

Vertical Restraints: Evolution from *Per Se* to Rule of Reason Analysis

Submitted for the November 16, 2017 ABA Antitrust Section Fall Forum

*David I. Gelfand and Linden Bernhardt
Cleary Gottlieb Steen & Hamilton LLP*

Alleged violations of the antitrust laws are typically analyzed in one of two ways: *per se* illegality or the “rule of reason.” When a court applies *per se* treatment, it does not consider the reasonableness of the conduct or arguments about procompetitive effects. The rule of reason, however, requires consideration of the circumstances surrounding the restraint, including the effects of the restraint in the particular case and any procompetitive benefits.

While the universe of conduct to which *per se* treatment is applied has narrowed in recent years, courts historically condemned a relatively broad array of conduct as *per se* unlawful, including various types of vertical restraints. For plaintiffs, this meant that if a violation could be categorized as *per se* unlawful, the case was easy to bring. Antitrust counselors would advise clients to avoid these categories of conduct but would worry much less about conduct that was likely to be analyzed under the rule of reason.

Over time, the Supreme Court has pulled back on what it considers to be *per se* unlawful violations, removing several broad categories such as maximum resale price maintenance and minimum resale price maintenance. The Court has made clear that *per se* treatment is reserved for those cases where the courts have sufficient experience with the conduct at issue to determine that it almost always results in competitive harm, and has discouraged lower courts from expanding *per se* treatment to new categories. This means that counselors and litigators need to be well versed in the types of evidence and considerations that will ultimately affect the outcome of a rule of reason case. Vertical restraints in particular have been almost entirely removed from the realm of *per se* treatment, yet they are often investigated and challenged in court. Companies need to be aware of the antitrust risk they face when using vertical restraints such as resale price requirements, exclusivity, anti-steering provisions, loyalty discounts, tying, and the like.

The Rise and Fall of Per Se Treatment

In *United States v. Trans-Missouri Freight Association*,¹ the Supreme Court found that an association of railroad companies formed in part to maintain freight rates at a fixed price was a violation of the antitrust laws, and that the government did not have to prove that the agreement was entered into with the intent to restrain commerce or maintain unreasonable rates because “[t]he necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.”² According to the Court, therefore, the government did not have to show that the rates themselves were actually unreasonable; the question the Court was concerned with was whether “the agreement restrain[s] trade or

¹ *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897).

² *Id.* at 340-42 (“The conclusion which we have drawn from the examination above made into the question before us is that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce ... and the question then arises whether the agreement before us is of that nature”).

commerce in any way so as to be a violation of the act.”³ The Court’s opinion in *Trans-Missouri* suggested that there were two types of analyses in cases alleging violations of the antitrust laws: one where the complainant was obligated to show some kind of “unreasonable” intent or result arising from the conduct, and one where the conduct itself had the “necessary effect” of restraining trade and thus no “unreasonable” intent needed to be shown.

The rule of reason was articulated in *Standard Oil v. United States*,⁴ where Chief Justice White, writing for the Court, said the Sherman Act was “expressly designed not to unduly limit the application of the act by precise definition, but ... to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.”⁵ This clarified the Court’s earlier ruling in *Trans-Missouri*, in that the Court made clear that only “unreasonable” restraints of trade would violate the Sherman Act.

The Court provided further clarity on how to apply the rule of reason in *Board of Trade of City of Chicago v. United States*,⁶ where, in an opinion written by Justice Brandeis, the Court held that a “call rule” – which prohibited board members from purchasing grain due “to arrive” after the close of the call session at any price other than that set by the closing bid at call – did not violate the antitrust laws. The Court explained that the “true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”⁷ The Court found that multiple facts were relevant to the rule of reason analysis, including “the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probable” along with “[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained.”⁸ After applying these factors, the Court found that “the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.”⁹

In *United States v. Trenton Potteries Co.*,¹⁰ the Supreme Court suggested that while most restraints of trade would be subject to the rule of reason defined in *Standard Oil*, there were classes of conduct that were automatically considered unreasonable, particularly agreements to fix prices.¹¹ The Court found that this outcome was consistent with its opinion in *Standard Oil* that only unreasonable restraints of trade are prohibited by the Sherman Act because an agreement to fix prices is not made reasonable “merely because the prices themselves are

³ *Id.* at 341.

⁴ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁵ *Id.* at 62-63 (finding that it is “obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of [the Sherman Act] have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve”).

⁶ *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918).

⁷ *Id.* at 236-38.

⁸ *Id.* at 238.

⁹ *Id.* at 244.

¹⁰ *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

¹¹ *Id.* at 396-97 (finding that “it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable”).

reasonable.”¹² Agreements to fix prices at any level could not be reasonable restraints on competition because “the aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition,” and an agreement to fix prices results in the power to maintain that price due to elimination of competition; the creation of this power is unreasonable in and of itself, “without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman [Act] the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.”¹³

The Court expanded *per se* treatment to a number of categories of vertical restraints in the 1950s and 1960s, including vertical non-price restraints,¹⁴ minimum resale price maintenance,¹⁵ maximum resale price maintenance,¹⁶ and tying arrangements.¹⁷ However, a significant amount of this jurisprudence has either been overruled by the Court or has been significantly cut back, and challenges to these vertical arrangements are now largely considered by courts under the rule of reason.

Vertical Non-Price Restraints

The Supreme Court held that vertical non-price restraints were *per se* unlawful in 1967 in *United States v. Arnold, Schwinn & Co.*,¹⁸ where it found that vertical restrictions on the locations of retail stores were subject to *per se* treatment. Schwinn, a manufacturer of bicycles, had assigned specific territories to the distributors of its bicycles and restricted its distributors to selling only in these territories.¹⁹ The district court held that “where a manufacturer sells products to his distributor subject to territorial restrictions upon resale, a *per se* violation of the Sherman Act results,” and the Supreme Court agreed with this finding because “[u]nder the Sherman Act, it is unreasonable without more for a manufacturer to seeking to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it,” and “[s]uch restraints are so obviously destructive of competition that their mere existence is enough.”²⁰ The Court explained that it was not going to apply the *per se* rule to “all vertical restrictions of territory and all franchising,” particularly in situations where the manufacturer retained ownership of the products and merely determined how the products would be distributed, but “to allow this freedom where the manufacturer has parted with dominion over the goods ... would violate the ancient rule against restraints on alienation and

¹² *Id.* at 396 (“Whether this type of restraint is reasonable or not must be judged in part at least, in the light of its effect on competition, for, whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman [Act] and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition”).

¹³ *Id.* at 397-98.

¹⁴ *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

¹⁵ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

¹⁶ *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

¹⁷ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1956).

¹⁸ *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

¹⁹ *Id.* at 371.

²⁰ *Id.* at 379.

open the door to exclusivity of outlets and limitation of territory further than prudence permits.”²¹

The Supreme Court overruled *Schwinn* ten years later in *Continental TV, Inc. v. GTE Sylvania, Inc.*,²² where the petitioner, a franchised retailer of the respondent, a television manufacturer, argued that Sylvania’s franchise agreements with its retailers that regulated where Sylvania’s products could be sold violated the Sherman Act.²³ The district court instructed the jury that if they found that Sylvania entered into an agreement to control the products sold to retailers, they must find that efforts to restrict the location of the sale of those products violated the Sherman Act, “regardless of the reasonableness of the location restrictions,” and the jury found for Continental TV and awarded treble damages.²⁴ The Ninth Circuit reversed, finding that *Schwinn* could be distinguished because Sylvania’s restrictions had “less potential for competitive harm” than those restrictions at issue in *Schwinn* and should be evaluated under the rule of reason, not the *per se* rule.²⁵

The Supreme Court acknowledged that it was “undisputed that title to the television sets passed from Sylvania to Continental,” and therefore under *Schwinn* the *per se* rule should apply. Unlike the Ninth Circuit, the Court did not see a basis on which it could distinguish *Schwinn* from these facts.²⁶ However, the Court characterized *Schwinn* as an “abrupt and largely unexplained departure from *White Motor Co.*” and noted that the *Schwinn* Court had failed to make any distinctions among vertical non-price restraints aside from whether or not title had passed, despite providing “no analytical support for these contrasting positions.”²⁷ Ultimately, the Court came to the conclusion that the distinction drawn by the *Schwinn* Court between transactions that transfer title and those that do not were “not sufficient to justify the application of a *per se* rule in one situation and a rule of reason in the other,” and the Court “found no persuasive support for expanding the *per se* rule.”²⁸

²¹ *Id.* at 379-80. The Court thus distinguished its opinion in *White Motor Co. v. United States*, 372 U.S. 253 (1963), where it reversed a finding of summary judgment against a manufacturer accused of engaging in both vertical nonprice restrictions and vertical price fixing because “there was no showing that the price fixing was ‘an integral part of the whole distribution system,’” and therefore did not apply *per se* treatment because a trial with evidence of the economic and business background of the restraint “might demonstrate their reasonableness.” *Schwinn*, 388 U.S. at 373-74. The Court found it relevant that Schwinn was the leading manufacturer of bicycles in the country, “not a newcomer, seeking to break into or stay in the bicycle business.” *Id.* at 374. While Schwinn asserted that the geographic restraints were designed to allow its distributors to more effectively compete, the Court noted that “restraints as to territory or customers, vertical or horizontal, are unlawful . . . if the price fixing is ‘an integral part of the whole distribution system.’” *Id.* at 374-76.

²² *Cont’l TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

²³ *Id.* at 40.

²⁴ *Id.* at 40-41.

²⁵ *Id.* at 41.

²⁶ *Id.* at 45-46.

²⁷ *Id.* at 47, 52-54. The Court found that it appeared that the *Schwinn* Court drew its distinction based on its belief that vertical restrictions that transfer title destroy intrabrand competition such that *per se* treatment is appropriate, while restrictions that do not transfer title have the potential to promote interbrand competition and thus should be evaluated under the rule of reason. *Id.* at 53-54. However, the Court found that there was no evidence that any “key variables” were “affected by the form of the transaction by which a manufacturer conveys his products to the retailers.” *Id.* at 54.

²⁸ *Id.* at 57.

The Court therefore overruled *Schwinn* and further found that, while it did not rule out the “possibility that particular applications of vertical restrictions might justify *per se* prohibition,” there had been no evidence that “vertical restrictions have or are likely to have a ‘pernicious effect on competition’” and therefore “the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*.”²⁹

Minimum and Maximum Resale Price Maintenance

Resale price maintenance occurs when a manufacturer of a product enters into an agreement with its distributors that controls the price at which the manufacturer’s products will be resold by distributors. When the manufacturer sets a floor below which the distributors may not sell the products, the manufacturer is engaging in minimum resale price maintenance. If the manufacturer instead sets a price ceiling and restricts the distributors from setting resale prices above this ceiling, the manufacturer is engaging in maximum resale price maintenance. The Supreme Court previously held both minimum and maximum resale price maintenance to be a *per se* violation of the antitrust laws. However, after extensive consideration by the courts and the further evolution of economic learning, the Supreme Court has overruled its decisions categorizing resale price maintenance as *per se* violations. In federal antitrust cases, the fact finder must now analyze resale price maintenance under the rule of reason.

The Supreme Court first held that minimum resale price maintenance was a *per se* violation of the antitrust laws in 1911 in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*³⁰ In that case, Dr. Miles, a medicine manufacturer, entered into pricing agreements with its distributors that allowed Dr. Miles to establish minimum retail prices. The Court found that these vertical agreements fell within a similar category of conduct as horizontal agreements to fix prices, and like horizontal price-fixing agreements were therefore *per se* illegal.³¹

In 1968, the Supreme Court found that maximum resale price maintenance was *per se* unlawful in *Albrecht v. Herald Co.*³² The respondent was a newspaper publisher that listed a suggested retail price for its newspaper and would terminate carriers, who sold its newspapers in exclusive territories, if they sold papers for above the suggested maximum price.³³ When the petitioner sold newspapers for above the suggested maximum, the respondent advised the petitioner that it would inform customers in the petitioner’s territory that the respondent would begin to sell to customers directly at the suggested retail price.³⁴ After engaging in this business for a while, the respondent told the petitioner that it did not want to be a carrier in this territory and offered to return the customers to the petitioner, but only if the petitioner would charge the suggested retail price.³⁵ A jury found that the respondent had not violated the Sherman Act and the district court denied the petitioner’s motion for judgment notwithstanding the verdict, which

²⁹ *Id.* at 58-59.

³⁰ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

³¹ *Id.* at 384-85 (“But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void ... The complainant’s plan falls within the principle which condemns contracts of this class ... It is not entitled to special privilege or immunity”).

³² *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

³³ *Id.* at 147.

³⁴ *Id.*

³⁵ *Id.* at 147-48.

argued that the respondent had engaged in an agreement to fix the resale prices of newspapers, a *per se* violation.³⁶ The Eighth Circuit affirmed, finding that the respondent had engaged in unilateral conduct outside the scope of the Sherman Act and that there was no restraint of trade.³⁷

The Supreme Court in *Albrecht* reversed the Eighth Circuit, finding that “schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market.”³⁸ This is because the fixed maximum price could be too low for the seller to offer services to consumers, and a maximum price that is fixed at a level close to the actual cost to the seller is essentially a minimum fixed price.³⁹ While the Court recognized that “[m]aximum and minimum price fixing may have different consequences in many situations,” it found that a fixed maximum price would still result in competitive harm and violated the Sherman Act, even if it was implemented “to protect the public from price gouging by dealers who had monopoly power in their own territories.”⁴⁰

The Supreme Court overruled *Albrecht* thirty years later in *State Oil v. Khan*,⁴¹ where the petitioner, State Oil Company, entered an agreement with the respondents to operate a gas station owned by State Oil that would sell gasoline at a suggested retail price.⁴² While the respondents could sell the gasoline for less than the suggested retail price, if the price actually charged by the respondents exceeded this suggested retail price, the excess would be given to State Oil.⁴³ After the respondents fell behind in payments on their lease to State Oil, State Oil moved to evict the respondents through state court proceedings and had a receiver appointed to operate the gas station, without the price restraints by which the respondents had been bound.⁴⁴ After the respondents sued in federal district court alleging an agreement to fix prices in violation of the Sherman Act, the district court found that the respondents had not alleged a *per se* violation and later entered summary judgment for State Oil.⁴⁵ The Seventh Circuit reversed the district court in an opinion written by Chief Judge Posner, holding that State Oil’s pricing agreement was a

³⁶ *Id.* at 148.

³⁷ *Id.* at 149.

³⁸ *Id.* at 152.

³⁹ *Id.* at 152-53. In his dissent, Justice Harlan asserted that the Court was incorrect in finding that the fixing of maximum prices and minimum prices were “economically equivalent,” writing that while an allegation to fix a maximum price “undoubtedly states a Sherman Act cause of action,” price ceilings “have the arguable justification that they prevent retailers or wholesalers from reaping monopoly or supercompetitive profits,” and therefore unlike fixed minimum prices, there may be a procompetitive justification that the court should consider. *Id.* at 156-59.

⁴⁰ *Id.* at 152-53. The Court later distinguished its opinion in *Albrecht* in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), where it noted that “in *Albrecht* we held such an agreement *per se* unlawful because of its potential effects on dealers and consumers, not because of its effect on *competitors*,” and “[r]espondent’s asserted injury as a competitor does not resemble any of the potential dangers described in *Albrecht*.” *Atl. Richfield Co.*, 495 U.S. at 336. Therefore, the respondent had not demonstrated that it suffered antitrust injury “since its losses do not flow from the aspects of vertical, maximum price fixing that render it illegal.” *Id.* at 337.

⁴¹ *State Oil v. Khan*, 522 U.S. 3 (1997).

⁴² *Id.* at 7-8.

⁴³ *Id.* at 8.

⁴⁴ *Id.*

⁴⁵ *Id.* at 9.

per se violation under *Albrecht*, although it noted that *Albrecht* was “inconsistent with later decisions” of the Supreme Court.⁴⁶

The Supreme Court reversed the Seventh Circuit, finding that it was “difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation.”⁴⁷ While the Court acknowledged *Albrecht*’s fear that fixed maximum prices could be functionally equivalent to a fixed minimum price, it found that “such conduct as with the other concerns articulated in *Albrecht* can be appropriately recognized and punished under the rule of reason.”⁴⁸ Ultimately, the Court found that the rationales underlying *Albrecht* were “difficult to accept” and that the hypothetical effects that would result from maximum resale price maintenance predicted by the Court in *Albrecht* had not actually come to pass.⁴⁹ The Court was careful to note that it was not holding that maximum resale price maintenance was therefore *per se* lawful, and instead stated that “vertical maximum price fixing, like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the rule of reason.”⁵⁰

In 2007, after nearly one hundred years, the Supreme Court finally overruled *Dr. Miles* and held that even minimum resale price maintenance should be judged under the rule of reason in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*⁵¹ In *Leegin*, the petitioner, a manufacturer and distributor of leather goods, refused to continue to sell to the respondent, a retailer who had discounted the petitioner’s products despite the manufacturer’s demands to stop.⁵² When *Leegin* attempted to enter evidence demonstrating the procompetitive effects of its pricing agreements, the district court excluded it, finding that the agreements were subject to *per se* treatment under *Dr. Miles*.⁵³ *Leegin* appealed to the Fifth Circuit, arguing that the rule of reason should apply to vertical price agreements, but the appellate court rejected its argument, finding that it was bound by the Supreme Court’s holding in *Dr. Miles* and the application of the *per se* rule barred consideration of any potential procompetitive effects of the pricing agreements.⁵⁴

The Supreme Court rejected the rationale on which the holding in *Dr. Miles* had been based, finding that vertical agreements could not be considered equivalent to horizontal restraints due to “the appreciated differences in economic effect between vertical and horizontal

⁴⁶ *Id.*

⁴⁷ *Id.* at 15. The Court highlighted Judge Posner’s explanation of the economic realities of a fixed maximum price in his Seventh Circuit opinion in this case, which noted that “[a] supplier might ... fix a maximum resale price in order to prevent his dealers from exploiting a monopoly position.” *Id.* at 15-16. For example, if State Oil had “spaced its dealers sufficiently far apart to limit competition among them ... State Oil might want to place a ceiling on the dealers’ resale prices in order to prevent them from exploiting that monopoly power fully.” *Id.* at 16.

⁴⁸ *Id.* at 17.

⁴⁹ *Id.* at 19-20. The Court also found that it was not bound by *stare decisis* to its opinion in *Albrecht* because “[w]ith the views underlying *Albrecht* eroded by this Court’s precedent, there is not much of that decision to salvage,” and *Albrecht*’s “conceptual foundations” had been “gravely weakened.” *Id.* at 21-22.

⁵⁰ *Id.* at 22 (finding that “rule-of-reason analysis will effectively identify those situations in which vertical maximum price fixing amounts to anticompetitive conduct”).

⁵¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁵² *Id.* at 884.

⁵³ *Id.*

⁵⁴ *Id.* at 884-85.

agreements.”⁵⁵ The Court found that minimum resale price maintenance is capable of promoting interbrand competition (competition between manufacturers of similar products under different brands) by facilitating entry even though it also restricts intrabrand competition (competition between retailers selling one brand). The net effect can be to incent retailers to invest in services and promotions. Without vertical agreements restricting the minimum price, discount retailers could free ride on the services provided by other retailers by undercutting them on price.⁵⁶

While the Court recognized the possibility of procompetitive effects of resale price maintenance, it also recognized the potential for anticompetitive harm – either through the formation of cartels or by discouraging manufacturers to sell to retailers for lower prices.⁵⁷ However, the potential for procompetitive effects as a result of resale price maintenance made *per se* treatment for these kinds of vertical arrangements inappropriate.⁵⁸

Tying Arrangements

Tying arrangements require buyers of one product from a seller to take an additional second product from that seller. In *Northern Pacific Railway Co. v. United States*,⁵⁹ the Supreme Court ruled that tying arrangements were *per se* unlawful, finding that the arrangements are “[a]mong the practices which the courts have ... deemed to be unlawful in and of themselves.”⁶⁰

The Court’s holding in *Northern Pacific* came five years after it issued its opinion in *International Salt Co. v. United States*,⁶¹ where International Salt was accused of violating the Sherman Act by requiring lessees of its patented salt processing machines to also purchase salt to be used in those machines. The Court found that the volume of these agreements tended to allow International Salt to achieve a monopoly and were therefore *per se* unlawful because over time they foreclosed competitors from the market for salt.⁶²

While the Court in *International Salt* considered the impact that International Salt’s patents had on its market power when determining that its tying arrangements were *per se* illegal, the Court in *Northern Pacific* did not engage in specific economic analysis of the industry and instead presumed Northern Pacific Railway’s market power through the existence of their widespread land holdings.⁶³ The use of *per se* analysis for tying arrangements was further

⁵⁵ *Id.* at 888.

⁵⁶ *Id.* at 890-91 (“With price competition decreased, the manufacturer’s retailers compete among themselves over services”).

⁵⁷ *Id.* at 892.

⁵⁸ *Id.* at 894. The Court also found that it was not bound by *stare decisis* because respected economists, the Department of Justice, and the Federal Trade Commission all recommended that resale price maintenance be evaluated under the rule of reason, not under *per se* analysis, and because the “Court’s treatment of vertical restraints has progressed away from *Dr. Miles*’ strict approach,” and the Court had “distanced [itself] from the opinion’s rationales.” *Id.* at 900. Justice Breyer, writing for the four dissenting justices, asserted that these arguments did not merit “overturning so well-established a legal precedent.” *Id.* at 908-09.

⁵⁹ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1956).

⁶⁰ *Id.* at 5.

⁶¹ *Int’l Salt Co. v. United States*, 332 U.S. 392 (1947).

⁶² *Id.* at 396 (“[I]t is immaterial that the tendency [towards monopoly] is a creeping one rather than one that proceeds at full gallop” for the purpose of applying *per se* treatment).

⁶³ *N. Pac. Ry.*, 356 U.S. at 5 (finding that the use of *per se* treatment “avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as the

confirmed in *United States v. Loew's, Inc.*,⁶⁴ where a motion picture distributor was charged with violating the Sherman Act by tying the sale of the licenses to its more popular copyrighted films to the acceptance of a block containing less popular films.⁶⁵ The district court found that this “block booking” violated the Sherman Act, and the case was directly appealed to the Supreme Court.⁶⁶

The Supreme Court, referring back to *International Salt*,⁶⁷ found that it did not need to conduct any economic analysis to determine market power because “the requisite economic power is presumed when the tying product is patented or copyrighted.”⁶⁸ The Court noted that by forcing television stations to take less popular films, Loew’s was preventing other distributors from selling to the stations and a significant amount of licensing fees paid by the stations repaid the cost of the unwanted films they were forced to take.⁶⁹ The Court found, therefore, that it was clear that the tying arrangement by its “inherent nature” and “effect” resulted in a restraint of trade, and that while it was possible that there were tying arrangements using patented or copyrighted products that would not be *per se* unlawful, the Court found it “difficult to conceive of such a case.”⁷⁰

The Supreme Court further entrenched the use of *per se* treatment for tying arrangements in *Fortner Enterprises, Inc. v. United States Steel Corporation* (“*Fortner I*”).⁷¹ In *Fortner I*, United States Steel was accused of tying its credit financing services to the sale of its prefabricated houses, which were allegedly sold at inflated prices.⁷² The district court entered summary judgment for United States Steel, finding that while Fortner had established the existence of a tying arrangement, it had failed to establish that United States Steel had “sufficient market power over the tying product and foreclosure of a substantial volume of commerce in the tied product,” and the Sixth Circuit affirmed without issuing an opinion.⁷³ The Supreme Court reversed, finding that the district court “misconceived the extent of its authority to evaluate the evidence in ruling on this motion for summary judgment” because the prerequisites of *Northern Pacific* – that the defendants have market power over the tying product and that the impact on interstate commerce be substantial – are only necessary to apply *per se* treatment to the violation, and are not necessary for the plaintiff to win on the merits.⁷⁴ In other words, even if *per se* treatment is not applied to a tying arrangement, a plaintiff can still demonstrate a violation of the

related industries, in an effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken”).

⁶⁴ *United States v. Loew's, Inc.*, 371 U.S. 38 (1962).

⁶⁵ *Id.* at 40.

⁶⁶ *Id.* at 44.

⁶⁷ The Court also cited to *United States v. Paramount Pictures* for the proposition that patent holders are forbidden from “condition[ing] [the patent’s] use on the purchase or use of patented or unpatented materials.” 334 U.S. 131, 157 (1948). In *Loew's*, the Court held that “[t]he principles underlying [its] *Paramount Pictures* decision have general application to tying arrangements involving copyrighted products,” and “[a]pplicability of *Paramount Pictures* brings with it a meeting of the test of *Northern Pacific*, since *Paramount Pictures* is but a particularized application of the general doctrine as reaffirmed in *Northern Pacific*.” *Loew's*, 371 U.S. at 50.

⁶⁸ *Loew's*, 371 U.S. at 45.

⁶⁹ *Id.* at 49.

⁷⁰ *Id.* at 49-50 (citing *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911)).

⁷¹ *Fortner Enters., Inc. v. United States Steel Corp.* (“*Fortner I*”), 394 U.S. 495 (1969).

⁷² *Id.* at 496-97.

⁷³ *Id.* at 497-98.

⁷⁴ *Id.* at 499-500.

Sherman Act following “a more thorough examination of the purposes and effects of the practices involved,” and therefore it was inappropriate for the district court to enter summary judgment in favor of the defendants without allowing the plaintiff to present further evidence.⁷⁵

The Court further found that the district court was incorrect in rejecting *per se* treatment, holding that a demonstration of “sufficient economic power” over the tying product does not require that the plaintiff prove the defendant holds “a monopoly or even a dominant position throughout the market for the tying product.”⁷⁶ The Court explained, “tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.”⁷⁷ According to the Court, plaintiffs did not need to show “truly dominant power over the tying product” because it was accepted that tying arrangements, in general, did not serve a legitimate purpose that could not be achieved in “some less restrictive way,” and therefore “the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie.”⁷⁸ This “appreciable restraint” is shown “whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market,” and therefore the appropriate standard in determining whether a seller has sufficient market power over the tying product is “whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.”⁷⁹

While the Court applied a *per se* approach in *Fortner II*,⁸⁰ it appeared to apply *per se* treatment less strictly by considering the economic impact of the tying arrangement at issue. In *Fortner I*, the Court had remanded the case back to district court on that basis after holding that the plaintiff was entitled to introduce evidence of United States Steel’s market power, and in *Fortner II*, the Court considered whether the record sufficiently demonstrated that United States Steel had sufficient market power in the tying product.⁸¹

Relying on its holding in *Fortner I*, the Court focused on the extent to which the “uniqueness” of a product could indicate its market power, finding that “the unique character of the tying product has provided critical support for the finding of illegality in prior cases” because a unique product would provide the seller an advantage that its competitors would not have.⁸² However, the fact that a product is unique does not, on its own, indicate market power; “[u]niqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves,” whether through legal barriers like patent or copyright laws or through economic barriers that prevent a competitor from producing a similar

⁷⁵ *Id.* at 500.

⁷⁶ *Id.* at 501-03.

⁷⁷ *Id.* The Court referred back to its opinion in *Loew’s*, writing that “[e]ven absent a showing of market dominance, the crucial economic power may be inferred from the tying product’s desirability to consumers or from uniqueness in its attributes.” *Id.* at 503 (quoting *Loew’s*, 371 U.S. at 45).

⁷⁸ *Id.* at 503.

⁷⁹ *Id.* at 503-04.

⁸⁰ *United States Steel Corp. v. Fortner Enters.* (“*Fortner II*”), 429 U.S. 610 (1977).

⁸¹ *Id.* at 611-12.

⁸² *Id.* at 619-20 (citing *International Salt*, 332 U.S. at 392, *Paramount Pictures*, 334 U.S. at 131, *Loew’s*, 371 U.S. at 38, and *Northern Pacific*, 356 U.S. at 1, as prior cases that “represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of economic power”).

product.⁸³ If the only unique aspect of the tying product is that a seller is willing to take a loss, this will not confer onto the seller market power over the tying product, and the Court found that there was no evidence in the record that indicated that there was any unique aspect to United States Steel's offerings other than its willingness to accept a lower profit on its credit financing agreements in order to sell more of its houses.⁸⁴ The Court therefore reversed.

Despite prior precedent that heavily relied on the use of the *per se* rule in tying cases, however, the Court made it clear in *Jefferson Parish v. Hyde*⁸⁵ that the rule of reason could still be an appropriate standard under certain circumstances. In *Jefferson Parish*, Edwin Hyde, an anesthesiologist, was denied admission to the medical staff of East Jefferson Hospital because the hospital had an arrangement with an outside company for the provision of all anesthesiological services.⁸⁶ Hyde alleged that the hospital's contract violated the Sherman Act, and the district court denied Hyde's request for declaratory judgment after finding that the anticompetitive effects of the contract were outweighed by its procompetitive benefits.⁸⁷

The Fifth Circuit reversed the district court and held that the contract was a tying arrangement that required anyone who used one of the hospital's operating rooms to also use the anesthesia services of the outside company, and was *per se* unlawful because of its "not insubstantial" impact on interstate commerce.⁸⁸ The Supreme Court agreed that "certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable '*per se*,'" but not every arrangement to package two products together is a *per se* illegal tying arrangement, particularly when products may be purchased separately or if buyers prefer to purchase the packaged products together.⁸⁹ The necessary component that must be present if a court is to apply *per se* treatment is some element of force, because if the seller has used its power over the tying product to force the buyer of the tying product to purchase an additional product it did not want or could have bought somewhere else, "competition on the merits in the market for the tied item is restrained and the Sherman Act is violated."⁹⁰ If, however, the seller has only used its power to get a better return on the tying product, rather than impose a restraint on the market for the tied product, this may not implicate the Sherman Act.⁹¹ Therefore, "[p]er se condemnation – condemnation without inquiry into actual market conditions – is only appropriate if the existence of forcing is probable," and even if forcing is present, "there must be

⁸³ *Id.* at 621.

⁸⁴ *Id.* at 621-22 ("Quite clearly, if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit or to incur greater risks than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market. Yet this is, in substance, all that the record in this case indicates ... Without any evidence that the Credit Corp. has some cost advantage over its competitors or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation").

⁸⁵ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

⁸⁶ *Id.* at 5.

⁸⁷ *Id.*

⁸⁸ *Id.* at 8.

⁸⁹ *Id.* at 9-12.

⁹⁰ *Id.* at 13-14 ("Accordingly, we have condemned tying arrangements when the seller has some special ability – usually called 'market power' – to force a purchaser to do something that he would not do in a competitive market").

⁹¹ *Id.* at 14.

a substantial potential for impact on competition in order to justify *per se* condemnation.”⁹² Therefore, the relevant question is whether patients are forced as a result of the arrangement to use the outside company’s anesthesia services as a result of the hospital’s market power in the market for patient services.⁹³ Ultimately, the Court found that while patients may have had a preference for East Jefferson Hospital, evidence demonstrated that a majority of patients in the region used other hospitals and patients were generally indifferent between board certified anesthesiologists, and therefore patients were not forced to either use East Jefferson Hospital’s services or, in turn, accept an anesthesiologist selected by East Jefferson Hospital.⁹⁴ After the Court found that because the necessary element of force was not present *per se* treatment would be inappropriate, the Court evaluated the reasonableness of the hospital’s contract with the outside company and found that the record demonstrated no actual harmful effects to competition.⁹⁵

The tension between the Court’s precedent applying *per se* treatment to tying arrangements and the economic realities of tying arrangements was evident in *United States v. Microsoft*.⁹⁶ There, the Department of Justice alleged, among other things, that Microsoft illegally tied its Internet Explorer web browser to its Windows operating system.⁹⁷

The district court agreed that Microsoft had illegally tied the sale of Windows and Internet Explorer. In so holding, the district court rejected Microsoft’s argument that Windows and Internet Explorer were “in reality only a single product,” because consumers viewed operating systems and internet browsers as separate products.⁹⁸ The district court further found that Microsoft had market power in operating systems.⁹⁹ And the court found that Microsoft’s tying arrangements resulted in substantial foreclosure of competition in browsers: Microsoft’s primary browser competitor, Netscape Navigator, had seen a dramatic decline in usage and a corresponding drop in revenue as a result of Microsoft’s tying of Internet Explorer into the Windows operating system.¹⁰⁰

The district court also found that the “force” element discussed in *Jefferson Parish* was met because Microsoft’s agreements with computer manufacturers prohibited manufacturers from removing Internet Explorer.¹⁰¹ Adding a second browser was impractical for

⁹² *Id.* at 15-16 (noting that “[i]f only a single purchaser were ‘forced’ with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law”).

⁹³ *Id.* at 18-25.

⁹⁴ *Id.* at 26-29.

⁹⁵ *Id.* at 28-31.

⁹⁶ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), *aff’g in part, rev’g in part* *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

⁹⁷ *Microsoft*, 87 F. Supp. 2d at 35.

⁹⁸ *Microsoft*, 87 F. Supp. 2d at 48-51 (“Considering the ‘character of demand’ for the two products, as opposed to their ‘functional relation,’ Web browsers and operating systems are ‘distinguishable in the eyes of buyers’ ... Consumers often base their choice of which browser should reside on their operating system on their individual demand for the specific functionalities or characteristics of a particular browser, separate and apart from the functionalities afforded by the operating system itself ... Moreover, the behavior of other, lesser software vendors confirms that it is certainly efficient to provide an operating system and a browser separately, or at least in separable form”).

⁹⁹ *Id.* at 49.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 50.

manufacturers, and the court found that, in practice, manufacturers were unable to respond to customer demand for a version of Windows that did not come with Internet Explorer, or that came with a different browser.¹⁰² Indeed, even end-use customers were not able to remove Internet Explorer from Windows' list of programs and could not select another browser as their default.¹⁰³ The district court applied the Supreme Court's *per se* analysis for tying arrangement of this type, because, as the district court noted, it was not "at liberty to extrapolate a new rule governing the tying of software products."¹⁰⁴

Microsoft appealed the district court's decision to the D.C. Circuit.¹⁰⁵ The D.C. Circuit affirmed the district court's separate holding that Microsoft had unlawfully maintained a monopoly in the market for operating systems, but reversed the district court's finding of liability for tying.¹⁰⁶ Specifically, the D.C. Circuit rejected the district court's conclusion that Microsoft's bundled offerings were *per se* unlawful, instead holding "that the rule of reason, rather than *per se* analysis, should govern the legality of tying arrangements involving platform software products."¹⁰⁷ As a threshold matter, the D.C. Circuit noted that *per se* treatment was typically only appropriate for cases where the courts have "considerable experience with certain business arrangements."¹⁰⁸ In the case before it, the court noted that software platforms were a relatively new business and concluded that, "simplistic application of *per se* tying rules carries a risk of serious harm."¹⁰⁹

After considering prior tying cases, including *Northern Pacific*, *Loew's*, *Fortner II*, and *Jefferson Parish*, the D.C. Circuit found that Microsoft's tying arrangement was distinct from these prior cases because "[i]n none of these cases was the tied good physically and technologically integrated with the tying good," and there was not sufficient "judicial experience," either from the Supreme Court or from lower federal courts, to know if the kinds of technological integrations at issue in Microsoft's tying arrangement were of the type that would "lack ... any redeeming value" such as to be the appropriate subject of *per se* treatment.¹¹⁰ Furthermore, the "nature of the platform software market" indicated that the use of *per se* analysis could "stunt valuable innovation" because *per se* analysis would tend to condemn the first firm to integrate separate products, while the application of the rule of reason would allow that firm to demonstrate the potential efficiencies that could arise from integrating the separate products.¹¹¹

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 51 (noting that other courts, including the D.C. Circuit, had declined to strictly apply the "separate products" test to cases of "technological tying").

¹⁰⁵ *Microsoft*, 253 F.3d at 45-46.

¹⁰⁶ *Id.* at 46.

¹⁰⁷ *Id.* at 84.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 90-91.

¹¹¹ *Id.* at 92. The Court found this particularly compelling in the software market because integration is common among all firms in that market, including those without market power, and "[f]irms without market power have no incentive to package different pieces of software together unless there are efficiency gains from doing so. The ubiquity of bundling in competitive platform software markets should give courts reason to pause before condemning such behavior in less competitive markets." *Id.* at 93.

The D.C. Circuit therefore remanded the tying claim back to the district court for evaluation under the rule of reason, which “more freely permits consideration of the benefits of bundling in software markets ... and a balancing of these benefits against the costs to consumers whose ability to make direct price/quality tradeoffs in the tied market may have been impaired.”¹¹² The Supreme Court denied Microsoft’s petition for writ of certiorari,¹¹³ and the case was subsequently settled.¹¹⁴ The settlement included restrictions that, among other things, required Microsoft to give manufacturers flexibility in the configuration of computers, including the display of icons and shortcuts,¹¹⁵ and limited Microsoft’s ability to bundle new products into Windows.¹¹⁶

While Supreme Court precedent still suggests that *per se* treatment is generally the appropriate standard to use when analyzing tying cases, the Court has been careful to place limits on the applicability of *per se* treatment by including prerequisites to its use, including requiring that the defendant must have market power in the market for the tying product, that the tying arrangements must lead to substantial foreclosure of competition in the market for the tied product, and that there must be some element of force on the consumer to purchase the tied product as part of the bundle, rather than purchase it separately. It is unclear whether the Court would retain any vestige of *per se* treatment if presented with a new tying case today.¹¹⁷

The “Quick Look”

Courts have also experimented with the use of “quick look” analysis, also known as abbreviated rule of reason analysis, which is reserved for categories of conduct that generally resulted in competitive harm but required some additional consideration that fell short of a full rule of reason application.

In *National Collegiate Athletic Association v. Board of Regents*,¹¹⁸ the Supreme Court appeared to apply quick look analysis to broadcasting agreements between the NCAA and television networks to broadcast college football games. The agreements had the effect of limiting the number of televised college football games in total and the number of games each school could televise, and prohibited member schools from selling the television rights to their games outside of the agreements.¹¹⁹ The district court held that the agreements violated the Sherman Act, and the Tenth Circuit agreed, holding that the agreements were *per se* unlawful price fixing, and even if the agreements were not *per se* unlawful, they were not justified by any

¹¹² *Id.* at 94.

¹¹³ *Microsoft Corp. v. United States*, 534 U.S. 952 (2001).

¹¹⁴ *See Microsoft Corp. v. United States*, 231 F. Supp. 3d 144 (D.D.C. 2002) (conditionally approving Microsoft’s consent decree pending alteration empowering the court to act *sua sponte*).

¹¹⁵ *Id.* at 171.

¹¹⁶ *Id.* at 186.

¹¹⁷ For example, the Court demonstrated some skepticism about the use of *per se* treatment for tying arrangements in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 35 (2006) (noting that “[o]ver the years ... this Court’s strong disapproval of tying arrangements has substantially diminished”). There, the Court held that tying arrangements involving patented products were more appropriately analyzed under the rule of reason, not under the *per se* rule, because recent Congressional legislation made it “clear that Congress did not intend the mere existence of a patent to constitute the requisite ‘market power’” necessary for *per se* condemnation. *Id.* at 41-43.

¹¹⁸ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85 (1984).

¹¹⁹ *Id.* at 94.

procompetitive effects under the rule of reason.¹²⁰ The Supreme Court agreed that the NCAA's agreements "share characteristics of restraints we have previously held unreasonable," and that the NCAA and its member schools had created a horizontal agreement that capped the number of games member schools could televise, which limited output.¹²¹

However, despite acknowledging that "[h]orizontal price fixing and output limitation are ordinary condemned as a matter of law under an 'illegal *per se*' approach," the Court "decided that it would be inappropriate to apply a *per se* rule to this case."¹²² The Court determined that horizontal agreements to restrain competition was "essential" to the existence of college football, which relied on agreements amongst the member schools to define the rules of the sport and preserve and promote the brand and integrity of college football; if any one school were to impose restrictions on its student-athletes regarding pay and class attendance unilaterally, "its effectiveness as a competitor on the playing field might soon be destroyed," and thus the NCAA's role in facilitating horizontal agreement among the member schools "widen[s] consumer choice ... and hence can be viewed as procompetitive."¹²³

While the Supreme Court went on to say that it was evaluating the agreements under the rule of reason, it also rejected the NCAA's argument that it had no market power and thus the agreements could not have anticompetitive effects because "when there is an agreement not to compete in terms of price and output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"¹²⁴ In a footnote, the Court wrote that "the rule of reason can sometimes be applied in the twinkling of an eye,"¹²⁵ and in another footnote the Court quoted the amicus brief of the Solicitor General, stating that "where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary."¹²⁶ The Supreme Court therefore characterized the challenged restraint as a horizontal restraint that would ordinarily be subject to *per se* treatment and stated that it instead applied the rule of reason due to the necessity of the restraint to the existence of the product, but effectively applied some intermediate standard by looking at the market only to the extent necessary to state that the restraint was essential to competition in the market.

The Supreme Court appeared to apply some form of intermediate quick look analysis between the *per se* rule and rule of reason in *NCAA*,¹²⁷ but in *California Dental Association v. Federal Trade Commission*,¹²⁸ the Court rejected the use of quick look analysis when it considered advertising restrictions imposed by an association of dental societies and challenged

¹²⁰ *Id.* at 97.

¹²¹ *Id.* at 99.

¹²² *Id.* at 100.

¹²³ *Id.* at 100-02.

¹²⁴ *Id.* at 109.

¹²⁵ *Id.* at 109 n.39 (quoting Areeda's "The Rule of Reason in Antitrust Analysis: General Issues").

¹²⁶ *Id.* at 110 n.42.

¹²⁷ The Court also appeared to apply some abbreviated form of rule of reason analysis several years before its decision in *NCAA in National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) (finding that "no elaborate industry analysis is required to demonstrate the anticompetitive character" of an agreement between competitors to not discuss prices) and two years after the *NCAA* opinion in *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) (quoting *National Society of Professional Engineers*).

¹²⁸ *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

by the FTC. The Ninth Circuit had sustained the district court's finding against the association, finding that quick look analysis, "designed for restraints that are not *per se* unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry," was appropriate because the restrictions on advertising were a "naked" restraint on price and the association's argument that the restrictions protected against false advertising "carried little weight."¹²⁹

The Court held that the Ninth Circuit had erred in holding that the advertising restrictions were subject to quick look analysis, finding that in previous quick look cases, "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," but in this case the Court thought that it was entirely plausible that the restrictions on advertising could have procompetitive justifications or no effect on competition whatsoever.¹³⁰ After evaluating the advertising restrictions imposed by the association, the Court found that "[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown,"¹³¹ suggesting that quick look analysis is only appropriate when actual anticompetitive effects are demonstrated.

Further, the Court noted that although it found that quick look analysis was not appropriate, this did not obligate the lower court to engage in a full-blown analysis of the market under the rule of reason, noting that the "categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear."¹³² In all cases, courts are required to look into the "circumstances, details, and logic of a restraint" to determine whether "a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look," and the Ninth Circuit here erred in taking too quick of a look at the restrictions at issue.¹³³

Overall, while the Supreme Court has generally tried to categorize violations of the antitrust laws as subject to either *per se* or rule of reason, the Court has also implicitly acknowledged that these standards are two ends of a spectrum, with potential room for intermediate analysis. Even if the Court has stated previously that it will consider a particular category of violation as *per se* unlawful, the Court may conduct some form of abbreviated rule of reason analysis in making its determination as to the legality of the restraint.

¹²⁹ *Id.* at 763-64.

¹³⁰ *Id.* at 769-71 (finding that "quick-look analysis carries the day when the great likelihood of anticompetitive effects can be easily ascertained").

¹³¹ *Id.* at 778.

¹³² *Id.* at 779.

¹³³ *Id.* at 781.

Recent Rule of Reason Cases

Recent cases where courts have applied the rule of reason include *Federal Trade Commission v. Actavis*,¹³⁴ *United States v. American Express*,¹³⁵ and *O'Bannon v. National Collegiate Athletic Association*.¹³⁶

In *Actavis*, the FTC alleged that Actavis, a generic drug manufacturer, entered into an agreement with the patent holder for a drug where the patent holder paid Actavis millions of dollars to delay bringing a generic version of the patent holder's drug to the market.¹³⁷ The FTC argued that these reverse payment settlement agreements are "presumptively unlawful" and that a quick look approach would be appropriate, not a rule of reason analysis.¹³⁸ The Court held that reverse payment settlement agreements did not meet the criteria for quick look analysis, as the potential for anticompetitive effects resulting from a reverse payment depended on a number of factors, including the size of the payment and its separation from other services for which there may be payment.¹³⁹ Given the complexity of these arrangements and the possibility for variation as to the existence and severity of anticompetitive harm arising from these arrangements, the Court found that the appropriate approach was the rule of reason.¹⁴⁰

The Second Circuit applied the rule of reason in *American Express*, where it reversed the district court's holding that the agreements that American Express had with its merchants that contained non-discrimination provisions – which prevented merchants from offering incentives to use less costly credit cards than those offered by American Express or from expressing a preference for a different card – violated Section One of the Sherman Act.¹⁴¹ The Second Circuit disagreed with the district court's market definition, holding that the credit card industry was a "two sided market," with one side being the market for network services and the other the market for cardholders.¹⁴² By failing to account for the two-sided market, the Second Circuit found that the district court had also failed to correctly determine American Express' market power, because it did not "recognize that increased demand on the cardholder side of the platform expands value on the merchant side," and therefore a credit card company that increases merchant fees must, in order to compete on the cardholder side of the platform, increase benefits to cardholders through better cardholder rewards, or else risk further merchant attrition as the result of fewer cardholders.¹⁴³ The district court considered "only one half of the pertinent equation" when it failed to consider potential increased cardholder benefits occurring as a result of increased merchant fees.¹⁴⁴ The Second Circuit found that the district court also placed undue weight on cardholder insistence on using American Express credit cards, which only existed as a result of investment by American Express into cardholder benefits and ignored the fact that a

¹³⁴ *FTC v. Actavis, Inc.*, 133 S.Ct. 2223 (2013).

¹³⁵ *United States v. Am. Express*, 838 F.3d 179 (2d Cir. 2016).

¹³⁶ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part* *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

¹³⁷ *Actavis*, 133 S.Ct at 2224-25.

¹³⁸ *Id.* at 2237.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Am. Express*, 838 F.3d at 184.

¹⁴² *Id.* at 196-97.

¹⁴³ *Id.* at 202.

¹⁴⁴ *Id.*

substantial percentage of merchants do not accept American Express.¹⁴⁵ Finally, the Second Circuit found that the district court had not found an actual adverse effect on competition because it had failed to take into account the potential impact on both sides of the market.¹⁴⁶

In *O'Bannon*, the Ninth Circuit considered a challenge to the NCAA's compensation rules that prevented member schools from paying student athletes for the use of their names, images, and likenesses.¹⁴⁷ The district court had found that the NCAA's compensation rules violated the Sherman Act through application of the rule of reason, holding that the NCAA's compensation rules caused anticompetitive harm in the market for college education but not in the market for group licensing, and that while the rules existed for procompetitive purposes by preserving demand for college sports, these purposes could be achieved through less restrictive means.¹⁴⁸ The less restrictive means identified by the district court included allowing NCAA member schools to give student athletes grants up to the amount of full cost of attendance and allowing student athletes to receive compensation for the use of their names, images, and likenesses.¹⁴⁹

The Ninth Circuit agreed that the rule of reason was the correct approach, and agreed with the district court that the compensation rules resulted in anticompetitive harm to the college education market because they precluded competition between NCAA member schools over the recruitment of high school players by fixing the value of student athletes' names, images, and likenesses at zero.¹⁵⁰ However, the Ninth Circuit found that the district court had undervalued the benefits of preserving amateurism in college sports when considering the procompetitive benefits of the rules, because "the amateur nature of collegiate sports increases their appeal to consumers."¹⁵¹

Finally, when considering the existence of less restrictive alternatives to the NCAA's compensation rules, the Ninth Circuit held that the district court had erred in finding that that permitting students to be paid compensation for the use of their names, images, and likenesses was equally as effective as the current NCAA's compensation rules.¹⁵² While agreeing with the district court that allowing schools to award student athletes scholarships up to the cost of attendance was an acceptable less restrictive alternative to the NCAA's compensation rules, the Ninth Circuit did not agree with the district court that a rule permitting NCAA member schools to pay student athletes for the use of their names, images, and likenesses was "equally as effective" as the NCAA's compensation rules because "the district court ignored that not paying

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 205.

¹⁴⁷ *O'Bannon*, 802 F.3d at 1052.

¹⁴⁸ *Id.* at 1056. The district court had identified two relevant markets: the "college education market" in which college athletic programs recruit high school players through scholarships, coaching, and facilities, and the "group licensing market" in which student athletes would be able to earn payment for the use of their names, images, and likenesses but for the NCAA's rules. *Id.* at 1056-57.

¹⁴⁹ *Id.* at 1074-76.

¹⁵⁰ *Id.* at 1069-1072 ("Although in another context the NCAA's decision to value student-athletes' [names, images, and likenesses] at zero might be *per se* illegal price fixing, we are persuaded – as was the Supreme Court in *Board of Regents* and the district court here – that the appropriate rule is the Rule of Reason").

¹⁵¹ *Id.* at 1073.

¹⁵² *Id.* at 1074.

student-athletes is *precisely what makes them amateurs*.”¹⁵³ After finding that small payments to student athletes for the use of their names, images, and likenesses were not an equally effective, less restrictive alternative to the NCAA’s current compensation rules, the Ninth Circuit vacated this portion of the opinion and permanent injunction, but otherwise affirmed the district court.¹⁵⁴ The Supreme Court denied petitions for writs of certiorari from both parties.¹⁵⁵

* * * *

While courts now typically analyze vertical conduct under the rule of reason, some U.S. states and European competition authorities still categorize some vertical restraints as *per se* unlawful, particularly minimum resale price maintenance. This is an important consideration for businesses that operate at either a national or international level when considering their vertical arrangements.

After *Leegin*, some states continue to maintain that resale price maintenance is *per se* unlawful. These states include Maryland, which amended its laws in 2009 to state that minimum resale price maintenance is *per se* unlawful,¹⁵⁶ and New York, whose antitrust officials have stated their belief that minimum resale price maintenance is *per se* unlawful under New York law.¹⁵⁷ The practical implication of this is that companies, when considering whether their resale price maintenance arrangements are permitted under the rule of reason, must also look to which states may be impacted by their vertical arrangements and evaluate whether their arrangements could be challenged as *per se* unlawful under state law.

Aside from the question of *per se* treatment, practitioners need to be well-versed in the factors that antitrust authorities and courts will consider when balancing procompetitive and anticompetitive effects when performing a rule of reason analysis. Recent cases, such as *American Express*, *Actavis*, and *O’Bannon*, provide important guidance on how courts will evaluate vertical conduct, but much remains to be developed in the case law and economic literature as existing categories and new categories of vertical conduct continue to be reviewed.

¹⁵³ *Id.* at 1076. The district court had proposed a yearly payment to student athletes of \$5,000, but the Ninth Circuit found little support in the record to show that annual payments of \$5,000 would “be as effective in preserving amateurism as the NCAA’s current policy.” *Id.* at 1078.

¹⁵⁴ *Id.* at 1079.

¹⁵⁵ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 137 S.Ct. 277 (2016); *Nat’l Collegiate Athletic Ass’n v. O’Bannon*, 137 S.Ct. 277 (2016).

¹⁵⁶ Md. Code Ann., Comm. Law § 11-204(b).

¹⁵⁷ Burns, James M. and Robert W. Shaw, *Prohibiting Resale Price Maintenance in Maryland*, Law360 (Oct. 16, 2009), available at <https://www.law360.com/articles/128655> (“[T]he attorneys general of several other states, including New York, Illinois and Michigan, have announced that resale price maintenance continues to be *per se* unlawful, despite *Leegin*, under their state antitrust laws, and have brought enforcement actions since *Leegin* that continue to assert a *per se* theory of liability”).