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When making predictions about the future of antitrust law, one can err in one of two directions: making a bold prediction that is provocative but ultimately wrong or making a conservative prediction that proves accurate but safe. In my essay for this symposium in which we are asked to speculate about changes in antitrust law in the next 15 years, I pursue the safe path. I predict that by the year 2025, courts will have ceased calling tying arrangements per se illegal and will evaluate them under a traditional the rule of reason analysis.

In general, trade restraints can violate Section One of the Sherman Act under either per se illegality or rule of reason analysis. The per se rule is reserved for concerted action “that would always or almost always tend to restrict competition and decrease output.”² Per se illegality means that a challenged restraint is condemned because it falls in a prohibited category and not because the particular restraint before the court is unreasonably anticompetitive. When a restraint falls within a per se category, the antitrust plaintiff need not prove that the defendants possess market power or an anticompetitive intent or that the restraint has an anticompetitive effect. The challenged agreement is presumed to unreasonably restrain competition as a matter of law. Furthermore, the defendant may not argue that a legitimate business justification saves an otherwise illegal restraint from condemnation.³

As of the 1960s, per se illegality dominated Section One jurisprudence. Courts condemned horizontal price fixing⁴ and agreements to divide markets as per se illegal.⁵ Vertical price agreements, i.e., resale price maintenance, were per se illegal.⁶ And non-price vertical agreements were condemned as per se illegal as well.⁷

The Chicago School antitrust revolution was largely a response to the overly broad reach of the per se rule. The impact of the Chicago School on antitrust jurisprudence is most clearly seen in the retreat from the per se rule. The trend began in earnest when the Supreme Court held that vertical non-price restraints are not in the per se category.⁸ Later, in two steps, the Court granted resale price maintenance a reprieve from per se illegal treatment. The Court first

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² *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985) (quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979)).

³ *Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1134 (5th Cir. 1977).

⁴ *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

⁵ *U.S. v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

⁶ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁷ *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

⁸ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

held that agreements to fix a maximum resale price should be evaluated under the rule of reason,⁹ then held that all vertical price-fixing agreements fall outside of the per se rule.¹⁰

Despite this trend away from per se illegality, the Supreme Court condemns tying arrangements as per se illegal. This use of the per se moniker has not been uncontested. Most notably, Justice O'Connor, concurring in the judgment in *Jefferson Parish*, argued that "[t]he time has ... come to abandon the 'per se' label" for tie-ins.¹¹ A majority of the Court, however, asserted that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'"¹² Given the high court's mandate, lower federal courts continue to refer to tying arrangements as "per se illegal."¹³

I predict that the Supreme Court will cease claiming that tying arrangements are per se illegal for a number of reasons. First, the label is already inaccurate. Unlike with other claims alleging conduct that antitrust law treats as per se illegal, in a tying case the plaintiff must prove that the defendant has market power over the tying product¹⁴ and that a not insubstantial dollar volume of commerce in the tied product market is affected.¹⁵ Furthermore, while claiming to apply the per se rule, courts allow tying defendants to argue that a legitimate business reason justifies imposing the tie-in.¹⁶ These elements and the defense are inconsistent with true per se illegality.¹⁷ Courts in tying cases have, however, retained the most important aspect of per se rule by "dispens[ing] with proof of anticompetitive effects."¹⁸

Second, the Supreme Court has laid the groundwork for shifting tie-ins out of the per se category. Justice O'Connor's concurrence in the judgment in *Jefferson Parish* advocated abandoning the per se rule against tying in part because the label did not reflect reality.¹⁹ While rejecting Justice O'Connor's call, the *Jefferson Parish* majority provided some basis for reversing the tying per se rule when it noted that the "application of the per se rule focuses on the probability of anticompetitive consequences." Lower courts have invoked *Jefferson Parish* to hold that the tying plaintiffs must prove that "anticompetitive forcing is likely" before a tie-in can be

⁹ *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

¹⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

¹¹ *Jefferson Parish*, 466 U.S. 2, 35 (1984) (O'Connor, J., concurring in the judgment).

¹² *Id.* at 9.

¹³ *In re Sulfuric Acid Antitrust Litigation*, ___ F.Supp.2d ___, 2010 WL 3835869 *26 (N.D. Ill. 2010); *St. Francis Medical Center v. C.R. Bard, Inc.*, 657 F.Supp.2d 1069, 1094 (E.D. Mo. 2009).

¹⁴ *See* *United States v. Loew's, Inc.*, 371 U.S. 38, 47-48 (1962); *Mozart Co. v. Mercedes-Benz of North America*, 833 F.2d 1342, 1345 (9th Cir. 1987) (The *Jefferson Parish* Court "rather than abandoning the per se rule against tying, chose to limit antitrust liability for tie-ins by insisting on a showing of actual market power in the tying product.").

¹⁵ *See Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969); *Station Enterprises, Inc. v. Ganz, Inc.*, 2009 WL 2926572, 2009-2 Trade Cases ¶ 76,737 (E.D.Mich. 2009).

¹⁶ *See, e.g., United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 555-60 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); *Mozart Co. v. Mercedes-Benz of North American, Inc.*, 833 F.2d 1342 (9th Cir. 1987) ("Technically, there is no 'violation' of the Sherman Act if the defendant prevails on a business justification defense.").

¹⁷ Christopher R. Leslie, *Cutting Through Tying Theory with Occam's Razor: A Simple Explanation of Tying Arrangements*, 78 *TULANE L. REV.* 727, 735 (2004).

¹⁸ *Station Enterprises, Inc. v. Ganz, Inc.*, 2009 WL 2926572, 2009-2 Trade Cases ¶ 76,737 (E.D.Mich. 2009).

¹⁹ *Jefferson Parish*, 466 U.S. 2, 34 (1984) (O'Connor, J., concurring in the judgment) ("The 'per se' doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement.").

condemned as per se illegal.²⁰ This is but one step removed from having to prove that the defendant's tie-in *actually* unreasonably injured competition.

Subsequent majority opinions could aid Justice O'Connor's cause. In *Kodak*,²¹ the Supreme Court announced that it would look at the economic realities of a restraint before condemning it. In its outcome, *Kodak* is a pro-antitrust-plaintiff case, but it still provides some ammunition against a per se rule as applied to tying arrangements. For example, the majority noted that "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis..."²² A future Supreme Court opinion could harness this language to justify requiring proof of anticompetitive effects of tie-in under a rule of reason analysis instead of hasty condemnation under a nominal per se rule.

Additionally, some language in *Illinois Tool Works* indicates that the Court may be drifting away from the per se rule condemning tying arrangements.²³ The question before the Court was whether courts should presume that a tying defendant possesses market power in the tying product market when the tying product is patented. The presumption, which the Court rejected, affected only one element in a tying cause of action. The Court, however, hinted that it was reexamining the per se rule against patent tying more broadly.²⁴

Third, lower courts have already moved towards the rule of reason for tying claims. For example, in its *Microsoft* decision, the D.C. Circuit announced that it would apply rule of reason, not per se, analysis to "tying arrangements involving platform software products."²⁵ More important—and more sweeping—are the Second and Fifth Circuits' announcements that they will require proof of anticompetitive effects before condemning tying arrangements as per se illegal.²⁶ This is the equivalent of the rule of reason, since the most important difference between per se analysis and rule of reason analysis is that the former does not require the plaintiff to prove anticompetitive effects.

Fourth, perhaps the most important reason for predicting that the Supreme Court will officially remove the per se label from tying arrangements is that it is the correct thing to do. The per se rule is designed to condemn "only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'"²⁷ The per se rule operates as a conclusive "prediction about what would happen if the court applied a rule of reason to the type of restraint at issue."²⁸

²⁰ See, e.g., *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F.Supp.2d 974 (N.D. Cal. 2010) (discussing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 (1984)).

²¹ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

²² *Id.* at 466-67.

²³ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

²⁴ See, e.g., *id.* at 40 ("This process has ultimately led to today's reexamination of the presumption of per se illegality of a tying arrangement involving a patented product..."); *id.* at 42 ("While the 1988 amendment does not expressly refer to the antitrust laws, it certainly invites a reappraisal of the per se rule announced in *International Salt*.").

²⁵ *U.S. v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001).

²⁶ See, e.g., *E & L Consulting, Ltd. v. Doman Industries Ltd.*, 472 F.3d 23, 31-32 (2nd Cir. 2006); *United Farmers Agents Assn. v. Farmers Insurance Exchange*, 89 F.3d 233, 235 n.2 (5th Cir. 1996).

²⁷ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

²⁸ Christopher R. Leslie, *Tying Conspiracies*, 48 WILLIAM & MARY L. REV. 2247 (2007).

Tying arrangements do not meet this criterion. Many tie-ins are benign.²⁹ The Supreme Court in *Illinois Tool Works* asserted that “[m]any tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market.”³⁰ It is hard to reconcile this observation with the premise of the per se rule that the restraint “would always or almost always tend to restrict competition and decrease output.”³¹

Finally, the per se rule is supposed to be based on judicial experience. The Court has declared that “[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.”³² Yet the Court condemned tying as per se illegal starting in the 1940s³³ without this “considerable experience.” More importantly, the Court has explained that subsequent experience can justify shifting a particular restraint from per se to rule of reason treatment.³⁴ Given the Court’s most recent pronouncement that tying arrangements can be “fully consistent with a free, competitive market,” this newly acquired understanding of the likely competitive effects of tying suggests that per se condemnation is inappropriate.

For these reasons, by the year 2025, the breadth of the per se rule will narrow yet again and federal courts will evaluate tying arrangements under the rule of reason.

²⁹ HERBERT HOVENKAMP, ANTITRUST ENTERPRISE 123 (2006) (“Most tying arrangements are efficient mechanisms for organizing distribution of one’s good or service in order to increase consumer satisfaction, prevent free riding, or meter the use of intellectual property rights.”).

³⁰ *Id.* at 45.

³¹ *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985) (quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979)).

³² *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972).

³³ *International Salt Co. v. U.S.*, 332 U.S. 392 (1947).

³⁴ *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 48-49 (1977) (“In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance.”) (removing non-price vertical restraints from per se condemnation); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (quoting *Continental T.V.* and invoking experience to remove vertical maximum price-fixing from per se category).