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Reflections on *Eastman Kodak Co. v. Image Technical Services, Inc.*: Continued Confusion Regarding Tying Arrangements and Antitrust Jurisprudence

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REFLECTIONS ON *EASTMAN KODAK CO. v. IMAGE TECHNICAL SERVICES, INC.*: CONTINUED CONFUSION REGARDING TYING ARRANGEMENTS AND ANTITRUST JURISPRUDENCE

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I. INTRODUCTION

In 1991, after the Supreme Court granted certiorari[1] to review the Ninth Circuit Court of Appeals' decision in *Image Technical Services, Inc. v. Eastman Kodak Co.*,[2] antitrust practitioners and scholars became hopeful that the Court would seize the opportunity to clarify antitrust tying jurisprudence and provide much needed guidance to the bench and bar.[3] Unfortunately, the Supreme Court's 6 to 3 decision in *Kodak* in June, 1992, resolves very little and instead promises to raise more substantive and procedural questions than it answers.[4]

Rather than clearly define the parameters of an illegal tying arrangement, the *Kodak* decision is likely to provoke greater uncertainty in this already confused area of antitrust law. The Court ignored concerns regarding the propriety of continuing a modified *per se* analysis for tie-ins and thus left the already blurry line between rule of reason and *per se* approaches even less clear. The majority opinion in *Kodak* could also trigger significant and protracted debate as well as considerable confusion regarding critical market definition and market power questions. Further, *Kodak* may require reconsideration of the appropriate standards for using summary judgment in the antitrust context, as lower federal courts may struggle to reconcile it with other precedents regarding the propriety of summary judgment in antitrust cases.

1. 111 S. Ct. 2823 (1991).

2. 903 F.2d 612 (9th Cir. 1990), *aff'd*, 112 S. Ct. 2072 (1992).

3. *See* David Pester, *Antitrust Law: Removing the Confusion in Tying Arrangement Jurisprudence*, 1990 Ann. Surv. Am. L. 699, 701, 745; Michael L. Weiner & James A. Keyte, *Supreme Court Preview—Image Technical Services: More Than Meets the Eye*, Antitrust, Fall/Winter 1991, at 18. Professor Areeda, a prolific antitrust scholar who has written extensively regarding tying analysis, has also observed that the pre-*Kodak* state of the law was less than crystal clear. *See* IX Phillip E. Areeda, *Antitrust Law* ¶ 1722b, at 288–90 (1991).

4. *See infra* notes 124–274 and accompanying text.

This Article begins with a brief history of the Supreme Court's often unclear and contradictory treatment of tying arrangements. Against this historical background, the discussion then turns to an analysis of the majority and dissenting opinions in *Kodak* in part III. Part IV focuses on the important legal questions left unresolved by *Kodak* and considers its impact on existing tying doctrine. Finally, the Article discusses possible alternative approaches to existing tying analysis.

The pervading theme of the Article is that the Supreme Court has missed an opportunity to articulate a clearer, more workable rule regarding tie-ins. While the actual result in *Kodak* may be unobjectionable, the Article demonstrates that the Court failed to deliver the result in a useful package. Further, the Article assesses the impact of *Kodak* on antitrust doctrine more generally and focuses on issues left unsettled by the decision.

II. TYING ARRANGEMENTS AND THE SUPREME COURT—A CHECKERED HISTORY

A classic tie-in occurs when a seller or lessor conditions the sale or lease of product *A* upon the acceptance of product *B* by the buyer or lessee. This type of agreement necessarily has the effect of preventing the buyer or lessee from dealing with the seller or lessor's rivals in the market for product *B*.

The Supreme Court's treatment of tying arrangements has hardly been a model of clarity or consistency. On the contrary, the Court has never satisfactorily resolved the status of tie-ins for purposes of antitrust analysis. After expressing dissatisfaction with the Court's early tying decisions pursuant to the Sherman Act,[5] Congress passed the Clayton Act to enhance antitrust enforcement against tying arrangements.[6]

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5. The legislative history of section 3 of the Clayton Act, 15 U.S.C. § 14 (1988), suggests that Congress was concerned that the judicial decisions were not addressing tying arrangements sufficiently pursuant to section 1 of the Sherman Act, 15 U.S.C. § 1 (1988). *See* 2 Earl W. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 995, 1431 (1978); 3 *id.* 2125, 2397, 2539, 2676, 2698, 2704, 2770.

6. Section 3 of the Clayton Act provides that:

> [I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the

Nevertheless, this attempt to strengthen legislative support for antitrust actions against tie-ins ultimately failed to clarify matters.

The Supreme Court has treated tie-ins both with hostility and considerable tolerance over the past 100 years.[7] At one point, the Court came very close to *per se* condemnation of these restraints when it concluded that tying arrangements serve little purpose other than the suppression of competition[8]—the classic rationale for a *per se* rule. Not surprisingly, in the wake of that utterance, a number of decisions characterized tie-ins as potentially illegal *per se*.[9] If, however, tying

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effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14.

Although section 3's language is more directly applicable to exclusive dealing or requirements contracts, the provision is broad enough to cover tying arrangements For a discussion of cases applying section 3 to tie-ins, see *infra* notes 27–47 and accompanying text. For discussion of different views regarding appropriate standards of legality pursuant to section 3, see *infra* notes 27–29, 51–52, 255–57, 281, 283 and accompanying text.

7. *See infra* notes 13–121 and accompanying text.

8. *See infra* notes 54–59 and accompanying text.

9. *See infra* notes 63–71 and accompanying text. As the Supreme Court explained in Northern Pacific Railway v. United States, 356 U.S. 1, 5 (1958), courts can presume some conduct conclusively "illegal without elaborate inquiry" because of its "pernicious effect on competition and lack of any redeeming virtue." In National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85 (1984), Justice Stevens noted: "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *Id.* at 103–04 (footnote and citation omitted). In Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), Justice Powell explained:

> *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials....

Id. at 50 n.16.

In contrast, the rule of reason requires that the trier of fact "weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* at 49. In National Society of Professional Engineers v. United States, 435 U.S. 679, 691 (1978), the Court concluded that the critical question in rule of reason analysis is "whether the challenged agreement is one that promotes competition or one that suppresses competition." Justice Stevens explained:

> There are, thus, two complementary categories of antitrust analysis In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing

arrangements were truly *per se* illegal, the inquiry would go no further once the court has found that a tie-in exists, regardless of any potential procompetitive effects or the absence of significant competitive injury. Despite this characterization, courts never conclusively labeled all tie-ins *per se* illegal and, adding to the confusion, often substituted a quasi-*per se* rule.[10] Although the Supreme Court continues to articulate a quasi-*per se* rule, it has adopted a much more benign view of tying arrangements in its more recent opinions and has distinguished earlier doctrine.[11]

The Supreme Court has never clearly treated tie-ins either as the equivalent of the classic *per se* violation or as a candidate for uniform rule of reason treatment for purposes of antitrust analysis. Instead, the decisions have vacillated, leaving litigants and scholars to ponder and attempt to apply an unwieldy and confused quasi-*per se* principle that continues to confound students of antitrust law. Unfortunately, the *Kodak* decision does little to solve the riddle; in fact, it confuses matters further and generates even greater uncertainty.

A. The Early Tying Decisions Under the Sherman Act

After the passage of the Sherman Act in 1890,[12] questions regarding the validity of tying arrangements first reached the Supreme Court in *Henry v. A. B. Dick Co.*[13] and were again considered in *United States v. Winslow.*[14] In both of the foregoing cases, the Court demonstrated an unwillingness to condemn tie-ins pursuant to the Sherman Act. In *Dick,*

> the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint.

Id. at 692.

As the tying and other antitrust cases illustrate, the distinction between *per se* and rule of reason principles is not always clear. *See infra* notes 243, 245 and accompanying text.

10. Courts use a quasi-*per se* rule to label tying as *per se* illegal upon a finding of market power in the tying product and the foreclosure of a not insubstantial amount of competition in the tied product. The mere existence of a tie does not suffice to establish illegality, but unlike true rule of reason analysis, there is no requirement of a balancing of procompetitive and anticompetitive effects. *See infra* notes 85–99 and accompanying text.

11. *See infra* notes 72–122 and accompanying text.

12. Section 1 of the Sherman Act, which applies to tying arrangements, provides, in relevant part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

13. 224 U.S. 1 (1912), *overruled by* Motion Picture Patents Co. v. Universal Film Mfg., 243 U.S. 502 (1917).

14. 227 U.S. 202 (1913).

plaintiff sold patented duplicating machines on the condition that buyers use only plaintiff's ink.[15] The Court found the defendant, who had been manufacturing and selling ink for use in the machines, guilty of contributory infringement of the patent, and rejected restraint of trade arguments as a defense.[16] Similarly, in *Winslow,* a tying arrangement involving patented shoe machinery passed muster even though the firm imposing the restraint held a clear dominance in the tying product.[17]

B. *The Post-Clayton Act Decisions—The Evolution of a Quasi-*Per Se *Rule*

1. *Uncertainty in the Seminal Cases*

The laissez-faire approach of these early cases prompted Congress to respond by enacting section 3 of the Clayton Act in 1914.[18] The initial judicial response to the more enforcement oriented language of section 3 was to find tying arrangements offensive to antitrust policy. In later cases this policy evolved into a quasi-*per se* approach to tying arrangements pursuant to both the Sherman and Clayton Acts.

In the first post-Clayton Act decision, *Motion Picture Patents Co. v. Universal Film Manufacturing Co.,*[19] the Court rejected a patent infringement claim on facts quite similar to those presented in *Dick.* In *Motion Picture Patents,* plaintiff licensed the use of its patented motion picture projector on the condition that only plaintiff's films be exhibited with the projector.[20] Recognizing that plaintiff's projector was essential to the operation of a movie theatre, and further noting that the restraint could extend plaintiff's monopoly into the film market, the Court expressly overruled *Dick* and found no infringement.[21] The Court did not specifically find the tying arrangement to be an antitrust violation, but it did refer to section 3 of the Clayton Act and noted the competitive harms effected by the tie-in.[22]

15. *Dick,* 224 U.S. at 11–12, 25–26.
16. *Id.* at 28–30.
17. *Winslow,* 227 U.S. at 217–18.
18. For the text of section 3 of the Clayton Act, see *supra* note 6.
19. 243 U.S. 502 (1917).
20. *Id.* at 506–07.
21. *Id.* at 518–19.
22. *Id.* at 517–19.

Soon after *Motion Picture Patents,* in *United States v. United Shoe Machinery Corp.,*[23] the attempt to enforce the antitrust laws against tie-ins was temporarily frustrated. In *United Shoe,* the Court refused to conclude that the tying of leases of patented shoe machinery to other machines by a dominant firm was inherently unlawful pursuant to section 1 of the Sherman Act.[24] The Court relied in part on the interest of a machine manufacturer with a valid patent, who was leasing rather than selling, in protecting the quality of the machines.[25] Further, the Court recognized the manufacturer's interest in making the machines available on favorable terms.[26]

In a subsequent action, however, the United Shoe leases were successfully attacked.[27] Unlike the previous *United Shoe* case, this time the government proceeded under section 3 of the Clayton Act. Distinguishing section 3 from section 1 of the Sherman Act, the Supreme Court noted that section 3 requires only a probability of a substantial lessening of competition, while the Sherman Act contemplates proof of an actual diminution of competition.[28] In addition, the Court relied on the language of section 3 which expressly made it applicable to patented goods, and the Court also recognized that the attempt by a manufacturer with market power in one product line to extend it into another necessarily had a negative impact on competition.[29]

The Court's apparent implication in *United Shoe* that tying arrangements could be inherently suspect was somewhat contradicted by its decision the following year in *FTC v. Sinclair Refining Co.*[30] In *Sinclair,* the Court declined to invalidate an arrangement whereby a lessor of gasoline pumps bearing its trademark and name required the lessees to use the pumps only to sell the lessor's gasoline.[31] Stressing the absence of economic power in the tying product (the pumps), and recognizing that lessees could sell other brands of gasoline from other vendors' or lessors' pumps, the Court found the tie-in unobjectionable.[32]

23. 247 U.S. 32 (1918).
24. *Id.* at 60–67.
25. *Id.* at 64.
26. *Id.* at 63.
27. United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922).
28. *Id.* at 459–60.
29. *Id.* at 460–61.
30. 261 U.S. 463 (1923).
31. *Id.* at 466, 469.
32. *Id.* at 474–75.

The Court also focused upon the issue of consumer goodwill and avoidance of deception to justify the restraint.[33] Consumers expected Sinclair gasoline to be in the Sinclair labeled pumps. The discussion of procompetitive and anticompetitive effects resulting from the tie-in belied the notion that the Supreme Court was wedded to the idea of true *per se* illegality for all tying arrangements. Rather, the case reflected an ambivalence regarding tie-ins notwithstanding the incipiency language of section 3 of the Clayton Act.

2. The Increased Emphasis on Per Se *Principles*

As one prominent antitrust scholar has noted, the cases following *Sinclair* became increasingly hostile to tying arrangements and began to militate strongly in favor of *per se* illegality for tie-ins.[34] In a series of decisions the Supreme Court created the impression that tying arrangements should be given short shrift by federal courts when assailed as antitrust violations. That is not to say, however, that the Court treated tie-ins in precisely the same manner as it chose to treat classic *per se* offenses such as horizontal price-fixing.

In *International Business Machines Corp. v. United States,*[35] IBM leased its patented computing machines only to those who agreed to use IBM punch cards with them.[36] While the Court did note that the tying product (the computing machine) was patented,[37] there was no detailed analysis of market structure. Rather, the Court focused upon the fact that IBM's competitors engaged in the same practices, and also indicated that foreclosure of competition in the tied product (punch cards) was substantial.[38] Further, the Court rejected IBM's alleged justification for the tie-in, which was predicated on the need to maintain punch card quality control to prevent machine damage and injury to defendant's goodwill.[39] Instead, the Court indicated that IBM could protect its name by providing specifications for the punch cards and requiring lessees to comply with those specifications.[40] Thus, without any elaborate inquiry into market structure or any detailed attempt to balance procompetitive

33. *Id.* at 475.

34. *See* Lawrence Anthony Sullivan, *Handbook of the Law of Antitrust* 436 (1977) (noting that the Court turned sharply towards a *per se* rule in the 1930s).

35. 298 U.S. 131 (1936).

36. *Id.* at 134.

37. *Id.* at 134, 137.

38. *Id.* at 135–37.

39. *Id.* at 138–40.

40. *Id.* at 139–40.

and anticompetitive effects, the Court found the tying arrangement unlawful. Despite the Court's failure to utilize any specific *per se* language in *IBM,* the trend was undeniably towards harsher treatment for tie-ins.

Several years later, in *International Salt Co. v. United States,*[41] the Court actually referred to a *per se* rule while invalidating a tying arrangement. In *International Salt,* defendant leased patented salt dispensing machines on the condition that lessees buy their salt from defendant.[42] Defendant contended that the reasonableness of the restraint was a triable issue of fact precluding the entry of summary judgment for the government.[43] Rejecting defendant's contention, the Court affirmed the entry of summary judgment and analogized to *per se* price-fixing cases.[44] The opinion failed to offer any real discussion of market power; the Court only noted the patented nature of the tying product.[45] Instead, the Court emphasized the quantity of salt used by lessees of defendant's machines and the fact that salt-selling competitors were foreclosed from competing for that business.[46] The Court also rejected quality control justifications for the tying arrangement. Responding to the contention that impure salt could damage the machines, the Court noted, as in *IBM,* that specifications could deal with that concern in a less restrictive manner.[47] Thus, *International Salt* created the impression that neither significant market power nor other evidence of anticompetitive effects would be required to invalidate tie-ins either under section 1 or section 3. This apparent absence of any requirement of proof of unreasonableness is, of course, the essence of a *per se* approach.

Subsequent to *International Salt,* the Court was less than clear as to whether it was endorsing a *per se* approach to tie-ins or actually adopting some other methodology. In *Times-Picayune Publishing Co. v. United*

41. 332 U.S. 392 (1947).

42. *Id.* at 393. Actually, the lease agreements did allow lessees of one patented machine to use another source of salt if a competitor offered salt of equal quality at a better price. *Id.* at 394 n.5. Further, lessees of another patented machine were entitled to the benefit of any general price reduction on defendant's salt. *Id.* at 395 n.6. Defendant contended that this demonstrated the reasonableness of its tying arrangement, but the Court rejected that argument. *Id.* at 396–97. For an interesting discussion of *International Salt* and possible reasons for defendant's imposition of the tie, see John L. Peterman, *The International Salt Case,* 22 J.L. & Econ. 351 (1979). *See also* Victor P. Goldberg, *The International Salt Puzzle,* 14 Res. Law & Econ. 31 (1991).

43. *International Salt,* 332 U.S. at 396.

44. *Id.*

45. *Id.* at 394.

46. *Id* at 396.

47. *Id.* at 397–98.

States,[48] a case brought under section 1 of the Sherman Act,[49] the Court actually held that there was no tie-in involved at all.[50] Nevertheless, the Court went on to articulate what it perceived to be the applicable tests of illegality under both the Sherman and Clayton Acts. Justice Clark wrote:

> When the seller enjoys a monopolistic position in the market for the "tying" product, *or* if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, *per se,* to foreclose competitors from any substantial market," a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met. In either case, the arrangement transgresses § 5 of the Federal Trade Commission Act, since minimally that section registers violations of the Clayton and Sherman Acts.[51]

The foregoing formulation of tests for the invalidation of tying arrangements is hardly identical to an articulation of a classic *per se* rule and is arguably inconsistent with *International Salt.* Unlike the traditional *per se* approach, requiring only the establishment of the existence of the offensive restraint, Justice Clark's method of analysis requires some factual showing of threatened harm to competition to satisfy even the "incipiency" standard of section 3 of the Clayton Act. The Court seemed rather clearly to endorse the idea that real proof of market power would be needed to satisfy the first prong of the test in the absence of patent or copyright.[52] Market dominance is not a requirement of a classic *per se* offense such as price-fixing.[53]

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48. 345 U.S. 594 (1953).

49. At oral argument, the government explained that it had declined to proceed pursuant to section 3 of the Clayton Act because it did not wish to assume the burden of proving that advertising space was a commodity for Clayton Act jurisdictional purposes. *See* Milton Handler et al., *Trade Regulation* 699 (3d ed. 1990).

50. *Times-Picayune,* 345 U.S. at 613–14. The case involved a "unit plan" for advertising that required purchasers of advertising space to place ads in two papers or none at all. The Court determined that advertising space in both the morning and evening newspapers actually constituted a single product and negated the existence of a tie-in. *Id.*

51. *Id.* at 608–09 (footnote and citation omitted).

52. *Id.* at 611.

53. The Supreme Court has repeatedly condemned both horizontal and vertical price fixing as *per se* illegal. *See, e.g.,* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348–55 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980); Goldfarb v. Virginia State Bar, 421 U.S. 773, 781–83 (1975); Albrecht v. Herald Co., 390 U.S. 145, 147–48, 151–53 (1968); United

Further confusion in the development of tie-in doctrine may be attributed to the next major decision—*Northern Pacific Railway v. United States.*[54] This was a section 1 case in which a railroad tied sales and leases of strategically located land to preferential routing clauses. More specifically, the railroad required that land transferees ship all commodities produced on the land over defendant's railroad lines unless competing lines offered better rates.[55]

In affirming summary judgment for the government in *Northern Pacific,* the Supreme Court took perhaps its harshest position ever regarding tying arrangements. Justice Black defined a tie-in as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[56] The Court then indicated that when this occurs "competition on the merits with respect to the tied product is inevitably curbed" and that "tying agreements serve hardly any purpose beyond the suppression of competition."[57] Justice Black continued by noting that tying arrangements deny competitors free access to the tied product market, not because the party imposing the tie has a superior product or a better price, but because of leverage derived from power in another market.[58] Further, consumers lose the freedom of choice usually associated with a truly competitive market.[59]

These comments by the Court suggested heavy reliance on *per se* concepts to invalidate tying arrangements. In the same *Northern Pacific* opinion, however, Justice Black somewhat contradictorily suggested that traditional *per se* analysis was not what the Court had in mind. More specifically, the Court stated that tie-ins are

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States v. Parke, Davis & Co., 362 U.S. 29, 37–38 (1960); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213–14 (1951), *overruled on other grounds by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 396–97 (1927); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 400–03 (1911); United States v. Joint Traffic Ass'n, 171 U.S. 505, 577 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312–13 (1897).

54. 356 U.S. 1 (1958).

55. *Id.* at 3.

56. *Id.* at 5–6.

57. *Id.* at 6 (quoting Standard Oil Co. v. United States, 337 U.S. 293, 305–06 (1911)).

58. *Id.*

59. *Id.*

> unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected . . . . Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.[60]

The Court found the requisite market power present in *Northern Pacific* because of the strategic location of the land used as the tying product, and it also focused upon the large number of tie-ins as evidence of market power.[61] At the same time, however, the Court seemed to give a broader definition to the notion of market power, as it refused to limit it to the market dominance or monopoly power concepts articulated in *Times-Picayune.*[62]

The statement in *Northern Pacific* that the requisite power in the tying product could be deemed to exist despite the absence of market dominance found more express approval in *United States v. Loew's, Inc.,*[63] where the Supreme Court found illegal the block booking of copyrighted feature films for exhibition on television. In *Loew's,* defendants conditioned the license or sale of one or more desired feature films upon the acceptance of a package of one or more unwanted, inferior films.[64] Reiterating earlier doctrine, Justice Goldberg noted that tie-ins can adversely affect competition by forcing buyers to forgo substitutes for the tied product, and by also destroying the free access of competing suppliers of the tied product to consumers.[65]

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60. *Id.* at 6–7.

61. *Id.* at 7–8.

62. See *id.* at 11, where the Court notes that the requirement of economic power means only sufficient power to impose an appreciable restraint on free competition in the tied product, provided that a not insubstantial amount of interstate commerce is affected. For a relatively narrow reading of the *Northern Pacific* decision and commentary regarding its lack of clarity, see Areeda, *supra* note 3, ¶ 1722b, at 288–89 (arguing that different passages within same opinion may point in different directions and that *Northern Pacific* does not compel *per se* condemnation for all tie-ins). For additional discussion of *Northern Pacific,* see Donald F. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 Harv. L. Rev. 50 (1958).

63. 371 U.S. 38 (1962).

64. *Id.* at 40.

65. *Id.* at 45.

The Court then explained 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."[66] Thus, "[t]he requisite economic power is presumed when the tying product is patented or copyrighted."[67] This conclusion by the *Loew's* Court shifted the emphasis away from the traditional notion of market power and substituted uniqueness or distinctiveness as a sufficient surrogate. Once again, while this is not the equivalent of deeming all tying arrangements illegal *per se*, it does push antitrust doctrine regarding tie-ins sharply in that direction.

3. *The Recent Retreat from* Per Se *Principles*—Fortner *and* Hyde

Despite the trend favoring harsh treatment for tying arrangements, the Court began to shy away from repudiation of tie-ins in more recent cases. After initially reversing a summary judgment for defendants in *Fortner Enterprises, Inc. v. United States Steel Corp.*[68] (*Fortner I*), the Court ultimately found no *per se* violation in *United States Steel Corp. v. Fortner Enterprises, Inc.*[69] (*Fortner II*). *Fortner* involved a tying arrangement whereby a seller of prefabricated housing agreed to provide credit only if the seller's housing was purchased by the borrower. The desired and allegedly unique financing constituted the tying product, and the housing was the tied product.[70]

In *Fortner I*, the Court provided the impression that it was continuing the trend towards *per se* invalidity for tying arrangements. The Court held that the tie-in affected a not insubstantial amount of commerce in the tied product, and that plaintiff was entitled to prove that "appreciable economic power" existed with regard to the tying product.[71] In *Fortner II*, however, the Court ultimately concluded that the financing provided by defendant was not sufficiently distinct or unique to support a *per se* tying claim.[72] This began the modern era of tie-in doctrine in the Supreme Court, and it represented a definite departure from earlier case

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66. *Id.*

67. *Id.*

68. 394 U.S. 495, 510 (1969). For discussions of *Fortner I*, see Kenneth W. Dam, Fortner Enterprises v. United States Steel: *"Neither a Borrower Nor a Lender Be,"* 1969 Sup. Ct. Rev. 1; Milton Handler, *Antitrust: 1969*, 55 Cornell L. Rev. 161, 161–71 (1970).

69. 429 U.S. 610, 622 (1977). For an analysis of *Fortner II*, see William K. Jones, *The Two Faces of* Fortner: *Comment on a Recent Antitrust Opinion*, 78 Colum. L. Rev. 39 (1978).

70. *Fortner II*, 429 U.S. at 613–14; *Fortner I*, 394 U.S. at 498.

71. *Fortner I*, 394 U.S. at 502–03.

72. *Fortner II*, 429 U.S. at 619–22.

law. While conceding that the facts in *Fortner* may be distinguished from those of cases reaching the opposite result, the spirit of the decision is clearly representative of a more tolerant attitude for tie-ins.

In *Fortner II,* the Court chose to read its earlier, more far-ranging tying opinions rather narrowly. To be sure, the *Fortner II* Court did not expressly repudiate prior cases holding that patents, copyrights, or other unique attributes could satisfy the requirement of power in the tying product. Indeed, Justice Stevens clearly noted that the earlier decisions "do not require that the defendant have a monopoly or even a dominant position throughout the market for the tying product."[73] But the Court did emphasize that those earlier cases do "focus attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market."[74]

Justice Stevens therefore reduced the critical question to "whether the seller has some advantage not shared by his competitors in the market for the tying product."[75] Rejecting the claim of uniqueness in *Fortner II,* the Court concluded that the unusual 100-percent financing offered by defendant was nothing more than a reflection of its willingness to provide cheap financing in order to sell expensive housing.[76] Absent proof of significant cost advantages or evidence that defendant could provide financing different from what its competitors could offer if they so chose, plaintiff failed to establish power in the tying product.[77]

At first blush, the result in *Fortner II* might appear appropriate and utterly consistent with the conclusions of the tying precedent it purports to follow. Admittedly, one could look at money as a fungible commodity and distinguish it from the unique nature of a patented machine, copyrighted film, or strategically located parcel of land. On the other hand, a decided consumer preference for the 100-percent financing offered by defendant was evident, as was the creation of a significant number of tie-ins. These factors were of importance in earlier cases but were unpersuasive in *Fortner II.* More importantly, the judicial attitude in *Fortner II*—an attitude of increased tolerance for tie-ins and a subtle departure from automatic *per se* illegality—underscored an evolving shift in prevailing tie-in doctrine. More specifically, the Court seemed to

73. *Id.* at 620.
74. *Id.*
75. *Id.*
76. *Id.* at 622.
77. *Id.*

turn the clock back to the earliest days of tie-in analysis and signal a departure from a *per se* approach and a rejuvenation of a more careful inspection of the anticompetitive effects of a tie.

The shift in the Supreme Court's general attitude regarding tying arrangements became strikingly evident in *Jefferson Parish Hospital District No. 2 v. Hyde.*[78] In *Hyde,* four justices concurred with a five justice majority and specifically called for a repudiation of any *per se* approach to tie-ins.[79] These four justices were, in essence, calling for rule of reason treatment of tie-ins as just another non-price vertical restraint. Even the majority, which did not wish to repudiate the *per se* approach, severely limited its applicability.[80]

In *Hyde,* the alleged tying product was hospital services, and the alleged tied product was anesthesiological services.[81] Every patient undergoing surgery at East Jefferson Hospital was required to use the services of a single firm of anesthesiologists.[82] Plaintiffs alleged that this was a *per se* illegal tie-in and also an illegal exclusive dealing arrangement.[83] The Supreme Court reversed the court of appeals' determination that the arrangement was illegal *per se.*[84] The differing approaches of the majority and Justice O'Connor's concurring opinion in *Hyde* reflect just how much uncertainty remained in the area of tie-ins.

Justice Stevens's majority opinion carefully pointed out that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'"[85] In fact, the majority opinion noted that this has been the accepted rule since *International Salt* and that such an approach was consistent with congressional policy as expressed in section 3 of the Clayton Act.[86] Nevertheless, the Court went on to explain that unlike classic *per se*

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78. 466 U.S. 2 (1984).

79. *Id.* at 35 (O'Connor, J., concurring). Justices Brennan and Marshall, while joining in the majority opinion, also wrote a brief, separate concurrence to reiterate support for a *per se* rule. *Id.* at 32 (Brennan, J., concurring).

80. *Id.* at 26–29.

81. *Id.* at 8.

82. *Id.* at 7.

83. *Id.* at 2.

84. 686 F.2d 286, 292–95 (5th Cir. 1982), *rev'd,* 466 U.S. 2 (1984).

85. *Hyde,* 466 U.S. at 9.

86. *Id.* at 9–10. The Court recognized that *Hyde* was not a section 3 case, but Justice Stevens commented that section 3 reflected Congress's "great concern about the anticompetitive character of tying arrangements." *Id.* at 10–11.

restraints, tie-ins do not always result in automatic invalidation. The packaging of two products as part of a single transaction may be desirable to consumers and does not necessarily distort competitive forces.[87]

Justice Stevens explained:

> The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.[88]

In other words, the buyer must be "forced" to purchase an unwanted tied product in order to threaten competition in a manner offensive to antitrust policy. According to Justice Stevens, this forcing can only occur where 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."[89] Thus, unlike the classic *per se* offense, which does not require market power to accompany the allegedly illegal restraint, the Court in *Hyde* reiterated what may be called a hybrid *per se* rule. It endorsed a method of analysis that does not entail all the elements of a full-blown rule of reason approach, but also does not label a tie-in illegal without some threshold demonstration of market power in the tying product.

Justice Stevens distinguished between a seller perhaps lawfully exploiting market power in a product to raise the price of that same product, and a seller using that market power to impair competition on the merits in another product market. In the latter circumstance, "a potentially inferior product may be insulated from competitive pressures" in violation of antitrust policy.[90] More specifically, existing competitors could be harmed or entry barriers could be raised to preclude new competition in the market for the tied product.[91] In addition, the tying arrangement could increase the social costs of market power by facilitating price discrimination and increasing monopoly profits even further.[92] Freedom of choice for consumers becomes impaired, and

87. *Id.* at 11–12.
88. *Id.* at 12.
89. *Id.* at 13–14.
90. *Id.* at 14.
91. *Id.*
92. *Id.* at 14–15.

market imperfections may cause consumers to disregard price or quality implications of a tie-in.[93]

Justice Stevens then noted that *per se* condemnation of tying arrangements is only appropriate if there is a probability of forcing consumers to purchase the tied product from the tying seller to the detriment of competing sellers of the tied product.[94] Because the application of a *per se* rule is premised upon the probability of anticompetitive consequences, the presence of forcing justifies truncated rather than extensive analysis of the facts and actual procompetitive and anticompetitive effects.[95] This forcing, according to the majority in *Hyde,* may occur if the seller has a "patent or similar monopoly" over a tying product,[96] or "in other situations in which the existence of market power is probable."[97] Such situations include cases where the seller has a high market share or provides a unique product not offered by its competitors.[98]

Somewhat cryptically, Justice Stevens noted that in the absence of proof of market power to support a finding of forcing, an antitrust plaintiff can only prevail by proving the existence of an unreasonable restraint of trade.[99] This statement suggests that even in the absence of market power in the tying product, a tie-in may still be found to violate the rule of reason. Left unclear, however, are the elements of a rule of reason violation in the absence of market power. How could a plaintiff demonstrate that a tying arrangement has anticompetitive consequences if there is no market power to force a purchase of the tied product? Are there surrogates for market power left undisclosed by the *Hyde* majority or are all tying claims falling outside the *per se* rule doomed to fail?

Applying the foregoing principles to the facts in *Hyde,* the Court addressed another threshold concern: Did the plaintiff challenge a practice that was not really a tie-in at all? In other words, did the hospital services, including anesthesiology, constitute a package

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93. *Id.* at 15.

94. *Id.* at 15–16. The Court added that foreclosure of a substantial amount of commerce in the tied product is required to show this probability. *Id.* at 16. Further, the Court noted that no anticompetitive consequences would flow from a tie-in requiring the purchase of a second product which the buyer would ordinarily not have bought even from another seller in the tied product market. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 17.

98. *Id.*

99. *Id.* at 17–18.

representing only one product? In answering this question the Court stated that the "definitional question depends on whether the arrangement may have the type of competitive consequences addressed by the rule."[100] Thus, the Court focused upon whether there was sufficient demand for anesthesiological services separate from demand for hospital services to justify finding two separate product markets.[101] After finding that consumers do differentiate between hospital services and anesthesiology, the Court concluded that there were two distinct products and that a tying arrangement existed.[102]

Moving on to the substantive question, the Court found that there was not sufficient power in the tying product (hospital services) to force patients to accept the tied product (anesthesiology).[103] The preference of some patients for the nearest hospital did not suffice to establish market power, because seventy percent of the patients residing in Jefferson Parish entered other hospitals for treatment.[104] A thirty-percent market share simply did not satisfy the *Hyde* majority's test of tying product market power. The Court also rejected claims that "market imperfections" buttressed the claim of anticompetitive forcing.[105] Absent a *per se* offense, plaintiffs needed to demonstrate actual anticompetitive effects to satisfy a rule of reason standard, but the record contained insufficient evidence of actual harm to competition.[106]

Complicating matters further in *Hyde* was the fact that while Justice O'Connor and three other justices concurred with the majority, they reached the same result utilizing dramatically different analysis.[107] Perhaps the most significant aspect of the O'Connor concurrence in *Hyde* was the unequivocal rejection of the *per se* label for tying arrangements. Justice O'Connor noted that the Court had never really taken a literal approach to the alleged *per se* rule in the tying context, but instead had

100. *Id.* at 21.

101. *Id.* at 21–22.

102. *Id.* at 22–23. The Court noted that patients and surgeons often requested specific anesthesiologists, that other hospitals allowed separate purchases of such services, that billing was separate, and that anesthesiologists were not fungible. *Id.* at 22–24 nn.36 & 39.

103. *Id.* at 26–29.

104. *Id.* at 7, 26–27.

105. *Id.* at 27–29.

106. *Id.* at 29–31.

107. *Id.* at 32–47 (O'Connor, J., concurring).

always required proof of market power or anticompetitive effect.[108] Thus, the tying cases, in O'Connor's view, always required "elaborate inquiry" into economic effects and therefore incurred the costs of a full-blown rule of reason analysis without gaining the benefits of its more comprehensive and time-consuming approach.[109] As a result, the misguided use of the *per se* rule created confusion for lower courts and led to the invalidation of possibly beneficial arrangements.[110] As an alternative, Justice O'Connor suggested that:

> The time has . . . come to abandon the *"per se"* label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. The law of tie-ins will thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements, except those few horizontal or quasi-horizontal restraints that can be said to have no economic justification whatsoever. This change will rationalize rather than abandon tie-in doctrine as it is already applied.[111]

Obviously, this approach to tying arrangements, if adopted by a majority of the justices, would dramatically shift tie-in doctrine away from the harsh treatment reflected in earlier case law. Rule of reason scrutiny would place tie-ins on the same footing as other vertical, non-price restraints and significantly increase their chances of surviving an antitrust challenge.

Pursuant to Justice O'Connor's proposed method of analysis, only tie-ins that have a "demonstrable exclusionary impact" in the market for the tied product or "abet the harmful exercise of market power" in the tying product market should be condemned.[112] Tying can be economically damaging in "rare cases" where power in the tying product creates additional market power in the tied product market, thereby foreclosing competing sellers or raising entry barriers.[113]

108. *Id.* at 34 (O'Connor, J., concurring). Thus, Justice O'Connor explained that the Court had never placed tie-ins on the same disfavored footing with "price fixing, division of markets, and other agreements subject to *per se* analysis, that . . . are always illegal." *Id.*

109. *Id.*

110. *Id.* at 34–35.

111. *Id.* at 35.

112. *Id.*

113. *Id.* at 36–37. Justice O'Connor identified two other possible anticompetitive effects: avoiding rate regulation and price discrimination. *Id.* at 36 n.4. For differing discussions of the "leveraging" concept, whereby a monopolist attempts to extend power from one product market into another, see Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem,* 67 Yale L.J. 19 (1957); Louis Kaplow, *Extension of Monopoly Power Through Leverage,* 85 Colum. L. Rev. 515

According to Justice O'Connor, the required anticompetitive effect can only result if "three threshold criteria" are satisfied: (1) seller power in the tying product market, (2) a substantial threat of acquiring power in the tied product market, and (3) a coherent economic basis for treating the tying and tied products as distinct.[114] Even if all three of these criteria are met, Justice O'Connor would still not condemn tying arrangements if their economic benefits outweigh their anticompetitive effects[115]—the essence of rule of reason analysis.

Applying these criteria to the facts in *Hyde,* the four justices in the O'Connor concurrence adopted an approach different from the majority's to answer the question of whether one or two products were involved. Rejecting the majority's "character of demand" test for determining the presence or absence of separate products, the concurrence found hospital and anesthesiological services to comprise one indistinguishable product for purposes of antitrust analysis.[116] Justice O'Connor based this conclusion on her observation that patients purchase anesthesia in conjunction with surgical services and would not wish to undergo a surgical procedure without it.[117] Thus, no additional market power could be acquired by selling the two services together, and the arrangement should not affect either the amount of anesthesia provided or the price of the combined service.[118] Unlike the majority, the O'Connor concurrence seemed to rely heavily on the functional relationship between the alleged tying and tied product. Unless the alleged tied product is one which the buyer might wish to purchase without also buying the tying product, there is no reason to treat the products as distinct.[119]

The far-reaching potential of Justice O'Connor's alternative approach to market definition, when combined with the more recent changes in Supreme Court personnel,[120] should not be overlooked or underestimated.

(1985); Keith K. Wollenberg, Note, *An Economic Analysis of Tie-In Sales: Re-examining the Leverage Theory,* 39 Stan. L. Rev. 737 (1987).

114. *Hyde,* 466 U.S. at 37–39 (O'Connor, J., concurring).

115. *Id.* at 41.

116. *Id.* at 43.

117. *Id.*

118. *Id.*

119. *Id.*

120. After *Hyde* and prior to *Kodak,* the membership of the Supreme Court changed significantly. Chief Justice Burger, as well as Justices Brennan, Marshall, and Powell, left the Court. These justices were replaced by Justices Scalia, Kennedy, Souter, and Thomas. Justices Burger and Powell joined in Justice O'Connor's concurrence in *Hyde,* while Justices Brennan and Marshall joined the majority plus reaffirmed in a separate concurrence their support for a *per se* rule for certain tying

By adopting an analytical approach more inclined to find that two separate products are not present, no tying analysis at all would occur. Rather, the facts would present nothing more than a seller offering to sell one product at a stated price to a buyer—with no antitrust consequences whatsoever.

In addition, even though her concurring opinion in *Hyde* did not rest its conclusion on the absence of market power in the tying product, Justice O'Connor made a passing reference to market power that also threatens to undermine antitrust enforcement against tie-ins. More specifically, Justice O'Connor noted that courts should not allow the presence of a patent, copyright, high market share, or uniqueness in the tying product market to automatically lead them to conclude that the requisite power exists in the tying product.[121] This seemingly innocuous, footnoted dicta seems to flatly contradict earlier tying decisions and certainly could form the foundation for an undermining of antitrust enforcement against tie-ins. One wonders whether it would signal the beginning of a rule of almost *per se* validity for tying arrangements.

In sum, the Supreme Court's decision in *Hyde,* considering the significantly different methods of analysis between the majority and O'Connor concurrence, left many important questions open. Would the *per se* rule retain any vitality in the context of tying arrangements? If so, when would it apply? Likewise, the preferred method of determining whether a tie-in existed at all, that is, whether one or two products were involved, remained unresolved. The appropriate method of market power analysis still required definition. Would the presumptions of market power attributed in earlier cases to sellers with patents, copyrights, large market shares, or unique products continue? In the absence of market power, however defined, could a plaintiff establish a rule of reason offense without proving a *per se* violation? What role would quality control and other defenses continue to play in tying jurisprudence? Would the Court require proof of power in the tied product market? And, perhaps most importantly, given the subsequent changes in Supreme Court personnel, would the concurring opinion in *Hyde* evolve into the prevailing doctrine of the future?[122]

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arrangements. *Id.* at 32 (Brennan, J., concurring). The appointment of four relatively conservative jurists after the decision in *Hyde* certainly left open the possibility that Justice O'Connor's alternative approach might muster majority support.

121. *Id.* at 37–38 n.7.

122. For discussions of *Hyde* and its uncertain implications for tying jurisprudence, see Areeda, *supra* note 3, ¶ 1722b, at 289–91 (noting that language of decision is "not fully transparent"). *See*

In the interim between *Hyde* and *Kodak*, lower federal courts struggled to apply *Hyde* and to reconcile it with earlier tying cases. Commentators also focused on the decision and took various approaches to the problem of antitrust treatment of tying arrangements. Opinions ranged from one extreme to another—from support for retention of a *per se* rule to proposed *per se* validity for tying arrangements.[123] It was hoped that when the Supreme Court agreed to hear the *Kodak* case it would put to rest many of the burning questions and provide real guidance to lower courts, practitioners, and scholars. Unfortunately, however, the *Kodak* decision did little to eliminate the considerable uncertainty left by *Hyde*. If anything, the *Kodak* decision raises more questions than it answers.

III. THE *KODAK* DECISION—BREAKING NEW ANTITRUST GROUND OR A NARROW, PROCEDURAL HOLDING?

A. *The Salient Facts and Key Issues*

On June 8, 1992, the Supreme Court affirmed the court of appeals' reversal of summary judgment for defendant in *Eastman Kodak Co. v. Image Technical Services, Inc.*[124] The plaintiffs/respondents in *Kodak* were eighteen independent service organizations (ISOs), and the defendant/petitioner (Kodak) was a manufacturer and distributor of photocopiers and micrographic equipment.[125] After the ISOs began servicing Kodak equipment in the early 1980s, Kodak adopted policies to limit the availability of spare parts to ISOs and to make it more difficult for ISOs to compete with Kodak in the servicing of Kodak equipment.[126]

According to the record, Kodak equipment was complex and unique: some software programs that operated on Kodak machines were not compatible with competitors' machines, Kodak parts were not

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also Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 Minn. L. Rev. 1013, 1063 (1985) (describing *Hyde* as "another swing in judicial attitude on the validity of tying arrangements").

123. For commentary favoring rejection of a *per se* rule, see Carson W. Bays, *Tying Arrangements Should Be Per Se Legal*, 26 Am. Bus. L.J. 625 (1989). For a response, see Arnold Celnicker, *A Response to Carson W. Bays's Call for Per Se Legality of Tying Arrangements*, 28 Am. Bus. L.J. 145 (1990). For an earlier proposal leaning towards the *per se* rule, see Joseph P. Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 Vand. L. Rev. 283 (1980).

124. 112 S. Ct. 2072 (1992).

125. *Id.* at 2076.

126. *Id.*

compatible with other manufacturers' equipment, and vice-versa.[127] Kodak provided both spare parts and service for its machines to its customers.[128] Some of the spare parts Kodak manufactured itself, and independent original equipment manufacturers (OEMs) produced others.[129] It was not Kodak's policy to sell a complete system of original equipment, lifetime service, and spare parts for one price.[130] Instead, Kodak provided service after the expiration of the initial warranty period either through annual service contracts (which included parts) or on a per-call basis.[131] Different customers paid different prices for equipment, parts, and service, and Kodak provided eighty to ninety-five percent of the service for its own machines.[132]

Beginning in the early 1980s, ISOs began to provide a competitive alternative for Kodak equipment customers by repairing and servicing Kodak machines, selling parts, and reconditioning and selling used Kodak equipment.[133] The ISOs enjoyed the patronage of federal, state, and local government agencies and other major users of Kodak equipment because they provided better service at prices lower than Kodak's.[134] Some of these users bought their own parts and utilized ISO service only; others expected the ISOs to provide both parts and service.[135] To accommodate customers requiring both service and parts, the ISOs kept an inventory of parts purchased from Kodak, OEMs, or other sources.[136]

In an effort to combat the growing competition from the ISOs, during the mid-1980s Kodak implemented a policy of selling replacement parts only to buyers of Kodak equipment who either used Kodak service or repaired their own machines.[137] In support of this new policy, Kodak also tried to prevent ISOs from acquiring Kodak parts from other sources. Kodak agreed with the OEMs that the OEMs would not sell Kodak parts to anyone but Kodak.[138] Further, Kodak pressured Kodak

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127. *Id.* at 2077.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 2078.

equipment owners and independent parts distributors not to sell Kodak parts to ISOs.[139]

As a result of these policy changes, ISOs were unable to obtain Kodak replacement parts and could not provide service for Kodak machines.[140] Many ISOs were driven out of business, and others lost large amounts of revenue.[141] Users of ISO service were compelled to switch to more expensive, less desirable Kodak service for Kodak equipment.[142] In response to Kodak's practices, the ISOs filed a federal antitrust suit, alleging that Kodak had illegally tied the sale of service for Kodak machines to the sale of replacement parts in violation of section 1 of the Sherman Act.[143] In addition, the ISOs alleged that Kodak's policies violated section 2 of the Sherman Act as an attempt to monopolize and actual monopolization of the service market for Kodak machines.[144]

B. *The District Court and Court of Appeals Decisions*

After limited discovery and without a hearing, the district court granted summary judgment for Kodak. The trial court found no tying arrangement to exist[145] and also rejected the section 2 claim on the ground that a unilateral refusal to deal on the foregoing facts did not constitute an antitrust violation.[146] The Ninth Circuit Court of Appeals, by a 2 to 1 vote, reversed the entry of summary judgment,[147] finding genuine issues of fact as to whether service and parts constituted separate markets and whether a tying arrangement existed between them.[148] The court of appeals went on to consider a question not addressed in the lower court: whether a material fact issue existed regarding Kodak's

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* Although the section 2 issues raised in *Kodak* are quite important, this Article focuses upon the implications of the decision for tying jurisprudence. Insofar as the section 1 and section 2 issues both involve questions of market definition and market power, the discussion of section 1 will necessarily involve questions relevant to the section 2 issue. However, no detailed examination of the effects of *Kodak* on the law of attempted or actual monopolization will be undertaken.

145. *Id.* According to Justice Blackmun, the district court found no tie-in between Kodak equipment and service or parts. However, the trial court failed to address the issue of a tie-in between Kodak parts and service—the issue upon which the Supreme Court focused because that was the tie alleged by plaintiffs. *Id.*

146. *Id.*

147. 903 F.2d 612 (9th Cir. 1990), *aff'd,* 112 S. Ct. 2072 (1992).

148. *Id.* at 615–16.

economic power in the parts market (tying product) to appreciably restrain competition in the service market (tied product).[149] While agreeing with Kodak that the absence of market power in the equipment market might preclude Kodak from enjoying power in the parts market, the court of appeals refused to uphold the granting of summary judgment on this purely theoretical basis because market imperfections could cause consumers' actual behavior to differ from economic theory.[150] Because the trial court had not addressed the market power question, and because discovery below had been limited, the Ninth Circuit did not require the ISOs to conduct market analysis or to specify market imperfections to survive a summary judgment motion. Rather, it was sufficient that the ISOs had presented evidence of actual events which could lead a reasonable fact finder to conclude that market power existed in the parts market even if it were absent in the equipment market.[151]

The court of appeals also addressed Kodak's three alleged business justifications for its change in policy: (1) prevention of substandard service, (2) lowering of inventory costs, and (3) prevention of ISO free-riding on Kodak's investment in the copier and micrographic industry. The court ruled that a trier of fact might find the first two alleged justifications "pretextual" and held that Kodak's quality goals could be achieved using less restrictive alternatives.[152] The Ninth Circuit also found Kodak's third purported justification for its policy to be legally inadequate.[153] The Ninth Circuit majority therefore concluded that enough evidence had been presented to withstand a motion for summary judgment.

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149. *Id.* at 616.

150. *Id.* at 617.

151. *Id.*

152. *Id.* at 618–19.

153. *Id.* at 619. The court of appeals also addressed the section 2 claim, holding that there was sufficient evidence to support a finding that the parts policy was anticompetitive and exclusionary and also reflected a specific intent to monopolize. *Id.* at 620. In sharp contrast, the dissent accepted Kodak's argument that the absence of power in the equipment market necessarily precluded market power in the derivative parts market. *Id.* at 622 (Wallace, J., dissenting). With respect to the section 2 claim, the dissent accepted Kodak's first business justification and concluded that this alone supported summary judgment for Kodak. *Id.* at 623.

C. *The Supreme Court Opinions*

1. *The Majority Opinion*

Against this factual and legal background, the Supreme Court affirmed by a 6 to 3 vote.[154] Justice Blackmun, writing for the majority, began his analysis by noting that tying arrangements violate section 1 of the Sherman Act if the seller has appreciable economic power in the tying product and if the arrangement affects a substantial volume of commerce in the tied product market.[155] Kodak did not dispute that the second prong of the legal standard had been satisfied; Kodak did, however, argue that no tying arrangement existed and that there was no market power in any alleged tying product.[156]

Because analysis of the market power question would be unnecessary regarding the section 1 tying claim if, in fact, no tying arrangement was presented, Justice Blackmun first considered whether a reasonable fact finder could conclude that service and replacement parts were two distinct products and whether their sale had been tied.[157] Relying upon the majority rather than the concurrence in *Hyde*, the Court applied the character of demand approach to the question and asked whether there was sufficient consumer demand "so that it is efficient for a firm to provide service separately from parts."[158] The record reflected the fact that Kodak had sold parts and service separately in the past and continued to sell parts separately to self-service equipment owners. Further, the Court deemed the evolution of a high technology service industry probative regarding the efficiency benefits of a separate service market.[159]

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154. 112 S. Ct. 2072 (1992).

155. *Id.* at 2079.

156. *Id.*

157. *Id.* at 2079–80.

158. *Id.* at 2080.

159. *Id.* The Court also focused upon the numerous *amicus* briefs filed by service organizations to underscore the magnitude of the service industry. *Id.* at 2080 n.6. It should also be recognized that others submitted *amicus* briefs in support of the ISOs. *See, e.g.*, Brief of Amicus Curiae Public Citizen in Support of Respondents; Brief Amicus Curiae of Grumman Corporation in Support of Respondents; Brief of Amici Curiae National Association of State Purchasing Officials and National Institute of Governmental Purchasing, Inc., in Support of Respondents; Brief for State Farm Mutual Automobile Insurance Company, Allstate Insurance Company, Nationwide Insurance, Government Employees Insurance Company, United Services Automobile Association, Alliance of American Insurers, and National Association of Independent Insurers, as Amici Curiae in Support of Respondents; Brief of Amicus Curiae States of Ohio, Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine,

Kodak argued that because there was no demand for parts separate from service, it followed that there could not be separate parts and service markets.[160] Justice Blackmun rejected this contention, however, noting that functionally linked products which are useless without the other can still be the subject of tying arrangements.[161] In addition, the majority challenged the accuracy of Kodak's factual contentions, observing that some consumers will buy service without replacement parts because some service does not require parts. Conversely, self-service customers will buy parts without requesting service.[162] Given the foregoing, summary judgment was an inappropriate method of resolving this disputed material fact question of market definition.[163] The majority then gave short shrift to the argument that no tie existed: the refusal to sell parts to third parties unless they agreed to avoid ISO service sufficed.[164]

After dealing with these threshold issues, Justice Blackmun turned to the most critical element of tie-in litigation: "appreciable economic power in the tying [product] market."[165] The majority defined market power as the ability to force purchasers to "do something that [they] would not do in a competitive market."[166] Justice Blackmun explained that on other occasions the Court had defined market power as the ability to raise price and restrict output, and ordinarily had inferred market power from possession of a "predominant share of the market."[167]

Applying these definitions to the facts, the Court acknowledged that the ISOs were contending that Kodak had sufficient power in the parts market to force purchasers of parts to accept unwanted service.[168] This power was derived from the fact that certain parts could only be obtained

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Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Texas, Utah, Vermont, Washington, and West Virginia, in Support of Respondents.

160. *Kodak*, 112 S. Ct. at 2080.

161. *Id.* Justice Blackmun cited the examples of cameras and film, automobiles and tires, and computers and software. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* The Court rejected Kodak's claim that plaintiffs alleged only a unilateral refusal to deal. Even if Kodak's refusal to sell parts to service organizations were unilateral, it could not properly characterize its sales to third parties, conditioned on their purchase of Kodak service, as a mere unilateral refusal to deal. *Id.* at 2080 n.8.

165. *Id.* at 2080.

166. *Id.*

167. *Id.* at 2080–81.

168. *Id.* at 2081.

from Kodak, while others were subject to Kodak's restrictive policy regarding parts it did not manufacture. More specifically, Kodak had allegedly prohibited independent manufacturers from selling Kodak parts to ISOs, pressured Kodak equipment owners and independent parts distributors to deny ISOs Kodak parts, and taken other steps to limit the availability of used machines.[169] The ISOs contended that through these practices Kodak excluded service competition, raised service prices, and compelled consumers to accept unwanted service from Kodak.[170] Consumers allegedly switched to Kodak service despite their preference for lower priced, higher quality ISO service, and ISOs were driven out of business by these practices.[171] Thus, the evidence submitted by the ISOs to support the foregoing assertions was sufficient to withstand a summary judgment motion.[172]

Kodak argued that even if it did have a monopoly share of an alleged parts market, the conceded high level of competition in the equipment market precluded any exercise of market power.[173] Kodak asserted that the presence of competition in the equipment market, causing consumers to shift to equipment manufacturers with more attractive service packages, would thwart any attempt to exercise putative market power in the parts market by raising prices for parts and services.[174] This threatened loss of profits in the equipment market would prevent Kodak from attempting to increase profits by exploiting any perceived power in the parts market. Based upon this economic theory, and in the absence of specific data on the equipment, parts, or service markets, Kodak asserted that the competitive equipment market necessarily precluded any real power in an aftermarket and supported summary judgment in its favor.[175] The majority, however, declined to oblige Kodak.

Justice Blackmun responded to Kodak's highly theoretical argument by first emphasizing the Court's preference for a case-by-case fact

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* The Court declined the ISOs' invitation to examine the question of market power in the equipment market. Instead, the Court reached its decision "based on the same premise as the Court of Appeals, namely, that competition exists in the equipment market." *Id.* at 2081 n.10.

174. *Id.* at 2081–82.

175. *Id.* at 2082. Justice Blackmun explained that Kodak argued for a *per se* approach; that is, the ISOs would be precluded from even attempting to rebut the conclusion that no market power could exist in the parts market. *Id.* at 2082 n.11. The federal government, acting as an *amicus*, took a position that would have allowed the ISOs to attempt to rebut this "economic reasoning." *Id.*

intensive approach: "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."[176] The Court would require actual proof of cross-elasticity of demand or its absence, not mere economic theory. Consequently, the majority rejected Kodak's reliance on the Court's approval of summary judgment for defendants in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[177] by distinguishing that decision and taking a rather narrow view of its implications. More specifically, the majority noted that *Matsushita* did not create any "special burden" on antitrust plaintiffs opposing a motion for summary judgment. While *Matsushita* does require that a plaintiff's claim make "economic sense," it does not stand for the proposition that defendants advancing any economic theory in support of their conduct could win a motion for summary judgment.[178] Rather, Justice Blackmun interpreted *Matsushita* to require "only that the nonmoving party's inferences be reasonable in order to reach the jury," as opposed to a theory that was "economically senseless" and subject to summary disposition.[179]

Applying this reasonableness standard to the record in *Kodak*, the Court attempted to "unravel the factual assumptions underlying [Kodak's] proposed rule that lack of power in the equipment market necessarily precludes power in the aftermarkets."[180] Focusing on the issue of cross-elasticity and rejecting Kodak's assertion that nothing could be gained from attempts to exploit power in the aftermarkets, the Court noted that "[e]ven if Kodak could not raise the price of service and parts one cent without losing equipment sales, that fact would not disprove market power in the aftermarkets."[181]

The majority correctly recognized that even a true monopolist loses some sales when it charges supercompetitive prices; however, the lower volume of sales does not change the fact that the fewer, higher-priced

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176. *Id.* at 2082.

177. 475 U.S. 574 (1986). In *Matsushita*, a number of American corporations manufacturing or selling consumer electronic products alleged that Japanese competitors had engaged in a 20-year predatory pricing conspiracy. The Court found that the theory advanced by plaintiffs made no economic sense and that it was unlikely that defendants would sustain losses for so long without foreseeable recoupment. Consequently, summary judgment for defendants was appropriate. *Id.* at 587–88, 594–98.

178. *Kodak*, 112 S. Ct. at 2083.

179. *Id.*

180. *Id.*

181. *Id.* at 2084.

sales yield a monopolist's profit-maximizing return.[182] Accordingly, the Court rejected Kodak's "false dichotomy" of either a competitive price or a ruinous one, and it recognized that Kodak could choose an "optimum" price that would allow supercompetitive prices for parts and service to more than compensate for losses in equipment sales revenue.[183] Some restraining effect by the equipment market on the parts and service markets did not preclude a finding of power in those markets, and Kodak's economic theory was therefore not irrefutable.[184]

The majority then considered what it termed "the more narrowly drawn question: Does Kodak's theory describe actual market behavior so accurately that [the ISOs'] assertion of Kodak market power in the aftermarkets, if not impossible, is at least unreasonable?"[185] Responding in the negative, Justice Blackmun emphasized that despite Kodak's economic theories, the record reflected that while service prices for Kodak customers had risen as a result of Kodak's practices, the evidence reflected no reduction in Kodak equipment sales.[186] Both Kodak and the United States, as *amicus curiae,* attempted to explain away this result, but the Court would have none of it.

Kodak argued that it could charge equipment buyers subcompetitive prices while simultaneously charging high prices for service, resulting in an overall competitive price spread over time.[187] This theory, however, found no support in the record, as Kodak had never claimed to recoup low equipment profits from higher priced service. Rather, Kodak had asserted that it sought profits in both equipment and service and priced its equipment comparably to its competition.[188] Further, Kodak's policies towards self-service customers contradicted its assertions; if equipment were underpriced, Kodak could not afford to sell parts without service to those users.[189] The actual market behavior in which Kodak engaged did not fit its own economic theory.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 2085. Justice Blackmun noted that if Kodak's economic theories were correct, one might have expected Kodak to take advantage of lower ISO service prices to expand sales of equipment. *Id.* However, Kodak instead adopted the restrictive policies challenged by the ISOs and tried to eliminate lower-priced service. This, according to the Court, was "an act that would be expected to devastate either Kodak's equipment sales or Kodak's faith in its theory." *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

The ISOs offered their own "forceful reason" to explain why Kodak's economic theory might prove inconsistent with economic reality. In markets for complex durable goods, significant information and switching costs could limit the responsiveness of equipment buyers to parts and service price increases.[190] If increases in the cost of replacement parts and service are to affect the demand for equipment, prospective purchasers must know the total package costs. That is, at the time of purchase, buyers must engage in "accurate lifecycle pricing."[191] For complex durable equipment, however, it is both difficult and expensive to engage in lifecycle pricing, as the relevant information often may be impossible to acquire or very customer specific.[192]

Kodak responded to this lifecycle pricing argument by suggesting that consumers' information needs would be satisfied by the presence of competitors in the equipment market. The Court stated, however, that fulfillment of information needs was a question of fact.[193] It was not undisputed that competitors either could or would be inclined to provide the necessary information.[194] Further, consumers might choose to avoid the expense of acquiring the information or find it difficult to compute the complete cost of a package at the time of initial purchase.[195] The Court also rejected Kodak's contention that a few large and sophisticated buyers would engage in the necessary information gathering and thus protect other consumers. Kodak could either let the few knowledgeable buyers go elsewhere, or it could engage in price discrimination by varying prices on its packages to continue exploiting the uninformed.[196] The Court was therefore unwilling to accept the bald proposition that equipment purchasing decisions reflected an accurate assessment of lifecycle costs.[197]

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190. *Id.*

191. *Id.*

192. *Id.* at 2085–86. The Court noted that a buyer would need data regarding price, quality, and product availability for upgrades, service and repair cost information, estimates of breakdown frequency, as well as a variety of other facts. *Id.* at 2085, 2085 n.20.

193. *Id.* at 2086.

194. *Id.*

195. *Id.* The Court noted that for some consumers it may not be cost-efficient to compile the information. For others, such as government entities with unique purchasing systems, it may be impossible to engage in lifecycle pricing because operating expenses and capital expenses may be handled by different departments. *Id.*

196. *Id.* at 2086–87.

197. *Id.* at 2087.

The Court then focused on the ISOs' evidence that Kodak did price discriminate by selling parts to high volume self-service users while refusing to sell parts to smaller volume users employing the ISOs.[198] The high volume users were most likely to be the ones in possession of needed information costs. Further, the majority noted that some equipment purchasers were "locked-in" because of high switching costs, and they were better off accepting somewhat higher service costs if these costs were lower than the cost of switching to another brand of equipment.[199] As a result, a seller could profitably pursue a strategy of supercompetitive pricing for parts and service if switching costs exceeded the higher service costs and if the number of locked-in customers was high relative to the number of new purchasers.[200] This strategy is enhanced if Kodak could price discriminate between the locked-in customers and new patrons.[201] Importantly, the ISOs had presented evidence of high switching costs, and Kodak itself confirmed significant variances in package prices for Kodak equipment, parts, and service.[202] The majority concluded that plaintiffs raised a fact question regarding the impact of information and switching costs on defendant's assumption that a competitive equipment market precludes a finding of power in aftermarkets.[203]

All of the foregoing led the majority inexorably to the conclusion that the ISOs' inferences of market power in the parts and service markets were not unreasonable. Further, as the ISOs had presented evidence of power in these aftermarkets, and because the ISOs' theory regarding the misuse of this power made economic sense, summary judgment for Kodak was inappropriate.[204] The Court rejected Kodak's reliance on *Matsushita* for the proposition that denial of summary judgment threatened to deter procompetitive behavior. Unlike *Matsushita*, which involved an arguably beneficial lowering of prices, *Kodak* contained allegations of conduct designed to raise prices and foreclose markets.[205] Although Kodak alleged that its marketing strategies actually enhanced

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 2087–88. The Court stated that it was plausible to infer that Kodak had chosen to profit immediately from its market power through price discrimination that exploited locked-in customers with high information costs. *Id.* at 2088.

205. *Id.*

competition,[206] the Court responded by stating that this was not entirely clear and that a trier of fact would have to decide that question:

> We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact. In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior go unpunished, the balance tips against summary judgment.[207]

Although this Article focuses primarily upon the tying claims asserted against Kodak by the ISOs, it is nevertheless significant to note that the ISOs' section 2 claims of actual and attempted monopolization of the parts and service markets also survived Kodak's summary judgment motion.[208] Some of the observations made in the context of the Court's section 2 discussion are also relevant to the resolution of the tying claims and are quite important for antitrust jurisprudence in general. While the Court acknowledged that "[m]onopoly power under § 2 requires . . . something greater than market power under § 1,"[209] it nevertheless found the evidence that Kodak controlled nearly 100 percent of the parts market and eighty to ninety-five percent of the service market sufficient to survive summary judgment.[210] Significantly, the Court flatly rejected Kodak's claim that a single brand of a product or service may never constitute a relevant market. Instead, the majority concluded that "[t]he relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners."[211] Recognizing that narrow market definitions have been approved in other antitrust cases, the Court utilized the reasonable interchangeability standard and noted that the "commercial realities" facing Kodak equipment owners could well

206. The Court recognized that competition could be enhanced by a firm offering innovative package plans. For example, lower equipment prices coupled with higher parts and service prices could facilitate initial financing and thereby increase sales. The elimination of parts and service options, however, did not necessarily further any procompetitive scheme. *Id.*

207. *Id.* at 2088–89 (citation omitted).

208. *Id.* at 2089–92.

209. *Id.* at 2090.

210. *Id.*

211. *Id.*

narrow the parts and service markets.[212] The implications of this approach to market definition could be quite profound, not only in section 2 litigation, but also in tying and other section 1 cases where market definition and market power may be the critical and determinative issues.[213]

While concluding that the foregoing analysis made summary judgment inappropriate, the Court did acknowledge that after trial all of Kodak's assertions might prove to have merit.[214] That is, it left open the possibility that a trier of fact might conclude that parts, service, and equipment were "components of one unified market," that the equipment market did affect pricing in the aftermarkets, or that Kodak's policies were actually procompetitive.[215] Consequently, the scope of the majority's decision could prove to be rather narrow and its impact more procedural than substantive.[216]

2. *The Dissent*

Justice Scalia's dissent, joined by Justices O'Connor and Thomas, painted a very different picture of the ISO-Kodak dispute and emphasized the substantive implications of the majority's decision.[217] The dissenters framed the dispositive question as:

> Whether, for purposes of applying our *per se* rule condemning "ties," and for purposes of applying our exacting rules governing the behavior of would-be monopolists, a manufacturer's conceded lack of power in the interbrand market for its equipment is somehow consistent with its possession of "market," or even

212. *Id.* The Court went on to explore the conduct element of the section 2 offense: willful acquisition or maintenance of monopoly power, as distinguished from growth or development as a result of a superior product, business acumen, or historic accident. *Id.* at 2090–92. The Court needed to determine whether Kodak's actions reflected valid business judgment or were simply exclusionary in nature. *Id.* at 2091. After examining Kodak's proffered justifications for its policies, the Court determined that factual questions existed regarding the validity of these alleged justifications. *Id.* Kodak argued that its policies allowed it to stress the quality of its service, to reduce inventory costs, and to prevent ISO free-riding on Kodak's capital investment. *Id.* Nonetheless, the Court found that the plaintiffs had presented enough evidence to raise a triable issue as to whether the alleged justifications were merely pretextual. Thus, the section 2 conduct question was not susceptible to resolution on a summary judgment motion. *Id.* at 2092.

213. *See infra* notes 258–69 and accompanying text.

214. *Kodak*, 112 S. Ct. at 2092.

215. *Id.*

216. *See* discussion *infra* part IV.E.

217. *Kodak*, 112 S. Ct. at 2092–2101 (Scalia, J., dissenting). Justice Scalia admonished the majority for treating *Kodak* as just another case regarding the standard for summary judgment in the antitrust context. *Id.* at 2092.

> "monopoly," power in wholly derivative aftermarkets for that equipment. In my view, the Court supplies an erroneous answer to this question, and I dissent.[218]

Although the majority had nowhere in its opinion specifically referred to *Kodak* as a *per se* tying case, Justice Scalia pointed out that the ISOs had waived any rule of reason argument in the court of appeals and were therefore limited to arguing for *per se* treatment of the challenged tie-in.[219] Accordingly, Justice Scalia treated it as such and proceeded to examine the traditional rationale advanced for *per se* invalidation of some restraints of trade. Justice Scalia noted:

> *Per se* rules of antitrust illegality are reserved for those situations where logic and experience show that the risk of injury to competition . . . is so pronounced that it is needless and wasteful to conduct the usual judicial inquiry into the balance between the behavior's procompetitive benefits and its anticompetitive costs.[220]

According to the dissent, in the tying context a demonstration of defendant's market power in the tying product satisfies this prerequisite for *per se* illegality.[221] When a defendant possesses such power, a tie may facilitate extension of that power into other markets, thereby increasing entry barriers in both the tying and tied product markets.[222] On this question, the majority and dissent in *Kodak* were in substantial accord.

Similarly, the dissent noted that section 2 monopolization doctrine also requires market power in combination with exclusionary or predatory behavior prior to any finding of an antitrust violation.[223] Absent market power, with its potential for coercion and market exclusion, neither the section 1 nor the section 2 claim advanced in *Kodak* made any sense to the dissent. Of course, the absence of any market power would have led the majority inexorably to the same

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218. *Id.*

219. *Id.* at 2094 (citing Image Technical Services, Inc. v. Eastman Kodak Co., 903 F.2d 612, 615 n.1 (9th Cir. 1990)).

220. *Id.* at 2092–93.

221. *Id.* at 2093. Justice Scalia did, however, recognize that some courts have accepted affirmative defenses to otherwise invalid ties. *Id.* No real effort was made to reconcile this apparent conflict between the *per se* concept and judicial practice.

222. *Id.* Referring to Justice White's dissenting opinion in *Fortner I*, the dissent noted that despite academic criticism of the Court's *per se* rule for tying, ties can facilitate evasion of price controls, effect price discrimination, and force a full line of products on customers in order to extract monopoly profits on a unique product in the line. *Id.*

223. *Id.* at 2093–94.

conclusion. The critical difference between the majority and dissent in *Kodak*, however, was their diametrically opposed views regarding the fundamental issue of market power.

Justice Scalia began his discussion of the market power question by "assuming" that Kodak lacked either market or monopoly power "in the interbrand markets for its micrographics and photocopying equipment."[224] It seemed logical to the dissent that this absence of market power in the equipment market necessitated a similar finding regarding the aftermarkets in parts and service.[225] If no *per se* illegality could be attributed to a tie involving the equipment market because of the absence of market power, it made no sense to the dissent to treat a tying arrangement involving only parts and service any differently. If "bundling" of equipment and parts and service would escape *per se* treatment, it seemed "anomalous" to the dissent to treat a bundling of just parts and service for that equipment another way.[226] The dissent regarded both scenarios as "economically similar phenomena."[227]

Justice Scalia argued that the ISOs recognized that a tying claim involving equipment would fail, so they instead zeroed in on an aftermarket where Kodak "unquestionably held a near-monopoly share: the parts uniquely associated with Kodak's brand of machines."[228] Nevertheless, the dissent concluded that this was not a proper antitrust concern because virtually every producer of durable goods requiring aftermarket support with relatively unique goods will find itself similarly situated.[229] It seemed "quite wrong" to the dissent to endorse an approach which attributed market power in these situations because many manufacturers facing intense interbrand competition for their

224. *Id.* at 2094. Justice Scalia explained that the ISOs had originally alleged an illegal tie between equipment and parts and service. *Id.* at 2094–95. Despite the ISOs' decision to abandon that claim, the dissent analyzed it and determined that it was bound to fail because no *per se* tying claim could succeed where the alleged tying product (equipment) was one in which market power was absent. Kodak would have lacked the ability to force purchasers of its equipment to accept unwanted parts and service, and the presence of interbrand alternatives in the equipment market would have prevented any anticompetitive consequences. *Id.* at 2095.

225. *Id.* at 2096.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* The majority addressed this idea of an inherent aftermarket monopoly in a lengthy footnote and rejected the idea that *per se* immunity should be afforded to such a "vast and growing sector of the economy." *Id.* at 2089 n.29. The majority viewed Justice Scalia's approach as a "radical departure" from existing doctrine, and also noted that a serious question existed as to the Court's authority to make such a policy decision. *Id.* Further, the majority found the dissent's theory to be "mere conjecture" given the procedural posture of the case. *Id.*

products would nevertheless be deemed to have some degree of market power in an aftermarket.[230] Justice Scalia felt that the competitive concerns to which tying doctrine addresses itself would not be implicated in these cases.[231]

Further, the dissent argued that control of a single-brand derivative market would not connote power to raise derivative market prices through output limitation. This followed from the notion that rational consumers interested in Kodak products would necessarily factor into their purchasing decisions the lifecycle costs of ownership and operation.[232] The presence of interbrand equipment competition would chill the ability of Kodak to exploit any advantage in the aftermarkets.[233]

The dissent also dismissed the majority's reliance on information costs to support a denial of summary judgment. Justice Scalia used the term "truism" and argued that while gaps in consumer information pervade markets they do not create true market power.[234] He also rejected the locked-in consumer theory discussed by the majority because even if there were some locked-in consumers, Kodak could not afford to lose additional equipment sales to potential purchasers who observed its conduct in the aftermarkets.[235] Justice Scalia termed the leverage that Kodak might have over some customers as "circumstantial" and not significant for assessing any relevant market power.[236] Thus, despite the majority's observation that narrow market definitions have received judicial approval on occasion, the dissent flatly stated: "We have never before accepted the thesis the Court today embraces: that a seller's inherent control over the unique parts for its own brand amounts

230. *Id.*

231. *Id.* at 2096–97.

232. *Id.* at 2097.

233. *Id.* Justice Scalia acknowledged that some purchasers may be "irrational" and therefore fail to consider long term expense as well as original equipment costs. Regardless, he noted that the Court had "never before premised the application of antitrust doctrine on the lowest common denominator of consumer." *Id.*

234. *Id.* at 2097–98. Justice Scalia conceded that some consumers will make "rough cut" judgments about price, creating "zones" within which otherwise competitive suppliers may overprice products without appreciable loss of market share. Nevertheless, he rejected the idea that "bands of apparent consumer indifference" result in power in the overall market. *Id.*

235. *Id.* at 2098.

236. *Id.*

to 'market power' of a character sufficient to permit invocation of the *per se* rule against tying."[237]

In sum, the dissent focused upon the deterrent effects of interbrand competition on any attempt to exploit intrabrand market power. Further, Justice Scalia speculated about the potential procompetitive benefits to be derived from bundling of goods and services: protection of the equipment's quality and performance to preserve manufacturer goodwill, creation of financing options, and promotion of product improvement.[238] The dissent's determination that market power was absent in *Kodak* was also dispositive of any section 2 claim advanced by the ISOs.[239]

IV. THE AFTERMATH OF *KODAK*—UNANSWERED QUESTIONS AND UNCERTAIN IMPACT ON PRECEDENT

Many had hoped that *Kodak* would clarify antitrust doctrine regarding tying arrangements by resolving some fundamental questions. Instead, the opinions in *Kodak* perhaps raise more issues than they resolve.[240] The uncertainty engendered by the Court's decision may also have significant implications for other areas of antitrust law where basic questions regarding the appropriate method of analysis, market definition, and the role of market power may be critical.

237. *Id.* at 2099. Justice Scalia distinguished this from a situation where the *per se* rule could apply to a tie involving the use of market power in the foremarket to force purchases in an aftermarket as a means of exploiting interbrand power. *Id.*

238. *Id.* at 2100–01.

239. *Id.* at 2101.

240. Some commentary on *Kodak* and its implications for the future of antitrust doctrine has already emerged. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1709, at 1161–83 (Supp. 1992) (summarizing and critiquing the majority and dissenting opinions); Michael S. Jacobs, *Market Power Through Imperfect Information: The Staggering Implications of* Eastman Kodak Co. v. Image Technical Services *and a Modest Proposal for Limiting Them*, 52 Md. L. Rev. 336, 348–66 (1993) (suggesting that *Kodak* inappropriately revolutionizes antitrust doctrine and radically alters market power analysis); Lawrence T. Festa, III, Comment, Eastman Kodak Co. v. Image Technical Services, Inc.: *The Decline and Fall of the Chicago Empire?*, 68 Notre Dame L. Rev. 619, 623–25 & nn.18–21 (1993) (noting the varied reactions to *Kodak* and its potential effects on the future of antitrust jurisprudence). For more recent discussion, see George A. Hay, *Is the Glass Half-Empty or Half-Full: Reflections on the* Kodak *Case*, 62 Antitrust L.J. 177 (1993); Herbert Hovenkamp, *Market Power in Aftermarkets: Antitrust Policy and the* Kodak *Case*, 40 UCLA L. Rev. 1447 (1993); Robert H. Lande, *Chicago Takes It on the Chin: Imperfect Information Could Play a Crucial Role in the Post-*Kodak *World*, 62 Antitrust L.J. 193 (1993); Gordon B. Spivack & Carolyn T. Ellis, Kodak: *Enlightened Antitrust Analysis and Traditional Tying Law*, 62 Antitrust L.J. 203 (1993); Jill Dickey Protos, Comment, Kodak v. Image Technical Services: *A Setback for the Chicago School of Antitrust Analysis*, 43 Case W. Res. L. Rev. 1199 (1993).

A. Per Se *or Rule of Reason Analysis for Tie-Ins?*

This Article has already traced the somewhat uncertain path of antitrust doctrine regarding tying arrangements.[241] It was observed that the Court moved decidedly towards classic *per se* analysis without ever actually applying it in the manner reserved for restraints such as price-fixing. More recently, the Court began to shy away from reflexive invalidation of tie-ins but continued to apply a hybrid or quasi-*per se* approach that resulted in such restraints withstanding antitrust scrutiny.

As the classic *per se* rule is usually reserved for restraints which almost always would fail to survive closer rule of reason analysis,[242] and because the classic approach does not generally require any elaborate analysis of market definition, market power, and other elements associated with full-blown rule of reason standards, the notion of a *per se* concept in the tying area has always been somewhat puzzling. Yet, for nearly a century the Court has treated tie-ins as *per se* illegal if certain conditions are satisfied. *Kodak* presented the Court with an opportunity to pick up on the concurrence by Justice O'Connor in *Hyde* and its suggestion to abandon the *per se* label in the tying context and replace it with rule of reason analysis. After all, as Justice O'Connor had recognized, the hybrid *per se* approach required some fairly elaborate inquiry into the facts but fell short of considering all relevant matters that would necessarily be considered in a real rule of reason case.[243]

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241. *See supra* notes 12–123 and accompanying text.

242. *See supra* notes 9, 222 and accompanying text. The *per se* doctrine has persisted in cases of horizontal price-fixing as well as vertical price-fixing, horizontal territorial and customer allocation, and certain tie-ins and boycotts. For cases explaining the rationale for a *per se* rule, see, e.g., National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 99 (1984); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 n.25 (1984); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344 (1982); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977). Even in its seminal rule of reason decisions, the Court has recognized that some restraints were so unreasonable as to require facial invalidation. *See* Standard Oil Co. v. United States, 221 U.S. 1, 58, 63–68 (1911); United States v. American Tobacco Co., 221 U.S. 106, 179–81 (1911).

243. *See Hyde*, 466 U.S. at 34 (O'Connor, J., concurring) (noting that prevailing tying analysis incurs costs but not benefits of rule of reason approach). In *NCAA*, 468 U.S. at 104 n.26, the Court cited *Hyde* and acknowledged that tying doctrine underscored the fact that it is difficult to draw a precise line of demarcation between *per se* and rule of reason analysis. In fact, the Court in *NCAA* recognized that "the rule of reason can sometimes be applied in the twinkling of an eye." *Id.* at 109 n.39 (quoting Phillip Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 38 (1981)). Accordingly, the Court has sometimes found rule of reason violations even without elaborate market definition when anticompetitive effects are obvious. *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460 (1986) (detailed market analysis not essential in boycott case where anticompetitive effect clear); *NCAA*, 468 U.S. at 110 (naked restraint on price and output requires proof of justification even in absence of detailed market analysis). For recent commentary regarding

Further, lower federal courts prior to *Kodak* had been willing to consider affirmative defenses to otherwise illegal tying arrangements[244]—a result inconsistent with traditional *per se* analysis and its avoidance of detailed factual investigation. That is, given the rationale for *per se* principles, the fact that a court might actually find a restraint procompetitive or not significantly anticompetitive in a particular case would usually not preclude *per se* treatment. Consideration of business justifications that might reveal procompetitive consequences for tie-ins therefore seemed inconsistent with this approach.

Although this fundamental question of *per se* versus rule of reason treatment for tying arrangements was ripe for reconsideration, the majority in *Kodak* made no reference to these separate methods of antitrust analysis.[245] Justice Scalia, in dissent, was persuasive in explaining that plaintiffs in *Kodak* had waived any rule of reason claim and were pursuing only a *per se* theory of liability.[246] Nevertheless, the majority was rather cryptic in its discussion of the ISOs' claims, leaving readers of the opinion uncertain about its implications for future tying analysis. Justice Blackmun merely noted that tie-ins violate section 1 when the seller has appreciable market power in the tying product and the arrangement affects a substantial volume of commerce in the tied product.[247] The majority made no attempt to distinguish between *per se*

the rule of reason and *per se* approaches to antitrust analysis, see Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis,* 64 S. Cal. L. Rev. 685 (1991).

244. *See, e.g.,* Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1348–51 (9th Cir. 1987) (quality control, goodwill, and no less restrictive alternative available), *cert. denied,* 488 U.S. 870 (1988); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 51 n.9 (9th Cir. 1971) (protection of trade secret suggested in dicta), *cert. denied,* 405 U.S. 955 (1972); Susser v. Carvel Corp., 332 F.2d 505, 514–16 (2d Cir. 1964) (possible protection of trademark), *cert. dismissed,* 381 U.S. 125 (1965); Baker v. Simmons Co., 307 F.2d 458, 469 (1st Cir. 1962) (protection of trademark); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 656–57 (1st Cir.) (avoidance of consumer dissatisfaction), *cert. denied,* 368 U.S. 931 (1961); United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 560 (E.D. Pa. 1960) (protection of business reputation in an infant industry, but noting that justification is not applicable after passage of time), *aff'd per curiam,* 365 U.S. 567 (1961).

245. The Court has observed in the past that "there is often no bright line separating *per se* from Rule of Reason analysis." *NCAA,* 468 U.S. at 104 n.26.

246. This suggests that despite the majority's silence on the question, *Kodak* should be viewed as a *per se* case and the majority's opinion should be examined in that light. Of course, if this is true, one must wonder what different analysis Justice Scalia would apply if a rule of reason claim had been asserted and pursued. Interestingly, on remand the trial judge concluded that a rule of reason claim could be pursued. *See* Image Technical Services, Inc. v. Eastman Kodak Co., No. C 87-1686 BAC, 1993 U.S. Dist. LEXIS 11368, at *3 (N.D. Cal. Aug. 6, 1993).

247. Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072, 2079 (1992).

and rule of reason theories. The majority did add that it was not necessary at the summary judgment stage to decide if Kodak's actions were at all procompetitive and if any such positive effects on competition outweighed anticompetitive effects.[248] This point implied that a rule of reason rather than a *per se* method of analysis would be more appropriate at trial, but the Court was not clear in this regard.

In sum, the Court missed a golden opportunity to clarify the appropriate methods of tying analysis and to articulate the elements of each approach. Justice Blackmun should have clearly stated whether he was proceeding on the same premise as the dissent and considering only the *per se* theory. Further, and perhaps more importantly, if the Court intended to retain the hybrid or quasi-*per se* approach, it lost its chance to articulate how a rule of reason tying claim, properly alleged and preserved, would proceed differently from the *per se* claim.

Antitrust practitioners and scholars are still left wondering how rule of reason analysis will really differ from the hybrid *per se* approach and whether they can usefully be distinguished.[249] More specifically, could a

248. *Id.* at 2088.

249. The case law prior to *Kodak* indicates that while some federal courts purported to distinguish between *per se* and rule of reason tying cases, other courts seemed to muddle together tying doctrine under one approach. *Compare* Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 481 (3d Cir.) (en banc), *cert. denied,* 113 S. Ct. 196 (1992); Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n, 938 F.2d 846, 850 (8th Cir. 1991); Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864, 870 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 1667 (1992); Beard v. Parkview Hosp., 912 F.2d 138, 140 (6th Cir. 1990); Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n, 891 F.2d 1473, 1483 n.11 (10th Cir. 1989), *cert. denied sub nom.* Mount Washington Cemetery v. Monument Builders of Greater Kansas City, Inc., 495 U.S. 930 (1990); Smith Mach. Co. v. Hesston Corp., 878 F.2d 1290, 1295–98 (10th Cir. 1989), *cert. denied,* 493 U.S. 1073 (1990); Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 826 F.2d 712, 720–21 (7th Cir. 1987); Action Ambulance Serv., Inc. v. Atlanticare Health Servs., Inc., 815 F. Supp. 33, 36 (D. Mass. 1993); Greene County Memorial Park v. Behm Funeral Homes, Inc., 797 F. Supp. 1276, 1285 (W.D. Pa. 1992), *aff'd mem.,* 993 F.2d 876 (3d Cir.), *cert. denied,* 114 S. Ct. 187 (1993); Webb v. Primo's Inc., 706 F. Supp, 863, 867 (N.D. Ga. 1988); Gould v. Sacred Heart Hosp., 1990-1 Trade Cas. ¶ 68,993, at 63,448 (N.D. Fla. 1988); Nurse Midwifery Assocs. v Hibbett, 689 F. Supp. 799, 809 (M.D. Tenn. 1988), *aff'd in part, rev'd in part on other grounds,* 918 F.2d 605 (6th Cir. 1990), *cert. denied,* 112 S. Ct. 406 (1991); Cemar, Inc. v. Nissan Motor Corp., 678 F. Supp. 1091, 1099–1100 (D. Del. 1988); Drs. Steuer & Latham, P.A. v. National Medical Enters., 672 F. Supp. 1489, 1503–04 (D.S.C. 1987), *aff'd,* 846 F.2d 70 (4th Cir. 1988); W.H. Brady Co. v. Lem Prods., Inc., 659 F. Supp. 1355, 1373–73 (N.D. Ill. 1987) (drawing distinctions between *per se* and rule of reason standards for antitrust tying analysis) *with* Suburban Propane v. Proctor Gas, Inc., 953 F.2d 780, 788 (2d Cir. 1992); Shafi v. St. Francis Hosp., 1991-1 Trade Cas. ¶ 69,500, at 66,134 (4th Cir. 1991); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1411–12 (9th Cir.), *cert. denied,* 112 S. Ct. 617 (1991); Xeta, Inc. v. Atex, Inc., 852 F.2d 1280, 1282–83 (Fed. Cir. 1988); Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407, 1414 (11th Cir. 1987); Continental Trend Resources, Inc. v. Oxy USA, Inc., 1991-2 Trade Cas. ¶ 69,510, at 66,241 (W.D. Okla. 1991); 305 East 24th Owners Corp. v. Parman Co., 714 F. Supp. 1296, 1304 (S.D.N.Y. 1989), *aff'd,* 994 F.2d 94 (2d Cir. 1993); O'Riordan

plaintiff succeed even if the defendant lacked market power in the tying product?[250] Would coercion remain an element of the offense and, if so,

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v. Long Island Board of Realtors, Inc., 707 F. Supp. 111, 116 (E.D.N.Y. 1988); Blair v. All American Bottling Corp., 1988-2 Trade Cas. ¶ 68,372, at 60,068 (S.D. Cal. 1988); Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477, 1488 (D. Or. 1987); Andrea Theatres, Inc. v. Theatre Confections, Inc., 1987-2 Trade Cas. (CCH) ¶ 67,711, at 58,594 (E.D.N.Y. 1987); Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861, 880 (D. Del. 1987); B.J.L.M. Liquor Store, Inc. v. Block Distrib. Co., 1987-2 Trade Cas. ¶ 67,710, at 58,691 (S.D. Tex. 1987); Taggart v. Rutledge, 657 F. Supp. 1420, 1446 (D. Mont. 1987), *aff'd mem.*, 852 F.2d 1290 (9th Cir. 1988); Posa, Inc. v. Miller Brewing Co., 642 F. Supp. 1198, 1209 (E.D.N.Y. 1986) (failing to clearly articulate differences between rule of reason and *per se* analysis). Since the *Kodak* decision, at least one lower court has suggested a separate test for *per se* and rule of reason analysis in the tying context. *See* Lee v. The Life Ins. Co. of N. Am., 829 F. Supp. 529, 536-37 n.4 (D.R.I. 1993).

250. In Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 481–85 (3d Cir.) (en banc), *cert. denied,* 113 S. Ct. 196 (1992), the Third Circuit expressly rejected the notion that rule of reason analysis also required market power to prove a tie-in unreasonable. The court reasoned that a contrary conclusion would be inconsistent with the Supreme Court's articulation of the law in *Hyde*. *Id.* at 483. The court in *Town Sound* did conclude, however, that the plaintiffs' theories of causation were flawed, and it therefore affirmed summary judgment for defendant. *Id.* at 487–95. This prompted Chief Judge Sloviter and one colleague to file a concurring and dissenting opinion agreeing that market power was unnecessary for a rule of reason violation but disagreeing with the majority's treatment of the causation question. *Id.* at 497–503 (Sloviter, C.J., concurring and dissenting). The Chief Judge argued that the majority was using the lack of market power to support its finding of an absence of antitrust injury. *Id.* at 502; *see also* Greene County Memorial Park v. Behm Funeral Homes, Inc., 797 F. Supp. 1276, 1288 (W.D. Pa. 1992) (stating that defendant need not have market power over tying product in rule of reason claim), *aff'd mem.*, 993 F.2d 876 (3d Cir.), *cert. denied,* 114 S. Ct. 187 (1993); Microbyte Corp. v. New Jersey State Golf Ass'n, 1986-2 Trade Cas. (CCH) ¶ 67,228, at 61,164 (D.N.J. 1986) (suggesting that rule of reason violation could be proved without market power). *But see* Digital Equip. Corp. v. Uniq Digital Technologies, Inc., 1993-2 Trade Reg. Rep. (CCH) ¶ 70,378, at 70,985-86 (N.D. Ill. 1993) (rejecting argument that *Kodak* dismisses market power requirement to support tying claim and stating that market power is demanded under both *per se* and rule of reason tests).

Professor Hovenkamp has asserted that, despite language in cases and commentary to the contrary,"[i]n no recent case . . . has a court condemned a tie-in when there was an express finding that the defendant had no market power in the tying product." Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 8.3, at 218 (1985). Others have suggested that even in the absence of market power, tie-ins may be anticompetitive. *See, e.g.,* Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues,* 62 B.U. L. Rev. 661, 663, 671–81, 700 (1982) (recognizing that consumers may be injured by tie-ins even if the defendant lacks market power, but suggesting that the issue is more of a consumer protection question than an antitrust concern); W. David Slawson, *Excluding Competition Without Monopoly Power: The Use of Tying Arrangements To Exploit Market Failure,* 36 Antitrust Bull. 457, 493 (1991) (commenting that some competitive harms resulting from tie-ins do not require monopoly power); *see also* Areeda, *supra* note 3, ¶ 1704c2, at 60–61 (suggesting that monopoly in tied market could result without monopoly in tying market). Professor Areeda also notes, however, that "[w]ith zero power in the market for the tying product, a tie-in cannot be a vehicle for distorting competition in the second market." *Id.* ¶ 1728d, at 371. The ultimate focus, according to Professor Areeda, is the degree of foreclosure in the tied product market. *Id.* at 372. Professor Ross concludes that a rule of reason inquiry for tying arrangements is "virtually identical to" the analysis used for exclusive dealing arrangements, thus how could it be established in the absence of market power?[251] Could any anticompetitive effects result in the absence of any real market power? If affirmative defenses to a *per se* claim are still permissible, what role do they play in the rule of reason claim? Is evidence of procompetitive effects flowing from the tie limited to the types of evidence presented as affirmative defenses in other antitrust cases, or will courts consider additional matters? While a number of courts have specifically noted that in the absence of *per se* illegality, a plaintiff could still prevail pursuant to rule of reason analysis by demonstrating anticompetitive effects, these decisions provide little or no explanation to illustrate when or how such effects would manifest themselves absent market power.[252] Although primary emphasis in discussions regarding tying arrangements is usually placed on the alleged danger of a tying market monopoly being "leveraged" into the tied market, other potential anticompetitive effects merit judicial consideration.[253] Further, the

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focusing significantly on the degree of foreclosure of competition. Stephen F. Ross, *Principles of Antitrust Law* 300 (1993).

251. If Professor Areeda is correct in his assessment that foreclosure of competition is the key question in these cases, *see supra* note 250 and *infra* note 252, it arguably matters not whether the defendant forced or coerced the plaintiff or whether the plaintiff willingly acceded to the alleged tie-in. In either scenario, the crucial inquiry would be whether the arrangement foreclosed such a significant share of the tied market that it could not support a competitive number of efficient rivals.

252. See *supra* notes 250–51 for cases and commentary regarding the issue of market power in tying analysis. Professor Areeda has explained that, in his view, the central question in all tying cases is the degree of foreclosure in the tied product market. Thus, he writes:

> I believe that the single best way to judge potentially adverse effects is by the severity of the foreclosure in a market, whether or not that foreclosure was brought about by power over a different product. . . . Without unreasonable foreclosure, the arrangement would be lawful even if it involved a tie-in; with unreasonable foreclosure, the arrangement would be prima facie unlawful even if not a tie.

Areeda, *supra* note 3, ¶ 1701d, at 29.

Professor Areeda also notes:

> That a defendant obtains patronage in a second market through a tie does not itself explain how or why the tie impairs the vitality of competition there. Small foreclosures can seldom, if ever, do so. To impair the vitality of competition in the tied market, the tie must preempt so much patronage that not enough remains to support a competitive number of efficient rivals.

Id. ¶ 1704a, at 55–56 (footnotes omitted).

These assertions are consistent with the notion that even in the absence of the type of market power required for *per se* invalidity of tie-ins, or in the absence of the element of coercion referred to in the Supreme Court cases, a tie could still violate section 1 in a rule of reason case if the requisite foreclosure were established in the tied product market.

253. See Ross, *supra* note 250, at 277–84, citing extension of monopoly, exclusion of rivals, price discrimination, impingement on consumer choice, reduction of consumer awareness, and the facilitation of cartel pricing as economic harms attributable to tie-ins. Professor Areeda adds the

Supreme Court has yet to discuss satisfactorily the procompetitive effects of some tie-ins and the role of such effects in an appropriate analysis.[254] Indeed, the presence of identifiable procompetitive virtues strikes at the very heart of the classic rationale for using *per se* analysis. Unless a restraint almost always lacks any redeeming value, courts should eschew reliance on the *per se* concept and substitute a rule of reason approach.

A related problem not reached in *Kodak* is the role that section 3 of the Clayton Act should play in tying jurisprudence. While some commentators have concluded that section 3 analysis and Sherman Act section 1 analysis are now identical, that conclusion is certainly not self-evident from the legislative history, statutory language, or earlier case law pursuant to section 3.[255] *Kodak* properly avoided any discussion of section 3 because that provision deals solely with commodities and does not extend to trade restraints involving services,[256] but the issue of section 3's scope remains unresolved.[257] A Supreme Court decision

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creation of a new monopoly or oligopoly in the tied product market, reduction of price competition among pre-existing oligopolists, raised entry barriers, limitation of input substitution, evasion of government price controls, evasion of price floors, concealment of true prices, cheating of upstream suppliers, obstruction of copying, blocking of customer autonomy, and foreclosure of a customer's access to supplies as possible reasons for attacking tie-ins. Areeda, *supra* note 3, ¶ 1703, at 32–50. Professor Areeda is skeptical, however, about the propriety of treating some of these problems as antitrust concerns, and would focus on the degree of foreclosure in the tied product market as the principal focal point of antitrust doctrine. *Id.*

In Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 475–76 (3d Cir.) (en banc), *cert. denied,* 113 S. Ct. 196 (1992), the Third Circuit summarized the potential evils of tie-ins by referring to leveraging, raising of entry barriers in the tied product market, impeding innovation in the tied product market, and price discrimination or evasion of price or other regulatory controls. The possibility of increased entry barriers resulting from tie-ins was also noted in Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 795–96 (1st Cir. 1988) (commenting that a tie-in might require new competitor to enter both markets to compete).

254. See Areeda, *supra* note 3, ¶ 1703g, at 50, suggesting that "[t]ying sometimes benefits society by protecting quality, lowering costs or increasing value, increasing price competition, aiding entry, or rewarding a valuable patent."

255. See *id.* ¶ 1719b, at 254–57, arguing that, despite differences in statutory language, the Sherman and Clayton Act standards "apply a single substantive standard." *Id.* at 254. Compare *Town Sound*, 959 F.2d at 495–96, where the court of appeals acknowledged that some have found that the Sherman and Clayton Act standards have "coalesced," *id.* at 496 n.42, but also recognized that the Clayton Act language "does suggest that the Clayton Act generally has a weaker standard for liability," *id.* at 496. The *Town Sound* court also noted that the legislative history of the Clayton Act, while "complicated," did not provide a clear answer. *Id.* at 496 n.43. For recent support for a different Clayton Act standard, see also *infra* notes 281, 283 and accompanying text.

256. For the relevant statutory language in section 3, see *supra* note 6.

257. It is undeniable that section 3, on its face, purports to make the substantive test of liability whether the effect of a restraint "may be to substantially lessen competition or tend to create a monopoly." The choice of the words "may" and "tend" connote something less than a full-blown

focusing on section 3 could provide much needed clarity in a still somewhat murky area of antitrust jurisprudence.

B. *Market Definition Problems*

The issue of market definition is one that plays a prominent role not only in tying jurisprudence but also in almost every area of antitrust law. Cases involving monopolization, mergers, vertical non-price restraints, boycotts, and other matters may all hinge upon the finding that market power follows from certain definitions of the relevant market. *Kodak* presented the Court with an opportunity to address the market definition question and provide appropriate guidance.

For many years, the Court has endorsed the notion that all products reasonably interchangeable with each other be included in the relevant product market.[258] Specifically reaffirmed in *Kodak,*[259] the reasonable interchangeability test seeks to determine whether cross-elasticity of demand exists between products. If a relatively slight increase in the price of product *A* results in a significant shift in patronage to product *B,* it makes sense to include both in the relevant market. Sellers of *A* would not be able to profit from charging a supercompetitive price because consumers could readily switch to an adequate substitute at a lower cost. This interbrand competition thus provides a powerful check on the ability to enhance price through output restriction or other market behavior.

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adverse effect on competitive forces. Rather, the language suggests a lower threshold for liability, predicated upon probable future developments resulting from the restraint. Not surprisingly, the Supreme Court labeled section 3 an "incipiency" statute early in its history: "The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own . . . ." Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922) (considering exclusive dealing claim). *See also* United Shoe Mach. Corp. v. United States, 258 U.S. 451, 459 (1922) (stating that Sherman and Clayton Acts have "different tests of liability"). Accordingly, section 3 addresses restraints which threaten a "reasonable probability" of evolving into a significant threat to competition. As Congress has not altered the operative language of section 3, it is not unreasonable to ask why courts and commentators rather cavalierly conclude that the Sherman and Clayton Act standards are now identical. Even if sound policy arguments may be articulated to support this result, is it for the judicial branch to ignore what appears to be a rather plain attempt to legislatively mandate a lower, less permissive threshold for antitrust liability?

258. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 111 (1984); United States v. Grinnell Corp., 384 U.S. 563, 571–73 (1966); Brown Shoe Co. v. United States, 370 U.S. 294, 328, 336–39 (1962); United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395 (1956); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 612 n.31 (1953).

259. Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072, 2090 (1992).

In *Kodak*, the question of market definition arose regarding Kodak brand replacement parts, and defendant argued that the single brand of a particular manufacturer should not be deemed to constitute a relevant market for antitrust purposes. The Court, however, suggested that market conditions could support a conclusion that a single brand did represent a relevant market. Although it would be unfair to criticize the Court too extensively given *Kodak's* procedural posture, it is unclear from the majority opinion just how broadly we can apply the result. First, after trial it might turn out that Kodak accurately contends that interbrand competition in the equipment market does affect the aftermarket in a way that supports broader market definition. Second, although the majority does make clear that a single brand of product may comprise a relevant market, the meaning of the Court's reference to the "'commercial realities' faced by consumers"[260] is not evident. While the Court correctly observed that it and some lower federal courts have occasionally endorsed narrow market definitions,[261] it is also undeniable that some lower courts have rejected single brand market definitions and the Supreme Court itself has frequently opted for broader definitions as well.[262]

The Court's reliance in *Kodak* on information and switching costs and its focus upon the fact that Kodak parts and service are not interchangeable with non-Kodak aftermarkets may support a narrow market definition on the facts of this case. What guidance this provides in other cases is more problematic. Is the Court endorsing single brand market definition whenever a significant number of consumers have expressed a preference for a particular brand? Does this connote that trademarked and other differentiated goods may constitute distinct markets? Or, should courts construe *Kodak* more narrowly to endorse narrow market definitions in very limited circumstances where a combination of locked-in customers and restrictive practices preclude arbitrage as a means of creating competition for the needed parts and service? In addition, what roles do potential competition and/or potential for arbitrage play in defining relevant markets?

260. *Id.*

261. *Id.* at 2090 n.31.

262. The best example of the Supreme Court's adoption of a broad market definition is *DuPont*, 351 U.S. at 400, where the Court defined the market as all flexible packaging materials, rather than just cellophane. *See also Kodak*, 112 S. Ct. at 2099–3000 (Scalia, J., dissenting).

C. *Market Power Issues*

Closely related to the market definition problem is the assessment of market power. Assuming a properly defined market, how should a court determine whether a particular defendant has market power—the power to raise price to a supercompetitive level?[263] Traditionally, the Court has focused primarily, if not exclusively, on "market share." For example, in *Kodak*, once the Court concluded that the relevant market could theoretically be Kodak parts and service, it focused upon Kodak's nearly 100-percent share of the parts market and eighty to ninety-five-percent share of the service market.[264]

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263. The Supreme Court has defined "market power" as "the ability to raise prices above those that would be charged in a competitive market." National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 109 n.38 (1984) (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n.46 (1984); United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 620 (1977); *DuPont*, 351 U.S. at 391). In *Kodak*, the Court reaffirmed this view, citing *Hyde, Fortner*, and *DuPont* for the proposition that market power is the power to force a purchaser to do something it would not do in a competitive market. 112 S. Ct. at 2080. The Court went on in *Kodak* to state that market power is "the ability of a single seller to raise price and restrict output," and that market power is usually inferred from a predominant market share. *Id.* at 2080–81 (quoting Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969)).

Scholars have defined the concept similarly, often adding the requirement that supercompetitive prices be maintained for a significant period of time without unacceptable diminution in sales. *See* George A. Hay, *Market Power in Antitrust*, 60 Antitrust L.J. 807, 812–13 (1992) (collecting definitions from Department of Justice Merger Guidelines, Landes, Posner, Areeda, and Turner).

264. *Kodak*, 112 S. Ct. at 2090. The Court noted that these percentages were sufficiently high to satisfy the section 2 requirement of monopoly power for summary judgment purposes, and that monopoly power requires "something greater" than market power for section 1 purposes. *Id.* The Court did not specify what it meant by "something greater." In *Hyde*, 466 U.S. at 26–29, the Court had rejected a 30-percent market share as insufficient to establish the requisite power in the tying product market.

In the tying context, federal courts have often relied on the Supreme Court's decision in *Hyde* and focused on the presence or absence of high market shares to determine whether sufficient economic power exists with regard to the tying product. *Compare* D.O. McComb & Sons, Inc. v. Memory Gardens Management Corp., 736 F. Supp. 952, 956–57 (N.D. Ind. 1990) (60 percent of burial market in one county suggests power; citing *Hyde*); McMorris v. Williamsport Hosp., 597 F. Supp. 899, 913 (M.D. Pa. 1984) (55–60 percent of market for diagnostic nuclear medicine procedures and 100 percent of market for therapeutic procedures raises genuine fact issue; citing *Hyde*) *with* Shafi v. St. Francis Hosp., 1991-1 Trade Cas. (CCH) ¶ 69,500, at 66,134 (4th Cir. 1991) (11-percent market share in hospital market insufficient; citing *Hyde*); Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n, 938 F.2d 846, 852 (8th Cir. 1991) (29–31-percent share of cemetery market not enough; citing *Hyde*); Western Power Sports, Inc. v. Polaris Ind. Partners L.P., 744 F. Supp. 226, 229 (D. Idaho 1990) (31 percent of retail snowmobile market insufficient; citing *Hyde*), *rev'd mem.*, 951 F.2d 365 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 70 (1993); M. Leff Radio Parts, Inc. v. Mattel, Inc., 706 F. Supp. 387, 399 (W.D. Pa. 1988) (30 percent of home video game market too low; citing *Hyde*); Seaward Yacht Sales, Ltd. v. Murray Chris-Craft Cruisers, Inc., 701 F. Supp. 766, 775 (D. Or. 1988) (less than 5 percent of cruiser sales inadequate); Homeware, Inc. v. Rexair, Inc., 1988-1 Trade Cas. (CCH) ¶ 68,085, at 58,593 (E.D. Mich. 1988) (3 percent of relevant market for vacuum cleaners insufficient).

What other evidence, besides market share, should courts use to determine the presence or absence of market power? Should "uniqueness" act as a relevant concern even if adequate functional substitutes appear to exist?[265] Again, should patents, trademarks, and consumer preferences count?[266] Do cost advantages matter?[267] Recent

265. Earlier Supreme Court opinions referred to the alleged uniqueness of a tying product as a basis for concluding that market power exists in the tying product market. *Fortner II*, however, cut back on an expansive use of uniqueness as a short cut to finding the requisite power. *See supra* notes 70–79 and accompanying text.

Recent lower federal antitrust decisions have reached differing results when uniqueness allegations have been made to support tie-in claims. *Compare* Outlet Communications, Inc. v. King World Productions, Inc., 685 F. Supp. 1570, 1577 (M.D. Fla. 1988) (finding Wheel of Fortune may be sufficiently unique) *with* Nurse Midwifery Assocs. v. Hibbett, 689 F. Supp. 799, 810 (M.D. Tenn. 1988) (accepting argument that lack of legal, physical, or economic barriers to competitors offering similar service makes family centered maternity care insufficiently unique).

266. The treatment of patents, copyrights, and trademarks as sufficient evidence of tying market power has been critically discussed in recent cases. *See, e.g.*, Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 480 (3d Cir.) (en banc) (trademark itself not equivalent of economic power), *cert. denied*, 113 S. Ct. 196 (1992); Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1346 (9th Cir. 1987) (trademark not persuasive evidence of economic power), *cert. denied*, 488 U.S. 870 (1988); Webb v. Primo's Inc., 706 F. Supp. 863, 868 (N.D. Ga. 1988) (mere existence of a unique franchise trade or service mark may not suffice); Allen-Myland, Inc. v. International Business Mach. Corp., 693 F. Supp. 262, 281 (E. D. Pa. 1988) (uniqueness or patent not necessarily sufficient to establish market power); Tominaga v. Shepherd, 682 F. Supp. 1489, 1493–94 (C.D. Cal. 1988) (pizza franchise trademark not sufficiently unique); Klo-Zik Co. v. General Motors Corp., 677 F. Supp. 499, 505 (E.D. Tex. 1987) (patent does not always create market power, citing Justice O'Connor's concurrence in *Hyde*); Nobel Scientific Indus., Inc. v. Beckman Instruments, Inc., 670 F. Supp. 1313, 1328 (D. Md. 1986) (patent does not necessarily reflect market power), *aff'd*, 831 F.2d 537 (4th Cir. 1987), *cert. denied*, 487 U.S. 1226 (1988). Even parcels of land, traditionally thought of as non-fungible and distinct, have been deemed insufficiently unique to confer market power in tying cases. *See* Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n, 938 F.2d 846, 852 (8th Cir. 1991); 305 East 24th Owners Corp. v. Parman Co., 714 F. Supp. 1296, 1306–07 (S.D.N.Y. 1989).

Because *Kodak* concluded that a single brand product market definition might be appropriate in some cases, 112 S. Ct. at 2090, it will be interesting and important to see whether the decision will have significant impact on the course of lower federal court decisions regarding patents, copyrights, or trademarks. Courts could follow *Kodak* but still conclude that the "commercial realities" faced by consumers dictate a broader product market definition even if patent, copyright, or trademark protects the tying product. Conversely, the willingness of the *Kodak* majority to endorse narrow market definitions could resurrect treatment of trademarked or patented goods as sufficiently unique. For examples of this earlier, alternative approach, see Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1341 (9th Cir. 1984) (unique, copyrighted tying product), *cert. denied*, 473 U.S. 908 (1985); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50 (9th Cir. 1971) (distinctive trademark reflecting consumer goodwill and acceptance unique), *cert. denied*, 405 U.S. 955 (1972). For rejection of single brand markets in tie-in cases, see *Town Sound*, 959 F.2d at 480 (Chrysler-only market inappropriate); Homeware, Inc. v. Rexair, Inc., 1988-1 Trade Cas. (CCH) ¶ 68,085, at 58,593 (E.D. Mich. 1988) (claim that one brand of vacuum cleaners constituted market was "patently frivolous"). For a recent discussion of tie-ins in the franchise context, see Jill M. Aubin, *Franchise Tie-Ins: The State of the Law*, 26 New Eng. L. Rev. 1 (1991) (citing numerous cases and secondary authorities).

literature has suggested other methods of measuring market power, such as the raising of rivals' costs.[268] What about the role of entry barriers and the argument that in their absence no real power exists to control price or exclude competition? If entry barriers are relevant, do low or non-existent barriers suggest that actual market share is a particularly poor measure of real economic power? In a related vein, should potential competition be included in any calculation of market share and market power? Should the courts consider trends in demand and questions regarding excess capacity? Should trends in sellers' market shares be considered? Does dynamic innovation affect the analysis? What about countervailing buyer power? Are profitability levels relevant?[269] *Kodak* does not consider these alternative approaches to market power determination and arguably forfeits an opportunity to at least consider and choose from the best of the more recent approaches. In sum, reliance on market share may result in failures to assess the presence of market power where a relatively small share does not accurately reflect "economic realities," and an inference of power derived merely from a relatively high share may be misleading and inaccurate. *Kodak*'s tunnel-vision focus on market share leaves uncertain the fate of these other methods of assessing market power.

In addition, the Court in *Kodak* focused upon the idiosyncratic position of "locked-in" customers. Will the uniqueness of these customers as compared to other business traders necessitate a narrow reading of *Kodak* regarding market power? Further, the role of market imperfections and their implications for other cases remains unclear.

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267. The Supreme Court, in *Fortner II*, 429 U.S. at 617, specifically referred to a defendant's cost advantages as a possible source of the requisite economic power in the tying product. More recently, cost advantages have been cited as a potential basis for finding market power in the tying product. *See Klo-Zik*, 677 F. Supp. at 505 (cost advantages might suffice if evidence supported such a finding); Patterson Dental Co. v, McGaughey, 1986-1 Trade Cas. (CCH) ¶ 66,931, at 61,795 (D. Or. 1985) (power can be established if competitors unable to offer equivalent product or service profitably).

268. *See* Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241 (1987); Thomas G. Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L. J. 209 (1986).

269. Many of these questions were raised in Daniel M. Wall, *Beyond Market Share—Strategies for the High Market Share Firm*, Antitrust, Fall/Winter 1991, at 24. For other recent commentary regarding approaches to market power questions, see Jerry A. Hausman et al., *A Proposed Method for Analyzing Competition Among Differentiated Products*, 60 Antitrust L.J. 889 (1992); David Scheffman, *Statistical Measures of Market Power: Uses and Abuses*, 60 Antitrust L.J. 901 (1992). *See also* Handler et al., *supra* note 49, at 215–223; Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805 (1990).

What will constitute a sufficient market imperfection to affect market definition and market power analysis?

D. *The One or Two Product Issue*

One issue that the Court did address clearly was the question of whether parts and service can constitute separate relevant markets. In concluding that they could be considered separate markets, the majority in *Kodak* reiterated the narrow five-justice majority's character of demand approach in *Hyde*—whether sufficient consumer demand exists so that it is efficient for a firm to provide service separately from parts.[270] Rejecting the notion that functionally linked products cannot be deemed separate, the Court more firmly endorsed the *Hyde* approach with a six-justice majority.

The implications of this approach, however, were not fully evaluated. The use of the character of demand approach raises questions in many commercial contexts and is not always easy to apply.[271] For example, if

270. *Kodak*, 112 S. Ct. at 2080.

271. Applications of the character of demand test prior to and after *Kodak* have produced varying results in the lower federal courts. *See, e.g.*, Montgomery County Ass'n of Realtors v. Realty Photo Master Corp., 1993-1 Trade Cas. (CCH) ¶ 70,239, at 70,181 (4th Cir.) (listing service and photographs one product), *cert. denied*, 114 S. Ct. 440 (1993); Service & Training, Inc. v. Data Gen. Corp., 963 F.2d 680, 684 (4th Cir. 1992) (computer repair software licenses and repair services separate products); Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1574–76 (11th Cir. 1991) (multilist service and professional association membership separate markets); Illinois Bell Tel. Co. v. Haines & Co., 905 F.2d 1081, 1088 (7th Cir. 1990) (desired listings and unwanted listings one product), *vacated*, 111 S. Ct. 1408 (1991); Wells Real Estate, Inc. v Greater Lowell Bd. of Realtors, Inc., 850 F.2d 803, 815 (1st Cir.) (multiple listing service and board membership may not be separate products), *cert. denied*, 488 U.S. 955 (1988); Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 477–78 (7th Cir.) (hospital services and pathology services are one product), *cert. denied*, 488 U.S. 852 (1988); Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp., 826 F.2d 1360, 1363 (4th Cir. 1987) (desired automobiles and undesired automobiles not separate products); Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 826 F.2d 712, 720 (7th Cir. 1987) (motors and replacement parts are separate products); Data Gen. Corp. v. Grumman Sys. Support Corp., 761 F. Supp. 185, 193–94 (D. Mass. 1991) (genuine dispute as to whether copyrighted diagnostic program and repair services one or two products); D.O. McComb & Sons, Inc. v. Memory Gardens Management Corp., 736 F. Supp. 952, 957 (N.D. Ind. 1990) (burial plots and opening and closing services separate products); Digital Equip. Corp. v. System Indus., Inc., 1990-1 Trade Cas. (CCH) ¶ 68,901, at 62,837 (D. Mass. 1990) (technological interrelationship of patented interconnect products and peripheral storage devices not determinative on one or two product question); Hodge v. Villages of Homestead Homeowners Ass'n, 726 F. Supp. 297, 298–99 (S.D. Fla. 1989) (further discovery needed to determine whether condominium units and contract for maintenance services separate products); Allen-Myland, Inc. v. International Business Mach. Corp., 693 F. Supp. 262, 289–90 (E.D. Pa. 1988) (computer upgrade parts and labor not separate products); Krause v. General Motors Corp., 1988-2 Trade Cas. (CCH) ¶ 68,163, at 59,094 (E.D. Mich. 1988) (automobiles and low interest financing one product); Klo-Zik Co. v. General Motors Corp., 677 F. Supp. 499, 503–04 (E.D. Tex. 1987) (warranties and engines not separate products; summary judgment for defendant); Smith v. Mobil

there is sufficient consumer demand to obtain rights to use a trademark or a franchise identification, will the franchiser or trademark holder be stifled in attempts to protect goodwill by conditioning a license upon the willingness of the licensee to purchase a package of materials or service? Or, alternatively, should the courts resolve this problem at another point in the antitrust analysis when the issue of justifications is raised?

E. A Narrow, Procedural Decision or Profound, Substantive Implications?

Arguably the most critical uncertainty engendered by *Kodak* is whether the case is properly viewed as merely a procedural decision regarding the propriety of summary judgment rather than as a far-reaching, substantive ruling that changes the face of antitrust jurisprudence. A narrow, defendant-oriented view of the decision might be that the denial of an adequate opportunity for the ISOs to conduct discovery precluded summary adjudication of claims that made some "economic sense." After all, the Court itself did not regard its decision as inconsistent with its earlier pronouncements in *Matsushita* regarding summary judgment in antitrust cases. Instead, the majority in *Kodak* carefully distinguished *Matsushita* as a case that involved an antitrust theory making no economic sense following quite extensive discovery.

At the very least, *Kodak* may dramatically alter the current trend towards increased use of summary proceedings in antitrust cases. In the wake of *Matsushita,* courts previously reluctant to utilize summary judgment to shorten protracted antitrust litigation became more aggressive in ridding themselves of questionable claims without the time and expense of full-blown trials. Whether *Kodak* will signal a return to the pre-*Matsushita* era, during which reluctance to dismiss antitrust plaintiffs prevailed, remains to be seen. This result would have profound consequences for litigants and judges alike, but would not necessarily affect prevailing substantive doctrine.

On the other hand, a more expansive reading of *Kodak* suggests significant substantive implications with respect to fundamental questions such as market definition and market power. Only future decisions by federal courts will satisfactorily reveal the true extent of *Kodak*'s effects on antitrust principles. Certainly, one cannot fault the majority in *Kodak* for failure to be clearer on this point. The Court was,

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Oil Corp., 667 F. Supp. 1314, 1324 (W.D. Mo. 1987) (branded gasoline and trademark not separate products).

after all, confronted with an appeal from a reversal of a grant of summary judgment. Still, the substantive implications of the decision could significantly affect tying practices by many manufacturers and distributors of durable goods requiring service and replacement parts. More sweeping ramifications may also be felt in tying doctrine generally and in other areas because of the market definition implications of the decision.[272]

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272. Since the Supreme Court's decision in *Kodak*, the case has been cited in the lower federal courts and just recently by the Supreme Court itself in Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993). The precise implications and effects of *Kodak* remain unclear. In *Brown & Williamson*, the Court focused upon language in *Kodak* requiring courts to examine "realities of the market" rather than rely merely upon econom c theory. *Id.* at 2591. Thus, "theory will not stand in the way of liability." *Id.*

The Court's analysis seems consistent with a retreat from rigid, Chicago School antitrust analysis; however, the actual result in *Brown & Williamson* parallels that of the rigorous economic approach of the Chicago School. In *Brown & Williamson*, the majority concluded that, in a primary line Robinson-Patman price discrimination case, a plaintiff must demonstrate that defendant had priced its goods below an appropriate level of costs and had a reasonable prospect of recouping its investment in below-cost prices. *Id.* at 2587–89. This approach to predation is wholly consistent with the Chicago School and reflects a judicial philosophy contrary to the populist, less economics-oriented methods of earlier case law. Thus, while the majority in *Brown & Williamson* pledges fealty to *Kodak's* reliance upon market realities rather than pure economic theory, the result reached fits comfortably within the Bork, Posner, and Easterbrook approaches to antitrust doctrine.

The lower federal court decisions citing *Kodak* also fail to provide an entirely clear picture regarding its effects on the course of antitrust decision making. *See, e.g.*, U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 n.2 (1st Cir. 1993) (*Kodak's* "quasi" *per se* rule for tying cited); Alvord-Polk, Inc. v. F. Schumacher & Co., 1993-2 Trade Reg. Rep. (CCH) ¶ 70,322, at 70,671 (3d. Cir. 1993) (*Kodak* cited for summary judgment standard); Fineman v. Armstrong World Indus., 980 F.2d 171, 187 (3d Cir. 1992) (*Kodak's* implications regarding standard of proof unclear in non-antitrust case), *cert. denied*, 113 S. Ct. 1285 (1993); BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (*Kodak* supports summary judgment if theory is "economically senseless"), *cert. denied*, 113 S. Ct. 1262 (1993); A.O. Smith Corp. v. Lewis, Overbeck & Furman, 979 F.2d 546, 549 n.2 (7th Cir. 1992) (Supreme Court has not resolved question of need for power in tied product market); Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1490 (8th Cir. 1992) (*Kodak* does not mandate special antitrust summary judgment standard), *cert. denied*, 113 S. Ct. 1048 (1993); Digital Equip. Co. v. Uniq Digital Technologies, Inc., 1993-2 Trade Reg. Rep. (CCH) ¶ 70,378, at 70,985-85 (N.D. Ill. 1993) (*Kodak* sets standards for tying violation and requires market power regardless of whether using *per se* or rule of reason test); Lee v. The Life Ins. Co. of N. Am., 829 F. Supp. 529, 536, 536-37 n.4 (D.R.I. 1993) (definition of tying and distinction between *per se* and rule of reason tests); Forsyth v. Humana, Inc., No. CV-S-89-249 PMP (LRL), 1993 U.S. Dist. LEXIS 10406, at *40 (D. Nev. July 21, 1993) (rejection of use of *Kodak* to support narrow market definition); Caldwell v. American Basketball Ass'n, 1993-2 Trade Reg. Rep. (CCH) ¶ 70,289, at 70,480–81 (S.D.N.Y. 1993) (*Kodak's* section 2 requirements and tests for market power); Farr v. Healtheast, Inc., 1993-2 Trade Reg. Rep. (CCH) ¶ 70,294, at 70,515–17 (E.D. Pa. 1993) (*Kodak* provides definition of market power and elements of section 2 violation); SCFC ILC, Inc. v. Visa U.S.A. Inc., 819 F. Supp. 956, 971–72 (D. Utah 1993) (*Kodak* requires economically sensible theory); Lifeline Ltd. No. II v. Connecticut Gen. Life Ins. Co., 821 F. Supp. 1201, 1207 (E.D. Mich. 1993) (*Kodak* requires definition of product and geographic markets); Burns v. Cover Studios, Inc., 818 F. Supp. 888, 892 (W.D. Pa. 1993) (*Kodak's* cross-elasticity of demand test for market

Further, the *Kodak* decision may reflect a movement away from the approach of Posner, Bork, Easterbrook, and others to antitrust, usually labeled the "Chicago School."[273] The Court had already demonstrated reluctance to embrace the Chicago School approach in its entirety, and *Kodak* may ultimately encourage courts to focus somewhat less on economic theory and assumptions and more on actual procompetitive and anticompetitive effects. Certainly, *Kodak* is a case where the majority seemed less enamored of economic theory and more concerned

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definition cited); New York v. Anheuser-Busch, Inc., 811 F. Supp. 848, 873 n.70 (E.D.N.Y. 1993) (*Kodak* suggests that standard for market power in section 1 case is lower than in section 2 case); King v FDIC, 1992 U.S. Dist. LEXIS 1992, at *20 n.7 (N.D. Ill. Dec. 29, 1992) (nonmovant gets benefit of inferences on summary judgment motion); SCFC ILC, Inc. v. Visa U.S.A. Inc., 801 F. Supp. 517, 521–22 (D. Utah 1992) (*Kodak* might disfavor summary disposition of antitrust claims); D.O. McComb & Sons v. Memory Gardens Management, 813 F. Supp. 663, 669–70 (N.D. Ind. 1992) (*Kodak* dicta not intended to narrow federal antitrust jurisdiction); Microsoft Corp. v. BEC Computer Co., 818 F. Supp. 1313, 1317 (C.D. Cal. 1992) (*Kodak's* definition of a tie-in cited); Comm-Tract Corp. v. Northern Telecom, Inc. 143 F.R.D. 20, 22–23 (D. Mass. 1992) (*Kodak* analyzes elements of antitrust claims but does not discuss use of survey evidence); Go-Video, Inc. v. Matsushita Elec. Indus. Co., 1992-2 Trade Cas. (CCH) ¶ 69,972, at 68,721 (D. Ariz. 1992) (elements of claim for attempted monopolization).

It is difficult to discern from these decisions just what impact *Kodak* will have on the future of antitrust jurisprudence.

273. For commentary espousing the Chicago School approach to antitrust law, see Robert H. Bork, *The Antitrust Paradox* (1978); Frank H. Easterbrook, *The Limits of Antitrust,* 63 Tex. L. Rev. 1 (1984); Richard A. Posner, *The Chicago School of Antitrust Analysis,* 127 U. Pa. L. Rev. 925 (1979). For a more populist approach, see Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 Cornell L. Rev. 1140 (1981); Robert Pitofsky, *The Political Content of Antitrust,* 127 U. Pa. L. Rev. 1051 (1979); Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust,* 127 U. Pa. L. Rev. 1076 (1979). See also Herbert Hovenkamp, *Antitrust Policy After Chicago,* 84 Mich. L. Rev. 213 (1985), for a critical assessment of the Chicago School's influence on the development of antitrust doctrine. According to Professor Hovenkamp:

> The Chicago School model of antitrust policy dictates that allocative efficiency as defined by the market should be the only goal of the antitrust laws. Within that paradigm even evidence derived from the legislative history of the antitrust laws is unimportant, unless to show that the legislative history supports or undermines the model. If the latter, the preservation of the model requires that the legislative history of the antitrust laws be deemed irrelevant to their current interpretation.
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> ....
>
> Orthodox Chicago School antitrust policy is predicated on two assumptions about the goals of the federal antitrust laws: (1) the best policy tool currently available for maximizing economic efficiency in the real world is the neoclassical price theory model; and (2) the pursuit of economic efficiency should be the exclusive goal of the antitrust enforcement policy.

Id. at 215–16, 226 (footnotes omitted). *See also* Barbara Ann White, *Black and White Thinking in the Gray Areas of Antitrust: The Dismantling of Vertical Restraints Regulation,* 60 Geo. Wash. L. Rev. 1, 2–3 n.6 (1991) ("Chicago School is willing to forego the presence of many firms, if . . . less efficient than their stronger competitors.").

with actual facts and effects on the market. Whether this will produce a spillover effect that shifts antitrust analysis generally remains to be seen.[274]

V. CLARIFYING THE LAW ON TYING ARRANGEMENTS: A PRACTICAL RULE OF REASON APPROACH

In the wake of *Kodak*, antitrust practitioners and scholars are still unable to articulate the definitive parameters of the Supreme Court's tying doctrine. In antitrust decisions rendered subsequent to *Kodak*, the federal courts have cited the case with respect to both substantive and procedural aspects of antitrust litigation.[275] No real pattern, however, has emerged evidencing any convincing, unitary interpretation of *Kodak* or its implications. Based on the recent cases, it is difficult to discern whether *Kodak* represents a bona fide departure from Chicago School analysis or merely a narrow, procedural decision with little potential for significant alteration of substantive principles.[276]

As an alternative to the current morass created by a quasi-*per se* approach and an uncertain rule of reason, I would propose that two major revisions be effected in current principles. The Court first should take to heart Justice O'Connor's suggestion in *Hyde* regarding abandonment of any *per se* concept in the tie-in area. Instead, a rule of reason approach similar to that employed in other non-price vertical restraint cases would be applied to tie-ins.[277] Second, in the context of the rule of reason

274. See *Post-Chicago Analysis After Kodak: Interview with Professor Steven C. Salop*, Antitrust, Fall/Winter 1992, at 20, 21, where it is asserted that the Court's analysis of the ISOs' claims in *Kodak* was "post-Chicago" and that "simply shouting free rider in a crowded court does not constitute adequate proof."

275. *See supra* note 272.

276. In Virtual Maintenance, Inc. v. Prime Computer, Inc., 113 S. Ct. 314 (1992), the Supreme Court granted certiorari and then vacated judgment and remanded the case to the court of appeals for further consideration in light of *Kodak*. In *Virtual*, 957 F.2d. 1318 (6th Cir. 1992), the court of appeals had reversed a judgment in favor of plaintiffs in a tying case. The Sixth Circuit had premised its reversal on an alleged absence of "market power in a properly defined interbrand tying product market" and an absence of "substantial anticompetitive effects in the tied product market." *Id.* at 1321. Perhaps the Supreme Court's decision to remand the case suggests that the Court itself views *Kodak* as an important substantive departure from prevailing tying doctrine. Indeed, on remand, the Sixth Circuit relied on *Kodak* to reverse its earlier position regarding a possible *per se* tying violation in the derivative aftermarket for manufacturer-required software support. Virtual Maintenance, Inc. v. Prime Computer, Inc., 1993 U.S. App. LEXIS 32575, at *16 (6th Cir. Dec. 15, 1993).

277. Professor Areeda, however, has argued that tie-ins have "little in common" with other vertical restraints. Areeda, *supra* note 3, ¶1700j4, at 18. He asserts that even though the Department of Justice once sought to categorize tying arrangements along with other vertical restraints, "[t]he

analysis to be applied, courts should take a realistic and pragmatic approach to the issues of market definition and market power. Thus, rather than merely focus upon traditional notions of market share and actual market participants, courts should look to all factors that would realistically affect the ability of a firm to restrict output and raise price to a supercompetitive level. Some of these factors might demonstrate market power where narrow, traditional approaches might not, and others might militate against a finding of market power even when market shares are high and sufficient under older approaches. For example, consideration of foreclosure would permit courts, even in the absence of traditional market power, to examine the impact of a tying arrangement upon rivals even if the tying product market is not dominated by the defendant.[278] The key question would remain whether the tie-in produced anticompetitive results in the tied product market. This shift in analysis would have profound effects not only in the tying area, but would also have a significant impact on all antitrust issues where market power is relevant.[279]

A. *Abandoning the* Per Se *Concept in Tying Cases*

Presently, use of the *per se* language in tying cases creates confusion and does not really save the judiciary and litigants any time or expense. On the contrary, the quasi-*per se* approach involves considerable factual

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mechanisms by which they might impair competition are quite different, as are their possible redeeming virtues." *Id.* Elaborating, Professor Areeda notes:

> While it might harm other manufacturers in special circumstances, an intrabrand restraint typically affects competition—if at all—by facilitating coordination among rival sellers or by enhancing the power of dealers. If tying impairs competition, it does so by limiting the access of rival sellers to the downstream market or even by excluding them altogether. Unlike tie-ins, moreover, intrabrand restraints are often self-limiting because they are more likely to injure the manufacturer who employs them.

Id. (footnotes omitted).

Notwithstanding Professor Areeda's articulation of distinctions between tie-ins and other vertical restraints, it should be noted that unlike horizontal agreements (i.e., agreements among competitors), tie-ins are restraints imposed by a seller on a buyer (which is typical of vertical restraints). Further, even if Professor Areeda's assessment of the differences in effects is conceded, those differences may still be taken into account in a rule of reason analysis balancing alleged anticompetitive effects against asserted procompetitive virtues. Certainly the questions of market definition and market power are common to all non-price vertical restraint cases, and the foreclosure issue emphasized by Professor Areeda for tying analysis is also appropriate in other rule of reason cases.

278. For a discussion of Professor Areeda's advocacy of the foreclosure factor, see *supra* notes 251–52.

279. *See supra* notes 250–52.

investigation and proof—a cost usually avoided pursuant to a classic *per se* rule. Further, the fundamental rationale for *per se* illegality is absent in tying cases. The major justification for *per se* principles is usually that the restraint invalidated will almost always fall even after closer examination pursuant to a rule of reason. This is simply not the case with tying arrangements. In the absence of proof of market power, courts uphold many tying arrangements and sustain others if defendants can establish an affirmative defense. This clearly is not the stuff of *per se* illegality.

Current reliance on a quasi-*per se* approach does indeed involve some of the administrative and judicial costs of rule of reason analysis without enjoyment of the benefits. Litigants must allege, discover, and analyze a great deal of information to establish the elements of the so-called *per se* tying violation. Yet, once plaintiffs prove these elements, courts ignore procompetitive effects unless they fit within one of the narrow, judicially created exceptions. There is little sense in requiring expenditure of considerable time and resources but then stopping short of full analysis. In a classic *per se* case, it is true that on occasion a restraint will be condemned that might withstand more detailed scrutiny. At least in those cases the benefit derived is that protracted discovery and trial are avoided. In current tying doctrine, the resources are utilized anyway, and an arguably wrong result may be reached.

To avoid confusion, achieve fairness, and further antitrust policy, courts should abandon the *per se* and quasi-*per se* approaches completely and replace them with a single rule of reason approach.[280] The test would then be the classic rule of reason—a balancing of any anticompetitive effects against any procompetitive effects. This will place tying arrangements in their proper place as non-price vertical restraints. In so doing, courts may also confine alleged affirmative defenses to those which benefit competition and weigh the alleged procompetitive effects against any anticompetitive effects. Although my call for a straightforward adoption of rule of reason analysis is not unprecedented, perhaps it will contribute another voice to the chorus seeking the attention of a majority of the Supreme Court. A clear and concise repudiation of *per se* language could contribute much in the way of

280. In addition to Justice O'Connor's concurrence in *Hyde*, see *supra* notes 107–11 and accompanying text, see Areeda, *supra* note 3, ¶ 1729, at 375–406, ¶ 1730d, at 413–14 (proposing a rule of reason approach focusing on foreclosure of a substantial share of a tied market that is concentrated or likely to become so). *Cf. Post-Chicago Analysis After* Kodak*: Interview with Professor Steven C. Salop*, *supra* note 274, at 22 (calling *per se*/rule of reason debate "something of a red herring" because of market power requirement).

guidance for lower federal courts, business people, the practicing bar, and the academic community.

B. More Careful Analysis of Market Definition and Market Power

One potentially positive aspect of the *Kodak* decision is its implicit invitation for courts to deal more with economic reality than mere theory in defining markets and assessing market power. In rule of reason analysis, the presence or absence of market power will often be determinative on the issue of unreasonableness. If consumers enjoy the protection of interbrand competition and can avoid supercompetitive prices by switching to a suitable substitute, a challenge to a restraint allegedly based upon exploitation of market power makes little sense. Rather, it would be more appropriate to conclude that a consumer is making a choice in his or her best interests.

In the tying context, if a seller conditions the sale of product *A* upon the buyer's agreement to also buy product *B,* and if product *C* is an adequate substitute for *A,* it only makes sense to conclude that the buyer preferred the package deal. If the buyer perceived the tying arrangement as unfair or uneconomical, the buyer could simply purchase product *C* as a substitute for *A* and either decline to buy *B,* buy *B* separately if available, or buy an adequate substitute for *B.* No forcing would be present in either case and any foreclosure of competition would flow not from misuse of market power but from buyers' choosing a package sale.[281]

The same may be said for other non-price vertical restraints where market power is absent. For example, in a vertical territorial restraint case, if consumers have suitable alternatives, a diminution of intrabrand competition will not permit sellers to exploit the marketplace by raising prices or restricting output. If a seller of *X* brand televisions were

281. However, if the foreclosure were significant enough to threaten competition in the market for the tied product, the absence of market power in the tying product or true coercion should not preclude a finding of liability. *See supra* notes 250–52 and accompanying text. This would be a particularly appropriate situation for application of section 3 of the Clayton Act which addresses the reasonable probability of a diminution of competition. Just recently, in Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993), a Robinson-Patman price discrimination case dealing with predatory pricing and primary line injury, the Supreme Court recognized the different thresholds for liability in the Sherman and Clayton Act statutory language. Both the majority, *id.* at 2587, and the dissent, *id.* at 2602 (Stevens, J., dissenting), acknowledged that the Clayton Act language is broader and designed to reach trade restraints at a more preliminary stage. As Justice Stevens noted in dissent, the Clayton Act is indeed an "incipiency" statute that can be applied to restraints that "may" have the proscribed effect. *Id.* at 2603 (quoting Corn Prods. Refining Co. v. FTC, 324 U.S. 726, 738 (1945)).

restricted to a particular geographic market by a restraint (and even if that seller faced no intrabrand competition in that market), the presence of interchangeable *Y* brand and *Z* brand sets would preclude any effort to raise prices above a competitive level because that effort would be unprofitable and cause severe loss of business. The restraint would arguably present no anticompetitive threat.[282] On the other hand, if the seller of *X* faced no interbrand competition in a well-defined geographic market, the vertical restraint would be unreasonable because it fostered a monopoly.

The critical issue in the foregoing examples is whether the seller imposing the restraint of trade can use the restraint to an anticompetitive end or whether the effect on competition will be either *de minimis* or actually procompetitive. This may well depend on the presence or absence of market power, which then will depend in part on market definition. Even if market power will not be dispositive in every case, it will be an important factor.

Kodak urged a pragmatic, economic approach to the market definition question that requires close investigation of real world facts: Only realistic alternatives for buyers should be included in the market definition. To this practical approach courts should add other factors that will provide a more accurate picture of a defendant's real power to exploit a market. As a result, courts would not automatically presume that low market share precludes a finding of unused residual power. Alternatively, high market share may not reflect the degree of

282. An argument can, however, be made that a single seller without significant market power itself could still negotiate a tie-in that would produce an anticompetitive effect. See *supra* notes 250–52 for authorities concluding that market power is not always necessary. It is possible that, in an oligopolistic tying market where several sellers impose tie-ins, the cumulative effect in the tied product market would be significant foreclosure. In Standard Oil Co. v. United States, 337 U.S. 293 (1949), an exclusive dealing case, the Supreme Court focused in part on the fact that the defendant's competitors also utilized exclusive dealing arrangements, thereby significantly increasing foreclosure in the relevant market and threatening competition. *Id.* at 309. See also Areeda, *supra* note 3, ¶ 1704c4, at 62, noting that:

> Oligopolists in a tying market might transfer their concentrated market structure from the tying to the tied market. To illustrate: suppose that all users of product *B* need product *A*, which is supplied only by five sellers; each of them supplies *A* only to those who also take their *B* requirements from him. So long as these tying arrangements continue, they create and maintain an oligopoly in the tied market by denying *all* potential customers to any new supplier of *B*. This total denial of potential patronage to others is well captured by the 100-percent foreclosure that results from adding together the separate foreclosures of each tying seller.

Professor Areeda also states that a proper inquiry into the effects of a tie-in should focus on the "cumulative impact," even where the individual tie "forecloses only a modest portion of the tied market." *Id.* ¶ 1709d2, at 103. Areeda further suggests that this cumulation should be calculated by including "all practices that bring about foreclosure," including requirements contracts. *Id.* at 104.

substitutability available to consumers from actual or potential competition. Courts should consider other measures of market power if these measures do reveal an ability to raise price over competitive levels.

Kodak opened a window of opportunity for courts to assess market definition and power questions in a pragmatic, fact-intensive, case-by-case manner. Courts should welcome the invitation and once again consider uniqueness claims and other arguments suggesting that consumers really do not perceive alleged substitutes as reasonably interchangeable. In addition, where market definitions fail to include competitors who do check the ability to exploit alleged power, a more extensive and practical approach to the problem can produce a more fully accurate assessment of market power. This change in analytical method would be useful not only in tying cases, but would also benefit courts in any section 1 or section 2 case where market power plays a critical role.

By eschewing reliance on any oxymoronic, archaic, quasi-*per se* rule in section 1 tying cases, the Supreme Court could clarify and simplify this mystifying area of antitrust jurisprudence. A straightforward rejection of *per se* language in this context and the clear adoption of the rule of reason approach as the exclusive method of analysis would yield better and more consistent results. It would bring tying analysis into the mainstream and allow sellers to plan their marketing strategies better. In doing so, however, courts must get a handle on the market definition and power issues in order to protect buyers and sellers alike from economically foolish judicial decisions that either fail to protect adequately or overprotect where the market could instead provide the needed discipline. All alleged defenses for tie-ins should be subsumed in the rule of reason analysis and explained in terms of benefits to competition. Asserted defenses that are premised on other values should be rejected; only procompetitive effects warrant consideration pursuant to the rule of reason.[283]

283. This suggestion leaves unresolved questions regarding the continued role of section 3 of the Clayton Act in tying cases where the jurisdictional requirements of that statute are satisfied by the presence of commodities in both the tying and tied markets. If the cases and scholars concluding that section 1 and section 3 have coalesced are correct, *see supra* note 255, the section 3 analysis may proceed along the same lines as the proposed section 1 approach.

If, however, the plain language of section 3, together with the legislative history and contrary precedent, do dictate a lower threshold of liability, my proposed rule of reason approach only covers section 1 cases. In that event, perhaps section 3 analysis could proceed by utilizing the "dangerous probability of success" element of the section 2 approach to attempts to monopolize. More specifically, tying arrangements which threaten to ripen into clearly anticompetitive restraints satisfy the "reasonable probability" standard articulated in earlier section 3 cases. Even if the tie-in cannot be shown under section 1 to actually create a significant anticompetitive impact at present, the

VI. CONCLUSION

Kodak's implications for tying doctrine and the future of American antitrust jurisprudence generally are far from certain. There is enough in the decision to lend some credence to a variety of different antitrust philosophies. Some will view it as a unique, narrow case with little general significance. Others will perceive it as the beginning of a new era of antitrust that abandons the highly theoretical Chicago School approach and replaces it with a new pragmatism.

My own view is that only time will tell what *Kodak's* impact will be. There is not yet enough evidence in the lower court decisions to determine whether *Kodak* will alter dramatically the course of antitrust decision making. It will also be important to note how the Supreme Court itself chooses to treat *Kodak* in its future antitrust deliberations. Perhaps in a another year or two it will be easier to ascertain whether *Kodak* will take its place alongside other landmark antitrust decisions as a ground-breaking precedent or whether it will be distinguished into obsolescence. One thing, however, is certain—*Kodak* will undoubtedly provide academicians and practitioners with much to think about and discuss in their attempts to make sense of our increasingly confused antitrust doctrine.

Ultimately, the Supreme Court and Congress will need to reassess United States antitrust policy and determine whether to provide more direct and unambiguous guidance. At present, the debate continues regarding even the most fundamental goals of antitrust, and the Court in *Kodak* provides an unclear and mixed message that makes prediction rather difficult even for the most diligent observers and analysts.[284]

"dangerous probability" that the tie could do so in the future would suffice to satisfy section 3. This would be consistent with an "incipiency" approach to Clayton Act liability. See *supra* note 281, for a discussion of the Supreme Court's recent recognition of the Clayton Act as an "incipiency" statute. For recent discussion of the attempt to monopolize offense, see Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884 (1993).

Further, courts could deem section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1988), which proscribes "unfair methods of competition," as violated by any practice which violates either section 1 or section 3. *See* Areeda, *supra* note 3, ¶ 1702, at 32, ¶ 1719c, at 257 (noting that FTC Act covers at least as much as the Sherman or Clayton Acts).

284. *Compare* Jacobs, *supra* note 240, at 356 (viewing Kodak as a "dramatic break from the past") *with* Festa, *supra* note 240, at 671 (concluding that "reports of the Chicago School's demise are greatly exaggerated").