Unresolved Questions: Disagreement Over the Per Se Treatment of Tying Arrangements Creates Uncertainty

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A recent 10th Circuit decision, *Healy v. Cox Communications, Inc.*, 871 F.3d 1093 (10th Cir. 2017), comes at a time when more and more consumers are “cutting the cord” and switching away from cable to streaming home entertainment services. While cable TV may soon be a relic of the past, Cox illustrates courts’ disagreement over the proper analysis of tying claims under Sherman Act Section 1.

In *Cox*, the plaintiffs subscribed to cable services offered by Cox Communications. The plaintiffs were unhappy that Cox required them to lease a cable set-top box along with their cable subscriptions. The plaintiffs alleged that Cox’s arrangement violated Section 1 of the Sherman Act by tying a desired or tying product--here, cable service--to an undesirable or tied product--here, the unwanted top box.\(^1\) An unlawful tying arrangement exists when a seller exploits its power over the tying product by forcing customers to purchase a secondary tied product that the buyer either didn’t want or would have purchased elsewhere.\(^2\)

To succeed on a tying claim, the plaintiff must generally prove the four elements set forth in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2

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1. *Cox*, 871 F.3d at 1095.
2. *Id.* at 1097.
(1984): (1) two separate products are involved; (2) the sale or agreement to sell one product is conditioned on the purchase of the other; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a ‘not insubstantial’ amount of interstate commerce in the tied product is affected.\(^3\) The unique nature of the Jefferson Parish test has led some to characterize it as a “modified per se rule.” This rule requires only a narrow market analysis to find a defendant’s conduct per se illegal, and it does not consider effects in the tied product market or defendant’s procompetitive justifications.\(^4\)

In Cox, the jury sided with the plaintiffs and found sufficient evidence of all four elements of a tying claim under Jefferson Parish’s modified per se test. The District Court, however, disagreed with the jury’s finding, holding that the plaintiffs had not met their burden of proving a per se unlawful tying arrangement. The court awarded judgment notwithstanding the verdict to Cox. The U.S. Court of Appeals for the 10\(^{th}\) Circuit recently upheld the District Court’s decision.\(^5\)

The majority in Cox held that the plaintiffs had failed to present sufficient evidence as to the substantial commerce element of the Jefferson Parish test.\(^6\) Historically, this element has not been one on which a plaintiff’s claim fails: It is normally uncontroversial and requires plaintiffs to show that the arrangement affects only a small dollar volume of commerce in the tied product.\(^7\) To answer

\(^3\) Jefferson Parish, 466 U.S. at 1560.
\(^5\) Cox, 871 F.3d at 1108.
\(^6\) Id.
\(^7\) Leslie, supra note 4, at 2140-41.
whether a ‘not insubstantial’ amount of interstate commerce in the tied product is affected, the majority believed the relevant inquiry was whether Cox foreclosed a substantial amount of commerce to other sellers or potential sellers of top boxes. The only evidence presented by the plaintiffs as to the fourth element of the *Jefferson Parish* test had been the substantial amount of profits Cox had made from the leasing of top boxes.⁸

Although many courts have found this type of evidence sufficient show a substantial amount of commerce under the test from *Jefferson Parish*, the majority rejected the jury’s finding.⁹ The majority was ultimately dissatisfied with its inability to determine whether Cox excluded any top box competitors from participating in the market and caused any broader economic damage.¹⁰ The 10th Circuit has not historically been allowed to consider these questions and has followed the modified per se test articulated by the majority in *Jefferson Parish*.¹¹ In this regard, Cox seems to move away from past cases and towards a rule of reason analysis.

Judge Briscoe, dissenting, wrote she would have reinstated the jury verdict from the District Court. Judge Briscoe disagreed with the majority’s view on proper analysis of tying claims. She stressed how per se claims, by their nature, focus on the character of anticompetitive conduct, not on the actual market effects that conduct may or may not have caused.¹² The dissent argued that discerning market effects ex

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⁸ *Cox*, 871 F.3d at 1115
⁹ *Id.*
¹⁰ *Id.*
¹¹ *Id.* at 1102.
¹² *Id.* at 1120.
post facto does not retroactively change the character of the preceding conduct. For that reason, Judge Briscoe argued that the plaintiffs had proved the four *Jefferson Parish* threshold requirements, and that application of the per se rule was warranted.13

The majority and dissent in *Cox* disagreed on the proper test for identifying which tying arrangements harm consumers. The majority believed that consideration of adverse economic and market effects was necessary to determine whether the tying arrangement violated the antitrust laws.14 However, the substantial amount of commerce element of *Jefferson Parish* does not directly call for evidence of effect in the tied product market. As noted in the majority opinion, courts are expressing more and more skepticism as to whether all tying claims are inherently anticompetitive and ought to be per se violations.15 The majority suggested that perhaps the per se category for tying should be abandoned in favor of a rule of reason analysis.16 In this way, the majority’s opinion is in lock step with the existing case law and broader legal trends.17

The dissent, on the other hand, noted that per se violations exist because the conduct which they encompass has, historically, been demonstrated to be pernicious and have anticompetitive effects. Additionally, plaintiffs who have suffered the

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13 Id. at 1121-22.
14 Id. at 1099.
15 Id. at 1100-01.
16 Id. at 1102.
17 Leslie, supra note 4, at 2158-59.
injurious effects of anticompetitive conduct may have limited resources and shouldn’t be barred from recovering for want of broader market evidence. If the dissent is correct in applying per se analysis to tying claims, then the dissent is also correct that the per se rule protects consumers.

The majority’s decision may signal that modified per se test is ultimately a poor vehicle for assessing the legality of tying arrangements. The modified per se test does not fully consider, for example, whether Cox actually possessed market power in sales of cable boxes or had a legitimate business reason for requiring customers to lease its cable boxes. One could envision, for example, that having uniformity among all top-boxes allowed Cox to economize on maintenance and service, thus driving down costs and, in turn, subscriber fees. As a result, the per se rule risks false positives which condemn procompetitive behavior. In this regard, the dissent’s best intentions for protecting consumers may inadvertently harm them instead. If the majority is wrong, however, and Cox’s tying arrangement is on the balance harmful to consumers, then competitive harm has gone unchecked. It is impossible to know which of these scenarios occurred in Cox, as evidence of competitive effects in the tied product market were not directly addressed in the record. One can be certain, however, that the differences between these two approaches to tying claims needs to be rectified, and that the best solution for protecting consumers is not an obvious one.

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18 Cox, 871 F.3d at 1121.
19 Id. at 1112.
20 Leslie, supra note 4, at 2158.