# Are tying arrangements illegal per se?

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In the deep, dark antitrust dungeon reserved for *per se* offenses, only one species of conduct remains that does not involve a horizontal conspiracy: tying arrangements. Minimum resale pricing agreements tunneled their way out thanks to the Supreme Court's 2007 *Leegin* decision, even though Congress and the states are in hot pursuit, with every intention of recapturing RPM agreements and casting them back into their *per se* cells. It may be, however, that tying arrangements have already escaped without being detected, leaving a cunningly designed dummy under the blankets to fool the guards.
Tying arrangements have always been the *per se* offense with a difference. A *per se* unlawful tying arrangement requires proof of market power in the tying product, making tying arrangements an antitrust oxymoron; one of the defining characteristics of a *per se* offense, in any other context, is that market power need not be proven.

The Supreme Court reaffirmed the market power requirement in its 2006 *Independent Ink* decision, holding that a patent does not raise a presumption of market power (not even a rebuttable one), and that market power in the tying product must be pled and proven in every tying case. The Court's opinion rules out any shortcuts to establishing market power, including some other time-honored but dubious presumptions, e.g., that real estate confers market power because every parcel of land is legally unique, or that market power can be inferred simply because a substantial number of buyers accept a tying arrangement.

In *Independent Ink*, the Court performed an analysis with regard to tying

arrangements that resembled its analysis of minimum resale price maintenance agreements in Leegin. The Court examined the history of tying arrangements—particularly Congress' lenient treatment of tying arrangements under the patent misuse doctrine—and concluded that long judicial experience with tying arrangements showed that such arrangements are often not anticompetitive and may in fact be procompetitive. In *Leegin,* the Court performed a similar analysis of minimum resale pricing agreements, albeit from an economic rather than a legislative perspective.

The Court's ultimate conclusions in *Leegin* and in *Independent Ink* were markedly different, however. In *Leegin,* the Court removed minimum resale pricing agreements from per se illegality, while in Independent Ink, the Court simply reaffirmed the market power requirement without expressly overruling tying arrangements' per se status. Why didn't the Court frankly abolish the per se rule for tying arrangements when it had the chance? After all, *Leegin* was a 5-4 decision, and *Independent Ink* was unanimous.

Professor Hovenkamp suggests that the Court did not reach that issue because it wasn't addressed in the lower court opinions, wasn't presented by the briefs, and wasn't within the grant of certiorari. Instead, the Court dropped tantalizing hints. For example, Justice Stevens' opinion characterized the plaintiff's argument for a rebuttable presumption of market power based on patents as "[r]ather than arguing that we should retain the *per se* rule of illegality." The opinion also notes that "some such arrangements are still unlawful, such as those that are the product of a true monopoly or a marketwide conspiracy[,]" without referring to the survival of the *per se* rule for tying arrangements. But those hints can be read as rejecting a per se presumption of market power for patents, rather than removing tying arrangements altogether from the category of per se offenses.

But the *per se* rule in tying cases is already eroding as courts increasingly often raise the bar for what a plaintiff must prove about the tie's effect on the market for the tied product. Traditionally, the only requirement under the *per se* rule for tying arrangements was proof that a "not insubstantial" amount of interstate commerce in the tied product must be affected. That minimal threshold will almost always be satisfied.

More and more courts have recognized that tying arrangements are simply a subspecies of a leveraging offense, albeit under Section 1 of the Sherman Act

rather than Section 2. Once upon a time, courts found Section 2 violations when a monopolist used its power in one market to do nothing more than gain a "competitive advantage" in a second market, in the words of the Second Circuit's much-criticized *Berkey Photo* opinion. Twenty years later, the Supreme Court gave that idea a well-deserved burial in a single sentence in *Trinko,* when Justice Scalia wrote that "[t]o the extent the Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred[.]"

Monopoly leveraging thus requires not just an effort to gain a "competitive advantage" in a second market but instead a dangerous probability of monopolizing that market. Then how can tying arrangements be condemned as per se unlawful if their only effect in the tied product market is to influence a "not insubstantial" volume of commerce? That's why, as one district court said not long ago, that "courts now require claimants allege that the tying agreement has an anticompetitive effect on the tied product's market."

What has not emerged, however, is any judicial consensus on the required magnitude of that anticompetitive effect. Must there be a danger of monopolization of the tied product market as the result of a tie? If that seems too extreme, how can the extent of the impact on the tied product market be expressed and quantified? In any event, if a tying arrangement can only be unlawful if there's both provable market power in the tying product, and an identifiable anticompetitive effect in the tied product market, tying arrangements no longer bear any resemblance to what can fairly be called a *per se* offense.

One should be cautious in attributing an intention to the Supreme Court to go further than it is willing to say that it has. As Judge Friendly pointed out many years ago in declining to regard the baseball antitrust exemption as implicitly overruled: "[W]e continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." In the case of tying arrangements, however, the demise of the per se rule for tying arrangements may be one of those occasions. The asteroid may have already hit, even if the dinosaurs don't know it yet.