [Courts] have expressed reluctance to adopt *per se* rules . . . where the economic impact of certain practices is not immediately obvious.” (citation omitted) (internal quotation marks omitted)).

avoiding lengthy rule-of-reason litigation.⁶⁹ With new industries and innovations, it is not always clear whether horizontal agreements will inevitably result in harm to competition and consumers.⁷⁰ By applying quick-look analysis, defendants in emerging industries and new-market entrants may be given the chance to rebut the presumption of illegality while allowing innovation to continue without bogging down the courts.⁷¹

Under quick-look analysis, courts have employed two approaches. One approach more closely mirrors the *per se* rule in that the court presumes competitive harm as a basis for the plaintiff's *prima facie* case unless and until the defendant can demonstrate some procompetitive business justification.⁷² The other technique more closely resembles the rule-of-reason analysis by employing a "flexible" inquiry—examining likely anticompetitive effects, market power, and efficiencies to the degree necessary to understand the alleged suppression of competition.⁷³ It can be difficult for courts and litigants to ascertain which method of analysis should apply, especially when the Supreme Court itself acknowledges that "there is often no bright line separating" the different modes of analysis.⁷⁴

69. Adam Weg, Note, *Per Se Treatment: An Unnecessary Relic of Antitrust Litigation*, 60 HASTINGS L.J. 1535, 1542 (2009) (discussing the benefits of quick-look analysis).

70. *See id.* at 1542–44.

71. *United States v. Microsoft Corp.*, 253 F.3d 34, 89–90 (D.C. Cir. 2001) (refusing to apply *per se* analysis to bundling of software because it would "create[] undue risks of error and [] deter[] welfare-enhancing innovation").

72. *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (noting that under quick-look analysis, the competitive harm is presumed and "the defendant must promulgate some competitive justification for the restraint" (internal quotation marks omitted)).

73. 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1508c (3d ed. 2006); *see also* *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (finding that an anticompetitive effect is established when the plaintiff shows a horizontal price-fixing agreement); *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n (Bulls I)*, 961 F.2d 667, 674 (7th Cir. 1992) (recognizing that the first step in any rule-of-reason analysis is an assessment of market power).

74. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 n.26 (1984); *see also* *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 779 (1999) ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear.").

B. The Sherman Act and Sports Leagues

At a basic level, sports leagues are formed by horizontal agreements among direct competitors.⁷⁵ However, courts have traditionally treated sports leagues' horizontal agreements differently than other horizontal agreements, and such agreements have not been subject to the per se rule.⁷⁶ Courts have long recognized that some cooperation between competitors (the teams) is necessary if the product (organized games leading to a championship) is to be available at all.⁷⁷ Both quick look and rule of reason have applied to agreements between leagues and teams.⁷⁸

For example, in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*,⁷⁹ although the football television broadcasting rights of the National Collegiate Athletic Association (NCAA) created horizontal price-fixing and output limitation, the Court did not apply the per se rule.⁸⁰ Rather, the Court used the rule of reason because the horizontal restraints on competition were essential to make the product available at all.⁸¹ Similarly, in *Law v. National Collegiate Athletic Ass'n*,⁸² when evaluating an NCAA rule limiting the annual compensation for men's assistant basketball coaches, the Tenth Circuit did not apply the per se rule because some horizontal cooperation was necessary to

75. See *Sports Business Cases Challenge League Power*, METROPOLITAN CORP. COUNSEL, Aug. 2010, at 26 ("Sports leagues are artificial entities made up of individual teams that choose to join together to create what is in effect an annual tournament. They do this because they believe that there will be more interest, and thus more potential revenue, from a tournament competition than there would be from individual contests between teams.").

76. E.g., *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 100–01 (1984) ("[I]t would be inappropriate to apply a *per se* rule to this case. . . . [W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.").

77. *Id.* at 101; *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n (Bulls II)*, 95 F.3d 593 (7th Cir. 1996); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984).

78. *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 101; *Law*, 134 F.3d at 1010.

79. 468 U.S. 85.

80. *Id.* at 101; see also James S. Arico, *Nat'l Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma: Has the Supreme Court Abrogated the Per Se Rule of Antitrust Analysis?*, 19 LOY. L.A. L. REV. 437, 468–70 (1985) (discussing the erosion of the per se rule).

81. *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 101; *The Truncated or "Quick Look" Rule of Reason*, FED. TRADE COMM'N, <http://www.ftc.gov/opp/jointvent/3Persepap.shtm> (last modified June 25, 2006).

82. 134 F.3d 1010.

produce college sports.⁸³ However, the court also determined that full rule-of-reason analysis was unnecessary because the coaches' salary cap succeeded in artificially lowering the prices for coaching services.⁸⁴ With this showing, the court went directly to the question of whether the procompetitive justifications advanced outweighed the anticompetitive effects under quick-look analysis and concluded that they did not.⁸⁵

IV. ANALYSIS: POTENTIAL FOR A PROCOMPETITIVE QUICK LOOK

Although counted as a rare win for plaintiffs in an antitrust case before the Supreme Court,⁸⁶ *American Needle* may have actually opened the door for a new method of analysis that favors defendants with the introduction of what this author titles the "procompetitive quick look."⁸⁷ It seems that applying the traditional per se-like quick look—in which the court presumes anticompetitive effects—will not be applied in joint-venture cases.⁸⁸ However, Justice Stevens referred to the quick-look analysis when he noted that "depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'"⁸⁹

This "twinkling of an eye" concept is not new to Section 1 analysis, but the context in which Justice Stevens employs it is novel. First, Stevens reminded the reader that cooperation between teams and the league may be perfectly legitimate:

Football teams that need to cooperate are not trapped by antitrust law The fact that NFL teams share an interest

83. *Id.* at 1019.

84. *Id.* at 1020.

85. *Id.*

86. Judd E. Stone & Joshua D. Wright, *Antitrust Formalism Is Dead! Long Live Antitrust Formalism! Some Implications of American Needle v. NFL*, 2010 CATO SUP. CT. REV. 369, 399 (2010) ("*American Needle* was the first case since 1992 that the Supreme Court resolved in favor of a private antitrust plaintiff.>").

87. Others have recognized *American Needle's* potential endorsement of a defendant-friendly quick-look analysis as well. James A. Keyte, *American Needle: A New Quick Look for Joint Ventures*, ANTITRUST MAG., Fall 2010, at 48, 51.

88. *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 n.3 (2006). *But see supra* Part III.C (discussing quick-look analysis in sports cases).

89. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2216–17 (2010) (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 n.39 (1984)).

in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions In such instances, the agreement is likely to survive the Rule of Reason.⁹⁰

This juxtaposition of the traditional quick-look—twinkling-of-an-eye—language with the potentially procompetitive justifications for agreements among the teams introduces the potential for a defendant to prevent a plaintiff from fully developing its cases and instead bring an early motion for summary judgment based on the procompetitive version of the quick-look analysis.

Generally under quick-look analysis, if the plaintiff can show anticompetitive effects despite the defendant's purportedly legitimate purpose for the agreement, the court presumes the agreement unreasonably restrains trade.⁹¹ If the defendant cannot meet its burden of showing procompetitive justifications, under quick look the court need not consider other factors—such as market share or market power—that the traditional rule-of-reason analysis requires.⁹² But what if at the outset the defendant can show that the procompetitive effects far outweigh any potential anticompetitive effects—should the defendant then be entitled to a presumption similar to the one that the plaintiff receives?

A procompetitive quick look can serve the same policy goals as the anticompetitive quick look by allowing courts to dispose of cases with analyses short of full-blown rule-of-reason analysis (for example, when the plaintiff's evidence of anticompetitive effects is weak as compared to the defendant's procompetitive justifications). Because this method of analysis provides a strong presumption in favor of defendants, application of the procompetitive quick look could be limited to cases concerning restraints in industries in which cooperation is inherently necessary. Under this version of quick look, courts would presume the agreement's legality for a defendant who shows strong procompetitive justifications and a need to cooperate.

90. *Id.* at 2216 (citations omitted).

91. *See supra* Part III.A.3.

92. *See Bulls II*, 95 F.3d 593, 600 (7th Cir. 1996) (“Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason.”).

The plaintiff would then have the opportunity to show any actual negative effects on competition, and—depending on the weight of these effects—the court could decide to end the analysis there.

For example, consider *American Needle*: if ANI could not show significant and pernicious anticompetitive effects caused by the exclusivity agreement with Reebok,⁹³ the NFL would have the opportunity to show that the centralized negotiations for exclusive dealing created strong procompetitive justifications. Possible justifications include lower transaction costs because licensees would only have to negotiate with one party instead of striking individual deals with each team, potentially also lowering prices for consumers; improved quality and uniformity of merchandise; and improved likelihood of preserving competition among the weak and strong teams. Combined with the inherent need for cooperation to produce professional football, a court could decide that deeper market analysis is unnecessary to uphold the restraint.

This approach would further the Supreme Court's goals of limiting per se application while also avoiding protracted litigation under the rule of reason. Essentially, by allowing courts to avoid the difficult issue of defining the relevant market and the defendants' market share, procompetitive quick look removes a contentious and costly issue of fact from litigation. In the NFL example, the court would no longer need to consider whether the NFL competes with *all* media and entertainment or simply with all other professional sports—often a difficult question to answer because each side produces competing experts with complicated economic analyses that can be tiresome for juries to wade through.⁹⁴

93. In *American Needle*, ANI did present evidence that prices increased once the agreement with Reebok went into effect. Gibeaut, *supra* note 17, at 20.

94. For example, as the Third Circuit reviewed in *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir. 2010), at the district court level experts used different methods and evidence to come to different definitions of the relevant market. Compare Expert Witness Deposition of Andrew Zimbalist at *1, *Deutscher Tennis Bund v. ATP Tour, Inc.*, 2009 U.S. Dist. LEXIS 97851 (D. Del. Oct. 19, 2009) (No. 07-178), 2008 Depo. Trans. LEXIS 8142 (“Q. The first conclusion you report in that paragraph is, ‘The relevant product market is the production of top-tier men’s professional tennis.’ A. Yes.”), with Expert Witness Deposition of Johnathan Walker, Ph.D. at *1–2, *Deutscher Tennis Bund*, 2009 U.S. Dist. LEXIS 97851 (No. 07-178), 2008 Depo. Trans. LEXIS 8132 (“I considered my general background in sports economics and an understanding about what a tennis event actually is, and all of those led me to conclude that consumers have other alternatives to ATP tennis, besides ATP tennis, itself. . . . [I] came to the conclusion that . . . there must be substitutes for tennis other than other tennis events.”). See

Although aligned with some Supreme Court goals, a procompetitive quick look could also have a negative impact on antitrust enforcement. First, plaintiffs already face a very steep climb under the rule of reason. In a recent empirical study, Professor Michael Carrier of Rutgers University School of Law found that courts only reach balancing of the competitive effects under the rule of reason in 2 percent of bench trials.⁹⁵ In most cases courts dismissed the plaintiffs' claims before reaching the balancing stage of the rule of reason for want of anticompetitive effects.⁹⁶ Under the procompetitive quick look, plaintiffs' difficulties could be further exacerbated because they would lose the chance to develop the full record necessary to balance all potential effects on competition and consumers.⁹⁷ Because market power in the relevant market can often be a determinative factor in any antitrust case,⁹⁸ without market definition or examination of the defendants' power in that market, already difficult cases for plaintiffs would become almost impossible. Second, taking the balancing question away from juries greatly increases the likelihood that defendants will prevail as courts already rarely reach the balancing stage of the rule of reason on their own.⁹⁹

V. CONCLUSION

Whether desirable or not, the possibility of some form of procompetitive quick-look analysis is very real.¹⁰⁰ In light of the Supreme Court's limitation of per se application, Carrier's data, and the Court's recent history of siding with antitrust defendants, the rule

generally 1 AM. BAR. ASSOC., ANTITRUST LAW DEVELOPMENTS 555–85 (6th ed. 2007) (discussing courts' varying approaches to defining relevant markets).

95. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON U. L. REV. 827, 829 (2009).

96. *Id.* Furthermore, even if a court conducted balancing analysis, it did so in a cursory manner once the defendant had shown procompetitive effects. *Id.* at 831.

97. *See id.* at 828 (finding that courts dispose of 97 percent of cases under the rule of reason for plaintiffs' failures to show anticompetitive effects).

98. *Bulls II*, 95 F.3d at 600. For an example of how market power can greatly affect the outcome of a case, compare two similar vertical-restraint cases: *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

99. Carrier, *supra* note 97, at 829–30.

100. *See BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area Hosp. Ass'n*, 36 F.3d 664 (7th Cir. 1994) (affirming dismissal without full rule-of-reason analysis when the alleged anticompetitive impacts on the market were minimal).

of reason seems to have *already* been severely truncated in many cases, not just those in which plaintiffs show anticompetitive effects. Articulation of a procompetitive quick look would further insulate defendants from the enforcement of antitrust laws. However, by applying a procompetitive quick look in cases involving industries in which cooperation is necessary, courts could avoid lengthy litigation when the defendant demonstrates increased efficiency, cost savings, and other procompetitive benefits.