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Tying Arrangement Analysis: A Continued Integration of the Rule of Reason and the Per Se Rule: Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551 (1984)

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TYING ARRANGEMENT ANALYSIS: A CONTINUED INTEGRATION OF THE RULE OF REASON AND THE PER SE RULE

Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551 (1984)

In *Jefferson Parish Hospital District No. 2 v. Hyde*,[1] the Supreme Court held that an exclusive services contract between a hospital and a firm of anesthesiologists is neither a per se[2] violation of section 1 of the Sherman Act[3] nor an unreasonable restraint on competition.[4]

The Board of Directors of East Jefferson Parish Hospital denied Edwin G. Hyde, an anesthesiologist,[5] medical staff privileges because the hospital had contracted with Roux & Associates[6] for the provision of its anesthesia services.[7] Although the hospital's contract with Roux did not

1. 104 S. Ct. 1551 (1984).

2. *See infra* notes 11 & 12.

3. Section 1 of the Sherman Act prohibits concerted activity between two or more persons that unreasonably restrains trade. Section 1 provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

15 U.S.C. § 1 (1982).

English courts first allowed restraints on trade in the 16th and 17th centuries, primarily for the purpose of assuring people the opportunity to work. The courts also hoped to maintain prices at a low level. The courts, however, made unlawful restrictions on the trade of certain essential commodities as a protection against abuse of restraints on trade. For complete documentation of the common law restraints on trade, see HEDGES, THE LAW RELATING TO RESTRAINT OF TRADE (1932); SANDERSON, RESTRAINT OF TRADE IN ENGLISH LAW (1926).

4. 104 S. Ct. at 1567.

5. Dr. Hyde's application had received favorable recommendations from both the Medical Staff Credentials Committee and the Medical Staff Executive Committee of East Jefferson Parish Hospital. 104 S. Ct. at 1554.

6. Roux & Associates is a professional medical corporation formed to perform anesthesiological services. Hyde v. Jefferson Parish Hosp. Dist. No. 2, 513 F. Supp. 532, 536 (E.D. La. 1981). Exclusive contracts between hospitals and medical specialty groups are common. *Id.* at 540. Patients generally do not select a certain doctor to perform specialized services such as anesthesiology, pathology, radiology, and nuclear medicine. The quality of these services consequently becomes the responsibility of the hospital. Exclusive contracts tend to insure the availability of these services and give the hospital greater control in regulating their quality. Foster, *Exclusive Arrangements Between Hospitals and Physicians: Antitrust's Next Frontier in Health?*, 26 ST. LOUIS U.L.J. 535, 540-41 (1982).

7. Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286, 287 (5th Cir. 1982). East Jefferson Hospital originally entered into the exclusive contract arrangement with Roux & Associates in February 1971. The contract provided that any anesthesiologist designated by Roux would be granted medical staff privileges at East Jefferson. In return, the hospital agreed to restrict its use of anesthesia services exclusively to those provided by Roux & Associates. The financial terms of the contract provided for separate billing for anesthesiological services by the hospital.

contain an express provision granting exclusive privileges,[8] the hospital chose to operate under such exclusive conditions.[9]

Dr. Hyde filed suit in federal district court,[10] alleging that the contract created a per se[11] illegal tying arrangement in violation of section 1 of the Sherman Act.[12] The district court, employing a rule of reason analysis,[13]

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8. *Id.* at 287 n.1. In 1976, the hospital entered into a five-year contract with Roux & Associates. At Dr. Roux's request, the new contract did not exclude other anesthesiologists from practicing at East Jefferson.

9. *Id.* The hospital retained the exclusive nature of the contract by including a provision restricting itself to only those anesthesia services provided by Roux & Associates. *Id.* The hospital wanted to continue the closed-group policy because it believed the exclusive arrangement promoted the quality of its patient care and gave it an efficient means for managing the anesthesiology department. 513 F. Supp. at 536.

10. Hyde v. Jefferson Parish Hosp. Dist. No. 2, 513 F. Supp. 532 (E.D. La. 1981). Hyde sought a declaratory judgment that the contract was unlawful under § 1 of the Sherman Act and an injunction ordering the hospital to appoint him to its medical staff. 104 S. Ct. at 1554. Hyde's complaint also alleged a violation of 42 U.S.C. § 1983 (on the grounds that the hospital's rejection of his application denied him a property right to which he was legally entitled), LA. REV. STAT. ANN. §§ 51:122-23 (West 1982) (the Louisiana antitrust law), and LA. REV. STAT. ANN. § 46:1058 (West 1982) (the enabling legislation under which the Hospital District was created). *See* 686 F.2d at 287.

11. In Northern Pac. Ry. v. United States, 356 U.S. 1 (1957), Justice Black described per se violations of the Sherman Act as "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." *Id.* at 5.

12. 513 F. Supp. at 542. Hyde contended that the hospital's contract with Roux & Associates created a per se illegal tying arrangement by tying the purchase of anesthesia services to the provision of hospital surgical services. The district court assumed without discussion that the contract established a tying arrangement, with the hospital's surgical facilities being the tying product and the anesthesia services being the tied product. The court, however, did not consider the tying arrangement to be per se illegal. The court decided that the per se rules used in antitrust cases involving regular commercial activities should not apply to cases involving professional activities. *Id.* at 543.

13. The rule of reason analysis presumes that all agreements concerning commerce restrain trade in some form or another. To determine the legality of a restraint, courts thus ask not whether the agreement restrains trade, but whether it promotes competition and the public's interest. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1917).

In *Chicago Bd. of Trade*, Justice Brandeis set forth the following guidelines for applying the rule of reason analysis to determine the validity of a restraint in trade:

> To determine [the legality of a restraint in trade] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

246 U.S. at 238.

The inquiry under the rule of reason focuses directly on the impact of the challenged restraint on competitive conditions. This inquiry often requires a complex, quantitative showing of the economic concluded that the contract was lawful because it enhanced the hospital's ability to compete.[14]

The United States Court of Appeals for the Fifth Circuit reversed,[15] holding that the contract represented a per se illegal tying arrangement because market imperfections in the health care industry provided the hospital with sufficient market power to force patients to purchase anesthesia services.[16] The Supreme Court reversed and held that the tying

impact of the activity balanced against the procompetitive traits of the restraining agreement. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 43-49 (1976).

The Court generally applies the rule of reason standard to examine the validity of an exclusive dealing arrangement, such as that between the hospital and Roux & Associates. Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346 (7th Cir. 1982). *See, e.g.*, Robinson v. Magovern, 521 F. Supp. 842, 903-14 (W.D. Pa. 1981) (court rejected assertion that exclusive contract between a hospital and a group of thoracic surgeons falls under the per se rule); Smith v. Northern Mich. Hosps., Inc., 518 F. Supp. 644 (W.D. Mich. 1981) (rule of reason analysis used to examine validity of exclusive contract for emergency room services); Dattilo v. Tucson Gen. Hosp., 23 Ariz. App. 392, 533 P.2d 700 (1975) (rule of reason analysis used on exclusive contract to provide nuclear medicine); Letsch v. Northern San Diego County Hosp. Dist., 246 Cal. App. 2d 673, 55 Cal. Rptr. 118 (1967) (closed radiology department held reasonable and valid under rule of reason analysis); Blank v. Palo Alto-Stanford Hosp. Center, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965) (exclusive agreement with diagnostic radiology department held reasonable and proper under rule of reason); Benell v. City of Virginia, 258 Minn. 559, 104 N.W.2d 633 (1960) (closed x-ray department promotes hospital efficiency and effectiveness and is not arbitrary and unreasonable). *See generally* Bates, *Exclusive Arrangements for In-Hospital Professional Services: Does* Hyde *Mark a Watershed?*, 14 U. TOL. L. REV. 639, 644 (1983).

Although courts usually judge tying arrangements under per se standards, *see infra* notes 32-59 and accompanying text, they have carved out exceptions to apply the rule of reason when a new industry is involved in a tie-in, when a problem with the efficient operation of the tying product exists, or when necessary to prevent fraud or deceit. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

14. 513 F. Supp. at 544. The district court found that the contract had a minimal anticompetitive effect on the practice of anesthesia in the relevant market area. The court found that the contract did not prevent anesthesiologists from practicing in other hospitals in the area. Instead, the exclusive contract probably enhanced competition among anesthesiologists who would have to compete for a limited number of exclusive contract opportunities. *Id.* at 544.

The district court maintained that the exclusive contract enhanced competition by improving the hospital's quality of patient care. *Id.* at 544. These benefits, the court concluded, supported the finding that the contract was reasonable. *Id.* at 540.

15. 686 F.2d at 295.

16. *Id.* at 289-94. The Fifth Circuit applied the per se analysis to the exclusive contract and found an illegal tie-in between hospital operating rooms (the tying service) and the chosen anesthesia services (the tied service). The court contended that a per se illegal tying arrangement exhibits the following characteristics: (1) two separate products, the tying product and the tied product; (2) sufficient market power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market. *Id.* at 289.

The court concluded that the relevant market consisted of the consumers of health care affected by the arrangement rather than the anesthesiologists' market. The court found that because market arrangement was not a per se violation of the Sherman Act.[17]

Congress enacted the Sherman Act to preserve and promote free competition and to prevent contracts in restraint of trade.[18] Courts have interpreted the Sherman Act to prohibit tying arrangements,[19] which occur when a seller conditions or restricts the sale of a desired product (the "tying product") by requiring a buyer to purchase a second product (the "tied product").[20] Tying arrangements fall within the antitrust laws[21]

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imperfections exist in the health care industry (such as third party reimbursements), the traditional economic definition of the market area did not apply. *Id.* at 290. Patients tend to select hospitals by their location because they are ambivalent about the true costs of their medical care. The court thus defined the market area as the East Bank of Jefferson Parish and not as all of New Orleans, as the district court had determined. Under this new delineation, the court found that the hospital had sufficient market power in the tying market to coerce purchase of the tied product. *Id.* at 291.

The court maintained that the exclusive contract "spawn[ed] a number of anticompetitive effects." *Id.* For example, the contract prohibited patients and surgeons from selecting Hyde as their anesthesiologist. The court noted that the contract also erected entry barriers for anesthesiologists entering the hospital controlled market. Finally, the contract reduced the incentive for improving and initiating techniques or procedures in the anesthesiology field. *Id.* at 292.

The court of appeals treated the interstate commerce requirement in a footnote. *Id.* at 292 n.10. The court stated that the dollar-volume of business due to surgery procedures at Jefferson Parish General was substantial enough to affect interstate commerce. *Id.*

17. 104 S. Ct. at 1568.

18. Congress passed the Sherman Act in 1890 in response to public dismay with the abuses of the great trusts. Myers, *Trends in Antitrust Law, What Impact on Providing Health Care Services in New Hampshire—A Primer on Antitrust*, 25 N.H.B.J. 81, 82 (1984). For an excellent discussion of the legislative history of the Sherman Act, see Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1955).

Justice Black defined the basic judicial view of the purpose of the Sherman Act in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958):

> The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions . . . . [T]he policy inequivocably laid down by the act is competition . . . . Although this prohibition is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably restrain" competition.

Id. at 4.

19. Note, *Trademark Franchising and Antitrust Law: The Two-Product Rule for Tying Arrangements*, 27 SYRACUSE L. REV. 953, 962 (1976) [hereinafter cited as *The Two-Product Rule*].

20. Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

21. Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949) (tying arrangements "serve hardly any purpose beyond the suppression of competition"). Tying arrangements can produce several economic injuries. *See* United States v. Loew's, Inc., 371 U.S. 38, 44-45 (1962) (tie-ins may compel a buyer to purchase a product that he does not need or want); Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958) (a tie-in to superior goods may help seller to market an inferior quality product); International Salt Co. v. United States, 332 U.S. 392, 396 (1947) (a tie-in may foreclose a portion of the market for the tied product by depriving competing sellers of the opportunity to supply the captive buyers).

because they extend the seller's power in the tying product's market to the tied product's market.[22]

The Supreme Court first analyzed tying arrangements in *Henry v. A.B. Dick Co.*,[23] utilizing the rule of reason standard. In *A.B. Dick*, the patentee of a duplicating machine conditioned machine sales on the purchase of ink and other supplies made by the patentee.[24] Sustaining an injunction restricting A.B. Dick from supplying ink to the machine owner, the Supreme Court held that the Sherman Act did not preclude tying arrangements.[25]

The Court's ruling in *A.B. Dick* prompted Congress to enact section 3 of the Clayton Act to proscribe directly tying arrangements.[26] Section 3,[27] limited in scope to the sale or lease of tangible products, prohibits tying arrangements if their effect "may be to substantially lessen competition."[28] Congress intended this language to arrest possible anticompetitive behavior at its incipiency.[29] Following the Clayton Act's lead, the Court developed a per se analysis of tying arrangements under section 1

22. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 431 (1977) [hereinafter cited as HANDBOOK ON ANTITRUST]. *See generally* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 HARV. L. REV. 50 (1958); Bowman, *Tying Arrangements and the Leverage Problem,* 67 YALE L.J. 19 (1957).

23. 224 U.S. 1 (1911).

24. *Id.* at 11.

25. *Id.* at 29-31.

26. HANDBOOK ON ANTITRUST, *supra* note 22, at 433.

27. 15 U.S.C. § 14 (1982). Section 3 of the Clayton Act provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding *may be* to substantially lessen competition or tend to create a monopoly in any line of commerce.

Id. (emphasis added).

28. *Id.* Like the rule of reason, this ambiguous standard is applicable only on a case-by-case basis. Mattson, *Tying Arrangements—An Update,* 1982 B.Y.U. L. REV. 857, 859. Because the Clayton Act applies only to goods and not to services, Hyde could not have brought a Clayton Act action in *Jefferson Parish.*

29. HANDBOOK ON ANTITRUST, *supra* note 22, at 432 (the legislative history suggests that the words "may be" indicate an intent to stop anticompetitive conduct before it develops into a § 1 Sherman Act violation). *See also* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 29 (2d ed. 1970) (the words "may be" can be interpreted to mean "will probably be" or "might conceivably be", indicating that the Clayton Act involves an element of prediction).

of the Sherman Act.[30]

The Supreme Court first used a per se analysis to invalidate a tying arrangement in 1947 in *International Salt Co. v. United States.*[31] In *International Salt,* the salt company required lessees of its patented salt machines to buy its salt tablets.[32] The Court held that because the lease agreement foreclosed potential competitors from a substantial market, the contract created a per se illegal tying arrangement[33] in violation of both the Sherman Act and the Clayton Act.[34] The Court assumed that the limited monopoly created by the patent provided the requisite market power to establish International Salt's tying arrangement.[35]

In *Times-Picayune Publishing Co. v. United States,*[36] the Supreme Court distinguished per se analysis of tying arrangements under the Clayton Act from the per se standard applied to Sherman Act violations.[37] The Court stated that a seller violates the Clayton Act if he has substantial market power in the tying product market or if the tie-in restrains a substantial volume of commerce in the tied product.[38] A violation of the Sherman Act occurs when both of these conditions are met because it is per se unreasonable to restrain competition in any substantial market.[39] Notwithstanding the distinction, the Court held that tying arrangement analysis requires a threshold finding of a tie between two separate and distinct product markets.[40]

30. *See infra* notes 32-59 and accompanying text.

31. 332 U.S. 392 (1947).

32. *Id.* at 394.

33. *Id.* at 396. The Court also noted that the volume of business affected by the contract was not insubstantial or insignificant. The Court did not determine whether a market in salt had actually been foreclosed due to the tie-in. Instead, it merely referred to the fact that International Salt was one of the country's largest producers of salt. *Id.* at 394.

34. *Id.* at 396. The Court failed to specify which antitrust law International Salt had violated. The Court simply stated that the tying arrangement was per se illegal.

35. *Id.* at 395-96. The Supreme Court only mentioned the tying product's market in reference to the patent. The Court made no determination as to whether the machine had any appreciable share of the market.

36. 345 U.S. 594 (1953).

37. *Id.* at 608-09.

38. *Id.*

39. *Id.*

40. *Id.* at 614. The Court stated that "[t]he common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." *Id.* at 614.

In *Times-Picayune,* the publishing company required advertisers to purchase advertising space in both its morning and evening newspapers. The Court refused to distinguish the company's advertis-

The Supreme Court clarified the market dominance theory of *Times-Picayune* in *Northern Pacific Railway v. United States.*[41] In *Northern Pacific,* the railroad, in disposing of its extensive land-grant holdings by sale and lease, inserted preferential routing clauses in its contracts.[42] The Court held that a tying arrangement is per se illegal when the seller's market leverage is sufficient to create "an appreciable restraint on free competition in the market for the tied product"[43] and when the restraint affects a "not insubstantial" amount of commerce in the tied product.[44] The Court concluded that the preferential routing clauses were per se illegal because the railroad's leverage was sufficient to isolate a portion of the market from competitors.[45]

The Supreme Court developed a second standard of illegality in *United States v. Loew's, Inc.*[46] In *Loew's,* the defendants conditioned the sale of feature films to television stations upon the acceptance of a package of unwanted films.[47] The Court found that, absent a showing of market dominance, it could infer economic power from the uniqueness or appealing attributes of the tying product.[48] Applying this standard to the facts in *Loew's,* the Court held that the consumer appeal of copyrighted

ing lineage in the morning paper from lineage in the evening paper because the two newspapers were under a single ownership at the same place and at the same time.

41. 356 U.S. 1 (1958). The Court interpreted the *Times-Picayune* discussion of market power in the tying product market to mean "sufficient economic power to impose an appreciable restraint on free competition in the tied product." *Id.* at 11. *See infra* text accompanying note 45.

42. *Id.* at 2-3.

43. *Id.* at 6. The Court stated that tying arrangements deny competitors free access to the tied product's market because of the seller's leverage in another market. Tying arrangements also restrict the buyer's freedom of choice. If the seller, however, does not have control or dominance so that the buyer is not coerced into taking the tied item, any restraint of trade caused by the tying arrangement would be insignificant and, therefore, not illegal. *Id.*

44. *Id.* at 6.

45. *Id.* at 7.

46. 371 U.S. 38 (1962).

47. *Id.* at 40.

48. *Id.* at 45. The Court described two concerns of the antitrust laws in tying arrangement cases. First, tying arrangements may be used to force buyers to give up free choice among competing products in the tying market. Second, competing suppliers of the tied product may be denied access to the market. Before a tying arrangement can threaten the market in either of these ways, the seller must have "economic leverage sufficient to induce his customers to take the tied product along with the tying item." Either a showing of the tying product's desirability sufficient to sustain an inference of economic power in the tying market or of actual market dominance satisfies the economic leverage test. *Id.* The *Loew's* inference of economic power is rebuttable. *In re* Data Gen. Corp. Antitrust Litig., 490 F. Supp. 1089, 1112-13 (N.D. Cal. 1980). A seller's economic leverage can arise directly through market dominance or indirectly through a tying product's appeal to consumers or its uniqueness based on patent or copyright. *Id.*

feature films creates sufficient leverage in the tying product market to force television stations to purchase undesirable films and constitutes a violation of section 1 of the Sherman Act.[49]

The Court delineated the parameters of this uniqueness doctrine in the *Fortner* decisions. In *Fortner Enterprises, Inc. v. United States Steel Corp.*[50] (*Fortner I*), Fortner and United States Steel entered into an agreement under which the steel company promised to provide 100% financing at cheap rates for the purchase and development of a specific tract of land.[51] As a condition of the loan, Fortner agreed to purchase and erect United States Steel's prefabricated homes on each lot of the tract.[52] The Court found that a tying arrangement existed between the credit terms (the tying product) and the prefabricated homes (the tied product). Reversing the lower court's summary judgment ruling,[53] the Supreme Court affirmed *Loew's* and held that unique financing terms might indicate an advantageous economic position[54] sufficient to induce buyers to purchase a second product they do not otherwise want.[55]

Eight years later, the Supreme Court readdressed the uniqueness doctrine in *United States Steel Corp. v. Fortner Enterprises, Inc.*[56] (*Fortner II*). The Court held that the steel company's unusual credit terms did not sustain an inference of substantial market power on three grounds.[57] First, nothing in the record indicated that the nationwide operation of the steel company gave it a cost advantage in the credit market.[58] Second, the steel company did not exercise economic leverage in the tying

49. 371 U.S. at 46-48.

50. 394 U.S. 495 (1969).

51. *Id.* at 497, 505.

52. *Id.* at 497.

53. *Id.* at 510.

54. The Court also indicated that if the seller has the ability to impose burdensome terms such as tie-ins on a substantial number of buyers, then the requisite economic power could be inferred. *Id.* at 504.

55. *Id.* at 505. The Supreme Court reasoned that other financial institutions would not risk the inexpensive financing. To arrive at the possible inference of economic power, the Supreme Court considered the unavailability of inexpensive financing in the area, the risk the creditor takes when it provides large and cheap loans, and the possibility that the steel company's nationwide operations gave it a substantial advantage over its competitors in furnishing high-risk loans. *Id.* at 504-06.

56. 429 U.S. 610 (1977). After the Supreme Court remanded *Fortner I*, the district court directed a verdict on the liability issue in favor of Fortner. The court of appeals reversed the directed verdict and remanded for a new trial on liability. The district court heard additional evidence and made extensive findings of fact, concluding that United States Steel had sufficient economic power in the credit market to find a violation of § 1 of the Sherman Act. *Id.* at 613.

57. *Id.* at 617-22.

58. *Id.* at 617.

product market.[59] The Court indicated that it could have inferred sufficient economic leverage to find a per se violation had Fortner shown that United States Steel conditioned the credit on the purchase of a disproportionate number of homes per tract of land financed.[60] Third, the credit arrangement merely proved the steel company was willing to provide cheap financing in order to sell expensive prefabricated homes.[61]

In *Jefferson Parish Hospital District No. 2 v. Hyde*,[62] the Supreme Court concluded that the contract between the hospital's surgical facilities and the anesthesia services constituted a tying arrangement.[63] The Court, however, did not find that the tie-in was a per se violation of the antitrust laws,[64] nor did it find that the hospital's contract unreasonably restrained trade among anesthesiologists.[65]

Initially, the Court stated that the essential characteristic of an illegal tie-in is the seller's ability to use its dominance in the tying product's market to force buyers to purchase a tied product.[66] A tying arrangement, therefore, requires two separate product markets distinguishable by the buyer.[67] The Court reasoned that anesthesia services, the tied product, constitute a separate market from surgical services, the tying product.[68] Because the hospital's exclusive contract eliminated the patient's option to purchase these services separately, the Court found that a tying arrangement existed.[69]

The Court employed a two-step analysis to determine the tying arrangement's validity. As a threshold inquiry, the Court considered

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59. *Id.*
60. *Id.*
61. *Id.* at 618-22.
62. 104 S. Ct. 1551 (1984).
63. *Id.* at 1563-65.
64. *Id.* at 1566-67.
65. *Id.* at 1567-68.
66. *Id.* at 1558-59. The Court recognized a distinction between using market power to increase the price of a tying product and using market power to impose restraints on competition in the tied product market. Under the Sherman Act, the latter circumstance is illegal because the tying arrangement may serve to insulate an inferior product from competition. Restraints on trade can also cause harm to existing competitors or prevent new competitors from entering the market. *Id.* at 1559.
67. *Id.* at 1562. The Court rejected the argument that the functional relationship between the surgical facilities and the anesthesia services created an integrated package. Instead, the character of the market demand for the two products is the determinant. For a discussion of the two-product issue, see *The Two-Product Rule, supra* note 19, at 963-65. *See also* Dolan and Ralston, *Hospital Admitting Privileges and the Sherman Act,* 18 HOUS. L. REV. 707, 757-58 (1981).
68. 104 S. Ct. at 1565.
69. *Id.* at 1563-64.

whether the challenged activity had a "significant potential for impact on competition."[70] According to the Court, a tying arrangement would not be illegal unless it foreclosed a substantial volume of commerce.[71]

Assuming the requisite impact on competition,[72] the Court proceeded to the second step of its analysis and examined the probability that the tying arrangement would produce anticompetitive consequences.[73] The Court reasoned that a tie-in results in anticompetitive consequences when the buyer of the tying product is forced to purchase a second, unwanted product from the seller as a condition of the original purchase.[74] The Court maintained that the probability of forced purchases depends on the extent of power that the seller enjoys in the tying product's market.[75] Observing that the hospital's services were not unique[76] and that the hospital's thirty-percent market share did not amount to domination of the surgery market,[77] the Court concluded that the hospital did not have sufficient market power in the surgery market to force patients to purchase the anesthesia services.[78] Thus, the hospital's exclusive arrangement with the anesthesiologists did not create a per se illegal tying arrangement.[79]

Concurring in the judgment, Justice O'Connor advocated abandoning

70. *Id.* at 1560.

71. *Id.* The Court contended that a per se inquiry would not be warranted if the tie-in only forced a "single purchaser" to buy an unwanted item. *Id.*

72. The Court never explicitly found that the tying arrangement "foreclosed a substantial volume of commerce." *See id.* The district court had earlier determined that because at least twenty other hospitals existed in the New Orleans metropolitan area, the East Jefferson hospital lacked any real "market power" and the impact on commerce of its contract with Roux & Associates was at best "minimal." *Id.* at 1555 & n.7.

73. *Id.* at 1560. To avoid the burdensome inquiry into actual economic consequences that the rule of reason requires, the Court noted that a showing of a substantial potential of anticompetitive conduct satisfies the per se inquiry. The "substantial potential" standard of the Sherman Act somewhat resembles the "may be" language of the Clayton Act. *See supra* note 28 and accompanying text.

74. 104 S. Ct. at 1558, 1560.

75. *Id.* at 1560. The seller's power over the tying product's market can result from a patent, the uniqueness of the seller's product, or the extent of the seller's market share. *Id.* at 1560-61. *See supra* note 53.

76. 104 S. Ct. at 1567. The Court also noted that the hospital did not hold a patent for its services. *Id.* at 1566.

77. *Id.* at 1566.

78. *Id.* at 1567.

79. The Court also briefly reviewed the exclusive contract under the rule of reason to determine if it unreasonably restrained trade. *Id.* at 1567-68. After noting that a rule of reason inquiry would require an examination of the "actual effect of the exclusive contract on competition among anesthesiologists," the Court found "insufficient evidence" to make a determination that the contract unrea-

per se analysis of tying arrangements in favor of a rule of reason analysis.[80] Justice O'Connor suggested that the required showing of market power or of probable anticompetitive effects under the per se rule required the same economic inquiry as under the rule of reason.[81] Justice O'Connor argued, however, that the rule of reason approach is superior because it allows the Court to consider the procompetitive effects of the tie.[82]

Justice O'Connor accepted the basic premise that tying is economically harmful when the seller uses its power in the tying product's market to create additional power in the tied product's market.[83] According to Justice O'Connor, the determination whether a given arrangement had an anticompetitive effect required two inquiries.[84] First, the Court should examine three criteria: the seller's power in the tying product's market,[85] the probability that the seller will acquire power in the tied product's market,[86] and the economic reasons for treating the two products as distinct.[87] If a plaintiff satisfied these requirements, the Court should next weigh the procompetitive effects against the anticompetitive effects of the tying arrangement[88] to determine the contract's ultimate legality.[89]

In *Jefferson Parish Hospital District No. 2 v. Hyde*, the Supreme Court narrowed the distinction between per se and rule of reason analysis of tying arrangements. The Court appropriately defined the per se standard in light of past precedent,[90] but questionably applied the test to the sub-

sonably restrained competition. *Id.* at 1567. No evidence appeared in the record showing the effects of the contract on the practice of anesthesiology in New Orleans. *Id.* at 1568.

80. *Id.* at 1570. Chief Justice Burger and Justices Powell and Rehnquist joined Justice O'Connor's opinion, thus making *Jefferson Parish* a 5-4 decision.

81. *Id.*

82. *Id.* Justice O'Connor's rationale for abandoning the per se test resembles analysis of monopolization under § 2 of the Sherman Act. A discussion of § 2 is beyond the scope of this Comment.

83. *Id.* at 1571.

84. *Id.* at 1571-74.

85. *Id.*

86. *Id.* In applying this element of the threshold test, Justice O'Connor assumed that the hospital possessed the requisite market power. *Id.* at 1574.

87. *Id.* at 1572. Justice O'Connor assumed that the hospital substantially threatened to obtain market power over the provision of anesthesia services. *Id.* at 1574.

88. *Id.* at 1575.

89. *Id.* at 1574. Justice O'Connor concluded that the significant benefits produced by the contract, as found by the district court, outweighed its harmful effects. *Id.*

90. *See supra* notes 31-61 and accompanying text.

stantive facts of the case.[91]

The Court continued integration of the rule of reason and the per se rule in its analysis of tying arrangements.[92] By expanding the threshold requirement of the per se test to an inquiry into the probability that the tie-in would create an anticompetitive effect,[93] the Court fashioned an analysis resembling the rule of reason.[94] The Court also required an extensive inquiry into market conditions, similar to that required by the rule of reason, before it would find a per se violation.[95]

The Court questionably applied the per se standard in the *Jefferson Parish* decision. First, the Court found that the hospital's surgical facilities and the anesthesia services constituted two distinct products. In *Times-Picayune*, the Court held that the market demand for both services must be distinguishable for tying to occur.[96] The facts in *Jefferson Parish*, however, indicate a different outcome. It is highly unlikely that patients demanding surgery would forego purchasing anesthesia or that patients would purchase anesthesia without undergoing surgery.[97] The market demands for the two services are congruent and indistinguishable.[98]

The Supreme Court also acted questionably in analyzing the hospital's exclusive contract under a tying arrangement theory. The contract did not contain a clause restricting the hospital to using only those services provided by Roux & Associates. Rather, the hospital voluntarily chose to restrict itself to the services performed by Roux. Like a storeowner

91. *See infra* notes 96-98 and accompanying text.

92. *See supra* notes 31-61 and accompanying text.

93. *See supra* notes 71 & 73 and accompanying text.

94. *See supra* note 13 and accompanying text.

95. The *Jefferson Parish* Court, when applying the per se rule, required a more sophisticated inquiry into the economic aspects of the tying arrangement than did the *International Salt* Court. An examination of market dominance, market demand, and anticompetitive consequences required more analysis than the per se label tended to indicate. *See supra* notes 31-61 and accompanying text. The Court recently noted the blurring of the distinctions between the per se rule and the rule of reason in its *Jefferson Parish* analysis. NCAA v. Board of Regents, 104 S. Ct. 2948, 2962 n.26 (1984).

96. *See supra* note 40 and accompanying text.

97. Because the Court did not consider the hospital to be the buyer of anesthesia services, the hospital necessarily was accountable to patients in the competitive market. While this analysis might promote competition among the anesthesiologists, *see supra* note 14, the contract arguably prohibits patients from individually selecting their anesthesiologist.

98. Under the Supreme Court's approach, the services would be distinguishable if patients were willing to undergo surgery without anesthesia, or if anesthesiology firms could provide anesthesia services independent of the hospital. In the latter case, the anesthesiologist would have to retain his own equipment, supplies, and malpractice insurance.

restricting the brands of goods it wishes to carry, the hospital chose to restrict the "brands" of anesthesiologists it wanted to carry.

The *Jefferson Parish* decision confirms the integration of the rule of reason and per se standards under tying arrangement analysis. The Supreme Court, however, should take notice of the intentions of Congress when applying antitrust laws and not force a tying arrangement characterization where it does not fit.

M. R.