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New Mexico Antitrust Law - Tying Arrangements under the New Mexico Antitrust Act: Smith Machinery Corp. v. Hesston, Inc.

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NEW MEXICO ANTITRUST LAW—Tying Arrangements Under the New Mexico Antitrust Act: *Smith Machinery Corp. v. Hesston, Inc.*

I. INTRODUCTION

In *Smith Machinery Corp. v. Hesston, Inc.*[1] the New Mexico Supreme Court faced the questions of what standard should govern in determining whether representative line contracts violate the New Mexico Antitrust Act[2] and how that standard should be interpreted and applied. Representative line contracts, which require a dealer to purchase the entire line of a manufacturer's products in order to obtain those products it desires, have been challenged as amounting to tying arrangements.[3] A tying arrangement exists when a seller allows a buyer to purchase a desired or "tying" product only on the condition that the buyer also purchase an undesired or "tied" product.[4] These types of arrangements are thought to have a destructive effect on competition[5] because they allow a seller with market power in a tying product to use this leverage to extend its market power to a tied product. In this way, the seller gains a competitive advantage in the tied product market by virtue of the tying product's leverage alone and not because it is a better product or has a lower price.[6] As a result, tying arrangements are generally suspect as transgressing federal and state antitrust laws.[7]

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1. 102 N.M. 245, 694 P.2d 501 (1985). It is noted that Defendant Hesston Corporation was misdesignated in the caption as Hesston, Inc. Answer Brief for Defendant-Appellee at ix, *Smith Machinery*, 102 N.M. 245, 694 P.2d 501.

2. N.M. STAT. ANN. §§ 57-1-1 to -19 (1978).

3. This type of arrangement is also described as "full-line forcing" or as a required purchase of a "representative sample" of products. *See, e.g.*, Earley Ford Tractor, Inc. v. Hesston Corp., 556 F.Supp. 544 (W.D. Mo. 1983); Pitchford v. Pepi, Inc., 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); Brandeis Machinery & Supply Corp. v. Barber-Greene Co., 1973-2 Trade Cas. (CCH) 74,672 (W.D. Ky. 1973), *aff'd*, 503 F.2d 503 (6th Cir. 1974); Osborn v. Sinclair Refining Co., 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).

4. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

5. The destructive effect of tying arrangements on competition was noted by the Supreme Court in Standard Oil Co. v. United States, stating that "[t]ying agreements serve hardly any purpose beyond the suppression of competition." 337 U.S. 293, 305-06 (1949).

6. In *Northern Pacific* the Supreme Court noted that tying arrangements "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." 356 U.S. at 6. *See also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S.Ct. 1551, 1558 (1984) ("forcing" unwanted product on buyer).

7. Tying arrangements have been successfully challenged under Section 1 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. § 1 (1982) (condemning contracts, combinations, or conspiracies in restraint of trade); Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982) (condemning monopolization); Section 3 of the Clayton Act, 15 U.S.C. § 14 (1982) (condemning tying and exclusive dealing); and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982) (condemning unfair methods of competition).

In order to determine the appropriate standard for analyzing tying arrangements in New Mexico, it was necessary for the court to construe Section 57-1-1 of the New Mexico Antitrust Act for the first time.[8] This section, while never having been construed by the New Mexico courts, was patterned after the federal Sherman Antitrust Act ("Sherman Act").[9] In fact, the New Mexico Antitrust Act seeks uniformity between state and federal antitrust law, specifically providing that the New Mexico Antitrust Act be construed consistent with federal court interpretations of the Sherman Act.[10] The federal courts have long held tying arrangements subject to a *per se* analysis.[11] The New Mexico Supreme Court, therefore, adopted the *per se* rule as the appropriate standard to judge the legality of tying arrangements under the New Mexico Antitrust Act.[12] The court then interpreted and applied the *per se* rule.[13]

This Note will review the New Mexico Supreme Court's reasoning for adopting the *per se* rule and the underlying rationale for the development of the *per se* rule in the federal courts. This Note will then examine the *per se* rule and the New Mexico Supreme Court's application of the *per se* rule in *Smith Machinery.* Finally, this Note will consider the implications of the supreme court's adoption of *per se* illegality for tying arrangements in New Mexico.

II. STATEMENT OF THE CASE

Smith Machinery Corporation ("Smith"), a dealer in irrigation and farm machinery equipment,[14] had a dealership contract with Hesston, Inc. ("Hesston") that required Smith to carry a representative line of Hesston

8. N.M. STAT. ANN. § 57-1-1 (1978). *See infra* note 9 and accompanying text.

9. Section 1 of the Sherman Act provides: "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." 15 U.S.C. § 1 (1982). Similarly, Section 57-1-1 of the New Mexico Antitrust Act provides: "Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is hereby declared to be unlawful." N.M. STAT. ANN. § 57-1-1 (1978).

10. N.M. STAT. ANN. § 57-1-15 (Cum. Supp. 1983) provides that the New Mexico Antitrust Act is to be construed "in harmony with judicial interpretations of the federal antitrust laws." The language of the New Mexico Antitrust Act, however, contains no language or concept similar to Section 3 of the Clayton Act or to Section 5 of the Federal Trade Commission Act. Therefore, the analysis of *Smith Machinery* is in accordance only with the Sherman Act.

11. The federal courts have long held that certain trade agreements have such an anticompetitive impact that they are presumed unreasonable and therefore illegal *per se*. Tying arrangements have been deemed unlawful because of their "pernicious effect on competition and lack of any redeeming virtue. . . ." *Northern Pacific,* 356 U.S. at 5. Other trade practices deemed unlawful in and of themselves include price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 223 (1940), *reh'g denied,* 310 U.S. 658 (1940); division of markets, Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); group boycotts, Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457, 468 (1941); and resale price maintenance agreements, Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951).

12. *Smith Machinery,* 102 N.M. at 249, 694 P.2d at 505.

13. *Id.* at 253-54, 694 P.2d at 509-10.

14. *Id.* at 246, 694 P.2d at 502.

equipment.[15] Subsequently, Fiat Corporation acquired controlling interest in Hesston.[16] Hesston then sought to add a new tractor line manufactured by Fiat to its product mix and required Smith to carry some of the new tractors as provided by the dealership contract.[17] Smith refused to take on the new tractor line but requested that it retain the product lines which it had marketed for Hesston in past years.[18] Hesston denied the request, however, and sought to terminate Smith's distributorship altogether.[19]

Smith brought suit claiming that Hesston's conditioning the sale of the established product lines to the sale of the new tractor line was a "tying arrangement" amounting to a restraint of trade, and that such a restraint was *per se* illegal under the New Mexico Antitrust Act.[20] The trial court held that representative line contracts are an exception to the *per se* rule.[21] Accordingly, the lower court dismissed the restraint of trade claim at the conclusion of the plaintiff's case-in-chief.[22]

On appeal,[23] the New Mexico Supreme Court adopted the federal standard of *per se* illegality as appropriate for analyzing tying arrangements under the New Mexico Antitrust Act.[24] In applying the *per se* rule, the *Smith Machinery* Court held that a manufacturer's requirement that a dealer add a new tractor line to the existing product mix amounted to a tying arrangement, that tying arrangements are illegal *per se* under the New Mexico Antitrust Act,[25] that representative line forcing is not a well-established exception to the *per se* rule,[26] and that Smith had established

15. *Id.* at 249, 694 P.2d at 505. Specifically, the contract provided: "Dealer agrees to order, keep on hand and display a *representative sample* of each type of Hesston products applicable to Dealer's trade area." (emphasis added) Answer Brief for Defendant-Appellee at xi, *Smith Machinery,* 102 N.M. 245, 694 P.2d 501.

16. *Smith Machinery,* 102 N.M. at 249, 694 P.2d at 505.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Smith Machinery* was a contract claim raising antitrust issues; therefore, the case by-passed the court of appeals and went directly to the supreme court pursuant to N.M. STAT. ANN. Rules of Appellate Procedure for Criminal, Children's Court, Domestic Relations Matters and Worker's Compensation Cases at 3 (Repl. Pamp. 1983).

24. *Smith Machinery,* 102 N.M. at 250-53, 694 P.2d at 506-09. A full discussion of the other issue addressed by the supreme court, whether a piece of farm machinery called a windrower is a motor vehicle within the meaning of the Motor Vehicle Franchise Act, N.M. STAT. ANN. §§ 57-16-1 to -16 (1978), is outside the scope of this Note. The court found the windrower is not a vehicle under the Motor Vehicle Franchising Act and is not covered by the provisions of that Act.

25. *Smith Machinery,* 102 N.M. at 254, 694 P.2d at 510.

26. *Id.* at 253, 694 P.2d at 509. The court was unpersuaded by Hesston's contention that representative or full-line forcing is a well-established exception to the application of the *per se* analysis. Hesston's only authority for such an exception was a 1951 decision stating that full-line forcing of farm implements "is not violative of any law." United States v. J.I. Case Co., 101 F.Supp 856, 867 (D. Minn. 1951). The court placed little weight on the *Case* decision, largely because the modern law of tying arrangements was only beginning to be formulated in 1951 and subsequent decisions developing the law of tying arrangements failed to support the *Case* approach. *Smith Machinery,* 102 N.M. at 251-53, 694 P.2d at 507-09.

a *prima facie* case under the *per se* rule.[27] The court remanded the case for a determination of whether Smith's *prima facie* case was rebutted or whether any business justifications for the tying arrangement were present.[28]

III. DISCUSSION AND ANALYSIS

A. *The New Mexico Supreme Court Adopted the Per Se Rule as the Standard for Judging the Legality of Tying Arrangements Under the New Mexico Antitrust Act*

Section 57-1-1 of the New Mexico Antitrust Act[29] is patterned after Section 1 of the federal Sherman Act.[30] The New Mexico Antitrust Act specifically provides for it to be construed "in harmony with judicial interpretations of the federal antitrust laws."[31] In the absence of New Mexico decisions construing the pertinent section of the New Mexico Antitrust Act, the New Mexico Supreme Court turned to federal case law interpreting the like section of the Sherman Act.[32]

Broadly stated, the purpose of both the New Mexico and federal antitrust laws is the protection of trade and commerce from unlawful restraints and monopolies, the maintenance of free competition, and the prevention of undue interference with the free exercise of the rights of those engaged in trade and commerce.[33] Specifically, both Acts prohibit trade practices which "unreasonably" restrain competition.[34] Whether a

27. *Smith Machinery,* 102 N.M. at 254, 694 P.2d at 510.

28. *Id.* Although the case was remanded, the parties stipulated to a dismissal of the state court action on December 5, 1985. Subsequently, the federal antitrust claims and pendent state claims were refiled in federal district court.

29. N.M. STAT. ANN. § 57-1-1 (1978). *See supra* note 9.

30. 15 U.S.C. § 1 (1982). See *supra* note 9.

31. N.M. STAT. ANN. § 57-1-15 (Cum. Supp. 1983).

32. *See supra* note 9 and accompanying text.

33. *See generally* Sullivan, *Antitrust* (1977).

34. The Sherman Act provides "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal. . . ." 15 U.S.C. § 1 (1982). Similarly, the New Mexico Antitrust Act states "[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce . . . is hereby declared to be unlawful." N.M. STAT. ANN. § 57-1-1 (1978). This language prohibiting every contract, combination or conspiracy in restraint of trade or commerce is literally all encompassing, however, courts have construed this language as precluding only those contracts or combinations which "unreasonably" restrain competition. *Northern Pacific,* 356 U.S. at 5. The early decisions of the Supreme Court construing the Sherman Act, contain language to the effect that literally every contract or combination, whether reasonable or unreasonable, which directly restrains trade or commerce is unlawful under the statute. *See* United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S 290, 328 (1897). Subsequently, however, this language was limited and qualified by a United States Supreme Court holding that, because the statute does not define the term "restraint of trade," it is necessary for the court to do so and this duty can only be discharged by a resort to reason. United States v. American Tobacco Co., 221 U.S. 106, 178-79 (1911). In applying the rule of reason to the construction of the statute, the court determined the rule to be that only undue or unreasonable restraints of trade or commerce are prohibited by this statute. Appalachian Coals v. United States, 288 U.S. 344 (1933); *Standard Oil,* 221 U.S. at 1.

trade practice is unreasonable is determined through the application of two subsidiary rules, the rule of reason[35] and the *per se* rule.[36] In most cases, the rule of reason determines the legality of a given trade restraint; resort to the *per se* rule is appropriate only when the arrangement in question is viewed as a "naked restraint of trade."[37] Tying arrangements are among those trade agreements so viewed in federal antitrust case law.[38]

In accordance with the New Mexico Antitrust Act's mandate that it be construed consistent with judicial interpretations of the federal antitrust laws, the New Mexico Supreme Court adopted *per se* illegality for tying arrangements in New Mexico without questioning the underlying rationale for this proscription. Thus, while not clearly articulated by the New Mexico Supreme Court, it is fair to assume that the court was swayed by the rationale developed in the federal courts since they adopted the federal *per se* standard. The rationale for proscribing tying arrangements, developed under federal antitrust law and followed by the New Mexico

35. One of the most frequently cited statements of the rule of reason is that of Mr. Justice Brandeis in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (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. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

The rule of reason thus calls on courts to judge shades and gradations of competitive impact.

36. The *per se* rule of illegality is appropriate when the trade practices in question are manifestly anticompetitive. As the Supreme Court explained in *Northern Pacific*, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 356 U.S. at 5. Thus, *per se* rules require the Court to make broad generalizations about the social utility of a particular trade practice. This necessarily involves a balancing of the probability and severity of anticompetitive consequences resulting from a particular practice, against the probability of the practice's 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.

37. *See supra* note 11 and accompanying text.

38. *Id.* The first United States Supreme Court opinion to enunciate a standard for striking down tying arrangements as illegal *per se* under the federal antitrust laws was International Salt Co. v. United States, 332 U.S. 392 (1947). *International Salt* made contract clauses tying products or processes illegal *per se*, once it has been established that "the volume of business affected" is not "insignificant or insubstantial" and that the effect of the contracts is to "foreclose competitors from [a] substantial market." 332 U.S. at 396. The proscription of tying arrangements has been approved on a number of occasions since *International Salt*. *See, e.g., Northern Pacific*, 356 U.S. at 6; Fortner Enterprises, Inc., v. U.S. Steel Corp., (*"Fortner I"*), 394 U.S. 495, 499-500 (1969); *Hyde*, 104 S.Ct. at 1556-57.

Supreme Court, rests on a "leverage theory."[39] According to the leverage theory, competitors are denied free access to the tied product market not because the seller has a superior product in that market, but because of the seller's power or leverage which is exerted through the tying product.[40] The harm resulting from such leverage is three-fold: competitors in the tied product market are injured if they cannot offer their products on an equal basis with the distributor of the tying product; buyers are injured because they forego choices among products and services; and the public is harmed by the adverse effect on the market for the tied product.[41]

Although the New Mexico Supreme Court did not discuss the criticism of the leverage rationale, it is crucial to recognize this criticism since the adoption of the *per se* rule implicitly rejects the contrary argument. Underlying the criticism is the belief that antitrust illegality should be governed by the demonstrated economic impact in the tied product market rather than the assumption of leverage based on the seller's control or dominance over the tying product market. Critics contend that, from a purely economic standpoint, tie-ins should be analyzed according to the rule of reason, on a case-by-case basis, as all tie-ins are not inherently detrimental. In fact, tying arrangements can be beneficial by facilitating entry into established markets, promoting price competition, and, in certain cases, reducing costs of production and distribution.[42] Economists and critics argue that the legality of a tying arrangement should turn on

39. *See* U.S. Steel Corp. v. Fortner Enterprises, Inc., (*"Fortner II"*), 429 U.S. 610, 617-22 (1977) and cases cited therein. The theory of "leveraging," the traditional justification for objecting to tying arrangements, focuses on preventing a seller with market power in the tying product market from "leveraging" his market power into the tied product market. Such a situation is only possible where the seller has some "control or dominance over the tying product." *Northern Pacific*, 356 U.S. at 6. In a situation where the tied product is useful only in combination with the tying product, the short term effect may indeed be a restriction on competition in the tied market; that is, the seller will have successfully imposed barriers to entry in the tied market which preclude competitors from selling their product. In a situation where there are uses for the tied product unrelated to the tying product, however, the leverage theory loses its appeal as an explanation for the seller's conduct. For further discussion of the leverage theory, *see* Bork, *The Antitrust Paradox*, 365-81 (1978); Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506 (1974); Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957).

40. *Northern Pacific*, 356 U.S. at 6.

41. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953); *see also* Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW. U.L. REV. 626, 631 (1965).

42. As Justice White stated in *Fortner I*:

> [t]ie-ins . . . may facilitate entry into fields where established sellers have wedded their customers to them by ties of habit and custom. [citations omitted] . . . They may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction. [citations omitted] . . . And, if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution.

394 U.S. at 514 n. 9 (White, J., dissenting).

the demonstrated economic consequences of the arrangement and should be prohibited only when its anticompetitive impact outweighs its contribution to economic efficiency.[43] The New Mexico Supreme Court, however, adopted the *per se* rule as the appropriate standard for judging the legality of tying arrangements under the New Mexico Antitrust Act, as mandated by that Act, critical commentary notwithstanding.

B. The Per Se Rule

Tying arrangements are among the few areas of federal antitrust law that have been singled out and labeled as illegal "*per se*."[44] The New Mexico Supreme Court, in adopting the federal standard, clearly articulated the *per se* rule as it applies to tying arrangements.[45] In order for tying arrangements to fall into the category of a *per se* antitrust violation under federal and now New Mexico law, three prerequisites must be shown: 1) there must be a tying arrangement between two distinct products—the tying product and the tied product; 2) the seller must have sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and 3) the amount of commerce affected in the tied product market must be "not insubstantial."[46] The New Mexico Supreme Court, while clearly stating the *per se* rule, goes on to apply this rule with little explanation. Thus, this Note will delineate the prerequisites of the *per se* rule before setting out the New Mexico Supreme Court's analysis.

The first element necessary for a showing of *per se* illegality, known as the "two-product rule," requires that the tying and tied items be separate products.[47] Whether the seller utilized two distinct products in a tying arrangement turns not on the functional relation between the two products, but on the character of the demand for the two items.[48] For example, anesthesiological services rendered by an independent contrac-

43. *See infra* note 79 and accompanying text. *See also* Markovits, *Tie-Ins, Reciprocity and the Leverage Theory*, 76 YALE L.J. 1397, 1397-98 (1967); Burstein, *A Theory of Full-Line Forcing*, 55 NW. U.L. REV. 62, 62-63 (1960). *But see* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958); Areeda, *Introduction to Antitrust Economics*, 52 A.B.A. ANTITRUST L.J. 523 (1983).

44. *See supra* notes 37-38 and accompanying text.

45. *Smith Machinery*, 102 N.M. at 250, 694 P.2d at 506.

46. *Fortner I*, 394 U.S. at 499; *Northern Pacific*, 356 U.S. at 6. This proscription of tying arrangements, while commonly referred to as *per se* illegality, is more correctly characterized as a qualified *per se* rule as it applies only when the three threshold requirements are established.

47. *See Fortner I*, 394 U.S. at 507 ("there is, at the outset of every tie-in case . . . the problem of determining whether two separate products are in fact involved."). For a complete discussion of the considerations involved in the two separate product aspect of the *per se* rule, *see* United States v. Jerrold Electronics Corp., 187 F.Supp 545, 559 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961); Hyde, 104 S.Ct. at 1562; *see also* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 67-72 (1958).

48. *Hyde*, 104 S.Ct. at 1562.

tor and hospital services have been held to be distinguishable products, as consumer-patients often request specific anesthesiologists to come to a hospital and provide anesthesia.[49] On the other hand, a morning and an evening newspaper have been held to be indistinguishable products because from the viewpoint of the consumer-advertiser the two newspapers were perceived as providing access to the same readership market.[50]

As these examples illustrate, a tying arrangement cannot exist unless two separate products, distinct from the perspective of the consumer, have been linked.[51] Furthermore, in order to qualify as separate products, there must be sufficient demand for the tied product to identify a distinct market in which it is efficient to offer the tied product separately from the tying product.[52] This requirement that two distinguishable products be involved stems from the economic concerns underlying the proscription of tying arrangements—in order for a tying arrangement to have an anticompetitive effect, two distinct products necessarily must be linked.

The second element needed to establish *per se* illegality is "sufficient economic power" in the tying market. The federal courts have concluded that an essential characteristic of an invalid tying arrangement is the seller's exploitation of its control over the tying product to force the buyer to purchase an unwanted tied product.[53] Thus, this element focuses on proof that the seller has sufficient market power and therefore leverage in the tying product market.

Typically, the element of sufficient economic power may be satisfied in three ways. First, where the seller has a legal monopoly in the tying product, sufficient economic power is presumed because the buyer cannot purchase the product elsewhere. Thus, sufficient economic power is demonstrated when the tying product is patented or copyrighted.[54] Second, sufficient economic power is present if the seller has some advantage not shared by its competitors in the tying product market.[55] This advantage

49. *Id.* at 1564.

50. *Times-Picayune Publishing*, 345 U.S. at 613-14.

51. *Hyde*, 104 S.Ct. at 1562.

52. *Id.* at 1563.

53. *Id.* at 1558.

54. United States v. Loew's Inc., 371 U.S. 38, 45-47 (1962). A patent is at least *prima facie* evidence of market control. *Times-Picayune Publishing*, 345 U.S. at 594. This presumption stems from a hostility toward the use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products. *See also Fortner I*, 392 U.S. at 504-06 and n. 2.

55. *Fortner I*, 394 U.S. at 502. The Supreme Court refined the standard of "sufficient economic power" in *Fortner II*, stating:

> [while tie-in cases do not] require that the [seller] have a monopoly or even a dominant position throughout the market for a tying product . . . [t]hey do, however, 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

over competitors may be shown a number of different ways; for example, by proof of the tying product's unique attributes over competitor's products,[56] or by the seller's ability to raise prices above levels that would be charged in a competitive market.[57] Third, sufficient economic market power is inferred when the seller has dominant market position or a significant share of a relevant market.[58] This market share inquiry will necessarily turn on the facts and circumstances of any challenged arrangement. The United States Supreme Court, for example, in the context of anesthesiological and hospital services, found a 30 percent share of a relevant geographic market to be insufficient proof of economic power.[59] In the context of tying the sale of tires, batteries and automobile accessories to the sale of gasoline, however, a lower federal court found a market share of 10 percent adequate for purposes of establishing sufficient economic power.[60]

The final element of the *per se* analysis considers whether a "not insubstantial" amount of commerce is involved in the tying arrangement. A "not insubstantial" amount of commerce is involved where the dollar-volume of business foreclosed in the tied market is not merely *de minimis*.[61] For purposes of making this determination, the relevant figure is the total amount of sales tied by the arrangement being challenged, and is not limited to the portion of this total accounted for by the particular plaintiff who brings the suit.[62]

> burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

429 U.S. at 620.

56. The product for which the claim of uniqueness in attributes is typically made is that of real estate since any piece of real estate is unique. *See, e.g., Fortner I*, 394 U.S. at 495; Rosebrough Monument Co. v. Memorial Park Cemetery, 666 F.2d 1130, 1143 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982).

57. *See Fortner II*, 429 U.S. at 620; *see also Hyde*, 104 U.S. at 1566 n. 46.

58. In its most recent tie-in decision, the *Hyde* case, the Supreme Court suggested that there must be "significant market power," a "kind of dominant market position," and found that a 30 percent share of a relevant geographic market was insufficient. 104 S.Ct. at 1566. The Court's reliance in *Hyde* on a defined geographic market and the seller's share of that market arguably marks a departure from the previous market power standard in tie-in cases, articulated in *Fortner I* and *Fortner II*. *Fortner II*, however, was cited with apparent approval in *Hyde*, 104 S.Ct. at 1566 n. 46. Thus, a fair conclusion is that the market power requirement in a tie-in case can now be proved, or disproved, by the *Hyde* geographic market definition and market share approach as well as the *Fortner II* standard of advantage over competitors. *See, e.g.*, Digidyne Corp. v. Data General Corp., 1984-1 Trade Cas. (CCH) 66,053 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 3534 (1985), *reh'g denied*, 106 S.Ct. 18 (1985) (post-*Hyde* case relying on *Fortner II*).

59. *Hyde*, 104 S.Ct. at 1566. *See supra* note 58 for a summary of the case.

60. Osborn v. Sinclair Refining Co., 286 F.2d 832, 838 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).

61. *Fortner I*, 394 U.S. at 501.

62. *Id.* Demonstration of foreclosure of commerce by sums as low as $60,800 is sufficient to comply with this requirement. *See also Loew's*, 371 U.S. at 49.

Once a *per se* tying arrangement is established, the seller may still prevail by offering a compelling business justification for the arrangement.[63] Although the most common justification for tying arrangements is the need to preserve quality control and customer good will,[64] tying arrangements have been justified upon a showing of necessity by a company trying to establish a new industry,[65] or enter a new market.[66]

C. The New Mexico Supreme Court's Per Se Analysis

In *Smith Machinery,* the New Mexico Supreme Court found the first element of distinct products satisfied under the two-product rule.[67] The court found the new line of Fiat tractors and the existing product lines including hay processing equipment to be clearly distinct items from a consumer's perspective. Thus, consistent with federal *per se* analysis, the *Smith Machinery* Court found the first element of *per se* illegality was present.

In considering the second element of the *per se* analysis, sufficient economic power, the *Smith Machinery* Court applied a "market share" approach[68] and determined that a 30 percent market share in hay processing equipment was sufficient to amount to an appreciable restraint on competition.[69] In reaching this conclusion, however, the court omitted any discussion of the relevant geographic market basis from which the

63. Early tying cases held that once tying arrangements were found to exist in the context of sufficient economic power affecting a "not insubstantial" amount of commerce, the tying arrangements were illegal without elaborate inquiry into the business excuses for their use. *See Northern Pacific,* 356 U.S. at 6. This reasoning is consistent with the underlying rationale for restricting tying arrangements—that they serve no purpose other than the suppression of competition. *Standard Oil,* 337 U.S. at 305-06. Some courts, however, have carved limited inroads into the rigid *per se* rule by recognizing exceptional circumstances in which business justifications render lawful a tie-in that otherwise possesses the requisite elements of *per se* illegality. *See* Susser v. Carvel Corp., 332 F.2d 505 (2d. Cir. 1964), *cert. granted,* 379 U.S. 885 (1964), *cert. dismissed,* 381 U.S. 125 (1965); *Jerrold Electronics,* 187 F.Supp at 545; Brown Shoe Co. v. United States, 370 U.S. 294, 330 (1962); Harley Davidson Motor Co., 50 F.T.C. 1047, 1059-60, 1066 (1954).

64. *See Susser,* 332 F.2d at 505 (customer goodwill held to justify a soft ice cream franchisor's requirement that a franchisee buy from it all supplies which form a part of the end product); *but see, Standard Oil,* 337 U.S. at 293 (business justification failed because specifications of the type and quality of the products to be used in connection with the tying product were said to be protection enough); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972) (customer goodwill held not a justification for requiring a chicken franchisee to buy the franchisor's packaging, mixes, and equipment).

65. *See Jerrold Electronics,* 187 F.Supp. at 545 (policy of selling community television antenna equipment only in conjunction with a service contract was not an unreasonable restraint of trade at the industry's inception).

66. *See Brown Shoe,* 370 U.S. at 294; *Harley Davidson,* 50 F.T.C. at 1047.

67. *Smith Machinery,* 102 N.M. at 253, 694 P.2d at 509.

68. As noted *supra* there are several ways of establishing sufficient economic power, including patents or copyrights, advantage over competitors and geographic market share. *See supra* notes 54-60 and accompanying text.

69. *Smith Machinery,* 102 N.M. at 253, 694 P.2d at 509.

30 percent market share was drawn. While this omission makes a detailed analysis difficult, the sufficient economic power element of the *per se* rule does turn on the facts and circumstances of each individual case.[70] Theoretically, therefore, this factor should not be considered a "bench mark" for subsequent cases, absent the same two products involved in the same trade restraint. Realistically, however, the 30 percent market share figure in this case does establish a reference mark for all future tie-in cases brought in New Mexico. By not clearly articulating its reasoning for finding the element of sufficient economic power satisfied in this case, the New Mexico Supreme Court fails to provide a functional guideline for the practitioner seeking to interpret the New Mexico Antitrust Act. Thus, this omission undermines the notions of predictability and guidance for the New Mexico business community—qualities which *per se* proscription are perceived as providing.

In addition, it should be noted that the 30 percent market share found sufficient without explanation in *Smith Machinery* was exactly the percent of market share found insufficient by the United States Supreme Court in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*.[71] This variation might be attributable to the differences inherent between hospital services and hay processing equipment. The *Smith Machinery* Court's opinion, however, is void of any explanation or discussion of this distinction. The failure of the court to delineate the distinction it presumably drew regarding percent of market share frustrates the notion of *per se* predictability and provides little guidance to the New Mexico business community for future interpretation of the New Mexico Antitrust Act.

Finally, the *Smith Machinery* Court considered whether a "not insubstantial" amount of commerce was involved.[72] The amount of business foreclosed to competitors by a tying arrangement is properly measured in terms of the total dollar volume of sales affected by the arrangement in the market overall.[73] The *Smith Machinery* Court, however, determined that a substantial amount of commerce was foreclosed based on Smith's representation alone.[74] The court, therefore, found it unnecessary to look beyond the particular plaintiff bringing the suit to the total dollar volume of sales affected in the overall market.[75]

The supreme court thus held that Smith had established a *prima facie*

70. *See supra* notes 58-60 and accompanying text.

71. 104 S.Ct. 1551 (1984). *See also supra* note 59 and accompanying text.

72. *Smith Machinery*, 102 N.M. at 253-54, 694 P.2d at 509-10.

73. *Id.* at 254, 694 P.2d at 510. *See supra* notes 61-62 and accompanying text.

74. *Smith Machinery*, 102 N.M. at 254, 694 P.2d at 510. The court concluded the evidence, which demonstrated the effect of the arrangement on Smith alone resulted in a foreclosure of commerce in the range of $100,000 to $300,000, was substantial enough not to be considered *de minimis*.

75. *Smith Machinery*, 102 N.M. at 254, 694 P.2d at 510.

case of a *per se* illegal tying arrangement and remanded the case to the district court for a determination of whether Hesston could successfully demonstrate a business justification for the tying arrangement imposed on Smith.[76]

D. Implications of Smith Machinery v. Hesston

By adopting the *per se* rule for judging the legality of tying arrangements under the New Mexico Antitrust Act, the New Mexico Supreme Court acknowledged that presumptive illegality serves three vital functions. First, the *per se* doctrine provides predictable and workable rules which in turn provide guidance to the business community as to the particular types of trade restraints condemned as unlawful by the New Mexico Antitrust Act. Second, the *per se* rule seeks to avoid a complicated and prolonged economic investigation[77] and diminishes the extent of inquiry required by New Mexico courts as to the nature, purpose and effect of any challenged arrangement before reaching a decision about its legality. Third, this reduction in economic inquiry serves to minimize the burden on litigants and the judicial system of undergoing the more complex and expensive rule-of-reason trials.

The underlying leverage rationale[78] for *per se* proscription of tying arrangements, however, has been earnestly questioned by commentators and economists,[79] as well as several courts.[80] This criticism stems from the conviction that antitrust proscription should be determined by the demonstrated economic impact in the tied product market rather than the assumption of leverage based on the seller's control or dominance over the tying product market. Critics contend the legality of a tying arrangement should be judged by the actual economic consequences of the arrangement and should be proscribed only when its anticompetitive impact outweighs its contribution to economic efficiency.[81]

It is clear that the supreme court's adoption of *per se* illegality for tying arrangements is consistent with the long line of federal court de-

76. *Id. See supra* notes 63-66 and accompanying text.

77. *Northern Pacific*, 356 U.S. at 5. Critics argue that the distinction between the *per se* rule and the rule of reason is somewhat mitigated; that the qualifications to the *per se* rule require an elaborate economic inquiry and at the same time stop short of achieving the benefits of the rule of reason. *See, e.g., Hyde*, 104 S.Ct. at 1569 (O'Connor, J., concurring).

78. *See supra* notes 39-41 and accompanying text.

79. *See, e.g.*, Bork, *The Antitrust Paradox*, 365-81 (1978); Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506 (1974); Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957).

80. *See, e.g., Hyde*, 104 S.Ct. at 1569 (O'Connor, J., concurring); Shop and Save Food Markets, Inc. v. Pneumo Corp., 683 F.2d 27, 31 (2d Cir. 1982) (Feinberg, C.J., concurring), *cert. denied*, 459 U.S. 1038 (1982); Hirsh v. Martindale-Hubbel, Inc., 674 F.2d 1343, 1349 n. 19 (9th Cir. 1982), *cert. denied*, 459 U.S. 973 (1982).

81. *See supra* notes 42-43 and accompanying text.

cisions, beginning with *International Salt v. United States* in 1949[82] and reaffirmed recently in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*.[83] It is arguable, however, that from an economic perspective, tie-ins should be governed by a rule-of-reason analysis, on a case-by-case basis.[84] By adopting the *per se* rule the supreme court followed the federal courts' notions of efficiency and economics, and adopted the federal courts' conclusions that the policies of judicial economy and certainty of interpretation outweigh the need for economic principles and market realities.[85]

IV. CONCLUSION

The New Mexico Antitrust Act directs the supreme court to construe the Act consistent with the federal court interpretations of the Sherman Act.[86] Thus, the importance of the decision in *Smith Machinery* is the New Mexico Supreme Court's interpretation and application of the federal antitrust cases.

The federal courts have long held tying arrangements subject to a *per se* analysis, critical commentary notwithstanding.[87] By adhering to the federal courts' three-pronged test of *per se* illegality for tying arrangements, the New Mexico Supreme Court acknowledged that economic issues in even a "garden-run" antitrust case can be complex, particularly to a bench and bar for the most part untrained in economics. The *per se* doctrine alleviates the necessity of courts to engage in a prolonged inquiry of the economic impact of such arrangements on competition, which in turn minimizes the burden on litigants and the judicial system of the more complex rule of reason trials. Further, the *per se* doctrine provides guidance to the New Mexico business community regarding the type of trade restraints which are proscribed by the New Mexico Antitrust Act.

Recent federal court opinions, however, indicate an increased scrutiny of the underlying rationale for *per se* proscription of tying arrangements.[88] Specifically, federal court opinions suggest that because *per se* proscription of tying arrangements adheres to a three-pronged threshold inquiry the distinction between the *per se* rule and the rule of reason is to a large

82. 332 U.S. at 392. *See supra* note 38.

83. 104 S.Ct. at 1551. The Supreme Court stated: "It 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*.'" *Id.* at 1556. Thus, a majority of the court expressly rejected the view of four concurring justices that the *per se* rule for tying cases should be abandoned.

84. *See supra* notes 79-80 and accompanying text.

85. *See supra* note 36 and accompanying text.

86. *See supra* note 10 and accompanying text.

87. *See supra* note 11 and accompanying text.

88. *See, e.g., Hyde*, 104 S.Ct. at 1574 (O'Connor, J., concurring).

extent mitigated.[89] That is, the *per se* standard utilized in tying arrangement analysis *does* require an elaborate inquiry into the economic effects of an arrangement in order to establish the three *per se* factors of two distinct products, sufficient economic power and affecting a "not insubstantial" amount of commerce.[90] Thus, the costs of a *per se* analysis can be equal to those incurred under the rule of reason, yet the *per se* rule stops short of achieving any corresponding benefits. In addition, the underlying theory of leverage has been persuasively questioned.[91] These criticisms provide a compelling argument for the abandonment of the *per se* rule and a refocusing of tie-in proscription in terms of economic principles and demonstrated market realities.

In *Smith Machinery,* the New Mexico Supreme Court, as directed by the New Mexico Antitrust Act, followed the prevailing interpretation of federal antitrust law for the proscription of tying arrangements. Should the federal courts, however, continue to question the appropriateness of the *per se* rule, and should the federal courts begin to move away from *per se* proscription, so too should the New Mexico courts.

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89. *Id.*
90. *Id.*
91. *See supra* notes 78-80 and accompanying text.