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Eric D. Young

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# THE ECONOMIC INTEREST REQUIREMENT IN THE PER SE ANALYSIS OF TYING ARRANGEMENTS: A WORTHLESS INQUIRY

## INTRODUCTION

Tying arrangements<sup>1</sup> have been subject to a rule of per se illegality<sup>2</sup> for the better part of seventy years.<sup>3</sup> During that time, these arrangements have received more attention from the Supreme Court than most other types of antitrust violations.<sup>4</sup>

In condemning tying arrangements under the per se approach, the Court has applied the prohibitions in Section 1 of the Sherman Act<sup>5</sup> and Section 3 of the Clayton Act.<sup>6</sup> Additionally, the Court has applied the prohibitions against any "unfair method[s] of competition" in Section 5 of the Federal Trade Commission Act.<sup>7</sup>

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1. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

2. In the context of tying cases, the per se rule is not, in fact, a traditional per se rule. The defendant in a tying case, unlike other antitrust cases, has the opportunity to rebut the presumptive illegality of the arrangement with a showing of a reasonable business justification. See *infra* notes 40-41 and accompanying text.

3. The Supreme Court first addressed tying arrangements in 1918. See *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918).

4. Since 1918 there have been at least twelve Supreme Court opinions in governmental or private treble damage actions against sellers allegedly employing tying arrangements. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977); *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495 (1969); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922); *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918); see also Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 *Vand. L. Rev.* 283, 283 n.1 (1980) (citing eleven of the Supreme Court decisions).

5. 15 U.S.C. § 1 (1988). The Sherman Act provides in relevant part that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

6. 15 U.S.C. § 14 (1988). The Clayton Act provides, in relevant part, that: [i]t 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 . . . 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 . . . may be to substantially lessen competition or tend to create a monopoly.

*Id.*

7. 15 U.S.C. § 45 (1988); see, e.g., *FTC v. Texaco, Inc.*, 393 U.S. 223, 224 (1968) (applying Section 5 of the FTC Act); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 317 (1966) (same).

There is disagreement over what is required to prove a per se violation.<sup>8</sup> Specifically, while courts agree on four basic elements of a per se violation,<sup>9</sup> they disagree on whether the tying seller must have an economic interest<sup>10</sup> in the sale of the tied product.<sup>11</sup>

8. See ABA Antitrust Section, *Antitrust Law Developments (Second)* 77 (Student ed. 1984).

9. Courts have agreed on the following requirements: (1) two separate products or services are involved, see *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953); (2) a sale or agreement to sell one product or service is "conditioned" on the purchase of another, see *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958); (3) the tying seller has sufficient economic power in the market for the tying product to enable the seller to restrain trade in the tied product market, see *Northern Pacific*, 356 U.S. at 6; *Times-Picayune*, 345 U.S. at 611; and (4) a not insubstantial amount of commerce in the tied product is affected. See *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947); *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969).

Several courts, however, have required additional elements, such as proof of an anticompetitive effect in the market for the tied product, see *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56-57 (2d Cir. 1980); *Shop & Save Food Mkts., Inc. v. Pneumo Corp.*, 683 F.2d 27, 30 (2d Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 844 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976), or actual coercion of the buyers. See *Ogden Food Serv. Corp. v. Mitchell*, 614 F.2d 1001, 1002 (5th Cir. 1980); *Ungar v. Dunkin' Donuts of Am., Inc.*, 531 F.2d 1211, 1218 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

10. A seller has an economic interest in the tied product when the seller receives a profit from the sales of the tied product or from the arrangement with the tying seller. See *infra* note 87.

11. The Courts of Appeal of the Third, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits require that the tying seller have an economic interest in the tied product market. See *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 712 (11th Cir. 1984); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 456 (5th Cir. 1979); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977); *Venzie Corp. v. United States Mineral Prod. Co.*, 521 F.2d 1309, 1317 (3d Cir. 1975); *Crawford Transp. Co. v. Chrysler Corp.*, 338 F.2d 934, 939 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441, 446-47 (4th Cir. 1958); see also *Tying Arrangements* 39 C.P.S. (BNA) A-8 (1989).

The Second Circuit, in contrast, has held that no economic interest need be shown. See *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1517 (2d Cir. 1989).

The Seventh Circuit has indicated that they will maintain a position similar to that of the Second Circuit. See *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 719 (7th Cir. 1987) (*dicta*), *cert. denied*, 110 S. Ct. 141 (1989).

Prior to the Supreme Court's decision in *Jefferson Parish*, the Seventh Circuit had held that a tying seller must have an economic interest in the tied product. See *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.*, 758 F.2d 203, 207 (7th Cir. 1985); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 835 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

In *Parts and Electric Motors*, the Seventh Circuit stated in *dicta* that these cases are controlled by *Jefferson Parish*, which "does not articulate as a prerequisite to a tying violation that there be a substantial danger that the tying seller will acquire market power in the tied product market." *Electric Motors*, 826 F.2d at 718.

It is rare that the tying seller will not have an economic interest in the tied product. In the typical case, a seller ties the sale of product *A* to the purchase of product *B*, both of which he sells. In such situations the economic interest is direct.

Examples of situations where there is no economic interest or where that interest is unclear include the following:

- (1) The tying seller, a low-income housing facility, required its residents to partici-

This Note considers the appropriateness of the economic interest requirement in the per se analysis of tying arrangements. Part I traces the development of tying arrangements and the per se analysis. Part II examines the current controversy regarding the economic interest requirement. Part III argues that the rationales supporting that requirement are inapposite. These rationales focus on one effect of the tie-in—the invasion of the tied product market by the tying seller. While helpful in locating ties that are imposed to invade the tied product market, the economic interest requirement does not further the analysis of the tie's anticompetitive effects. Per se analysis should consider only those elements that establish the high probability of the tie's anticompetitive effects. This Note concludes that when the inquiry appropriately focuses on the adverse effects of the tying arrangement, the tying seller's economic interest in the tied product becomes an irrelevant inquiry.

## I. TYING ARRANGEMENT JURISPRUDENCE

### A. *Tying Arrangement Development*

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product."<sup>12</sup> The Supreme Court first examined tying arrangements in the context of patent infringement.<sup>13</sup> Originally, the Court was fairly lenient with such arrangements under the patent laws,<sup>14</sup> but observed that these arrangements posed a substantial threat to free competition.<sup>15</sup>

The Court's early decisions preceded the Clayton Act and motivated

pate in a mandatory meal program. The facility was barred from subsidizing other projects with income received from the meal program and from earning a profit on the meals. *See Gonzalez*, 880 F.2d at 1515.

The purported purposes for this mandatory meal plan were "to ensure proper nutrition, encourage social interaction and a sense of community, and allow management to identify residents' health problems as they arise." *Id.*

(2) A condominium developer tied the sale of condominium units to a two-year management contract with an unaffiliated company. *See Carl Sandburg Village Condominium Ass'n v. First Condominium Dev. Co.*, 758 F.2d 203, 208-09 (7th Cir. 1985).

(3) The tying seller tied the sale of a restaurant's trademark to the use of a particular contractor to construct the restaurant. *See Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 456 (5th Cir. 1979). The alleged justification for this requirement was that the contractor assisted in developing the plans for the buildings. *See id.*

12. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

13. *See, e.g., IBM v. United States*, 298 U.S. 131, 132 (1936) (tying sale of patented tabulators to sale of unpatented punch cards); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 503 (1917) (tying sales and leases of patented motion picture projectors to sale of films produced by seller); *Henry v. A.B. Dick Co.*, 224 U.S. 1, 8-9 (1912) (patented mimeograph machines tied to sale of unpatented ink and other supplies) (overruled by *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917)).

14. *See Henry*, 224 U.S. at 48-49.

15. After elaborating on the myriad of possible tying arrangements, Chief Justice White stated that patent tying arrangements could tend "to subject the whole of society to a widespread and irksome monopolistic control." *See id.* at 56 (White, C.J., dissenting).

the passage of Section 3 of that Act.<sup>16</sup> The Clayton Act expressly prohibits tying arrangements.<sup>17</sup> After its enactment, the Court viewed tying arrangements with increasing hostility.<sup>18</sup>

The Court's original tying arrangement jurisprudence was directed at limiting the extension of existing monopolies.<sup>19</sup> The early cases applying the Sherman and Clayton Acts<sup>20</sup> appeared to be concerned primarily with preventing transfers or extensions of monopoly power from one market (the tying product market) to another (the tied product market).<sup>21</sup> This underlying concern gave rise to what has become known as

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16. See 51 Cong. Rec. 14095-98 (1914) (remarks of Senator Reed quoting from Chief Justice White's dissent in *Henry*). Senator Reed considered the material he quoted to be a call for Congress to take action to fill the gap that the patent laws left open: "[n]ow the dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind." *Henry*, 224 U.S. at 57 (White, C.J., dissenting) (quoting *Wilson v. Sanford*, 51 U.S. (10 How.) 99, 101-02 (1850)).

17. See *supra* note 6.

18. See, e.g., *Northern Pac. Ry. v. United States*, 356 U.S. 1, 1 (1958) (invalidating tie of land to requirement that buyer transport its goods over seller's rails); *International Salt Co. v. United States*, 332 U.S. 392, 393 (1947) (invalidating tie of patented salt processing machines to unpatented salt); *IBM v. United States*, 298 U.S. 131, 132 (1936) (invalidating tie of patented tabulators to unpatented punch cards); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922) (restrictive clauses requiring lessees of seller's machines to use only its supplies violated antitrust laws); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 503 (1917) (invalidating tie of patented motion picture projectors to unpatented movies); see also *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949) ("Tying arrangements serve hardly any purpose beyond the suppression of competition."); Note, *An Analysis of Tying Arrangements: Invalidating the Leverage Hypothesis*, 61 Tex. L. Rev. 893, 900 (1983) (Court would be "hostile to any tying arrangement").

19. See *supra* note 18 and accompanying text.

20. Originally, two different tests were applied to tying arrangements, depending on the statute applied. See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-09 (1953). Under the Clayton Act, the Court presumed injury to competition if the arrangement had certain effects in the market of either the tying or the tied product. See *id.* (emphasis added). If the challenge was under the Sherman Act, however, the plaintiff would have to show the requisite effect in both markets. See *id.* at 609. In recent years, the two standards have melded into the Clayton Act Standard. See *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 428 (5th Cir. 1978), cert. denied, 444 U.S. 831 (1979); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1214 (9th Cir. 1977); see also *Reisner v. General Motors Corp.*, 511 F. Supp. 1167, 1176-77 (S.D.N.Y. 1981) (elements under both statutes require showing of anticompetitive effect in tied product market), *aff'd*, 671 F.2d 91 (2d Cir.), cert. denied, 459 U.S. 858 (1982).

21. See *United Shoe*, 258 U.S. at 457-58; see also *Times-Picayune*, 345 U.S. at 611 (per se requirements derive from awareness that the vice apt to exist in tying agreements "is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next"); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947) ("[T]he tendency of the [tying] arrangement to accomplishment [sic] of monopoly seems obvious. Under the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop."); *IBM*, 298 U.S. at 139-40 (tying arrangement operated to prevent competition and create monopoly in production and sale of tabulating cards suitable for appellant's machines).

the "leverage" theory.<sup>22</sup> Leverage is the use of monopoly power in one market to influence consumer choice in a second market.<sup>23</sup> The use of the term has created some confusion.<sup>24</sup>

The Supreme Court's original analysis of tying was concerned with leverage as a method to extend monopoly power.<sup>25</sup> The Court recently indicated, in *Jefferson Parish Hospital v. Hyde*,<sup>26</sup> that it would no longer rely exclusively on the extension of monopoly power as grounds to condemn tie-ins.<sup>27</sup> "The tying seller may be working toward a monopoly position in the tied product and, *even if he is not*, the practice of tying" creates anticompetitive effects in the tied product market which are in-

22. See *Times-Picayune*, 345 U.S. at 611; see also Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19, 20 (1957) ("leverage" describes establishment of a new monopoly).

23. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 n.20 (1984). Leveraging is the power of a seller to induce its customers to purchase a second product that would not otherwise be purchased. See *id.* (citing 5 P. Areeda & D. Turner, *Antitrust Law* ¶ 1134a, at 202 (1980)).

24. There are two schools of thought regarding the effect of leverage on tying arrangement jurisprudence. The first argues that a tie-in should be illegal only if leverage is used to enhance the seller's monopoly power in some fashion. See Bowman, *supra* note 22, at 32-34; see also Slawson, *A Stronger, Simpler Tie-In Doctrine*, 25 *Antitrust Bull.* 671, 686-87 (1980) (analyzing Bowman's article). Moreover, Professor Bowman argues that the antitrust laws' sole concern is how much monopoly power exists. Accordingly, he is concerned with a tying arrangement only when it increases the amount of monopoly power. See Bowman, *supra* note 22, at 32-36.

The second school of thought condemns not only the extent of monopoly power, but uses of leverage which have anticompetitive consequences. Professor Slawson contends that Bowman's premise is flawed. See Slawson, *supra*, at 688-89. Slawson argues that "[i]t is *only* particular *uses* of monopoly power that render monopoly power illegitimate . . ." *Id.* at 688.

According to Professor Slawson, even if the tying seller does not intend to invade another market, the tie may have anticompetitive effects. Even assuming that the seller's use of the tie is beneficial, such use "cannot possibly be [the tie-in's] *only* effect" even if it is the seller's only purpose. *Id.* at 690. In the real world, all actions have "innumerable" effects, which should be examined for anticompetitiveness. See *id.* For example, one effect of a tie-in is that "there is *always* at least some lessening of competition, arising from the reductions in buyers' alternatives." *Id.* Therefore, under this view, for the tie to be condemned the seller need not use its leverage to expand its monopoly power. See *id.*

25. See *Times-Picayune*, 345 U.S. at 611.

A number of commentators and economists have argued that it is impossible for the tying seller to use leverage to extend monopoly power. See D. Armentano, *The Myths of Antitrust* 199-203 (1972); R. Bork, *The Antitrust Paradox: A Policy at War with Itself* 365-81 (1978); Bowman, *supra* note 22, at 34-36; Markovits, *Tie-Ins, Reciprocity and the Leverage Theory Part II: Tie-Ins, Leverage, and the American Antitrust Laws*, 80 Yale L.J. 195, 292-93 (1970); Pearson, *Tying Arrangements and Antitrust Policy*, 60 *Nw. U.L. Rev.* 626, 632-34 (1976).

26. 466 U.S. 2 (1984).

27. See *id.* at 13 n.19; see also *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1515-17 (2d Cir. 1989) (after *Jefferson Parish* plaintiff need only prove that tie impairs competition in tied product market); *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 718-19 (7th Cir. 1987) (requirement that there be a threat of market power in tied product market not endorsed as a requisite for a tying violation), *cert. denied*, 110 S. Ct. 141 (1989).

compatible with free competition.<sup>28</sup>

The Court stated that the use of leverage imposes substantial restraints of trade, even if no invasion of a second market occurs.<sup>29</sup> If left unchecked, such leverage could lead to "the existence of power that a free market would not tolerate."<sup>30</sup> The stifling of competition due to the restrictive nature of tying arrangements is, therefore, a sufficient injury to warrant an antitrust violation even if no increase in monopoly power occurs.<sup>31</sup>

### B. *Anticompetitive Effects*

The essential characteristic of an invalid tying arrangement is the seller's use of its market power in the tying product market to force buyers to purchase products they did not want or would have preferred to purchase elsewhere.<sup>32</sup> The principal effect of a tie-in is the "foreclosure" of competition in the tied product market.<sup>33</sup> The tie-in could "either harm existing competitors or create barriers to entry of new competitors in the market for the tied product."<sup>34</sup> However, even though there is an effective foreclosure of competitors from entry into the market, the anti-

28. *Jefferson Parish*, 466 U.S. at 13 n.19 (emphasis added) (quoting *Fortner Enters., v. United States Steel Corp.*, 394 U.S. 495, 512-14 (1969) (White, J., dissenting)); see also *Parts & Elec. Motors, Inc. v. Sterling Elec. Inc.*, 826 F.2d 712, 718 (7th Cir. 1986) (citing *Jefferson Parish*, 466 U.S. at 14).

29. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984).

30. *Id.* (citing *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610, 617 (1977)).

31. See *Northern Pacific*, 356 U.S. at 11; *Jefferson Parish*, 466 U.S. at 9; see also Slawson, *supra* note 24, at 690 (leverage argument "focuse[s] on the seller's purposes rather than the tie-in's effects, which it seems to me, misses the point").

32. See *Jefferson Parish*, 466 U.S. at 12; see also *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958) ("buyers are forced to forego their free choice between competing products"); Bauer, *A Simplified Approach to Tying Arrangements*, 33 Vand. L. Rev. 283, 287 (1980) (tying may "force the buyer either to take goods that it does not want, or to take those goods from a supplier other than the one it might have chosen absent the tie . . ."); Slawson, *A New Concept of Competition: Reanalyzing Tie-In Doctrine After Hyde*, 30 Antitrust Bull. 257, 264 (1985).

33. See Slawson, *supra* note 32, at 264; Bauer, *supra*, note 32, at 288-89.

Additional anticompetitive effects include:

(1) the effect on would-be competitors (barriers to entry into the tied market), see *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 509 (1969); C. Kaysen & P. Turner, *Antitrust Policy: An Economic & Legal Analysis* 157 (1959); Bauer, *supra* note 32, at 288;

(2) effects on buyers (forcing), see *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958); accord *United States v. Loew's, Inc.*, 371 U.S. 38, 44-45 (1962); *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 (1962);

(3) an increase in the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie. See *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610, 617 (1977).

"The foreclosure which any tie-in effects in the markets for both the tying and the tied products is in itself a lessening of competition without more." Slawson, *supra* note 24, at 676. This follows from the fact that "competition is buyer's alternatives." *Id.* at 676. When the alternatives are lessened competition is lessened.

34. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984) (citing *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 509 (1969)). It could also increase the

trust laws are intended to protect competition generally, not individual competitors.<sup>35</sup>

Competition is fostered when buyers have a choice of alternative products of a given type in a market for those particular products.<sup>36</sup> When choices are limited, as when buyers are forced to purchase a particular product, competition in the market for that product is lessened.<sup>37</sup> Additionally, "from the standpoint of the consumer—whose interests the statute was especially intended to serve—the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product . . . ."<sup>38</sup>

The anticompetitive effects of tying arrangements are the same whether or not the seller intends to reap a profit from the arrangement, as these effects are due to the restrictive nature of the arrangements and not the intent of the seller to invade the tied product market.<sup>39</sup>

### C. *Per Se* Analysis

The per se analysis applied to tying law is not the same as a typical antitrust per se analysis.<sup>40</sup> Under a traditional approach, if the plaintiff proves the required elements of the per se rule, the practice in question is conclusively presumed to be an antitrust violation without further inquiry.<sup>41</sup> In contrast, the per se analysis of tying takes the form of a re-

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"social costs of market power." See *id.* at 15 (citing *United States Steel Corp. v. Fortner Enters.*, 429 U.S. at 617).

35. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1296 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1119 (1990); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794 (1st Cir. 1988).

Injury to a particular competitor alone cannot support an antitrust violation. See *Jefferson Parish*, 466 U.S. at 16; *B.C. Recreational Indus. v. First Nat'l Bank*, 639 F.2d 828, 833 (1st Cir. 1981) (quoting *A.D.M. Corp. v. Stigma Instruments, Inc.* 628 F.2d 753, 754 (1st Cir. 1980).

36. See Slawson, *supra* note 24, at 676.

37. See *id.*; The Attorney General's National Committee to Study the Antitrust Laws 145 (1955); Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U.L. Rev. 661, 666-68 (1982); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 Harv. L. Rev. 50, 60-62 (1958); see also *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958) (tie-ins "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market"); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1140 (8th Cir. 1981) (same), *cert. denied*, 457 U.S. 1111 (1982); *W.H. Brady Co. v. Lem Prods., Inc.*, 659 F. Supp. 1355, 1372 (N.D. Ill. 1987) ("[t]he key characteristic of an illegal tying arrangement is . . . anticompetitive 'forcing'").

38. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984).

39. See generally *Penn Galvanizing Co. v. Lukens Steel Co.*, 59 F.R.D. 74, 84 (E.D. Pa. 1973) (Although the tied product is provided by a third party and the tying seller has no interest in the sales of the tied product, "a tie-in requirement still has the same undesirable competitive effects.")

40. See Baldwin & McFarland, *Some Observations on "Per Se" and Tying Arrangements*, 6 Antitrust Bull. 433, 434-35 (1961); Bauer, *supra* note 32, at 285.

41. See Baldwin & McFarland, *supra* note 40, at 435. For example, a traditional per



buttable presumption.<sup>42</sup> If the plaintiff proves the required elements, the tie is rebuttably presumed to be anticompetitive.<sup>43</sup> Unlike traditional per se analyses, however, the defendant may rebut the presumption<sup>44</sup> by showing that the tie falls into one of the categories of business justifications.<sup>45</sup> In addition to showing that there is a legitimate business justification for the tie, the defendant must show that the tie represents the least restrictive means to attain that end.<sup>46</sup> If this showing is sufficient, the tie will be held to be legal.<sup>47</sup>

If the plaintiff is unable to prove the necessary elements under the per

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se approach is applied to price fixing because this practice has very obvious anticompetitive consequences. *See id.* at 439.

42. *See* Comment, *Antitrust: The Second Circuit Sees Double in Construing Tying Arrangements*, 49 Brooklyn L. Rev. 713, 713-14 n.4 (1983).

43. *See supra* notes 40-41 and accompanying text.

44. *See, e.g.,* *Mozart Co. v. Mercedes-Benz, Inc.*, 833 F.2d 1342, 1350-51 (9th Cir. 1987) (tying arrangement was legitimate means of maintaining quality of replacement parts so as to protect reputation of manufacturer of automobiles), *cert. denied*, 109 S. Ct. 179 (1988). "It has been shown that even though the Court says 'per se,' it proceeds to examine the attendant circumstances to determine whether the acts in question constitute violations." Baldwin & McFarland, *supra* note 40, at 439. The authors argue that because the Court does engage in this inquiry they should adopt a strict rule of reason approach. *See id.*; *see also* Slawson, *supra* note 24, at 692 (tie-ins have been permitted upon certain showings of business justifications). *But see* *Miller v. Granados*, 529 F.2d 393, 396 (5th Cir. 1976) (no defenses will be entertained by court).

Such affirmative defenses do not undermine the purpose of a per se rule—to make enforcement easier and to facilitate voluntary compliance—because the burden of proof and persuasion that they impose are only on the defending parties. *See* Slawson, *supra* note 32, at 276. Furthermore, the availability of such defenses makes the application of the rule much fairer to the defendant. *See id.*

45. Examples of business justifications include: (1) development period of a new industry, *see* *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 556-58 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); (2) when separate sales have led to widespread dissatisfaction, *see* *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653, 656 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); or (3) to ensure product quality control in the protection of a trademark. *See* *Susser v. Carvel Corp.*, 332 F.2d 505, 517 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965).

46. *See* *Metrix Warehouse, Inc. v. Daimler-Benz A.G.*, 828 F.2d 1033, 1040 (4th Cir. 1987); *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 739 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1217 (9th Cir. 1977); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 376 (5th Cir. 1977); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 47 (5th Cir. 1976), *aff'd in part, rev'd in part*, 567 F.2d 1316 (5th Cir. 1978) (overruled on unrelated issue by *Copper Liqueur, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983)); *Siegel v. Chicken Delight, Inc.* 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

47. *See, e.g.,* *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 713 (11th Cir. 1984) (showing that tie constitutes necessary device for controlling quality of end product sold to consuming public is a defense); *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 557-58 (E.D. Pa. 1960) (tie allowed that brought new technology to community), *aff'd per curiam*, 365 U.S. 567 (1961).

The *Jerrold* court held that the sale of a cable television system and service contract could be tied because the result would bring a new technology to the community. *See Jerrold*, 187 F. Supp. at 557-58. The court limited this defense in two ways. The defense applies only when implementation of the new technology requires substantial investment in a large undertaking. *See id.* at 560. Second, the court noted that after the system is

se doctrine, the court might still condemn the tie under the rule of reason.<sup>48</sup> The rule of reason requires that the complaining party prove, "on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the [antitrust laws] have been violated."<sup>49</sup> This burden of proof necessarily involves an inquiry into the actual effect of the tie on competition in both the tied and tying markets.<sup>50</sup> Under this approach, the plaintiff has the burden of engaging in a lengthy, expensive and often fruitless search into the effects of the tie on the markets of both the tied and tying industries.<sup>51</sup>

The effect of the rebuttable presumption is that the per se doctrine in the tying context is a burden shifting device: it shifts the burden of proving the anticompetitive effects of the tie to the offending defendant, who

established, restrictions in the service contract would become unreasonable and the tying arrangement would then be illegal. *See id.*

Because of the non-traditional treatment of tying arrangements, arguments have been made that the per se analysis should be discarded in favor of a solid rule of reason approach. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 34-35 (1984) (O'Connor, J., concurring). The advocates of these arguments assert that because there are some, albeit few, ties that do have some limited beneficial effects, a per se analysis would hold them illegal even in light of these beneficial effects. *See id.*; Bays, *Tying Arrangements Should Be Per Se Legal*, 26 Am. Bus. L.J. 625, 661-62 (1988). These arguments, however, overlook the affirmative defenses recognized in the per se approach to tying cases. *See supra* notes 44-47 and accompanying text.

48. *See Jefferson Parish*, 466 U.S. at 29; *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 499-500 (1969); *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203, 1228 (9th Cir. 1982); *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 738 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983); *Jordan's Apparel, Inc. v. Genesco, Inc.*, No. 86-3484 (E.D. Pa. May 26, 1989) (LEXIS, Genfed library, Dist file); *W.H. Brady Co. v. Lem Products, Inc.*, 659 F. Supp. 1355, 1372 (N.D. Ill. 1987); *Williams v. Kleaveland*, 534 F. Supp. 912, 915 (W.D. Mich. 1981); *see also Bauer, supra* note 32, at 341 (tying arrangements are illegal per se, or if the conduct is unreasonable).

49. *Fortner Enters. v. United States Steel Corp.*, 394 U.S. at 500; *see also Jefferson Parish*, 466 U.S. at 29 ("in the absence of per se liability, respondent has the burden of proving that the . . . contract violated the Sherman Act because it unreasonably restrained competition").

50. *See Fortner Enters. v. United States Steel Corp.*, 394 U.S. at 500. It has been noted that "an effective rule of reason would be extraordinarily costly to apply in tying cases." Bays, *supra* note 47, at 626. The range of the inquiry under the rule of reason has been limited from its original pronouncement by Justice Brandeis in *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238-39 (1918). The more current inquiry is "whether the challenged agreement is one that promotes competition or one that suppresses competition." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1978).

51. *See Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

Although Justice O'Connor has argued that the per se approach should be abandoned, *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35 (1984) (O'Connor, J., concurring), the benefit of the per se approach is that the burden of proof placed on the complaining party is significantly less than the rule of reason burden. Under the per se rule the plaintiff must merely prove the various elements. Once these are proven the defendant has the burden of proving the beneficial nature of the tie. *See supra* notes 44-47 and accompanying text. In addition, the offending party has the burden of proving the beneficial aspects of the tie. *See Maywood Sportservice, Inc. v. Maywood Park Trotting Ass'n*, 14 Ill. App. 3d 141, 153, 302 N.E.2d 79, 87 (1973); *infra* note 52 and accompanying text.

must prove that the tie-in has beneficial effects.<sup>52</sup>

The Court's jurisprudence in this area has often been questioned. There has been a barrage of scholarly commentary calling for the abolition of the per se analysis in the tying context.<sup>53</sup> A number of Justices on the Supreme Court have voiced similar sentiments.<sup>54</sup> The Court, however, has consistently upheld the validity of the doctrine.<sup>55</sup> The per se analysis of tying arrangements serves at least two vital functions. First, such a rule avoids the necessity for "incredibly complicated and prolonged economic investigation" by the courts.<sup>56</sup> Second, the per se rules provide an analysis that is both predictable and workable.<sup>57</sup>

## II. ECONOMIC INTEREST REQUIREMENT

The additional requirement under the per se analysis that the tying seller have an economic interest in the tied product first appeared in the Fourth Circuit's decision in *Miller Motors, Inc. v. Ford Motor Co.*<sup>58</sup> The theory behind the economic interest requirement is that the primary threat posed by tying arrangements is the extension of monopoly power.<sup>59</sup> A business entity would never attempt to extend its monopoly power into a tied product market absent an economic interest in the tied

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52. See, e.g., *Mozart Co. v. Mercedes-Benz, Inc.*, 833 F.2d 1342, 1349 (9th Cir. 1987) ("The defendant bears the burden of showing that the case falls within the contours of this affirmative defense."), cert. denied, 109 S. Ct. 179 (1988); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 376 (5th Cir. 1977) (defendant has burden of proving benefit of the tie); *Maywood Sportservice*, 14 Ill. App. 3d at 153, 302 N.E.2d at 87 (after prima facie "tie" of two products or services has been established, the burden of showing a legitimate business reason for the tie shifts to the party attempting to uphold the contract for the sale of the products); Comment, *supra* note 42, at 713 n.4 (if plaintiff alleges per se violation burden shifts to defendant).

53. See, e.g., Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235, 1236-37 (1980) (suggesting that per se rule be abandoned in favor of rule of reason analysis); Baldwin & McFarland, *supra* note 40, at 439 (rule of reason should be applied); Bays, *supra* note 47, at 661-62 (arguing that there might be some beneficial ties and cost to locate these cases would exceed their benefit; thus, although there are greater numbers of harmful ties, it would be economically efficient to legalize all ties to avoid this expensive process); Pittman, *Tying Without Exclusive Dealing*, 30 Antitrust Bull. 279, 295 (1985) (tie-ins not requiring exclusive dealing imposed only on distributors should be legal); Turner, *supra* note 37, at 74-75 (discussing types of cases in which per se rule should be imposed).

54. "The time has . . . come to abandon the 'per se' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have." *Jefferson Parish*, 466 U.S. at 35 (1984) (O'Connor, J., concurring).

55. "It 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.'" *Id.* at 9 (opinion of the Court).

56. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1213 (9th Cir. 1977) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)); see also *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1339 (9th Cir. 1984) (same), cert. denied, 473 U.S. 908 (1985).

57. See *Moore*, 550 F.2d at 1213.

58. 252 F.2d 441, 446 (4th Cir. 1958).

59. See *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514,

product.<sup>60</sup> The plaintiff, therefore, must prove that the defendant has such an interest in the tied product. Most cases that require an economic interest are derived from *Miller*; their arguments follow a predictable stream of citations to precedent, without developing the initial theory.<sup>61</sup> Some decisions have added that this requirement will protect beneficial ties.<sup>62</sup>

The argument against the economic interest requirement is derived from the recent Supreme Court decision in *Jefferson Parish*.<sup>63</sup> In *Jefferson Parish*, the Court discussed the various anticompetitive aspects of tying arrangements and indicated that no extension of monopoly power need occur to condemn these arrangements.<sup>64</sup> A showing that the tying seller has an economic interest in the tied product only identifies the increased likelihood that the seller is attempting to extend its monopoly

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1517 (2d Cir. 1989); *Crawford Transp. Co. v. Chrysler Corp.*, 338 F.2d 934, 939 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Miller Motors*, 252 F.2d at 446.

The *Miller* court stated that "[i]t is not shown that [the tying seller] had any interest in the [tied product] . . . . Ford was not using its economic position as an automobile manufacturer to invade and dominate" the tied product market. *Id.*

In a more recent tying case, the Court of Appeals for the Seventh Circuit explained that "courts have imposed this economic interest requirement because when the seller of the tying goods has no interest in the sale of the tied product, he is not using his power in the tying product market to invade a second market." *Carl Sandburg Village Condominium Ass'n v. First Condominium Dev. Co.*, 758 F.2d 203, 208 (7th Cir. 1985).

Furthermore, the Eastern District of New York stated that "without an economic interest in the tied product there is no danger that the tying seller will acquire market power in the tied product market." *Posa, Inc. v. Miller Brewing Co.*, 642 F. Supp. 1198, 1210 (E.D.N.Y. 1986) (citation omitted).

60. See *Gonzalez*, 880 F.2d at 1517; *Carl Sandburg Village*, 758 F.2d at 208; *Posa*, 642 F. Supp. at 1210.

61. See, e.g., *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 610 (6th Cir. 1987) (relying on *Rickards*); *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1479-80 (9th Cir. 1983) (relying on *Moore*); *Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1454-55 (9th Cir.) (same), *cert. denied*, 464 U.S. 994 (1983); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977) (relying on *Venzie*); *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1317 (3d Cir. 1975) (relying on *Crawford*); *Crawford*, 338 F.2d at 939 (relying on *Miller*).

Little rationale is offered by these courts for applying this requirement. Presumably it is the same as that offered in *Miller Motors*. See, e.g., *Venzie*, 521 F.2d at 1317 (tying seller was not using its "economic position . . . to invade and dominate" tied product market); *Crawford*, 338 F.2d at 938 (defendant contends that "condemned type of tying arrangement involves a seller who not only competes in the tying item's line of commerce but participates for profit in the area of competition to which the tied item belongs").

62. "The absence of a direct interest in the tied product market leaves open the possibility of a nonpredatory justification for requiring sales only through [the third party seller] and distinguishes this situation from the solely anticompetitive arrangements which have been branded as per se antitrust violations." *Venzie*, 521 F.2d at 1317-18; see also *Posa*, 642 F. Supp. at 1210 ("where there is no economic interest in the market for the tied product it is difficult to infer an improper purpose on the part of the tying seller").

63. 466 U.S. 2 (1984). See *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1517 (2d Cir. 1989); *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 718 (7th Cir. 1987), *cert. denied*, 110 S. Ct. 141 (1989).

64. See *Jefferson Parish*, 466 U.S. 2, 13 n.19. For discussion, see *supra* notes 27-30 and accompanying text.

power into the tied product market.<sup>65</sup> It does not, however, show the anticompetitive effects necessary to strike down such arrangements. Discussing *Jefferson Parish*, the Second Circuit stated that “[i]t does not seem . . . that a majority of the Supreme Court has as yet cut back on the application of tie-in doctrine by incorporating this additional requirement into the test for an illegal tying arrangement.”<sup>66</sup>

### III. ANALYSIS OF THE ECONOMIC INTEREST REQUIREMENT

Although adopted by a number of courts, the economic interest requirement serves no significant purpose. The arguments defending the requirement are not compelling and there are a number of arguments opposing such a requirement that are more in line with the underlying motivations of the per se treatment of tying arrangements.

First, a closer analysis of *Miller Motors* reveals that it does not support such a requirement. *Miller* addressed two separate claims: a conspiracy in restraint of trade prohibited by Section 1 of the Sherman Act,<sup>67</sup> and a

65. See *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F.2d 1309, 1317-18 (3d Cir. 1975); *Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441, 446-47 (4th Cir. 1958).

66. *Gonzalez*, 880 F.2d at 1517.

In *Electric Motors*, the Seventh Circuit, in dicta, also discussed the requirement in light of the Supreme Court's decisions. See *Electric Motors*, 826 F.2d at 718. The court stated that the circuit's cases adopting the economic interest requirement are controlled by *Jefferson Parish*. See *id.* The court went on to say that

[*Jefferson Parish*] does not articulate as a prerequisite to a tying violation that there be a substantial danger that the tying seller will acquire market power in the tied product market. . . . the [majority] opinion does not seem to suggest any role for the threat of market power in the tied product market as a factor in the analysis.

*Id.*

When a court increases the requirements necessary to prove a per se violation, the benefits of the per se rule are thwarted. Moreover, when the added requirement does not indicate an increased or decreased probability of anticompetitive consequences due to the tie, the requirement detracts from the value of the rule without producing a commensurate benefit.

67. 15 U.S.C. § 1 (1988); see *Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441, 443 (4th Cir. 1958).

The first claim arose from an arrangement between Ford Motor Company and the Lincoln-Mercury Dealer Advertising Funds (“LMDA’s”). LMDA’s are formed by a group of dealers in a region who pool their money to advertise in that region. See *Miller Motors*, 252 F.2d at 443-44.

*Miller Motors* claimed that Ford entered into an arrangement with several LMDA’s under which Ford collected from each dealer the assessments made by the LMDA and turned the money over to that LMDA. The money would be spent by the LMDA for advertising in the name of the individual dealer or of Lincoln-Mercury dealers generally. See *id.* at 444.

*Miller Motors* claimed that this arrangement was a conspiracy that unreasonably burdened interstate commerce in Lincoln-Mercury automobiles in violation of Section 1 of the Sherman Act. See *id.* at 443.

In the district court, *Miller Motors* also claimed that this arrangement was a tie-in of the sale of advertising with the sale of automobiles in violation of Section 3 of the Clayton Act. See *Miller Motors, Inc., v. Ford Motor Co.*, 149 F. Supp. 790, 793 (M.D.N.C. 1957), *aff’d*, 252 F.2d 441 (4th Cir. 1958). Addressing this claim, the district court stated

tying claim under Section 3 of the Clayton Act.<sup>68</sup> In discussing the first of these claims,<sup>69</sup> the court was not addressing a tying issue, nor did it engage in the typical tying analysis; rather it was addressing plaintiff's claim that Ford was engaged in a conspiracy that unreasonably burdened interstate commerce in Lincoln-Mercury automobiles in violation of Section 1 of the Sherman Act.<sup>70</sup> Therefore, the first part of the opinion, which identified an economic interest requirement, did not even address tying arrangements. Furthermore, when discussing the second claim, which was a tying claim, the court never even mentioned the requirement of an economic interest of the tying seller in the tied product.<sup>71</sup>

Even if the holding in *Miller Motors* did apply to tying arrangements, the holding is unpersuasive. *Miller Motors* and its progeny held that the danger posed by a tying arrangement is the extension of monopoly power created by the tie.<sup>72</sup> Therefore, because a seller will not extend its monopoly power if it does not earn a profit on the sale of the tied product, a requirement of an economic interest is necessary only because it identifies ties that extend monopoly power. The predatory aspects of a tie, the attempted invasion of the tied product market by the tying seller, however, are not the sole reason for their condemnation.<sup>73</sup> Tying arrangements have other anticompetitive effects.<sup>74</sup> All ties result in some harm to competition in the tied product market by restricting existing competitors' sales and by creating barriers to entry for potential competitors in the tied market.<sup>75</sup> In addition, economists have suggested that ties may be used to facilitate price discrimination.<sup>76</sup> Finally, all ties restrict the freedom of tied-product buyers to purchase products based on the merits

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that "Ford . . . is not seeking to enter the field of selling advertising. . . . All of the tying cases . . . discussed . . . involve efforts by a defendant to tie one of his own products to the sale of another of his products—never to the sale of somebody else's product. . . ." *See id.* at 806.

The plaintiff did not raise this issue on appeal, which confined the claims relating to the LMDA to the conspiracy between Ford and the LMDA. *See Miller Motors*, 252 F.2d at 443.

68. 15 U.S.C. § 14 (1988); *see Miller Motors*, 252 F.2d at 443.

69. *See Miller Motors*, 252 F.2d at 443-48.

70. *See supra* note 67.

71. When the court addressed the claim that the franchise was tied to the sale of Ford parts, a legitimate tying claim, the court discussed the traditional tying elements and cited the traditional tying cases. *See Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441, 448-51 (4th Cir. 1958).

In addition, the court in discussing this issue did not articulate any requirement of an economic interest. The court did discuss that Ford had no economic interest in the advertising business. *See id.* at 446. This, however, was in the context of deciding whether the arrangement between Ford and the LMDAs was a conspiracy in restraint of trade. *See id.*

72. *See supra* notes 59-62 and accompanying text.

73. *See supra* notes 27-30 and accompanying text.

74. *See supra* notes 32-39 and accompanying text.

75. *See Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 509 (1969).

76. *See United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610, 617 (1977).

of that product,<sup>77</sup> resulting in a lessening of competition in the tied product market.<sup>78</sup> The economic interest requirement ignores these effects.

A seller's economic interest in the tied product merely indicates the possibility that the seller is motivated by a desire to invade the tied product market.<sup>79</sup> The effects on the tied product market, however, are independent of the seller's motivation to earn a profit from the arrangement.<sup>80</sup> The effect on competition is the same, since the effect is due to the reduction in consumer choices rather than the success of one seller to eliminate the others in the market. Moreover, an economic interest requirement would shield tie-ins that produce these effects from the antitrust laws when the seller of the tied product is not the seller of the tying product.<sup>81</sup> A more appropriate analysis would look to the effects of tying on the tied-product market itself.<sup>82</sup>

The anticompetitive consequences resulting from a tying arrangement are the same regardless of whether the tying seller has an economic interest in the tied product.<sup>83</sup> It is beyond reason, therefore, to condemn only those arrangements in which it is certain that the seller's purpose was to invade the second market.<sup>84</sup>

Additionally, the use of the economic interest requirement to protect tying arrangements justified by a business consideration is inappropriate. The very reason tying arrangements have been held per se illegal is because their restrictive nature creates a high probability of anticompetitive

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77. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984).

78. See *Slawson*, *supra* note 32, at 264.

79. See *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F.2d 1309, 1317-18 (3d Cir. 1975).

80. See *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1517 (2d Cir. 1989); *Penn Galvanizing Co. v. Lukens Steel Co.*, 59 F.R.D. 74, 84 (E.D. Pa. 1973)

81. See *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1480 (9th Cir. 1983).

The court in *Elaine Powers* stated that "[t]he involvement of a third party in a financial transaction . . . may insulate the seller of the tying product from an allegation of restraint of trade in the absence of evidence that the defendant has an economic interest in the sale of the tied product." *Id.*

82. See *Gonzalez*, 880 F.2d at 1517. "[T]he majority in *Jefferson Parish* focused primarily on the anticompetitive effect of tying arrangements and the resultant harm to consumer choice in the tied-product market." See *id.* (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14-15 (1984)); see also *Slawson*, *supra* note 24, at 690 (focusing merely on the purposes of the arrangements misses the point).

83. For example, in *Gonzalez*, if the housing facility were to make a profit from selling the meals, the practice would be illegal in the jurisdictions where an economic interest is required. The adverse effect on competition is due to the restrictions on the buyers' freedom to purchase meals from the provider of their choice. This restriction has the same effect whether St. Margaret's earns the profit from the sales of the meals or a third party earns the profits. See *Gonzalez*, 880 F.2d at 1517.

84. See generally *id.* at 517 (acknowledging that tying arrangements should be condemned even if no invasion of a second market is occurring); *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 718 (7th Cir. 1987) (same), *cert. denied*, 110 S. Ct. 141 (1989).

consequences.<sup>85</sup> This probability does not change depending on who profits from the arrangement.<sup>86</sup> Therefore, when it is proven that a tie exists, the arrangement should be presumed illegal and the burden should be placed on the defendant to prove the beneficial nature of the tie.

If an economic interest requirement is employed to confirm that the tying seller is attempting to invade another market, only a direct financial interest in the tied product should be held to satisfy the requirement. Yet, decisions applying the economic interest requirement have required much less than a direct economic interest.<sup>87</sup> If the economic interest is not required to be direct, the economic interest requirement will not always attain its avowed goals. If the interest is not direct, as for example when the tying seller receives a loan from the seller of the tied product,<sup>88</sup> the tying seller may or may not be intending to invade the second market. The only certain result, therefore, is that application of this requirement increases the burden on the complaining party without returning the benefit it was intended to provide. In addition, because the economic interest need not be direct, it may be difficult to prove.<sup>89</sup> These problems in the application of the requirement thwart the efficiency goals of the per se rule by increasing the burden on the prospective complainant and making it less clear what types of arrangements violate the antitrust laws.

The Supreme Court has never added such a requirement to its analysis. The Court in *Jefferson Parish* refocused the inquiry on the anticompetitive effects of tying arrangements rather than on the tying seller's motivation to invade a second market.<sup>90</sup> This shift confirms the irrele-

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85. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 (1984); *Arizona v. Maricopa County Medical Soc'y.*, 457 U.S. 332, 351 (1982).

86. See *Penn Galvanizing Co. v. Lukens Steel Co.*, 59 F.R.D. 74, 84 (E.D. Pa. 1973).

87. See, e.g., *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1480 (9th Cir. 1983) ("economic interest may take a form other than profit from a direct sale of the tied product by the seller of the tying product").

Examples of economic interest that courts have accepted as sufficient include: (1) receipt of a commission by the tying seller from the tied seller, see *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977); (2) loan from tied seller to tying seller, see *Elaine Powers*, 708 F.2d at 1481; (3) benefit from higher-than-average market price, see *United States v. Mercedes-Benz, Inc.*, 517 F. Supp. 1369, 1378 n.10 (N.D. Cal. 1981); and (4) reducing the losses of the tying seller. See *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1517 (2d Cir. 1989).

88. See *Elaine Powers*, 708 F.2d at 1481.

89. See, e.g., *Gonzalez*, 880 F.2d at 1517 (discussing problems with locating benefit); *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.*, 758 F.2d 203, 208 (7th Cir. 1985) (discussing difficulty in locating benefit in atypical case).

90. "The majority in *Jefferson Parish* does not require any 'economic interest' by the tying seller in the tied-product market." *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1517 (2d Cir. 1989).

"Justice Stevens, therefore, in [*Jefferson Parish*] does not articulate as a prerequisite to a tying violation that there be a substantial danger that the tying seller will acquire market power in the tied product market." *Parts & Elec. Motors v. Sterling Elec., Inc.*, 826 F.2d 712, 718 (7th Cir. 1987), cert. denied, 110 S. Ct. 141 (1989). In *Jefferson Parish* the majority held that the tying seller need not be working towards a monopoly in the tied



vance of economic interest in the Supreme Court's current method of analyzing tying arrangements.

### CONCLUSION

Tying arrangements are considered illegal under the antitrust laws when the requirements of the per se doctrine are met. A per se rule is effective when the requirements are clear and concise, thus providing workable guidelines for the courts and for the parties. Unnecessarily increasing the number of requirements reduces the effectiveness of the antitrust laws in deterring and eradicating anticompetitive arrangements without returning any benefit. Moreover, when those requirements do not address relevant anticompetitive concerns, the result is to deter antitrust complainants.

Whether the tying seller has an economic interest in the tied product is an irrelevant inquiry. The critical question is how the tie-ins affect the tied market, not the tying seller's motivation for imposing the tie.

*Eric D. Young*

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product market. Thus, the predatory nature of tying arrangements is not paramount. "The tying seller may be working toward a monopoly position in the tied product and, *even if he is not*, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market.'" *Jefferson Parish*, 466 U.S. at 13 n.19 (quoting *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 513 (1969) (White, J., dissenting) (emphasis added)).