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An Unnecessary Relic of Antitrust Litigation

ADAM WEG*

INTRODUCTION

Over the past thirty years, the Supreme Court’s test for finding a violation of the Sherman Act for certain types of business agreements has changed significantly.1 Prior to that time, several types of agreements were illegal “per se,”2 while others were judged by a “rule of reason.”3 Per se treatment is based solely on the existence of the offending agreements in the marketplace.4 An agreement violates the Sherman Act if it falls into one of the per se illegal categories.5 Conversely, a rule-of-reason analysis (which has recently been supplemented with “quick-look” analysis) allows a court to delve further into the intricacies of an agreement by examining the purpose, power, and effect of the agreement.6 As the complexity of products and the need for cooperation by market competitors has increased in recent years, the Court has moved several types of agreements from the per se category to the rule-

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1. See, e.g., Leegin Creative Leather Prods. v. PSKS, Inc., 127 S. Ct. 2705, 2721–22 (2007) (recounting the Court’s movement away from a “per se” test to a “rule of reason” during this period); see also infra Part I.C.
2. See infra Part I.B.
3. See infra Part I.A.
4. See N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); see also Sherman Act § 1, 15 U.S.C. § 1 (2006) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”).
of-reason category by weighing the procompetitive justifications against the anticompetitive effects for agreements previously held to be per se illegal.\(^7\)

Several kinds of agreements remain per se illegal in the eyes of the Court,\(^8\) but even these agreements potentially have procompetitive justifications and, therefore, should receive a form of rule-of-reason analysis instead. These include agreements that provide for horizontal price fixing between businesses that compete with each other, agreements among competitors to divide markets horizontally, horizontal boycotts agreed to by a group of competitors, and vertical tying agreements between manufacturers and distributors.\(^9\) Recently, the Court has moved in this direction and found a category of agreements that have traditionally been per se illegal to be subject to a rule-of-reason analysis.\(^10\) In *Leegin Creative Leather Products v. PSKS, Inc.*, the Court held that an agreement that contemplates vertical minimum resale price fixing is no longer subject to per se treatment under the Sherman Act, but will instead be tested under the rule-of-reason analysis—that weighs the procompetitive and anticompetitive effects of the agreement to determine its antitrust validity under the Act.\(^11\)

This Note will first examine the history and evolution of the per se and rule-of-reason tests. The following Part will explore further refinements that can be predicted in the wake of *Leegin*, taking into

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8. See *Leegin*, 127 S. Ct. at 2713; *Palmer v. BRG of Ga.*, Inc., 498 U.S. 46, 48-50 (1990) (per curiam) (explaining that several types of agreements still merit per se illegal treatment because they unreasonably restrain trade in every instance and thus are contrary to the public interest); see also *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9-11 (1984); *NCAA*, 468 U.S. at 104-05; United States v. Container Corp. of Am., 393 U.S. 333, 338-39 (1969) (Fortas, J., concurring); *N. Pac. Ry.*, 356 U.S. at 4-6. These agreements are all what is commonly referred to as “restraints of trade.” A restraint of trade involves an “agreement between or combination of businesses intended to eliminate competition, create a monopoly, artificially raise prices, or otherwise adversely affect the free market.” BLACK'S LAW DICTIONARY 1340 (8th ed. 2004). A horizontal restraint is “[a] restraint of trade imposed by agreement between competitors at the same level of distribution [i.e., between manufacturer and manufacturer].” *Id.* A vertical restraint of trade is “[a] restraint of trade imposed by agreement between firms at different levels of distribution (as between manufacturer and retailer).” *Id.* Also, it is important to note that an unreasonable restraint of trade is commonly regarded as one “that produces a significant anticompetitive effect.” *See id.*


10. See *Palmer*, 498 U.S. at 48-50; *NCAA*, 468 U.S. at 110-20; Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8-10 (1979); see also United States v. Microsoft Corp., 253 F.3d 34, 84-89 (D.C. Cir. 2001) (favorably discussing the idea that tying agreements, a traditional per se illegal category under the Sherman Act, should be scrutinized under many of the very same standards as a rule-of-reason analysis).

11. See *Leegin*, 127 S. Ct. at 2714-20 (recognizing that very often per se treatment fails to examine the detailed economic reasons (for example, competitive effects) that would make an agreement legal or illegal under the Sherman Act).
account the modern (post–Warren Court) tendency to avoid, or at the very least steer away from, using per se treatment. The final Part will focus on the potential advantages and disadvantages of this trend, along with the accompanying legal, economic, and social implications.

Ultimately, this Note will point out that in light of accelerating globalization of the legal, economic, and social environment, coupled with the recent pro-business direction of the Court, per se antitrust treatment is no longer an appropriate test to scrutinize modern business agreements. Instead, agreements that provide for horizontal price fixing among competitors, horizontal market divisions, horizontal boycotts, and vertical tying agreements should be examined using either a quick-look or rule-of-reason analysis.

I. HISTORY AND EVOLUTION OF PER SE TREATMENT AND THE RULE OF REASON

A. PER SE TREATMENT

Early in the twentieth century, the Supreme Court started establishing the parameters for determining that certain categories of agreements that involve anticompetitive conduct and effects violate the antitrust laws. The first landmark decision came in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, where the Court held that resale minimum price fixing was illegal per se under section 1 of the Sherman Act. The Court reasoned that if horizontal price fixing was historically barred by the lower courts as a violation of the antitrust laws under the per se rule then, by analogy, allowing manufacturers to fix vertical minimum resale prices must be barred as a per se violation as well. The Court explained that

> [t]o sustain the restraint [of trade], it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the [manufacturer]. Otherwise restraints of trade are void as against public policy.

The Court later validated the premise of its holding in *Dr. Miles* by finding horizontal price fixing agreements to be unreasonable and, therefore, per se illegal in *United States v. Socony Vacuum Oil Co.*

In 1958 in *Northern Pacific Railway Co. v. United States*, the Court finally articulated the four categories of agreements that receive per se

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12. See infra Part III.
16. 310 U.S. 150, 218 (1940). For further discussion, see *id.* at 216–24.
treatment: (1) horizontal price fixing, (2) market-division agreements, (3) group boycotts, and (4) tie-in sales. In 1967, the Court's decision in United States v. Arnold, Schwinn & Co. added agreements that involve vertical market divisions to the per se list.

Since 1977, however, the Court has whittled away at the categories of agreements that receive per se treatment. Previously, the Court stressed that agreements that had no procompetitive, redeeming qualities and thus were inherently and innately anticompetitive in nature, would be found illegal per se with minimal proof. In its important 1977 decision in Continental T.V., Inc. v. GTE Sylvania Inc., the Court held that nonprice vertical restraints do have redeeming value and potential procompetitive justification. The Court reasoned that a manufacturer with a small market share can attract more quality retailers within a given market if the manufacturer is permitted to carve out intrabrand, competition-free enclaves for its retailers. The Court explicitly recognized that the Sherman Act can be used as a tool to protect interbrand competition. The decision marked a shift in the focus of a Court that historically equated intrabrand competition with interbrand competition. Accordingly, in determining the legality of an agreement under Sherman Act section I, the analysis requires balancing the procompetitive and anticompetitive effects of the agreement. Agreements do not warrant per se treatment unless the Court can determine that the anticompetitive effects almost always substantially outweigh the procompetitive justifications.

17. 356 U.S. 1, 5 (1958). Market division occurs when competitors agree to sell in certain areas and not in others. See Leegin Creative Leather Prods. v. PSKS, Inc., 127 S. Ct. 2705, 2713 (2007); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990) (per curiam); see also infra Part I.C. Group boycotts occur when competitors agree not to do business with a buyer or seller with whom the competitors would normally trade. See infra Part II.B. Tie-in sales occur when a seller in essence forces a buyer who desires a certain product of the seller to also purchase an undesired product in order to obtain the desired one. See infra Part II.A. Horizontal price fixing occurs when competitors agree to charge the same price for an item. See infra Part II.D.

18. 388 U.S. 375, 372-73 (1967) (explaining that the vertical agreement between Schwinn, the manufacturer, and its own distributors involving vertical market division was per se illegal under the Sherman Act), overruled by Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).


20. See Socony Vacuum, 310 U.S. at 216-24; Dr. Miles, 220 U.S. at 404-09.

21. 433 U.S. at 54-55. The Court here overruled its prior decision in Schwinn. Id. at 57-58. This exemplifies the trend of the Court moving away from per se treatment towards a rule-of-reason analysis in order to scrutinize each agreement on a case-by-case basis. See id.

22. Id. at 54-55.

23. Id.

24. Id. at 51-52.

25. Bd. of Trade v. United States (Chi. Bd. of Trade), 246 U.S. 231, 238-39 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

B. RULE-OF-REASON AND QUICK-LOOK ANALYSES

In 1918, the Court, in Board of Trade of Chicago v. United States, established the methodology for applying a rule-of-reason analysis.27 First, the Court examines the purpose of the agreement to determine whether it is anticompetitive or benign.28 A "benign" agreement is one that promotes competition.29 If the purpose is benign, the Court then will determine the existence of potentially procompetitive effects of the agreement on competition in the relevant geographic and product markets.30 In evaluating the possible procompetitive effects, the Court considers both predictive expert testimony and the historic impact of similar agreements.31 The Court also examines the market power of the parties involved, an examination that sheds light on the predictive effect of the agreement on the market and competition in general.32

Over the years, the Supreme Court recognized the increasing complexity of the markets and the gravity of the procompetitive versus anticompetitive analysis.33 Despite the additional time, expense, and judicial resources required, the Court reduced the number of situations in which the per se test applies and opened up the door to more frequent use of the fact-specific, case-by-case evaluation required under the rule-of-reason standard.34

This divide between the dismissive nature of per se treatment and the increased expense and time the rule-of-reason criteria requires soon gave rise to a middle ground test between the two extremes of antitrust scrutiny by the Court. This middle ground came in 1978, in National Society of Professional Engineers v. United States.35 The case involved an

27. 246 U.S. at 238-41.
28. See id.
29. See id. (explaining that the agreement in this case, although traditionally treated as per se illegal, was benign in the sense that it "had no appreciable effect on general market prices; nor did it materially affect the total volume of [the product in the market].," and that "within the narrow limits of its operation the [agreement] helped to improve market conditions").
30. See id.
35. 435 U.S. 679 (1978). Under the "middle ground" test, the Court would not summarily dismiss certain agreements as per se illegal, but would not go into a full-blown, rule-of-reason analysis either. See Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769-71 (1999) (discussing Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 693; NCAA, 468 U.S. at 110; FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986)). Instead, the Court would only look to certain specific aspects of the agreement to determine if it was an
association of engineers that attempted to justify a horizontal boycotting agreement that excluded other associations of engineers from bidding on potential projects. The Association argued that their collective agreement was rational and valid because they did not want their own members putting in price bids for contracts, and then once they got the contracts, cutting back the time they spent on engineering so they could bring in other additional work. The additional work would generate profit to keep up with competition among other engineers who were not members of the association. The agreement's purpose, according to the Association, was to give its members security in their contracts while simultaneously preventing them from putting in lower quality work on existing contracts in an effort to continue to compete with nonmember engineers for future contracts. The Court reasoned that this was not a per se case and should get rule-of-reason analysis. However, the Court reasoned that the premise of the Association's agreement was that price competition is undesirable and would lead members to provide lower-quality work, and perhaps endanger the public interest and health. Further, the Court held that a justification grounded in a belief that competition was harmful in the relevant market is legally untenable and thus, without a tenable, procompetitive justification, the rule-of-reason analysis ends with a determination that the purpose of the contract is illegal under Sherman section 1.

The holding in Professional Engineers has led to a broader procedure known now as a "quick look" analysis. This analysis begins with an examination of the justification for an agreement, with the requirement that the purpose would encourage the validity of competition (a procompetitive justification). In NCAA v. Board of

unreasonable and anticompetitive restraint under the Sherman Act. See id. The Court eventually labeled this "middle ground" framework the "quick look" analysis. See id.

36. Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 681.
37. Id. at 684-85, 692-96.
38. Id. at 692-94.
39. Id. at 685 & n.7.
40. See id. at 692-96. Although the Court does not explicitly say that the agreement shall not receive per se treatment, it takes a traditionally per se agreement involving horizontal boycotting by price bidding, and actually does a more thorough investigation than is warranted under traditional per se treatment. See id. This was the beginning of the Court's willingness to take some previously per se illegal agreements, and give them a more detailed investigation regarding the competitive purpose of the agreement. Clearly, this was not traditional per se treatment by the Court, but it was also not a full-blown rule-of-reason analysis either because that would entail not only examination of the competitive purpose, but also an examination of the power and effect of the agreement.
41. Id. at 693.
42. Id. at 694-96.
43. See Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770-71 (1999). A quick-look analysis involves examining the competitive purpose of the agreement to determine its legality, as opposed to also examining the power and effect of the agreement. Id. at 769-71. This new method operates as a middle ground between per se treatment and rule reason analysis. Id.
Regents of the University of Oklahoma, the Court went further, noting that in some industries horizontal restraints might be necessary to produce a given product so long as the purpose was consistent with the competition premise. In that case, the Court evaluated the merits of a plan that limited live broadcasting of college football teams by curtailing members’ freedom to negotiate and enter into their own television contracts as individual schools. The Court held that the power and effect of the agreement did not need to be ascertained in excruciating detail and, very importantly, there was no need to define the relevant market and determine the relevant market percentages. Therefore, the Court concluded, as a matter of law, that a naked restraint on price or output was illegal without regard to the degree of market power possessed by the competitors imposing the restraint. The plan ultimately restricted output and set the product price—effects that are inconsistent with the Sherman Act’s requirement that price and supply be responsive to consumer preference. The Court was still willing to look at the purpose and merits of the agreement, however, even though it fell into the per se categories of horizontal price fixing. Therefore, even with a procompetitive purpose, if the contract or agreement between competitors is a naked restraint on price or output competition, the Court will not need to determine market definition and market power under a traditional rule-of-reason analysis.

These developments in Professional Engineers and NCAA ultimately led to the establishment of the present quick-look analysis. Under this analysis, the Court goes no further than to examine whether the agreement has an invalid or anticompetitive purpose or a naked restraint on price or output. The Court articulated this analysis in California Dental Ass’n v. FTC in 1999, and added that the

45. Id. at 100–07.
46. Id. at 109–13. The NCAA’s plan, on its face, made the price in the relevant market unresponsive to consumer demand because no matter how desirable televised college football was to the viewers, the market price for such exposure was being fixed by the NCAA. Id. at 128–29 (White, J., dissenting).
47. Id. at 109–10 (majority opinion) (“As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.’” (quoting Nat’l Soc’y of Prof’l Eng’rs, 435 U.S. at 692)).
48. Id. at 109–13.
49. Id. at 117. This case marked a significant change by the Court. The agreement should have been immediately dismissed as per se illegal but instead the Court (marking the current trend) moved away from per se illegality and began to examine the purposes of even the most conspicuous agreements. See id. at 117–20. This type of analysis is much more similar to a rule-of-reason or a quick-look analysis.
51. Id. at 768–70.
procompetitive justification must have some intuitively obvious merit before any market definition or economic data need to be scrutinized. Consequently, the "quick-look" analysis of the Court has created a middle ground between per se treatment and a full rule-of-reason analysis where the Court will not dismiss an agreement initially because of its mere existence as in per se treatment, but will only examine the purpose of the agreement to determine the anticompetitive and procompetitive justifications. This new middle form of analysis between per se treatment and rule-of-reason analysis supports the Court's goal of reducing the number of per se categories by no longer fearing it is opening the door to the increased cost and time of a full-length rule-of-reason litigation.

C. The Leegin Decision

In 2007, the Court decided Leegin, moving further away from per se treatment toward the rule-of-reason, or at least the quick-look analysis. The Court recognized the increasing complexity of commercial relationships, and that agreements between commercial entities are more likely to have tenable procompetitive justifications. In Leegin, minimum resale price maintenance was shown to stimulate interbrand competition (i.e., "the competition among manufacturers selling different brands of the same type of product") by reducing intrabrand competition (i.e., "the competition among retailers selling the same brand"), contrary to the holding and rules established years before in Dr. Miles. The Court noted that there are several advantages and procompetitive effects that arguably justify minimum resale price restraints. First, minimum resale

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52. Id. at 769–71, 778–81. The Court explained that because the agreement here had plausible procompetitive justifications, a further investigation and analysis by the court of appeals was warranted. Id. at 777–78. The Court implicitly reasons that when there is a potential procompetitive justification under such circumstances, further analysis is needed. Id. By inference then, the Court is also reasoning that without such an apparent procompetitive justification, such additional investigation would not have been necessary.


54. 127 S. Ct. at 2713 ("[T]he per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.... '[W]e have expressed reluctance to adopt per se rules ... where the economic impact of certain practices is not immediately obvious." (citations omitted) (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997))).

55. Id. at 2713–15; see also Todd J. Anlauf, Severing Ties with the Strained Per Se Test for Antitrust Tying Liability: The Economic and Legal Rationale for a Rule of Reason, 23 Hamline L. Rev. 476, 508 (2000) ("Whether courts allow defendants to assert business justification or other claims as limited affirmative defenses, a strict per se approach is untenable. Only that conduct which holds no possible legal or economic justification should be subject to a strict per se rule.").

56. See Leegin, 127 S. Ct. at 2714–16.


price restraints might foster interbrand competition. Second, "[r]esale price maintenance also has the potential to give consumers more options so that they can choose among [more] low-price, low-service brands; high-price, high-service brands; and brands that fall in between." Third, enforcement of these agreements is an efficient method of eliminating the free-rider problem where discounting retailers "free ride on retailers who furnish services and then capture some of the increased demand those services generate" by preventing the discounter from undercutting the service provider. Finally, "[w]ith price competition decreased, the manufacturer's retailers [should] compete [more vigorously] among themselves over services."

Minimum resale price restraints' most significant procompetitive justification, according to the Court, is that they can also promote "interbrand competition by facilitating market entry for new firms and brands." "[I]f markets can be penetrated by using resale price maintenance there is a procompetitive effect." Also, this

encourage[es] retailer services that would not be provided even absent free riding. . . . Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services.

Disadvantages and potential anticompetitive effects of resale-minimum price fixing include the possibility for retail cartels and higher profits for inefficient retailers. However, the Court noted that the source of the desired minimum resale price must be considered because, if the retailers, as opposed to the manufacturer, want the minimum price, the procompetitive justification might not be as strong.

When discussing the rule-of-reason analysis to be applied under Leegin, the Court pointed out that the single most important factor to consider in reviewing agreements that call for either resale price maintenance or nonprice restraints (customer and territorial restrictions) is the total or collective market share of the firms employing these types

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59. Id. at 2715 ("Minimum resale price maintenance can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand.").

60. Id.
61. Id. at 2715-16.
62. Id. at 2716.
63. Id.
64. Id.
65. Id.
66. Id. at 2716-17.
67. Id. at 2719-20.
of agreements.\textsuperscript{68} If all the firms in a market impose resale price fixing, this will potentially restrain both interbrand and intrabrand competition—a key factor in determining the legality of the agreement.\textsuperscript{69}

Regardless of the validity of the \textit{Leegin} holding, the decision underscores the continued trend of the Court to move consistently away from per se treatment and toward a rule-of-reason analysis for even those types of agreements that used to be in the per se illegal categories.\textsuperscript{70} Presumably, as the markets for products become more complex and industries continue to develop, plausible procompetitive justifications will emerge for what were previously considered the most anticompetitive types of agreements—those that traditionally receive per se treatment.

\section*{II. Justification for Abolishing the Remaining Categories of Per Se Treatment}

In light of the continuing trend of the Court to remove categories of agreements from per se treatment and to scrutinize more agreements under a quick-look or rule-of-reason analysis, as demonstrated by the recent \textit{Leegin} decision, per se treatment should be abolished. Generally, per se treatment should be supplanted with the framework already used by the Court to weigh the procompetitive and anticompetitive effects and purposes of all types of agreements. Rapidly evolving global markets, products, and technology—along with a general disfavor for the blunt and dull edge of a per se analysis\textsuperscript{71}—should now compel courts to discard the simplistic and anachronistic use of that test. As the Court suggested in \textit{Leegin} with respect to minimum resale price restraints, an agreement that traditionally received per se treatment potentially can have procompetitive justifications that merit at least a quick-look or even a full rule-of-reason analysis.\textsuperscript{72} Therefore, the Court ultimately should recognize the need to apply this reasoning to the four remaining agreements that have traditionally received per se treatment under the Sherman Act. A quick examination of the four remaining per se categories will provide the adequate justifications.

\begin{footnotesize}
\begin{enumerate}
\item[68.] \textit{Id.} at 2716–23.
\item[69.] \textit{Id.}
\item[70.] \textit{Id.} at 2721–22.
\item[71.] Thomas G. Krattenmaker, \textit{Per Se Violations in Antitrust Law: Confusing Offenses with Defenses}, 77 Geo. L.J. 165, 178 (1989) ("In antitrust law, there is no such thing as a per se offense or conduct that merits per se invalidation.").
\item[72.] \textit{Leegin}, 127 S. Ct. at 2714–16; see also Anlauf, supra note 55, at 509–10 ("The rule of reason is better equipped to undertake full consideration of the economic harms and benefits which result from tying arrangements. . . . The per se test fails to acknowledge the existence of potential benefits arising out of tying arrangements.").
\end{enumerate}
\end{footnotesize}
A. Tying Agreements

Tying agreements (or "tie-in sales"), one of the remaining traditional per se illegal categories under Sherman section I, should no longer receive per se treatment by the Court and instead should be scrutinized under a rule-of-reason analysis. The Court has demonstrated its increased leniency towards tying agreements and articulated its potential procompetitive justifications for such agreements. With the increasing complexity of technologically sophisticated goods, tying agreements have become more and more commonplace. Today, many products involve some form of procompetitive tying agreement between the "tying" or desired product and the "tied" or undesired product. Tying agreements can provide convenience and utility to the consumer that can often outweigh the previously feared anticompetitive effects of these agreements. Continued per se treatment of tying agreements will only invalidate an ever-increasing number of agreements that would ultimately promote innovation, consumer benefits, and efficiency. The Court already has demonstrated its leniency towards tying agreements and the procompetitive justifications for these agreements.

73. For a similar argument, see Anlauf, supra note 55, at 478.


75. See Microsoft Corp., 253 F.3d at 90–94.

76. See id.; see also Ill. Tool Works, 547 U.S. at 44–45 ("[W]hile price discrimination may provide evidence of market power, particularly if buttressed by evidence that the patentee has charged an above-market price for the tied package, it is generally recognized that it also occurs in fully competitive markets." (citation omitted)).

77. See Anlauf, supra note 55, at 510 ("Only a rule of reason approach which fully weighs the economic benefits and anticompetitive effects imposes a rational analysis of antitrust tying liability."). For example, when buying a personal computer, a consumer is required to purchase not only the desired or tying product of the computer, but also all of its tied programs. See Microsoft Corp., 253 F.3d at 87–88. This allows these additional programs to be offered at a lower price, which ultimately benefits the consumer and allows the consumer to achieve the most utility out of his or her purchase because without being able to tie such products, a consumer who was buying a personal computer would have to purchase each item separately. See id. at 87. These separate items would include the mouse, keyboard, Windows, Internet Explorer, etc., but because they are tied to the purchase of the computer the consumer is able to obtain all these products at once at a lower price, and with greater efficiencies. See id. at 87–88, 90–91.

78. See Ill. Tool Works, 547 U.S. at 44–45; Jefferson Parish, 466 U.S. at 11–12 ("It is clear, however, that every refusal to sell two products separately [through a tying arrangement] cannot be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts."); see also Microsoft Corp., 253 F.3d at 87 (examining in detail several potentially procompetitive tying arrangements and concluding that "not all ties are bad").
It is also important to note that in addressing “exclusive dealing” arrangements coupled with tying agreements, the Court has shifted toward the rule of reason as well. After the Supreme Court decision in Jefferson Parish Hospital District No. 2 v. Hyde, the lower courts effectuated significant change in the decision standard for an illegal exclusive dealing arrangement. For example, the District of Columbia Circuit Court in United States v. Microsoft Corp. reasoned that in such a situation where there is an exclusive dealing arrangement coupled with a tying agreement, “[a]pplying per se analysis to such an amalgamation creates undue risk of error and of deterring welfare-enhancing innovation.” The Court reasoned that allowing antitrust actions to proceed virtually any time a firm enters into an exclusive dealing arrangement would both discourage a presumptively legitimate business practice and encourage costly antitrust actions. This further illustrates the modern inclination of the federal courts to at least hear and examine potential procompetitive justifications (benefits to the consumer, increased interbrand competition in a market, product innovation and efficiencies) of traditionally per se illegal agreements to further facilitate growth, expansion, efficiency, and maturity in the complex markets that now constitute the world economy.

B. Horizontal Group Boycotts

The next traditional per se illegal category that should and will likely receive a rule-of-reason or quick-look analysis is horizontal group boycott agreements. Taking into account the purpose, power, and effect of these agreements, in its most recent boycott opinion the Court has already moved towards an approach reminiscent of a rule-of-reason analysis. Traditionally, the per se test applied to cases in which firms jointly worked to disadvantage competitors by either directly denying, persuading, or coercing suppliers or customers to prevent or impede

79. Exclusive dealing arrangements that occur where tying agreements are involved require a rule-of-reason analysis in the eyes of the Court because an investigation must be made regarding market power, competitive effects, and competitive purposes. See Jefferson Parish, 466 U.S. at 17-18. Although the Jefferson Parish Court stated that per se treatment is appropriate when market power is “probable,” it seems that by examining market power at all the Court is requiring something more than per se treatment in every case. See id. In Jefferson Parish, the Court investigated the Hospital’s market power (part of a rule-of-reason analysis), and concluded that without sufficient market power, an antitrust violation can only be established by continuing to investigate the anticompetitive and procompetitive effects of such an agreement (the other part of the rule-of-reason analysis). Id. at 17-25.

80. Id. at 17-18. An exclusive dealing arrangement is commonly regarded as an “agreement requiring a buyer to purchase all needed products from [a single] seller.” Black’s Law Dictionary 607 (8th ed. 2004).

81. See 253 F.3d at 89-90.
82. Id. at 84-95.
other relationships that the suppliers or customers need in a given competitive struggle over markets. Accordingly, the Court has explained that an agreement which amounts to a horizontal group boycott generally involves an unspecified number of the following characteristics: (1) "the boycott ... cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete"; (2) the boycotters have a dominant market position; and (3) there is no valid procompetitive justification. The final factor enumerated by the Court suggests a willingness to consider evidence relevant to a rule-of-reason analysis when evaluating horizontal group boycotts. Moreover, even presupposing these factors or so-called requirements, with the increasing complexity of both domestic and foreign markets most horizontal group boycotts could arguably have procompetitive effects promoting interbrand competition leading to consumer benefits. For example, in FTC v. Indiana Federation of Dentists, the marketplace involved competition among highly specialized professionals. Even if competitors were assumed to be targets, a horizontal group boycott could help self-correct the market by creating market standards that need to be met, regulations that must be followed, and procedures that are to be used, thereby increasing consumer utility and satisfaction along with encouraging innovation and efficiencies. As previously discussed, the

86. 476 U.S. at 449-50.
87. See id. at 458-59. Although the Indiana Federation of Dentists Court purports to resolve the case by refusing to classify the Federation's policy as a "group boycott," this is simply another example of the Court eroding per se treatment without explicitly abolishing it. See id. at 458 ("Although this Court has in the past stated that group boycotts are unlawful per se, we decline to resolve this case by forcing the Federation's policy into the 'boycott' pigeonhole and invoking the per se rule." (citations omitted)). However, it seems clear that group boycotts are sufficiently analogous to the Federation's practice that they could, under the Court's analysis, potentially have procompetitive justifications that would deserve a rule-of-reason analysis and could be such that might even survive such an analysis by having those procompetitive effects outweigh the anticompetitive effects. Id. at 458-59. In this case, there was an agreement among dentists that they would not furnish x-rays to dental insurance companies. Id. at 451-52, 455. Insurance companies objected, wanting to see them before paying for treatment that dentist would request based on the x-ray readings. Id. The dentists claimed that x-ray submissions would deny coverage on the part of insurance carriers made by nondentists. Id. The ultimate effect claimed by the dentists is that the habit of denying certain procedures will result in dentists' inclination not to proscribe the procedures—taking a step to help people of Indiana. Id. at 452.
88. See NW. Wholesale Stationers, 472 U.S. at 295 ("Although a concerted refusal to deal need not necessarily possess all of these traits to merit per se treatment, not every cooperative activity involving a restraint or exclusion will share with the per se forbidden boycotts the likelihood of predominantly anticompetitive consequences."); see also NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) (finding that per se treatment of the NCAA's restrictions on the marketing of televised college football was inappropriate even though there was an obvious restraint on output because the "case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all").
Court is willing to examine the procompetitive justifications for horizontal group boycotts, an analysis that is strikingly similar to a full-blown rule-of-reason analysis. Either way, the traditional per se treatment of horizontal boycotts is no longer necessary or even justifiable under the Court's current trend.

C. HORIZONTAL MARKET DIVISION

Another traditionally per se illegal category that should eventually receive a rule-of-reason or at least quick-look analysis is horizontal market division agreements. Although the Court has previously found horizontal market division agreements to be per se illegal, today these agreements can arguably have procompetitive justifications. As the Court has already explained, the crux of the illegality of market division agreements turns on whether the restraint involved is an ancillary or a naked one. To determine whether there are ancillary or naked restraints in a given market division agreement, the primary purpose of the agreement must be scrutinized, which leads to a review that is like a quick-look analysis and not per se treatment. Also, if the ancillary restraint is linked with a legal agreement, the Court has reasoned that the agreement might then have procompetitive justifications. Finally, market division agreements may also lead to more efficiencies, innovation, and greater consumer satisfaction, which are further procompetitive justifications for such agreements. For example, a horizontal market division agreement could allow potential competitors to invest in facilities to better serve consumers in a certain area more efficiently. This horizontal market division at least would raise the procompetitive justifications, which should receive a rule-of-reason analysis. This might arise where a specialized product particular to an area is developed that might cost a great deal to market and develop in that area. To develop the product (such as an agricultural product that is

89. See Nw. Wholesale Stationers, 472 U.S. at 295 (“The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers.”).

90. Palmer v. BRG of Ga., Inc., 498 U.S. 46, 48-50 (1990) (per curiam). Although in theory under per se treatment it should not matter whether there is a naked restraint or an ancillary restraint, the Court acknowledged this difference along with the coinciding different analyses. See Texaco Inc. v. Dagher, 547 U.S. 1, 7 (2006) (“[C]ourts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid.”). This approach is more analogous to a rule-of-reason analysis than to a per se treatment line of reasoning.

91. See Texaco, 547 U.S. at 5-7 (“As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.”).

92. See id.
specifically tailored to the special needs of a particular type of geographic market), it might be necessary to allow a horizontal market division agreement to be in place for at least some period of time to cultivate the product and deliver it effectively and economically to targeted consumers. This scenario demonstrates possible procompetitive justifications and deserves a rule-of-reason analysis instead of per se treatment. A similar situation arose in United States v. Topco Associates, Inc., where the Court treated the horizontal market division as per se illegal because it determined that the practices of a cooperative association of small and medium-sized supermarket chains constituted a horizontal restraint of trade.93 However, as the current trend of the Court indicates, this situation no longer merits per se treatment because, as the lower court in Topco found, the practices of the cooperative association were arguably procompetitive since they enabled members of the association to compete successfully with larger regional and national chains.94

Of course, anticompetitive effects will still remain, but this is exactly why a rule-of-reason analysis is necessary to determine the purpose, power, and effect of the agreement without dismissing it as per se illegal immediately. The Court's past willingness to scrutinize market division agreements in a manner incompatible with the per se standard indicates a willingness to examine the purpose and, eventually, the power and effect of the agreement.95 Again, this trend is influenced by the complexity of agreements and markets in our current economy.96 Where thirty years ago these enumerated per se agreements might not have had any conceivable procompetitive justifications, the Court has consistently recognized that in most, if not all, of these categories of agreements, this is no longer the case.97

93. 405 U.S. 596, 596, 598–600, 608 (1972) ("We think that it is clear that the [market division] restraint in this case is a horizontal one, and, therefore, a per se violation of § 1 [of the Sherman Act].").

94. Even though the Topco Court ultimately dealt with the horizontal market division agreement as per se illegal, it acknowledged that if such agreements were not given per se treatment, procompetitive justifications for the agreement did exist under a rule-of-reason analysis. Id. at 605–06. ("[T]he sale of Topco private label brands is far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories." (quoting United States v. Topco Assocs., Inc., 319 F. Supp. 1031, 1043 (N.D. Ill. 1970))). Unfortunately, the Court at that time was unwilling to treat one of the more traditionally per se illegal agreements (market division) under a rule-of-reason analysis as the lower court had. See id.


96. See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 87 (D.C. Cir. 2001); see also Texaco, 547 U.S. at 4–5 (involving a complex oil agreement in which persons who were normally competitors combined their capital allowing them to share opportunities for profits and risk of losses).

D. HORIZONTAL PRICE FIXING

The final and most-feared agreement traditionally held by the Court to be per se illegal is the horizontal price fixing agreement. However, even this type of agreement can have potentially procompetitive justifications that, at the very least, warrants a quick-look analysis to weigh the potential purposes regarding the market and the consumer. In NCAA, decided in 1984, the Court began its frontal assault on the per se treatment concept. There, the Supreme Court held that a particular type of horizontal price fixing agreement would not receive per se treatment because in some industries horizontal restraints are necessary to produce and procure the given market successfully, in this case college football. The broadcast networks contracted for a limited number of broadcasts of football games sanctioned by the NCAA nationally and regionally every year. No team was allowed to be shown nationally more than four times per year or regionally more than six times per year. The rule prohibited the NCAA member schools from negotiating television rights outside of the plan. In that case, the Court reasoned that the relevant market did not have to be defined, and market powers and percentages did not need to be examined, because the plan of the NCAA, on its face, made the price unresponsive to consumer demand and was therefore a naked restriction on price or output. Therefore, the plan of the NCAA was “inconsistent with the Sherman Act’s command that price and supply be responsive to consumer preference.”

However, the Court acknowledged and discussed the allegedly procompetitive purpose of the NCAA plan, which was to protect live attendance of games which would not be televised even if there was a naked restraint. The Court held that the NCAA’s purpose was not procompetitive, as it eliminated consumer choice between live and television broadcast football. In the end, the Court recognized that “there is often no bright line separating per se from Rule of Reason analysis,” a view that only further justifies eliminating the per se test and demystifying the Court’s previous dichotomous per se and rule-of-

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100. Id. at 100-02.
101. Id. at 91-94.
102. Id. at 94.
103. Id.
104. Id. at 104-13.
105. Id. at 110.
106. Id. at 115-17.
107. Id. at 116-17.
108. Id. at 104 n.26.
reason categories while also creating a more reasonable and logical way of examining agreements in markets.

Ultimately, the Court in \textit{NCAA} concluded that there were alternative and commercially feasible ways that college football could be shown on television.\textsuperscript{109} The plan eliminated these alternatives, denying the possibility of consumer preference, meaning that the Court, \textit{sub silentio}, made a rudimentary market investigation, holding that live games and telescast games are in the same market for some purposes.\textsuperscript{110} The Court then considered other competition restrictions to be sufficient to guarantee nontelevised live football.\textsuperscript{111} Market investigation is a key element of a rule-of-reason analysis.\textsuperscript{112} If televised college football was only feasible under the NCAA plan, the Court would have given a rule-of-reason analysis to the plan as an ancillary restraint. Apparently, the Court was willing to incorporate a partial rule-of-reason analysis for a horizontal price fixing agreement.

In another case, involving Columbia Broadcasting System (CBS), the Court again refused to give per se treatment to a horizontal price fixing agreement when a new product was involved.\textsuperscript{113} The Court reasoned that although the agreement was, legally speaking, horizontal price fixing, the product created by the agreement would not exist without the uniform price in the market brought about by the agreement creating the product.\textsuperscript{114} This allowed the Court to decide that if the agreement only involved "literal" price fixing that was in actuality not comparable to a situation in which a group of like-minded competitors

\footnotesize
\begin{itemize}
\item \textsuperscript{109} \textit{Id.} at \textsuperscript{119}.
\item \textsuperscript{110} \textit{Id.} at \textsuperscript{111–13}. The Court even conceded that its market and competition investigation were rooted in a rule-of-reason analysis, by explaining that the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and ... it has operated to raise prices and reduce output. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market. \textit{Id.} at \textsuperscript{113}.
\item \textsuperscript{111} \textit{Id.} at \textsuperscript{119} ("[T]he NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than in the television plan.").
\item \textsuperscript{112} \textit{See} \textit{id.} at \textsuperscript{109–13} (setting forth a detailed investigation of not only the market analysis involving NCAA's agreement, but also NCAA's proffered competitive justifications for such an agreement within that market); \textit{Bd. of Trade v. United States (Chi. Bd. of Trade)}, 246 U.S. \textsuperscript{231}, \textsuperscript{238–39} (1918) (acknowledging that part of a rule-of-reason analysis is ascertaining the market power of the parties involved in the agreement, which requires an in-depth market investigation).
\item \textsuperscript{113} \textit{Broad. Music, Inc. v. Columbia Broad. Sys., Inc.}, \textsuperscript{441} U.S. \textsuperscript{1}, \textsuperscript{7–10}, \textsuperscript{24–25} (1979) (using many elements of a rule-of-reason analysis to scrutinize a traditional per se category agreement of horizontal price fixing).
\item \textsuperscript{114} \textit{Id.} at \textsuperscript{7–10, 19–24}.
\end{itemize}
come together and fix the price, then a rule-of-reason analysis would be applicable.\textsuperscript{115}

Thus, horizontal price fixing has not been as diabolical and feared by the Court as some of its opinions would indicate. The Court has developed a willingness to deal with these agreements in certain situations, as discussed above, where the Court went beyond the dismissive procedure of per se treatment and examined the agreements in more detail.\textsuperscript{116} This is presumably because the Court thought that in those instances there might be some justifications for the agreements. In light of the Court’s past willingness to go beyond per se treatment regarding horizontal price fixing agreements, such treatment should ultimately be abolished to make way for economic, social, and political developments, and to produce a legal environment that will allow market and product agreements to evolve in response to rapidly changing economic and political conditions.

\section*{III. Economic Justifications Favor the Abolishment of Per Se Treatment}

The growing complexity and interdependence of agreements and commerce, domestically and abroad, militates against the per se construct. Many agreements formerly given per se treatment are unique in purpose, power, and effect and should be examined on a case-by-case basis under a rule-of-reason analysis. These economic justifications for doing away with the per se test further buttress the rationale found in recent cases to accelerate the trend to reach this result.

\subsection*{A. Technological Innovation}

Both in the United States and internationally, per se treatment will have to be eliminated to allow agreements relating to technology to survive the scrutiny of the Court. Such agreements exist to promote more interbrand competition, innovation, and increased efficiencies within and across markets.\textsuperscript{117} As articulated above, procompetitive tying agreements promote technological innovation and, ultimately, pave the way for consumers to benefit from modern technology-driven innovations.\textsuperscript{118} Computer software and hardware, and ink jet printers are just a few examples of the many products that consumers purchase that utilize or contain tied technology.\textsuperscript{119} The court in \textit{Microsoft Corp.} reasoned that

\begin{thebibliography}{9}
\bibitem{115} Id.
\bibitem{117} See Anlauf, supra note 55, at 509; see also Donald L. Beschle, “What, Never? Well, Hardly Ever”: \textit{Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality}, 38 \textit{HASTINGS L.J.} 471, 500–03 (1987) (criticizing the use of a per se rule in contemporary antitrust litigation).
\bibitem{118} See supra notes 75–78 and accompanying text.
\end{thebibliography}
current “technological integration [facilitated by a tying agreement] of added functionality into software” can serve as a procompetitive platform for third party applications while also potentially reducing costs for the consumer. In an increasingly wireless world, consumers will benefit from products that are created through tying agreements to the point where one device might perform all technology needs “tied” into one product. To encourage this trend and to allow U.S. firms to compete, both domestically against foreign competitors and in foreign markets, per se illegality of tying agreements is no longer appropriate. A rule-of-reason analysis is necessary for those agreements that are predominately procompetitive to be upheld. Such a change will benefit the entire market and promote interbrand competition and innovation among manufacturers while simultaneously providing lower prices and providing more utility per product for the consumer.

B. GLOBALIZATION OF MARKETS

With both geographic and product markets shifting toward global commerce, the traditional per se categories will most likely lose their utility, leaving procompetitive and anticompetitive arguments and justifications susceptible to a quick-look or rule-of-reason analysis. The developments these agreements allow will facilitate growth and competition in the global marketplace that will in turn also benefit the United States’ markets domestically by benefiting the American consumer and interbrand competition. International organizations have recognized the benefits of eliminating a broad per se rule and replacing it with a rule-of-reason, case-by-case analysis. For example, in the treaty establishing the European Union, the drafters foresaw the necessity for a

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120. States v. Microsoft Corp., 253 F.3d 34, 87 (D.C. Cir. 2001) (computer software and hardware).
121. See Anlauf, supra note 55, at 501 (“Particularly in the case of software and computer hardware bundles, multiple products can be packaged as a single product.”).
122. See id. at 502 (“Absent such coercion and with sufficient competition in the second market, consumers benefit from the one-stop efficiencies of the tie-in.”). Because tying agreements often allow firms to foreclose the secondary market, in order for U.S. firms to compete against other firms able to use tying arrangements without fear of per se illegality, tying agreements should be judged under a rule-of-reason analysis. Id. at 507 (“Arguably, tying arrangements operate as a subset of a firm’s monopolization of either the tying or the tied market. Thus, tying arrangements then must be viewed as a component of illegal monopolization and subject to a rule of reason analysis applied to monopolization claims.” (footnote omitted)).
rule-of-reason analysis to overcome the broad stroke of per se treatment by permitting a rule-of-reason analysis for any agreement "which contributes to [the] improv[ed] production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit." The drafters recognized, ten years before Leegin, that with current global developments, most agreements would require a rule-of-reason analysis. This will be accomplished by the agreements allowing for lower prices that come with exploring global options, encouraging innovation and efficiencies domestically to compete with a more diverse global marketplace and also to provide the consumer more utility through the many options that the expansion into the global marketplace would allow.

There are several key industries that will benefit from abolishing per se treatment of the four remaining categories of agreements to which this test is applied. For example, the automobile industry will benefit from increased flexibility with respect to tying agreements, in addition to permitting procompetitive justifications for market division agreements and group boycotts. Outside the United States, automobile manufacturers are effectively boycotted by local governments in favor of domestic products. The domestic manufacturers of automobiles should be given room to compete against the more successful foreign producers

124. See id.
125. See, e.g., Texaco Inc. v. Dagher, 547 U.S. 1, 6 & n.1 (2006). This case involved a joint venture by the international gas companies Shell and Texaco that sold separately branded gasoline to service station owners at a uniform price. Id. at 3-6. The Court declined to find the decision to sell both brands of gasoline at a single price per se illegal as a form of horizontal price fixing. Id. at 5-6. Instead, the Court reasoned that internal pricing agreements of a legitimate joint venture are not per se unlawful because, "[a] s a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells." Id. at 6-7. Therefore, even an agreement which involves some degree of horizontal price fixing is not necessarily illegal on its face and might deserve a rule-of-reason analysis to examine the procompetitive justifications. Id. at 6 & n.1 (recognizing that the record from the court below contained voluminous economic justifications for creating the joint venture).
126. See, e.g., F.M. Scherer, Retail Distribution Channel Barriers to International Trade, 67 Antitrust L.J. 77, 86 (1999) ("[A] llegations were advanced by U.S. advocates: (1) that restrictive zoning and high land prices made it virtually impossible for U.S. auto makers to establish their own dealerships within Japan; (2) that the retailers selling Japanese cars in Japan dealt exclusively in the vehicles of the domestic manufacturer whose franchise they held, or, if they handled American cars at all, did so unenthusiastically, (3) that because of restrictive governmental regulations regarding annual auto safety inspections and longstanding ties between some 20,000 'designated' repair shops and manufacturers, opportunities for U.S. companies to sell repair parts to Japanese automobile service outlets were constrained; (4) that despite the sharp fall of the dollar relative to the yen in the late 1980s, U.S. sales of original equipment parts to Japan increased only trivially; and (5) that in their rapidly growing American transplant manufacturing operations, Japanese companies favored home sources or U.S. sources owned by Japanese parents over U.S. producers in procuring original equipment parts to be assembled into Japanese nameplate cars." (footnote omitted)).
through the form of less restrictive group boycotts by producers, consumers, the government, or some combination of the three. Moreover, scrutinizing certain types of tying agreements (i.e., an agreement that would allow U.S. auto manufacturers to tie other products into their products) under a rule-of-reason analysis will allow domestic auto producers to better compete with foreign manufacturers that are not subject to the same limitations on tying agreements127 (e.g., BMW's partnership with Apple, Inc. that ties both their technologies into one automobile128).

IV. POTENTIAL OBSTACLES STEMMING FROM THE ELIMINATION OF PER SE TREATMENT

A. DIMINISHED JUDICIAL CERTAINTY AND CONSISTENCY

One of the two acknowledged benefits of per se treatment is the judicial certainty that it provides. Having a formula that the courts can apply allows for more certainty, efficiency, and consistency of outcome in litigation. Abolishing per se treatment, especially at the initial stages, will impose a system with very malleable standards that will take considerable effort and experience for the U.S. Supreme Court to develop over time. This will, in turn, make it even more difficult for lower federal courts and state courts to apply the rule-of-reason analysis to previously held per se categories. However, the quick-look analysis, with or without a naked restraint, should reveal truly anticompetitive agreements almost as clearly as per se treatment; the loss of procompetitive agreements as false positives that hinder per se treatment will therefore have ended. Therefore, the benefits from abolition will ultimately outweigh the detriments.129

B. INCREASED COSTS OF LITIGATION

The second primary benefit per se treatment affords the courts is the ability to curtail litigation and prevent the exhaustion of judicial and financial resources.130 Having a judicial mechanism that allows the courts

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130. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as
in antitrust actions under the Sherman Act to hear evidence only pertaining to the existence of certain agreements before dismissing the action allows for a considerably shorter litigation process. After all, antitrust litigation under a rule-of-reason analysis allows the parties to proffer evidence that includes an investigation of the market history, market power, and competitive justifications.\textsuperscript{31} Without per se treatment, the courts will only have the rule-of-reason and quick-look analyses to scrutinize agreements, both of which can produce a longer, more arduous litigation process.\textsuperscript{32} However, quick-look and naked-restraint analyses\textsuperscript{33} will eliminate the need for full-scale rule-of-reason evidentiary hearings in appropriate cases.

V. PROPOSED SOLUTIONS TO OBSTACLES STEMMING FROM THE PER SE ELIMINATION

A. PRETRIAL HEARINGS

One potential solution to curb the increased cost of litigation resulting from the elimination of per se treatment would be to develop a special pretrial hearing in antitrust actions under section 1 of the Sherman Act. These hearings would be very similar to a generic early pretrial scheduling hearing under the Federal Rules of Evidence and Civil Procedure.\textsuperscript{34} However, this type of pretrial hearing could be structured specifically so that the plaintiff alleging the violation would be

\textsuperscript{31} See Leegin Creative Leather Prods. v. PSKS, 127 S. Ct. 2705, 2712-13 (2007). Antitrust litigation can also end up fostering battles of experts and long, drawn out settlement negotiations and hearings that ultimately lead to an exhaustive fact-finding process. \textit{See, e.g.}, United States v. Microsoft Corp., 253 F.3d 34, 47-48, 56-58, 65-66, 101-03 (D.C. Cir. 2001) (noting that it took a seventy-six-day bench trial just for the district court to make findings of fact).

\textsuperscript{32} Without per se treatment to quickly dispose of certain agreements on their face, the Court will inevitably have to do at least some type of investigation for each agreement before the Court. \textit{See, e.g.}, \textit{Leegin}, 127 S. Ct. at 2712-13 (noting that rule-of-reason analysis entails an investigation of market power, industry history and analysis, competitive justifications, etc.); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769-71 (1999) (describing how even quick-look analysis requires some investigation into the competitive justifications of an agreement); \textit{cf.} N. Pac. Ry. Co., 356 U.S. at 5 (stating that per se treatment allows the Court to dismiss certain agreements on their face, saving the Court time and resources).

\textsuperscript{33} \textit{See supra} notes 45-53, 91 and accompanying text.

\textsuperscript{34} A pretrial hearing for antitrust cases would narrow and clarify basic issues between parties, and help ascertain the existence or whereabouts of relevant facts. \textit{Cf.} Fed. R. Civ. P. 16. Like in the Federal Rules of Civil Procedure, there would be some established rules that would organize expert testimony, require pretrial conferencing among the parties, and organize the evidence as a way of synthesizing discovery before trial to alleviate some of the findings-of-fact burden on the trial court. \textit{Cf.} Fed. R. Civ. P. 26; Microsoft Corp., 253 F.3d at 47-48 (it took the District Court a seventy-six-day bench trial just to make findings of fact). Although the Microsoft court did not grant the hearing, it considered allowing an evidentiary hearing to further explore some of the fact finding involved in the case. \textit{See id. at} 101-03.
required to first plead the specifics of the alleged illegal agreements, and then provide the defendant with a brief opportunity to provide some procompetitive justifications for the agreement and an explanation for why there is no naked-restraint effect. The structure of this type of hearing would save the courts considerable time and money by saving them from performing a lengthy and full-blown rule-of-reason evidentiary analysis at trial because the procompetitive justifications and naked-restraint arguments would already be in the record for prompt evaluation. At this initial trial hearing, which would take place before discovery and expert testimony, the court would be required to determine the nature of the agreement (i.e., whether it is a horizontal price fixing agreement, or a vertical resale price fixing agreement, tying agreement, vertical boycott, etc.), the anticompetitive and procompetitive justifications of the agreement, the purpose of the agreement, and the power and effect of the agreement if a full rule-of-reason analysis is necessary. In addition, the burden of proof would be on the party asserting the agreement to be illegal under section 1 of the Sherman Act to prove that a reasonable fact finder could find that the agreement unreasonably restrains trade and that the anticompetitive premises of the agreement not only exist but outweigh the procompetitive justifications. This would initially orient the court to the nature of the agreement, while exposing the restraints and anticompetitive and procompetitive justifications.

B. QUICK-LOOK ANALYSIS

Most importantly, the Court has already provided an intermediate standard between per se treatment and a rule-of-reason analysis that will allow courts to fill the void efficiently. This middle ground, as previously discussed, is the quick-look analysis articulated in California Dental Ass'n.135 Under a quick-look analysis, the court need only examine the purpose of the agreement.136 While not rising to the stringent level of per se treatment, a quick-look analysis allows courts to quickly dismiss patently illegal agreements because they are only required to scrutinize the purpose of the agreement without performing a drawn out rule-of-reason analysis.137 Through experience and stare decisis, courts will be


136. In California Dental, the Court reasoned that under a quick-look analysis, instead of focusing on the effects of the agreement, the Court would focus on the competitive purpose behind the agreement. Id. at 775 (discovering that the effects of the agreement were not readily apparent before making a closer investigation of the purpose of the CDA’s plan and determining that “the CDA’s rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators”).

137. Throughout the California Dental Court’s analysis, it is apparent that the main consideration
able to determine which of the current per se agreements will receive a quick-look or rule-of-reason analysis. However, under a quick-look analysis, courts will still be able to review each agreement on a case-by-case basis (in addition to immediately being able to determine whether the agreement is a naked restraint of trade), allowing them to weigh the procompetitive justifications against the anticompetitive justifications that are now apparent for nearly all types of agreements.

CONCLUSION

Abolishing per se treatment and implementing a system of rule-of-reason and quick-look analyses will help promote efficiency in the marketplace and provide benefits for consumers in a constantly evolving and increasingly complex and diverse economy by allowing the courts to fully consider the procompetitive justifications of each agreement on a case-by-case basis. Because of the complex and diversified characteristics of the current marketplace, using per se treatment is not only unrealistic and inequitable but also discourages some of the very types of behavior and consequences that antitrust theorists have argued should be preserved, such as interbrand competition, consumer satisfaction, overall product utility, innovation, and efficiency. The Supreme Court's abolition of per se treatment should be the inevitable trend in an ever-changing economic landscape. Consequently, rule-of-reason and quick-look analysis should survive as the only rational methods of scrutinizing agreements for antitrust violations.

138. See Leegin Creative Leather Prods. v. PSKS, 127 S. Ct. 2705, 2713 (2007) ("[T]he per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue . . . ."); see also Cal. Dental, 526 U.S. at 781 ("We have recognized . . . that 'there is often no bright line separating per se from Rule of Reason analysis,' since 'considerable inquiry into market conditions' may be required before the application of any so-called 'per se' condemnation is justified." (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.26 (1984))).