Nielsen Appeal Tests Antitrust Limits Of Pricing And Bundling

By **Luke Hasskamp** (May 18, 2026)

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When a monopolist conditions access to an essential product on the purchase of a separate, competing product — or offers the essential product on a stand-alone basis, but at an exorbitant price that effectively forecloses stand-alone purchase — how should antitrust law respond?

That question is before the U.S. Court of Appeals for the Second Circuit in Cumulus Media New Holdings Inc. v. The Nielsen Co. (US) LLC, a Jan. 15 appeal of a preliminary injunction from the U.S. District Court for the Southern District of New York.

The case involves Nielsen's network policy, a corporate policy adopted in September 2024 that conditions access to Nielsen's national radio ratings product on the purchase of Nielsen's local radio ratings data in every market where a broadcaster operates. Cumulus Media Inc., one of the nation's largest radio broadcasters, sued in the Southern District of New York on Oct. 16 to enjoin that policy.

On Dec. 30, the district court agreed Cumulus was substantially likely to succeed on the merits and blocked Nielsen from enforcing its network policy and from charging a commercially unreasonable rate for its nationwide report as a standalone product. Nielsen appealed, and the Second Circuit temporarily paused the Southern District of New York's order. The Second Circuit heard argument May 7.

The case has since taken on added urgency: On March 5, Cumulus filed for Chapter 11 protection in the U.S. Bankruptcy Court for the Southern District of Texas, citing Nielsen's conduct as a contributing cause, and will lose access to the national radio ratings product entirely when the September 2026 report cycle begins.

Although the U.S. Trustee's Office argued that the plan's third-party claims releases were nonconsensual, U.S. Bankruptcy Judge Alfredo R. Perez approved Cumulus' Chapter 11 plan.

Nielsen's Second Circuit appeal implicates three issues of note: (1) the nature and legal sufficiency of two independent tying theories, one resting on the network policy as an express tie and one resting on Nielsen's stand-alone price as a constructive tie; (2) whether Nielsen's procompetitive justification — cost recovery — survives scrutiny under the Microsoft burden-shifting framework; and (3) whether an independent per se finding left unchallenged on appeal forecloses Nielsen's arguments entirely.

The significance of the case extends beyond radio ratings. Nielsen holds monopoly power in an essential upstream product and has allegedly used that power to condition access on purchases in a downstream market where it faces an emerging competitor — Eastlan Ratings — it has effectively foreclosed.

That structural pattern, in which a monopolist exploits upstream market power to foreclose downstream competition, recurs across industries where customers depend on a single supplier for an essential input. Whatever the Second Circuit decides, its reasoning will be studied closely by monopolists and their customers in analogous positions.

The Procedurally Narrowest Path: Nielsen's Per Se Waiver

The most important question the Second Circuit faces may be procedural rather than substantive. The district court found Nielsen's conduct per se unlawful under Section 2 of the Sherman Antitrust Act. Nielsen did not expressly challenge that finding in its opening brief on appeal.

Cumulus argues this constitutes waiver of an independent ground for affirmance. If the Second Circuit agrees, it can affirm the injunction without reaching any of the contested substantive tying questions.

On reply, Nielsen disputes the characterization, arguing it had repeatedly challenged the per se analysis in its opening brief. Nielsen further argues its rule-of-reason defenses would have been irrelevant if it had silently accepted per se treatment. A footnote added that even without waiver, the per se label is substantively unavailable for novel theories under the U.S. Supreme Court's 2007 decision in Leegin Creative Leather Products Inc. v. PSKS Inc., which holds that per se condemnation requires "considerable experience" with the relevant category of restraint.[1]

The Leegin argument, while technically accurate, is analytically strained. The "considerable experience" requirement was articulated to explain why decades-old per se rules governing novel restraints should be revisited — not to cast doubt on tying doctrine.

The more consequential point about the per se finding concerns its doctrinal content. Under the test articulated by the U.S. Court of Appeals for the D.C. Circuit in its 2001 decision in United States v. Microsoft Corp., a per se tying violation requires: (1) two separate products; (2) market power in the tying product market; (3) the defendant conditions purchase of the tying product on the purchase of the tied product; and (4) foreclosure of a substantial volume of commerce.[2] A per se finding does not require a separate showing of anticompetitive effects — the four elements establish competitive harm inherently.

The Merits of the Tying Theory: Two Independent Coercion Theories

Assuming the Second Circuit reaches the merits, Cumulus presses two coercion theories, each with a different relationship to the contested American Manufacturers line of cases.

The Network Policy as an Express Tie

A stronger analytical path for affirmance may rest on the unremitting policy doctrine identified in Hill v. A-T-O Inc. in 1976.[3] There, the Second Circuit held that "an unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes the requisite coercion." It establishes that a categorical policy, combined with market power and foreclosure, satisfies coercion as a matter of law.

The network policy is precisely that kind of categorical condition. It prohibits supplying a complete, commercially usable national radio ratings product to any customer whose local stations do not subscribe to Nielsen's local data as well. Nielsen told Cumulus that a stand-alone purchase was not possible in light of the policy.

The most recent application of the unremitting policy doctrine came in the U.S. District Court for the Northern District of New York's decision in AngioDynamics Inc. v. C.R. Bard

Inc., which confirms that such a categorical policy constitutes actual coercion "if, and only if" market power, separate products and foreclosure are independently satisfied.[4]

Here, all three are met: Nielsen has not appealed the market power finding or the two-product requirement, and the court found substantial foreclosure of Eastlan from local ratings markets. Critically, the Hill unremitting-policy doctrine does not ask the court to evaluate whether Nielsen's stand-alone price was commercially reasonable. Coercion is established by the categorical policy itself, not by any assessment of what Nielsen charged.

The Price-Differential Theory: Constructive Tying and the American Manufacturers Question

Setting aside the question of the express tie, Cumulus separately argues — and the district court found — that Nielsen's stand-alone national radio ratings product price was itself coercive. This constructive tying theory rests on the proposition that a price differential conditioning access to one product on the purchase of another can constitute unlawful tying even absent an express written condition.

The foundation for this theory lies in a never-fully-resolved tension within the Second Circuit. In American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, the Second Circuit first held in 1967 held that a seller cannot condition access to one product on the purchase of a package by charging a prohibitively higher stand-alone price.[5]

Four years later, on remand after a full trial, the same court reached a different result — holding that a buyer who failed to "persevere long enough" in negotiations to "feel any economic pressure" could not establish coercion, and that such "bartering ploys" are "not generally the concern of antitrust laws."[6]

The tension turns on a distinction the parties now dispute sharply. Cumulus reads American Manufacturers I as establishing the legal rule (a price differential conditioning one product on another is unlawful) and American Manufacturers II as reaching a factual conclusion on a different record. Nielsen reads American Manufacturers II as holding that an opening stand-alone price, however high, is not unlawful tying absent evidence the buyer persevered long enough to establish genuine coercion.

This distinction maps directly onto the sharpest factual dispute. Nielsen characterizes its stand-alone national radio ratings product offer as an "opening proposal" that Cumulus "did not engage with or counter." Cumulus characterizes it as Nielsen's fourth offer — made only after Cumulus had already put Nielsen on written notice of the antitrust violation — and notes it made three further counteroffers proposing individual pricing for the national radio ratings product, which Nielsen rejected.

The district court's findings sided with Cumulus. Because American Manufacturers II's holding explicitly turned on whether the plaintiff persevered long enough to feel economic pressure, the Second Circuit's resolution may determine whether American Manufacturers II applies at all.

The most frequently cited authority on the constructive-tying question is the Southern District of New York's decision in Ortho Diagnostic Systems v. Abbott Laboratories, in which the court in 1996 dismissed a Section 1 tying claim because Abbott had received more than $9.5 million — over 17% of its 1993 blood-screening revenues — from actual stand-alone sales at unbundled prices, establishing empirically that unbundled purchase was not

economically prohibitive.[7] By contrast, Nielsen's stand-alone national radio ratings product offer produced zero stand-alone purchases.

Given the other paths available, it seems likely the Second Circuit will bypass the American Manufacturers question. But the Nielsen facts represent a strong predicate for resolving it, and its answer would define the boundary of tying liability for any monopolist whose customer rejects a stand-alone price as economically infeasible.

Anticompetitive Effects: Two Distinct Elements

Nielsen contends Cumulus cannot show injury from the network policy because Nielsen offered a stand-alone national radio ratings product option. But that argument addresses the coercion element, or whether Cumulus was individually compelled to purchase the tied product. It says nothing about anticompetitive effects, or whether competition in the tied product market — local radio ratings — was harmed by the network policy's operation across the broader market.

The existence of a less efficient alternative does not eliminate foreclosure — it means foreclosure is not total. Even if the stand-alone offer gave Cumulus an option, the network policy foreclosed Eastlan from that customer segment across all markets. The three major integrated broadcasters control roughly a third of radio advertising dollars and represent the commercially valuable accounts Eastlan needs to achieve economically viable scale. Without them, Eastlan faces coverage gaps that reduce its attractiveness to remaining potential customers, creating a self-reinforcing dynamic.

The U.S. District Court for the District of Columbia's decision in United States v. Google LLC supplies a close doctrinal parallel: "[W]hen a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general."[8]

Eastlan cannot achieve the scale necessary to become a genuine competitive constraint not because its product is inferior, but because Nielsen's exclusionary conduct has blocked access to the customer accounts necessary for growth.

Procompetitive Justifications: Cumulus' Strongest Issue

The procompetitive justification analysis most clearly favors Cumulus. The governing framework from the Second Circuit's 2015 decision in New York ex rel. Schneiderman v. Actavis PLC,[9] requires a procompetitive justification to be "specified and substantiated" — not merely asserted — and when a court finds a justification pretextual, it "need not weigh" it against anticompetitive harms.

But Nielsen's cost-recovery justification fails Microsoft's sufficiency requirement. If the network policy genuinely reflected cost-recovery needs, one would expect internal analyses quantifying those costs, correlating them to local data collection, and explaining why the specific stand-alone price offered to Cumulus tracked those costs. The record contains no such analysis.

A further complication is the cross-market problem. Nielsen's cost-recovery claim, even if credited, inures to the national ratings market, while the anticompetitive harm is in the local ratings market where Eastlan competes — and procompetitive benefits in one market only rarely rebut anticompetitive effects in another.

Pretext Under Schneiderman

The district court's pretext finding rests on two reinforcing pillars: the complete absence of any cost quantification or internal business analysis supporting cost recovery, and Nielsen's own contemporaneous documents showing the policy was designed to "drive local subscription" and "command subscriptions in local markets."

Under Schneiderman, a defendant's "own documents" rebut its procompetitive justifications when they contradict the claimed purpose.[10]

Nielsen argues a pretext finding requires a record "replete" with evidence of anticompetitive purpose, quoting Schneiderman. But "replete" describes the record in Schneiderman, not a threshold requirement the Second Circuit imposed.

Conclusion: Three Paths and What Is Actually at Stake

The Second Circuit has several paths to affirmance.

The per se waiver path is the narrowest and most procedurally contingent. If the Second Circuit holds that Nielsen failed to squarely challenge the district court's per se finding in its opening brief, affirmance on that ground would say relatively little about tying doctrine going forward — the substantive questions would remain open for the next case that presents them. For practitioners, the lesson is a familiar but consequential one: A litigant that wants to preserve a defense against per se characterization must say so expressly in its opening brief.

The argument that rule-of-reason defenses implicitly contest per se treatment — Nielsen's position on reply — is a weaker form of preservation than a direct challenge, and courts may have little patience for it. A party that allows per se treatment to go uncontested at the appellate level may forfeit the ability to complain about it later.

A ruling on the Hill unremitting policy doctrine would carry more lasting precedential weight. Hill establishes that a monopolist's categorical written condition — tying access to an essential product to purchases of a competing product across the entire customer base — constitutes coercion as a matter of law, without any individualized inquiry into whether a particular buyer was actually forced. A Second Circuit affirmance on Hill grounds would confirm that doctrine for a generation of data services cases in which essential upstream products generate exactly this kind of leverage.

Importantly, the Hill theory is a Section 1 theory; an affirmance on that ground would leave open whether the network policy separately constitutes monopoly maintenance under Section 2 — a question the district court answered in Nielsen's favor and which neither party pressed on appeal. That open question may matter in future cases where the express tie evidence is less clear.

A ruling on Schneiderman pretext grounds would be the most consequential for procompetitive justification doctrine. Schneiderman established that a defendant's own contemporaneous documents can defeat a claimed justification when they point to competitive entrenchment rather than the stated purpose.

A Second Circuit affirmance applying that principle to a bundling and pricing case — as distinct from Schneiderman's product withdrawal context — would extend the doctrine to a

new category of conduct and send a clear signal to monopolists contemplating exclusionary bundling policies: A justification that lacks contemporaneous, quantified internal support will not be available when litigation arrives.

When it heard argument on May 7, the Second Circuit appeared skeptical of Nielsen's merits defense, directing its sharpest questions at the coercion element and the conditional-tying framework. The panel invoked the Supreme Court's opinions in United States v. Loew's[11] and Jefferson Parish Hospital District No. 2 v. Hyde,[12] as well as its American Manufacturers line of cases, suggesting engagement with the doctrinal foundations of conditional tying and the coercion inquiry those cases supply.

The panel did express some concern about the specificity of the injunction as written, though it questioned whether further specification would be readily achievable — a remedial question that, under Loew's, the district court may be better positioned than an appellate court to resolve. And the panel seemed inclined to issue a decision relatively quickly, given that Cumulus is in bankruptcy and will lose access to the Nielsen data, and likely its customers, by Sept. 1.

For Cumulus, the urgency is not abstract — if the court does not rule before the September report cycle, the preliminary injunction that has kept it in business may lapse before any of these questions are answered on the merits. Either way, the ruling will be studied closely by companies in analogous positions and by the practitioners advising them.

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[1] Leegin Creative Leather Products Inc. v. PSKS Inc., 551 U.S. 877, 885–87 (2007).

[2] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[3] Hill v. A-T-O Inc., 535 F.2d 1349 (2d Cir. 1976).

[4] AngioDynamics Inc. v. C.R. Bard Inc., 537 F. Supp. 3d 273 (N.D.N.Y. 2021).

[5] American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, 388 F.2d 272, 283 (2d Cir. 1967) (Am. Mfrs. I).

[6] Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres Inc., 446 F.2d 1131, 1137 (2d Cir. 1971) (Am. Mfrs. II).

[7] Ortho Diagnostic Systems v. Abbott Laboratories, 920 F. Supp. 455 (S.D.N.Y. 1996).

[8] United States v. Google LLC, 747 F. Supp. 3d 1, 163 (D.D.C. 2024).

[9] New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015).

[10] See also United States v. Google, 778 F.Supp.3d 797, 868 (E.D. Va. 2025) ("courts

may give greater weight to the contemporaneous statements contained in the company's internal records than to later trial testimony").

[11] 371 U.S. 38 (1962).

[12] 466 U.S. 2 (1984).