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Shedding Light on the Federal Courts' Treatment of Horizontal Restraints Under Section 1 of the Sherman Antitrust Act

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SHEDDING LIGHT ON THE FEDERAL COURTS' TREATMENT OF HORIZONTAL RESTRAINTS UNDER SECTION 1 OF THE SHERMAN ANTITRUST ACT

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The federal judiciary's application of Section 1 of the Sherman Antitrust Act to horizontal restraints remains one of the least defined areas of antitrust jurisprudence. Part of this problem stems from the Supreme Court's failure to articulate clear guidelines since shifting from the widely used per se standard to the more comprehensive rule of reason and quick look approaches. Additionally, because the rule of reason analysis—the predominant standard used by federal courts today—places great emphasis on a defendant's market power, the costs and burdens make it difficult for the plaintiffs to prove Section 1 violations.

This Article surveys recent lower federal court decisions to see how courts today analyze Section 1 claims, demonstrating that while considerable confusion still exists in the application of the per se, rule of reason, and quick look approaches to horizontal restraints, a small number of federal courts are beginning to apply these approaches with greater clarity. This Article also argues that the quick look approach should be abandoned because the per se approach and the rule of reason already provide sufficient means for analyzing horizontal restraints. Finally, this Article offers suggestions that shift the rule of reason analysis away from relying heavily on a defendant's market power to determine whether a horizontal restraint violates Section 1.

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I. INTRODUCTION

The federal courts' application of Section 1 of the Sherman Antitrust Act to horizontal restraints is not clear,[1] causing some to consider it as "one of the darkest corners of antitrust law."[2] Much of this lack of clarity arose when the Supreme Court stopped determining the legality of some horizontal restraints under the per se approach—which applies to an agreement or conduct that appears on its face to be plainly anticompetitive—and began engaging in a more nuanced analysis under the rule of reason—which balances the net procompetitive efficiencies and anticompetitive effects of a defendant's agreement or conduct.[3]

This move away from the per se approach was driven by the fact that many horizontal restraints produced procompetitive efficiencies[4] or were necessary to make a product available.[5] However, this shift has produced uncertainty among the federal courts because there is no single, unified standard for the courts to apply.[6] Over the last twenty years, federal courts have even utilized a third method of analysis known as the "quick look approach," which "applies in

1. The federal courts apply Section 1 to determine the legality of horizontal restraints. David C. Gustman & Jill C. Anderson, *Joint Ventures and Other Competitor Collaborations*, *in* 46TH ANNUAL ANTITRUST LAW INSTITUTE 197, 207 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1484, 2005). A horizontal restraint is an agreement that restrains trade between two companies that compete with one another. Michael J. Denger et al., *Vertical Price, Customer, and Territorial Restrictions*, in 48TH ANNUAL ANTITRUST LAW INSTITUTE 295, 305 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1602, 2007). Horizontal restraints can range from price-fixing agreements to joint ventures. *Id.* For an in-depth analysis of Section 1 and horizontal restraints, see *infra* Part II.

2. *In re* ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1007 (N.D. Cal. 2008) (quoting Joseph F. Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 ANTITRUST BULL. 453, 453 (1976)); Thomas A. Piraino Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Standard for Joint Ventures*, 76 MINN. L. REV. 1, 12 (1991).

3. Piraino, *supra* note 2, at 14–15.

4. *See* Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1754 (1994).

5. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984). A horizontal restraint does not always have to produce a new product in order to trigger the application of the rule of reason. For example, the Supreme Court in *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.* applied the rule of reason to a cooperative arrangement among a group of retailers aimed at reducing prices. 472 U.S. 284, 297 (1985). Similarly, in *In re ATM Fee Antitrust Litigation*, a district court in the Northern District of California applied the rule of reason to an agreement that eliminated the interchange fees of an ATM network. 554 F. Supp. 2d at 1016.

6. Piraino, *supra* note 2, at 2.

cases where *per se* condemnation is inappropriate but where no elaborate industry analysis [under the rule of reason] is required to demonstrate the anticompetitive character of an inherently suspect restraint."[7]

The courts' inability to develop a unified standard for analyzing competitor collaborations is found not only in the application of the per se approach, the rule of reason, or the quick look approach but also in the application of the ancillary restraints doctrine. Under the ancillary restraints doctrine, the challenged agreement "must be subordinate and collateral to a separate, legitimate transaction."[8] This Article will point out, however, that there are varying interpretations of the ancillary restraints doctrine, which creates confusion in its application. To add more fuel to the fire, federal courts also employ different standards in determining how related a horizontal restraint must be to a defendants' agreement or conduct under the ancillary restraints doctrine. For example, in order for a restraint to be ancillary, some courts hold that the restraint must be "essential" to the defendants' agreement or conduct,[9] while other courts hold that the restraint must be "reasonably" or "plausibly related" to the defendants' agreement or conduct.[10] This lack of unity makes it difficult for defendants to predict which level of scrutiny will apply in their cases.

Another reason why the courts have been unable to articulate a consistent standard for analyzing horizontal restraints arises from the fact that competitors are collaborating in increasingly new and creative ways.[11] For example, with regard to some joint ventures,[12] American firms have realized that the procompetitive efficiencies that result from entering into a joint venture may outweigh the

7. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010). The quick look approach has its origins in *NCAA v. Board of Regents of the University of Oklahoma* and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). *See infra* Part II.D.3.

8. Gustman & Anderson, *supra* note 1, at 213 (quoting Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214 (D.C. Cir. 1986)).

9. *See* Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court's* Dagher *Decision*, 57 EMORY L.J. 735, 746 (2008).

10. *Id.*

11. Piraino, *supra* note 2, at 2.

12. A joint venture is defined as "two or more firms agree[ing] to cooperate in producing some input that they would otherwise have produced individually, acquired on the market, or perhaps done without." Gustman & Anderson, *supra* note 1, at 203.

anticompetitive conduct, if any, that the joint venture produces.[13] Thus, such firms are motivated to create collaborations that can result in innovative technologies, efficient production and manufacturing, and entry into new markets.[14] Unfortunately, the inconsistency created by the federal courts has made it difficult for American businesses to know whether their joint venture will be upheld as valid under Section 1.[15]

This Article analyzes how the federal courts decide which approach to apply in analyzing horizontal restraints. Specifically, this Article surveys how recent lower federal courts have interpreted the Supreme Court's horizontal-restraint jurisprudence and describes the methods of analyses they employ in these cases. This Article also advocates three changes in the judiciary's treatment of horizontal restraints by calling on the federal courts to do the following: (1) abandon the quick look approach because the rule of reason and per se approach already provide sufficient means for analyzing Section 1 violations; (2) decide whether to apply the rule of reason or quick look approach by either analyzing the defendants' procompetitive justifications for the restraint or using the ancillary restraints doctrine, which applies a "reasonably necessary" standard to determine how related a restraint must be to the horizontal agreement; and (3) employ a set of factors under the rule of reason, which will force the courts to move away from placing a heavy emphasis on a defendant's market power in a relevant market.

Part II of this Article offers an overview of horizontal agreements. Part II.A identifies Section 1 as the legal standard that governs horizontal restraints and describes what kinds of action trigger Section 1 scrutiny. Part II.B defines different types of horizontal agreements, focusing on joint ventures and the benefits and consequences resulting from such organizations in the marketplace. Part II.C summarizes the history of the federal judiciary's treatment of horizontal agreement; Part II.D discusses the three types of analyses that courts use in analyzing Section 1

13. *See* Piraino, *supra* note 2, at 2.
14. *See id.* at 2–3.
15. *See id*. at 5.

violations: the per se approach, the rule of reason, and the quick look approach.[16]

Next, Part III analyzes how the lower federal courts have drawn distinctions among these approaches and limited their application to different types of conduct. Part IV highlights crucial problems in the federal courts' application of the three types of approaches, paying careful attention to how the courts unnecessarily emphasize market share analysis under the rule of reason. Part IV also argues that although considerable confusion is apparent in the lower courts' application of the per se approach, the rule of reason, and the quick look approach, a small number of recent lower court decisions signal the possibility that these courts are finally distinguishing between the three approaches with greater confidence. Finally, Part V proposes that courts abandon the quick look approach, apply a more refined ancillary restraints doctrine, and adopt certain factors to better apply the rule of reason. Part VI concludes by reminding the federal courts that, in an attempt to solve these problems, the courts should strive for simplicity.

II. BACKGROUND

This part first describes the threshold requirements that a plaintiff must meet in order to trigger Section 1 liability. Next, this part discusses the three approaches that lower federal courts use to analyze Section 1 claims: the per se approach, the rule of reason, and the quick look approach. Finally, this section summarizes the development of these three approaches in the federal courts.

A. The Legal Standard: The Sherman Antitrust Act

Section 1 of the Sherman Antitrust Act "applies only to concerted action that restrains trade."[17] Under Section 1, "[e]very

16. Justice Souter in *California Dental Ass'n v. FTC* suggested the possibility of another approach, one that lies between the quick look approach and the rule of reason. *See infra* note 206.

17. Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2208 (2010). The Sherman Act distinguishes concerted action from independent action. *Id.* Concerted action occurs when "two or more entities that previously pursued their own interests separately [combine] to act as one for their common benefit" in restraining trade. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984). Concerted action carries with it a high degree of anticompetitive risk because it "deprives

contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States" is deemed illegal.[18] Literally read, Section 1 can apply to every possible type of agreement, ranging from "a group of competing firms fixing prices [to] a single firm's chief executive telling her subordinate how to price their company's product."[19] However, courts have not interpreted Section 1 literally.[20] Instead, the Supreme Court has long recognized Congress's intent that Section 1 should only apply to concerted action that unreasonably restrains trade.[21]

To successfully plead a Section 1 violation, a plaintiff must show that two or more independent competitors, pursuing their own, separate economic goals, came together through an agreement or conduct, which subsequently resulted in anticompetitive effects, such as a "loss of actual or potential competition," a "decrease in diversity of entrepreneurial interests," or a "reduction of independent centers of decision making."[22] If the agreement produces such anticompetitive effects, then a defendant has likely violated Section 1.[23]

the marketplace of independent centers of decisionmaking [sic] that competition assumes and demands." *Am. Needle*, 130 S. Ct. at 2209. It does not matter whether the alleged conspirators are a single entity or have a single name, or whether the parties seem like one firm or multiple firms. *Id.* at 2211–12. Instead, the court focuses on how the parties involved in the alleged anticompetitive conduct actually operate. *Id.* at 2209.

18. 15 U.S.C. § 1 (2006). The Sherman Act was adopted as Congress began to realize that more and more businesses were joining together in order to increase their market share and squeeze out competition. 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 46 (2009). The purpose behind the act was to replace the common law rules that addressed horizontal restraints with a uniform standard that "condemned such restraints whenever they occur[ed] in or affect[ed] interstate commerce." *Id.* The common law at the time the Sherman Act was adopted made contracts, combinations, and agreements in restraint of trade illegal and unenforceable if they "restricted or suppressed competition in the market, fixed prices, divided marketing territories, apportioned customers, restricted production, [or] . . . raised prices." *Id.*

19. *Am. Needle*, 130 S. Ct. at 2208.

20. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978).

21. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); *see also* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (stating that the Supreme Court "has long recognized that Congress intended to outlaw only unreasonable restraints").

22. *Am. Needle*, 130 S. Ct. at 2212.

23. *Id.* at 2212.

B. Horizontal Restraints of Trade and Commerce

Horizontal and vertical restraints[24] can be classified as concerted action under Section 1.[25] A horizontal restraint is an agreement between companies that directly compete with one another at the same production or distribution level.[26] Horizontal restraints are either naked or ancillary and can range in form from plain vanilla pricing-fixing agreements to highly integrated joint ventures where two companies collaborate to offer a product or service in an economically efficient manner.[27] An ancillary restraint is a restraint that is created in addition to or after the initial collaboration between the competitors that allows them to reach the objectives of their initial agreement more effectively.[28] For example, a joint venture is a collaborative activity that exists when "two or more firms agree to cooperate in producing some input that they would otherwise have produced individually, acquired on the market, or perhaps done without."[29] Thus, an ancillary restraint is created either before or

24. A vertical restraint is an "agreement between firms at different levels of distribution." Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1219 (2008); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–93 (2007) (discussing the procompetitive and anticompetitive effects of vertical price restraints). Vertical agreements are beyond the scope of this Article.

25. *See* Lemley & Leslie, *supra* note 24, at 1212, 1219–20, 1223, 1243.

26. Denger et al., *supra* note 1, at 305.

27. William J. Kolasky, *Antitrust Treatment of Joint Ventures*, *in* 50TH ANNUAL ANTITRUST LAW INSTITUTE 129, 131 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1738, 2009).

28. Claire E. Trunzo, *Ancillary Restraints in a Competitive Global Economy: Does the Possibility Exist for an Ancillary Restriction to Be Reasonable in Light of Section 1 of the Sherman Act?*, 29 DUQ. L. REV. 291, 292–93 (1991). Section 188 of The Restatement (Second) of Contracts states that an ancillary restraint is unreasonable if the "restraint is greater than is needed to protect the promisee's legitimate interest, or . . . the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public." RESTATEMENT (SECOND) OF CONTRACTS § 188 (2010). Such examples include "a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold [and] . . . a promise by a partner not to compete with the partnership." *Id.*

29. Gustman & Anderson, *supra* note 1, at 203. The most common types of joint ventures include research and development, production/manufacturing, marketing, and network joint ventures. Mary L. Azcuenaga et al., *Overview of the Antitrust Analysis of Joint Ventures*, *in* 48TH ANNUAL ADVANCED ANTITRUST SEMINAR: DISTRIBUTION & MARKETING 175, 180–83 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1714, 2009). In a research and development joint venture, partners combine their research and development departments to develop new products more efficiently. *Id.* at 180. In a production/manufacturing joint venture, firms "collaborate to manufacture products, either to sell to consumers or for use by the parties themselves as an input in their own production process." *Id.* In a marketing joint venture, parties "reduce costs, bring products to market more quickly, sell new products . . . or sell to new

after the parties form a joint venture, and it produces greater productivity or output that benefits the joint venture.[30] Conversely, a naked restraint is an agreement that serves no purpose other than to eliminate competition.[31] Such restraints include those that fix prices or reduce output. Courts declare naked restraints per se illegal and analyze ancillary restraints under the rule of reason.[32]

Once a court determines that the defendant's conduct is concerted action that triggers Section 1, it must then determine which method of analysis to use: per se or rule of reason.

Conduct that falls under the per se approach is deemed illegal on its face, without any regard to surrounding circumstances.[33] Alternatively, conduct analyzed under the rule of reason is subject to

customers that they otherwise would have been unable to reach on their own." *Id.* at 181. In a network joint venture, parties collaborate "to create a system, or 'network,' that consumers can use to access a variety of things, including information and services." *Id.* at 182. Research and development, production/manufacturing, and network joint ventures are generally viewed favorably by the courts because they produce competitive efficiencies with little anticompetitive effects. *Id.* at 180–83. On the other hand, marketing joint ventures are subject to more scrutiny because of the possibility that the collaborators can coordinate pricing and output decisions or allocate territories. *See id.* at 181–82.

Since the mid-1970s, joint ventures have become increasingly popular. Howard H. Chang et al., *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223 (1998). For example, in the information technology industry, two hundred joint ventures formed from 1970 to 1990. *Id.* at 228–29. Additionally, joint ventures between U.S. and foreign firms increased by as much as 27 percent per year between 1985 and 1992. *Id.* at 229.

30. Consider a hypothetical example:

> Compu-Max and Compu-Pro are two major producers of a variety of computer software. Each has a large, world-wide sales department. Each firm has developed and sold its own word-processing software. However, despite all efforts to develop a strong market presence in word processing, each firm has achieved only slightly more than a 10% market share, and neither is a major competitor to the two firms that dominate the word-processing software market. Compu-Max and Compu-Pro determine that in light of their complementary areas of design expertise they could develop a markedly better word-processing program together than either can produce on its own. Compu-Max and Compu-Pro form a joint venture, WORD-FIRM, to jointly develop and market a new word-processing program, with expenses and profits to be split equally. Compu-Max and Compu-Pro both contribute to WORD-FIRM software developers experienced with word processing.

FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS app. § 3.2 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

31. Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188–89 (7th Cir. 1985).

32. Trunzo, *supra* note 28, at 294–97.

33. E-mail from Daniel E. Lazaroff, Professor of Law and Leonard Cohen Chair in Law and Econs. and Dir., Loyola Sports Law Inst., Loyola Law Sch. of L.A. (Mar. 2, 2012, 08:59 PST) [hereinafter Mar. 2 E-mail from Daniel E. Lazaroff] (on file with author).

an inquiry based on a number of factors, most notably analysis of market power, to determine whether the particular restraint violates Section 1.[34] In the last fifteen years, the courts have sparingly used a third method of analysis, known as the quick look approach, when it would be inappropriate to apply the per say approach but unnecessary to conduct an elaborate analysis of the relevant market under the rule of reason.[35]

In deciding which method of analysis to apply, a court must ultimately consider whether the alleged conduct or agreement produces sound procompetitive efficiencies that outweigh its anticompetitive effects—i.e., the net procompetitive effects,[36] To answer this question, courts either use the ancillary restraints doctrine or look to the defendant's procompetitive justifications to determine whether the defendant's conduct is more than just a naked price restraint or restriction on output.[37] If under either approach the court determines that the defendant's conduct or agreement is a naked restraint, it applies the per se approach.[38] If, however, there appears to be potential for overall procompetitive effects, the court applies either the rule of reason or the quick look approach.[39]

1. Ancillary Restraints Doctrine

William Howard Taft, then a judge on the Sixth Circuit Court of Appeals, introduced the ancillary restraints doctrine into American common law in *United States v. Addyston Pipe & Steel Co*.[40] Since

34. Piraino, *supra* note 4, at 1753–54.

35. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010).

36. Mar. 2 E-mail from Daniel E. Lazaroff, *supra* note 33.

37. *Id.*

38. *See infra* Part II.D.1.

39. E-mail from Daniel E. Lazaroff, Professor of Law and Leonard Cohen Chair in Law and Econs. and Dir., Loyola Sports Law Inst., Loyola Law Sch. of L.A. (Feb. 24, 2012, 14:12 PST) (on file with author).

40. 85 F. 271 (6th Cir. 1898); *see also* Gregory J. Werden, *The Ancillary Restraints Doctrine*, *in* RULE OF REASON V. PER SE: WHERE ARE THE BOUNDARIES NOW? 1, 1 (Am. Bar Assoc. Section of Antitrust Law ed., 2006), *available at* http://apps.americanbar.org/antitrust/at-committees/at-s1/pdf/spring-materials/2006/werden06.pdf (stating that Judge Taft imposed the ancillary restraint doctrine into the Sherman Act jurisprudence in his *Addyston Pipe* opinion). In *Addyston Pipe & Steel Co.*, Judge Taft wrote that

> no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.

then, there have been varying interpretations of the doctrine.[41] Regardless of which interpretation of the ancillary restraint doctrine a court uses, it initially determines whether there may be plausible or credible procompetitive justifications that result from the defendant's restraint.[42] If a restraint is ancillary, the defendant's restraint may have procompetitive efficiencies.[43]

Under the first definition, a restraint is ancillary or nonancillary depending on whether it carries the "potential to facilitate the accomplishment of a joint venture's legitimate objectives."[44] If the defendant's agreement "promoted enterprise and productivity at the time it was adopted," the court must apply the rule of reason to analyze this agreement with greater scrutiny.[45] Thus, whether the restraint is ancillary is clearly distinct from whether it is reasonable because the court only decides if the defendant's restraint creates some plausible basis for procompetitive efficiencies that would then allow it to analyze the restraint under the rule of reason.[46]

A second definition of the ancillary restraints doctrine conflates the issue of whether the restraint is ancillary with the question of whether it is reasonable.[47] Under this interpretation, an ancillary restraint is lawful so long as it is "reasonably 'related to the efficiency sought'" by the defendants' initial agreement.[48] Since a

85 F. at 282. In *Texaco Inc. v. Dagher*, the Court stated in dicta about the ancillary restraints doctrine:

> [It] governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, or nonventure activities. Under the doctrine, courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid.

547 U.S. 1, 7 (2006) (citations omitted).

41. *See generally* Werden, supra note 40 (discussing various approaches to the ancillary restraint doctrine).

42. E-mail from Daniel E. Lazaroff, Professor of Law and Leonard Cohen Chair in Law and Econs. and Dir., Loyola Sports Law Inst., Loyola Law Sch. of L.A. (Mar. 2, 2012, 14:45 PST) (on file with author).

43. *Id.*

44. Werden, *supra* note 40, at 4.

45. *Id.* (quoting *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985)).

46. *Id.*

47. *Id.*

48. James H. "Hart" Holden, *Joint Ventures and the Supreme Court's Decision in* Texaco, Inc. v. Dagher*: A Win for Substance over Form*, 62 BUS. LAW. 1467, 1476–77 (2007).

court considers ancillary restraints reasonable under this definition, all ancillary restraints are lawful.[49]

Finally, under a third definition, a restraint is ancillary "if [it is] reasonably necessary to the accomplishment of a [joint] venture's efficiency-enhancing purposes."[50] Under this approach, an ancillary restraint is analyzed along with the formation of the joint venture, while a nonancillary restraint is analyzed separately from the joint venture.[51] For example, if a restraint produces a "loss of independent decision making" among competitors in the market but is "reasonably necessary" to make the joint venture more efficient, the restraint is ancillary.[52] On the other hand, if a restraint is nonancillary, the court analyzes only the restraint, with no consideration of the joint venture.[53] Under this definition, a court may condemn a nonancillary restraint in a joint venture as per se illegal despite the potential procompetitive efficiencies that may result from that joint venture.[54] Alternatively, if the joint venture is legitimate, a court analyzes the joint venture and its ancillary restraint together under the rule of reason.[55] Thus, unlike the second definition of the ancillary restraints doctrine, this definition does not conflate the issue of whether the restraint is ancillary with the question of whether the restraint is reasonable. This is because

49. Werden, *supra* note 40, at 4.

50. Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 734 (1998). Such a restraint "may be reasonably necessary to the achievement of the efficiency-enhancing purposes . . . in a variety of ways." *Id.* at 707. For example, a

> restraint may make the venture itself operate more efficiently[,] . . . prevent a [member of the] joint venture from appropriating an undue share of the venture's benefits[,] . . . prevent nonparticipants from appropriating joint venture benefits for which they have not shared costs[,] . . . [or] prevent unintended . . . consequences that might make the joint venture uneconomic.

Id.

51. Werden, *supra* note 40, at 4.

52. For example, in *Major League Baseball Properties, Inc. v. Salvino, Inc.*, then-Judge Sotomayor concluded in her concurrence that the exclusivity and profit-sharing provisions in Major League Baseball Properties' (MLBP) agreement were "reasonably necessary to achieve MLBP's efficiency-enhancing purposes because [the provision] eliminate[d] . . . potential externalities" that would "limit the potential efficiency gains of [the] MLBP." 542 F.3d 290, 340 (2d Cir. 2008) (Sotomayor, J., concurring). After making this determination, Sotomayor concluded that MLBP's restraint should be analyzed together with the defendants' joint venture under the rule of reason. *Id.*

53. Werden, *supra* note 50, at 734.

54. *Id.*

55. *Id.*

initially, a court is only concerned with whether the defendant's restraint produces potential procompetitive efficiencies that warrant further analysis under the rule of reason.

2. Procompetitive Justifications

If a federal court does not use the ancillary restraints doctrine to determine whether to apply the per se approach, it looks to the procompetitive justifications offered by the defendant to reach this decision.[56] Again, when determining whether to apply the rule of reason, the court makes a preliminary determination to see whether there may be plausible or credible procompetitive justifications for the defendants' restraint.[57] If the court believes that the defendants' restraint may create potential benefits, this is enough to trigger the rule of reason.[58]

This analysis is separate from the one the court conducts under the rule of reason, where the court considers the procompetitive justifications that the defendants offer to rebut the claim that their conduct or agreement violates Section 1.[59] Here, the court's analysis of the defendants' procompetitive justifications parallels its analysis under the ancillary restraints doctrine, where it determines whether the defendants' restraint is naked or ancillary. For example, in a joint venture, the parties integrate their resources while simultaneously competing with one another in the areas not covered by the joint venture.[60] This generates competitive efficiencies, such as reduced cost, higher output, and better quality, which in turn produce many advantages, including the addition of a new competitor to the market, the facilitation of "market entry primarily through risk-sharing and the fusion of complementary resources," and the ability to "penetrate new markets which its partners [individually] could not have

56. *E.g.*, California *ex rel.* Harris v. Safeway, Inc., 651 F.3d. 1118, 1138 (9th Cir. 2011) (en banc); *Salvino*, 542 F.3d at 307–08.

57. Mar. 2 E-mail from Daniel E. Lazaroff, *supra* note 33.

58. *Id.*; *see, e.g.*, Major League Baseball Props., Inc. v. Salvino, Inc., 420 F. Supp. 2d 212, 219 (S.D.N.Y. 2005) (concluding that the rule of reason, not the per se approach, should apply simply because "MLBP's role in licensing [Major League Baseball (MLB)] intellectual property [was] not a naked restraint on trade"), *aff'd*, 542 F.3d 290 (2d Cir. 2008).

59. *See infra* Part II.D.2.

60. Gustman & Anderson, *supra* note 1, at 204.

entered . . . ."[61] The court will apply the rule of reason where the defendants' agreement or conduct produces procompetitive efficiencies "that could not have been achieved independently."[62] This suggests that the more integrated a joint venture is, the more likely a court is to apply the rule of reason.

Although the court either uses the ancillary restraints doctrine or looks to the defendant's procompetitive justifications to determine whether to apply the rule of reason or per se approach, it essentially conducts the same analysis under both methods to answer the ultimate question of whether the defendant's conduct or agreement produces procompetitive efficiencies. In other words, the defendant succeeds under the rule of reason if the court finds that the defendant's restraint is reasonable under the ancillary restraints doctrine *or* that the defendant's procompetitive justifications are legitimate.

This process of either using the ancillary restraints doctrine or considering the defendant's procompetitive justifications is best illustrated by the majority and concurring opinions in *Major League Baseball Properties, Inc. v. Salvino, Inc*.[63] This case concerned whether Major League Baseball Properties (MLBP) violated Section 1 by designating itself as the exclusive licensing agent for Major League Baseball (MLB).[64] In upholding the district court's decision to apply the rule of reason, the *Salvino* court did not use the ancillary restraints doctrine.[65] Rather, it focused on Salvino's arguments that

61. Piraino, *supra* note 2, at 8–9. The joint venture between Boeing, an aircraft manufacturer, and several Japanese manufacturers to produce and share the immense cost of producing a new commercial aircraft illustrates such efficiencies. *Id.* at 9. The efficiencies that joint ventures produce, however, are not free of anticompetitive effects. Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1530–32 (1982). A joint venture can produce anticompetitive effects, including "collusion," "loss of potential competition," or "market exclusion and access discrimination." *Id.*

62. Azcuenaga et al., *supra* note 29, at 184. For example, in *Salvino*, the Second Circuit affirmed the district court's decision to apply the rule of reason to Major League Baseball Properties' conduct because Salvino failed to prove that MLBP's conduct reduced output. *Salvino*, 542 F.3d at 306–07, 334. Therefore, per se treatment was inappropriate because MLBP's conduct was "not a naked restraint on trade." *Id.* at 307. Similarly, quick look treatment was inappropriate because the "casual observer could not summarily conclude that MLBP's arrangement has an anticompetitive effect on customers." *Id.*

63. 542 F.3d 290 (2d Cir. 2008).

64. *Id.* at 293–94.

65. *Id.* at 334 (holding that the rule of reason, and not the per se or quick look approach, applied to MLBP's licensing agreement).

the MLBP's conduct amounted to a restriction on output and price and, therefore, did not produce any procompetitive efficiencies.[66] In rejecting Salvino's arguments, the Second Circuit pointed to deficiencies in Salvino's presentation of evidence.[67]

In her concurring opinion, then-Judge Sotomayor agreed with the majority's holding that analyzing MLBP's conduct under the rule of reason was appropriate, but she instead used the ancillary restraints doctrine to reach that conclusion.[68] Judge Sotomayor argued that the ancillary restraints doctrine was the "superior method for analyzing the challenged restraint [in the case] because it effectively isolates when an exclusive arrangement should be viewed under the rule of reason, as a reasonably necessary part of a joint venture, and when it should be reviewed as a naked restraint."[69]

According to Judge Sotomayor, the exclusivity provision that made the MLBP the exclusive licensor of MLB's intellectual property was "reasonably necessary to achieve MLBP's efficiency-enhancing purposes because [the provision] eliminate[d] . . . potential externalities that [would] otherwise distort the incentives of individual [c]lubs and limit the potential efficiency . . . of MLBP."[70] As a result, Judge Sotomayor believed that MLBP's "restraints must be viewed as ancillary to the joint venture and reviewed under the rule of reason in the context of the joint venture as a whole."[71] Thus,

66. *Id.* at 318–21.

67. *Id.* at 318–34. The court held that Salvino could not prove that the agreement between MLB and the MLBP "limit[ed] output." *Id.* at 319. The only evidence that Salvino pointed to showed that the output had, in fact, increased. *Id.* at 319. Furthermore, according to the court, Salvino misunderstood what a price restriction is: what he thought was an agreement to fix prices was actually a profit sharing agreement. *Id.* at 320. Finally, the court also pointed out that Salvino unsuccessfully and incorrectly drew comparisons between this case and *Broadcast Music, Inc.* and *NCAA*. *Id.* at 320–25.

68. *Id.* at 341 (Sotomayor, J., concurring).

69. *Id.* This is similar to the third interpretation of the ancillary restraints doctrine discussed in Part II.B.1.

70. *Id.* at 340. According to Judge Sotomayor, one of the most notable externalities that the exclusivity provision would eliminate is the free-rider problem. *Id.* Free riding in this context occurs if one baseball club gains an advantage over other clubs from MLB's licensing of its products. *Id.* In fact, Judge Sotomayor pointed out that both Salvino and the MLBP admitted that the externalities are in place to promote efficiency, and without them, any progress the MLBP made in gaining efficiencies would be lost. *Id.*

71. *Id.* Judge Sotomayor criticized the majority for failing to recognize that this exclusivity agreement differed from the blanket licensing agreement in *Broadcast Music, Inc.* and for further failing to offer analysis as to this distinction. *Id.* at 341.

after initially determining that there was a potential for procompetitive efficiencies, Judge Sotomayor concluded that these justifications must be analyzed under the rule of reason and concurred with the majority's rule of reason analysis.[72]

In *Salvino*, the majority opinion—which considered Salvino's procompetitive justifications—and the concurring opinion—which used the ancillary restraints doctrine—both reached the same conclusion that the rule of reason, not the per se approach, should be applied to MLBP's conduct. However, this is not surprising given that both approaches aim to answer whether the defendant's alleged conduct or agreement produces net procompetitive efficiencies.

C. Treatment of Horizontal Agreements Since the Passage of Section 1

The law of horizontal restraints did not develop overnight. When Congress passed the Sherman Antitrust Act in 1890, it delegated broad authority to the courts "to develop [the] federal 'common law' of antitrust regulation."[73] Since then, the federal courts have been responsible for developing the rule of law for American businesses.[74] During the first thirty years after the Sherman Act's enactment, the largest issue that the federal courts faced was the scope of the Sherman Act's restrictions and the extent to which these restrictions affected American businesses such as "steel, oil, and railroad trusts."[75] One thing that was certain, however, was that the federal courts had a duty to regulate competition among American firms under the Sherman Act.[76]

72. *Id.* While at first glance it may seem that Judge Sotomayor utilized the second definition of the ancillary restraints doctrine, which conflates the issue of whether a restraint is ancillary with whether the restraint is reasonable, she did not. Instead, Judge Sotomayor first determined that MLBP's restraint had a potential to produce procompetitive efficiencies and, therefore, was a reasonable part of the joint venture. Based on this, Judge Sotomayor pointed out that the application of the rule of reason was appropriate and concurred with the majority's rule of reason analysis.

73. Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 346 (2007).

74. Thomas A. Piraino, Jr., *An Antitrust Common Law for the Twenty-First Century*, 2009 UTAH L. REV. 635, 636 (2009).

75. *Id.* at 638.

76. *Id.*

Following this initial era, the courts transitioned into a period known as "the Harvard Era."[77] From the 1930s to the 1960s, the courts turned their attention to ensuring that big businesses did not harm the American consumers by taking advantage of their large market power.[78] As a result, the courts looked out for small businesses, scrutinizing "a wide range of competitive conduct" that potentially harmed these businesses.[79] During this time, the per se approach was the dominant method of analysis used to analyze horizontal restraints.[80]

Then, beginning in the 1970s, a new school of thought has emerged known as "the Chicago Era."[81] Under this ideology, courts view antitrust laws as a way "to increase the efficiency of the American economy" rather than adopting the Harvard Era's view that small businesses should be protected from big businesses that abuse their market power.[82] As the federal courts began to better understand economic theory, they started to move away from the per se approach and toward the rule of reason.[83] The courts realized that the per se approach held certain conduct illegal, even if it provided legitimate, competitive efficiencies.[84]

Over the past twenty years, there has been a trend in the federal court system toward recognizing that, while markets must be respected, courts must intervene to protect consumers and prevent harm from conduct that arises from aggressive competition.[85] Similarly, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) promulgated the Antitrust Guidelines for Collaborations Among Competitors (the "Collaboration Guidelines") in 2000 in order to provide greater "clarity [and guidance to businesspeople] regarding their treatment under antitrust laws."[86] The Collaboration Guidelines describe the analytical framework that the FTC and DOJ use "to assist businesses in

77. *Id.*
78. *Id.*
79. *Id.*
80. Piraino, *supra* note 4, at 1755–56.
81. Piraino, *supra* note 74, at 638.
82. *Id.* at 638–39.
83. Piraino, *supra* note 4, at 1754.
84. *Id.* at 1756–57.
85. Piraino, *supra* note 74, at 639–40.
86. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 30, at 1.

assessing the likelihood of an antitrust challenge to a collaboration with one or more competitors."[87] The purpose of the Collaboration Guidelines is to help competitors understand how the agencies interpret antitrust law so that when these competitors are evaluating a potential collaboration, they know with greater certainty whether their collaboration will violate Section 1.[88] This, in turn, will "encourage procompetitive collaborations, [deter] collaborations likely to harm competition and consumers, and [facilitate] the Agencies' investigation of collaborations."[89]

Since 2009, the Obama Administration has taken an aggressive stance toward enforcing antitrust laws, arguing that corporations should not be allowed to abuse their large market power to "elbow out [other] competitors or to keep them from gaining market share."[90] Instead, Christine Varney, the Director of the Antitrust Division at the DOJ, has clearly stated that it must return to focusing on the ultimate goal of antitrust law: protecting the consumer.[91]

D. The Three Methods of Analysis: Per Se, Rule of Reason, and Quick Look

As discussed in Part II.B, the federal courts apply one of three different analyses to determine whether a horizontal restraint violates Section 1: the per se approach, the rule of reason, or the quick look approach. This section chronicles the history of how the federal courts have developed and applied each approach.

87. *Id.* at 2. Some have argued that the Collaboration Guidelines need to be revised because of key Supreme Court decisions—including *Texaco, Inc. v. Dagher* and *American Needle, Inc. v. National Football League*—that address joint ventures. *See* Robert A. Skitol, *Are the Competitor Collaboration Guidelines Ripe for Revision?*, ANTITRUST, Fall 2010, at 55.

88. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 30, at 2.

89. *Id.* The D.C. Circuit Court's decision in *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005), demonstrates how the FTC brought a Section 1 challenge against a joint venture between two record labels, Warner and Polygram. Kolasky, *supra* note 27, at 145–46. Here, Polygram and Warner entered into a joint venture to "distribute recordings from the third concert" of a three-part concert series by the Three Tenors. *Id.* at 146. Warner and Polygram realized that the third recording would have been less profitable and therefore "agreed not to advertise or discount either of the earlier recordings for a ten-week period surrounding the launch of the third recording." *Id.* The district court upheld the FTC's finding that Polygram and Warner's agreement violated Section 5 of the Federal Trade Commission Act. *Id.* at 145.

90. Stephen Labaton, *Obama Takes Tougher Antitrust Line*, N.Y. TIMES (May 11, 2009), http://www.nytimes.com/2009/05/12/business/economy/12antitrust.html?pagewanted=all.

91. *Id.*

1. Application of the Per Se Approach by the Federal Courts

The Sherman Act makes a combination per se illegal if it was "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate . . . commerce" per se illegal.[92] In other words, an agreement or conduct that appears "so plainly anticompetitive" carries a presumption of per se illegality.[93] For example, conduct that "almost always" results in a reduction of competition or output is anticompetitive on its face and is per se illegal.[94] As a result, under the per se approach, the court need not engage in the "elaborate industry analysis" required by the rule of reason.[95]

Under the per se approach—the most direct method for challenging the reasonableness of a restraint—courts presume the competitive effect of the challenged conduct or agreement without any inquiry into the claimed business purpose, anticompetitive harm, or overall competitive effects.[96] In analyzing a joint venture, a court

92. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). The Supreme Court announced the per se rule for the first time in *Socony-Vacuum Oil Co.* Travis J. Hill & Stephanie B. Lezell, *Antitrust Violations*, 47 AM. CRIM. L. REV. 245, 250 (2010). In this case, the defendant oil companies were able to charge higher prices for their own products as a result of their having bought "low-priced distressed gasoline from independent refineries." Donald L. Beschle, *"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 HASTINGS L.J. 471, 477 (1987). In holding that the defendants' conduct violated the Sherman Act, the Court held that "it was irrelevant that the defendants lacked sufficient market power to actually achieve their goals." *Id.*

93. Broad. Music, Inc. v. CBS, 441 U.S. 1, 7–8 (1979).

94. *Id.* at 19–20.

95. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986). The rationale behind the per se approach is that if a restraint is anticompetitive on its face, then courts need not engage in a "complicated and prolonged economic investigation into the entire history of the industry involved" in order to deem that restraint "unreasonable." Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 351 (1982) (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)). For an in-depth analysis of the defendant's market share in a relevant market, see *supra* Part IV.C.

96. Lemley & Leslie, *supra* note 24, at 1213–14. In *Northern Pacific Railroad Co. v. United States*, Justice Blackmun explained the appropriateness and need for per se rules. 356 U.S. 1, 5 (1958). Justice Blackmun wrote:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the

considers the level of integration between the parties when determining whether to apply the per se approach.[97] The more joint ventures integrate resources, the less likely they will be subject to per se scrutiny.[98] The Collaboration Guidelines employ the same analysis to evaluate whether the challenged restraint is per se illegal.[99]

By the 1960s, the per se approach was widely used by federal courts at all levels because of its many benefits.[100] For example, this approach easily applied to a wide variety of conduct and agreements, which conserved the judicial system's resources by cutting the cost and length of trials.[101] At the same time, the per se approach functioned as a deterrent to anticompetitive conduct.[102] However, as courts became more versed in economic theory, it became apparent increasingly apparent that the per se approach was too inflexible.[103] The central problem with the per se approach was that it kept potentially beneficial business from forming because courts applied it "mechanically" without considering the potential procompetitive efficiencies generated by many of the challenged collaborations.[104] In 1979, the Supreme Court, in *Broadcast Music, Inc. v. CBS*,[105] recognized the need to depart from the per se approach and move toward the rule of reason.[106] Since then, the Court has limited the application of the per se approach while expanding the use of the rule of reason.[107]

> necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Id.

97. Azcuenaga et al., *supra* note 29, at 184.
98. *Id.*
99. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 30, at 8.
100. Piraino, *supra* note 4, at 1755–56.
101. *Id.* at 1756.
102. *Id.*
103. *Id.*
104. *Id.* at 1756–57.
105. 441 U.S. 1 (1979).
106. Piraino, *supra* note 4, at 1758.
107. *Id.* at 1753–54.

2. Application of the Rule of Reason Approach by the Federal Courts

In 1918, the Supreme Court formally defined the rule of reason in *Board of Trade of City of Chicago v. United States*.[108] Since then, the Court has maintained that under the rule of reason, the central inquiry is "whether the challenged agreement [or conduct] is one that promotes . . . or one that suppresses competition."[109] Similarly, the Collaboration Guidelines define the rule of reason approach as an "analysis [that] focuses on the state of competition with, as compared to without, the relevant [horizontal] agreement" between the competitors.[110] The purpose of the rule of reason is to recognize that certain restraints on competition are necessary if the collaborators' "product is to be available at all."[111]

The first step a plaintiff must satisfy under the rule of reason is to prove that the defendant's "alleged conduct or agreement . . . produces . . . anticompetitive effects within the relevant product and geographic markets."[112] The plaintiff can prove this by demonstrating the "existence of actual anticompetitive effects" of the defendant's agreement or conduct or that the defendant has market

108. 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."). The rule of reason was first suggested in an early English case, *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. (Q.B.) 347. At issue in that case was a promise by a seller of a bakery that he would not compete with his purchaser. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978). The *Mitchel* court upheld the covenant as reasonable because the long-term benefits of increasing the business's marketability outweighed any negative effects on competition. *Id.* at 688–89.

109. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 691.

110. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 30, at 10. "The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement." *Id.*

111. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984). Even without the creation of a new product, there may be efficiencies that justify the application of the rule of reason. For example, a restraint that produces efficiencies, cuts cost, or increases the quality of a product receives treatment under the rule of reason. *See supra* notes 4–5 and accompanying text.

112. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010) (quoting United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1983)).

power[113] in a particular market for goods and services.[114] For example, in *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*,[115] a district court in the Central District of California held that TYR Sport met its burden of proof regarding the defendant's market power by providing sufficient evidence that the market for performance swimwear in the United States was a distinct market, separate from the international market.[116] Sometimes, however, the plaintiff and defendant offer conflicting sets of data that frame the scope of the relevant market to each party's benefit, making it difficult for the court to accept one party's definition over the other's.[117] In these circumstances, the definition of the relevant market is left to the jury.[118]

If the plaintiff meets the initial burden of proving actual anticompetitive effects or adequate market power, the defendant is

113. The Supreme Court has defined market power as "the ability to raise prices above those that would be charged in a competitive market." *NCAA*, 468 U.S. at 109 n.38. Market power may be proven through "evidence of specific conduct undertaken by the defendant that indicates he has the power to affect price or exclude competition," or "alternatively, market power may be presumed if the defendant controls a large enough share of the relevant market." United States v. Visa U.S.A., Inc., 344 F.3d 229, 239 (2d Cir. 2003). A relevant market is made up of two types of markets: a geographic market and a product market. Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591, 596 (8th Cir. 2009). A geographic market is the "geographic area 'in which the seller operates and to which . . . purchasers can practicably turn for supplies.'" *Id.* at 598 (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)). A court defines the size of a geographic market by considering several factors such as "'[p]rice data and such corroborative factors as transportation costs, delivery limitations, customer convenience and preference, and the location and facilities of other producers and distributors.'" Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1027 (10th Cir. 2002) (quoting T. Harris Young & Assocs., Inc. v. Marquette Elec., Inc., 931 F.2d 816, 823 (11th Cir. 1991)). Product market, on the other hand, is defined as being "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956).

114. *Deutscher Tennis Bund*, 610 F.3d at 830.

115. 709 F. Supp. 2d 802 (C.D. Cal. 2010).

116. *Id.* at 816. The court found relevant a number of factors in holding that the U.S. market for swimwear was distinct from the international market. For example, the Executive Vice President of TYR Sport testified to numerous barriers to competition, including "1) the ability to provide local technical support; 2) on-the-ground customer service networks able to quickly respond to the needs of elite swim teams; 3) relationships with athletes, coaches, and swim directors; 4) cultural differences in suit preferences; [and] 5) differences in physiology of swimmers from country to country . . . ." *Id.*

117. Meijer, Inc. v. Barr Pharm., Inc., 572 F. Supp. 2d 38, 62 (D.D.C. 2008).

118. *Id.* For example, in *Meijer, Inc. v. Barr Pharmaceuticals, Inc.*, a district court in the District of Columbia left the definition of the oral contraceptive market to the jury because both the plaintiff and defendant defined the relevant market to their own benefit, which left the court with a disputed version of the defined market. *Id.*

given the opportunity to prove that its conduct or agreement "promotes a sufficiently procompetitive objective."[119] If the defendant is unable to offer any procompetitive justifications, the inquiry ends and the challenged restraint is illegal under the rule of reason.[120] For example, in *United States v. Visa U.S.A., Inc.*,[121] the DOJ challenged Visa and Mastercard's exclusionary rule, which "prohibit[ed] members of their networks from issuing American Express or Discover cards."[122] There the court rejected the defendant's proposed procompetitive justification that the exclusionary rule served to "promote 'cohesion' within the Mastercard and Visa networks." The Second Circuit upheld the district court's finding that the exclusionary rule was not necessary to promote cohesion and that, even if it was, its precompetitive effects did not outweigh its anticompetitive ones.[123] If, however, the defendant offers sound procompetitive justifications, the plaintiff then must prove that these proffered justifications are not "reasonably necessary" to accomplish the defendant's objective.[124]

The Collaboration Guidelines follow a similar approach.[125] First, either the FTC or the DOJ begins by examining the nature of the defendant's agreement to determine whether it has caused anticompetitive harm.[126] If no such harm is evident, the inquiry ends.[127] If the possibility of anticompetitive harm is clearly evident, or if it has resulted, the agencies "challenge such agreements without a detailed market analysis."[128] If the agreement at issue indicates the *possibility* of anticompetitive harm, the agencies scrutinize the defendant's agreement by conducting a detailed market analysis.[129]

119. *Deutscher Tennis Bund*, 610 F.3d at 830.
120. *See id.*
121. 344 F.3d 229 (2d Cir. 2003).
122. *Id.* at 234, 237.
123. *Id.*
124. *Deutscher Tennis Bund*, 610 F.3d at 830.
125. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 30, at 10–12.
126. *Id.* at 10.
127. *Id.*
128. *Id.* at 10–11.
129. *Id.* at 11. At the market-analysis stage, the agencies look at several factors, including whether an agreement is "exclusive or non-exclusive," the "duration of the collaboration," and "whether entry [into the market] would be timely, likely, and sufficient to deter or counteract any anticompetitive harms." *Id.* If no anticompetitive harm is apparent, the inquiry ends and the court will not find a Section 1 violation. *Id.* If the market analysis reveals anticompetitive harm, the

The Supreme Court first applied the rule of reason in *Broadcast Music, Inc. v. CBS*, which involved a horizontal agreement that fixed a common price for the licensing of musical compositions.[130] In doing so, the Court acknowledged that federal courts should initially consider whether a restraint "appears to be one that would always or almost always tend to restrict competition and decrease output."[131] Following its decision in *Broadcast Music, Inc.*, the Supreme Court used the rule of reason to analyze other horizontal agreements with potential efficiency justifications.[132] In *NCAA v. Board of Regents of the University of Oklahoma*,[133] the Court applied the rule of reason to an agreement limiting the number of times that a college sports team from the National Collegiate Athletic Association (NCAA) could appear on television as well as the fees that these teams could receive from the networks.[134] Although the agreement at issue was a horizontal price fixing and output limitation agreement that would have been automatically illegal under the per se approach, the Court applied the rule of reason because the restraint at issue "involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all."[135] The Court continued this trend, expanding the application of the rule of reason

agency "examine[s] whether the relevant agreement is reasonably necessary to achieve procompetitive benefits that likely would offset any anticompetitive harms." *Id.* at 11–12.

130. 441 U.S. 1, 24–25 (1979).

131. *Id.* at 19–20.

132. Piraino, *supra* note 4, at 1758.

133. 468 U.S. 85 (1984).

134. *Id.* at 94.

135. *Id.* at 99–101. The Court ultimately struck down the defendant's procompetitive justifications for the agreement since the television plan did not promote a competitive balance among amateur athletic teams. *Id.* at 117–20. The Court believed that protecting live attendance was not a legitimate goal and that the NCAA's restraint did not help to protect it. *Id.* at 115–17. Additionally, it is important to note that the creation of a new product is not a necessary prerequisite to trigger the application of the rule of reason. The rule of reason can also apply if the defendant's conduct or agreement creates procompetitive efficiencies. *See supra* Part II.B.2.

throughout the 1980s.[136] Today, the rule of reason is the most common method of evaluating horizontal restraints on trade.[137]

3. Application of the Quick Look Approach by the Federal Courts

The quick look approach is an intermediate standard that "applies in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis [under the rule of reason] is required to demonstrate the anticompetitive character of an inherently suspect restraint."[138] Under the quick look approach, the defendant's restraint carries a presumption of anticompetitiveness that the defendant can rebut only by offering procompetitive efficiencies that justify the restraint.[139] Thus, the court initially tries to determine whether the restraint carries obvious anticompetitive effects.[140] At this level, the inquiry is focused on whether "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."[141] Where the effect of a horizontal restraint appears complex on its face, however, "assumption[s] alone will not do."[142] Instead, a court must properly identify the anticompetitive effects of a restraint and determine whether those effects are actually anticompetitive.[143]

Once the court has clearly decided that the effects of the restraint are anticompetitive, the burden shifts to the defendant to offer "some competitive justification" for the restraint.[144] If the

136. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458 (1986) (holding that although the conduct at issue resembled a group boycott that would normally be deemed per se illegal, the rule of reason should apply because the economic impact of the horizontal agreement was not immediately obvious); Nw. Wholesale Stationers v. Pac. Stationary & Printing Co., 472 U.S. 284, 298 (1985) (holding that the per se approach should not apply since a "mere allegation of a concerted refusal to deal does not suffice [as anticompetitive conduct] because not all concerted refusals to deal are predominantly anticompetitive").

137. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829–30 (3d Cir. 2010).

138. *Id.* at 830 (quoting United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1983)).

139. *Id.* at 831.

140. *Id.*

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

142. *Id.* at 775 n.12.

143. *Id.*

144. *Deutscher Tennis Bund*, 610 F.3d at 831 (internal quotation marks omitted) (citing United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)).

defendant cannot carry this burden, then the restraint is illegal under a quick look analysis.[145] If, however, the defendant is able to offer a legitimate procompetitive justification for the restraint, the court abandons the quick look approach and engages in a rule of reason analysis.[146]

While the Court in *NCAA* used the rule of reason to analyze the restraints at issue, it stated that this approach can sometimes be applied "in the twinkling of an eye"[147]—language that some legal scholars consider to be the origin of the quick look approach.[148] In *NCAA*, the NCAA argued that its agreement limiting collegiate sports' teams television appearances did not have "significant anticompetitive effects" because the NCAA possessed no market power.[149] The Court rejected this argument, holding that "the absence of proof of market power does not justify a naked restriction on price or output."[150] According to the Court, "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"[151] The Court has "never required proof of market power in such a case."[152] Therefore, even in the absence of a detailed market analysis, a naked restraint on price and output requires some competitive justification.

Along with *NCAA*, the Court's decision in *FTC v. Indiana Federation of Dentists*[153] is also regarded as paving the way for the quick look approach.[154] In *Indiana Federation of Dentists*, a group of professional dentists (the "Federation"), made an argument similar to the *NCAA* plaintiffs': the FTC could not identify a relevant market in which the Federation restrained trade, and therefore the Federation

145. *Id.*
146. *Id.*
147. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.39 (1984) (quoting PHILLIP AREEDA, FED. JUDICIAL CTR., THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 37–38 (1981)).
148. James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After* American Needle, 21 MARQ. SPORTS L. REV. 517, 531 n.54 (2011).
149. *NCAA*, 468 U.S. at 109.
150. *Id.*
151. *Id.*
152. *Id.* at 110.
153. 476 U.S. 447 (1986).
154. McKeown, *supra* note 148, at 530–31.

did not unreasonably restrain trade.[155] In rejecting the FTC's argument, the *Indiana Federation of Dentists* Court reaffirmed its decision in *NCAA* by holding that the FTC's failure to engage in a detailed market analysis did not defeat the FTC's finding that the Federation's conduct was illegal under the rule of reason.[156] According to the Court, because the purpose of market analysis is to determine whether an agreement or conduct can adversely affect competition, "'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power."[157] Thus, the Court held that the Federation violated Section 1 under the rule of reason and did not provide a detailed analysis of market power.[158]

III. WHERE DO WE DRAW THE LINE, IF A LINE CAN BE DRAWN AT ALL?

Although it may seem that the Court has clearly established three approaches to analyze horizontal restraints that potentially violate Section 1, the use of these approaches has created a great deal of uncertainty among lower federal courts and American firms.[159] Oftentimes it is difficult to see how courts decide which approach to apply. One way to offer insight into this problem is to look at how the federal courts have limited or expanded the application of these approaches. The next section looks at lower federal court decisions in the past five years and shows how courts continue to use the rule of reason while limiting the use of the per se and quick look approaches.

A. Limits on the Per Se Approach

The most significant limit that the Supreme Court has placed on the per se approach was to preclude its application where the restraint on competition produces procompetitive efficiencies or is

155. *Ind. Fed'n of Dentists*, 476 U.S. at 460.
156. *Id.*
157. *Id.* at 460–61.
158. *Id.*
159. *See* Gustman & Anderson, *supra* note 1, at 205.

"essential if the product is to be available at all."[160] The Supreme Court, along with the lower federal courts, has consistently upheld this limitation.[161] For example, when defendants are members of a joint venture that requires a certain degree of cooperation to compete in the relevant market or to market a product, any horizontal restraint that they impose will be subject to the rule of reason as long as most of their regulatory controls are procompetitive.[162] Thus, even if the restraint at issue is a price-fixing agreement, courts apply the rule of reason because the horizontal agreement is necessary for the joint venture to function.[163]

In its 2010 decision, a court in the Northern District of Illinois in *In re Sulfuric Acid Antitrust Litigation*[164] did not apply the per se approach when considering the plaintiffs' motion for summary judgment, even though it could have.[165] The plaintiffs brought suit against producers of sulfuric acid, alleging that these producers conspired "to reduce the output and fix the price of sulfuric acid in Canada and the United States."[166] In analyzing whether the plaintiffs offered enough facts to prove that the defendants' restraint was per se illegal, the court exercised caution in deciding whether to apply the per se approach.[167] According to the court, a plaintiff cannot

160. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984); *e.g.*, Broad. Music, Inc. v. CBS, 441 U.S. 1, 23 (1979). A horizontal restraint does not always have to produce a new product in order to trigger the application of the rule of reason. *See supra* note 5.

161. *E.g.*, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2216 (2010); Texaco Inc. v. Dagher, 547 U.S. 1, 7 (2006); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 831 (3d Cir. 2010); *In re* ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1014 (N.D. Cal. 2008).

162. *See In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1014.

163. *Id.*

164. 743 F. Supp. 2d 827 (N.D. Ill. 2010).

165. *Id.* at 865.

166. *Id.* at 835. The plaintiffs argued that the rule of reason should not apply and instead focused on the application of the per se approach. *Id.* at 864. The plaintiffs did not discuss the challenged practices' anticompetitive effects or the defendants' market power in the relevant market. *Id.* As a result, the court held that the plaintiffs waived their rule of reason argument. *Id.* at 865.

167. *Id*. The defendants first argued that the courts do not have enough experience with their conduct to be able to apply the per se approach. *Id.* at 869. The court rejected this argument, holding that the defendants' alleged agreement is a classic price-fixing and output-restriction agreement. *Id.* Next, under the ancillary restraints doctrine, the defendants argued that the output-reduction agreements served to make their joint venture successful. *Id.* at 872. The court found the defendants' argument "problematic." *Id.* It held that "a restraint is only ancillary if it [is] necessary to achieve otherwise unattainable procompetitive benefits." *Id.* According to the court, a reasonable jury could conclude that the defendants' conduct was not ancillary. *Id.* at 874. But

benefit from the per se standard at trial unless one could conclude from the undisputed facts in the case that the challenged conduct was "of the type" that is customarily regarded as illegal per se.[168]

Because the plaintiffs were unable to present undisputed facts that the defendants' conduct was per se illegal, the court did not decide whether it could apply the per se approach.[169] Instead, it held that there were "enough issues of contested material fact to preclude both summary judgment on the merits and the determination of the appropriate legal standard."[170] However, the court noted that if it became clear that the defendants acted in the way that the plaintiffs described, the defendants' conduct would constitute a per se violation.[171] The holding in *In re Sulfuric Acid Antitrust Litigation* may foreshadow a trend toward exercising a cautious reluctance to apply the per se approach to alleged Section 1 violations, even if it is potentially applicable.

The Supreme Court in *Texaco Inc. v. Dagher*[172] also limited the use of the per se approach by applying the rule of reason when plaintiffs challenged the "core activity" of a joint venture.[173] Consistent with *Dagher*, a California district court in *In re ATM Fee Antitrust Litigation*[174] applied the rule of reason when the plaintiffs challenged a joint venture's right to set an interchange network fee—an activity that the court determined was at the "core" of the joint venture.[175] According to the court, "*Dagher* teaches that such

because a dispute remained over whether such conduct was ancillary, the court could not determine whether the per se or rule of reason should apply. *Id.*

168. *Id.* at 865.

169. *See id.* at 887.

170. *Id.*

171. *Id.*

172. 547 U.S. 1 (2006).

173. *Id.* at 5. The joint venture in *Dagher* was formed by two oil companies that consolidated to refine and sell gasoline in the United States. *Id.* at 3. After the joint venture set a single price for both brands of gasoline, the plaintiffs challenged the joint venture's agreement to set a unified price. *Id.* at 4. The Supreme Court held this practice to be part of the joint venture's "core activity." *Id.* at 7–8. The Court further precluded the application of the per se approach to joint ventures that set their own prices. According to the Court, a single entity that sets its own prices is not guilty of price fixing. *Id.* at 6. While this activity may be "price fixing in the literal sense, it is not price fixing in the antitrust sense." *Id.* For more analysis on what a "core" activity is, see *infra* Part IV.A and note 230.

174. 554 F. Supp. 2d 1003 (N.D. Cal. 2008).

175. *See id.* at 1013.

challenges [to the joint venture's core activity] must be analyzed under the rule of reason."[176]

Indeed, the federal courts are universally reluctant to expand the application of the per se approach.[177] This reluctance is appropriate given the goals of antitrust law. Joint ventures are formed to make production more efficient, develop more innovative products, and deliver the best price possible to the consumer.[178] Courts do not want to inhibit their growth by blindly holding a joint venture's conduct per se illegal when it can instead analyze and weigh the procompetitive efficiencies of the alleged anticompetitive restraint to determine Section 1 legality.[179] Doing so would make it more difficult for American firms to provide the most competitive price to the consumer.

B. Limits on the Rule of Reason

Because the rule of reason has become the default analysis to determine the legality of a horizontal restraint, the courts have not placed many limits on its application.[180] In fact, many of the limits placed on the per se approach have in turn expanded the application of the rule of reason.[181] At the same time, where per se treatment is

176. *Id.* The court cited to *NCAA*, pointing out that the Supreme Court held that when "horizontal agreements are necessary for the functioning of a joint venture, all horizontal agreements among members of that venture . . . should be subject to the Rule of Reason." *Id.* at 1014. The court pointed out that the holding in *NCAA* would compel it to apply the rule of reason to the restraint at issue. *Id.* at 1015. But, the court turned to *Freeman v. San Diego Ass'n of Realtors*, a Ninth Circuit Court of Appeals case that has limited the application of *NCAA*. *Id.* In *Freeman*, the Ninth Circuit held that for *NCAA* to apply, "the *particular* restraint at issue must be 'reasonably ancillary to the legitimate cooperative aspects of the [joint] venture.'" *Id.* (quoting Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1151 (9th Cir. 2003)). Thus, defendants must prove two things: that their joint venture requires a horizontal restraint and that the particular restraint is ancillary to the joint venture's legitimate business operations. *Id.* The court in *In re ATM Fee Antitrust Litigation* held that the defendant's conduct also fell under the *Freeman* limitation, making the rule of reason the proper approach. *See id.* at 1017.

177. *See, e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); *In re* Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827, 887 (N.D. Ill. 2010); *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1014.

178. Piraino, *supra* note 2, at 3–4.

179. Piraino, supra note 74, at 651.

180. *See, e.g.*, Am. Needle, Inc. v. NFL 130 S. Ct. 2201, 2216 (2010); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829–30 (3d Cir. 2010); *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1014.

181. *See, e.g.*, NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–01 (1984); Broad. Music Inc. v. CBS, 441 U.S. 1, 23 (1979).

appropriate, the rule of reason has a limited application.[182] For example, when the anticompetitive effects of a horizontal restraint are unclear, courts use the rule of reason rather than the per se approach so that they can fully consider the procompetitive justifications of the alleged restraint.[183] Conversely, when a restraint is plainly anticompetitive, courts do not need to engage in an extensive analysis of the relevant market or defendant's market power. Accordingly, they use the per se approach, and not the rule of reason, to find such restraints illegal.[184] Thus, the per se approach and the rule of reason function as a check on each other.

C. Limits on the Quick Look Approach

In *California Dental Ass'n v. FTC*,[185] the Supreme Court held that it was inappropriate to apply the quick look approach to advertising restrictions placed on members of the California Dental Association because the restrictions' anticompetitive effects were not "obvious."[186] In reaching its decision, the Court made clear that the quick look approach should only be applied when the deciding court "has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive."[187] If the conduct "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," then the quick look approach is not applicable.[188] Thus, the Court recognized the quick look approach while simultaneously placing limits on it.

Since the Court's decision in *California Dental*, subsequent lower federal courts have been careful in applying the quick look

182. *See Broad. Music, Inc.*, 441 U.S. at 7–8. In *Broadcast Music, Inc.*, the court stated in dicta that there is no need to analyze defendants' conduct or agreement under the rule of reason when it is "plainly anticompetitive." *Id.* Instead, such an agreement or conduct is declared per se illegal. *Id.*

183. *See* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 IOWA L. REV. 1137, 1143–44 (2001) (stating that where the economic effects of a defendant's conduct or agreement is ambiguous, the courts engage in a detailed analysis of the defendant's restraint on the relevant market under the rule of reason).

184. *See* Broad. Music, Inc., 441 U.S. at 7–8.

185. 526 U.S. 756 (1999).

186. *Id.* at 774, 759.

187. *See id.* at 775 n.12.

188. *See id.* at 771.

approach.[189] For example, in 2010, the Third Circuit Court of Appeals in *Deutscher Tennis Bund v. ATP Tour, Inc.*[190] held that applying the quick look approach to an agreement reorganizing the ATP tennis tour to increase popularity and exposure was not appropriate because "the definition of the relevant [tennis] market was one of the most contested issues at trial."[191] According to the court, a thorough market analysis was necessary because the relevant market was not "sufficiently well-known or defined" to allow a court to decide whether the reorganization agreement was anticompetitive.[192] Similarly, in 2011, the Ninth Circuit Court of Appeals in *California ex rel. Harris v. Safeway, Inc.*[193] refused to apply the quick look approach to an agreement among a group of supermarket competitors to share revenues in the event of a strike or lockout.[194] According to the court, the "unique features of the agreement"—along with "the uncertain effects these features had on the grocers' competitive behavior"—were "not obvious."[195] The court specifically noted that in order to reach a confident conclusion about the anticompetitive effects of the agreement, "further development of the record [was] required."[196] The Ninth Circuit seems to have learned its lesson after the Supreme Court overturned its decision in *California Dental* because in *Harris* it did not apply the quick look approach to an agreement whose anticompetitive effects were unclear.

Despite the infrequent use of the quick look approach[197] by the federal courts in the last five years, in 2008, the court in *North Texas*

189. *E.g.*, California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118 (9th Cir. 2011) (en banc); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010).

190. 610 F.3d 820 (3d Cir. 2010).

191. *Id.* at 832. This case highlights the problem that under the rule of reason, courts focus too heavily on the defendant's market power in a relevant market in order to decide whether the defendant's restraint is anticompetitive. For more on this problem, see *infra* Part IV.C.

192. *Id.* Additionally, even if the anticompetitive effects of the agreement were obvious, the quick look analysis still would have been inappropriate because the defendants offered sound procompetitive justifications. *Id.* at 833. According to the court, once a defendant offers such procompetitive justifications, the quick look presumption disappears and a full-scale rule of reason analysis should be used. *Id.*

193. 651 F.3d 1118 (9th Cir. 2011) (en banc).

194. *Id.* at 1122, 1137.

195. *Id.* at 1137.

196. *Id.*

197. *See* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1413 (2009).

Specialty Physicians v. FTC[198] applied it appropriately.[199] There, the Fifth Circuit Court of Appeals held that the "net anticompetitive effects of the [North Texas Specialty Physicians'] NTSP's practices were obvious" and that the procompetitive justifications offered by the NTSP did not "result in a net procompetitive effect."[200] In its holding, the *NTSP* court carefully noted that one reason that the Supreme Court found the quick look approach improper in *California Dental* was because the Ninth Circuit used empirical evidence to determine whether the defendant's conduct resulted in any adverse anticompetitive effects.[201] According to the Supreme Court, the Ninth Circuit's reliance on empirical evidence showed that it was lenient in "its enquiry into evidence of the restrictions' anticompetitive effects."[202] Unlike the Ninth Circuit in *California Dental*, the FTC in *North Texas Specialty Physicians* (*NTSP*) "relied on the theoretical basis for the anticompetitive and procompetitive effects of NTSP's" conduct.[203] Thus, the *NTSP* court, through a "quick look," held that the "NTSP engaged in concerted action to

198. 528 F.3d 346 (5th Cir. 2008).

199. *Id.* at 363.

200. *Id.* at 362–63. The NTSP is an organization of independent physicians whose purpose is to "assemble physician groups and negotiate contracts between these groups and insurance [companies]." *Id.* at 352. The written contract that NTSP had with each of its physicians obligated the physician to refrain from pursuing an offer from an insurance company that the NTSP was negotiating with. *Id.* at 353. "This either foreclosed or delayed negotiations between these [insurance companies] and the physicians who were willing to accept a lower fee than the minimum fee determined by the NTSP." *Id.* at 363. "If the NTSP did not consummate a contract with [the insurance company] in its negotiations, then [the insurance company's] ability to bargain directly with the physician was delayed." *Id.* As a result, the insurance company's patients who were in need of medical services did not have access to NTSP's physicians while negotiations were ongoing, which in turn reduced the number of competing physicians. *Id.* at 364.

201. *Id.* at 362.

202. *Id.* (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 776 (1999)).

203. *Id.* Under the Physician Participation Agreement between NTSP and a physician, if the NTSP was negotiating with a certain payor, the physician was not allowed to pursue an offer from that payor. *Id.* at 363. Therefore, if a physician was willing to accept from the payor a lower fee than the minimum required by the NTSP, he or she was prevented from doing so because the NTSP was already in talks with that payor. *Id.* The court inferred that if the NTSP closed the deal with a payor, the agreed-upon fee between the payor and the NTSP "would be higher than the minimum fees . . . that a NTSP member physician . . . w[as] willing to accept . . . ." *Id.* The FTC supported this through expert testimony. *Id.* Furthermore, turning to the issue of NTSP's procompetitive justifications, the court rejected them, citing to "significant gaps in logic." *Id.* at 368. The court held that NTSP's procompetitive justifications "do not meet the 'might plausibly be thought to have a net procompetitive effect, or possibly no effect at all . . .' threshold." *Id.* at 370.

increase its bargaining power," which amounted to a horizontal price fixing agreement.[204] The procompetitive justifications offered by the NTSP were not sufficient to overcome this finding.[205]

IV. INCONSISTENCIES AND UNCERTAINTIES AMONG THE FEDERAL COURTS

In expanding the rule of reason while significantly limiting the per se and quick look approaches, the federal courts have struggled to distinguish when each approach should apply. Instead of attempting to resolve this confusion, Justice Souter in *California Dental* compounded it: after holding that the quick look approach was inappropriate, Justice Souter went on to say,

> [O]ur 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 . . . . [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.[206]

As this part demonstrates, the federal courts still struggle with the Supreme Court's inability to articulate clear and consistent standards to analyze horizontal restraints under Section 1.

A. The Ancillary Restraints Doctrine and Procompetitive Justifications

The inability to clearly distinguish between the per se approach and rule of reason existed long before the Supreme Court began using the rule of reason as the dominant approach in evaluating

204. *Id.* at 367, 370.

205. *Id.* at 368–70.

206. Cal. Dental Ass'n v. FTC, 526 U.S. at 779–81. Justice Souter, in the majority opinion, suggested yet another type of analysis that would fall between the quick look approach and the rule of reason. *Id.* Justice Souter pointed out that the plaintiffs had not shown the "obvious anticompetitive effect" that would trigger the quick look approach. *Id.* at 778. At the same time, Justice Souter wrote that this does "not . . . necessarily . . . call for the fullest market analysis" under the rule of reason. *Id.* at 779. According to the Court, "a less quick look" was required to determine the competitiveness of the defendant's advertising restrictions. *Id.* at 781.

horizontal restraints. In *United States v. Topco Associates, Inc.*,[207] Topco Associates ("Topco"), a group of twenty-five regional supermarket chains, adopted "territorial restraints" to create a private label system to compete with larger supermarket chains.[208] The district court found these territorial restraints to be procompetitive because they would enhance competition between Topco's members and other supermarket chains.[209] In ignoring the potential benefits of Topco's restraints, the Supreme Court reversed the district court's decision and held these restraints to be per se unlawful.[210] Justice Burger, in his dissenting opinion, argued that the majority did not examine whether the district court's finding was correct but instead essentially said that "the District Court had no business examining Topco's practices under the 'rule of reason.'"[211] The majority's holding contradicted Judge Taft's formulation of the ancillary restraints doctrine in *United States v. Addyston Pipe & Steel Co.*, which stated that if a restraint is ancillary, it is exempt from per se treatment.[212] The Court moved away from *Topco*'s reasoning in its subsequent decisions in *Broadcast Music, Inc.* and *NCAA*. Both cases involved a horizontal restraint on price competition, but in both cases, the Supreme Court refused to apply the per se rule because the horizontal restraint was necessary to ensure the product's availability.[213]

Lower federal courts struggled with the *Topco* decision after the Supreme Court decided *Broadcast Music, Inc.* and *NCAA*. For example, in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*,[214] the D.C. Circuit Court pointed out that its holding on the legality of Atlas Van Lines's current carrier policy would differ depending on whether it followed the *Topco* line of reasoning or the *Broadcast*

207. 405 U.S. 596 (1972).

208. Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 469 (2000).

209. *Topco Assocs., Inc.*, 405 U.S. at 605–06.

210. *Id.* at 608.

211. *Id.* at 614 (Burger, J., dissenting).

212. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986) (citing United States v. Addyston Pipe & Steel Co., 85 F. 271, 282–83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)).

213. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–01 (1984); Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 24 (1979).

214. 792 F.2d 210 (D.C. Cir. 1986).

Music, Inc. and *NCAA* line of reasoning.[215] Under *Topco*, the defendant's restraint would have been per se illegal under Section 1.[216] Under *Broadcast Music, Inc.* and *NCAA*, the restraint imposed by the defendant would not have violated Section 1 because it was ancillary.[217] The court in *Rothery Storage* ultimately adopted the *Broadcast Music, Inc.* and *NCAA* reasoning and held that the defendant's conduct did not violate Section 1.[218] According to the court, the restraint was ancillary to the defendant's joint venture and did not "suppress market competition . . . [or] decrease output."[219] In reaching its decision, the court pointed out that the holdings of *Broadcast Music, Inc.* and *NCAA* overturned *Topco*.[220] Yet the Supreme Court has not done so.[221]

Confusion is further apparent when courts analyze whether a restraint is ancillary under the ancillary restraints doctrine. The lower federal courts have failed to uniformly distinguish between naked restraints—where the per se approach applies—and ancillary restraints—where the rule of reason applies.[222] For example, "[s]ome courts have found that, in order to be ancillary, restraints must be 'plausibly related' to a venture's pro-competitive effects."[223] Others

215. *Id.* at 229. In *Rothery Storage*, Atlas Van Lines was a national moving company that contracted with independent moving companies across the nation to provide moving services to individuals and businesses. *Id.* at 211. Atlas Van Lines executed a standard contract with its independent agents, which prohibited the agents from affiliating or dealing with any other van line. *Id.* In 1979, the moving industry became deregulated and this produced a free-rider problem for Atlas. *Id.* at 212. As a result, Atlas instituted a new policy that allowed "any carrier agent already affiliated with Atlas [to] continue to exercise independent interstate authority only by transferring its independent interstate authority to a separate corporation with a new name." *Id.* at 213. This, in effect, rendered Atlas's services or facilities unavailable to these new entities. *Id.*

216. *Id.* at 229.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Despite moving away from *Topco* in cases like *Broadcast Music, Inc.* and *NCAA*, the Supreme Court cited to it in *Palmer v. BRG of Georgia, Inc.* In *Palmer*, the Court held that an agreement between two bar test-preparation companies to divide territories and not compete in each other's territories was per se illegal. Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990). The Court cited its decision in *Topco*, which held that "'an agreement between competitors . . . to allocate territories in order to minimize competition'" is illegal. *Id.* at 49 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972)). This signals that the Court is not ready to do away with *Topco* just yet.

222. Kolasky, *supra* note 27, at 135.

223. Piraino, *supra* note 9, at 745–46. *California Dental* supports the idea that a restraint must be plausibly related to the procompetitive effects of a joint venture to be ancillary. *Id.* at 746.

"have concluded that the restraints must be 'reasonably related' to such effects."[224] Also, a few courts have also held "that the restraints must be 'essential' to achieving the effects."[225] The Supreme Court had a chance to clarify the use of the ancillary restraints doctrine and provide guidance on how the courts should distinguish between naked and ancillary restraints.[226] Instead, the Court created more confusion.

In *Dagher*, Texaco Incorporated and Shell Oil Company agreed to form a joint venture, Equilon Enterprises, to "refine and sell gasoline in the Western United States."[227] Through Equilon, Texaco and Shell Oil agreed to a pricing policy that set the price of gasoline that they sold.[228] The Court held that the ancillary restraints doctrine did not apply to the defendants' joint venture because the plaintiffs were challenging the core activity of Equilon—namely, the pricing of its product, gasoline.[229] Yet the Court failed to explain why it considered the pricing of Equilon's gasoline a "core activity" of the joint venture.[230] At the same time, the Court held that even if the ancillary restraints doctrine had applied, Equilon's pricing policy was "clearly ancillary to the sale of its own products."[231] This

224. *Id.* at 746. *Broadcast Music, Inc.* supports the idea that a restraint must be reasonably related to the procompetitive effects of a joint venture to be ancillary. *Id.*

225. *Id.*

226. *See* Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

227. *Id.* at 3.

228. *Id.* at 6.

229. *Id.* at 7–8.

230. One possible interpretation of what the Court meant in its discussion of the "core activity" of a joint venture is that core activity is "the opposite of non-venture activity." Holden, *supra* note 48, at 1477. Thus, if a specific restraint involves a core activity, as opposed to a nonventure activity, then the ancillary restraints doctrine cannot be the basis of finding that restraint unlawful. *Id.* Alternatively, analysis of what constitutes a joint venture's core activity "could be an important new qualifier on the antitrust legal standards applied to joint ventures, or something in between." *Id.* However, "it is clear that the pricing decisions of a legitimate, integrated joint venture are a 'core' activity to which ancillary restraints doctrine simply does not apply." *Id.* This raises a question of the scope of what a "core activity" is. For example, if "core activity" covers all activities of a joint venture, how does this differ from an ancillary restraint? The answer to this question, however, is beyond the scope of this Article.

231. *Dagher*, 547 U.S. at 8. The Ninth Circuit considered Texaco as an efficiency-enhancing joint venture. Holden, *supra* note 48, at 1476. However, this did not mean that the parties had "carte blanche 'to do anything they please[d] with full immunity from *per se* analysis.'" *Id.* (quoting Dagher v. Saudi Ref., Inc., 369 F.3d 1108, 1118 (9th Cir. 2004), *rev'd sub nom.* Texaco Inc. v. Dagher, 547 U.S. 1). According to the Ninth Circuit, the issue involving joint ventures is "whether the price fixing is 'naked' (in which case the restraint is *per se* illegal) or 'ancillary' (in which case it is not)." *Id.*

decision has left many courts and legal scholars wondering what constitutes a "core activity" of a joint venture and why the ancillary restraints doctrine did not apply where Equilon's pricing policy was ancillary.[232]

B. Distinguishing Between the Rule of Reason and Per Se Approach with Greater Confidence

A widespread belief among the courts and legal scholars that a great deal of uncertainty exists in the area of horizontal restraints is nothing new.[233] Considerable confusion is still apparent, especially in the federal courts in California.[234] For example, in 2008, a district court in the Northern District of California in *In re ATM Fee Antitrust Litigation* held that although the rule of reason should apply to an agreement fixing prices of interchange fees in the Star ATM network, "there remains serious doctrinal confusion over the proper analysis of cooperative arrangements among competitors."[235] The court certified a request to the Ninth Circuit to determine whether the plaintiff's antitrust claim was correctly decided under the rule of reason or whether the per se approach should have been used instead.[236]

This is not the only confusion that exists in California. In *California ex rel. Brown v. Safeway, Inc.*,[237] the Ninth Circuit struggled in applying the per se approach, the rule of reason, and the quick look approach.[238] Initially, a California district court denied the

232. *See* Holden, *supra* note 48, at 1477.

233. Piraino, *supra* note 2, at 12.

234. *See, e.g.*, California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118 (9th Cir. 2011) (en banc); *In re* ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003 (N.D. Cal. 2008).

235. *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d at 1017 (internal quotation marks omitted).

236. *Id.* The Ninth Circuit declined to address the question. *In re* ATM Fee Antitrust Litig., 768 F. Supp. 2d 984, 989 (N.D. Cal. 2009).

237. 615 F.3d 1171 (9th Cir. 2010), *aff'd en banc sub nom. Harris*, 651 F.3d 1118. At issue in this case was a collective bargaining agreement on the eve of expiration between local chapters of a union and the defendants, three large supermarket chains. *Id.* at 1175. The defendant grocers entered into a Mutual Strike Assistance Agreement with each other. *Id.* This agreement contained a "revenue sharing agreement," which stated, "in the event of a lockout or strike, any firm that earned revenues above its historical share of the combined revenues of all four firms would redistribute 15% of those surplus revenues among the other chains according to a fixed formula." *Id.* at 1175–76.

238. *See id.* at 1182–84.

state's motion for summary judgment, which asked the court to declare the defendants' revenue-sharing agreement per se illegal or, alternatively, unlawful under the quick look approach.[239] The State of California appealed to the Ninth Circuit.[240] Here, the court took into account Justice Souter's warning in *California Dental* that there is "no bright-line" distinction between the three categories of analysis and that what is required is an "enquiry meet for the case."[241]

As a result, the court came up with a mixed approach: consider "the history of [the] judicial experience with profit sharing agreements, apply rudimentary economic principles to the meaning and effects of the . . . agreement in question, and thoroughly analyze the circumstances, details and logic of the agreement in order to determine the likelihood of anticompetitive effects."[242] The next step under this mixed approach is to consider the defendants' offered procompetitive justifications.[243] The ultimate issue is whether, after conducting this mixed-approach analysis, the court could reach a "confident conclusion that the principal tendency of [the] defendants' agreement [was] anticompetitive."[244] Using this approach, the Ninth Circuit rejected the defendants' procompetitive justifications and held that the anticompetitive effects of the defendants' agreement were easily ascertainable.[245] Thus, under this mixed approach, the Ninth Circuit was able to confidently conclude that the agreement violated Section 1 and that the rule of reason was not necessary.[246]

The Ninth Circuit subsequently reheard the case en banc[247] and held that the rule of reason was the proper approach for determining the legality of the defendants' revenue-sharing provision.[248] The Ninth Circuit held that the quick look approach was not appropriate because "[t]he unique features of the arrangement among the grocers . . . and the uncertain effect these features had on [their]

239. *Id.* at 1177.
240. *Id.*
241. *Id.* at 1179 (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 758 (1999)).
242. *Id.* at 1183.
243. *Id.*
244. *Id.* at 1179.
245. *Id.* at 1189.
246. *Id.* at 1189, 1192.
247. California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118 (9th Cir. 2011) (en banc).
248. *Id.* at 1139.

competitive behavior" rendered any anticompetitive effect of the agreement not obvious.[249] This holding is consistent with those of other courts[250] that have precluded a quick look application when a restraint's anticompetitive effects were not obvious, and it further indicates that the Ninth Circuit has finally learned when to apply the quick look approach.

As these cases demonstrate, courts still find it difficult to decide which approach to apply. Yet a small number of recent lower federal court decisions signal that these courts are distinguishing between the rule of reason and per se approach with increasing confidence.[251] For example, in *Deutscher Tennis Bund v. ATP Tour, Inc.*, the Third Circuit Court of Appeals upheld the district court's application of the rule of reason to an agreement that reorganized the ATP Tennis Tour in order to increase popularity and better compete with other sporting events.[252] First, the Third Circuit held that the district court correctly determined that the per se approach should not apply to the ATP Tennis Tour because, in a tennis tour, "horizontal restraints . . . are essential if the product is to be available at all."[253] Next, the Third Circuit determined that the district court properly declined to apply the quick look approach because "the definition of the relevant market was one of the most contested issues at trial."[254] Because the relevant market was not properly defined, the quick look approach was inappropriate.[255] Furthermore, because the defendant offered "'sound procompetitive justifications,'" the district court correctly shifted the analysis from the quick look approach to the rule of reason.[256]

249. *Id.* at 1137. According to the court, because the length of the agreement among the defendants was short and there were other supermarkets, or competitors, in the market, the agreement among the defendants was "unique." *Id.* Thus, the competitive effects of the agreement were not clear enough to support application of the quick look approach. *Id.*

250. *E.g.*, Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010).

251. *E.g.*, *Deutscher Tennis Bund*, 610 F.3d 820; Stanislaus Food Prods. Co. v. USS-POSCO Indus., No. CV F 09-0560, 2010 WL 3521979 (E.D. Cal. Sept. 3, 2010).

252. *Deutscher Tennis Bund*, 610 F.3d at 824, 833.

253. *Id.* at 831 (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984)).

254. *Id.* at 832–33.

255. *Id.* at 832

256. *Id.* at 832–33.

Additionally, in its order on a motion to dismiss, a court in the Eastern District of California held in *Stanislaus Food Products Co. v. USS-POSCO Industries*[257] that the plaintiff failed to allege facts that the defendants' conduct violated both the per se and rule of reason.[258] The court pointed out that the plaintiff, in its own brief, admitted that the defendants "legitimately operated and competed with [other manufacturers] without antitrust implications."[259] Accordingly, the court held that the plaintiff had failed to allege that the defendants engaged in anticompetitive conduct, thus precluding an application of the per se approach.[260] Furthermore, the court held that the rule of reason was similarly inapplicable because the plaintiff had failed to prove facts that the defendants unreasonably restrained trade.[261] According to the court, the plaintiff did "not allege that the operation of [the defendants] resulted in competitors exiting the market."[262] Because the plaintiff was unable to plead facts sufficient to trigger either the per se approach or rule of reason, the court dismissed the plaintiff's claim.[263] The district court did not demonstrate any confusion in reaching its decision.

C. Problems with the Rule of Reason

While courts are distinguishing between the rule of reason and per se approach with greater confidence, there are still problems inherent in the application of the rule of reason. "The rule of reason has been criticized for its inaccuracy, its poor administrability, its subjectivity, its lack of transparency, and its yielding inconsistent results."[264] Rather than clarifying these problems, the Supreme Court and the circuit courts have focused instead on whether the per se or rule of reason approach should apply and not on how the actual rule of reason analysis should be carried out at the district court level.[265]

257. No. CV F 09-0560 LJO SMS, 2010 WL 3521979 (E.D. Cal. Sept. 3, 2010).
258. *Id.* at *23.
259. *Id.*
260. *Id.*
261. *Id.* at *24.
262. *Id.*
263. *Id.* at *23–24, *32.
264. Stucke, *supra* note 197, at 1421.
265. Piraino, *supra* note 9, at 739.

As a result, district courts have little to work with when they engage in an actual rule of reason analysis.[266]

Problems with the rule of reason do not affect only the courts. Many plaintiffs are reluctant to initiate rule of reason cases because of the high cost associated with proving an antitrust violation under this approach.[267] In order for the plaintiff to be successful under the rule of reason, the plaintiff must prove that the defendant's conduct or agreement results in anticompetitive effects either by proving the existence of actual anticompetitive effects or by demonstrating that the defendant has market power in a particular market.[268] Plaintiffs often rely on circumstantial evidence to demonstrate market power.[269] For instance, the plaintiff may introduce evidence of a high market share by offering expert testimony or documentary evidence.[270] Because so much of the defendant's liability depends on how broadly the judge or jury defines the relevant market, it is hardly surprising that parties devote so many of their litigation resources to framing the relevant market to each party's benefit.[271]

What defines the relevant market in each case often becomes the most contested issue at trial.[272] As mentioned above in Part II.B, the court in *Meijer* was unable to determine on summary judgment the proper relevant market because the plaintiff and the defendant presented conflicting definitions of the relevant market to support their own positions. In *Wampler v. Southwestern Bell Telephone Co.*,[273] the issue of what constituted the proper geographic market went on appeal to the Fifth Circuit.[274] On appeal in *Southeast Missouri Hospital v. C.R. Bard, Inc.*[275] was the issue of what

266. *Id.* at 739–40.

267. Piraino, *supra* note 4, at 1761; Piraino, supra note 9, at 739.

268. *See* Piraino, *supra* note 4, at 1761–62.

269. Stucke, *supra* note 197, at 1425.

270. Piraino, *supra* note 4, at 1761.

271. *See* Stucke, *supra* note 197, at 1425–26; *see also* Meijer, Inc. v. Barr Pharm., Inc., 572 F. Supp. 2d 38 (D.D.C. 2008) (stating that the relevant oral contraceptive market could not be determined on summary judgment because both parties defined the relevant market to their own advantage).

272. *See* Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 439 & n.2 (2010).

273. 597 F.3d 741 (5th Cir. 2010).

274. *Id.* at 743. The court held that appellants' Section 1 claim failed because they were unable to define a proper geographic market. *Id.* at 746.

275. 642 F.3d 608 (8th Cir. 2011).

constituted the proper product submarket.[276] While the majority in that case held that the plaintiff failed to define a proper product submarket, the dissent disagreed, arguing that there were factual disputes regarding the scope of the relevant product market and the defendant's market power.[277] These recent cases demonstrate that the courts dedicate an unnecessary amount of time and number of resources to analyzing the definition of the relevant market under the rule of reason. In the majority of cases, the plaintiff fails to prove a relevant product or geographic market and the claim is dismissed.[278] As the Eighth Circuit has said, "Antitrust claims often rise or fall on the definition of the relevant market."[279]

V. SOLUTIONS

This Article has demonstrated that there remains a serious lack of unity among the federal courts in applying Section 1 to horizontal restraints. This lack of unity has led to confusion among the district courts and circuit courts.[280] In an attempt to simplify the confusion, this part proposes three solutions that will help to clarify the law of horizontal restraints under Section 1. Part V.A advocates for abandoning the quick look approach. Part V.B then argues that, to make things simpler, courts should either use the ancillary restraints doctrine or look to the defendants' procompetitive justifications in determining whether to apply the rule of reason. If a court chooses the ancillary restraints doctrine, it should use a "reasonably necessary" standard to determine how related the ancillary restraint is to a horizontal agreement. Finally, Part V.C offers several

276. *Id.* at 613. In the Eighth Circuit, a product market can contain well-defined submarkets. *Se. Mo. Hosp.*, 642 F.3d at 614 (citing Brown Shoe Co. v. United States, 370 U.S. 294 (1962)). To determine a submarket, the court listed a number of factors, including "public recognition of its separate economic character, special uses or characteristics or production facilities, distinct customers or prices, price sensitivity, and specialized vendors." *Id.* at 614. In *Southeast Missouri Hospital*, the plaintiff failed to establish a relevant submarket. *Id.* at 614–17.

277. *Se. Mo. Hosp.*, 642 F.3d at 625 (Beam, J., dissenting).

278. *See* Little Rock Cardiology PA v. Baptist Health, 591 F.3d 591, 596 (8th Cir. 2009).

279. *Id.* (citing Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 345 (8th Cir. 1995)) (holding that the plaintiff erroneously defined the relevant product market, thereby precluding any antitrust claim); *see also* Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038 (9th Cir. 2008) (reversing the district court's holding that the plaintiff failed to allege a relevant market and remanding for further consideration of additional factors to determine relevant market share).

280. *See* California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118 (9th Cir. 2011) (en banc).

suggestions that can make the application of the rule of reason more effective.

A. Abandon the Quick Look Approach

As discussed above, courts have used the quick look approach infrequently since it was officially adopted by the Supreme Court in *California Dental*.[281] Many district courts that have attempted to apply the quick look approach have done so incorrectly and have been overturned by the circuit courts.[282] In other cases, the courts have found the defendant's anticompetitive effects were not so obvious as to warrant quick look treatment.[283] Furthermore, even if a defendant's conduct is clearly anticompetitive, if the defendant offers procompetitive justifications, then the analysis shifts from the quick look approach to the rule of reason.[284] Taking these issues into account, courts should abandon the quick look approach for several reasons.[285]

First, the quick look approach applies only when a defendant's anticompetitive conduct is obvious.[286] If it is, the court skips the daunting analysis of the relevant market and the defendant's market share and goes straight to considering the defendant's procompetitive justifications.[287] This may be an efficient step, but once the defendant offers *any* legitimate procompetitive justification for its action, the court must abandon the quick look approach and begin its analysis anew using the rule of reason.[288] This means that the court must analyze the relevant market and the defendant's market share. Taking

281. *See supra* Part III.C.

282. *E.g.*, California *ex rel.* Brown v. Safeway, Inc., 615 F.3d 1183 (9th Cir. 2011).

283. *E.g.*, *Harris*, 651 F.3d. 1118.

284. *See id.* at 1134.

285. Professor Alan J. Meese also advocates for abandoning the quick look approach. Meese, *supra* note 206, at 464–65. He argues that the courts should use a full-blown rule of reason analysis to "any restraint that is plausibly procompetitive, even if the restraint appears to affect price or output." *Id.* at 465–66. This is because advances in modern economic theory have shown that horizontal restraints previously thought to be anticompetitive are in many instances attempts to minimize costs associated with market contracting and therefore are actually procompetitive. *Id.* at 479–80. For example, in *Topco*, the territorial restraints were formed to reduce transaction costs in distributing the private label brand. *Id.* at 480. According to Professor Meese, there is "no good reason to presume such restraints unlawful without proof of anticompetitive effect." *Id.* Thus, they deserve treatment under the rule of reason.

286. *See* Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830–31 (3d Cir. 2010).

287. *See id.* at 831.

288. *Id.*

into account the federal courts' track record of rarely applying the quick look approach, the quick look has turned into a tool that stands in the way of the eventual application of the rule of reason.

Further, the courts already have a working approach to utilize if the defendant's conduct is found to have obvious anticompetitive effects: the per se approach. As the courts have universally held, conduct that appears plainly anticompetitive is deemed illegal under the per se approach.[289] A defendant's conduct that is "obvious" under the quick look approach can surely be "plainly anticompetitive" under the per se approach. If the court does not want to expand the per se approach to a defendant's obvious anticompetitive conduct, a plaintiff can still prevail under the rule of reason without undertaking the tedious relevant market analysis by instead proving the anticompetitive effects of the defendant's conduct. Because the conduct in this situation would be so obviously anticompetitive that the quick look would condemn it, the plaintiff should have no problem proving the direct effects of the defendant's anticompetitive conduct under the rule of reason. Therefore, together the per se approach and rule of reason sufficiently safeguard the plaintiff where the defendant's conduct is plainly anticompetitive.

Doing away with the quick look approach will also simplify matters for both courts and litigators. For example, in the federal courts, there will be less back-and-forth between the district court and circuit court regarding the application of the quick look approach. Courts can return to focusing on and improving the use of the per se approach and rule of reason. Similarly, litigators will now focus only on two possible approaches and will not need to prepare unnecessarily for a quick look analysis that might not even be used.

B. Apply the Rule of Reason with Greater Clarity

If the quick look approach is abandoned, the federal courts could focus on creating a unified approach to the ancillary restraints doctrine, since there currently appears to be varying interpretations of the ancillary restraints doctrine.[290] Further, the courts do not use a

289. Broad. Music, Inc. v. CBS, 441 U.S. 1, 7–8 (1979).
290. *See supra* Part II.B.1.

universal approach when determining how related a restraint must be in order to be declared ancillary.[291] As Part IV.A described, a restraint can be "plausibly related," "reasonably related," or "essential" to a joint venture's procompetitive effects.[292] Moreover, this Article has emphasized that when deciding whether to apply the rule of reason, a court either looks at the defendant's procompetitive justifications or uses the ancillary restraints doctrine. However, there is no difference between which analysis the court engages in because, ultimately, the court reaches the same result under both approaches. To do away with the confusion surrounding the application of the rule of reason, the courts should first choose either to analyze the defendant's procompetitive justifications or to use the ancillary restraints doctrine. If the courts choose to utilize the ancillary restraints doctrine in determining whether to apply the rule of reason, then they should adopt a "reasonably necessary" standard to analyze how related to the joint venture a restraint must be in order to be ancillary.[293]

Using a "plausibly necessary" standard would allow almost all types of restraints to fall under the rule of reason. This would not be efficient because, under this standard, hardly any restraint would be determined to be a naked restraint. As a result, the rule of reason would apply to conduct that does not deserve such an analysis. Likewise, using an "essentially necessary" standard would be too high a threshold because conduct that is reasonably necessary but not essential would not be analyzed under the rule of reason. Instead, it would be analyzed, incorrectly, under the per se approach, which would frustrate the purpose of the ancillary restraints doctrine.

Using a "reasonably necessary" standard would be the most efficient use of the ancillary restraints doctrine. First, both reasonably necessary restraints and essential restraints would fall under the umbrella of the "reasonably necessary" standard. Such a standard would cover a significant range of restraints while avoiding

291. *See supra* Part IV.A.

292. *Id.*

293. Thomas Piraino, Jr., argues that the legality of a joint venture's restraint should be determined by its reasonableness. Piraino, *supra* note 9, at 795. For example, if a restraint is unrelated to a joint venture's purpose, it is illegal under Section 1. *Id.* On the other hand, if a restraint is "reasonably necessary" to contribute to the purpose of the joint venture, then the restraint is legal. *Id.*

the risk of being too broad or too narrow. Additionally, if a restraint does not rise to the level of "reasonably necessary," then the court should consider whether such a restraint is even ancillary to begin with. Finally, under the "reasonably necessary" standard, the more reasonable the restraint is, the more likely that it will be analyzed under the rule of reason. Therefore, the next time the Supreme Court has the opportunity to do so, it should clarify the application of the ancillary restraints doctrine and perhaps encourage the lower federal courts to apply a "reasonably necessary" standard under that doctrine. Doing so would restore the federal courts' analysis to Judge Taft's use of the ancillary restraints doctrine in *United States v. Addyston Pipe & Steel Co.*[294]

C. Keep the Rule of Reason

While the use of a "reasonably necessary" standard under the ancillary restraints doctrine will lead to a more efficient application of the doctrine, there remains concern over the application of the rule of reason. Although the rule of reason has been the dominant method of analysis in the courts, the academic community has advocated abandoning it, offering alternative approaches that the courts can use.[295] For example, academics suggest that the courts adopt a continuum-based approach that focuses on the competitive purpose of the joint venture.[296] Under such an approach, if the joint venture has a legitimate competitive purpose, then it is deemed legal.[297]

294. *Id.* at 794. Under Judge Taft's analysis of the ancillary restraints doctrine, if the purpose of horizontal restraint is "to promote the objectives of a separate legitimate transaction, a court should uphold the restriction as an 'ancillary' restraint." Piraino, *supra* note 2, at 5–6. But, if the horizontal restraint was "broader than necessary to achieve the [collaborator]'s legitimate objectives," it would be struck down as nonancillary. *Id.* at 6. Thus, a court would first determine the legality of, for example, a joint venture, by looking at "the parties' competitive purposes and the . . . impact of the joint venture on competition." *Id.* If the court upholds the joint venture, then it should determine whether the restraint is "reasonably necessary to promote the legitimate purposes of the joint venture." *Id.*; *see also* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 229 (D.C. Cir. 1986) ("The alternative formulation was that of Judge Taft in *Addyston Pipe & Steel*: a naked horizontal restraint, one that does not accompany a contract integration, can have no purpose other than restricting output and raising prices, and so is illegal per se; an ancillary horizontal restraint, one that is part of an integration of the economic activities of the parties and appears capable of enhancing the group's efficiency, is to be judged according to its purpose and effect.").

295. *E.g.*, Piraino, *supra* note 2, at 5.

296. *See id.* at 28.

297. *Id.* at 28–29.

Accordingly, the court would be able to focus on the competitive characteristics of the joint venture instead of "unnecessary inquiries into the parties' market power."[298] Others have recommended ways to improve the rule of reason.[299] Among these improvements the promulgation of new standards aimed at the legislative goals of the Sherman Act.[300]

This Article proposes that once a court determines that the rule of reason is applicable, it should require plaintiffs to prove anticompetitive conduct by demonstrating the existence of actual anticompetitive effects instead of heavily focusing on market-share analysis. Several commentators have suggested a wide range of factors to accomplish this goal. For example, one scholar has suggested that courts may consider "the testimony of market participants, the internal and third-party market studies, pricing patterns [among competitors]," and even "views of the plaintiff."[301] Additionally, the 2010 Horizontal Merger Guidelines, which were jointly promulgated by the DOJ and FTC, state that in order to establish a relevant market, one can consider whether a defendant's conduct reduced "the number of significant rivals offering a group of products, [which in turn] cause[d] prices for those products to rise significantly."[302] These guidelines further note that courts can consider the "customers' ability and willingness to substitute away from one product to another in response to" the change in the product's price or a decrease in the quality of the product or service.[303]

Courts should also place more emphasis on the purpose behind the joint venture[304] and the degree of integration between the

298. *Id.* at 5. Also, it has been suggested that courts should focus on the degree of integration achieved by the parties in a joint venture. *Id.* at 8, 28–30.

299. Stucke, *supra* note 197, at 1375.

300. *Id.* at 1480–81. Under this argument, the Sherman Act was never meant to act "as a vehicle for the Court to advance its own ideologies." *Id.* at 1480. As a result, "[t]he Court should refrain from announcing new policies based on its perception of 'modern' economic theor[ies]" that are opposite from the Sherman Act's aims. *Id.* at 1480–81.

301. James T. McKeown, *2008 Antitrust Developments in Professional Sports: To the Single Entity and Beyond*, 19 MARQ. SPORTS L. REV. 363, 383 & n.106 (2009).

302. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 7 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

303. *Id.*

304. Piraino, *supra* note 2, at 5. A "purpose-based approach would avoid both the harshness of the per se rule and the complexities of a market-based rule of reason . . . analysis." *Id.* For

parties.[305] For example, courts should look at the degree of integration between two or more parties on a continuum.[306] If there is little to no integration, the court should be inclined to hold that the collaboration violates of Section 1.[307] At the other extreme, if the parties are highly integrated, the court should be inclined to uphold the collaboration as legal.[308] If the collaboration is at neither extreme but is instead in the middle of the continuum, the court may consider several factors to make its determination. For example, if a joint venture combines "assets such as technology, capital, or facilities," it is integrated enough to survive per se treatment.[309] If such integration results in cost savings and generates efficiencies, there is a strong argument that the restraint at issue is reasonable.[310] However, this should not be a blanket rule. Courts should instead review each restraint on a case-by-case basis because a high degree of integration between two parties does not always make the conduct of the joint venture legal.[311] A highly integrated joint venture may still produce anticompetitive effects, while a less integrated joint venture may not.

While incorporating these factors into a court's analysis may force that court to shift its emphasis away from the definition of the relevant market, such change does not come quickly or easily. In fact, as this Article has demonstrated, courts are still struggling to better apply the per se approach, the rule of reason, and the quick look approach in their decisions thirty years after the Court handed

example, if a joint venture has a "legitimate competitive purpose, such as facilitating its partners' entry into the market," as opposed to an illegitimate one like "facilitat[ing] collusion in existing markets," under the purpose-based approach, a court should uphold the legitimate joint venture because it is procompetitive. *Id*.

305. Piraino, *supra* note 183, at 1163–64.

306. *See id.*

307. *Id.* at 1163.

308. *Id.*

309. Piraino, *supra* note 2, at 28.

310. Thomas Piraino, Jr., argues that joint ventures should be presumed to be legal. Piraino, *supra* note 183, at 1164. Since joint ventures are only partially integrated, this allows both parties to the joint venture to collaborate and compete with each other at the same time within the same market. *Id.* The less integrated a joint venture is, the more it must show that the "venture brings together business functions of other resources previously held separately by the parties." *See infra* note 311.

311. *See* Piraino, *supra* note 183, at 1166. To generate efficiencies, a joint venture must integrate its resources in "some way." *Id.* If a joint venture is collaborating only to make "joint business decisions" or to "coordinate parallel activities," then it is not a true joint venture and no economic benefit results. *Id.*

down its major decisions in *Broadcast Music, Inc.* and *NCAA*. Furthermore, there may be unknown issues, such as those regarding admissibility under the Federal Rules of Evidence, that may make incorporating these factors difficult. However, such challenges should not discourage courts from attempting to integrate these factors. As this Article argues, the emphasis on—and the difficulty of—establishing the definition of a defendant's market share makes plaintiffs reluctant to bring Section 1 claims against collaborators and makes such cases difficult for them to win. This should not be the case, especially when the challenged restraint threatens consumer welfare.

VI. CONCLUSION

To shed light on one of the "darkest corners of antitrust law,"[312] the Supreme Court must issue a clear and consistent holding that the lower federal courts can use to better apply the per se approach and rule of reason to horizontal restraints. Unfortunately, progress takes time. In attempting to achieve this change, the federal courts must strive for simplicity.

This Article has argued that the quick look approach should be abandoned because the per se approach and the rule of reason provide adequate safeguards that will hold competitors accountable when collaborating with each other. Such a result will free the courts' time and resources and create greater consistency that American firms can rely on. This Article has also urged the Supreme Court to clarify its application of the ancillary restraints doctrine in *Texaco* by using a "reasonably related" standard to decide how related an ancillary restraint must be to a joint venture's principal transaction. Finally, this Article has suggested that, when applying the rule of reason, courts should move away from emphasizing only the defendant's share of the relevant market and instead focus also on other factors, including the degree of integration among the collaborators, internal or third party studies, and testimony of market participants.

The federal courts have made progress in better administering the per se approach and the rule of reason. While considerable

312. Brodley, *supra* note 2, at 453.

confusion still exists, the small, but forward, progress that several circuit courts have made is promising. As long as the federal courts keep in mind the concept of simplicity and the interest of the consumer, the time will come when the regulation of the law of horizontal restraints will move out of the shadows and into the light.