No. 82-1031

In the Supreme Court of the United States

OCTOBER TERM, 1982

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., PETITIONERS

v.

EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether a hospital that combines the sale of anesthesiology services with the sale of operating room facilities, as a result of an exclusive dealing contract between itself and a single group of anesthesiologists, may be held to have engaged in a "tie-in" that is per se unlawful under the Sherman Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission, which have primary responsibility for enforcement of the federal antitrust laws, have a substantial interest in assuring that the Sherman Act is construed in a manner that advances, rather than impedes, the Act's objectives.

STATEMENT

1. This case involves a common practice in the health care industry—an arrangement in which a hospital contracts with a group to be the exclusive provider of a particular service to the hospital and its patients. In considering the legal issues presented it will be helpful to recognize the factual landscape in which they are set. For a hospital to compete effectively in the market for surgical procedures, or indeed for any medical treatment, it must provide the full panoply of associated goods and services: operating, recovery and patient rooms; surgeons, anesthesiologists, nurses, and attending staff; and equipment, medicines,

bandages, beds, etc. The failure to offer any of these essential components of surgery would undermine the hospital's competitive posture in relation to other facilities.

The hospital will ordinarily have several options in deciding how to procure and provide these services. It may (1) hire professionals to fill an allotted number of staff positions; (2) contract with a group of professionals for it to be the exclusive provider of such services; or (3) establish an open staff system that allows any qualified practitioner to obtain staff privileges.

The hospital involved in this case chose to have an exclusive dealing arrangement with a group of anesthesiologists. Thus, the services of that group were among the items provided to surgical patients when they selected the hospital for their medical care.

2. Petitioner Jefferson Parish Hospital District No. 2 owns East Jefferson District Hospital ("East Jefferson" or "Hospital"). Pet. App. 20a. The Hospital is located in Metairie, Louisiana, a suburb of New Orleans. Prior to its opening in 1971, the Hospital entered into a contract with Roux & Associates ("Roux"), a professional medical corporation, for Roux to be the exclusive provider of anesthesia services for the Hospital. *Id.* at 22a. In 1976, the contract was renewed, and Roux continues to provide all anesthesia services at the Hospital. *Id.* at 23a.[1] As a result of this contract, patients who are operated on at the Hospital must use the anesthesiology services of the Roux group.[2]

Respondent, Dr. Edwin Hyde, is a licensed and board certified anesthesiologist who chairs the anesthesiology department at Lakeside Hospital in New Orleans. Pet. App. 2a, 30a. When he applied for staff privileges at East Jefferson, the Hospital's Credentials Committee recommended that Hyde be appointed to the staff, but the Board

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[1] At Roux's request the contract language designating Roux as the exclusive provider of anesthesia services was deleted in 1976; the Hospital, however, has maintained its practice of relying exclusively on Roux for these services. Pet. App. 23a.

[2] There was testimony at trial that doctors who are not on the Hospital medical staff could apply for temporary privileges on a case by case basis. Pet. App. 23a.

of Directors refused him privileges because of the exclusive contract with Roux. *Id.* at 25a-26a.

Hyde brought this antitrust suit in the United States District Court for the Eastern District of Louisiana, claiming that the Hospital had tied the use of Roux's anesthesia services to purchase of the Hospital's surgical facilities and that this conduct violated Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 36a-37a.[3]

3. The district court dismissed the complaint. Although it assumed there was a "tie" of two separate services,[4] the district court rejected respondent's claim of per se illegality. First, the court held that the professions are not subject to the same per se rules applicable to other businesses. Pet. App. 37a, 39a. It also ruled that the arrangement was not illegal per se since the Hospital did not have dominant power in the market for surgical facilities, the tying product. *Id.* at 38a. This ruling rested on its finding (*id.* at 33a-34a) that the geographic market in which the Hospital competes (the New Orleans metropolitan area) included at least 20 other hospitals that provided the same surgical services. These hospitals serve the large majority of residents who live in the vicinity of East Jefferson Hospital; indeed 70% of patients who live on the East Bank of Jefferson Parish (where the Hospital is located) go to hospitals other than East Jefferson. *Id.* at 33a. The court also found that traditional indicia of market power were lacking: the tying product was not unique and similar packages were available from other local facilities; the Hospital's prices were no higher than its competitors' nor were its terms of supply

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[3] Respondent also alleged violations of the Fourteenth Amendment and of state law. The district court dismissed those claims. Pet. App. 42a-47a. The court of appeals did not reach those issues (*id.* at 5a n.3), and they are not before this Court.

[4] The only finding on this issue was that anesthesia service appears as a separate item on the patient's bill. Pet. App. 33a.

more burdensome; and there was no indication that unwilling patients were coerced to take a product on unsatisfactory terms. *Id.* at 37a-38a.[5]

The district court therefore applied the rule of reason to petitioners' conduct and found it reasonable. It noted significant efficiencies that result from the exclusive contract with Roux: improved round-the-clock coverage, better control and standardization of procedures, and more efficient and less costly operation of the department.[6] And it concluded that, given the relevant market, the benefits of the closed system outweighed any "minimal" foreclosure of Roux's competitors.

4. The court of appeals reversed (Pet. App. 1a-19a), concluding that the Hospital's contract with Roux was illegal per se.[7] *Id.* at 14a-15a. The court stated that there was a "tie" of "two distinct services which a buyer should be able to obtain separately," *i.e.*, surgical services and anesthesia services. *Id.* at 5a, 6a. Next, the court rejected the dis-

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[5] The district court found that most surgeons have privileges at more than one hospital; thus, they can take their patients to another hospital if they prefer a particular anesthesiologist. Pet. App. 34a. Patients have the same choice. *Ibid.*

The court also found that it is common practice in the health care industry for hospitals to enter into exclusive contracts with physicians engaged in certain hospital-based specialties, such as anesthesiology, radiology and pathology, to insure the availability of these services to their patients; and that, generally, a patient does not specifically select a particular specialist to perform these services. Pet. App. 32a. In the court's view, these factors increased the hospital's responsibility to provide quality service. *Ibid.*

[6] The court found that such a system lends flexibility to the scheduling of operations because it is not necessary to accommodate physicians with outside commitments; it permits the doctors, nurses, and technicians in the department to develop a work routine and a proficiency with the equipment; it increases the Hospital's ability to monitor performance because fewer individuals are involved; and maintenance of equipment is simplified and equipment breakdowns reduced as a result of use by fewer doctors. Pet. App. 32a-33a.

[7] The court held that per se rules under the Sherman Act are as applicable to the health care industry as to other industries. Pet. App. 14a-18a. See *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982).

trict court's finding that the proper geographic market for the tying product included hospitals in Orleans Parish because, in its view, imperfections in the health market (due to third-party payors, and inability of patients to compare the quality of medical care) deprive consumers of the incentive to shop for quality or lower costs; consumers were therefore deemed likely to select the hospital closest to their homes. *Id.* at 9a. The court thus found the relevant market to be the East Bank of Jefferson Parish, a market "much smaller than the district court found" and one in which the Hospital "ha[s] sufficient market power * * * to coerce purchase of the tied product." *Id.* at 10a. The court's finding of market power was based on the fact that nearly one-third of the patients from the East Bank of Jefferson Parish go to the Hospital. *Ibid.*

Addressing the anticompetitive effects of the challenged practice,[8] the court acknowledged that the "tie-in" did not result in higher charges for anesthesia services. Pet. App. 11a. It found, however, that "it accomplished just as dramatic an effect by increasing the hospital's profit" by enabling the Hospital to "supplement[ ] a small contract group of anesthesiologists with a larger group of lower priced [paraprofessional] anesthetists." *Id.* at 11a-12a. The court found that the contract produces "a number of anticompetitive effects:" it prevents anesthesiologists from entering the portion of the market controlled by the hospital; it indirectly limits the number of anesthesiologists in the area, and reduces the incentive for improving quality; and it limits the surgeon's or patient's choice of anesthesiologist. *Id.* at 12a. In addition, the court rejected the contention that competition still exists at the point where the contract for anesthesiology is awarded by the Hospital, because the Hospital "has not permitted this competition since the original contract was signed over ten years ago." *Id.* at 12a n.9. The court also rejected the "business justifications" for the contract because, in the court's view, the

[8] It was apparently not disputed that the practice involved a "not insubstantial" volume of interstate commerce, as the district court (Pet. App. 3a) and court of appeals (*id.* at 13a n.10) both found.

same objectives could be achieved through less restrictive alternatives. *Id.* at 14a.

SUMMARY OF ARGUMENT

1. The court of appeals mischaracterized the exclusive dealing arrangement at issue here as a "tie-in" by focusing solely on the combined sale of surgical facilities and anesthesiology services without appreciating that the combined sale resulted automatically from the exclusive dealing arrangement between the Hospital and the Roux group. This mechanical adherence to labels elevated form over substance and led the court to brand the Hospital's conduct as a "tie-in" and, accordingly, to condemn it as illegal per se without fully considering the procompetitive effects the district court had found. Even if the challenged practice is viewed as a "tie-in," the court of appeals' analysis is legally deficient in several respects; first, it erred in concluding that, merely because surgical and anesthetic services *could* be sold separately, they *must* be. Second, it improperly rejected the district court's definition of the relevant geographic market and then, within this smaller market, used inappropriate guidelines for assessing the Hospital's market power.

2. The ease with which the court of appeals could transform an exclusive dealing contract, subject to scrutiny under the rule of reason, into a "tie-in" that is illegal per se, illustrates one of the difficulties inherent in the tying doctrine. Although this Court has, since *Internationl Salt Co.* v. *United States*, 332 U.S. 392 (1947), placed tying arrangements in the category of per se offenses, it has not accepted the simplistic approach employed by the court of appeals. Instead, the tying doctrine has evolved in a manner quite unlike other per se rules. Whereas other per se violations are established without regard to competitive impact, the tie-in rules laid down by this Court explicitly require an inquiry into facts peculiar to the products and markets at issue to determine whether a foreclosure effect exists. Moreover, some of the lower courts, following this Court's lead, have scrutinized whether a practice is justified by business reasons or lack of anticompetitive effect in order to avoid

per se condemnation of "tie-ins" that do not threaten competition. This is of course more consistent with the rule of reason approach applied to conduct that does not invariably have a "pernicious effect on competition" and that may have some "redeeming [competitive] virtue." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977). Accordingly, we believe it would now be appropriate for the Court expressly to confirm that alleged tie-ins should be scrutinized to determine whether market conditions are such that anticompetitive effects could be realized and, in those instances, whether sufficient justifications nevertheless exist to permit the challenged practices.

3. The course we suggest is not an abrupt or radical departure from current law. First, the more discerning opinions have already adopted analyses that incorporate traditional competitive impact factors. Second, economists and legal scholars have recognized that the instances in which alleged "tie-ins" in fact produce anticompetitive effects arise only in limited circumstances. These relatively few instances do not justify the proscription of a broad category of conduct that in many cases is procompetitive. Moreover, where anticompetitive effects are shown, and they outweigh economically beneficial effects, antitrust liability will still be imposed—but with the assurance that only demonstrably pernicious conduct will be penalized.

ARGUMENT[9]

I. THE COURT OF APPEALS MISAPPLIED PREVAILING ANTITRUST LAW IN TREATING THE HOSPITAL'S CONTRACT WITH ROUX AS A TIE-IN AND, HENCE, ILLEGAL PER SE

The court of appeals erred in treating the arrangement between the Hospital and Roux as a "tie-in," governed by a per se standard of illegality, rather than as an exclusive dealing contract whose legality is judged by the rule of reason. All other courts of appeals that have addressed the is-

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[9] The Federal Trade Commission joins in Section I of this brief; it also supports the general conclusions of Sections II and III, that the legal treatment of tying arrangements should be clarified to take into account the relevant economic and competitive factors.

sue have treated exclusive arrangements between hospitals and physicians as vertical restrictions subject to the rule of reason.[10] The Fifth Circuit, however, failed to recognize that the combined sale of anesthesiology and surgical services by the Hospital resulted automatically from and, as a practical matter, was required by the arrangement under which Roux provided all of the anesthesiology services in the Hospital. Since the legality of the exclusive dealing contract is judged under the rule of reason, *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 333-335 (1961), neither logic nor antitrust policy is served by judging the resultant and ancillary combined sale by a per se standard.

In addition to its error in condemning the Hospital's practice as per se unlawful, the court's analytical path to that conclusion reflects additional misapplications of established tie-in principles. For example, the court mechanically classified the aggregation of surgical and anesthesia services as a "two-product" package, each component of which patients should be free to obtain separately. In contrast to the automatic approach adopted below, this Court has made clear that the mere separability of combined products or services does not suffice for invocation of the tying doctrine. *Times Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 613-614 (1953). Accordingly, the separability test employed by the court of appeals does not comply with this Court's instruction that the gravamen of the tie-in offense is "the forced purchase of a second *distinct* commodity * * * resulting in economic harm to competition in the 'tied' market." *Id.* at 614; emphasis added. See Gov't Pet. Br. 7-12.[11]

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[10] *Dos Santos* v. *Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (7th Cir. 1982); *Capili* v. *Shott*, 620 F.2d 438 (4th Cir. 1980); *Harron* v. *United Hospital Center, Inc.*, 522 F.2d 1133 (4th Cir. 1975), cert. denied, 424 U.S. 916 (1976); *Smith* v. *Northern Michigan Hospitals, Inc.*, 518 F. Supp. 644 (W.D. Mich. 1981), aff'd, No. 81-1513 (6th Cir. Mar. 25, 1983). See the recent advisory opinion by the Federal Trade Commission, appended to petitioner's brief at A-1 to A-10. See also *Robinson* v. *Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), aff'd mem., 688 F.2d 824 (3d Cir. 1982), cert. denied, No. 82-415 (Nov. 1, 1982).

[11] "Gov't Pet. Br." refers to the government's amicus curiae brief filed in support of the petition for a writ of certiorari.

Further, the court's geographic market definition and resulting finding of substantial market power in the market for surgical services ignored clearly supported findings of fact made by the district court. See Gov't Pet. Br. 12-14. This Court's decision in *Tampa Electric Co.* v. *Nashville Coal Co. supra*, 365 U.S. at 331, teaches that a court must identify the "relevant market of effective competition." See *Robinson* v. *Magovern*, 521 F. Supp. 842, 878 (W. D. Pa. 1981), aff'd mem., 688 F.2d 824 (3d Cir. 1982), cert. denied, No. 82-415 (Nov. 1, 1982). In this case, the court of appeals pared down the geographic market determined by the district court[12] and then, on the basis of this reduced area, concluded that the Hospital wielded sufficient power to warrant application of the per se standard. In our view, the Fifth Circuit was incorrect in redrawing the borders of the market, and consequently erred in assessing the Hospital's power in that market. Indeed, the court below acknowledged that under the "traditional method of economic power analysis" the respondent "has failed to prove an illegal tying arrangement" (Pet. App. 8a). Only by relying on its own assessment that patients "select the hospital closest to home" and prefer a "non-profit entity" (*id.* at 9a), did the court reject the traditional analysis and the district court's conclusions. The court's reliance on these factors was misplaced as a matter of law (see Gov't Pet. Br. 13-14).

Any one of these errors would suffice to justify reversal by this Court. But we believe that the fundamental error in the court of appeals' decision is its wooden characterization of the contract as a "tie-in" and the resulting condemnation of the arrangement as per se unlawful. The court of appeals' opinion is virtually a roadmap showing how the hypertechnical affixing of labels, without meaningful substantive analysis, can lead to results that distort the federal antitrust laws. Because antitrust legality should turn on a reasonable assessment of likely competitive effects, the fact that a practice could fit within a particular rubric—*e.g.*, "tie-in" or "exclusive dealing"—should not be determina-

[12] The court of appeals did not conclude that the district court's findings of fact on market definition were clearly erroneous; it therefore erred in substituting its judgment on these factual matters. Fed. R. Civ. P. 52(a); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, No. 80-2182 (June 1, 1982), slip op. 10-13; *Pullman-Standard* v. *Swint*, 456 U.S. 273, 290-292 (1982).

tive. See *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 47 (1977); *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 9 (1979). In order to avoid similar errors in future cases, and to assist the court of appeals should the case be decided on narrower grounds and remanded, we urge this Court to articulate criteria that address the primary antitrust inquiry: whether a challenged practice is likely to harm competition.

II. THIS COURT SHOULD ARTICULATE EXPLICITLY THE FACTORS THAT ARE OFTEN IMPLICITLY USED TO CHARACTERIZE AND EVALUATE THE LEGALITY OF TIE-INS

A. Tie-ins Were Placed In The Category Of Per Se Offenses Because They Were Perceived To Be A Monopolization Device

This Court first placed "tying" arrangements in the category of conduct deemed illegal per se under the Sherman Act in *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947). Tying arrangements were viewed as "serv[ing] hardly any purpose beyond the suppression of competition" (*Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 6 (1958)); they were considered to be a coercive means by which a seller with economic power in one market (the tying product) could extend that power into another market (the tied product). *International Salt Co.* v. *United States*, *supra*, 332 U.S. at 396; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305-306 (1949); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 611 (1953). The per se rule against tie-ins, therefore, was based on the desire to prevent the expansion or extension of monopoly power from one market to another. *Times-Picayune*, *supra*, 345 U.S. at 611; *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 498-499 (1969) *("Fortner I")*; *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 617-618 & n.8 (1977) *("Fortner II")*.

The per se rule involving tie-ins has, from its inception, differed from other applications of that standard in one significant respect. Per se rules ordinarily preclude analysis of anticompetitive effects or consideration of defense "justifications." See *Broadcast Music, Inc.* v. *CBS*, *supra*, 441 U.S. at 17. Thus, in a price-fixing case a plaintiff need not prove anticompetitive effect, nor may defendants justify their behavior because their conspiracy was ineffective or set prices that were in fact at a competitive level. In applying the tying doctrine, however, the courts have recognized that not every practice that could literally be characterized as a "tie-in" invariably justifies condemnation under the Sherman Act. Indeed, the tie-in rules laid down by this Court explicitly require an inquiry into facts peculiar to the products and markets at issue to determine whether one product is being tied to a separate product, whether the seller has sufficient economic power in the tying product market, and whether a "not insubstantial" amount of commerce in the tied market is involved. *Times-Picayune, supra,* 345 U.S. at 608-614; *Fortner I, supra,* 394 U.S. at 498-500. These rules thus make some attempt to assess the seller's power in the tying market and to assess foreclosure of competing producers in the tied market—factors more akin to the rule of reason analysis employed for other vertical restraints—before judging the arrangement to be per se illegal.[13] In addition to this three-part inquiry, moreover, some lower courts have accepted evidence of "business justifications" or "lack of anticompetitive effects" to avoid application of the per se rule to tie-ins that do not threaten competition. See, *e.g., United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 559-560 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961);[14] *Coniglio* v.

[13] If an alleged tie-in does not meet the "separate product," tying market power, and "not insubstantial" amount of commerce tests, then it is judged under the rule of reason. *Times-Picayune, supra,* 345 U.S. at 614.

[14] In *Jerrold Electronics* the district court found that, while the government had elsewhere established a two-product tie-in of community antenna equipment to engineering service contracts, and where the other prerequisites of "economic power" and effects on a "not insubstantial amount of interstate commerce" were met, the unique circumstances of the case nonetheless justified a refusal to condemn the tie-in. 187 F. Supp. at 555-556. The court found the tie-in to be reasonable, hence legal, because it was used "to foster the orderly growth of the industry on which the future of Jerrold depended." *Id.* at 557. This "business justification defense," as it has come to be called (see, *e.g.*, Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot,* 66 Va. L. Rev. 1235, 1249-1251(1980)), is something that per se rules normally do not permit. E. Singer, *Antitrust Economics and Legal Analysis* 109-110 (1981).

Highwood Services, Inc., 495 F.2d 1286 (2d Cir.), cert. denied, 419 U.S. 1022 (1974); cf. *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, No. 80-5629 (9th Cir. Feb. 23, 1983).

In the following sections, we will examine the unusual application of the per se test as it has been implemented by the courts in cases alleging tie-ins.

B. The Better Reasoned Tie-in Decisions Have Permitted Some Extended Competitive Analysis Within The "Per Se" Framework

1. In this case, the Hospital's provision of surgical and anesthesia services as a single package can literally be characterized as a "tie-in." But the simple fact that a label can be applied to a practice does not necessarily determine its potential for anticompetitive effect and should not, therefore, be dispositive of its legality.[15] *Continental T.V. Inc.*, v. *GTE Sylvania, Inc., supra*, 433 U.S. at 47; *Broadcast Music* v. *CBS, supra*, 441 U.S. at 9. As a consequence, some of the lower courts have recognized the potential procompetitive functions of tie-ins and have, accordingly, applied the per se rules laid down by this Court in a manner that takes into account the competitive effects and business justifications for the conduct at issue.

2. Some courts have used the one-product/two-product test to justify an inquiry into the business considerations relevant to a challenged tying practice, and have avoided classifying a packaged sale as illegal absent a realistic threat of anticompetitive effects. See Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235, 1315 (1980). For example, in *United States* v. *Jerrold Electronics Corp., supra*, 187 F. Supp. at 559-560, the court accepted "a sound business reason" (*i.e.*, the inability to launch and develop an experi-

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[15] In this case the tie-in was the inevitable result of the Hospital's exclusive dealing contract with Roux. If such an exclusive contract were legal under the rule of reason approach that is generally applied to nonprice vertical restraints, then as a matter of logic the tie-in automatically following from that arrangement should be legal. Whether the practice is viewed as an exclusive dealing arrangement or a tie-in, therefore, the antitrust analysis should follow the same course.

mental business using sensitive and unstable equipment unless service was sold in a package with the equipment) as a legal justification for the sale of a package of various items of equipment designed for community antenna systems.[16] Similarly, in *Hirsh* v. *Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1347-1348 (9th Cir. 1982), cert. denied, No. 82-570 (Nov. 1, 1982), the court observed that it must consider "whether the aggregation serves to facilitate competition by promoting product quality or whether it, in fact, amounts to no more than a naked effort to impede competition on the merits" and that "where * * * the aggregate sale of ostensibly separate items serves to improve the quality of the product offered by the seller * * * no tying arrangement is present."

Unless a court is as discerning as the *Jerrold* and *Hirsh* courts were to go beneath the surface of the literal tie-in rules to examine competitive realities, it may feel obliged to find a practice per se illegal even though the procompetitive benefits may outweigh any ancillary anticompetitive effects. This more mechanistic approach is demonstrated by the decision below. The court of appeals found it "clear," without any analysis, "that we are dealing with two distinct services which a buyer should be able to obtain separately" (Pet. App. 5a-6a). This cursory consideration, amounting to a "separability" test, led the court to ignore both the close functional relationship between the "tied" services, and the vertical integration achieved by the challenged contract.[17]

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[16] Accord, *Dehydrating Process Co.* v. *A.O. Smith Corp.*, 292 F.2d 653, 655-656 (1st Cir.), cert. denied, 368 U.S. 931 (1961) ("sound business interests of the seller" warranted treatment of components as "inseparable"); *Foster* v. *Maryland State Savings & Loan Ass'n*, 590 F.2d 928, 932 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979) ("Incidental services purchased by the seller (lender) for legitimate business reasons cannot be viewed as a separate (or tied) product, merely because the buyer is charged for them"); cf. *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 48 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972) (package may be single product where the amalgamation results in cost savings apart from reduction in sales expenses and the like, or where the items are normally sold or used in fixed proportions).

[17] Many items can be broken down into components that conceivably could be offered for sale separately. For example, a pair of shoes is lit-

By contrast, many lower courts have looked beyond the separability of products sold as a package in determining whether to treat an aggregation as an illegal "tie"; they have instead looked to the seller's reasons for coupling the products and the policies underlying the tying rule as guides to characterization.[18] Unlike the oversimplified ap-

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erally a "tie" of one right and one left shoe and, going further, of shoes and laces, heels and soles. It is, of course, preposterous to suggest that the sale of shoes in pairs is an illegal tie-in; but the illustration is instructive in two respects. First, it highlights the pitfalls of a hypertechnical approach to the one product/two product issue. And, if we analyze the reasons why pairs of shoes are not illegally tied products we can discern rules of more general application. A shoe has no commercial utility without its mate; consumers expect to purchase the pair as a unit; there are not separate markets for right and left shoes, negating the possibility that power in one market could be "leveraged" into the other; competitors are easily able to duplicate the "package"; and finally, there are efficiencies that can be realized in manufacture and distribution. The same factors are present in this case. Yet the court of appeals' elevation of formal labels over substance left no place for consideration of the functional and economic justifications for the packaged sale of surgical and anesthetic services.

Proper product definition is "not bounded by the minimum product that could be or typically is sold, but rather bounded at the point where the amalgamation appears to have relatively little economic justification." Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 Harv. L. Rev. 50, 71-72 (1958); R. Bork, *The Antitrust Paradox*, 371, 378-379 (1978); L. Sullivan, *Handbook of The Law of Antitrust* 455 (1977). "The definition of what constitutes a single product in a tying arrangement * * * may have to change with its economic environment." E. Singer, *supra*, at 114. Authors Dolan & Ralston, *Hospital Admitting Privileges and the Sherman Act*, 18 Hous. L. Rev. 707 (1981), suggest that factors relevant to a proper product definition of hospital services include: customary practices in the industry, the common understanding of people about such commodities, technological realities, and other economic efficiencies. *Id.* at 757. The authors also suggest that in specialties like anesthesiology, "custom requires the purchase of those services from the hospital" and "it could be reasoned that no tying agreement exists because of the close identity of the services and the hospital." *Id.* at 758.

[18] See, *e.g.*, *Krehl* v. *Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1354 (9th Cir. 1982); *Principe* v. *McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981); *Dehydrating Process Co.* v. *A.O. Smith Corp.*, *supra*; *United States* v. *Jerrold Electronics Corp.*, *supra*.

proach adopted by the Fifth Circuit, the better reasoned opinions have "long recognized that the rules governing tying arrangements are designed to strike solely at practices employed to impede competition on the merits." *Hirsh* v. *Martindale-Hubbell, Inc., supra,* 674 F.2d at 1348. As *Hirsh* and similar cases illustrate, the conclusion that an illegal tying arrangement exists cannot properly be reached without consideration of the purposes of the tying rule and the competitive function of the challenged aggregation of products. Because the Hospital's anesthesia contract combines functionally related services in an efficient form of vertical integration, it does not create a "forced purchase of a * * * distinct commodity" and may not cause "economic harm to competition in the 'tied' market." It therefore should not be characterized as the illegal sale of two distinct services. *Times-Picayune, supra,* 345 U.S. at 614. Nevertheless, the court of appeals failed to consider possible justifications for the bundling of anesthesia services with other hospital products and services, even while it acknowledged that the exclusive contract resulted in significant cost savings to the Hospital.[19]

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[19] The court of appeals erred in holding that such cost savings brought about an anticompetitive result merely by increasing the Hospital's profits. Pet. App. 11a-12a. Arrangements that increase efficiency and lower costs enhance welfare, even if they also increase a firm's profits. It is, of course, the profit incentive that motivates firms to innovate and to reduce costs.

The court was also incorrect in implying that anesthesiologists require special protection from nurse-anesthetists, their "paraprofessional counterpart[s]." Pet. App. 11a. To the contrary, the antitrust laws were promulgated to promote, not frustrate, the entry of competitive alternatives. The antitrust laws should not be transformed into a tool that allows competitors to prevent competition by competent, state-licensed, non-physician health care providers; their purpose, rather, is to assure that where state-authorized alternatives are available consumers have the option to use them.

The court's failure adequately to consider cost reductions and other competitive justifications was exacerbated by its invocation of the "less restrictive" alternative standard (Pet. App. 12a-13a). While the clear availability of such alternatives is a relevant factor in determining the existence of either anticompetitive intent or effect (see *White Motor Co.* v. *United States*, 372 U.S. 253, 270-272 (1963) (Brennan, J., concurring), it does not in itself prove that the means selected were ei-

Sellers throughout our economy offer aggregations of parts, products, and services that can be sold separately, but that sometimes may be supplied more efficiently and conveniently when packaged together. It is important that antitrust analysis distinguish aggregations that promote consumer welfare and competition from those that injure competition and coerce consumers. Pet. App. 5a-6a. Consequently, we believe that this Court should go beyond its tacit acceptance of the more sophisticated decisions that analyze the economics of a package sale before classifying it as a one- or two-product sale (see *Jerrold Electronics, supra*, 365 U.S. at 567),[20] and should explicitly require such an analysis in appropriate cases.[21]

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ther unreasonable or anticompetitive. The court of appeals' use of the rule would make firms

> guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade. And courts would be placed in the position of second-guessing business judgments as to what arrangements would or would not provide 'adequate' protection for legitimate commercial interests.

American Motor Inns, Inc. v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249-1250 (3d Cir. 1975).

[20] This Court discussed the relevant considerations generally in *Times-Picayune Publishing Co.* v. *United States, supra.* There, the Court looked beyond mere separability, to the nature and function of the allegedly tied products and the realities of the market. 345 U.S. at 613. It then compared the challenged practice with the "common core of the adjudicated unlawful tying [cases]"—"the forced purchase of a second distinct commodity * * * resulting in economic harm to competition in the "tied' market." *Id.* at 614. Finding that "neither the rationale nor the doctrines evolved by the 'tying' cases" were involved, the Court refused to dispose of the case under the tying rule; it held instead that the challenged practice must be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade." *Ibid.*

[21] Under the tie-in rules presently articulated, the one-product/two-product issue is the first one considered by the courts. Under criteria that focus on anticompetitive potential rather than on the form of the challenged conduct, however, one would not need to examine the separate product issue unless analysis indicated that the defendant possessed sufficient market power to enable a court to conclude that the tie-in had significant anticompetitive potential. In that situation, the defendant would have the burden of proving as an affirmative defense

3. The second pre-condition of a per se illegal "tie-in"—that the seller have significant economic power in the market for the tying product—has also been used by discerning courts to avoid automatic condemnation of sales of bundled products whose purpose and effect is unlikely to be anticompetitive. See *Fortner II, supra; Warner Management Consultants* v. *Data General Corp.*, 545 F. Supp. 956, 965-966 (N.D. Ill. 1982); *In re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801, 806-821 (N.D. Cal. 1981); *JBL Enterprises, Inc.* v. *Jhirmack Enterprises, Inc.*, 509 F. Supp. 357, 377-378 (N.D. Cal. 1981); *Refrigeration Engineering Corp.* v. *Frick Co.*, 370 F. Supp. 702, 711-712 (W.D. Tex. 1974). Yet, the "economic power" test, as enunciated in some of this Court's decisions, may also lead to erroneous predictions of a tie-in's competitive effects. While on its face the "economic power" test may "suggest [] a discussion of the available economic evidence in what might appear to be a rule of reason approach" (see E. Singer, *Antitrust Economics and Legal Analysis* 109-110 (1981)), a number of this Court's earlier tie-in decisions indicated that the usual analytical means for ascertaining the existence of significant market power could be eschewed. Thus, under *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962), it did not appear necessary to determine the relevant geographic market share with any precision because sufficient power in the tying market could be inferred from the unique nature of the tying product, *e.g.*, a patent or a copyright.[22] *Id.* at 45-46, 48-49. Yet, a patented or

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that a combined sale afforded sufficient benefits to outweigh the anticompetitive potential.

[22] In *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949), the Court noted that in *International Salt* "[i]t was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant * * *." 337 U.S. at 305-306. The presumption of market control was based on the assumption that "only [the seller's] control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter [a tying contract]." *Ibid.* Some courts of appeals have extended the *Loews'* "uniqueness" rationale to trademarks and franchises, finding not only that the trademark is a separate "product" from the product that the

copyrighted article is not necessarily a market unto itself; in many cases such articles have close substitutes that preclude the exercise of any significant degree of market power by the holder of the patent or copyright. As a result, it should not be presumed that a patent or copyright confers market power. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965); E. Singer, *supra*, at 112. In other tie-in decisions, the Court has said that sufficient economic power could be presumed from the existence of the tie itself. *Northern Pacific Ry.* v. *United States, supra,* 356 U.S. at 7-8. Yet, further analysis would suggest that the reason a buyer accepts a tie-in is just as likely to be buyer preference as seller coercion, see *Fortner II, supra*, 429 U.S. at 621-622, and thus the existence of the tie-in itself has no probative value in determining the existence of market power.

In *Fortner II* the Court seems to have retreated from the language of *Northern Pacific* and *Loew's* " 'which could be read to make actual market power irrelevant' " (*Fortner II, supra*, 429 U.S. at 620 & n.13), and reaffirmed the central importance of market power to the finding of an illegal tying arrangement. However, this apparently has eluded many courts that continue to seek guidance from pre-*Fortner II* precedent. See *Ware* v. *Trailer Mart, Inc.*, 623 F.2d 1150, 1154 (6th Cir. 1980); *Moore* v. *Jas. H. Matthews Co.*, 550 F.2d 1207, 1215 (9th Cir. 1977); *In re Data General Corp. Antitrust Litigation*, 490 F. Supp. 1089, 1112 (N.D. Cal. 1980). Even those courts that follow *Fortner II*, moreover, may be led astray. For instance, the test of "whether the seller has some advantage not shared by his competitors in the market for the tying product" (*Fortner II, supra*, 429 U.S. at 620) might appear to encompass a finding that a product with a favorably regarded brand name, or the corner grocery store, or the nearby hos-

trademark represents (*Siegel* v. *Chicken Delight, supra*, 448 F.2d at 48 & n.2), but also that the uniqueness of the trademark is sufficient by itself to support a finding of economic power in the tying product market. *Id.* at 50; *Warriner Hermetics, Inc.* v. *Copeland Refrigeration Corp.*, 463 F.2d 1002, 1015 (5th Cir.), cert. denied, 409 U.S. 1086 (1972).

pital, has market power simply by reason of its reputation or close proximity to a core of neighborhood users. Indeed, in this case the court of appeals, purporting to rely on *Fortner II* for its economic power analysis (Pet. App. 8a), found that the Hospital possessed the significant market power necessary for a per se determination despite the fact that there is nothing in its opinion that indicates the Hospital possessed either market dominance or any distinct advantage over its competitors for offering a unique or differentiated product. See *Fortner II, surpa*, 429 U.S. at 620-621. The court of appeals' finding of "sufficient market power" based solely on the Hospital's 30% share of patients living on the East Bank of Jefferson Parish (Pet. App. 10a), without examination of the proper standards for defining a relevant market, defeats any rational aim of using "economic power" to gauge the likelihood of anticompetitive effects. The district court's finding that the relevant geographic market included the larger group of 20 hospitals in the metropolitan New Orleans area—and that 70 % of patients from the East Bank of Jefferson Parish go to hospitals other than petitioners'—is reasonable on its face and should not have been rejected by the court of appeals absent findings that disclose clear error by the district court.[23]

4. While some courts have been willing to analyze the one/two product issue and the tying product market power issue by focusing on business efficiency and market power, none has analyzed the third element of the per se test—the impact on the tied product market—in terms of actual effects on market structure, behavior, or performance. Although the illegality of tie-ins is said to rest on their potential to extend market power into the tied product market (*International Salt, supra*, 332 U.S. at 396; *Times-Picayune, supra*, 345 U.S. at 611), current tie-in rules focus not on competitive effect in the tied market, but solely on the dollar volume of commerce affected by the arrangement. *Fortner I, supra*, 394 U.S. at 501; *Northern Pacific*

[23] See pp. 8-9, *supra*. In *Times-Picayune, supra*, 345 U.S. at 611, this Court instructed that "the whole and not part of a relevant market must be assigned controlling weight" when testing the strength of a firm's tying "lever."

Ry., *supra*, 356 U.S. at 9. Yet this test tells us nothing about whether the extension of market power or foreclosure of competitors is of a magnitude sufficient to affect market structure or pricing pressures. It does not attempt to assess the seller's ability to affect the tied market, or the likely result of the tie-in on market shares, price, or output. For other forms of vertical restraint, however, which are analyzed under the rule of reason, the market inquiry squarely addresses likely competitive effects as they may be predicted from changes in market power and structure. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 329 (1961). This disparity in treatment between tie-ins and all other forms of nonprice vertical arrangements elevates form over substance. See *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, *supra*, 433 U.S. at 47. Given the ambiguity of the characterization of the conduct here as "tying" or "exclusive dealing," it is particularly important that formal labels not be the sole determinant of legality. See *Broadcast Music, Inc.* v. *CBS*, *supra*, 441 U.S. at 9. Since the anticompetitive potential of tie-ins and exclusive dealing contracts is basically identical, both arrangements should be judged by the same criteria. See Baker, *supra*, 66 Va. L. Rev. at 1306.[24]

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[24] In this case the court of appeals found the contract with Roux to be anticompetitive because it "prevents anesthesiologists from entering that part of the anesthesia services market which the hospital controls", and it "eliminates the surgeon's or patient's choice of anesthesiologist at this hospital." Pet. App. 12a. But this degree of foreclosure and limitation on consumer choice is inherent in any contract for the sale of goods or services. Without an assessment of the market, and the effects of foreclosure on competition, the court's findings are meaningless as a test for judging the reasonableness of the restraint. See *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918).

III. Economic and Legal Analysis Indicates That There Is Only A Narrow Range Of Conditions Under Which Tie-Ins Are Likely To Produce Anticompetitive Effects

As we have just discussed, the history of the tying doctrine in the federal courts reveals at least a tacit recognition that the doctrine does not fit comfortably within the category of offenses branded illegal per se. While this Court has labeled many tie-ins per se offenses, it—and the lower courts—have usually looked to economic factors relevant to a particular sales arrangement before deciding whether to place it in the per se category. The label applied to such an analytical approach—"per se", "modified per se," or "rule of reason"—is ultimately unimportant so long as the analysis aimed at identifying anticompetitive conduct is sound. The discussion above indicates that, while some courts have applied the existing per se rules to take into account competitive effects and avoid striking down conduct that is not anticompetitive, courts that have been less discerning or have felt more constrained by the per se label have not undertaken sufficient competitive analysis.[25]

Although the existing rules implicitly acknowledge the need to consider cost justifications for offering a product "package" (the "one-product/two-product" test), and the need for finding a degree of market power in the tying product sufficient to enable a seller to expand that power through a tied sale (the "economic power" test), the rules should be more explicit to demand employment of these two tests as a prerequisite to a finding of illegality in every tie-in case. Moreover, the existing rules, which now require

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[25] *E.g.*, *Earley Ford Tractor, Inc.* v. *Hesston Corp.*, 1983-1 Trade Cas. ¶ 65,232 (W.D. Mo. 1982) (once literal criteria for identifying a tie-in are met, no other justification is appropriate); *Rosebrough Monument Co.* v. *Memorial Park Cemetery*, 666 F.2d 1130, 1143 (8th Cir. 1981) (a cemetery plot is "unique" for market power analysis; volume of commerce is sufficient if it meets the tests established under "interstate commerce" criteria); *Siegel* v. *Chicken Delight, Inc.*, *supra*, 448 F.2d at 50; *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 722 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980) (franchise can be a separate tying product).

only that a "not insubstantial" amount of commerce be affected in the market for the tied product, should be modified to require instead a true competitive analysis of the effects of the tying arrangement on the tied product market. Such a competitive analysis turns not on the quantitative amount of commerce affected, but rather on the relationship of the tying arrangement to the possibility that the defendant might exercise market power in the tied product market. With these modifications, the rules governing the legality of tying arrangements would be consistent with the approach employed in the more rigorously analytical cases; they would also, as we now discuss, make unlawful those tying arrangements with anticompetitive effects about which this Court was properly concerned in its earlier tie-in cases, without impeding those tying arrangements that are procompetitive or are competitively neutral.

1. Since *International Salt* and its immediate progeny, legal scholars and economists have come to recognize that existing precedent both underestimates the extent to which alleged tie-ins may be procompetitive or competitively neutral, and overestimates the frequency with which they pose potential anticompetitive problems.

Profit-seeking firms have strong incentives to find the most efficient ways to distribute their goods and services to consumers, so as to maximize their sales and hence their profits. Efficient distribution benefits consumers as well, providing them with the goods and services they want at the lowest cost. A failure on the part of a supplier to distribute its goods and services in the most efficient way opens the possibility that it will be undercut by its more efficient competitors, who will be able to price their products below the higher prices resulting from the supplier's distribution inefficiencies. As a result, the interests of a supplier and of consumers in achieving an efficient distribution system are usually coincident.

Accordingly, the strong presumption should be that a supplier will choose that method of distribution that yields the most attractive package to consumers in terms of price, product mix and quality. In particular, where a supplier chooses to offer physically separable products only in a single package, the choice ordinarily will reflect the supplier's judgment that this method of distribution is the most likely to satisfy consumer preferences at the lowest price and so enhance the supplier's ability to compete in the marketplace.

Besides cost efficiencies in distribution, a number of other beneficial uses of tie-ins have been observed (*Fortner I*, *supra*, 394 U.S. at 514 n.9 (White, J., dissenting)):

> They may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 330 (1962); Note, Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives, 18 Stan. L. Rev. 457 (1966). They may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers in the market* * *. And, if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution.

See also E. Singer, *supra*, at 106. Another recognized justification for tying is to protect the seller's goodwill by assuring that the tying product is used with essential complements that do not impair the product's quality or performance. *United States* v. *Jerrold Electronics Corp.*, *supra*, 187 F. Supp. at 559. See E. Singer, *supra*, at 113-114; R. Bork, *supra*, at 379-380; Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19, 27 (1957); Markovits, *Tie-ins, Reciprocity, and the Leverage Theory*, 76 Yale L.J. 1397, 1459 (1967); see also *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F.2d 641, 643 (7th Cir. 1935), aff'd per curiam, 299 U.S. 3 (1936).

2. However, as this Court has recognized, in some instances the supplier may have an incentive to use an inefficient tying arrangement (*i.e.*, one that does not minimize the costs of supplying the products, contrary to the interests of consumers) in order to achieve an anticompetitive effect. The courts and commentators have identified two principal types of anticompetitive harm that might arise from a tying arrangement: (1) where the defendant uses its

market power in the tying product in order to foreclose other sellers and make it more difficult for new firms to enter either the tying product or tied product markets; and (2) where the defendant uses its market power in the tying product in order to extract supracompetitive profits from consumers in their purchase of the tied product (the "leverage" theory).[26]

a. Under the foreclosure theory, the supplier uses a tying arrangement to raise barriers that increase the manufacturing or distribution costs of its rivals in the market for one of the products in the tying package and thereby enhances the supplier's ability to obtain supracompetitive profits. See *Hirsch* v. *Martindale-Hubbell, Inc.*, *supra*, 674 F.2d at 1349; P. Areeda, *Antitrust Analysis* 569-570 (2d ed. 1974); L. Sullivan, *Handbook of the Law of Antitrust* 447-448 (1977). Under the appropriate conditions, foreclosure through a tying arrangement may increase the relative costs of the supplier's competitors by forcing them to produce both the tying and the tied products.[27]

[26] Other potential uses for a tying arrangement, which may or may not be anticompetitive depending on the circumstances, are where it is used as a counting device for metering demand (see note 30, *infra*) and where the defendant uses the tying arrangement to evade price controls in a regulated tying product market through clandestine transfer of the profit to the tied product. See generally *Fortner I*, *supra*, 394 U.S. at 512-514 (White, J., dissenting); quoted in *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, *supra*, slip op. 875 n.3; E. Singer, *supra*, at 105-109.

[27] This may occur where the tying and tied products in the package are complements (*i.e.*, products that are used in combination), as in the case of central processing units ("CPU's") and peripheral equipment (punch card readers, storage discs, printers, etc.). A monopolist CPU manufacturer might tie peripheral equipment to the sale of the CPU and, as a result, inhibit the entry of independent manufacturers of peripheral equipment because of a lack of potential customers. Conversely, entry into the CPU market may also be impeded, for in the absence of an available supply of peripheral equipment from independent producers the new CPU entrant would have to produce peripherals as well.

If the degree of foreclosure in the market for the tied product is small, the supplier's competitors simply can turn to other, non-foreclosed customers with little or no negative effect on competition. To be anticompetitive, the supplier must have power in the market for the tying product to coerce the purchase of the tied product by those who would otherwise purchase it elsewhere; absent market power, consumers would be free to look to the supplier's competitors as an alternative source of supply and anticompetitive foreclosure could not occur.[28]

Moreover, if the supplier does not also have market power in the tied product, whatever foreclosure might result from a tying arrangement cannot have an anticompetitive effect. Only if the tying arrangement results in the elimination of enough existing rivals in the tied product market to give the supplier power in that market will the arrangement itself be anticompetitive. L. Sullivan, *supra*, at 445-446. So long as the remaining independent competitors in the relevant tied product market can produce output for sale at the competitive price, the tying arrangement itself cannot create or enhance the power of the tying firm to obtain supracompetitive profits through foreclosure of other firms.[29]

b. The "leverage" theory can be seen as the consumer counterpart to the foreclosure theory. The anticompetitive harm under the leverage theory flows from the use of a tying arrangement to extract supracompetitive profits from consumers that otherwise would not be available to the ty-

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[28] This explains why true market power in the market for the tying product—and not merely the "economic power" lower courts were willing to find on the basis of the "uniqueness" of the tying product—is necessary for an anticompetitive effect to occur under the leverage theory. See pp. 17-18, *supra*.

[29] Even if the tying arrangement can be shown to reduce the number of the supplier's competitors, this reduction does not necessarily imply less effective competition for consumer dollars. Indeed, where a tying arrangement increases the efficiency of a supplier's distribution system, it may well result in the elimination of those competitors who are not as efficient. The antitrust laws are designed "for the protection of competition, not competitors." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

ing firm. These profits arise because entry into one or both product markets has been made more difficult—and thus consumers have been deprived of the extra output and the lower prices that the foreclosed entrants would have provided. Thus, again, market power is clearly needed in the tying good; and contrary to the assumption of many lower courts, market power in the tied good is needed as well. In the absence of market power in both markets, entry will not be inhibited, and the tying arrangement will not allow the extraction of supracompetitive profits from consumers.[30]

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[30] While the terms "leverage" and "extension of monopoly" sometimes refer to enhancement of the supplier's market power, as described above, these terms have more often been used to describe an alternative hypothesis on which the condemnation of tie-ins has been based, *i.e.*, that, through tying, a firm can use its market power in the tying product market, to create new market power (typically in the tied product market) and thereby increase overall profitability. The deficiency in this version of the leverage argument can be grasped by asking why a firm with monopoly power over a single product does not extend its monopoly to a multitude of other products by insisting that those products also be purchased from it as a condition for purchasing the monopolized product. The answer is that there is some limit to the amount each consumer would pay for the tying product; and, if the seller has extracted this maximum amount from each consumer, it cannot "force" consumers to purchase a tied product that would ordinarily be obtained elsewhere. It can "force" the purchase of the tied product only to the extent it lowers the price of the tying product. See P. Areeda, *supra*, at 569; L. Sullivan, *supra*, at 446-447. As a result, where they have anticompetitive effects, "tie-ins" are usually a device for exploiting pre-existing market power in the tying market, rather than a means of generating new market power in either the tied or tying market. Indeed, many observers believe that "[m]onopoly in the tied product is both rare and not often threatened by most actual tying arrangements." P. Areeda, *supra*, at 70; accord, Markovits, *supra*, ~~*Reciprocity, and the Leverage Theory*~~, 76 Yale L.J. at 1397-1398; Burstein, *A Theory of Full-Line Forcing*, 55 Nw.U.L. Rev. 62-63, 93 (1960).

It is possible, of course, that the seller cannot extract the maximum revenue from each consumer solely by manipulating the price of the tying product. Consumers might differ in the strength of their preferences for the product, but the seller might be unable to charge them different prices (because he lacked information about individual consumer demands, because he could not prevent arbitrage among con-

It should not be surprising that both the leverage theory and the foreclosure theory posit the same necessary preconditions for anticompetitive harm: market power in both the markets for the tying and tied products. The leverage theory looks at competition through the eyes of the consumer, while the foreclosure theory looks at competition through the eyes of the producer. But since both theories ultimately look at the same thing—competition—the necessary conditions for an adverse effect are identical.

3. In view of this economic analysis and the Court's implicit acceptance of competitive impact as a factor in analyzing business conduct, we believe it would now be appropriate for this Court to offer clearer guidance by requiring explicitly a complete, but focused, examination of the factors that are most significant in predicting whether, in particular cases, practices that may be viewed as tie-ins might serve anticompetitive purposes. These factors include, first, whether the defendant has substantial market

sumers, or because prices or price differences are regulated by law). If so, a tie-in of a complementary product, the demand for which varied in proportion with the frequency or intensity of use of the tying product (*e.g.*, a stapling machine and staples), could be used both to meter the intensity of demand for the tying product and to extract revenue reflecting this intensity by raising the price of the tied, metering product. Cf. *IBM Corp.* v. *United States*, 298 U.S. 131 (1936); *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Henry* v. *A.B. Dick Co.*, 224 U.S. 1 (1912). See P. Areeda, *supra*, at 570; Bowman, *supra*, 67 Yale L.J. at 23. Where tie-ins are used for such metering purposes, the economic effects are ambiguous depending on the specific circumstances. The use of a tie-in to meter demand and collect revenue clearly can increase the output of the tying product. See O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* 11-13 (1975); R. Bork, *supra*, at 375-376. The use of tie-ins for metering can also, of course, lead to a decrease in output, but we believe that, more often than not, such tie-ins will tend to increase output and will thereby tend to be procompetitive. Tie-ins employed for metering purposes need not drive out independent suppliers in the tied market. Sellers would be perfectly willing to purchase the tied products from the most efficient independent suppliers, mark up their price, and resell them to buyers of the tying product. The ability to charge the higher prices for the tied product derives, not from having obtained market power over the tied product, but from market power possessed over the tying product.

power in the relevant product and geographic markets for the tying product and, second, whether there is a reasonable possibility that the defendant will obtain substantial market power in the relevant market for the tied product after the tie-in. Where one or both of these factors is absent, the danger of anticompetitive effects is absent and further inquiry is unnecessary. Where both factors are present, there may be significant anticompetitive potential and the defendant should be required to demonstrate justifications for the packaged sale sufficient to outweigh its potential adverse effects.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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