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American Needle and a "Positive" Quick Look Approach in Challenges To Joint Ventures

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IN *AMERICAN NEEDLE V. NATIONAL Football League*, the Supreme Court limited the "single entity" arguments that joint venture defendants may use to defend against claims brought under Section 1 of the Sherman Act.[1] In particular, the Court held that if the conduct in question joined together "separate economic actors pursuing separate economic interests" such that it "deprives the market of independent centers of decision-making," then it is generally collective conduct that is subject to Section 1 scrutiny.[2] In those instances, Section 1 claims against joint venture defendants will typically be analyzed under the rule of reason. The Court emphasized, however, that the rule of reason standard is "flexible" and that joint ventures need not be "trapped by antitrust law."[3] Indeed, the Court explained that application of the rule of reason "may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye,'" depending on the circumstances.[4]

The Court cited to the *NCAA v. Board of Regents* decision, applying a "quick look" doctrine. In *NCAA* itself, as well as in subsequent lower court cases, the "quick look" was used to condemn collective conduct with a truncated analysis under the rule of reason. *American Needle* suggested that similarly abbreviated analysis can also be used to approve of conduct. This raises the possibility that joint-venture defendants might also use the "quick look" approach to provide an earlier and more efficient judicial determination. The *American Needle* suggestion echoes remarks by Robert Pitofsky (the then Chairman of the Federal Trade Commission) when the FTC and Department of Justice proposed the Antitrust Guidelines for Collaborations Among Competitors in 1999.[5] Pitofsky explained that the quick look doctrine may be used not only to find a violation, but also to "exonerate a collaboration."[6]

American Needle provided only the general direction; it did not provide much in the way of guidelines or a roadmap for resolving challenges to joint venture conduct without a full-blown rule of reason analysis. Lower courts will need to develop answers to the important practical questions: Under what circumstances can a "quick look" be used to exonerate joint venture conduct, and how will the "quick look" be applied? These questions will need to be addressed from both substantive and procedural perspectives.

The basic tools necessary for applying this positive "quick look" approach are already well established: Rule 12 motions, orders sequencing discovery, and summary judgment motions. So, too, the relevant substantive considerations are also in place, and courts have applied them in the past to antitrust challenges to joint venture conduct under the rule of reason. As a substantive matter, some challenges to the conduct of joint ventures can be rejected without a full rule of reason analysis because procompetitive effects are obvious. As a procedural matter, the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly* encourages trial judges to dismiss claims involving implausible allegations evidence, and to structure pleadings and discovery so as to minimize the litigation burdens in cases that might well be resolved on discrete grounds.[7] All of these methods, as well as others described below, may be used to approve of joint venture conduct without allowing the rule of reason analysis to dictate long and drawn-out proceedings.

Development of the "Negative" Quick Look Doctrine

The "quick look" doctrine has evolved in the last several decades as an analytical compromise between the per se and rule of reason approaches, allowing for an efficient method of managing antitrust litigation that can otherwise become overly complex. While there is no single, universally accepted definition of the "quick look" approach, three Supreme Court decisions provide useful guidance for understanding the effect of the "quick look" approach on modern antitrust litigation.

NCAA v. Board of Regents dealt with an NCAA restriction on the number of games played, and an agreement on minimum prices for broadcasting games. Although the restraints amounted to a "naked restriction on price and output," the Court explained that there were potential procompetitive effects that prevented per se condemnation. Simply put, some level of cooperation was necessary for the NCAA's product—college football games—to be produced at all. But the Court applied an abbreviated rule of reason analysis that did not require proof of market power.[8]

The Supreme Court affirmed a similar "quick look" approach in *FTC v. Indiana Federation of Dentists*. There the Court considered a dental trade association policy requiring members to withhold x-rays from insurers. The Court held that the policy amounted to a restriction on output of a service desired by patients and insurers that lacked a credible justification,[9] so that the FTC was not required to define the relevant market or demonstrate market power. Allowing a shortcut by not requiring evidence of market power in these

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cases makes sense. Market power is generally recognized as the ability to engage in anticompetitive conduct, so if anticompetitive effects are obvious then examination of market power becomes less necessary.

In *California Dental Association v. FTC*, the Court held that the quick look approach could not be used. The case involved a challenge to advertising restrictions adopted by the California Dental Association.[10] The restrictions at issue effectively prohibited advertisements regarding the quality of the advertiser's dental services and required dentists to make significant disclosures when advertising discounted prices. The FTC applied a quick look analysis to condemn the advertising restrictions and the Ninth Circuit affirmed, finding that they had plainly anticompetitive effects, including decreased competition with respect to quality and price.[11] The Supreme Court reversed, holding that quick look treatment was not appropriate because the limited nature of the advertising restrictions meant that the anticompetitive effects were not obvious without an empirical analysis, and because the restrictions had potential procompetitive effects, such as protecting consumers from misleading advertisements and from information asymmetry between the patient and dentist.[12] The Court explained that the analysis of an alleged restraint should be "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."[13] It emphasized that the "quick look" analysis should be applied to conduct that is not per se unlawful, but nevertheless appears obviously anticompetitive, in situations "when the great likelihood of anticompetitive effects can easily be ascertained," and when "an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers and markets."[14]

The Costs of Antitrust Litigation

The Supreme Court's concern with long, drawn-out proceedings in antitrust cases has led it not only to adopt the "quick look" doctrine to condemn conduct, but also to impose more exacting requirements on plaintiffs asserting Section 1 claims. The Supreme Court has recognized at least three costs of antitrust litigation: cases are very expensive to defend, have the potential to deter procompetitive conduct, and bring with them a real danger that antitrust defendants will be pressured to settle weak claims given the threat of significant liability. In *Bell Atlantic Corp. v. Twombly*, concerns over the expense of discovery and the potential for coercive settlement were (at least in part) responsible for the Court's imposition of a more demanding pleading standard in a case involving Section 1 claims.[15] Similarly, the Supreme Court expressed its concern that meritless antitrust litigation can chill procompetitive conduct in *Matsushita Industrial Electrical Co. v. Zenith Radio Corp.*, and held a Section 1 plaintiff opposing summary judgment to fairly strict requirements for demonstrating the existence of an unlawful agreement.[16]

The Court's concerns with the complexity and expense of antitrust litigation apply with even stronger force in rule of reason challenges to joint venture conduct, which typically focus on the competitive effects and market analysis elements of rule of reason analysis. These elements often involve a more complex analysis than is typical, for example, of ordinary price-fixing claims that focus on the agreement element. Under the rule of reason, a plaintiff must generally demonstrate that the defendant has market power in a properly defined relevant market, and that there are substantial anticompetitive effects from the conduct that outweigh any procompetitive effects. The potential breadth of the rule of reason analysis applicable to joint ventures is suggested by Justice Brandeis's classic formulation of the standard in *Chicago Board of Trade*:

> 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 is 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.[17]

The nature of this analysis has predisposed some courts against ending rule of reason challenges at early stages of litigation. This judicial reluctance, however, exacerbates the very risks that the Supreme Court has repeatedly been concerned with in antitrust litigation: discovery costs will often be high, defendants may be pressured to settle even weak cases that courts fail to dismiss, and procompetitive conduct may be chilled. Moreover, this past reluctance is inconsistent with *American Needle*'s suggestion that a detailed analysis may not always be required to dispose of Section 1 challenges to joint venture conduct.

Substantive Considerations

Historically, courts have been more willing to dispose of rule of reason challenges to joint venture conduct when the plaintiff has failed to adequately allege or demonstrate anticompetitive effects or market power in a relevant market. Michael Carrier's extensive empirical analysis of reported rule of reason decisions finds that of those cases resolved on dispositive motion the vast majority were decided on grounds of failure to show anticompetitive effects or market power in a relevant market.[18] Beyond these traditional grounds for dismissing rule of reason claims without a full rule of reason analysis, however, courts have other ways to implement *American Needle*'s suggestion that rule of reason claims can sometimes be dismissed without a long and drawn out rule of reason analysis—and *American Needle* may lead to their more frequent use:

Full Integration of Competitor Operations Within the Relevant Market. An important substantive consideration arises when co-venturers have fully integrated their operations in the market in which anticompetitive effects are alleged,

and there is no challenge to that formation. Take the example of two oil companies that have formed a joint venture which integrates their operations with respect to marketing of gasoline to retailers in the Western United States, but that continue to compete in other markets, as was the case in *Texaco v. Dagher*.[19] In such a circumstance, it makes little sense to challenge the operation of their joint venture as a Section 1 agreement having anticompetitive effects within the market for sales to retailers in the Western United States; they are essentially merged for purposes of that market, and their joint post-integration conduct—such as setting prices for joint ventures output—does not reduce competition.[20]

This approach is in line with the test the DOJ and FTC proposed in their *American Needle* amicus brief. In particular, the agencies argued that, once entities form a legitimate venture, they "are incapable of conspiring under § 1 if they 'have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition . . . in that operational sphere' and 'the challenged restraint [does] not significantly affect actual or potential competition . . . outside their merged operations.'"[21]

Although the Supreme Court in *American Needle* reserved decision on the agencies' proposal,[22] it makes sense to develop a legal rule that there would be no Section 1 concern in such a situation: even though co-venturers often still compete in certain respects, if the challenged concerted activity between the co-venturers only has effects within a market in which they are fully integrated and no longer compete, then their conduct does not in any way reduce competition between them that would otherwise exist. It should accordingly be approved without the need for further factual analysis of broader market dynamics.

Conduct that Is Very Likely to Produce Procompetitive Effects. Section 1 claims might also be disposed of efficiently if a "quick look" analysis demonstrated that the category of challenged conduct would very likely have procompetitive effects. This approach is essentially the flipside of the approach taken in the line of negative quick look cases cited in *American Needle*, which allow courts to condemn certain types of facially anticompetitive venture conduct in some instances without a full rule of reason analysis. As *California Dental* noted, an abbreviated analysis may be applied if "an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers and markets," or if "the great likelihood of anticompetitive effects on customers can easily be ascertained."[23] Under those circumstances, anticompetitive effects are presumed, so that a defendant generally may not defend by arguing that its conduct did not harm competition—i.e., by arguing that it lacks market power, or by denying the anticompetitive effects. These same principles suggest use of a quick look to dispose of Section 1 claims if it could be said that a basic understanding of economics suggests that the category of challenged conduct would very likely have procompetitive effects. In those circumstances, procompetitive effects could be presumed, and a challenge to joint venture conduct could not prevail simply by pointing to high market shares or a risk of anticompetitive effects. Instead, a plaintiff would be required to demonstrate substantial anticompetitive effects that outweigh the presumed procompetitive effects.[24]

The Court in *American Needle* implicitly suggested an instance in which this sort of truncated analysis may be appropriate. In particular, the Court stated that the conduct of a joint venture is "likely" to withstand rule of reason scrutiny if it is "essential" for the venture's product "to be available at all."[25] If conduct necessary for the product's availability were prohibited, the product would not be produced by the venture, and competition (or at least the number of competitors) would necessarily be reduced. Given the facially procompetitive effect of the joint venture, it would be appropriate to require a less detailed analysis than the rule of reason would otherwise require. In these circumstances, a plaintiff should only prevail in the (often unlikely) circumstance that it can produce evidence of significant anticompetitive effects that outweigh the procompetitive effects from the existence of the venture's product. Although this would require some factual analysis, it would be less extensive than is typical under a full rule of reason analysis. And in many instances it will be quite difficult to demonstrate anticompetitive effects that exceed the procompetitive effects generated by the venture's product, as the Supreme Court itself suggested in *American Needle*. This approach is consistent with the Court's suggestion that an abbreviated analysis may be used to approve of conduct where procompetitive benefits are established.

A somewhat different, although related, question was addressed in *NCAA*, where the Court analyzed association rules directly restricting output (i.e., the number of televised football games) and setting minimum prices—both of which are typically considered naked restraints subject to per se treatment. Instead of condemning these naked restraints as per se unlawful, the Court held that the somewhat less harsh quick look approach should apply because at least some horizontal agreements among teams were necessary for a league like the NCAA to function. Significantly, the Court did not hold that the restraints at issue were necessary for NCAA to function, noting that the district court had found that "NCAA football could be marketed just as effectively without" the restraints.[26] It was enough that *some* restraints were necessary to remove the restraints from per se condemnation. Since the need for some level of coordination is enough to bring *unnecessary* conduct out of per se treatment into the less restrictive quick look doctrine, it makes sense that *necessary* conduct should be subject to reduced rule of reason scrutiny, as implied by *American Needle*.

Consider a hypothetical from the Competitor Collaboration Guidelines, in which two competing producers of computer software that together have somewhat more than 20 percent market share (and thus do not fall within the

Guidelines' "safe harbor" for market power) collaborate to develop and market a "markedly better" word processing program than either could produce on its own, sharing profits and expenses. The Guidelines suggest that in these circumstances the venture is producing a product that they "could not have developed separately," and the agencies "likely would conclude that the joint word-processing software development project is an efficiency-enhancing integration of economic activity that promotes procompetitive benefits."[27] Under the approach suggested in this article and implied in *American Needle*, a challenge to conduct that is necessary for the creation of the software—such as the initial set-up of the venture, the required sharing of expertise or information, or sharing of profits and losses—should face a significant hurdle in demonstrating anticompetitive effects that outweigh the obvious procompetitive benefits from the very existence of the venture's product.

Venture Conduct that Increases Output. There are other circumstances in which it would make sense to conduct a more abbreviated rule of reason analysis to dispose of Section 1 challenges to joint venture conduct. As Judge Easterbrook noted in *Chicago Professional Sports*, "[T]he core question in antitrust is output," and "[u]nless a contract reduces output in some market . . . there is no antitrust problem."[28] Indeed, if challenged conduct does not reduce marketwide output, there is no "deadweight loss," which is the type of overall efficiency reduction that is the traditional concern of economists. Moreover, according to Areeda and Hovenkamp, such output reductions are a "prerequisite" for the other primary type of anticompetitive effect typically recognized by courts—namely, supracompetitive pricing.[29] They also suggest that output restrictions are at the root of anticompetitive effects analysis for joint ventures, even under the broad test articulated in *Chicago Board of Trade*.[30] If joint venture defendants present evidence that challenged conduct is reasonably necessary to achieve output—enhancing activity, then a plaintiff should prevail only if it demonstrates that the same output effect could be achieved by a less restrictive alternative, or by demonstrating with competing evidence that the conduct actually reduces output, according to Areeda and Hovenkamp.[31] Although few courts have considered this approach, they should do so in light of *American Needle*. In circumstances where there is evidence that challenged venture conduct increases output, this approach would narrow the inquiry and make it more efficient for a court to determine whether the net effect is pro- or anticompetitive.

Procedural Considerations

Aside from these substantive points, courts also have procedural tools for *American Needle*'s suggestion that challenges to venture conduct can sometimes be disposed of under the rule of reason without a detailed factual analysis. A willingness to resolve dispositive motions on discrete issues is an effective means of efficiently administering antitrust litigation. This willingness should extend to rule of reason challenges to venture conduct. Courts may also order staged discovery on narrow issues to resolve litigation quickly.

Motions to Dismiss. The Court's suggestion in *American Needle* implies that courts should not be reluctant to apply *Twombly* to dismiss rule of reason claims in appropriate circumstances—such as those described above. In particular, although well pled allegations of competitive effects and market power may at times require factual development or findings prior to final resolution, at other times courts should recognize that a plaintiff's factual allegations do not plausibly allege market definition, market power, or anticompetitive effects and that the case can therefore be dismissed on the pleadings.

Some courts initially were reluctant to apply *Twombly* to the competitive effects, market definition, and market power elements because *Twombly* itself dealt directly only with the agreement element of a Section 1 claim. This reluctance is no longer justified after the Supreme Court's holding in *Ashcroft v. Iqbal* that *Twombly*'s plausibility standard applies to all elements of all claims brought in federal court.[32] Thus, if a complaint does not allege sufficient facts for an inference of market power to be plausible, the complaint should be dismissed. The district court in *Pennsylvania Ave. Funds v. Borey*, for example, dismissed a Section 1 claim brought by a shareholder of an acquired corporation, WatchGuard, alleging that two competitor corporations entered into an arrangement for the purpose of artificially fixing WatchGuard's share price in a bidding war.[33] The plaintiff alleged that the relevant market was "the market for corporate control of WatchGuard and other technology companies," but admitted in the complaint that "nearly $159 billion [w]as poured into private equity funds" in the relevant year. The court dismissed the complaint because the plaintiff offered no allegations from which it could be inferred that the combined resources of the two defendants were "more than a minuscule fraction of this market."[34] The court's approach is consistent with *Twombly* and *Iqbal*, and with the suggestion in *American Needle* that the rule of reason analysis can at times be conducted "in the twinkling of an eye."

Similarly, the Ninth Circuit's recent decisions in *Gilley v. Atlantic Richfield Co.*[35] provide a useful illustration with respect to the potential impact of applying *Twombly* and *Iqbal* to the allegations of anticompetitive effects. The plaintiff in *Gilley* was a wholesale purchaser of gasoline who claimed that various defendants entered into a series of bilateral agreements that allegedly had cumulative anticompetitive effects of raising prices and reducing output. The district court dismissed the complaint, in part because the plaintiff provided no plausible causal connection between the individual agreements and the alleged marketwide anticompetitive effects.[36] Initially, the Ninth Circuit reversed dismissal of the complaint, holding that on a motion to dismiss the courts are not allowed to evaluate "the soundness of Plaintiffs' economic theory," even if it were "highly improbable," and

apparently even if the complaint contains nothing more than mere conclusory assertions.[37] Approximately one month after the Ninth Circuit issued its initial decision in *Gilley*, however, the Supreme Court decided *Iqbal*, which as noted above, makes clear that *Twombly*'s plausibility standard applies to all federal claims, and thus all elements of a rule of reason claim. The Ninth Circuit then withdrew its initial decision and issued a new decision, noting that *Twombly* and *Iqbal* apply to all elements of federal claims, and that the plaintiff had not adequately alleged a connection between the individual agreements and the broad anticompetitive effects asserted in the complaint. It should be clear today that conclusory pleading of competitive effects is not sufficient to maintain a claim.

Applying these principles to challenges to venture conduct under the rule of reason, courts should dismiss complaints that do not contain sufficient factual allegations to support plausible anticompetitive effects such as supracompetitive pricing or reductions in output. Areeda and Hovenkamp identify several examples of competitor collaborations for which anticompetitive effects are not plausible (and the case should be dismissed on the pleadings): (1) exchanges of information regarding the "names of customers who have not paid their bills"; (2) joint publication of a "newsletter for customers restricted to teaching about new uses of their product"; and (3) joint "nonprice advertising touting their product's advantages."[38] Areeda and Hovenkamp conclude that these sorts of collaborations would not be expected to lead to increased prices or reductions in output; absent additional facts that support the claims, anticompetitive effects in these contexts are not plausible and the claims should be dismissed on the pleadings.

Summary Judgment. Neither should courts shy away from disposing of Section 1 claims on summary judgment motions merely because the full rule of reason analysis can require a balancing of pro- and anticompetitive effects. While the case law is fairly well developed regarding the strength and quality of evidence necessary for a Section 1 claim to survive a motion for summary judgment on the "agreement" element of the claim, courts have provided relatively less guidance on whether or how to balance competitive effects on summary judgment, and some courts have even seemed inclined to view such issues as reserved for the jury. *American Needle* suggested, however, that the rule of reason analysis can be applied quickly in some instances.

To the extent the Court's suggestion in *American Needle* that joint ventures need not be "trapped" by antitrust litigation reflects concerns similar to those that underlie *Matsushita*, it is useful to consider how a standard like that articulated in *Matsushita* for the agreement element of a Section 1 claim could be extended and applied to the other elements of a rule of reason antitrust challenge to joint venture conduct. *Matsushita* made clear that a plaintiff opposing summary judgment on the "agreement" element may not rely solely on ambiguous evidence, and instead must present evidence that "tends to exclude the possibility" of independent, rather than collusive conduct.[39] The Court also held that conduct that is just "as consistent with" permissible competition as conspiracy does not, standing alone, support an inference of collusion.[40]

The same principles provide a sound basis to argue that courts should not allow rule of reason claims based solely on ambiguous evidence to proceed to trial. The Second Circuit has, in fact, applied the *Matsushita* "tend to exclude" standard generally to rule of reason claims challenging the conduct of an association, suggesting that the standard applies to more than just the conspiracy element of a Section 1 claim.[41] It would be consistent with the principles underlying *Matsushita* to hold that summary judgment should be granted for joint venture defendants if, even after drawing all inferences in plaintiffs' favor, the evidence is sufficiently ambiguous or lacking in empirical support that it does not "tend to exclude the possibility" that procompetitive effects outweigh anticompetitive effects. In this way, courts can give effect to the Supreme Court's concerns with the risks of antitrust litigation, and the suggestion in *American Needle* that joint ventures should not be "trapped." Judicial refusal to weigh countervailing pro- and anticompetitive effects where the plaintiffs' evidence is at best ambiguous could lead to the chilling of conduct by joint ventures that is procompetitive.

Consistent with these principles from *American Needle*, some courts have not been reluctant to reject claims as a matter of law after balancing pro- and anticompetitive effects, particularly where evidence was ambiguous or not empirically supported. For example, in *Reifert v. South Central Wisconsin MLS Corporation*, the Seventh Circuit balanced pro- and anticompetitive effects as a matter of law, without the need for a full trial under the rule of reason.[42] In that case, the plaintiff challenged rules that prohibited members of the association from (a) using information received through the real estate multiple listing service to target clients of other realtors, and (b) advising customers of their superior services or prices while the customers were under exclusive contract with another realtor. The Seventh Circuit suggested that the plaintiff's assertions of anticompetitive effects from these restrictions were "overly broad," since the rules did not preclude realtors from generally advertising their services, but rather were intended to prevent targeted solicitations that would interfere with existing exclusive contracts.[43] Moreover, the court held—without engaging in a prolonged analysis—that the balance between pro- and anticompetitive effects "weigh[ed] heavily" in favor of the association rule, because allowing realtors to use the multiple listing service to steal clients under contract would inefficiently deter use of the system.[44]

This sort of balancing of pro- and anticompetitive effects is consistent with *American Needle*'s suggestion that venture defendants need not be "trapped" by antitrust law, particularly in weak cases. In the past, however, many courts have not engaged in the balancing of anticompetitive effects against procompetitive effects as a matter of law as in *Reifert*. In fact, Michael Carrier's extensive analysis of rule of reason

cases documented only five instances in the last decade where a court undertook such balancing.[45] *American Needle*'s suggested "twinkling of an eye" approach underscores the validity of the approach in *Reifert* and similar cases.

Staging of Discovery. The *American Needle* suggestion also raises the possibility of staging discovery and dispositive motions to resolve litigation quickly on narrow issues. For example, it may be apparent early in litigation that the core question in the case may be resolved quickly, without the need for full merits discovery on all issues relevant to the rule of reason analysis. This approach is particularly consistent with the Supreme Court's recognition in *Twombly* that courts should be sensitive to the substantial cost of antitrust litigation, especially discovery. In *Twombly*, both the majority and dissenting opinions gave extended consideration to discovery burdens in antitrust cases, urging trial courts to actively manage discovery processes to limit or ameliorate the burdens.[46] Even though dissenting, Justice Stevens (who also wrote the *American Needle* decision) agreed that the concern was valid and concluded that the expense warranted nothing less than "strict control of discovery."[47]

Some courts may be reluctant to adopt this approach due to the risk that staging discovery to prioritize certain rule of reason issues will only add to the time and cost needed to complete pretrial proceedings. However, limited discovery over a shortened time frame on narrow, threshold issues is less likely to raise such concerns, and may be more efficient if it resolves the case expeditiously. Thus, for example, if it appears that a major issue in dispute is whether the defendant has market power, or whether plaintiffs' allegations of output restrictions resulting from defendants' conduct are correct, a court could order discovery and subsequent summary judgment briefing limited to such issues. Some courts, in fact, have undertaken such an approach, which is supported by Federal Rule of Civil Procedure 26(d)'s provision that the court, "upon motion," "for the parties' and witnesses' convenience and in the interests of justice," may control the sequence and timing of discovery.

For example, in *Marrese v. American Academy of Orthopaedic Surgeons*, Judge Posner stressed the importance of requiring antitrust plaintiffs to satisfy threshold requirements that could be dispositive before being given carte blanche to embark on extensive discovery. In *Marrese*, two orthopedic surgeons brought an action under Section 1 of the Sherman Act against an association that had denied them membership, allegedly on behalf of a class of all other similarly situated surgeons.[48] Plaintiffs sought access to the defendant's membership list, purportedly to obtain information about other individuals who had been denied membership. Although the district court initially granted plaintiffs' request, the Seventh Circuit reversed. Judge Posner noted:

> The district court should not in these circumstances have ordered discovery of the Academy's membership files before there was any discovery on the issue of competitive effect. It was not enough for the court to observe that "nothing in the Federal Rules of Civil Procedure or the case law requires the imposition of such a bifurcation [of discovery] on plaintiffs." As we have pointed out, a district court has the power under Rules 26(c) and (d) of the Federal Rules of Civil Procedure, and in a clear case the duty, to defer a burdensome discovery request pending completion of discovery on an issue that may dispose of the entire case and thereby make the request moot.[49]

Although not in the context of a joint venture, another example of this approach is provided in *Rebel Oil Co. v. Atlantic Richfield Co.*, an action brought under Sections 1 and 2 of the Sherman Act and the Robinson-Patman Act. The district court limited discovery solely to the issue of whether defendant ARCO had sufficient market power to charge prices above competitive levels.[50] The court justified its limited discovery ruling on the ground that, absent a showing of market power, plaintiff Rebel could not demonstrate that it suffered antitrust injury. The court refused discovery on the issues of predatory pricing, intent, and collusion, explaining:

> Proving that a defendant has engaged in pricing below cost entails extensive discovery regarding virtually all aspects of a company's business. On the other hand, discovery into relevant markets and entry barriers is a more discrete undertaking. Since . . . Rebel must prove the existence of entry barriers and relevant markets, it makes sense for this Court to initially restrict discovery to those topics.[51]

The district court granted summary judgment in favor of the defendant on all antitrust claims.[52]

This sort of discovery staging is a reasonable, practical way to implement the Supreme Court's suggestion in *American Needle* that an extensive analysis is not always required, and joint venture conduct can sometimes be approved quickly under the rule of reason. By limiting discovery to threshold issues in appropriate instances, courts could effectively manage the litigation, conserve the court's own resources, and protect defendants from litigation costs that can make an antitrust lawsuit unduly expensive to defend. By phasing discovery, the natural break points for dispositive motions can come sufficiently early in the case to offer at least the possibility of efficient resolution.

Conclusion

Lower courts interpreting *American Needle* will be faced with managing rule of reason challenges to joint venture conduct without concomitant excessive discovery costs, the pressure to settle even weak claims, and the deterrence of procompetitive conduct. As *American Needle* suggested, courts should use the available tools to ensure that joint ventures are not trapped by antitrust law. ■

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[1] 130 S. Ct. 2201, 2212, 2216 (2010). There is an ongoing debate regarding whether the decision merely articulates prior law, or instead actually cuts back on the single entity defense recognized in some prior decisions. *See, e.g.*, Herbert Hovenkamp, American Needle*: The Sherman Act, Conspiracy, and Exclusion*, COMPETITION POL'Y INT'L, June 2010, *available at* https://www.competitionpolicyinternational.com/assets/Free/HovenkampJune-

10HotTub.pdf. In either event the decision places limits on the scope of the single firm defense.

[2] *American Needle*, 130 S.Ct. at 2212.

[3] *Id.* at 2216.

[4] *Id.* (quoting NCAA v. Board of Regents, 468 U.S. 85, 109 n.39 (1984)).

[5] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (2000) [hereinafter Competitor Collaboration Guidelines], *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[6] Robert Pitofsky, Joint Ventures and Strategic Alliances: The New Federal Antitrust Competitor Collaboration Guidelines, Remarks Before the ABA Section of Antitrust Law Workshop (Nov. 11 & 12, 1999), *available at* http://www.ftc.gov/speeches/pitofsky/jvg991111.shtm.

[7] 550 U.S. 544, 558 (2007).

[8] 468 U.S. 85 (1984).

[9] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–64 (1986).

[10] Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999).

[11] Cal. Dental Ass'n v. FTC, 128 F.3d 720 (9th Cir. 1997).

[12] *Cal. Dental*, 526 U.S. at 781.

[13] *Id.*

[14] *Id.* at 770.

[15] 550 U.S. 544, 558 (2007).

[16] 475 U.S. 574 (1986).

[17] Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918).

[18] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 2009 Geo. Mason L. Rev. 827 (2009).

[19] 547 U.S. 1 (2006).

[20] *Id.* at 8.

[21] *American Needle*, 130 S. Ct. at 2216 n.9.

[22] *Id.*

[23] 526 U.S. at 770.

[24] *Cf.* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled on other grounds by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977) (stating that competitive harm is established if the effect on competition is "substantially adverse"); Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15 (1940) (stating that the Sherman Act is designed to prevent restraints of trade that have "significant effect" on competition).

[25] 130 S. Ct. at 2216.

[26] 468 U.S. at 114.

[27] Competitor Collaboration Guidelines, *supra* note 5, at 31 (Example 6).

[28] Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 597 (7th Cir. 1996).

[29] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1912e (2d ed. 2004).

[30] Areeda and Hovenkamp explain:

> [W]hile *Chicago Board of Trade* may have stated the rule of reason in an overly inclusive and ambiguous manner, the court was clear about the fundamental nature of the rule of reason inquiry, which is to determine whether a restraint destroys competition by reducing the size, or output, of a market; or merely regulates and thereby promotes competition by increasing its output.

Id. ¶ 1912b.

[31] *Id.* ¶ 1912i.

[32] 129 S. Ct. 1937 (2009).

[33] 569 F. Supp. 2d 1126, 1135 (W.D. Wash. 2008).

[34] *Id.* at 1134.

[35] Gilley v. Atl. Richfield Co., 588 F.3d 659 (9th Cir. 2009), *opinion withdrawn and replaced by* Gilley v. Atl. Richfield Co., 561 F.3d 1004 (9th Cir. 2009).

[36] *Gilley*, 588 F.3d at 661.

[37] *Gilley*, 561 F.3d at 1011–14.

[38] Areeda & Hovenkamp, *supra* note 29, ¶ 1912j.

[39] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

[40] *Id.*; Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

[41] Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 542 (2d Cir. 1993) ("In the context of antitrust litigation the range of inferences that may be drawn from ambiguous evidence is limited; the non-moving party must set forth facts that tend to preclude an inference of permissible conduct.").

[42] 450 F.3d 312 (7th Cir. 2006).

[43] *Id.* at 321.

[44] *Id.*

[45] Carrier, *supra* note 18, at 831.

[46] 550 U.S. 544, 558.

[47] *Id.* at 573.

[48] Marrese v. Am. Academy of Orthopaedic Surgeons, 706 F.2d 1488 (7th Cir. 1983).

[49] *Id.* at 1497. In *American Needle* itself, the Seventh Circuit affirmed an order by the lower court that had limited discovery to the defendants' "single entity" defense.

[50] Rebel Oil Co. v. Atl. Richfield Co., 133 F.R.D. 41, 45 (D. Nev. 1990).

[51] *Id.*

[52] Rebel Oil Co. v. Atl. Richfield Co., 808 F. Supp. 1464 (D. Nev. 1992).