The Sedona Conference Journal

Volume 2 2001

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Max R. Shulman

Recommended Citation: Max R. Shulman, *The Quick Look Rule of Reason: Retreat from Binary Antitrust Analysis*, 2 SEDONA CONF. J. 89 (2001).

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THE QUICK LOOK RULE OF REASON: RETREAT FROM BINARY ANTITRUST ANALYSIS[1]

Max R. Shulman
Cravath, Swaine & Moore, New York City, NY

This paper examines recent developments in and future prospects for the quick look rule of reason.

I. THE QUICK LOOK RULE

The quick look rule of reason mediates between the *per se* rule and the full blown rule of reason. The *per se* rule assumes that certain conduct, such as horizontal agreements to fix price or restrict output, violates Section 1 of the Sherman Act without the need to assess market power, anticompetitive effects or procompetitive justifications. *See*, *e.g.*, *United States v. Socony-Vacuum Oil*, 310 U.S. 150 (1940). In contrast, under the rule of reason, there must be a showing of market power and anticompetitive effects within a relevant market that outweigh any procompetitive justifications for the challenged conduct. *See*, *e.g.*, *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993).

The quick look rule incorporates aspects of both the *per se* rule and the rule of reason. Courts apply quick look to market restraints that appear to be facially anticompetitive but occur in markets or contexts that are new, unusual or unfamiliar to traditional antitrust analysis. The courts are therefore willing to consider possible procompetitive justifications that would not be considered under the *per se* rule. *See*, *e.g.*, *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) (*per se* treatment is inappropriate in markets where "the economic impact of certain practices is not immediately obvious"); *United States v. Realty Multi-List*, 629 F.2d 1351, 1365 (5th Cir. 1980) (*per se* treatment is inappropriate when the court is unfamiliar with the "competitive significance" of the restraint).

The kinds of markets where quick look has been applied include collegiate and professional sports: *see NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 95 F.3d 593 (7th Cir. 1996); *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998); professional associations, *see National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679 (1978); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *Indiana Fed'n of Dentists*, 476 U.S. at 447; *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) ["*CDA*"]; and academia, *see Brown*, 5 F.3d at 669.

Courts use quick look like a "track switching" device to appraise the market restraint in question before deciding whether it should be treated as a *per se* violation or analyzed under the full blown rule of reason. *See* Lafcadio Darling, *The College Bowl Alliance and the Sherman Act*, 21 Hastings Comm./Ent. L.J. 433, 455-56 (1999). In applying quick look, courts sometimes presume the existence of competitive harm. *See Brown*, 5 F.3d 669. Alternatively, courts require the plaintiff to show likely anticompetitive

1 I would like to thank Christopher E. Pushaw for his significant contribution to this paper.

effect, *see California Dental Ass'n*, 526 U.S. at 773-76, although this does not involve extended market analysis. *See Law*, 134 F.3d at 1019; *Engineers*, 435 U.S. at 692. The burden then shifts to the defendant to demonstrate procompetitive justifications for the conduct. The defendant will generally argue that the restraint's facial anticompetitiveness is ancillary to some deeper purpose of efficiency or consumer protection. *See Indiana Fed'n*, 476 U.S. at 459; *Board of Regents*, 468 U.S. at 116; *BMI v. CBS*, 441 U.S. 1, 24 (1979). Having considered the challenged conduct, the market in which it operates, the possible anticompetitive effects and the proffered procompetitive justifications, the court will then either condemn the practice as a *per se* violation, *see Law*, 134 F.3d at 1019; *Indiana Fed'n*, 476 U.S. at 463, or require full rule of reason consideration, *see California Dental Ass'n*, 526 U.S. at 781; *NBA*, 95 F.3d at 600.

Litigants sometimes use quick look as a burden shifting tool. For example, plaintiffs can request quick look analysis, hoping that the court will ultimately decide to apply the *per se* rule, which would avoid the plaintiffs' having to establish market power and anticompetitive effects. *See* James A. Keyte, *What It Is and How It Is Being Applied: The "Quick Look" Rule of Reason*, 11 Antitrust 21, 22 (1997). Conversely, defendants sometimes request quick look when a market restraint looks facially anticompetitive, hoping to avoid *per se* condemnation. *See id*.

II. EVOLUTION OF QUICK LOOK

The quick look rule arose in the early 1970s as part of growing antagonism by courts to reflexive application of the *per se* rule, especially with regard to conduct that arguably had a valid competitive purpose. The shift began with Justice Burger's dissent in *United States v. Topco*, 405 U.S. 596 (1972). Justice Burger objected that judicial efficiency afforded by the *per se* rule should not compromise the overall policy goals of the Sherman Act, which are to promote competition and enhance consumer welfare. *See id*. at 614-15, 620. In *Topco*, the Court ruled that a cooperative buying association of medium sized supermarket chains, which had granted exclusive licenses to its members to sell the association's private label brands, was a *per se* illegal horizontal restraint. *See id*. at 608. Justice Burger took a more macro view of the "market", reasoning that such cooperative agreements, while stifling medium sized competition to a certain extent, allowed the cooperatives to compete more successfully with large chains. *Id*. at 622-23. Thus, Justice Burger felt, the cooperative agreements actually promoted competition and enhanced consumer welfare on a global scale, virtues that would be ignored under the *per se* rule. *Id*.

The Supreme Court gradually adopted Justice Burger's cautionary approach to *per se* analysis. In *Continental v. GTE-Sylvania*, 433 U.S. 36 (1977), the Court approved a television manufacturer's territorial market allocation among its retailers. The Court allowed the vertical restraint on intrabrand competition because it enhanced interbrand competition. *Id*. at 54-55. The Court warned against expanding the *per se* rule and emphasized that departure from the rule of reason required a strong showing of anticompetitive effect. *See id*. at 57-58.

The Supreme Court's increasingly wary approach to *per se* analysis was soon evident even in cases involving classic horizontal restraints. In *BMI*, 441 U.S. at 24, for example, the Court rejected *per se* condemnation of a blanket licensing agreement among music performers, writers and publishers. Although the blanket license appeared at first blush to be a horizontal restraint on price competition, the Court reasoned that it was "ancillary" to the overall consumer benefit afforded by reduced transaction costs and "reasonably necessary" to take advantage of rights protected by the copyright laws. *Id*. at 19, 24. Thus, the Court held, *per se* treatment was inappropriate because it failed to take account of such market benefits. *Id*. at 24.

The Supreme Court next disavowed *per se* treatment of group boycotts and tying arrangements. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985), a retail office supply store claimed that its expulsion by a cooperative buying association was a group boycott. The Court acknowledged that group boycotts are usually *per se* violations of the Sherman Act, but reasoned that it was often difficult to identify the types of boycotts that in fact qualify for *per se* treatment. *See id*. at 293-94. The Court concluded that, given the efficiencies generated by cooperative buying associations and the fact that such cooperatives depend upon horizontal agreements, expulsion of a single retailer would not necessarily create anticompetitive effects. *See id*. at 296. Absent a showing of market power, the alleged concerted refusal to deal was insufficient to warrant *per se* treatment. *See id*. at 298. As in the *Topco* dissent, the restraint at issue was ancillary to the promotion of the broader competitive virtue of enabling groups of smaller retailers to compete against larger ones.[2]

In *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2 (1984), the Supreme Court embraced a more tolerant approach toward tying arrangements, which had previously been considered *per se* violations of the Sherman Act. That case involved an arrangement in which patients were forced to accept a certain anaesthesiology service if they used a particular hospital. The Court held that the tied service would be *per se* illegal only if a significant number of consumers had no choice but to use the hospital in question. *See id*. at 15-16. Since foreclosure of consumer choice was not evident, the Court refused to apply the *per se* rule.

The Courts of Appeal have followed the Supreme Court's lead in retreating from application of the *per se* rule in unfamiliar or unusual market contexts. For example, in *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781 (9th Cir. 1996), the Ninth Circuit held that a horizontal agreement among national publishers of yellow pages to eliminate commissions to middlemen who sold local advertising was not *per se* illegal. The court reasoned that, while such horizontal arrangements normally merit *per se* condemnation, the underlying virtue of reducing costs to the consumer by eliminating commissions militated in favor of rule of reason treatment. *See id*. at 785. *See also Bhan v. NME Hospitals*, 929 F.2d 1404, 1412-14 (9th Cir. 1991) (an agreement between physicians and a hospital to eliminate nurse-anaesthesiologists increased competition for patients by providing higher quality hospital care and therefore should not be analyzed under the *per se* rule).

This growing judicial antagonism toward *per se* condemnation was the seed bed for development of the quick look rule of reason. The quick look approach first arose—and has been most often followed—in the fields of sports, professional associations and academia.

III. APPLICATION OF QUICK LOOK

A. Sports

Professional and collegiate sports lend themselves to quick look because of the peculiar nature of their product.[3] Horizontal agreement among teams is necessary to produce competition itself, which is the product offered by sports leagues. *See Board of Regents*, 468 U.S. at 101. For example, sports leagues must agree on rules of eligibility and the rules by which the sports are played, and professional teams often agree to hold drafts to enable weaker

2 Analytical solicitude for group boycotts had emerged earlier in *Rothery Storage & Van Co. v. atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1980). In that case, the court approved an agreement between a van line and its affiliates to terminate any affiliate who failed to service its own accounts through a separate corporation with a different name from the van line. The court found the agreement to be necessary to combat "free-riding" caused by pirating the national name to attract the affiliates' own accounts. *Id.* at 228. *See also Realty Multi-List*, 629 F.2d at 1369 (rejecting application of the *per se* rule to a group boycott because of the court's lack of familiarity with the "competitive significance" of the restraint).

3 Some commentators have argued that NCAA agreements should be exempt from antitrust analysis altogether because of the NCAA's overarching concern for amateurism and shielding collegiate sports from strict economic considerations. *See* Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 Tul. L. Rev. 2631, 2671 (1996).

teams to obtain better players so as to preserve competitive balance. Applying *per se* analysis to such horizontal arrangements would make little sense. *See id*. at 104 (applying the *per se* rule in these cases is appropriate only where there is a substantial likelihood of anticompetitive effect); *Law*, 134 F.3d at 1018-19 (affirming rejection of the *per se* rule in sports cases).

However, other horizontal agreements involving sports leagues are sufficiently anticompetitive on their face to make full blown rule of reason analysis unnecessary. *See Board of Regents*, 468 U.S. at 108 ("elaborate" analysis of market power is not required in the face of "naked" market restraints). Quick look is particularly useful in these cases to enable the court to choose which approach to follow. *See Law*, 134 F.3d at 1019.

For example, in *Board of Regents*, the Supreme Court considered an NCAA restriction on the number of games that could be televised for each Division I college football team. Although the Court acknowledged that this type of output restriction was traditionally *per se* illegal, it held that the unique nature of collegiate athletic competition warranted evaluation of the procompetitive justifications for the practice, such as protection of the live gate and maintenance of competitive balance. *See* 468 U.S. at 116. Having reviewed those justifications, the Court concluded that they failed to offset the anticompetitive effect of the restraint and held that the agreement violated the Sherman Act. *Id.* at 119-20.

In *NBA*, the Seventh Circuit applied quick look to a similar output restriction for televised professional basketball games and held that the procompetitive justifications did require full blown rule of reason analysis. *See* 95 F.3d at 600. It therefore remanded the case to the district court. *Id.* In *Law*, the Tenth Circuit used quick look to assess an NCAA rule that set maximum salaries for entry level college basketball coaches and concluded that the proferred procompetitive justifications were insufficient to counterbalance the anticompetitive effect.

In sum, application of quick look to collegiate and professional sports has yielded mixed results. For those horizontal restraints that have a substantial, direct adverse economic impact, the result under quick look has generally been no different from what it would have been had the *per se* rule been applied. *See*, *e.g.*, *Board of Regents*, *Law*. But that has not always been the case. *See*, *e.g.*, *NBA*.

B. Professional Associations

Courts have used quick look to evaluate ethical norms adopted by professional associations. The rationale is that facially anticompetitive conduct might have a more important social value. *See Indiana Fed'n*, 476 U.S. at 458-59 (professional association rules that prohibited forwarding x-rays to insurance companies should not be condemned as illegal *per se*); *Engineers*, 435 U.S. at 692 (no "elaborate industry analysis" was required to demonstrate the anticompetitive nature of an agreement that restricted price competition for contracts).

In *Engineers*, the defendants attempted to justify their horizontal price restraint on the basis of the deleterious social effects of cost cutting in major construction projects. *See* 435 U.S. at 696. Although the argument was ultimately rejected, the Court felt that it did warrant a quick look. The Court also rejected the association's purported justification in *Indiana Fed'n—i.e.*, that forwarding x-rays to insurance companies would reduce the quality of dental care—but again gave it a quick look. *See* 476 U.S. at 463. In neither case did the Court apply the *per se* rule. *Cf. Maricopa County*, 457 U.S. at 349 (the absence of social welfare concerns supporting a fee fixing arrangement among doctors justified application of the *per se* rule). Nonetheless, in both cases, the Court reached the same result under quick look that it would have under a *per se* approach.

C. Academia

In *Brown,* Ivy League universities agreed to make a collective determination of the amount of financial aid that would be offered to needy students. The Third Circuit used quick look to take "full consideration" of the social value of the challenged practice. *Brown*, 5 F.3d at 670. The court concluded that possible procompetitive effects—including enhanced consumer choice and greater diversity among the student body—required full rule of reason analysis. *See id*. at 676.

IV. RECENT DEVELOPMENTS

The *CDA* case provides the Supreme Court's most recent analysis of the quick look doctrine. The decision is important because it is the first time that the Court directly addresses the propriety of using quick look itself.

The case involved an agreement among dentists to restrict certain types of advertising. The Court held that quick look had been improperly applied. *See id*. at 769. The Court explained that quick look is appropriate only where the "likelihood of anticompetitive effects" was "comparably obvious" to one possessing a mere "rudimentary understanding" of economics. *Id*. at 770-71. The Court held that there was not such a likelihood in the present case and that there were clear procompetitive justifications for the advertising restriction, such as reduction of patient confusion and elimination of misleading advertisements. Thus, the Court concluded, full blown rule of reason analysis and not quick look was required. *See id*. at 771, 778.

Perhaps most significantly, the Court rejected the notion that antitrust analysis was binary—*i.e.*, either *per se* or rule of reason—and advocated an analytic continuum between the two poles, one that was "meet for the case, looking to the circumstances, details, and logic of a restraint." *Id*. at 781. Within that continuum, the Court suggested that quick look was appropriate when drawn from established market precedent, such that a "confident conclusion" about the effect of a challenged restraint on the market could be reached. *Id*.

In dissent, Justice Breyer formulated more precise standards for application of quick look. Justice Breyer disagreed with the majority, finding that the consumer protectionism justification offered by the dentists was a pretext and that quick look therefore was the proper approach. The quick look rule that Justice Breyer would apply is one that (a) identifies the challenged market restraint, (b) assesses its likely anticompetitive effects, (c) considers possible procompetitive justifications and (d) assesses the market power of the defendant[4]. *See id*. at 782 (Breyer, J., dissenting).

On remand, the Ninth Circuit applied the Supreme Court's more fluid analysis. *See California Dental Assoc. v. FTC*, 2000 WL 1239199, at *4 (9th Cir. 2000). The court "situate[d] its inquiry" in the "rule of reason continuum" on a point closer to a full blown analysis, focusing primarily on whether the advertising restriction enhanced competition. *Id*. The court concluded that the procompetitive justifications offered by the dentists counterbalanced the anticompetitive effect identified by the FTC and ordered that the case be dismissed. *See id*. at 15.

4 Here, Justice Breyer was satisfied with an abbreviated showing of market power, instead of the in depth analysis required under the full blown rule of reason. *See* Wayne D. Collins, *California Dental Association and the Future of Rule of Reason Analysis*, 14 Antitrust 54, 62 (1999)(plaintiff's burden consists only of a "coherent, supported" showing of market power).

V. FUTURE TRENDS

A. Retreat from a Binary Approach

As mentioned above, recent Supreme Court decisions reflect a retreat from the traditional binary approach to antitrust issues—*i.e.*, an analysis that categorizes challenged behavior as either *per se* or rule of reason. Instead, *CDA* advocates an analytic continuum commensurate with the overall factual context of the particular market restraint.

Interestingly, this also signifies a retreat from the quick look rule. Despite the Supreme Court's professed reservation of quick look for situations where the "likelihood of anticompetitive effects" is "comparably obvious", *CDA* in fact indicates a deeper hostility toward depending upon quick look as a way to mediate between the *per se* rule and the rule of reason. The Court in *CDA* urges abandonment of hard and fast categories in favor of a more flexible analysis and reliance upon rules of burden allocation. *See* Philip Areeda, *Antitrust Law*, ¶1511 at 427 (1986).

The Court's disenchantment with quick look is perhaps understandable in light of the fact that: (a) most cases applying the rule have reached results no different from what they would have reached under traditional antitrust analysis; and (b) the markets where quick look was first developed have become increasingly familiar to antitrust analysis and hence less open to some sort of special treatment.

For example, in cases involving professional associations, the courts in *Engineers* and *Indiana Fed'n* applied quick look to consider consumer welfare justifications but ended up condemning the horizontal restraints at issue just as they would have under the *per se* rule.[5]

A similar collapse of the binary approach to antitrust analysis is evident in the areas of collegiate and professional sports and academia. The market dynamics involved in those areas are often unusual, but are not beyond the type of common sense assessment and economic analysis that occurs in other areas. Thus, special analytic categories such as quick look are not needed. The *NBA* court's use of quick look to guide a remand for rule of reason analysis would have been unnecessary if the court had initially adopted a more fluid assessment. The same is true of cases like *Brown*, where noncommercial issues have required a closer analysis than that afforded by *per se* treatment, but do not justify treatment under a "special" category such as quick look.

B. Development of the Analytic Continuum

Judicial antagonism toward the *per se* rule started slowly, evident first in the area of vertical restraints (*GTE*), before appearing in analysis of more classic horizontal arrangements (*BMI*). *CDA* shows that the trend will likely continue across the spectrum of market restraints. The result will be an approach to antitrust issues that is more responsive to and more firmly grounded in the realities of an increasingly complex and international marketplace.

Following *CDA*'s directive, the analysis of a given restraint along the prescribed continuum will depend upon three factors: whether the restraint fits within a traditional area of *per se* illegality; whether it is a commercial or noncommercial restraint; and whether it has occurred in a market that is familiar to antitrust assessment. What this means is that classic horizontal restraints such as price fixing or output restrictions in markets previously

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5 Similar horizontal restraints by professional associations were condemned in *Goldfarb v. Virginia St. Bar*, 421 U.S. 773, 786 (1975) (minimum fee set by lawyers for title searches), and *Maricopa County*, 457 U.S. at 349 (maximum fee arrangement by physicians).

subject to antitrust analysis will almost certainly be condemned. However, as *BMI* illustrates, even those kinds of restraints, if they appear in unfamiliar contexts, will be subject to a more searching assessment that is, in the words of the *CDA* Court, more "meet" for the occasion. Similarly, as *Brown* and *CDA* illustrate, horizontal agreements that are "noncommercial" in the sense that they are not classic price or output restrictions will receive more thorough analysis.

This might appear to be a recipe for increased unpredictability in antitrust enforcement—and that could be true in the short term. However, over time, unpredictability will give way as case law develops for dealing with particular restraints in unfamiliar contexts, without jeopardizing the inherent flexibility of the analytic continuum. *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, 1770 (1994); Areeda, *supra*, at ¶1507 at 402.

What we will probably see is development of a set of presumptions tied to the nature of the conduct at issue. *See* Piraino, *supra*, at 1775. For example, classic horizontal price or output restrictions would justify a presumption of illegality closest to the *per se* rule. *See id.* at 1778. Defendants would be required to make a strong showing of the underlying procompetitive purpose before more extended analysis is required.

Vertical restraints, on the other hand, would enjoy a presumption of legality, with the attendant burden on the plaintiff to demonstrate that anticompetitive effects outweigh procompetitive justifications. *See id.* at 1795. Other restraints, such as group boycotts and tying arrangements, would be subject to a medium level of scrutiny, with the burden of proving competitive harm and procompetitive justification dependent upon the particular market facts at issue. *See id.* at 1783; *see* Areeda, *supra*, ¶1507 at 402.

At bottom, *CDA* sends two strong messages. The first is that rigid categorization—like *per se*, rule of reason and quick look—is dead. The second is that courts will be taking a more active role in gauging the anticompetitive effect of market restraints. *See* Jay P. Yancey, *Is the Quick Look Too Quick?: Potential Problems with the Quick Look Analysis of Antitrust Litigation*, 44 U. Kan. L. Rev. 671, 679 (1995). This might lead to more uncertainty in the short run. But *CDA* urges courts to embrace that uncertainty head on, making the determination relating to a given restraint commensurate with the particular facts of the particular situation against a background of market experience. The end result will be fairer and more rational antitrust enforcement.