

The Supreme Court's Upcoming Antitrust Cases

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The Supreme Court has accepted certiorari on two Sherman Section 1 cases, to decide during its 2005-2006 term. The following overview briefly describes the cases, the issues presented to the Court, the rationales employed by the lower courts, and the potential impact of the Supreme Court eventual decisions.

04-1329 Illinois Tool Works Inc., et al. v. Independent Ink, Inc. Decision Below: 396 F.3d 1342 (Fed. Cir. 2005)

Illinois Tool Works focuses on whether a presumption of market power exists in a Sherman Act Section 1 tying case when the defendant has a patent over the tying good. In this case, defendant Illinois Tool Works (“ITW”) holds a patent on the technology used in printing bar codes. Its standard licensing agreements require licensees to use ink supplied by it. The ink itself is not covered under any patent.

The district court held that the plaintiff, Independent Ink (“Independent”), did not adequately demonstrate that ITW had market power nor did it attempt to delineate the relevant market. A tying violation of Section 1 exists only when the defendant has market power in the market for the tying product.

The appellate court dutifully reversed, finding that a patent over the tying good gives rise to a rebuttable presumption of market power. The appellate court does not appear to endorse the presumption, but instead maintains that prior Supreme Court jurisprudence demanded a reversal

of the district court. In tone, the appellate court seems to actually anticipate and welcome a reversal by the Supreme Court.

Section 1 tying jurisprudence has diverged into two strains, those that do not involve intellectual property rights, and those that do. After an initial hostility to all tying arrangements, the Supreme Court has held that a plaintiff must demonstrate market power over the tying product in order to prove a Section 1 violation. *See e.g.*, *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 462 (1992); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984); *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 620 (1977).

However, in those cases that do involve a copyright or patent over the tying good, the Supreme Court has held that market power may be presumed rather than proved. *E.g.*, *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947). According to the appellate court, the district court attempted to sidestep clear and binding precedent, which the Supreme Court has never explicitly overruled. Essentially, the district court found several of the cases outdated, such as the 1947 *International Salt* and the 1962 *Loew's* decisions.

Additionally, the district court engaged in what the appellate court termed a “nose-counting” exercise. The defendant and district court point to a footnote in a strong concurrence in the *Jefferson Parish* case and the dissent in a denial of certiorari the following year in *Data General*. Notably, this exercise is quite uncertain (of the six justices “counted,” none remain on the bench today). *See Jefferson Parish*, 466 U.S. at 37 n. 7, (O'Connor, J., concurring).

Finally, the defense and the district court noted the strong scholarly criticism of the market power presumption. *See, e.g.*, Phillip E. Areeda et al., 10 *Antitrust Law* ¶ 1787c (2d ed.

2004); Richard A. Posner, *Antitrust Law* 197-98 (2d ed. 2001). The appellate court admonished the district court for its reliance on scholarship, rather than precedent.

The importance of this case is readily apparent in the allocation of the burden of proof in future Section 1 tying cases. Specifically, under current Supreme Court precedent and the appellate court's approach, the intellectual property right creates a presumption of market power, which the defendant would be forced to rebut. If the case is overruled, then the IP tying cases will come in alignment with tying cases that do not involve intellectual property, and future plaintiffs must proffer evidence of both market power and market definition.

04-805 <i>Texaco, Inc. v. Dagher et al.</i> 04-814 <i>Shell Oil Co. v. Dagher, et al.</i> (consolidated) Decision Below: 369 F.3d 1108 (9th Cir. 2004)
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The set of *Dagher* cases presents the question whether price fixing agreements within a joint venture constitute a per se violation of Section 1 of the Sherman Act. Shell and Texaco created an alliance in the form of two legitimate and efficiency-producing joint ventures (organized regionally). Indeed, the joint ventures themselves were sanctioned by the Federal Trade Commission and various State Attorneys General.

The distinguishing aspect of the alliance is that the two companies maintained separate branding of their products, but consolidated pricing decisions. The companies preserved their separate identities by selling products with differing compositions of additives, retaining separate trademarks, and targeting different consumer bases. The joint ventures eliminated competition between the companies, and may have allowed the alliance to increase their uniform price despite a decrease in costs.

The district court granted the defendants' motion for summary judgment, holding that the rule of reason guided the price fixing analysis within the context of the joint ventures. The plaintiffs relied exclusively on a per se or "quick look" theory. Essentially, the district court determined that price setting constituted an integral function of a joint venture, and a per se ban on pricing agreements would functionally eliminate joint ventures between competitors.

The appellate court reversed and remanded, determining that the case presented an issue of fact as to per se liability warranting trial. In general, courts interpret Section 1 to prohibit price fixing agreements per se. However, pricing agreements have been permitted where the agreement is merely ancillary, or reasonably necessary, to further the legitimate purpose of the combination or agreement. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (allowing blanket licensing agreements of music at uniform price). On the other hand, a naked pricing agreement, or one unrelated to the legitimate agreement, will constitute a per se violation. *See Citizen Publ'g Co. v. United States*, 894 U.S. 131 (1969).

In this case, the appellate court examined the record, and found no connection between the unified pricing and the purported efficiencies of the combinations. The court highlighted the continued separation of products and brands as particularly important, noting the probability of a different result had the companies entirely consolidated their respective product lines or had they created a new product.

Ninth Circuit Judge Fernandez wrote a dissent that would have affirmed the district court's grant of summary judgment, indicating that a rule of reason analysis should apply. The dissent points to the economic integration inherent in the legitimate joint venture, noting that it should be treated as a single economic unit. The opinion further emphasizes the importance of the price-setting function to any economic unit, in much the same way as other merged, but

unchallenged functions, such as manufacturing, inventorying, transportation, and marketing. In a particularly illustrative passage, Judge Fernandez describes the result of the majority's decision as creating an "exotic beast:"

The beast would otherwise be a true business, but when it acts like a true business—sets prices for its own goods—it subjects its otherwise insulated members to the severe sting of antitrust liability. While it has the head of a business man and the body of an entrepreneurial lion, it has the tail of a liability scorpion.

Dagher v. Saudi Ref., Inc., 369 F.3d 1108, 1127 (9th Cir. 2004) (Fernandez, J., dissenting).

This decision will affect the degree of integration necessary to allow uniform pricing decisions in a joint venture. Clearly, if the joint venture creates a new product or merges its products, then its price setting function is essential to its business structure, and there would be no per se violation for price fixing. If two competitors agree to fix the prices of their separate goods, then a per se violation has occurred and liability accrued. This case lies in the gray area between these two extremes. Where many functions are unified for legitimate efficiency gains, but the products and brands remain distinct, is a pricing agreement permissible?

The answer to this question will affect the structure of future joint ventures. If the Ninth Circuit is affirmed, joint ventures either must either more fully integrate or maintain competitive pricing. On the other hand, if the Ninth Circuit is reversed, then joint ventures should enjoy freedom in making consolidated business and pricing decisions, even while maintaining separate brands.