Kentucky Law Journal

Volume 75 | Issue 3 Article 3

1987

Jefferson Parish and Its Progeny: More Efficient Health Care at What Price?

H. Ward Classen

Jefferson Parish and Its Progeny: More Efficient Health Care at What Price?*

H. WARD CLASSEN**

INTRODUCTION

In response to rising costs and increasing numbers of medical malpractice suits, many hospitals have contracted with independent physician groups for provision of health care services.[1] These physician groups act as independent contractors, thereby lowering the risk of malpractice recoveries against the hospital.[2]

** B.A. Trinity College 1982; J.D. Catholic University 1985. The author would like to express his gratitude to Jeffrey T. Agnor, Esquire, Matthew S. Greenberg, Esquire and Christina L. Smith for their help in preparing this Article.

[1] These contractual arrangements allow the hospital to reduce its malpractice liability by designating the contracting physicians as independent contractors. When sued, a hospital can use the contract as evidence that it did not exercise control over the physician and that it intended the physician to be an independent contractor, thereby exculpating the hospital from liability. *See infra* note 2.

For an in-depth discussion of the use of the independent contractor exception by health care providers, see generally Lisko, *Hospital Liability Under Theories of Respondent Superior and Corporate Negligence*, 47 UMKC L. REV. 171 (1978); Southwick, *The Hospital's New Responsibility*, 17 CLEV. MAR. L. REV. 147 (1968).

[2] A typical contract between a physician group and a hospital would contain the following language:

> 3. STATUS OF CLASSEN SURGICAL GROUP
>
> 3.1 *Existing Staff.* The Hospital acknowledges that the surgeons presently employed by Classen, as identified on *Schedule 1* attached to this Agreement, are fully privileged to practice cardiovascular surgery at the Hospital and that the nursing and other paramedical personnel employed by Classen and comprising the Classen Group are authorized to participate in surgical procedures at the Hospital under the direction of Classen or the surgeons employed by him.
>
> 3.2 *Staff Privileges.* The Hospital recognizes that Classen's expertise in the field of cardiac surgery qualifies him to select and evaluate surgeons for employment as part of the Classen Group and the practice of cardiac

These contractual relationships also allow hospitals to provide more cost-efficient services, lowering the overall expense of health care.[3] In return for staffing a specific hospital department, the physician group usually receives the exclusive right to provide a particular service, such as anesthesiology, laboratory, or emergency services to the hospital's patients.[4] These exclusive con-

---

surgery at the Hospital. Accordingly, upon request by Classen from time to time, the Hospital will grant full surgical privileges to surgeons employed by Classen as part of the Classen Group. Staff privileges for each surgeon presently employed by Classen and for each surgeon employed by Classen in the future will be granted, extended or renewed by the Hospital expressly subject to the condition that the privileges for cardiac surgery shall remain in effect only so long as the surgeon is employed as part of the Classen Group and shall terminate upon termination of such employment.

3.3 *Independent Contractor Status.* Classen and its employees comprising the Classen Group will perform surgical services at the Hospital as provided by this Agreement for the account of Classen and not as employees or agents of the Hospital. Classen shall have the exclusive right to select, retain, terminate, supervise and provide for the remuneration of the employed surgeons and paramedical personnel constituting the Classen Group. Classen and his employees shall act in the capacity of independent contractors (for which purpose the terms of the consultating service arrangement shall be such that Classen and his employees shall be considered independent contractors under the applicable Social Security laws).

[3] Health care costs of the hospital or health care provider can be reduced in several ways. First, administrative costs are significantly reduced. The physician group normally will be responsible for billing the patients, hiring its own staff, maintaining any necessary equipment and managing all other aspects of providing its particular services. Additionally, the physicians will provide their own malpractice insurance.

Second, under many agreements the physician group assumes the risk that the particular service will be underutilized. The physician group will benefit, however, if the particular service is overutilized. For example, if too few patients utilize the hospital's emergency room, the physician group will lose money because the emergency room was overstaffed. If the emergency room is extremely busy, however, the physician group will make an even greater amount of money.

A typical contract includes the following language:

1. GRANT OF EXCLUSIVE PRIVILEGES BY HOSPITAL. The Hospital grants to Classen the exclusive right to perform all vascular surgery and to use heart-lung machines for patients in the Hospital during the term of this Agreement.

2. OBLIGATIONS OF CLASSEN. Classen, individually, and with the services of the Classen Group, agrees to provide all vascular surgery services required by patients in the Hospital.

[4] Because they are "self-contained" specialties, these areas usually are compatible with closed staffing. Unlike a surgery department which might require 40 surgeons to

tracts, however, have come under attack as violating the antitrust laws, specifically those prohibiting "tying arrangements."[5]

The Supreme Court recently addressed these contentions in *Jefferson Parish Hospital District No. 2 v. Hyde*.[6] The Court held that an exclusive contract providing for a physician group to render all medical services required by a health care provider[7]

---

offer a full range of surgical services, a small number of physicians can provide comprehensive services in these areas.

[5] Section 1 of the Sherman Act makes every contract, combination or conspiracy in restraint of trade illegal. It provides:

> 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: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding provision shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1. (1986).

A tying arrangement "ties" two products together so that they may not be purchased separately. Spartan Grain and Mill Co. v. Ayers, 581 F.2d 419 (5th Cir. 1978). For an in-depth discussion of tying arrangements, see REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMISSION 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); Slawson, *A Stronger, Simpler, Tie-In Doctrine*, 25 ANTITRUST BULL. 671, 676-84 (1980); Turner, *The Validity of Tying Arrangements under the Antitrust Laws*, 72 HARV. L. REV. 50, 60-62 (1958).

[6] 466 U.S. 2 (1984).

[7] The term "health care provider" refers to any individual or entity that provides

does not, in and of itself, violate federal antitrust laws.[8] This decision broke new ground by acknowledging the legality of these increasingly utilized physician-hospital contracts[9] and by possibly signaling the end of *per se*[10] scrutiny in tying arrangements.[11] Since the *Jefferson Parish* decision, several important lower court decisions have expanded its reasoning,[12] creating new interpretations which are potentially incompatible with previous rulings.[13] These rulings threaten to create a new niche in antitrust law for health care providers.[14]

This Article briefly examines the development of case law in "tying arrangements." It then explores the *Jefferson Parish* decision, examining both the majority opinion and the O'Connor concurrence. These opinions represent a potential dichotomy among the justices in the proper approach to determine the legality of health care tying arrangements. The Article concludes with a review of subsequent health care antitrust decisions and a discussion of the impact of those decisions.

I. HISTORIC SURVEY OF THE *Per Se* APPROACH TO TYING ARRANGEMENTS

A. International Salt: Per Se Illegality

The United States Supreme Court has long reserved the right to hold certain types of contractual arrangements unreasonable and unlawful.[15] A specific arrangement's character, in and of

---

health care services including physicians, hospitals, and nursing homes, as well as alternative delivery systems such as Health Maintenance Organizations ("HMOs") and Preferred Provider Organizations ("PPOs").

[8] 466 U.S. at 32.

[9] *See infra* notes 68-74 and accompanying text.

[10] Under *per se* scrutiny, courts need not investigate an activity's reasonableness to determine if it violates the antitrust laws. Connecticut Ass'n of Clinical Laboratories v. Connecticut Blue Cross Inc., 324 A.2d 288, 299 (Conn. 1973). *See also infra* note 28 and accompanying text.

[11] *See infra* notes 77-91 and accompanying text.

[12] *See infra* notes 125-42, 148-61 and accompanying text.

[13] *Compare* text accompanying notes 123-61 *infra with* text accompanying notes 15-58 *infra*.

[14] *See infra* notes 163-91 and accompanying text.

[15] *See* United States v. Columbia Steel Co., 334 U.S. 495, 522-23 (1948) (contracts involving price-fixing, refusal to deal with non-members of an association, or licensing of a patented device on condition unpatented materials be used held *per se* illegal).

itself, may be a sufficient ground for determining such a contract to be illegal, without any analysis of the contract's effect on the market.[16] In essence, because such arrangements present a severe risk of suppressing competition, they are *per se* unlawful.[17] Price-fixing arrangements[18] and tying arrangements are two such agreements. In tying arrangements, customers are required to purchase an additional product (the tied product)[19] whenever they buy the tying product. These arrangements are held unlawful because they restrict customers' ability to freely choose their purchases.[20]

---

[16] *See, e.g.*, Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50 (1977) (certain agreements or practices have such a pernicious effect on commerce and lack any redeeming virtue that they are conclusively presumed illegal).

[17] *See* 334 U.S. at 522-23.

[18] Price fixing is the cooperative agreement by competitors regarding prices to be charged to customers. Such behavior is prohibited under the Sherman Act, 15 U.S.C. § 1 (1986). Price fixing can be either vertical (attempting to control resale prices) or horizontal (agreements among competitors). Knuth v. Erie-Crawford Dairy Coop. Ass'n., 326 F. Supp. 48, 53 (W.D. Pa. 1971).

[19] Sales of the tied product correspond directly to sales of the tying product. Because customers purchasing the tying product must also purchase the tied product, a higher absolute price for the tying product results. For in-depth discussions of this relationship see P. AREEDA, ANTITRUST ANALYSIS ¶ 533 (2d ed. 1974); R. POSNER, ANTITRUST LAW 173-80 (1976); Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 25-27 (1957); Burstein, *A Theory of Full-Line Forcing*, 55 NW. U.L. REV. 62, 78-83 (1960); Dam, Fortner Enterprises v. United States Steel: *"Neither a Borrower, Nor a Lender Be,"* 1969 SUP. CT. REV. 1, 15-16; Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROBS. 552, 554-58 (1965); Markovits, *Tie-Ins, Reciprocity, and the Leverage Theory*, 76 YALE L.J. 1397, 1431-59 (1967); Sidak, *Debunking Predatory Innovation*, 83 COLUM. L. REV. 1121, 1127-31 (1983); Stigler, United States v. Loew's, Inc.: *A Note on Block-Booking*, 1963 SUP. CT. REV. 152, 152-54.

[20] *Accord* Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 508-09 (1975); Atlantic Ref. Co. v. FTC, 381 U.S. 357, 369-71 (1965); United States v. Loew's, Inc., 371 U.S. 38, 44-45 (1962); Northern Pac. R.R. v. United States, 356 U.S. 2, 6 (1958). In *Fortner I*, Justice White stated:

> There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who because of their preference for the seller's brand of the first are artificially forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand

The *per se* rule was first utilized in *International Salt Co. v. United States.*[21] In *International Salt*, the defendant, International Salt Company, owned patented canning machines which were technologically superior to all others on the market.[22] The company leased their machines subject to the stipulation that the lessees purchase all salt used in operating these machines from the defendant.[23] The Supreme Court found that these leases violated section 3 of the Clayton Act[24] because when International Salt's patents, providing the necessary market power[25] in

---

> of the first, such tying agreements may work significant restraints on competition in the tied product. 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. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers. In addition to these anti-competitive effects in the tied product, tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line.

394 U.S. at 512-14 (White, J., dissenting) (footnotes omitted).

[21] 332 U.S. 392, 396 (1947). The *per se* doctrine evolved from Motion Picture Patents Co. v. Universal Film Co., 243 U.S. 502 (1917), where the Court held that a tying arrangement would have the effect of enlarging a patent monopoly. *Id.* at 518. *See also* Henry v. Dick Co., 224 U.S. 1, 70-73 (1912) (White, C.J., dissenting) (contracts requiring use of unpatented materials should be *per se* invalid).

[22] 332 U.S. at 396-97.

[23] *Id.* at 394.

[24] 15 U.S.C. § 15 (1986). In enacting § 3 of the Clayton Act, Congress emphasized its great concern about the anti-competitive effect of tying arrangements. *See* H.R. REP. No. 698, 63d Cong., 2d Sess. 10-13 (1914); S. REP. No. 698, 63d Cong., 2d Sess. 6-9 (1914).

[25] As an economic matter, market power exists whenever prices can be raised above those levels which would be charged in a competitive market. *See* United States Steel Corp. v. Fortner Enter., Inc., 429 U.S. 610, 620 (1977); 394 U.S. at 503-04. Market power allows the use of force, i.e., the forcing of an item upon customers that they do not necessarily want to purchase. When such "forcing" is present, competition for sales of the tied item is restrained in the market and the Sherman Act is violated.

> Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public,

the tying product (the machines),[26] were combined with the substantial amount of business from which competitors were foreclosed, a negative effect on competition arose. The Court, therefore, characterized such agreements as *per se* unlawful.[27] The Court declared not only that price fixing was illegal but also that it was *per se* unlawful to foreclose competitors from any substantial markets.[28]

B. Times-Picayune: Move Towards a Rule of Reason Approach?

Times-Picayune Publishing Co. v. United States[29] narrowed the holding in *International Salt*.[30] In *Times-Picayune*, a newspaper with both morning and evening editions, whose only competition was another evening paper,[31] had required advertisers to advertise in both editions.[32] The government, assuming that advertisers would not advertise in both evening papers, contended that this tying arrangement foreclosed the other evening paper from potential business.[33] The Supreme Court found that, because the Times-Picayune did not occupy a dominant position in the market, advertising opportunities of the other paper were not foreclosed.[34] The Court further concluded that the antitrust

---

> acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. . . . By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the 'tied' product would convince freely buyers to select it over others anyway.

Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953).

[26] 332 U.S. at 395-97.

[27] *Id.* at 396-97.

[28] *Id. See generally* 429 U.S. at 620; 394 U.S. at 503-04; 371 U.S. at 45, 48 n.5.

The *per se* approach attempts to avoid a costly and difficult examination of market conditions in situations where the likelihood of anti-competitive conduct is so great that an examination of market conditions is unnecessary. *See, e.g.*, Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 350-51 (1982) (fee schedules establishing maximum fee for physician services held *per se* illegal price fixing).

[29] 345 U.S. 594 (1953).

[30] 332 U.S. 392 (1947).

[31] 345 U.S. at 600.

[32] *Id.* at 596-97.

[33] *Id.* at 599-601.

[34] *Id.* at 611-13.

laws were violated only when the plaintiff could show that the defendant held a monopoly in the tying product and that a substantial volume of commerce in the tied product would be affected.[35]

This decision was a step backward from *International Salt* which held that an antitrust violation existed if either of *Times-Picayune*'s requirements were present.[36] Most important, the *Times-Picayune* Court held there was no tying arrangement because there were not two distinct products as viewed by the public.[37] In essence, the Court retracted its *per se* approach, suggesting instead that the facts of each case should be evaluated independently under a "rule of reason."[38]

C. *Northern Pacific: A Return to Per Se Scrutiny?*

The "rule of reason" approach alluded to in *Times-Picayune* was soon rejected in *Northern Pacific Railroad v. United States*[39] as the Court drifted back toward *per se* scrutiny.[40] In *Northern Pacific*, the Northern Pacific Railroad had sold and leased land adjoining its rail lines with contracts requiring the purchasers or lessees to ship any goods produced on these lands via the railroad.[41] The United States brought suit alleging the railroad was implementing an illegal tying arrangement.[42] The Court's opinion

---

[35] *Id.* at 608-09.

[36] 332 U.S. at 395-97.

[37] 345 U.S. at 613-15. There must be two distinct products for a tying agreement to be present. *Cf.* Standard Oil Co. v. United States, 283 U.S. 163, 176-78 (1931) (no tie-in because "straight run" and "cracked" gasoline not distinct products); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (no tie-in because "virgin" and "secondary" aluminum ingots not distinct products).

[38] *Id.* at 614.

[39] 356 U.S. 1 (1958). *Cf.* Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 278-80 (1934) (*per se* rule applied if any "restraint of competition" shown).

[40] 356 U.S. at 6. *See generally* 345 U.S. at 606; 332 U.S. at 396. *Cf.* United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-59 (1948) (practice of "block-booking" held illegal *per se*); United States v. Griffith, 334 U.S. 100, 105 (1948) (practice need not be intended to restrain trade or build a monopoly to be illegal). The Court, in *Northern Pacific*, reiterated that the only purpose of a tying arrangement is to suppress competition. 356 U.S. at 6.

[41] 356 U.S. at 2-4.

[42] *Id.* at 3-4.

confirmed the *per se* test elucidated in *International Salt*.[43] The Court again declared that the proper standard of illegality required that an entity have sufficient economic power to appreciably restrain commerce in the tied product and that a substantial amount of interstate commerce be affected.[44] In essence, the Court abandoned the standard promulgated in *Times-Picayune* by failing to require any absolute evidence of substantial market power in the tying product market.[45]

The Supreme Court strengthened the *per se* approach to tying agreements in *Fortner Enterprises, Inc. v. United States Steel Corp.*[46] ("*Fortner I*"). In *Fortner I*, the United States Steel Company had offered attractive credit terms and financing to individuals who purchased its prefabricated homes. The plaintiff alleged that these credit terms induced buyers to purchase homes that were over-priced and defective.[47]

The *Fortner I* Court found that United States Steel's offer of one hundred percent financing at below market rates and its large yearly sales in the prefabricated housing market, from which competitors were foreclosed by the tying arrangement, was unlawful.[48] The Court rejected the argument that these attractive credit terms were available through United States Steel's large economies of scale, stating that, if this were true, cost savings should be passed on to the consumer in the form of lower retail prices for the tied product.[49] Because this case was an appeal of the district court's summary judgment award, the Court remanded the case for a determination of United States Steel's market power in the product market.[50]

---

[43] *Id.* at 9-11.

[44] *Id.* at 6.

[45] *Id.* at 11-13.

[46] 394 U.S. 495 (1969).

[47] *Id.* at 496-97.

[48] *Id.* at 497, 500.

[49] *Id.* at 506-09. The Court also rejected the argument that the arrangement involved only a single product. *Cf.* United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947) (fact that defendants constituted a "vertically integrated enterprise" does not remove them from Sherman Act prohibitions); Perma Line Mufflers, 392 U.S. 134, 141-42 (1967) (common ownership of two distinct entities does not relieve defendants of restraints of antitrust laws); Kiefer Stewart Co. v. Seagram & Sons, 340 U.S. 211, 215 (1951) ("common ownership and control does not liberate corporations from . . . anti-trust laws").

[50] 394 U.S. at 497.

Eight years later, the Supreme Court considered whether United States Steel had power in the credit market in *United States Steel Corp. v. Fortner Enter., Inc.*[51] ("*Fortner II*"). The Court narrowed its earlier *Fortner I* holding by requiring the plaintiff to show that United States Steel had "significant" power in the credit market,[52] giving the impression the Court was shifting away from a standard of rigid illegality of tying arrangements.[53] The Court restated, however, adherence to the *per se* rule in even broader terms.[54] The *Fortner II* opinion suggested a new direction, declaring that the purchase requirement was only a prerequisite for the loan.[55] The Court emphasized that the plaintiff had not been forced to accept the favorable credit terms but rather that the low financing had been the most attractive terms United States Steel could offer.[56]

The drift of the United States Supreme Court away from a rigid *per se* scrutiny of tying arrangements has been clearly illustrated by past decisions.[57] The Court continued this progression in *Jefferson Parish Hospital District No. 2 v. Hyde.*[58]

II. THE *Jefferson Parish* DECISION

In 1971, East Jefferson Hospital entered a contractual arrangement with Roux & Associates ("Roux"), a physician group founded by Dr. Kermit Roux.[59] The agreement required Dr. Roux to provide anesthesiology services for the hospital's operating rooms and required the hospital to furnish the space, equipment, support staff, medication, and services necessary to operate the anesthesiology department. Dr. Roux was to have control over the nursing staff of the department. East Jefferson Hospital also agreed to restrict the employment of anesthesiol-

---

[51] 429 U.S. 610 (1977). *Fortner I* litigated the standards to be applied in a motion for summary judgment in a civil antitrust action, but did not examine whether a *per se* violation could be proven.

[52] *Id.* at 619.

[53] *Id.* at 619-20.

[54] *Id.* at 615-17.

[55] *Id.* at 619-22.

[56] *Id.* at 613-17.

[57] *See supra* notes 29-37, 46-56 and accompanying text.

[58] 466 U.S. 2 (1984).

[59] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 5-6 (1984).

ogists solely to those under contract with Dr. Roux for the duration of the agreement.[60]

In 1976, the contract was renewed with an amendment which no longer excluded other anesthesiologists from practicing at East Jefferson. The hospital, on its own accord, however, continued to allow only Dr. Roux and his associates to perform anesthesiology services. This agreement affected two distinct parts of the economy. Patients were not allowed to choose an anesthesiologist when they were treated at East Jefferson and other anesthesiologists were foreclosed from practicing at the hospital.[61]

One year later, Dr. Edwin Hyde, a board certified anesthesiologist, applied for staff privileges[62] at East Jefferson Hospital. The credentials committee[63] and the medical staff executive committee[64] recommended that his application be approved but the hospital board denied him privileges based on the hospital's contract with Dr. Roux. Dr. Hyde sued East Jefferson Hospital and its board of trustees, seeking a declaratory judgment that the contract was illegal and an injunction requiring that East Jefferson grant him staff privileges.[65]

---

[60] *Id.* at 5-6.

[61] *Id.* at 6-7.

[62] Staff privileges constitute the right of physicians to admit their personal patients to a hospital and perform at the hospital any procedures for which the physicians qualify on those patients. The denial of staff privileges has been heavily litigated. As to public hospitals, see Sosa v. Board of Managers of Val Verde Memorial Hosp., 437 F.2d 173 (5th Cir. 1971); Martino v. Concord Community Hosp. Dist., 43 Cal. Rptr. 255 (Cal. 1965); Rosner v. Eden Township Hosp. Dist., 25 Cal. Rptr. 551 (Cal. 1962); Group Health Coop. v. King County Medical Soc'y, 237 P.2d 737 (Wash. 1951). As to private hospitals, see Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Mulvihill v. Julia Butterfield Memorial Hosp., 329 F. Supp. 1020 (S.D.N.Y. 1971); Greisman v. Newcomb Hosp., 192 A.2d 817 (N.J. 1963); Woodland v. Porter Hosp., Inc., 217 A.2d 37 (Vt. 1966). *See generally* Hein, *Hospital Staff Privileges and the Courts: Practice and Prognosis*, 34 FED'N INS. COUNS. Q. 157 (Wint. 1984); McCall, *A Hospital's Liability for Denying, Suspending, and Granting Staff Privileges*, 32 BAYLOR L. REV. 175 (1980).

[63] The credentials committee usually reviews all applications for staff privileges to determine if the physician is professionally qualified to practice at the hospital in question.

[64] The medical staff executive committee usually has authority regarding all aspects of the medical staff. This includes ensuring that the staff physicians maintain their professional qualifications and that they continue to follow hospital guidelines.

[65] 466 U.S. at 5-6. Dr. Hyde brought action under 42 U.S.C. § 1983 and state law

The district court, after a two-day bench trial, dismissed Dr. Hyde's claim, concluding that the anti-competitive effects of the Roux contract were minimal and outweighed by the benefits of improved patient care.[66] On appeal, the United States Court of Appeals for the Fifth Circuit reversed, finding the contract to be *per se* illegal because each person using East Jefferson's operating rooms was denied a choice in anesthesiologists.[67]

The Supreme Court struck down the court of appeals' decision, holding that the hospital's contract with Dr. Roux did not constitute an unlawful tying arrangement.[68] The majority noted that the exclusive anesthesiology contract did not restrain competition among anesthesiologists because there were twenty hospitals in the area and Dr. Roux only had a contract with one.[69] In her concurrence, Justice O'Connor scrutinized the Roux contract under the "rule of reason."[70] She concluded the agreement was legal[71] and appeared to call for the abandonment of *per se* scrutiny in tying arrangements.[72]

III. THE DICHOTOMY OF REASONING

A. Majority: No Antitrust Violation Under Per Se and "Rule of Reason" Analysis

1. *Review Under Per Se Scrutiny*

Jefferson Parish[73] is the first United States Supreme Court decision to hold that a physician-hospital contract granting a physician group the exclusive right to provide all required health care services needed by a hospital's patients conforms to federal

---

as well as the Sherman Act. The former charges, however, were dismissed by the district court.

[66] Hyde v. Jefferson Parish Hosp. Dist. No. 2, 513 F. Supp. 532 (E.D. La. 1981).

[67] Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286 (5th Cir. 1982).

[68] 466 U.S. at 31-32.

[69] *Id.* at 29.

[70] *Id.* at 41-42 (O'Connor, J., concurring).

[71] *Id.*

[72] *Id.* at 35 (O'Connor, J., concurring).

[73] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 4-5 (1984).

antitrust laws. This unanimous verdict[74] is the first to confront this issue and has had a significant impact on the contracting of medical services by health care providers.

Writing for the majority, Justice Stevens declared that the Court was confronted by two issues. The first issue was whether the contract in question was a *per se* violation of federal antitrust laws because each patient undergoing surgery at East Jefferson was required to use a member of the Roux group as his anesthesiologist.[75] The second issue was whether the physician-hospital contract restricted competition among anesthesiologists by foreclosing them from practicing at East Jefferson.[76]

In his opinion, Justice Stevens mandated that the existence of power to coerce the purchase of the tied product is an essential requirement for finding an unlawful tying arrangement.[77] He emphasized that every refusal to sell two products separately is not *per se* unlawful. Central to Justice Stevens' premise was that where the ability to purchase tied products individually exists elsewhere in the competitive market, the selling of products in

---

[74] Although unanimous, there was a concurring opinion written by Justice O'Connor in which Justices Burger, Powell and Rehnquist joined. In addition, Justice Marshall joined with Justice Brennan in a one paragraph concurrence, although each also joined Stevens' majority opinion. *Id.*

[75] *Id.* at 4-5.

[76] *Id.*

[77] *Id.* at 12. *See* Northern Pac. R.R. v. United States, 356 U.S. 1, 7 (1958). Although anesthesiological services are directly dependent on other services provided by the hospital, the Roux contract would not automatically be rejected from being a tying arrangement. Previously, the Supreme Court has found directly dependent and interrelated products to be illegally tied. *See* International Salt Co. v. United States, 332 U.S. 392, 397-98 (1947) (salt machine and salt); Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661, 671 (heating system and stoker switch), *reh'g denied,* 321 U.S. 802 (1944); Morton Salt Co. v. Suppiger Co., 314 U.S. 488, 492-93 (1942) (salt machine and salt), *reh'g denied,* 315 U.S. 826 (1942); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 462-63 (1938) (process patent and material used in the patented process); International Business Mach. Corp. v. United States, 298 U.S. 131, 135 (1936) (tabulators and tabulating punch cards); Carbice Corp. v. American Patents Dev. Corp., 283 U.S. 27, 30 (1931) (ice cream transportation package and coolant); FTC v. Sinclair Ref. Co., 263 U.S. 463, 472 (1923) (gasoline and underground tanks and pumps); United Shoe Mach. Co. v. United States, 258 U.S. 451, 462-64 (1922) (shoe machinery and supplies, maintenance, and peripheral machinery); United States v. Jerrold Elec. Corp., 187 F. Supp. 545, 558-60 (E.D. Pa. 1960) (components of television antennas), *aff'd,* 365 U.S. 567 (per curiam), *reh'g denied,* 365 U.S. 890 (1961). In some situations, the interdependency between the two products may allow the seller to maximize its return on the tying product by charging a higher price to a larger user of the tying product.

a single package is only an attempt to compete effectively.[78] It is therefore important to differentiate between an agreement such as the one between Dr. Roux and East Jefferson and an agreement between a hospital and its patients where the hospital requires that its patients purchase from a physician group like Roux, an agreement which would create a tying arrangement. Justice Stevens differentiated the two types saying that, although the hospital was able to impose the requirement on its patients, Dr. Roux's agreement with East Jefferson only provided for supplying the hospital's needs.[79] He emphasized that tying arrangements are only illegal in the presence of market power,[80] and that a *per se* scrutiny should only be implemented if the existence of force is probable.[81]

Because, under *Times-Picayune*, two distinct and separate products must be present to find a tying arrangement and thus an antitrust violation,[82] Justice Stevens then considered whether two or more products existed.[83] The majority concluded that the hospital did sell two distinct products: hospital and anesthesiology services. The existence of force, however, was not found, an absence which precluded invoking *per se* scrutiny and thus finding an illegal tying arrangement.[84]

Citing a possible basis for implementing the *per se* approach, the majority noted that 30% of the patients in the surrounding area enter East Jefferson possibly because it is the closest hospital. This, however, was not found to be indicative of market power.[85] Justice Stevens' opinion acknowledged that neither East

---

[78] 466 U.S. at 11-12. *See* Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 517-18 (1969) (White, J., dissenting) and 524-25 (Fortas, J., dissenting).

[79] 466 U.S. at 18 n.28.

[80] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613-14 (1953). "Market power" is defined as the ability to force a purchaser to act contrary to how he would have acted in a competitive market. *Id.* at 613-14.

[81] 466 U.S. at 15-16.

[82] *Id.* at 21-25. *See* 345 U.S. at 613-15; Standard Oil Co. v. United States, 283 U.S. 163, 176-78 (1931); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945). *Cf.* Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 278-80 (1934) (publishing journal and obtaining advertising for journal held not separate services).

[83] 466 U.S. at 19.

[84] *Id.* at 23-24.

[85] *Id.* at 26-27.

Jefferson's market share nor market imperfections, such as the existence of third party payments[86] which both reduce competition and can create a lack of adequate knowledge in the marketplace,[87] indicated that the defendant possessed enough market power to find a violation of federal antitrust laws.[88]

The majority opinion declared that tying arrangements were only unlawful when the consumer was forced to make purchases he did not wish to make. Justice Stevens emphasized that a lack of competition in the price or quality of a service does not create or indicate the existence of force.[89] In reaching his decision, Justice Stevens first assumed that every patient undergoing surgery at East Jefferson required the services of an anesthesiologist and then noted that there was no evidence that the hospital had forced anesthesiology services on any unwilling patients.[90] The failure of the record to indicate the presence of force removed any justification for the Court to apply *per se* scrutiny to the Roux-East Jefferson contract.[91]

2. *Review Under the "Rule of Reason"*

Upon determining the inapplicability of *per se* scrutiny, the majority then addressed the Roux contract, using a "rule of reason." The burden was placed upon the plaintiff to demonstrate that the Roux contract unreasonably restrained competition.[92] The majority first defined the relevant market affected by the contract, finding the relevant market not necessarily

---

[86] Third party payments are payments made by private insurers such as Blue Cross and Blue Shield, Medicare, Medicaid, or other insurance groups, in contrast to those made by the individual receiving treatment.

[87] Where market imperfections exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, hence the tie-in may impede competition on the merits. *See* Craswell, *supra* note 5, at 675-79.

[88] 466 U.S. at 27. Congress has found that these market imperfections exist. *See* National Gerimedical Hosp. v. Blue Cross, 452 U.S. 378, 388 n.13, 391-92, 393 n.18; 42 U.S.C. §§ 300k, 300k-2(b) (1986); S. REP. No. 96-96, 96th Cong., 1st Sess. 52-53 (1979); H.R. CONF. REP. No. 96-420, 96th Cong., 1st Sess. 57-58 (1979).

[89] 466 U.S. at 27-28. Although there was some contrary evidence, it was equivocal and the lower courts made no findings of fact.

[90] *Id.* at 28.

[91] *Id.* at 22-29.

[92] *Id.* at 29-31.

synonymous with the market to which East Jefferson Hospital offered services. Justice Stevens did not limit the market definition to a specific geographic area. He noted that the record provided insufficient evidence to prove that the Roux contract, as it operated, unreasonably restrained competition. The record further failed to indicate either that a substantial percentage of patients wanted to negotiate separately for anesthesiology services or that a reasonable number of patients realized they could do so.[93]

In addition, Justice Stevens declared that even if Dr. Roux did not have an exclusive contract with the hospital, patient choices would be restricted by the hospital's inherent right to govern and limit the physicians allowed to practice at the hospital.[94] The majority rejected the contention that limiting patient choice in selecting an anesthesiologist created an adverse effect on competition.[95] Although a small number of patients might have been affected, there was no indication the market as a whole would be. Furthermore, there was no evidence that the price, quality, supply, or demand of hospital or anesthesiological services would be affected.[96] The majority emphasized that the plaintiff had made no showing that the Roux contract foreclosed so much of the market from competing anesthesiologists as to unreasonably restrain competition in the market for anesthesiology services.[97]

B. Justice O'Connor: Tying and Exclusive Dealing Claims Should Receive "Rule of Reason" Scrutiny

In her concurring opinion, Justice O'Connor agreed with Justice Stevens that the Roux contract did not violate federal antitrust laws,[98] but rejected the majority's opinion that the

---

[93] *Id.* at 29-30.

[94] *Id.* at 30.

[95] *Id.*

[96] *Id.* at 31. A contract is illegal if it forecloses a large part of any one market from competition. *See generally* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 325-28 (1961); Standard Oil Co. of California v. United States, 337 U.S. 293, 299-314 (1949).

[97] 466 U.S. at 31-32.

[98] 466 U.S. 2, 33 (1984). Justices Powell, Rehnquist and Chief Justice Burger joined in Justice O'Connor's concurrence.

agreement should be considered under a *per se* approach. Justice O'Connor instead adopted the "rule of reason,"[99] considering it the proper standard regardless of whether the Roux agreement was treated as an exclusive dealing arrangement or as a tying arrangement.[100]

Justice O'Connor argued that application of the *per se* rule in tying cases necessitated an in-depth investigation into the economic effects of the tying arrangement. Thus, that doctrine incurred the high cost of the "rule of reason" scrutiny without achieving its benefits.[101] Her concurrence emphasized that the *per se* doctrine required an "extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial."[102] She also noted that the *per se* doctrine often was misinterpreted by lower courts which omitted the necessary economic analysis.[103]

Justice O'Connor advocated total abandonment of the *per se* label in tying arrangements[104] with the adverse economic effects and potential benefits instead scrutinized under a "rule of reason." Utilization of this rule would subject tying arrangements to the same level of review as other anti-competitive agreements.[105]

---

[99] 466 U.S. at 35. "Tie-ins" usually receive a *per se* analysis while exclusive contracts receive "rule of reason" analysis. *See infra* note 105 and accompanying text.

[100] 466 U.S. at 35 (O'Connor, J., concurring).

[101] *Id.* at 34.

[102] *Id.*

[103] *Id.* at 34-35.

[104] *Id.* at 35.

[105] *Id.* O'Connor stated that by abandoning the *per se* test, tying arrangements would be evaluated under the same standard as all other anti-competitive restraints, except for a few horizontal or quasi-horizontal restraints that lack any economic benefits. She advocated that this would justify the tie-in doctrine as it is now utilized.

O'Connor described tying law as anomolous because similar arrangements are generally evaluated under the rule of reason.

> For example, the "*per se*" analysis of tie-ins subjects restrictions on a franchisee's freedom to purchase supplies to a more searching scrutiny than restrictions on his freedom to sell his products. Compare, e.g., Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47-52 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972), with Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47-59 (1977). And exclusive contracts, that, like tie-ins, require the buyer to purchase from one seller, are subject only to the rule of

Justice O'Connor maintained that under the "rule of reason," tying arrangements should be held unlawful only when they have "a demonstrably exclusionary impact in the tied-product market" or when they abet the harmful exercise of market power by the seller in the tying product market.[106] Justice O'Connor found tying to be economically harmful where market power in the tying product market is used to expand power in the tied product market, but noted that the probability of such a relationship occurring was unlikely unless the markets in question and the nature of the products met three criteria.[107]

First, "the seller must have power in the tying product market."[108] Second, the seller must pose a substantial threat of obtaining market power in the tied market product.[109] Finally, the tying and tied products must be distinct and distinguishable on a "coherent economic basis."[110] The existence of these three conditions, however, does not necessarily indicate that the tying arrangement is unlawful.[111] Justice O'Connor emphasized that these conditions are merely "threshold requirements" in applying the rule of reason to a tying agreement. Once met, the inquiry shifts to focus on whether a tie-in's economic benefits outweigh its adverse impact on competition.[112]

Justice O'Connor assumed that East Jefferson Hospital had market power in providing hospital services in its area and that the hospital would acquire market power by providing anesthe-

---

reason.

Id. at 35 n.2. *See generally* P. AREEDA, ANTITRUST ANALYSIS 735 (3d ed. 1981); R. BORK, THE ANTITRUST PARADOX 372-74 (1978).

[106] 466 U.S. at 35 (O'Connor, J., concurring).

[107] *Id.* at 36-37.

[108] *Id.* at 37. *Cf.* United States Steel Corp. v. Fortner Enter., Inc., 429 U.S. 610, 617-18, 618 n.8, (1977); Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 498-99 (1969); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611 (1953); Standard Oil Co. of California v. United States, 337 U.S. 293, 305-06 (1949); International Salt Co. v. United States, 332 U.S. 392, 396 (1947). *Accord* Atlantic Ref. Co. v. FTC, 381 U.S. 357, 371, *reh'g denied,* 382 U.S. 873 (1965) (oil and rubber companies found to have sufficient market power in tying product).

[109] 466 U.S. at 38 (O'Connor, J., concurring).

[110] *Id.* at 39.

[111] *Id.* at 41.

[112] *Id.* at 41-42.

siological services in the area.[113] She found, however, that the third condition was not met. In her opinion, there was no economic foundation for treating surgery and anesthesia services as separate services, thereby preventing the hospital from acquiring additional market power by tying the sale of these services.[114]

Justice O'Connor argued that, even if the services were distinct products, the tying arrangement did not violate the federal antitrust laws because the arrangement could not increase the seller's market power.[115] Believing it very unlikely that a patient would opt for surgery without anesthesia, Justice O'Connor found the Roux agreement presented little harm to the hospital's patients. On the contrary, she cited many potential benefits of contracting with one physician group.[116] Such an arrangement theoretically ensured more efficient services and facilities while allowing more effective scheduling with around-the-clock coverage. Furthermore, the arrangement permitted the hospital to maintain easily the quality of care, removed the responsibility of selecting an anesthesiologist from the patient, and avoided burdening the hospital with full responsibility for the anesthesiologist.[117] In short, Justice O'Connor determined that there were substantial benefits in contrast to slight drawbacks.[118]

Upon concluding that an illegal tying agreement was not present, Justice O'Connor briefly examined the potential existence of an exclusive dealing contract. As had the majority, she utilized a "rule of reason" approach in examining the Roux contract as a potential exclusive dealing contract,[119] citing *Standard Oil Co. v. United States*,[120] which held exclusive dealing contracts unlawful only when a significant amount of purchasers and sellers were prevented from entering the market.[121] In the situation before the Court, however, Justice O'Connor deter-

---

[113] *Id.* at 42.
[114] *Id.* at 43.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 43-44.
[118] *Id.* at 43.
[119] *Id.* at 44-47.
[120] 337 U.S. 293 (1949).
[121] 466 U.S. at 45. *See* 337 U.S. at 299-314.

mined that only a small part of the potential market was foreclosed to other anesthesiologists because there were twenty hospitals in the area with only one, East Jefferson, closed to them.[122]

IV. THE PROGENY OF *Jefferson Parish*

Since *Jefferson Parish*, several decisions have interpreted and expanded upon the Supreme Court's reasoning.[123] Most have relied heavily upon the Court's determination that exclusive employment agreements do not necessarily constitute or result in forced tying arrangements.[124]

One of the first post-*Jefferson Parish* cases was *Ezpeleta v. The Sisters of Mercy Health Corp.*,[125] where an anesthesiologist whose staff privileges had been terminated sought reinstatement and monetary compensation.[126] In support of her claim, she alleged that the hospital engaged in an illegal tying arrangement, because the performance of surgery was tied to receiving anesthesiology services from those physicians who had exclusive practice privileges at the hospital.[127]

The *Ezpeleta* court found that because the hospital lacked the 30% market share present in *Jefferson Parish*, the hospital's actions were not *per se* illegal.[128] The plaintiff's argument was found unpersuasive because it mistakenly focused on the effect of the hospital's exclusive service contract on the plaintiff and not on the patients in the market or on other competing anesthesiologists.[129]

In addition, the court declared that the exclusive service contract did not unreasonably restrain competition among anesthesiologists. It ignored the plaintiff's demonstration of her lost income and apparent inability to practice anethesiology at other area hospitals.[130] Although admitting that the plaintiff had suf-

---

[122] 466 U.S. at 45-46.

[123] *See infra* notes 125, 132, 148, 190 and accompanying text.

[124] *See supra* notes 74-97 and accompanying text.

[125] 621 F. Supp. 1262 (N.D. Ind. 1985), *aff'd*, 800 F.2d 119 (1986).

[126] *Id.* at 1266-67.

[127] *Id.* at 1267.

[128] *Id.* at 1269.

[129] *Id.* at 1268-70.

[130] *Id.*

fered because of defendant's actions, the court concluded that nothing demonstrated that economic injury had been suffered by either the hospital's patients or other anesthesiologists.[131]

The relatively small market share possessed by the hospital in *Ezpeleta* made the court's decision relatively easy to reach. In *McMorris v. Williamsport Hospital*,[132] however, a court was confronted with a hospital that had a 55-60% share in the relative market.[133] In *McMorris*, a physician, Dr. McMorris, brought an action against Williamsport Hospital and its Board of Trustees challenging the hospital's right to remove him as director of its radiology department.[134] Dr. McMorris further questioned the hospital's ability to offer another physician the exclusive right to provide all radiological services at the hospital.[135]

The facts indicated that other physicians at the hospital had ordered nuclear tests and requested that Dr. McMorris interpret the results.[136] Dr. Gouldin, who had exclusive privileges at the hospital, however, denied these requests, stating that "it was her department" and she alone would interpret any results.[137] Dr. McMorris asserted that this arrangement constituted an illegal tie-in because the hospital forced its nuclear medicine patients to purchase Dr. Gouldin's services, and thus restrained competition among nuclear medicine physicians in the relevant market.[138]

The court recognized the importance of the fact that physicians at the hospital had requested that Dr. McMorris interpret the results of the tests they ordered and that the physicians stopped requesting Dr. McMorris's services because of Dr. Gouldin's exclusive contract.[139] Evaluating the antitrust implications,

---

[131] *Id.* at 1270.

[132] 597 F. Supp. 899 (M.D. Pa. 1984).

[133] *Id.* at 913.

[134] *Id.* at 908-09.

[135] *Id.* at 908.

[136] *Id.* at 908 n.5.

[137] *Id.*

[138] *Id.* at 910-11.

[139] *Id.* Although this was not a determining factor, the court did find it to be significant enough to discuss it in a footnote. *See supra* notes 136-37 and accompanying text.

the court first determined that the hospital possessed a 55-60% market share with respect to nuclear medicine procedures.[140] Further, certain procedures were performed only at Williamsport Hospital.[141] As a result of these findings, the *McMorris* court held that there was enough evidence potentially to find an illegal tying arrangement.[142]

The court acknowledged that many factual dissimilarities with *Jefferson Parish* made the existence of an illegal tying arrangement an extremely close question.[143] Unlike *Jefferson Parish* where patients received separate bills for the hospital's services and the anesthesiologist's services,[144] Williamsport Hospital did not bill its patients separately for Dr. Gouldin's services.[145] Furthermore, Dr. Gouldin received a salary from the hospital.[146] The court concluded that these factors weighed against finding that Dr. Gouldin's and the hospital's services were distinct products, which prevented granting the defendants a summary judgment.[147]

In *Konik v. Champlain Valley Physician's Hospital*,[148] the United States Court of Appeals for the Second Circuit rejected a challenge to a physician-hospital contract by a competing group of physicians,[149] justifying its decision on the *Jefferson Parish* holding.[150] Central to the court's conclusion was the premise that a hospital has the right to determine which physicians may practice at the hospital.[151]

Konik involved a physician who challenged the removal and subsequent denial of her practice privileges at Valley Physician's Hospital.[152] Dr. Konik had been a member of a physician group

---

[140] *Id.* at 912-13.
[141] *Id.* at 913.
[142] *Id.*
[143] *Id.* at 912.
[144] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 22 (1984).
[145] 597 F. Supp. at 912.
[146] *Id.*
[147] *Id.*
[148] 733 F.2d 1007 (2d Cir. 1984), *cert. denied,* Konik v. Champlain Valley Physicians Hospital Medical Center, 469 U.S. 884 (1984).
[149] *Id.* at 1009.
[150] *Id.* at 1007-08.
[151] *Id.* at 1014-15.
[152] *Id.* at 1009.

which had the exclusive right to provide anesthesiology services at the hospital. After resigning from the physician group over personal differences, Dr. Konik attempted to negotiate her own contract with the hospital.[153] The hospital offered Dr. Konik the same contract it had with the physician group, but Dr. Konik rejected it. The hospital then denied Dr. Konik anesthesiology privileges at the hospital, but allowed her to retain her senior staff privileges.[154]

Dr. Konik alleged that the hospital tied the use of its operating facilities to the purchase of anesthesiology services from the physician group.[155] The court held that under its interpretation of *Jefferson Parish*, the hospital's operating facilities and anesthesiology services were separate services. The court acknowledged that the hospital required patients using its operating facilities to purchase anesthesiology services from an anesthesiologist licensed at the hospital.[156] In rejecting the plaintiff's claims, however, the court noted that the hospital had not limited practice privileges solely to members of the physician group, as evidenced by the contract it had offered Dr. Konik.[157] The court emphasized that the hospital was simply limiting practice privileges to those with whom it had contracted and recognized that under *Chicago Board of Trade v. United States*,[158] every contract excluded, at least to some degree, those who were not parties to it.[159]

The court differentiated *Konik* from *Jefferson Parish* in that, in *Jefferson Parish*, East Jefferson Hospital had a closed anesthesiology department with only one physician group allowed to practice at the hospital.[160] Thus, the court declared that the circumstances in *Jefferson Parish* which led the United States

---

[153] *Id.* at 1010-11. All physicians holding anesthesiology staff privileges at the hospital were shareholders or employees of the physician group, even though the group did not have a formal contract with the hospital.

[154] *Id.* at 1011.

[155] *Id.*

[156] *Id.* at 1017-18.

[157] *Id.*

[158] 246 U.S. 231 (1918). "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Id.* at 238.

[159] 733 F.2d at 1014-15.

[160] *Id.* at 1018.

Supreme Court to find a tying arrangement did not exist in *Konik*.[161]

V. *Jefferson Parish* AND ITS PROGENY: POSITIVE RESULTS WITH POTENTIALLY BROAD IMPLICATIONS

As a continuation of efforts to set forth a workable integration of previous United States Supreme Court decisions,[162] *Jefferson Parish* reaffirms those decisions while breaking new ground. The Court's decision in *Jefferson Parish* guarantees physician groups the right to have an exclusive contract with a hospital while recognizing the public's interest in receiving cost-efficient health care.[163] The Court's enumeration of guidelines will enable subsequent courts and health care providers to more effectively and efficiently assess the antitrust laws as they relate to the health care industry. *Jefferson Parish* is the logical conclusion to earlier decisions because it acknowledges the importance of both the antitrust laws and more cost-efficient health care.

The Supreme Court's recognition of the need for more efficient health care is important. The delivery of health care in the United States is presently beset by runaway costs and expenditures.[164] While many people cannot afford necessary health care, the government is reducing its health care expenditures.[165]

---

[161] *Id.*

[162] *See supra* notes 29-37, 46-56 and accompanying text.

[163] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29-32, 31 n.52, 43-44 (1984).

[164]

National Health Expenditures

Year	Total *(bil.)*	*Per Capita*	*% of GNP*
1960	$ 26.9	$ 146	5.3
1965	41.9	207	6.1
1970	75.0	350	7.6
1975	132.7	591	8.6
1980	248.0	1,049	9.4
1983	355.1	1,461	10.7
1984	387.4	1,580	10.6

Statistical Abstract of the United States 96 (1986).

[165] Total government expenditures for Medicare were reduced 1% effective March 1, 1986. H.R.J. RES. 672, 99th Cong., 2d Sess. (1986) (ratifying and affirming Seques-

In order to ensure delivery of high quality, cost-efficient health care in the United States, expenses must be reduced. One possible solution is to grant health care providers more autonomy.

Health care providers should be encouraged to provide the most cost-efficient health care. By allowing an institutional provider, such as a hospital, to determine the method of providing the most efficient health care, the Court will ensure that health care providers seek the most favorable means of doing so. Health care providers must be allowed to operate in the manner they see necessary to avoid the ills of socialized medicine. Arguably, hospitals presently do not have total self-autonomy and have little incentive to operate more efficiently. Much of the federal reimbursement of hospitals in the past for delivering health care has been on a "state" or "hospital" specific basis.[166]

Closed staffing of certain departments of a hospital allows a hospital to act more efficiently.[167] Administrative costs are reduced because a limited number of people hold practice privileges. Furthermore, the hospital can maintain quality control by carefully supervising those few physicians granted practice

---

tration Report for Fiscal Year 1986—A Joint Report to the Comptroller General of the United States, 51 Fed. Reg. 1917, 1934 (1986)). As the government comes to grips with a shrinking budget, federal spending on health care will be reduced further.

[166] *See, e.g.*, 49 Fed. Reg. 34,728 (1984). *See also* 42 C.F.R. § 405.401 *et seq.* (1985) (stating principles of reimbursement to hospital-based physicians).

[167] In the words of Justice O'Connor:

> The tie-in improves patient care and permits more efficient hospital operation in a number of ways. From the viewpoint of hospital management, the tie-in ensures 24 hour anesthesiology coverage, aids in standardization of procedures and efficient use of equipment, facilitates flexible scheduling of operations, and permits the hospital more effectively to monitor the quality of anesthesiological services. Further, the tying arrangement is advantageous to patients because, . . . the closed anesthesiology department places upon the hospital, rather than the individual patient, responsibility to select the physician who is to provide anesthesiological services. The hospital also assumes the responsibility that the anesthesiologist will be available, will be acceptable to the surgeon, and will provide suitable care to the patient. In assuming these responsibilities—responsibilities that a seriously ill patient frequently may be unable to discharge—the hospital provides a valuable service to its patients. And there is no indication that patients were dissatisfied with the quality of anesthesiology that was provided at the hospital or that patients wished to enjoy the services of anesthesiologists other than those that the hospital employed.

466 U.S. at 43-44.

facilities at a hospital. This is especially important in those specialties in which only a few physicians are needed to staff a particular department. As long as closed staffing protects the interest of the public, exclusive contracting by health care providers should be respected.

The continued increase in health care costs should encourage the courts to reconsider their present treatment of health care providers under the antitrust laws. If more efficient low-cost health care can be delivered in contravention of the antitrust laws, consideration should be given to granting a limited exemption to health care providers. In *Jefferson Parish*, the United States Supreme Court seemed to recognize the possibility of such an exemption by emphasizing the importance of delivering high quality cost-efficient health care. Presently, professional baseball enjoys a judicially-created exemption from the antitrust laws.[168] Health care providers arguably should be granted a limited exemption similar to professional baseball's in certain situations. If such an exemption were found unsuccessful in reducing health care costs, it could easily be revoked. Courts must not look for a quick solution but rather a long term plan to provide low-cost quality health care.

The *Jefferson Parish* decision is a logical place to start. Previous court decisions simply have defined the standards to which health care providers must conform. These standards have not addressed the problems confronting the health care industry today. More action is needed in the area of providing affordable health care to all citizens. This goal can be accomplished through judicial review of the economic effects of any potential antitrust violation. Justice O'Connor's concurrence took such a step in utilizing a "rule of reason" analysis to exclusive contracts and

---

[168] *See* Flood v. Kuhn, 407 U.S. 258, 282-85 (1972) (reluctantly upheld exemption on ground that Congress, not the Court, should remove it); Toolson v. New York Yankees, 346 U.S. 356, 357, *reh'g denied*, 346 U.S. 917 (1953) (upheld exemption on ground that only Congress should remove it); Federal Baseball Club v. National League, 259 U.S. 200, 209 (1922) (created "exemption" on Court's finding that professional baseball is not a part of interstate commerce). *See also* L. LOWENFISH & T. LUPIEN, THE IMPERFECT DIAMOND 88, 91, 105, 212 (1980); Jacobs and Winter, *Antitrust Principles and Collective Bargaining of Athletes*, 81 YALE L.J. 1, 21-28 (1971); Morris, *In the Wake of Flood*, 38 LAW & CONTEMP. PROBS. 85, 85 n.1, 87-93 (1973); Note, *Superbowl and the Sherman Act*, 81 HARV. L. REV. 418, 418 n.5, 420-26 (1967).

calling for the abandonment of the *per se* approach.[169] This is the proper direction in which advancement is needed.

The lower courts should recognize the importance of cost efficiency and attempt to implement Justice O'Connor's call for the abandonment of the *per se* approach. This abandonment would be extremely beneficial in lowering the cost of health care. Alternative delivery systems such as Health Maintenance Organizations[170] ("HMOs") and Preferred Provider Organizations[171] ("PPOs") can reduce health care costs greatly, but their potential is extremely limited by the present antitrust laws.[172]

---

[169] 466 U.S. at 35 (O'Connor, J., concurring).

[170] As a result of rising health care costs, Health Maintenance Organizations ("HMOs") have become widely accepted. HMOs provide unlimited health care for covered services to the enrollee for a set fee during the term of contract. The HMO, in turn, contracts with physicians to deliver this comprehensive health care service for a fixed fee, in contrast to a fee-for-service basis. The prospective patient's choice of physicians is limited, however, to those physicians who are members of the HMO's network. By contracting with a limited number of physicians for reduced fees, the HMO is able to substantially lower the cost of providing health care. *See generally* 42 U.S.C. § 300e (1982); Bovbjerg, *The Medical Malpractice Standard of Care: HMOs and Customary Practice*, 1975 DUKE L.J. 1375, 1375-78; LUFT, HEALTH MAINTENANCE ORGANIZATIONS: DIMENSIONS OF PERFORMANCE, 5-6, 17 (1981).

[171] Preferred Provider Organizations ("PPOs") provide an alternative for those individuals who desire the lower costs of HMOs but are dissatisfied by their restricted choice of physicians. PPOs contract with third party payors such as employers and insurance companies to provide health care. Hospitals and physicians that participate in a PPO agree to deliver specific health care services at fixed reduced fees in return for becoming preferred providers. PPOs benefit both the physician and patient as the physician receives a fee for service payment and the individual's choice of physician is not limited. *See generally* Preferred Provider Organizations (J. Waxman ed. 1984).

Another alternative system closely related to HMOs is an Individual Practice Association ("IPA"). An IPA also contracts with individual physicians to deliver services in accordance with the IPA-HMO contract. The physician is paid on a fee-for-service basis and the prospective patient has the choice of physician. IPAs are a novel idea, however, in that the physician bears part of the risk of overutilization of the IPA but also participates in any savings from underutilization. *See generally* LUFT, HEALTH MAINTENANCE ORGANIZATIONS: DIMENSIONS OF PERFORMANCE, 5-6, 17 (1981).

[172] PPOs have been closely scrutinized for potential antitrust violations. The United States Supreme Court established guidelines for PPOs in Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982). In *Maricopa*, a group of physicians collectively developed a relative value scale and a maximum fee schedule for services to subscribers. The Supreme Court held this pricing mechanism *per se* illegal. *Id.* at 356-57. Furthermore, the Federal Trade Commission ("FTC") has issued a number of letter rulings further limiting the actions of PPOs. *See, e.g.*, FTC Letter of March 17, 1986; Health Care Management Assoc. Advisory Opinion, 3 Trade Reg. Rep. (CCH) ¶ 22,036 (1983).

Although the *Jefferson Parish* decision is praiseworthy, the risk exists that the rights of some physicians and members of the allied health professions will be subordinated in the name of economic efficiency. *Jefferson Parish* has been cited in numerous opinions for denying members of allied health professions practice privileges at hospitals.[173] One of these, *Kaczanowski v. Medical Center of Vermont*,[174] involved a group of licensed podiatrists who alleged that the hospital had violated federal antitrust laws by denying them staff privileges.[175] The court concluded, however, that the hospital's denial was not an illegal restraint of trade.[176] The Court declared that there was insufficient factual evidence to provide a legal justification for applying the *per se* rule to the plaintiffs' claims.[177] Finding no evidence that other members of the professional staff were furthering their own interests in denying the podiatrists' applications for staff privileges, the court rejected the podiatrists' claims.[178]

The *Kaczanowski* court's use of *Jefferson Parish* to justify its decision is an improper application of the United States Supreme Court's reasoning. *Jefferson Parish* should not be used to justify inter-professional differences in the health care field. Podiatrists and other allied health professionals, like medical doctors,[179] still deserve the protection of the antitrust laws. The antitrust laws afford necessary protection to both the allied

---

[173] *See* Weiss v. York Hosp., 745 F.2d 786, 823 (3d Cir. 1984), *cert. denied,* 470 U.S. 1060 (1985) (osteopath); Chiropractic Coop. Ass'n of Mich. v. American Medical Ass'n, 617 F. Supp. 264, 269 (D.C. Mich. 1985) (chiropractors); Machovec v. Counsil for Nat'l Register of Health Service Providers in Psychology, Inc., 616 F. Supp. 258, 270 (E.D. Va. 1985) (psychologists); Kaczanowski v. Medical Center of Vt., 612 F. Supp. 688, 693 (D. Vt. 1985) (podiatrists); Cooper v. Forsyth County Hosp. Auth., Inc., 604 F. Supp. 685, 688 (M.D.N.C. 1985) *aff'd,* 789 F.2d 278 (4th Cir.) (podiatrists), *cert. denied,* 107 S. Ct. 474 (1986).

[174] 612 F. Supp. 688 (D. Vt. 1985).

[175] *Id.* at 690-91.

[176] *Id.* at 697.

[177] *Id.* at 693.

[178] *Id.* at 695.

[179] Podiatrists, chiropractors and other similar health care professionals receive advanced training in addition to a college education, usually lasting two years. Although these individuals are addressed as "doctor" they are not medical doctors. They are, however, usually licensed by the state in which they practice. *See infra* note 180 and accompanying text.

health professionals and those consumers that can benefit from their services.

As with most other professionals, allied health professionals are licensed by the states and must meet a minimum level of competency.[180] As competition in the health care field increases, health care providers will attempt to ensure their own financial well being. Each group should be subjected to competition from other types of health care providers. Increased competition will only lower the cost of health care in the United States and benefit consumers.

Arguably, there is potential for some health care professionals to deliver services for which they are unqualified. Numerous individuals who are not familiar with the differences among medical doctors, podiatrists, chiropractors, and others could potentially be the victims of the unauthorized practice of medicine. Although this possibility exists, it does not justify stifling inter-professional competition. All states have laws both requiring the licensing of health professionals and forbidding the unauthorized practice of medicine.[181] The probability of unauthorized treatment remains quite remote. The risk of the unauthorized practice of medicine is small in light of the large economic benefits to be derived from increased competition among all health professionals.

The impact of *Jefferson Parish* and its progeny will be felt not only among the allied health professions but also among those physicians who are excluded from practicing at various hospitals. Their rights should not be ignored totally. As the number of physicians continues to increase, it is only natural that competition among physicians will increase and salaries will fall.[182] The antitrust laws were created to increase competition;

---

[180] *See, e.g.*, MD. HEALTH OCC. CODE ANN. §§ 2 (audiologists), 3 (chiropractors), 4.5 (dieticians), 5 (electrologists), 7 (nurses), 9 (occupational therapists), 13 (physical therapists), 15 (podiatrists), 16 (psychologists) and 19 (speech pathologists) (1986).

[181] *Id.*

[182] The number of medical degrees that have been granted continues to increase. In 1950, 5,612 medical degrees were conferred, 7,032 in 1960, 7,304 in 1965, 8,314 in 1970, 12,447 in 1975, 14,902 in 1980, 15,814 in 1982, and 15,484 in 1983. *Statistical Abstract of the United States* 160 (1986). In certain geographical areas of the United States there is already an over-abundance of physicians.

theoretically benefiting the consumer and the economy through the efficient delivery of health care services. Without the protection afforded by the Sherman Act[183] and the Clayton Act,[184] the risk exists that the rights of some physicians will be slighted in order to achieve cost efficient health care.

In *Jefferson Parish*, the Supreme Court noted the rule applied to the alleged antitrust violations in *Times-Picayune*,[185] *International Salt*,[186] and *Northern Pacific*,[187] but failed to address the dissimilarities. In *International Salt* the Court was concerned with patented machinery[188] and in *Northern Pacific* the Court addressed shipping goods on railroads.[189] In *Jefferson Parish*, however, the Court was confronted with an individual's right to work. These differences reflect upon the *Jefferson Parish* Court's application of *International Salt* and *Northern Pacific*. *International Salt* and *Northern Pacific* taken together provide the foundation of the *Jefferson Parish* Court's decision to allow exclusive contracts between physician groups and health care providers. The misinterpretation of these prior cases, however, potentially exposes the Court's decision to criticism as being founded on faulty reasoning.

Although the influence of *Jefferson Parish* on the interpretation of the antitrust laws is uncertain, several conclusions may be surmised. Of primary importance, black letter law appears to have been created regarding exclusive contracts and closed staffing as it relates to hospitals.[190] First, to successfully challenge an

---

[183] 15 U.S.C. § 1 *et seq.* (1986).

[184] 15 U.S.C. § 12 *et seq.* (1986).

[185] Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1952).

[186] International Salt Co. v. United States, 332 U.S. 392 (1947).

[187] Northern Pac. R.R. v. United States, 356 U.S. 1 (1958).

[188] 332 U.S. at 393-95.

[189] 356 U.S. at 7.

[190] *See, e.g.*, 745 F.2d at 792 (hospital's policy regarding grant of staff privileges to osteopaths held illegal restraint of trade); Konik v. Champlain Valley Physician's Hosp. Medical Center, 733 F.2d 1007, 1017-18 (2d Cir. 1984), *cert. denied*, 469 U.S. 884 (contract required for employment held not unlawful boycott or monopolization of market); Ezpeleta v. Sisters of Mercy Health Corp., 621 F. Supp. 1262, 1268-69 (N.D. Ind. 1985), *aff'd*, 800 F.2d 119 (7th Cir. 1986) (exclusive services contract between physician and hospital held not *per se* illegal); Rockland Physician Assoc. v. Grodin, 616 F. Supp. 945, 955 (D.C.N.Y. 1985) (hospital's exclusive services contract with one

exclusive agreement, a physician must demonstrate not only that he or she was excluded from practicing at a particular hospital because of an exclusive dealing contract but also that the contract had an adverse effect on competition. Second, to invoke the use of the *per se* rule, the plaintiff must prove that the hospital possessed market power and that it forced unwanted medical services on the consumer. Without the benefit of a presumption of illegality, the plaintiff must demonstrate that the contract unreasonably restrains competition in the relevant market under a "rule of reason" analysis. This difficult burden requires a study of the competition among the physicians in the appropriate geographic market. Furthermore, the plaintiff must demonstrate that the anti-competitive elements of a restrictive staffing agreement are not outweighed by the delivery of cost-efficient health care and other pro-competitive effects. This burden is extreme and makes a successful challenge to such a physician-hospital contract unlikely.[191]

---

anesthesiologist not *per se* illegal); 612 F. Supp. at 692-94 (hospital's denial of staff privileges to podiatrist held not illegal restraint of trade); Coastal Neuro-Psychiatric Assoc. v. Onslow County Hosp., 607 F. Supp. 49, 53 (D.C.N.C. 1985); 604 F. Supp. at 688 (refused to allow podiatrist staff privileges held not illegal group boycott); McMorris v. Williamsport Hosp., 597 F. Supp. 899, 912-13 (M.D. Pa. 1984) (exclusive staffing agreement held not illegal group boycott or illegal exclusive dealing contract); Mays v. Hosp. Auth. of Henry County, 596 F. Supp. 120, 122 (N.D. Ga. 1984) (exclusive staffing agreement held not illegal group boycott or illegal exclusive dealing contract). *Cf.* 617 F. Supp. at 264 (policy of physicians and medical associations toward chiropractors held not illegal group boycott); 616 F. Supp. at 270-71; 612 F. Supp. at 692-94 (failure to list psychologist in register of qualified psychologists held not illegal boycott).

[191] *See generally,* 733 F.2d at 1017-18 (contract required for employment held not unlawful boycott or monopolization of market); Smith v. Northern Mich. Hosp., Inc., 703 F.2d 942, 952-54 (6th Cir. 1983) (rejecting challenge to exclusive staffing arrangement for emergency rooms); Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1352-54 (7th Cir. 1982) (adopting the reasoning of the district court in *Jefferson Parish* and rejecting argument that exclusive medical contracts amount to boycott or other *per se* violation); Capili v. Shott, 620 F.2d 438, 439 (4th Cir. 1980) (exclusive arrangement found reasonable and challenge also fails to show effect on interstate commerce); Harron v. United Hosp. Center, Inc., 522 F.2d 1133, 1134 (4th Cir. 1975), *cert. denied,* 424 U.S. 916 (1976) (antitrust challenge to exclusive medical contract held so "frivolous" that suit must be dismissed for lack of federal jurisdiction); 621 F. Supp. at 1268-69 (exclusive services contract between physician and hospital held not *per se* illegal); 616 F. Supp. at 270-72 (failure to list psychologists in register of qualified psychologists was not an illegal boycott); 612 F. Supp. at 692-96 (hospitals' denial of staff privileges to podiatrists was not an illegal restraint of trade); 604 F.

CONCLUSION

In *Jefferson Parish Hospital District No. 2 v. Hyde*,[192] the United States Supreme Court ruled that a contract between a physician group and a hospital to exclusively provide essential medical services will not violate federal antitrust laws.[193] This decision acknowledges the goals of the federal antitrust policy, while recognizing the health care industry's need to formulate new means of providing cost-efficient health care. While *Jefferson Parish* is the Supreme Court's first meaningful guideline to physician-hospital contracts in the antitrust area, it raises uncertainties as to the future of the *per se* doctrine. This uncertainty most likely will result in a larger degree of responsiveness in the judiciary that will be a positive input in the health care field. The consequence of this responsiveness logically should lead to more cost-efficient health care in the future.

Supp. at 688 (refusal to allow podiatrists staff privileges held not illegal group boycott; rejecting other antitrust claims); 597 F. Supp. at 912-16 (exclusive staffing agreement not illegal group boycott or illegal exclusive dealing contract); 596 F. Supp. at 121-22 (exclusive contract with hospital held to not constitute unreasonable restraint of trade); Robinson v. Magovern, 521 F. Supp. 842, 919 (W.D. Pa. 1981), *aff'd mem.*, 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982) (by using a closed staff, hospital has built "high quality staff" and "improved its ability to compete"; rejecting a large number of different antitrust claims).

[192] 466 U.S. 2 (1984).

[193] *Id.* at 2.