[Vanderbilt Law Review](https://scholarship.law.vanderbilt.edu/vlr)

Volume 36
Issue 2 *Issue 2 - March 1983*

Article 1

3-1983

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VANDERBILT LAW REVIEW

VOLUME 36 MARCH 1983 NUMBER 2

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Class action tying arrangement suits present courts with difficult issues because the "common question" requirement for class certification complicates the already complex economic analysis that courts must use to establish the tying arrangement's harm. In his Article Professor Hovenkamp argues that class certification should depend on the economic function of the tying arrangement in the defendant's distribution scheme. Most tie-ins, he notes, benefit some groups of potential plaintiffs and harm other groups, and these groups vary depending on the function of the tying arrangement. Professor Hovenkamp evaluates the various purposes and effects of tying arrangements and analyzes the propriety of certifying a tying arrangement class action in each situation. He concludes that tie-ins in which the court cannot determine easily which plaintiffs have suffered injury are not suitable for class action proceedings. Professor Hovenkamp proposes that in these situations use of nonmutual, offensive collateral estoppel may be a viable alternative.

I. INTRODUCTION

Few areas of federal antitrust law are more confusing than the law that governs tying arrangements. Plaintiffs compound the confusion by bringing tying arrangement cases as class actions because the "common question" requirement for class certification vastly complicates the economic analysis of the potential harms of tying arrangements. In their recent attempts to unravel some of this confusion, scholars have failed to focus on either the economic justifications for tying arrangements or the precise nature of the arrangements' poten-

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tial for economic harm.[1] This Article begins with the premise that one cannot understand the class action tying arrangement case without understanding the tying arrangement—its functions, potential economic benefits, and potential harms. Indeed, these considerations should be crucial to a court's decision whether to certify a tying arrangement class action.

A. *Tying Arrangements*

A tying arrangement is a condition that a seller imposes upon a buyer which allows the buyer to purchase one product only if the buyer also takes a second product.[2] The first product, presumably the one that the purchaser really wants, is the "tying product." The second product, which the buyer may not want, is the "tied product." The creator of the tying arrangement may lease rather than sell one or both of the products.[3]

Sellers create tying arrangements for several reasons, and correspondingly, tying arrangements have a number of social and economic effects. Among the purposes and effects that courts, commentators, and litigants have attributed to tying arrangements are the following: (1) They permit the holder of a monopoly to create an additional monopoly in a second ("tied") product and thereby increase monopoly profits;[4] (2) they permit sellers in price-regulated markets to avoid or conceal avoidance of price regulation;[5] (3) they permit certain sellers to engage in or conceal predatory pricing;[6] (4) they permit certain kinds of sellers to engage in or conceal price discrimi-

1. *See* Austin, *The Individual Coercion Doctrine in Tie-In Analysis: Confusing and Irrelevant*, 65 CAL. L. REV. 1143 (1977); Matheson, *Class Action Tying Cases: A Framework for Certification Decisions*, 76 NW. U.L. REV. 855 (1982); Note, *Tying the Hands of Franchisees — The Individual Coercion Doctrine in Antitrust Class Actions*, 9 CONN. L. REV. 164 (1976); Note, *Tying Arrangements—Class Actions—Each Franchisee Must Prove Individual Coercion*, 55 TEX. L. REV. 343 (1977); Note, *Tying Arrangements and the Individual Coercion Doctrine*, 30 VAND. L. REV. 755 (1977).

2. Federal antitrust law condemns tying arrangements in § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), and in § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Although the statutes may impose slightly different substantive tests and have slightly different subject matter and jurisdictional limits, these distinctions are of no concern in this Article. *See* Hovenkamp, *Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy*, 33 HASTINGS L.J. 325 (1981).

3. *See* IBM v. United States, 298 U.S. 131 (1936).

4. *See* Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 21 (1957); *infra* notes 51-62 and accompanying text.

5. *See* Bowman, *supra* note 4, at 21-23; Markovits, *Tie-ins and Reciprocity: A Functional, Legal, and Policy Analysis*, 58 TEX. L. REV. 1363, 1383-85 (1980); *infra* notes 64-71 and accompanying text.

6. *See* Markovits, *supra* note 5; *infra* notes 72-76 and accompanying text.

nation, or alternatively, they permit certain sellers to meter costs in situations in which sellers' costs vary with use;[7] (5) they may increase efficiency by improving the quality or distribution of a seller's product.[8] Sellers may create tying arrangements for one or more of these reasons.[9]

In the strictest physical sense, virtually all sales are "tying arrangements." For example, a customer cannot walk into a grocery store and purchase corn flakes without also taking and paying for the box. A buyer cannot purchase half a jar of peanut butter without taking the other half or buy a can of vegetable soup without taking the turnips. As these illustrations suggest, the vast majority of sales are "tying arrangements" in the purest sense because these sales are so extraordinarily efficiency creating. The grocery business would come to a standstill if the law entitled every purchaser to atomize his purchases as he chose. When Congress passed the Clayton Act it did not intend to permit purchasers to remove and decline to pay for the turnips in the vegetable soup or to spoon out one-half of the jar of peanut butter and pay only for the remainder.

Nevertheless, Congress predicated the law against tying arrangements on the assumption that not all mandatory combined sales are efficiency creating. While some tying arrangements are socially beneficial, others are socially harmful. Still others may be characterized as beneficial or harmful depending upon the viewer's own economic and social values. An effective antitrust policy ought to approve the first category of tying arrangements, condemn the second category, and scrutinize the third category. In other words, the purpose of the law of tying arrangements should be to distinguish efficiency-creating from efficiency-destroying tying arrangements.[10]

This Article does not attempt to identify socially harmful tying arrangements.[11] Rather, it draws upon the vast literature and case

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7. *See* Bowman, *supra* note 4, at 20-21; Markovits, *Tie-ins, Reciprocity, and the Leverage Theory,* 76 YALE L.J. 1397, 1443-59 (1967); *infra* notes 77-122 and accompanying text.

8. *See infra* notes 123-49 and accompanying text.

9. *See, e.g.,* Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir.), *cert. denied,* 103 S. Ct. 127 (1982); *infra* notes 150-56 and accompanying text.

10. *See* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 365-81 (1978).

11. For some attempts to do this, see *id.*; L. SULLIVAN, ANTITRUST §§ 151-162 (1977); Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis,* 33 VAND. L. REV. 283 (1980); Bowman, *supra* note 4; Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis,* 30 LAW & CONTEMP. PROBS. 552 (1965); Freed, *Reconsidering the Per Se Approach to Tying Agreements,* 13 U. TOL. L. REV. 571 (1982); Markovits, *supra* note 5; Markovits, *supra* note 7; Markovits, *Part II: Tie-Ins, Leverages, and the American Antitrust Laws,* 80 YALE L.J. 195 (1970) [hereinafter cited as Markovits, *Part II*]; Posner, *Exclusionary Practices and the Antitrust Laws,* 41 U. CHI. L. REV. 506 (1974); Slawson, *A*

law of tying arrangements to suggest possible solutions to a perplexing problem in the law of antitrust class actions: under what circumstances do common questions predominate over individual questions in tying arrangement cases and thereby justify class action treatment? Courts today agree generally that although the amount of damages may vary considerably from one prospective class member to another,[12] certification of a class action requires that the *fact* of injury be demonstrable by proof common to all members of a class.[13] As this Article shows, some tying arrangements injure all customers or competitors of the seller in the same way and are socially injurious. Cases concerning tie-ins of this kind usually are suitable for class action treatment. Other tie-ins, however, injure one set of customers while they benefit another set. These kinds of tying arrangements may or may not be socially injurious.[14] They are not suitable for class action treatment unless the customers injured by the arrangement are somehow distinguishable from the customers that the tie-in benefits.

B. The Requirements of Rule 23

Federal Rule of Civil Procedure 23 governs class actions in the federal courts.[15] Rule 23(b)(3) specifically addresses class actions for damages that carry little risk of adversely affecting either the defendant or other plaintiffs if individual class members brought them as separate actions.[16] Since plaintiffs in class action tying arrangement

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Stronger, Simpler Tie-in Doctrine, 25 ANTITRUST BULL. 671 (1980); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

12. *See infra* text accompanying notes 20-21.

13. Alabama v. Blue Bird Body Co., 573 F.2d 309, 327-28 (5th Cir. 1978); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); Windham v. American Brands, Inc., 565 F.2d 59, 69-70 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 968 (1978); Martino v. McDonald's Sys., 86 F.R.D. 145, 147 (N.D. Ill. 1980); *see* Kypta v. McDonald's Corp., 671 F.2d 1282, 1284 (11th Cir.), *cert. denied*, 103 S. Ct. 127 (1982).

14. Whether tie-ins of this kind are socially injurious is a fundamental question of liability and is not a central concern of this Article.

15. *See* Advisory Committee's Note, 39 F.R.D. 69, 102 (1966).

16. Rule 23(b)(3) states:

> Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . . .
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or

cases seek predominantly damages, they bring virtually all these actions under rule 23(b)(3). Rule 23(b)(3) not only requires that certain questions be common to all members of the class, but also that these common questions "predominate" over individual questions. The rule does not define predominate, and no generalized theory of common question predominance has developed in the case law. Courts, however, have articulated a number of criteria.[17] For example, certification of a rule 23(b)(3) class requires a showing that the simultaneous litigation of certain issues with respect to all class members will save substantial judicial time.[18] Under this standard, even if some issues require separate resolution for each class member, the court, nevertheless, will approve certification if a "common nucleus of operative facts"[19] exists that the court can determine most efficiently in a sin-

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against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

See Advisory Committee's Note, 39 F.R.D. at 96, 102-103.

Rule 23(b)(1) permits a class action when separate actions might adversely affect class members or the opposing party. Although rule 23(b)(1) might apply in some antitrust cases, plaintiffs rarely have used it. A few situations, however, have arisen in which the common interest of a group of antitrust plaintiffs was strong enough that a court was willing to certify a class under rule 23(b)(1). For example, in Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 901 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682, 685 (2d Cir. 1977), plaintiffs were all members of the same association of athletic teams, and a proposed league merger affected all team members. The advantages of using rule 23(b)(1) are several. First, unlike rule 23(b)(3), it does not require individual notice to class members. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Second, while rule 23(b)(3) gives class members the option of excluding themselves from the class, rule 23(b)(1) does not. *See* FED. R. CIV. P. 23(c)(2). Last, while rule 23(b)(3) explicitly requires that those parties seeking certification show that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," rule 23(b)(1) assesses no such requirement. The case law has muted these differences considerably. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1777-1779, 1786-1788 (1972). One instance in which rule 23(b)(1)(A) might have been applicable in tie-in litigation was Sandles v. Ruben, 89 F.R.D. 635 (S.D. Fla. 1981). The plaintiff class seeking certification in *Sandles* comprised owners of condominium units in a single condominium complex. They alleged that a mandatory 99-year recreational lease in part of the common areas of the condominium complex was an illegal tying arrangement. Each member of the class owned an exclusive interest in his individual condominium unit and an undivided interest in the common areas, which members of the proposed class shared. Thus, a declaration by the court in an action brought by any individual condominium unit owner that the 99-year lease in the common areas was invalid could adversely affect the rights of all other owners in the condominium complex. *See* Bennett v. Behring Corp., 42 ANTITRUST & TRADE REG. REP. (BNA) 1222 (S.D. Fla. Mar. 12, 1982). A common interest in real property, however, does not guarantee that the court will certify a class of people who have the interest. *See* Potrero Hill Community Action Comm. v. Housing Auth., 410 F.2d 974 (9th Cir. 1969).

17. For a general discussion of these criteria and the issues surrounding them, see 7A C. WRIGHT & A. MILLER, *supra* note 16, § 1778.

18. *See id.* § 1779.

19. *See id.* § 1778, at 53; Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*,

gle proceeding. Just because the amount of damages suffered by each class member varies, a court will not deny certification as long as common proof for the class as a whole can establish violation of the statute, causation, and fact of injury.[20]

A price-fixing conspiracy that injures all direct purchasers in a cartelized market is a paradigm example of an antitrust action suitable for rule 23(b)(3) treatment.[21] Although each member of the class may have purchased a different amount of the cartelized product and, therefore, claims a different amount of damages, the existence of the cartel and the injury it caused nevertheless present questions common to all direct purchasers. These questions "predominate" for rule 23(b)(3) purposes.[22] If proof of a liability question will vary from one putative class member to another, however, then the court either should not certify the class or it should identify a smaller, more homogeneous class.[23] In general, the courts adamantly require that the fact of injury be susceptible to common proof for all members of the class.[24]

II. Class Actions and the Logic of Tying Arrangements

Tying arrangements occasionally affect all purchasers in the same way and present questions suitable for class action consideration. More frequently, however, the tying arrangement has the economic effect of dividing its "victims" into groups. The tie-in disadvantages some groups more than others; some suffer no injury at all, and a few actually benefit from the alleged tying arrangement. In these cases class action certification is unsuitable unless the court can limit the putative class to a group of persons upon whom the tying arrangement has a similar and adverse impact.

To decide whether a tying arrangement case is suitable for class action certification, a court first must establish the economic function that the tying arrangement serves in the defendant's distribution scheme. Only through this determination can a court ascertain

394 U.S. 928 (1969).

20. 7A C. Wright & A. Miller, *supra* note 16, § 1778, at 54-55 nn. 29 & 30.

21. *See* Reiter v. Sonotone Corp., 442 U.S. 330 (1979); National Constructors Ass'n v. National Elec. Contractors Ass'n, 498 F. Supp. 510 (D. Md. 1980); *In re* Plywood Anti-Trust Litig., 76 F.R.D. 570 (E.D. La. 1976); Illinois v. Harper & Row Publishers, 301 F. Supp. 484 (N.D. Ill. 1969).

22. *See* 7A C. Wright & A. Miller, *supra* note 16, § 1781, at 79-80.

23. *See, e.g.*, Kendler v. Federated Dept. Stores, Inc., 88 F.R.D. 688 (S.D.N.Y. 1981); Boro Hall v. Metropolitan Tobacco Co., 74 F.R.D. 142 (E.D.N.Y. 1977); McCoy v. Convenient Food Mart, Inc., 69 F.R.D. 337 (N.D. Ill. 1975).

24. *See supra* cases cited note 13.

whether the legal issues in a case are predominately common to all class members or whether they are individual and thus necessitate separate actions.

To determine the legality of tying arrangements, courts have developed a verbally simple test that belies the complexity and inconsistency of the underlying case law. Although many courts identify three elements of an illegal tying arrangement, those courts actually have combined two or more distinct legal questions into a single element.[25] In the interest of clarity, therefore, this Article uses the five element test that the United States Court of Appeals for the Second Circuit articulated in 1980, as follows: (1) There must be separate tying and tied products; (2) there must be "evidence of actual coercion by the seller that in fact forced the buyer to accept the tied product . . .;" (3) the seller must possess "sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product . . .;" (4) there must be "anticompetitive effects in the tied market . . .;" and (5) there must be "involvement of a 'not insubstantial' amount of interstate commerce in the tied product market . . . ."[26]

The courts first developed this legal test for tying arrangements before economic efficiency emerged as a major concern of the antitrust laws. The test, therefore, largely ignores the elements of economic efficiency and the tying arrangements' economic impact on purchasers. A judicial test that attempted to distinguish between efficiency-creating and efficiency-destroying tying arrangements probably would differ substantially from the standard that the courts now use. The current test, however, appears to have the imprimatur of the United States Supreme Court[27] and likely will remain in use. Cre-

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25. For an example of a three part test, see Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), in which the court stated:

> *First*, . . . the scheme in question involves two distinct items and provides that one (the tying product) may not be obtained unless the other (the tied product) is also purchased. . . . *Second*, . . . the tying product possesses sufficient economic power appreciably to restrain competition in the tied product market. . . . *Third*, . . . a "not insubstantial" amount of commerce is affected by the arrangement.

448 F.2d at 47 (emphasis by the court) (citations omitted). This test merges the requirements of market power in the tying product and the existence of injury. *See infra* note 43.

26. Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 (2d Cir. 1980) (citations omitted). For a slightly different five part test, see Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 117-18 (C.D. Cal. 1978). The Ninth Circuit, however, refused to adopt the suggested test. Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1352 n.8 (9th Cir. 1982). For a four element test that is now the law of the Fifth Circuit, see Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286, 289 (5th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3649 (Mar. 7, 1983 U.S.); Bob Maxfield, Inc. v. American Moters Corp., 637 F.2d 1033, 1037 (5th Cir. 1981).

27. The Supreme Court has not adopted the generally accepted three part tie-in test that

ative courts have read economic efficiency into certain elements of the test; for example, they occasionally have used economic efficiency as a criterion to determine whether the "package" that the defendant sold consisted of separate products or a single product. These courts have reasoned that if a seller can manufacture or distribute items most efficiently in a certain package, then the evidence is strong that the particular package is a single product.[28] Indeed, by ignoring the element of economic efficiency, the current test fails to address the possibility tbat a particular tying arrangement should be legal because it is efficiency creating.

Two elements of the Second Circuit's test create no barrier to class action certification of tying arrangement cases. The courts uniformly consider the issue whether the tying arrangement consists of separate tying and tied products to be common to all members of the class.[29] Similarly, the issue whether the tying arrangement affects a "not insubstantial" amount of commerce in the tied product market is common to all class members because the court determines the substantiality requirement using the defendant's total sales, not its sales to any particular plaintiff.[30]

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appears in Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). *See supra* note 25. In Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953), however, the Supreme Court required that the tie-in consist of separate tying and tied products. *Id.* at 613-14. Writing for the majority, Justice Clark also stated that in tying actions brought under § 1 of the Sherman Act, the plaintiff must show both sufficient market power in the tying product to restrain competition in the tied product and restraint of a substantial volume of commerce in the tied product. *Id.* at 608-09. Justice Clark, however, added that if a plaintiff brings the action under § 3 of the Clayton Act, only one of these two conditions must be shown. *Id.* The circuits generally have ignored Justice Clark's distinction and have opted for a unitary test that imposes all three requirements. *See* Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980); Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 428 (5th Cir. 1978); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977).

28. For express acknowledgement of the relationship between efficiency and the "separate product" requirement, see Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1347-48 (9th Cir.), *cert. denied*, 103 S. Ct. 305 (1982); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1352-53 (9th Cir. 1982); Principe v. McDonald's Corp., 631 F.2d 303, 309-11 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); Anderson Foreign Motors v. New England Toyota Distribs., 475 F. Supp. 973, 982 (D. Mass. 1979); ILC Peripherals Leasing Corp. v. IBM, 448 F. Supp. 228, 233-34 (N.D. Cal. 1978) (*Memorex*); Meenan Oil Co. v. Long Island Lighting Co., 39 A.D.2d 233, 238, 333 N.Y.S.2d 657, 661 (Sup. Ct. 1972). The "separate products" requirement is actually an indirect way for a court to determine the legality of a particular tying arrangement based on its efficiency.

29. Courts that have examined roughly identical sets of facts, however, have decided the separate products issue differently. *Compare* Martino v. McDonald's Sys., 81 F.R.D. 81, 87-88 (N.D. Ill. 1979) (franchise rights and lease in store are separate products) *with* Principe v. McDonald's Corp., 631 F.2d 303, 309-10 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) (franchise rights and lease in store are a single product).

30. *See* Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 501-02 (1969).

Courts in tying arrangement class action cases have used the three remaining elements of the Second Circuit test to defeat the rule 23(b)(3) requirement that common questions predominate over individual questions. Federal courts have found certification improper on the ground that the plaintiffs failed to prove that they as a class were forced to purchase the tied product.[31] Courts also have held that one must analyze the seller's market power in the tying product individually for different purchaser-plaintiffs in different geographical areas.[32] Finally, some courts have held that the existence of "anticompetitive effects" can vary depending upon the plaintiff and, thus, the issue requires individual analysis and a denial of class certification.[33] The last of these three elements is the most problematic. A determination whether the tying arrangement actually required each class member to take the tied product along with the tying product usually reduces to the rather simple conceptual problem but difficult factual problem of deciding if some members of the class could have acquired the tying product without the tied product and, hence, took the tied product of their own free will. Courts have devised some simplifying schemes for answering this question. For example, circuits hold uniformly that if all members of a putative class can produce a written contractual provision requiring them to take the tied product, then the court will assume that the seller actually forced the arrangement upon them. Class certification then will be prima facie appropriate on this issue.[34] If, however, the court must examine a course of dealing between the defendant and each individual plaintiff to establish coercion, or if the evidence shows that the parties negotiated each sales package individually with terms that varied from one purchaser to another, then the issue is likely to be an individual question, and class certification is inappropriate.[35]

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31. Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1226 (3d Cir.), *cert. denied,* 429 U.S. 823 (1976); Cities Serv. Oil Co. v. Coleman Oil Co., 470 F.2d 925, 930 n.5 (1st Cir. 1972), *cert. denied,* 411 U.S. 967 (1973); Schuler v. Better Equip. Launder Center, Inc., 74 F.R.D. 85, 87 (D. Mass. 1977); Hehir v. Shell Oil Co., 72 F.R.D. 18, 21-22 (D. Mass. 1976); *see* Matheson, *supra* note 1, at 875-80.

32. *See* Cash v. Arctic Circle, Inc., 1980-1 Trade Cas. (CCH) ¶ 63,095 (E.D. Wash. Dec. 14, 1979); Esposito v. Mister Softee, Inc., 1980-1 Trade Cas. (CCH) ¶ 63,089 (E.D.N.Y.) Dec. 14, 1979); *infra* notes 36-38 and accompanying text.

33. *See* Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir.), *cert. denied,* 103 S. Ct. 127 (1982); Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978); Windham v. American Brands, Inc., 565 F.2d 59, 65-66 (4th Cir. 1977), *cert. denied,* 435 U.S. 968 (1978); *infra* note 44 and accompanying text.

34. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 450 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978); Martino v. McDonald's Sys., 81 F.R.D. 81, 87 (N.D. Ill. 1979).

35. *See* cases cited *supra* note 31.

The question whether the defendant has market power in the tying product has played a smaller role in tying arrangement class action certification decisions. Nonetheless, courts have used it occasionally to defeat certification of a proferred class.[36] A seller's market power is limited to certain geographic areas. As in the law of monopolies or mergers, therefore, the plaintiffs in tying arrangement cases must show that the defendant has a certain amount of power in some relevant market. When the plaintiffs are the defendant's customers, the court must limit class certification to class members that operate in that particular market.[37] When the plaintiffs are competitors of the defendant, their location is not as important because the courts measure a seller's market power vis-à-vis the purchasers of the tied package, not the seller's competitors.[38]

The economic issue of market power in tying cases is approachable from the perspective of either the defendant or the purchaser. Under the traditional legal requirement that the defendant have sufficient market power in the tying product market to restrain competi-

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36. *See* Cash v. Arctic Circle, Inc., 1980-1 Trade Cas. (CCH) ¶ 63,095 (E.D. Wash. Dec. 14, 1979); Esposito v. Mister Softee, Inc., 1980-1 Trade Cas. (CCH) ¶ 63,089 (E.D.N.Y. Dec. 14, 1979); Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 119-20 (C.D. Cal. 1978).

37. *See* Cash v. Arctic Circle, Inc., 1980-1 Trade Cas. (CCH) ¶ 63,095, at 77,443 (E.D. Wash. Dec. 14, 1979).

38. The most common kind of competitor tying arrangement lawsuit arises when a manufacturer of the tied product alleges that the tying arrangement forecloses its ability to compete for sales to those customers that purchase the tying product from the defendant. For example, an independent manufacturer or seller of automobile air conditioners might object to an automobile manufacturer's requirement that the manufacturer itself approve or make all air conditioners that its new car dealers install. *See* Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). Competitor tying suits also have occurred in the high technology computer industry when the defendant integrates two separate products, which causes a competitor that manufactures one of the older products a loss of business. *See* ILC Peripherals Leasing Corp. v. IBM, 448 F. Supp. 228 (N.D. Cal. 1978).

In general, the substantive law of tying arrangements is the same whether the plaintiffs are customers or competitors of the defendant. Certain elements of proof, however, are different in competitors' suits. For example, competitors must prove not that the seller coerced them into taking the tied product but that the seller forced its customers to do so. Thus, the location of the plaintiffs in the defendant's market is not important in a competitor's suit. The plaintiff competitor, however, must show that it competes with the defendant in the product and geographic markets for the tied product. In Moore v. Jas. H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977), the Ninth Circuit analyzed the geographic market with respect to plaintiffs' claim that defendant monopolized the market in grave memorials, in violation of § 2 of the Sherman Act. The court, however, neglected to undertake a similar analysis in examining the claim that defendant illegally tied the purchase of grave markers to the purchase of cemetery plots.

For an analysis suggesting that the individual coercion requirement is not an issue in tying arrangement lawsuits brought by competitors, see Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 978 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). For a discussion which concludes that it is a requirement, see Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286, 289-91 (5th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3649 (Mar. 7, 1983 U.S.).

tion in the tied product market, the court examines the market power question from the seller's perspective and asks essentially the same question it asks in monopoly cases:[39] does the defendant have sufficient power in the relevant section of the country to reduce its output and thereby raise its prices? The courts developed this requirement to allow plaintiffs to show that the existence of an illegal, presumably inefficient, tying arrangement is plausible, both under the traditional leverage theory and with tying arrangements used to permit price discrimination.[40] The assumption is that a seller with no market power in the tying product market could not force buyers to take an unwanted tied product; buyers simply would purchase the tying product from an alternative source.[41] If the alleged tying arrangement actually creates efficiency, then the seller will be able to impose the requirement whether or not it has market power in the tying product market. Indeed, if competition in the market is intense and the tying arrangement is extraordinarily efficiency creating, then the seller's competitors may have to establish the "tying arrangement" themselves or lose their share of the market.[42]

The most problematic element of the Second Circuit test that courts have used to defeat class certification in tying cases is the re-

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39. Although the question is essentially the same, courts generally consider the *amount* of market power required in a tying case to be less than the amount that a plaintiff must show in a monopoly case. *See* Fortner Enters. v. United States Steel Corp., 394 U.S. 494, 502-03 (1969) (*Fortner I*); Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958).

40. See *infra* notes 77-122 and accompanying text for a discussion of price discrimination.

41. The courts have created several simplifying assumptions to determine the existence of market power in the tying product. For example, if the tying product is patented or copyrighted, a presumption of market power in the tying product arises. *See* United States Steel Corp. v. Fortner Enters., 429 U.S. 610, 621 (1977) (*Fortner II*). Although some circuits believed for a time that a trademark created the same presumption, they now hold otherwise. *See* Note, *Trademarks as Tying Products: The Presumption of Economic Power*, 50 ST. JOHN'S L. REV. 689 (1976). Only the Fifth Circuit still appears to follow the doctrine that a trademark gives rise to a presumption of market power. *See* Warriner Hermetics, Inc. v. Copeland Refrigeration Corp., 463 F.2d 1002, 1012-16 (5th Cir.), *cert. denied*, 409 U.S. 1086 (1972); Matheson, *supra* note 1, at 864 n.39. For an argument that some inefficient tie-ins are plausible even absent the defendant's market power in the tying product, see Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U.L. REV. 661 (1982).

42. For example, department stores can and do impose requirements that people buying shirts take and pay for the buttons, that people who purchase left shoes also take and pay for right shoes, and that people buying volume I of Karl Marx's *Das Kapital* also take and pay for volumes II and III. The seller would not need "market power" to impose the requirement in any of these instances. Similarly, a manufacturer of one new piece of equipment which performs cheaper and better the same functions that two pieces of equipment performed before, does not need market power to sell the new product. *See* ILC Peripherals Leasing Corp. v. IBM, 448 F. Supp. 228 (N.D. Cal. 1978). Of course, if the new product is superior to the product offered by any competitor, the new product itself may confer some market power on its manufacturer, particularly if it is patented.

quirement of "anticompetitive effects" in the market for the tied product. A plaintiff must have sustained injury because it was forced to purchase the tied product. That plaintiff must have preferred not to have the tied product or to have obtained it elsewhere, perhaps at a lower price.[43] The economic rationale for this requirement of the law of tying arrangements is clear. Even a defendant that has market power in an entire area does not have the power to raise prices with every single buyer within that area. By reducing output to sell at a higher price, the monopolist acknowledges that certain marginal buyers will be unwilling to pay the higher price and will substitute away.

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43. The "anticompetitive effects" in the market for the tied product are measurable in two ways: First, by measuring the injury to a purchaser that either must buy the tied product when it really would prefer not to have the product or must pay a higher price for the package than the fair market value, and second, by measuring the injury to a competitor in the market for the tied product that results when the competitor loses a sale, not because the defendant has a more attractive product, but because of the defendant's tying arrangement.

Courts have employed different terms, such as "anticompetitive effects in the tied product market," "fact of injury," or "coercion" to describe the effect that this necessary element of the tying arrangement has on the plaintiff. Undoubtedly, the most frequently abused term is "coercion," which courts have given widely different meanings. Some courts use it to determine whether the tying arrangement actually required the plaintiff to take the tied product as a condition of obtaining the tying product. *See, e.g.*, Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1327 (5th Cir. 1976). Other courts use the term "coercion" to convey that the defendant has market power in the tying product. *See* Rex Chainbelt, Inc. v. Harco Prods., Inc., 512 F.2d 993, 1002-03 (9th Cir.), *cert. denied*, 423 U.S. 831 (1975). Finally, many courts use "coercion" to describe the foreclosure of options that faces the plaintiff-purchaser as a result of the tying arrangement. Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 663 (2d Cir. 1974). Professor Matheson argues that the term "coercion" properly refers only to the first two circumstances: the existence of the tie itself or of the market power of the defendant. Although Professor Matheson observes correctly that the term "coercion" refers to the plaintiff's obligation to take the tied product as a condition to receiving the tying product, Matheson, *supra* note 1, at 866, the use of the term to describe the existence of the defendant's market power in the tying product market is a misnomer. Someone who has market power is not necessarily coercing anyone. Under traditional tying arrangement analysis, market power is a *prerequisite* for coercion; it is not identical to coercion.

Courts that use a three part tying arrangement test do not have a separate "coercion" requirement. By merging the questions of market power in the tying product and fact of injury, however, they uniformly require that the plaintiff establish the latter element. *See* Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *supra* note 25. Since the *Siegel* decision the Ninth Circuit seems to have had some difficulty in deciding whether to apply a separate "coercion" requirement. In Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343 (9th Cir.), *cert. denied*, 103 S. Ct. 305 (1982), the court cited the *Siegel* test and added in a footnote that only a "minority of courts" additionally require "some sort of anticompetitive effect in the market for the tied product." *Id.* at 1347 n.16. In Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982), however, the court set forth the *Seigel* test but added the requirement of "some modicum of coercion." *Id.* at 1352 n.8. Since the court articulated as a separate requirement that the plaintiffs prove that the sale of the tying product was conditioned on the sale of the tied product, "coercion" could not refer to that requirement. *See also* Bell v. Cherokee Aviation Corp., 660 F.2d 1123, 1131 (6th Cir. 1981); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977).

Similarly, once a plaintiff in a tying arrangement case establishes sufficient market power in the tying product market—that is, proves that the tie-in is plausible for some reason other than efficiency—the plaintiff still must prove that the defendant's exercise of its market power injured it.

When a seller creates a tying arrangement for a purpose other than price discrimination, buyers or potential buyers fall into three categories: (1) Those that would have purchased the tying product without the tying arrangement but substitute away once the seller imposes the tying arrangement; (2) those that would have bought both the tying and tied products from the same seller at the same price anyway so that the seller's tie-in requirement is irrelevant; and (3) those that would have preferred either not to purchase the tied product at all or to buy it from a different seller, but that value the tying product so highly that they take the tied product to receive the tying product. All tying arrangements produce these three sets of purchasers or potential purchasers, regardless of the degree of the seller's market power.[44]

Although the buyers in the first category—those that opt away—almost certainly suffer economic harm from the defendant's tying arrangement, they probably do not have a cause of action because the link between their injury and the defendant's activity is too remote. In other words, a nonpurchaser will have great difficulty proving any injury from the tying arrangement.[45]

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44. This division occurs even when the tying arrangement is efficiency creating. *See infra* notes 123-49 and accompanying text. In some instances, however, one or more of the three sets may be empty. For example, certain tying arrangements created to avoid maximum price regulation—such as a gasoline seller's requirement that all gasoline purchasers buy a rabbit's foot for $5—may produce an empty category of customers that would have preferred to take both tying and tied products even absent the tying arrangement. *See infra* text accompanying note 64.

45. In Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979), plaintiff, Murray, alleged that he bought a cartelized product from a nonmember of the cartel who charged a higher than competitive price because the cartel increased the general price level in the market. *Id.* at 580. Although Murray's economics were plausible, the Third Circuit held that Murray was not within the "target area" of the antitrust violation, and that a "tenuous line of causation [existed] between defendants' price-fixing and the prices paid by Murray." Furthermore, the court found that "defendants secured no illegal benefit at Murray's expense . . .," since any profit that defendants received from membership in the cartel came from customers that actually purchased from the cartel; conversely, any costs to Murray accrued as benefits not to the violators but to their competitors. *Id.* at 583. The Third Circuit concluded that the problem of tracing the overcharge would be at least as difficult with a nonpurchaser as with an indirect purchaser. *See* Illinois Brick v. Illinois, 431 U.S. 720 (1977).

The Tenth Circuit engaged in similar analysis in Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981), *cert. denied,* 102 S. Ct. 1634 (1982), when it denied standing to plaintiff which alleged that it was unable to purchase from defendants because they were en-

The purchasers in the second category—those that would have taken both the tying and tied products even without a tie-in—simply do not suffer injury. If the tying arrangement creates and passes on no efficiencies to them and if it imposes no undesired requirements on them, they are neither better off nor worse off as a result of the tie-in. Any legal requirement that a plaintiff in a tying case show either injury in fact or that the seller actually "coerced" the plaintiff into taking the tied product must be designed to deny purchasers in this class a cause of action.[46]

Finally, those buyers forced to take the tied product against their will are the ones that can show competitive injury or coercion. In all purchaser-plaintiff cases, a class action certification requirement that the plaintiffs as a group show injury in fact, or coercion, must identify and separate this particular group of buyers.

When the purpose of the tie-in is price discrimination, purchasers or potential purchasers generally are separable into four categories: (1) Those that are better off because of the tie-in price discrimination scheme; (2) those that are neither better off nor worse off (this set of purchasers may be very small or it may be empty); (3) those that are worse off as a result of the tie-in price discrimination scheme but choose to buy from the seller anyway;[47] and (4) those that would be worse off as a result of the tie-in price discrimination scheme but that choose not to buy. Again, the law probably denies people in the fourth category a cause of action, even though the tie-in price discrimination scheme injures them.[48] Clearly the buyers in category three ought to have a cause of action, provided that tying arrangements created to permit price discrimination are illegal.[49] The pur-

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gaged in a conspiracy to reduce output and raise prices. As part of the alleged conspiracy, defendants refused to sell to new customers. The court held that plaintiff had no standing since no established course of dealing existed between plaintiff and defendants. To hold otherwise, the court noted, would permit an almost infinite number of plaintiffs in price-fixing suits, which would drive the defendants into bankruptcy. *Id.* at 868; *see In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 691 F.2d 1335 (9th Cir. 1982); Berger & Bernstein, *An Analytical Framework for Antitrust Standing,* 86 YALE L.J. 809 (1977).

46. *See* E.B.E., Inc. v. Dunkin' Donuts of America, 387 F. Supp. 737, 738-39 (E.D. Mich. 1971).

47. Some courts have attempted to identify this group of huyers by inquiring whether the plaintiff was "overcharged"—in other words, whether the price that the defendant charged for the tied product exceeded fair market value or whether the defendant's price for the package exceeded the sum of the fair market values of the tying and tied products. Presumably, no buyer would prefer to purchase a tied package if the individual components were available separately at a lower price. *See* Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir.), *cert. denied,* 103 S. Ct. 127 (1982).

48. *See supra* note 45.

49. The issue whether tying to permit price discrimination ought to be illegal has been a

chasers in categories one and two should not have a cause of action against the seller. Some courts, however, have permitted these buyers to join in class action tying arrangement litigation and have not distinguished them from the purchasers in category three.[50]

In summary, not all buyers and potential buyers of a tied package necessarily suffer injury from an illegal tying arrangement. Consequently, the most problematic class action certification issue in the law of tying arrangements is the legal requirement of injury in fact, or economic coercion. The analysis that follows pertains predominantly to the "common question" requirement of this fact of injury or coercion issue.

III. Class Actions and the Economic Functions of Tying Arrangements

A. *The Leverage Theory*

The leverage theory, which is perhaps the oldest judicial economic theory about the operation of tying arrangements and their harms, states that a seller with significant monopoly power in one product—the tying product—can use a tying arrangement to create a second monopoly in the tied product and thereby reap two sets of monopoly profits instead of one. The Supreme Court applied this rationale in *IBM v. United States*.[51] Defendant IBM had monopoly power in the market for its computation machines but not in the market for the perforated paper cards that the machines used. The Supreme Court explained that by requiring all lessees of its machines to use IBM paper cards, defendant obtained a virtual monopoly in both the cards and the machines.[52]

If the leverage theory were valid, it not only would explain many tying arrangements, but also would supply a suitable "common question" basis for class certification on the injury in fact issue in tie-in class actions. Under the leverage theory a tying arrangement injures all customers of the tying seller in the same way because the seller requires them all to pay a monopoly price for both the tying and tied products. Presumably, the amount of their injury would equal the difference between the fair market value of the tied product in a competitive market and the price they actually paid for the tied

subject of some dispute in law review commentary, although courts generally have found the practice to be a violation of the antitrust laws. *See infra* note 81.

50. *See infra* notes 105-14 and accompanying text.

51. IBM v. United States, 298 U.S. 131 (1936).

52. *Id.* at 135-36.

product, multiplied by the amount of the tied product that they purchased. Some courts, however, have held that the purchaser's damages equal the difference between the price of the entire package in a competitive market and the price that the plaintiff paid for the package. This theory suggests that if a seller uses a tying arrangement, the monopoly price in the tying product becomes illegal even though that price alone would be legal without the tie-in.[53]

Unfortunately, as economists and lawyers have argued for the past twenty-five years, the leverage theory of tie-ins rests upon an erroneous economic theory and cannot plausibly explain a significant number of tying arrangements.[54] For example, although IBM, which owned an absolute monopoly in calculating machines that used paper cards, might be able to increase its market share in the market for paper cards with a tie-in, it could not necessarily increase its monopoly profits. Unless IBM is the most efficient manufacturer of the paper cards, it actually will lose money.

All lessees of IBM's computation machines also purchase cards. The profit-maximizing price of the machines, therefore, is the lease price that produces the largest amount of revenue when the cards are sold competitively. The customers purchase a package of computation services. Hence, they attribute a price increase in either machines or cards to the package itself. For a purchaser that requires both elements of the package, the difference between a $1 increase in the price of one element and a $1 increase in the price of the other element is immaterial. In either instance the price of the package increases by $1. To illustrate, if the profit-maximizing price of using the computation machine for a year is $900, and the competitive price of a year's supply of cards is $100, then customers are paying $1000 for the combination.[55] By computing its profit-maximizing price for the machine at $900, the seller of the machines has determined that any increase in the price of the machines—to $925, for

53. In the absence of the tying arrangement, the monopoly price of the tying product alone would be legal, provided it did not violate § 2 of the Sherman Act or another antitrust statute. *See* Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir.), *cert. denied,* 103 S. Ct. 127 (1982); *infra* note 59 and accompanying text; *see also* Midwestern Waffles, Inc. v. Waffle House, Inc., No. 78-223A (N.D. Ga. Dec. 30, 1982).

54. *See, e.g.,* R. BORK, *supra* note 10, at 365-81; R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 171-84 (1976); Burstein, *A Theory of Full-Line Forcing,* 55 NW. U.L. REV. 62 (1960); Markovits, *supra* note 5, at 1363-1409; Posner, *supra* note 11; Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1349 n.19 (9th Cir.), *cert. denied,* 103 S. Ct. 305 (1982). *But see* Bauer, *supra* note 11, at 292-305.

55. This discussion assumes that all users of the computation machine require the same number of cards and that the seller did not create the tying arrangement for price discrimination or metering purposes.

example,—will reduce the seller's profit. The demand for the machine will decrease and revenues will diminish by an amount greater than the price increase will cover. Precisely the same result would occur, however, if the price of cards were to increase from $100 to $125. The price of the package would rise $25, and demand would fall by exactly the same amount as if the price of cards remained constant but the cost of the machine increased $25.

As the seller of the computation machines, IBM can maximize its profits by ensuring that the price of the cards is competitive. If a seller can produce and sell cards for $90 instead of $100, IBM would be wise to encourage that seller to do so, because when the price of cards drops, the profit-maximizing price of the computation machines will rise. The sale of the cards by IBM itself would be profitable only if it were a more efficient supplier of cards than its competitors. In that instance, however, the lessor of the machines would not need a tying arrangement to make the sales. The customers of IBM's machines would naturally buy cards from IBM if IBM's cards were cheaper than those of any other supplier. This situation might arise if a cartel controlled the market for the cards and fixed the price at $125 rather than at the competitive price of $100. By selling the cards at $100, IBM could deprive the card cartel of its profits. If IBM were selling cards more cheaply than its competitors, however, it would not need to require its lessees to purchase the cards as a condition of taking the machine.[56]

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56. A seller might use a tying arrangement to obtain a certain kind of "leverage" when the seller has market power in the tying product and a cartel controls the market for the tied product. For example, assume that the tying product is bottles; lids are the tied product and for each bottle most purchasers require one lid. The two products are obtainable from separate sellers. The lids would have a competitive price of 10¢ but sell for 15¢ because of a successful cartel. If the seller has market power in the bottle market but does not sell lids, it must predicate its profit-maximizing price on a 15¢ price for lids due to the cartel. Alternatively, if the price of lids were to fall to 10¢, the bottle seller would be able to obtain a higher profit-maximizing price for its bottles. If the combination of one bottle plus one lid sells for 50¢, purchasers do not care whether the bottle and lid producers apportion 35¢ to the bottle and 15¢ to the lid or 40¢ to the bottle and 10¢ to the lid.

Assume that the seller acquires the capacity to manufacture enough lids to satisfy the needs of its own bottle customers. If the seller raises the price of bottles to 40¢, sells lids at the competitive price of 10¢, and undercuts the cartel, customers will line up to buy the seller's lids, even though they might be buying their bottles elsewhere. As a result of the seller's inability to meet the sudden increased demand for lids, some customers will have to buy their lids from the cartel. Because the seller's price for bottles is 40¢, not 35¢, these customers will not buy their bottles from the seller. One risky alternative would be for the seller to increase its lid capacity. If the lid cartel terminates, however, the seller may have more capacity than is profitable. The better solution would be for the seller to continue to sell bottles at 35¢ but price its lids at the cartel price of 15¢, even though it is not a member of the cartel. The seller would be competing with the cartel, and some of its customers might prefer to buy bottles from the seller

Conversely, if IBM were a somewhat less efficient producer of cards than the competing producers, the tie-in would cost IBM money. If, for example, the competitive price for cards is $100 but IBM could not profitably make and sell them for less than $110 because of production inefficiencies, the company would lose money by manufacturing the cards and imposing a tying arrangement. IBM's sale of cards at $110 would be no more profitable than a competitor's sale of cards at $100 because the production inefficiencies would eat up the higher price, and IBM's profit-maximizing price for the computation machines would be lower because of the higher price that its customers were paying for the cards.

In short, if IBM has a monopoly in computation machines, but the market for cards is competitive, then IBM will realize the greatest profit when the cards are sold in the most efficient competitive market at the lowest possible price. If IBM is the most efficient card supplier, it will be able to sell its product without imposing a tying arrangement. If, however, another company is more efficient, IBM could allow the other company to sell the cards more profitably than it could require IBM customers to purchase all their cards from IBM.

Although the leverage theory of tying arrangements has no economic merit,[57] courts nevertheless apply it as a rationale for tying arrangements.[58] Consequently, it may explain certain judicial rules defining the injury that a tying arrangement causes to a purchaser. For example, in 1982 the United States Court of Appeals for the

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at 35¢, but lids from a member of the cartel at 15¢. Through a tie-in the seller can sell all its lids and bottles at maximum profit by putting the bottles and lids together in a package and selling them for 50¢. By entering the lid market, the seller is able to increase its monopoly profits by 5¢, not because it has greater monopoly power than before, but because it can transfer the monopoly profits earned by the cartel away from the cartel to itself.

57. *But see* Bauer, *supra* note 11, at 297-301. In support of the leverage theory Professor Bauer argues that if the tied product is competitive and heavily advertised, then a seller by imposing a tying arrangement would he able to sell the tied product at the competitive price but avoid the advertising or marketing cost. The seller thus would reap a supracompetitive rate of return. *Id.* at 229. This argument is fallacious, however, because if the competitors are spending their advertising money efficiently, consumers will be assigning to their products a value that reflects the advertising disbursements. Professor Bauer assumes that consumers are indifferent to whether they purchase a heavily advertised item or a comparable unadvertised item. That lack of preference permits a seller to use a tying arrangement to avoid the costs of advertising the tied product. If customers really are indifferent, however, then the competitor is wasting the money it spends for advertising. A seller does not advertise unless it expects to create consumer preference for the advertised product.

58. The Ninth Circuit, however, recently suggested that the leverage theory is discreditable and no longer should serve as a judicial rationale for condemning tying arrangements. *See* Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1349 n.19 (9th Cir.), *cert. denied,* 103 S. Ct. 305 (1982).

Eleventh Circuit in *Kypta v. McDonald's Corp.* held that to prove injury from a tie-in a plaintiff must show that the "payments for both the tied and tying products exceeded their combined fair market value."[59] Although this test may also describe the economic consequences of a tying arrangement created to permit price discrimination, the *Kypta* opinion contains no evidence that the Eleventh Circuit believed that defendant's tying arrangement was part of a price discrimination scheme. The Eleventh Circuit did not explain why defendant would use a tie-in to establish its profit-maximizing price rather than simply charge a higher price for the tying product. The court, however, did acknowledge that raising the tying product price to the profit-maximizing level was an alternative available to defendant. The court concluded that plaintiff had to do more than show that the value of the tied product alone was less than the price plaintiff paid, because "a lower price might conceivably have been exacted by the franchisor for the tying product."[60] The court appeared to establish the impossible requirement that to prove injury in a tying case the plaintiff-purchaser must show that the defendant sold the tied product at a supracompetitive price in a situation in which it could not raise the price of the tying product.[61]

Clearly, if the leverage theory were valid and a seller not engaged in price discrimination could use a tying arrangement to enlarge its monopoly profits, then the fact of injury would be uniform for all purchasers of the tying arrangement, as it is for all purchasers that buy from a cartel. Under the leverage theory all purchasers are victims of a monopoly overcharge created by a tying arrangement. Unfortunately, several courts have certified tie-in class actions based on the fallacious economic theory that tie-ins permit leverage.[62]

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59. Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir.), *cert. denied,* 103 S. Ct. 127 (1982) (citing Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972)).

60. Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir.), *cert. denied,* 103 S. Ct. 127 (1982).

61. The defendant could do this if it were using the tying arrangement to avoid maximum price regulation in the market for the tying product. *See infra* notes 64-71 and accompanying text. Such price regulation was not present in *Kypta*. Alternatively, the defendant might have been engaging in price discrimination and using the supracompetitive price in the tied product to avoid raising the price of the tying product to the nondiscriminatory profit-maximizing level. *See infra* notes 77-122 and accompanying text.

62. *See, e.g.,* Sandles v. Ruben, 89 F.R.D. 635 (S.D. Fla. 1981); Martino v. McDonald's Sys., 86 F.R.D. 145 (N.D. Ill. 1980); Rental Car of New Hampsbire, Inc. v. Westinghouse Elec. Corp., 496 F. Supp. 373 (D. Mass. 1980); Fifth Moorings Condominium, Inc. v. Shere, 81 F.R.D. 712 (S.D. Fla. 1979).

B. *The Use of Tying Arrangements to Evade Price Regulation*

A seller in a price-regulated market might want to evade price regulation for two reasons. First, if the regulated price is artifically low, the seller may believe that it can maximize its profits by charging a higher price. Second, if the regulated price is artificially high, the seller may increase its profits by selling at a lower price. Use of a tie-in to evade price regulation in the first instance generally injures the customers of the evader. By creating a tying arrangement in the second instance, a seller usually injures its competitors in the tying product. If the evader has a statutory monopoly, then use of the tying arrangements for either reason can injure competitors in the tied product by creating a type of leverage.[63]

As an example of the first kind of evasion, Judge Posner and Professor Easterbrook recount the story of a Chicago gasoline station operator during a recent gasoline shortage.[64] Federal law regulated the maximum retail pump price of gasoline and created an artifically low price. The operator sold the gasoline at its maximum legal price but required each customer to purchase a rabbit's foot for $5. Since the retail demand for gasoline exceeded the supply at the regulated price, the dealer had sufficient legally created "market power" to succeed with the scheme even at a price substantially higher than the legal maximum. Given that the rabbit's foot had a fair market value far below $5, the dealer's motive clearly was to make more profit on gasoline sales than the price regulations permitted.[65] If the fair mar-

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63. *See infra* text accompanying note 68.

64. *See* R. POSNER & F. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 809 (2d ed. 1981).

65. *See id.* Judge Posner and Professor Easterbrook suggest that defendant in United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977), created the tying arrangement at issue for the same purpose. R. POSNER & F. EASTERBROOK, *supra* note 64, at 835. Plaintiffs alleged that defendant tied the sale of prefabricated houses to the granting of loans for the purchase and development of land upon which the houses were to be placed. Defendant required payment of an above-market price for the houses. If, as Judge Posner and Professor Easterbrook suggest, state usury laws were setting a below-market interest rate, defendant could have been using the arrangement evasively to transfer part of the return on the loan to the price of the prefabricated house. *See In re* Use of the Carterfone Device, 13 F.C.C.2d 420 (1968).

Certain regulated utilities, such as telephone companies, may require customers to purchase all their terminal equipment (for example, telephones, extension cords, and recording devices) from the utilities themselves, because they can charge a supracompetitive price for these devices and thereby evade the maximum price regulation for the phone line. This activity injures not only the telephone company's customers but also competing sellers of the terminal devices. *See* Litton Systems v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983); White Directory Pub., Inc. v. New York Tel. Co., No. 78-224 (W.D.N.Y. Dec. 15, 1982); Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981), *cert. denied,* 51 U.S.L.W. 3526 (Jan.

ket value of the rabbit's foot was 25¢, the tying arrangement injured each consumer in the amount of $4.75 per gasoline purchase. A court in this instance should hold that common questions predominate and allow a class action lawsuit against the dealer.

Litigation arises more frequently in cases concerning the use of tying arrangements to evade price regulation when the evader employs the tying arrangement to *lower* the price of the regulated commodity. For example, assume that during the years of airline price regulation federal law fixed the price of a flight from San Francisco to Austin, Texas, at $100. Pacific Airlines, which flies that particular route, charges $100 but has many empty seats. Pacific determines that by charging $80 it could fill its planes and make more money. It offers its customers a package consisting of a ticket from San Francisco to Austin for $100 and, for an additional $1, a night in a $20 Austin hotel. In this particular case the "tying" product is the hotel room and the "tied" product is the airline ticket. While Pacific Airlines will sell the trip to Austin without the hotel room for $100, it will not sell the hotel room in Austin for $1 without the purchase of the air ticket. The chief victims of Pacific Airlines' scheme are, of course, its competitors that have a route from San Francisco to Austin at a regulated price of $100.[66] These airlines all have been injured in the same way by defendant's tying arrangements.[67]

If the seller imposing the tie-in in a price-regulated market has a legally protected monopoly in the tying product, and only a limited market for the tied product exists among buyers that do not purchase the tying product, then the tying arrangement can harm competitors in the tied product regardless of the seller's motive for imposing the tying arrangement. For example, an electric utility that requires all its customers to purchase lightbulbs with their electricity[68] or a telephone line company that requires customers to buy its terminal equipment[69] can cause injury to competitors that sell

18, 1983 U.S.); Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956).

66. *See* Union Pac. R.R. v. United States, 313 U.S. 450 (1941); Baltimore & O.R.R. v. United States, 305 U.S. 507 (1939); Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., 491 F. Supp. 1199 (D. Hawaii 1980).

67. *But see* Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., 491 F. Supp. 1199 (D. Hawaii 1980). Courts frequently have found injuries to competitors under the leverage theory but in the one instance when inefficient injury to competitors by means of a tie-in was plausible, the court failed to recognize it. This failure was due largely to the court's confusion of the tying product with the tied product.

68. *See* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); White Directory Pub., Inc. v. New York Tel. Co., No. 78-224 (W.D.N.Y. Dec. 15, 1982).

69. *See* Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981), *cert. denied*, 51 U.S.L.W. 3526 (Jan. 18, 1983 U.S.); *In re* Use of the Carterfone Device, 13 F.C.C.2d

lightbulbs or telephone instruments. In these cases the injury accrues not because the defendant is evading the price regulation at the expense of buyers or competitors, but because the legal monopolist's tying arrangement forecloses competition in the market for the tied product. In short, the price-regulated monopoly provides an instance in which a modified version of the leverage theory works: a seller with a legal monopoly in one (regulated) product can create a virtual monopoly in a second (unregulated) product and obtain monopoly profits that the price regulation otherwise would deny it.

Tying arrangements in price-regulated industries may be efficiency creating. For example, the airlines' flight-hotel scheme actually may fill airplanes at a price that is profitable to the airlines and provides a more efficient allocation of resources than did price regulation. The recent substantial deregulation of airline industry prices supports this notion.[70] Nevertheless, in general, efficiency should not be a defense when the purpose of the tying arrangement obviously is to evade the statutory regulation. The legislature and the relevant regulatory agency already have decided how best to allocate resources in that market. If the activity is within the jurisdiction of the antitrust laws,[71] the courts should condemn the tie-in regardless of any

420 (1968); International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 518 F.2d 913 (9th Cir. 1975).

70. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in various sections of 49 U.S.C.); Keeler, *Airline Regulation and Market Performance*, 1972 BELL J. ECON. 399; Panzar, *Regulation, Deregulation, and Economic Efficiency: The Case of the CAB*, 69 AMER. ECON. REV. 311 (1980). In general, evasion of price regulation is likely to be efficient when the evader's profit-maximizing price is lower than the regulated price, because the evasion will benefit consumers, at least in the short run. Evasion of price regulation is likely to be inefficient when the evader's profit-maximizing price is higher than the regulated price, since the evasion will constitute an increase in the seller's monopoly rents at the expense of its customers. The single exception to this latter rule occurs when the regulated price is lower than the seller's marginal cost—that is, when the regulatory authority presumably made an error and imposed an unprofitable price on the price-regulated industry.

71. In some instances a seller's activities in a price-regulated market are exempt from the antitrust laws. This exemption generally falls under the rubric of "implied immunity" if the price regulation is federal, and under the "state action" doctrine if a state imposes tbe regulation. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Canter v. Detroit Edison Co., 428 U.S. 579 (1976); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973); Parker v. Brown, 317 U.S. 341 (1943); Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981), *cert. denied*, 51 U.S.L.W. 3526 (Jan. 18, 1983 U.S.); Sound, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324 (8th Cir. 1980); Essential Communications Sys. v. American Tel. & Tel. Co., 610 F.2d 1114 (3d Cir. 1979); International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 518 F.2d 913 (9th Cir. 1975); Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 HARV. L. REV. 435 (1981); Note, *The Application of Antitrust Law to Telecommunications*, 69 CALIF. L. REV. 497 (1981); Note, *AT & T and the Antitrust Laws: A Strict Test for Implied Immunity*, 85 YALE L.J. 254 (1975).

defense that avoidance of the statutory price regulation is efficient.

Clearly, the issue of the seller's market power in the tying product should be irrelevant in cases concerning tying arrangements created to evade price regulation. The price regulation acts as a substitute for market power. If the regulated price is higher than the defendant's profit-maximizing price, the price regulation statute prohibits others from competing with the tying arrangement without violating the price regulation statute themselves. When the regulated price is lower than the defendant's profit-maximizing price, the statutory regulation creates artificial shortages that permit the defendant to sell at a price higher than the law permits through the use of tying arrangements. For example, the gasoline dealer that foists a rabbit's foot upon its customers may have far less than one percent of the retail gasoline market in Chicago and would have no market power if competition determined prices. The price regulation statute, however, creates a dislocation between the price of gasoline and the demand and gives the dealer a perfect substitute for the market power requirement in tying cases.

It follows, therefore, that in a tying arrangement the purpose of which is to thwart the consequences of price regulation, questions of "market power" and fact of injury are common to all members of the class. If the class members can show by common proof that they all were required to take the tied product, then a court should certify the class.

C. The Use of Tying Arrangements to Conceal or Facilitate Predatory Pricing

A seller can engage in predatory pricing in two ways: By lowering the price of a product, or by maintaining the price while improving the quality of the product or adding some special service at less than cost. The latter technique may constitute a tying arrangement. To illustrate, a grocery store might engage in predatory pricing by leaving its retail grocery prices unchanged but offering free delivery of all purchases. If the price charged for the groceries plus the delivery is less than the seller's average variable cost, then the defendant may be engaging in predatory pricing under the Areeda-Turner test.[72] The

72. *See* 3 P. AREEDA & D. TURNER, ANTITRUST LAW 154 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). The Areeda-Turner test, which suggests that a price below reasonably anticipated average variable cost is illegal, does not distinguish predatory pricing accomplished by lowering the price of a product from predatory pricing achieved hy adding an extra product or service to the package, provided that the defendant's average variable cost reflects the cost of the additional

combination of groceries plus delivery is a "tying arrangement" because the grocery store will not make a delivery unless the buyer also purchases groceries there. Sellers might use tie-ins to facilitate predation in price-regulated industries, in which the seller cannot legally lower the price of its product but may be able to attach a service at a price lower than the cost of delivering the service.[73]

Although concealment or facilitation of predatory pricing may explain certain tying arrangements, a class action tie-in lawsuit in which the plaintiffs allege predatory pricing is implausible. A seller is unlikely to be able to engage in predatory pricing against a group of competitors so large that it warrants class action consideration. Such a case might arise if, for example, a defendant has forty percent of a market and sixty competitors have one percent each. The giant might attempt to drive out the pygmies through predatory pricing.[74] Nevertheless, most predatory pricing cases to date have consisted of a solitary plaintiff or a small group of plaintiffs.

A possible exception to this general rule exists: a class action predatory pricing suit brought by customers of the predator. The modern law of predatory pricing rests on the assumption that the ultimate victims of predation are not the competitors of the predator, but its customers. Indeed, Professors Areeda and Turner base their test for predatory pricing on the premise that a seller will engage in predatory pricing only if it has a reasonable belief that it can sell below cost to dispatch competitors from the market, then recoup all losses encountered during the predatory period by selling at a monopoly price, and still realize a profit.[75] A group of consumers that must pay monopoly prices as a result of a seller's previous removal of all competition through predation should have a cause of action

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product or service. Professors Areeda and Turner do discuss the problem of additional services provided at below marginal cost as a form of predatory pricing. *See id.* at 728; *see* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 304-12 (1981); Ordover & Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8 (1981).

73. *See, e.g.*, Sound, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324 (8th Cir. 1980).

74. Predatory pricing in this circumstance, however, is extremely implausible. Predatory pricing generally will not be successful in a market in which barriers to entry are low, because the predatory activity will be profitable only if the predator can enjoy a substantial period of supracompetitive pricing once it removes its rivals from the market. The presence of 40 firms in a market, each with a one percent share, suggests low barriers to entry. *See* Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738, 742 (1981).

75. *See* 3 P. AREEDA & D. TURNER, *supra* note 72, at 151; Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1031 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982).

under the antitrust laws.[76] Plaintiffs likely will file such a lawsuit as a monopolization action under section 2 of the Sherman Act rather than as a tying arrangement case under section 3 of the Clayton Act. The group of customers paying the higher price is a victim not of a tie-in but of the prior use of a tie-in to perpetrate a successful scheme of predatory pricing.

D. Tying Arrangements as Metering or Price Discrimination Devices

Sellers commonly use tying arrangements as metering or price discrimination devices.[77] Although economists almost universally view metering and price discrimination as principle functions of tying arrangements, few federal courts have analyzed tie-ins in this way.[78] Rather, courts generally consider the issue whether a seller is using a tying arrangement to facilitate metering or price discrimination as irrelevant to the determination of legality. Consequently, little law exists that specifies the circumstances under which a seller can employ a tie-in as a metering or price discrimination device. An unfortunate situation arises when a seller uses a tying arrangement for nondiscriminatory metering, because this metering serves as an alternative to more costly or less reliable metering mechanisms. Tie-ins that permit the seller to engage in nondiscriminatory metering are socially efficient, and the antitrust laws should not condemn their use.[79]

The social utility of a price discrimination tying arrangement, on the other hand, is controversial. As a general rule, a seller must have market power to price discriminate. If the seller has no market power, disfavored purchasers—those asked to pay more than the competitive price—will buy elsewhere. The purpose of many of the tying arrangements that plaintiffs have litigated clearly has been to extract a higher rate of return from high-use or high-preference purchasers of a certain product than from low-use or low-preference pur-

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76. To date, no class of plaintiffs has brought such a lawsuit. *But see* Interview with Robert Tollison, FTC Chief Economist, 43 ANTITRUST & TRADE REG. REP. (BNA) 609, 613 (Sept. 30, 1982); Easterbrook, *supra* note 72, at 331-33.

77. *See* Bowman, *supra* note 11; Markovits, *supra* note 5, at 1407-10; Posner, *supra* note 11, at 509-15.

78. *But see* United States Steel Corp. v. Fortner Enters., 429 U.S. 610, 617 n.7 (1977) (*Fortner II*); Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 513 (1969) (*Fortner I*) (White, J., dissenting); Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1349 (9th Cir.), *cert. denied*, 103 S. Ct. 305 (1982); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1213 (9th Cir. 1977).

79. For an economic argument to support this viewpoint, see Markovits, *supra* note 5, at 1439-40.

chasers.[80] Whether the antitrust laws ought to condemn this practice depends on one's view of the appropriate social goals of the antitrust laws. Price discrimination sometimes results in an efficient allocation of resources and thus may provide some social benefit.[81] The practice of price discrimination does not necessarily require a reduction of output. On the contrary, price discrimination often encourages a seller with market power to increase its output by enabling the seller to include in its market marginal purchasers that would not have

80. A tying arrangement facilitates economic price discrimination when the ratio of package price to marginal cost varies from one customer to the next. R. POSNER, *supra* note 54, at 62. Price discrimination provides the best economic explanation of the tying arrangements at issue in many classic tie-in cases. *See, e.g.*, IBM v. United States, 298 U.S. 131 (1936) (tying punch cards to computing machines); Henry v. A.B. Dick Co., 224 U.S. 1 (1912) (tying paper and ink to mimeograph machines); Morgan Envelope Co. v. Albany Perforated Paper Co., 152 U.S. 425 (1894) (tying toilet paper to dispensers); Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 F. 288 (6th Cir. 1896) (tying buttons to button-fastening machinery). *But see* International Salt Co. v. United States, 332 U.S. 392 (1947). Defendant in *International Salt* may have created the tying arrangement to effectuate quality control not price discrimination. Defendant executed a contract with its buyers that permitted the buyers to purchase salt from a competitor if the competitor offered salt of the same quality and price. By forcing itself to sell the tied product at a competitive price, defendant was unlikely engaging in price discrimination. *Id.* at 396-97; *see* Peterman, *The International Salt Case*, 22 J.L. & ECON. 351 (1979).

81. For an argument that the use of tying arrangements to price discriminate is not inefficient but merely facilitates a transfer of wealth from buyers to sellers, see Stigler, *United States v. Loew's, Inc.: A Note on Block-Booking*, 1963 SUP. CT. REV. 152, 152-54 (1963). One commentator has argued that price discrimination by tying arrangement may or may not be efficient, depending upon the circumstances. *See* Markovits, *supra* note 7, at 1406-08. For an argument that price discrimination by tying arrangement generally is inefficient, see Posner, *supra* note 11, at 509-15.

A problem arises with any practice that requires the defendant to have a certain amount of market power. Any rational profit-maximizing business will be willing to spend a certain amount of its resources to acquire the necessary market power, and this expenditure of resources is frequently a social loss. For example, a company that makes false statements about its product or destroys a competitor's plant to acquire the necessary market power to enable it to price discriminate imposes a considerable loss upon society. What appears to be merely a transfer of wealth from consumers to producers facilitated by market power actually may be a destruction of resources if the seller expends 90% of the producer surplus created by the exertion of its market power in obtaining that power. *See* R. POSNER, *supra* note 54, at 8-22.

One answer to Judge Posner's argument is that firms do not always spend their money in a socially inefficient way to obtain market power. For example, innovation that results in a patented invention can create considerable market power, and the innovation itself is efficient if the invention creates a social value that is greater than the cost of developing and producing the new product. In many tying cases the defendant possesses market power in the tying product because it holds the patent in the product. *See* International Salt Co. v. United States, 332 U.S. 392 (1947); IBM v. United States, 298 U.S. 131 (1936). Moreover, when a seller already has market power in a product, discriminatory pricing of the product, which permits the seller to make all sales above marginal cost, may be more efficient than forcing the seller to offer its product at its nondiscriminatory profit-maximizing price. The latter situation would restrict output.

purchased the product at the seller's nondiscriminatory profit-maximizing price but that will buy it at cost or at a price between cost and the nondiscriminatory profit-maximizing price.[82] Consequently, many economists agree that price discrimination does not always misallocate resources. Nevertheless, the device does transfer wealth away from the purchasers of a product and to the price-discriminating seller.[83] If the underlying and exclusive goal of the antitrust laws ought to be the condemnation of inefficient practices, then, arguably, price discrimination often is not an antitrust problem. If, however, the goal of the antitrust laws should be to maximize the welfare of consumers, then perhaps price discrimination is socially harmful because it transfers wealth away from consumers to producers.[84]

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82. *See infra* note 101 and accompanying text. Price discrimination is "perfect" when every sale is made to a purchaser at the maximum price that the purchaser is willing to pay, and every purchaser willing to pay a profitable price buys the product. Output is as large under perfect price discrimination as it is under perfect competition; hence it is greater than the output of a monopolist charging its nondiscriminatory profit-maximizing price. *See* G. STIGLER, THE THEORY OF PRICE 212-14 (3d ed. 1966). In the real world, however, price discrimination is always imperfect, for the seller cannot possibly identify the value that each individual customer places on a product and sufficiently isolate the customer to make the sale at that price. At best, real world sellers can identify different groups of customers that place different values on the product and make sales at the profit-maximizing price to each group. This practice may enable the monopolist to enlarge output if at least one set of sales is made at a price lower than the monopolist's nondiscriminatory profit-maximizing price. Alternatively, the monopolist may price discriminate, but only within the group of customers willing to pay more than the nondiscriminatory profit-maximizing price. Consequently, any generalization whether real world price discrimination results in enlarged or reduced output is impossible. *See* J. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 188-95 (1933).

83. *See supra* authorities cited note 81.

84. *But see* R. BORK, *supra* note 10. Judge Bork argues both that "maximization of consumer welfare" ought to be the exclusive goal of the antitrust laws, *id.* at 107-15, and that tying arrangements desigued to effect price discrimination ought to be legal, *id.* at 380. In his discussion of the Robinson-Patman Act, *id.* at 395-98, Judge Bork reasons that since longterm price discrimination requires market power, the seller that is considering price discrimination has two choices: Reduce output and sell at its profit-maximizing price, or price discriminate. A seller that chooses to price discriminate will not need to reduce output because, assuming near-perfect price discrimination, it will be able to make a sale to every customer willing to pay marginal cost. Indeed, Judge Bork argues that price discrimination by a seller with market power actually encourages the seller to increase output. Since consumers benefit from efficient allocation of resources, price discrimination increases consumer welfare. The flaw in Judge Bork's argument is that efficient resource allocation may not always benefit buyers and price discrimination by tying arrangements may simply be one of the exceptions. Consumer preferences are not consistent, and a benefit to one class of consumers will be a detriment to another class. In fact, price discrimination divides consumers into two groups: Those that are better off because they can obtain the product for less than its profit-maximizing price, and those that are worse off because they must pay more than the profit-maximizing price. If the injuries suffered by the latter group are greater than the benefits received by the former group, price discrimination does not increase consumer welfare. This conclusion is particularly true if one additionally believes that the social welfare losses that result from nondiscriminatory monopoly

Some sellers find price discrimination by tying arrangement attractive because they can accomplish it without violating the Robinson-Patman Act.[85] Although courts and commentators refer to the evil that the Robinson-Patman Act condemns as "price discrimination," that statute actually forbids price *differences*.[86] Economic price discrimination occurs when a seller obtains a higher rate of return from one buyer than it does from another buyer, regardless whether the prices charged to both buyers were identical. Violation of the basic provision of the Robinson-Patman Act, however, only results when a seller charges two or more purchasers different prices for the same product.[87] Although the Robinson-Patman Act permits a defendant to show that a price difference was not economically discriminatory because it was cost justified, the statute does not recognize that the sale of a product to two different purchasers at the same price can be economic price discrimination. This circumstance arises when a seller effects the price discrimination by a tying arrangement.[88]

1. Fixed Proportion and Variable Proportion Tie-ins

Tying arrangements come in two kinds: Fixed proportion and variable proportion. In a fixed proportion tie-in every consumer uses a fixed amount of the tied product with a fixed quantity of the tying product. For example, a shoe seller requires that a purchaser of a left shoe also take a right shoe. Similarly, a hardware store obliges a customer that purchases a bolt also to buy a nut. Under most circumstances consumers use a single right shoe with a single left shoe, a

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pricing are relatively small. *Cf.* Goldberg, *Welfare Loss and Monopoly: the Unmaking of an Estimate*, 16 ECON. INQUIRY 310 (1978); Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. 77 (1954); Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 954 (1981); Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975); Stigler, *The Statistics of Monopoly and Merger*, 64 J. POL. ECON. 33 (1956).

85. 15 U.S.C. § 13 (1976). Since the Robinson-Patman Act applies only to sales, not leases, the statute would not apply to lease-ties.

86. The Robinson-Patman Act makes "[i]t unlawful to discriminate in price between different purchasers of commodities of like grade and quality . . . ." The Supreme Court established in FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549-50 (1960), that the statute applies to price *difference*, not to economic price discrimination. *See* Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 36-38 (1956).

87. *See* FTC v. Anheuser-Busch, Inc., 363 U.S. at 549-50.

88. Assume, for example, that IBM sells computation machines to every buyer at a price of $5000 and has a 10% rate of return. IBM also requires each purchaser to buy all its cards from IBM. IBM sells the cards to all buyers at a price of 10¢ each, which gives it a 50% rate of return on the cards. IBM's net rate of return on the package is much higher from the purchaser that uses 1,000,000 cards per year than from the buyer that consumes 10,000 cards per year. IBM has not violated the Robinson-Patman Act, however, because it is selling the machine to every purchaser for $5000 and the cards to every buyer at 10¢ each.

single bolt with a single nut, and replace the tying product and the tied product at the same time. In a variable proportion tie-in, on the other hand, consumers use varying amounts of the tied product with the tying product. The tying arrangement at issue in *IBM v. United States*[89] provides a good example of a variable proportion tie-in: consumers that use the same quantity of the tying product—computation machines—purchase widely varying amounts of the tied product—cards.

Fixed proportion tying arrangements generally are unlikely candidates for use as metering devices. A tying arrangement can function as a metering device when the consumer's use of a certain product is measurable by the amount of a particular ingredient that the product requires. This kind of measurement requires a variable proportion tying arrangement. Fixed proportion tying arrangements can facilitate price discrimination, although sellers can approximate perfect price discrimination more closely with a variable proportion tying arrangement. The "block-booking" arrangement may serve as a fixed proportion price discrimination device by allowing a seller to take advantage of the preferences of its customers. Block-booking is a scheme in which a distributor of television motion pictures leases films only in groups; if *Casablanca* and *Gorilla Man* are in the same group, for example, then a television station cannot obtain one film without also taking the other. As George J. Stigler and other economists have noted, block-booking can be a disguised form of price discrimination because it permits the distributor of the films to take into account the station's various preferences for films and to set these preferences off against each other.[90] For example, assume that station *A* is willing to pay $10,000 for *Casablanca* and $6000 for *Gorilla Man.* Station *B*, however, will pay $8000 for *Gorilla Man* but only $7000 for *Casablanca.* If the distributor licenses the films separately and cannot price discriminate, it will be able to license *Casablanca* twice only at a price of $7000 and *Gorilla Man* twice only at a price of $6000.[91] This arrangement will give the distributor total revenues of $26,000 from these two stations for the two films. By packaging the films and selling the package for $15,000, however, the distributor can sell both films to both stations and generate revenues of $30,000. Station *A* is willing to pay $16,000 for the combination and

89. 298 U.S. 131 (1936). *See supra* notes 51-52 and accompanying text.

90. *See generally* Stigler, *supra* note 81. For a more elaborate version of this theory, see R. Bork, *supra* note 10, at 378; Markovits, *supra* note 7, at 1454-58.

91. The distributor can also license the films once each at prices of $10,000 and $8000 and generate total revenues of $18,000.

station *B* is willing to purchase the package for $15,000.

Few fixed proportion package sales likely serve as price discrimination devices. Unless a particular seller's customers are divisible into two fairly homogenous groups with dissimilar preferences, the seller probably would not be able to construct a "package" that would account for its customers' wide variety of preferences.[92] For example, in *United States v. Loew's, Inc.*[93] each defendant made five or more sales and the blocks of films were in packages of as many as 26 films, 52 films, or, in one instance, 754 films.[94] As the number of customers and films in a block increases, evaluating each customer's individual film preferences and determining a profit-maximizing price for the block of films that will generate more revenue than would individual licensing becomes increasingly difficult and unlikely.[95] Defendants in *Loew's*, which were competing distributors,[96]

92. Professor Markovits describes the most likely instance in which this form of price discrimination may occur. Suppose that a manufacturer of a household product, for example, dish detergent that has a widely recognized brand name, believes that it has two classes of purchasers: High demand purchasers that will buy the name even at a price which is well above cost and exceeds the price of less well known brands, and low demand buyers that will purchase the product only if it has an attractive price. The manufacturer, therefore, places in each box of the product a coupon offering a different product, such as a set of inexpensive dishes, at a low price. The high demand purchasers, which are presumably wealthier, will buy the product at a supracompetitive price, but will throw the coupon away because they would never buy the cheap dishes. The low demand purchasers, which are presumably less wealthy, will buy the household product at the higher price because of the cost savings they can obtain by using the coupon to purchase the dishes. Markovits, *supra* note 5, at 1407.

Although the courts have not identified blanket licensing agreements as price discrimination devices, blanket licensing apparently enables licensors to price discriminate by taking advantage of the different preferences of radio stations. Some stations place a high value on country and western music, others on classical, rock, or other types of music. In a blanket license agreement the licensee pays one price for the right to play all the music in the licensor's inventory. The United States District Court for the Southern District of New York recently condemned a blanket licensing practice, but it apparently based its decision on the leverage theory. The court found that the "selling power of one [copyrighted composition] adds to that of the others and the monopoly of all is enlarged." Buffalo Broadcasting Co. v. American Soc'y of Composers, 546 F. Supp. 274, 293 (S.D.N.Y. 1982); *see* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979), *aff'd on remand*, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

93. 371 U.S. 38 (1962).

94. *See id.* at 41-42.

95. In a much simpler factual context the Ninth Circuit rejected the notion that a seller could use a fixed proportion tie-in as a price discrimination device. *See* Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1349 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 305 (1982). The tie-in in that case, however, could have been price discriminatory. Defendant, which publishes a directory of American attorneys, requires each attorney who advertises in the directory to purchase at least one copy himself. Some attorneys may place a very high value on having their name in the directory since they will then be known to other lawyers. Other lawyers may place a higher value on having a copy of the directory, so that they can locate attorneys elsewhere. Under these circumstances, defendant could have used the tie-in to achieve price discrimina-

probably used block-booking arrangements not for price discrimination purposes but to lower transaction costs.[97]

Variable proportion tying arrangements, on the other hand, are inherently conducive to both metering and price discrimination. Suppose, for example, that the lessor of a copying machine requires that the lessee purchase its copy paper and ink from the lessor as a condition of obtaining the machine.[98] The lessee's consumption of the paper and ink will serve as a reasonably good measure of the lessee's use of the machine. This measurement may serve the lessor in two ways. First, the lessor's maintenance and depreciation costs may vary according to the intensity with which the lessee uses the machine. By renting all machines at the same basic rate and then charging a higher than competitive price for the paper and ink, the lessor may obtain from high intensity users of the machine additional revenue that will approximate the additional service requirements and loss in resale value that the lessor inevitably will incur. If this revenue differential precisely offsets the cost differential between more intense and less intense users, the lessor's tying arrangement is not economic price discrimination. The lessor does not receive a higher rate of return from the high intensity users but merely recovers the higher cost that high intensity use imposes. The tying arrangement, therefore, serves as a metering device to measure costs.

Sellers also can use variable proportion tying arrangements to effect price discrimination. For example, suppose that the lessor of a copying machine has reason to believe that high intensity users of its machine value the machine more highly than do lower intensity users. In other words, someone who makes 10,000 copies per year would pay more for a machine than someone who makes only 500 copies per year. The 500 copy user, however, would be willing to pay the actual cost of providing the machine and would negotiate a lease profitable to the lessor. If the lessor had market power in the copy machine market and could not practice price discrimination, the lessor might set a profit-maximizing price higher than the 500 copy user would pay, even though the 500 copy user would willingly pay the cost price.

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tion among attorneys that ascribe different values to the two products.

96. *Loew's* was a consolidation of actions against six film distributors. The United States did not allege that any combination or conspiracy existed among them. 371 U.S. at 40.

97. The distributors could license the films in blocks more cheaply than they could negotiate individually with each station for performance rights to each film. *Cf.* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979).

98. *See* Henry v. A.B. Dick Co., 224 U.S. 1 (1912).

Ideally, the lessor would like to engage in perfect price discrimination. If the value that each lessee places on the machine varies directly with the number of copies which each one makes,[99] then the lessor of the machine could approach perfect price discrimination by "giving" the machine to each lessee but charging a supracompetitive price for the paper and ink. The lessor would calculate its profits in the paper and ink to match the amount that each lessee values the machine. Under this near-perfect scheme of price discrimination each lessee would spend the full amount that it is willing to pay for use of the machine, and the seller would pocket the entire consumer surplus.[100] Furthermore, every user that was willing to pay a price equal to or above marginal cost could obtain a machine. Consequently, even though the seller has market power, output would be the same as in a competitive market.

No seller could engage in perfect price discrimination because purchasers of a machine simply do not value the machine in direct proportion to their intensity of use. For example, high volume users might place a lower per unit value on the machine than low volume users since alternatives, such as taking their copying to a third party firm, might be available at a lower price to the high volume users. Nevertheless, as a general rule, high volume users place a greater value on the machine than do lower volume users. Therefore, a seller can use a tying arrangement in certain situations to increase its profits above the amount it could earn in a market completely free of price discrimination.

2. Price Discrimination, Variable Proportion Tie-ins, and Class Actions

Suppose that a seller of a copying machine creates a variable proportion tying arrangement solely to facilitate price discrimination. The cost to the seller of providing the machine is the same regardless whether the use is light or heavy. The seller employs the tying arrangement plus supracompetitive profits in the tied product to earn a higher rate of return from high intensity users of the tying product. The "victims" of the seller's tying arrangement—the seller's customers—initiate a class action.

The court first must determine the identity of those customers

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99. For example, a 1000 copy-per-year user values the machine twice as much as a 500 copy-per-year user, and a 2000 copy-per-year user attaches twice as much worth to its machine as a 1000 copy-per-year user.

100. *See infra* note 101.

whom the tying arrangement injures. Obviously, high intensity users suffer the greatest harm, because the seller is obtaining the highest rate of return from them, and if the seller were not engaging in the tying arrangement they probably could obtain the machine and supplies at a lower aggregate price. Some low intensity users actually benefit from the tie-in because the price discrimination scheme enables them to obtain the machine. For example, assume that the cost of providing the machine is $500 per year. Furthermore, the seller of the machine has monopoly power and determines that if it sells or leases machines to all customers for the same amount, its profit-maximizing price will be $800 per year. Certain high volume users of the machine, however, are willing to pay more than $800 per year, and the highest intensity user is willing to pay $1500. If the seller were able to use a tying arrangement to create perfect price discrimination, it would make a sale to every buyer that values the machine at its cost price or higher because each of these sales would be profitable. The sale price would be the maximum amount over $500 that the purchaser is willing to pay. If the seller were not able to price discriminate, it would not make sales to these potential purchasers that value the machine at more than $500 but less than $800 per year. These buyers are unwilling to purchase the machine at its nondiscriminatory profit-maximizing price. In short, this particular class of purchasers actually benefits from the tie-in because the scheme enables them to purchase the defendant's product. The class that the defendant's tying arrangement injures consists of those buyers that would have paid the defendant's profit-maximizing price in a nondiscriminatory market, but must pay more in the price discriminatory market.[101]

Although variations in the *amount* of damages that each puta-

101.

FIGURE 1

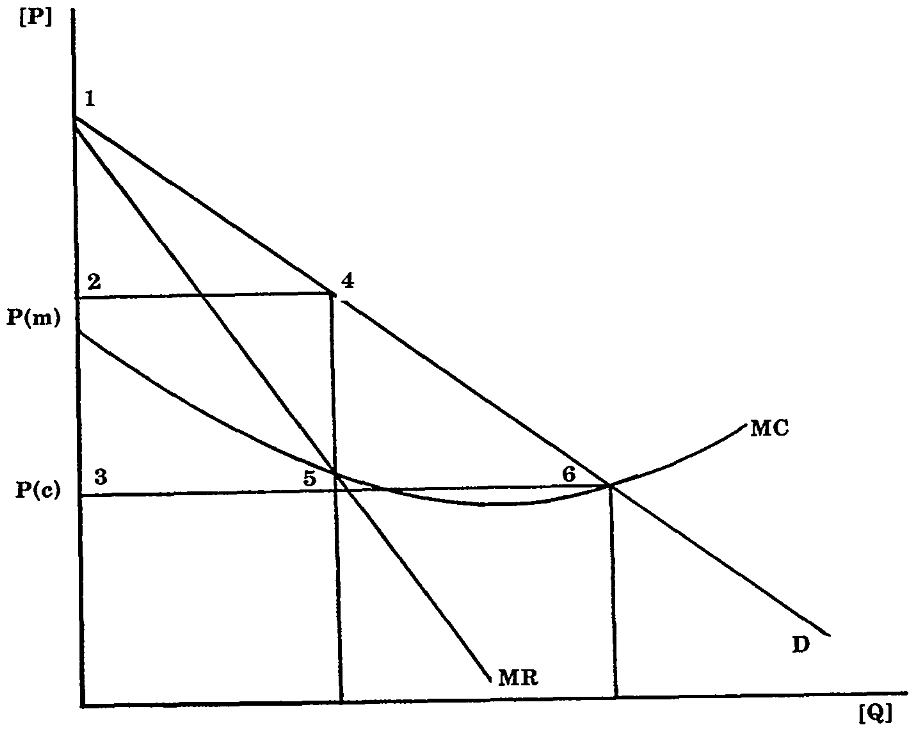

Figure 1 illustrates this analysis. The figure shows the demand curve of a seller with market power, with marginal cost (MC) and marginal revenue (MR) curves. The competitive price, P(c), is the point at which the demand curve and the seller's marginal cost curve intersect. At that point, further expansion of output by the seller would cause losses, for the seller could sell its products only at a price less than the marginal cost of production. The nondiscriminatory profit-maximizing price, P(m), is located where the marginal cost (MC) and marginal revenue (MR) curves intersect. A seller in the position illustrated by the graph would maximize its profits by pricing its output at P(m) if it were not able to price discriminate. With the product at that price, all buyers located along the demand curve between points 4 and 6 (those buyers willing to pay more than P(c) but less than P(m)) would substitute a different product.

In a perfectly price discriminatory market, however, as in a perfectly competitive market, every sale at a price greater than the marginal cost of producing the extra output is profitable. If the seller is able to engage in perfect price discrimination, it will make every sale to every purchaser along the demand curve at the maximum price that the buyer is willing to pay for the product. The seller thus can transfer to itself an amount equal to the area of triangle 1-2-4, which otherwise would be consumer surplus, and an amount equal to triangle 4-5-6, which, after some adjustments, otherwise would be deadweight loss. *See* R. POSNER, *supra* note 54, at 12-14. The figure also illustrates the consequences for the buyers if the seller is able to engage in perfect price discrimination. All buyers located along the demand curve between points 4 and 6 (those buyers that are willing to pay more than P(c) but are not willing to pay P(m)) will benefit from the seller's price discrimination scheme. In a nondiscriminatory market in which tive class member suffers will not defeat class certification,[102] class action plaintiffs must establish the *fact* of injury by common proof for all members of the proferred class.[103] Consistent with this requirement, if the sole purpose of the defendant's tying arrangement is price discrimination, the court must determine what the defendant's profit-maximizing price would be in a nondiscriminatory market. Only in this way can the court identify which purchasers the price discrimination scheme injured. The court then should limit class certification to the purchasers that are paying more than the defendant's nondiscriminatory profit-maximizing price as a result of the price discrimination scheme.[104]

Ignoring this distinction, courts frequently have certified classes consisting of *all* plaintiff purchasers in cases in which the purpose of the defendant's tying arrangement was to meter or price discriminate. The leading example of this situation is *Siegel v. Chicken Delight, Inc.*[105] The *Seigel* facts allow only two reasonable explanations

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the seller charged P(m), these buyers would have suffered foreclosure from the seller's market. On the other hand, the price discrimination scheme injures all buyers along the demand curve above point 4. They could have purchased at price P(m) in a nondiscriminatory market; yet because of the price discrimination scheme they either must pay a price greater than P(m) or must substitute away. If the tie-in price discrimination scheme did not result in any increased output above the nondiscriminatory monopolistic output, the set of customers located between points 4 and 6 would be empty. *See supra* note 82. When a tie-in facilitates price discrimination, however, good reason exists to helieve that the discrimination results in a larger output than nondiscriminatory monopoly pricing would, particularly if the price of the tying product is zero, as it was in *Chicken Delight. See infra* notes 105-14.

102. *See supra* notes 20-22 and accompanying text.

103. *See* authorities cited *supra* note 13.

104. Limiting the class to those buyers that paid more than the defendant's profit-maximizing price is no easy task. It may require the court to decide some of the merits of the claim while determining whether certification is appropriate. To identify the class of purchasers, the court will have to establish the profit-maximizing price and, in doing so, determine at least one of the substantive elements of a tying arrangement: the defendant's market power in the tying product. The court also necessarily will discover whether anticompetitive effects exist in the market for the tied product—that is, whether a group of buyers paid more for the tied product than they would have paid in the absence of the tying arrangement. Computation of the defendant's profit-maximizing price in a nondiscriminatory market requires information about the defendant's marginal cost and the elasticity of demand facing the defendant. *See* Landes & Posner, *supra* note 84, at 940. Alternatively, knowledge of the defendant's market share, the market elasticity of demand, and the competing firms' elasticity of supply, permits a determination of the defendant's market power. *Id.* at 944. In all cases, however, identification of the defendant's profit-maximizing price will require the court to engage in factfinding substantially in excess of that normally undertaken to determine whether class certification is appropriate. The only alternatives that a court has to deciding the merits of a case seem to be refusal of class action certification when the defendant clearly is using a tying arrangement for price discrimination, or modification of the well-estahlished doctrine that all members of a class must show fact of injury by common proof.

105. 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).

for the tying arrangement at issue. First, the tying arrangement created efficiency by permitting Chicken Delight to monitor the quality of the product that its franchisees delivered.[106] Second, the tie-in permitted Chicken Delight to meter the sales of its franchisees or obtain a higher rate of return from high volume outlets than from low volume outlets. Perhaps both of these explanations have some validity.[107]

The tying product in the *Chicken Delight* litigation was franchisor-defendant's name, trademark, and method of doing business, all of which franchisor licensed to franchisees. The tied product was various cooking machinery and certain batter mixes and packaging materials. Defendant provided franchisees with the tying product at no charge, but it required franchisees to purchase from it the tied products at a price substantially above the prevailing market rate.[108] Defendant did not manufacture any of the tied products; rather it bought them on the open market and resold them to franchisees.[109] Defendant argued that this arrangement was "[a] convenient accounting device for compensation of the trademark license . . . ."[110] The district court ruled that the accounting explanation did not justify "so onerous an anti-competitive device as the tie-in agreement herein condemned."[111] The United States Court of Appeals for the Ninth Circuit acknowledged that defendant probably used the tie-in to measure and charge franchisees according to sales volume but replied that "feasible alternative methods of compensation for the franchise licenses [exist], including royalties based on sales volume . . . ."[112] The Ninth Circuit failed to explain why this mechanism was any less anticompetitive than or different from Chicken Delight's device. Presumably, franchisor lawfully could allow franchisees to enter the market themselves to buy packages of mix, and then charge them 25¢ for each package they purchased. When Chicken Delight

106. For examples of this kind of tying arrangement, see Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir.), *cert. denied*, 103 S. Ct. 127 (1982); Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981).

107. The functions of metering and price discrimination need not he mutually exclusive. Costs to a lessor or licensor may vary with the licensee's intensity of use, and the variable rate that the licensees pay may exceed the variation in costs. To the extent that the licensee's higher charges exceed the higher costs which the licensor incurred, the charges are price discriminatory.

108. Siegel v. Chicken Delight, Inc., 448 F.2d at 46-47.

109. *Id.* at 48 n.4.

110. Siegel v. Chicken Delight, Inc., 311 F. Supp. 847, 850 (N.D. Cal. 1970), *modified*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

111. 311 F. Supp. at 850.

112. Siegel v. Chicken Delight, Inc., 448 F.2d at 50.

bought the package itself and added 25¢ to an ordinary markup, however, the measuring device became an antitrust violation. Plaintiffs never argued that defendant had anything approaching a monopoly in the materials, such as flour, batter, paper products, or cookers and fryers, that constituted the tied product. Furthermore, since Chicken Delight itself purchased these items, the scheme did not "foreclose" any competitor in the tied product market. For example, plaintiffs made no allegations that Chicken Delight had an exclusive dealing contract with any supplier of the tied products. Chicken Delight's arrangement permitted it to enter the market once for each product and cover the needs of its 650 franchisees, presumably at significant transaction cost savings. Perhaps more importantly, since Chicken Delight bought the batters, mixes, and equipment itself, it could assure uniformity and consistency of quality in the product sold by its franchisees. Chicken Delight's tie-in, therefore, was probably efficiency creating.

The class that the court certified consisted of "all 'Chicken Delight' franchisees in the United States."[113] Since no evidence existed that the cost of providing the tying product to a particular franchisee varied with the volume of that franchisee's sales, defendant undoubtedly was engaging in price discrimination. It received a higher net rate of return from high volume franchisees than from lower volume franchisees. As a result, many plaintiffs certified in the class were beneficiaries rather than victims of defendant's tying arrangement. If Chicken Delight had not price discriminated, it would have charged its profit-maximizing price, and many low volume franchisees would not have had a franchise at all.[114]

When a tying arrangement—particularly a variable proportion tie-in[115]—apparently serves to facilitate price discrimination, courts must look more carefully at class certification requests than they have in the past. If the case is to proceed as a class action, the court either must establish the defendant's nondiscriminatory profit-maxi-

113. Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 725 (N.D. Cal. 1967), *mandamus granted,* 412 F.2d 830 (9th Cir. 1969), *enforced,* 311 F. Supp. 847 (N.D. Cal. 1970), *modified,* 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).

114. Furthermore, although the Ninth Circuit suggested that Chicken Delight could have engaged in price discrimination by another mechanism, such as royalties based on sales volume, 448 F.2d at 50, the district court declined to permit defendant to offset franchisees' damages by the value of the license (the tying product). Consequently, plaintiffs potentially could recover treble damages for the only fees they paid to Chicken Delight since Chicken Delight had provided the license without charge and collected its fees exclusively through sales of the tied product. 311 F. Supp. at 852. The Ninth Circuit declined to modify this ruling. 448 F.2d at 53.

115. *See supra* text accompanying notes 98-101.

mizing price before certification, or it must relax the rule that requires all members seeking class certification to show fact of injury by common proof. The first alternative is probably unrealistic if courts are to maintain any distinction between certification proceedings and deciding the case on the merits. Determining the defendant's profit-maximizing price in a nondiscriminatory market would require little less than a full trial of virtually all the important economic issues at stake in a tie-in case. The second solution—relaxing the requirement that all rule 23(b)(3) class members be able to show fact of injury by common proof—is inconsistent with the case law and may conflict with rule 23 itself.[116] Therefore, courts should not certify tying arrangement class actions when the tie-in serves as a price discrimination device.

Failure to certify a class action in a franchise tie-in case ordinarily could force dozens or even hundreds of similar individual actions into the federal court system.[117] Plaintiffs in the *Chicken Delight* class action, for example, numbered more than 650.[118] Fortunately, the Supreme Court's 1979 decision in *Parklane Hosiery Co. v. Shore*[119] greatly mitigated the consequences of refusal to certify a franchisee class action by permitting offensive nonmutual collateral estoppel in appropriate circumstances. If a case meets the *Parklane*

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116. *See* cases cited *supra* note 13.

117. The franchise tie-in cases typically consist of franchisees as the plaintiffs and a franchisor as the defendant. The franchisees claim that the defendant-franchisor required them to take some product necessary to their business but obtainable from competing suppliers at a lower price. In the class action cases the franchisees seeking certification usually have identical or nearly identical arrangements with the franchisor. Although the courts seldom discuss the possibility that the franchisor is using the tying arrangement to price discriminate, the inference is commonly present. *See, e.g.*, Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir.), *cert. denied*, 103 S. Ct. 127 (1982) (tied product a lease of franchisee's retail location; rent varied with gross sales); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982) (tied product ice cream sold by the individual franchisees); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (tied products expressly used to effect price discrimination scheme). For a discussion of similar cases, see Harkins, *Tying and the Franchisee*, 47 A.B.A. ANTITRUST L.J. 903 (1978); Hensley, *Franchise Tying: Gauging the Economic Power of a Trademark*, 15 U.C.D. L. REV. 405 (1981); Kahn, *The Importance of Franchisee Class Actions*, 47 A.B.A. ANTITRUST L.J. 915 (1978); Lipner, *The Legality of Franchise Lease Tying*, 46 ALB. L. REV. 858 (1982); McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-ins*, 58 CALIF. L. REV. 1085 (1970); Note, *Trademark Franchising and Antitrust Law: The Two-Product Rule for Tying Arrangements*, 27 SYRACUSE L. REV. 953 (1976); Comment, *A New Approach to the Legality of Franchising Tie-Ins*, 129 U. PA. L. REV. 1267 (1981).

118. Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 725 (N.D. Cal. 1967), *mandamus granted*, 412 F.2d 830 (9th Cir. 1969), *enforced*, 311 F. Supp. 847 (N.D. Cal. 1970), *modified*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

119. 439 U.S. 322 (1979).

Hosiery standard[120] —as many franchisee antitrust cases do—a single plaintiff-franchisee or a small group could litigate against the franchisor, determine liability, and identify what the defendant's profit-maximizing price would have been in a nondiscriminatory market. With these issues established in an initial judgment, other franchisees that, because of the illegal tying arrangement, paid more than the defendant's nondiscriminatory profit-maximizing price could have the benefit of earlier fact findings and assert their own right to damages.[121] This kind of "test case" approach,[122] with careful judicial

120. A subsequent plaintiff seeking to benefit from offensive collateral estoppel under the *Parklane* test must show (1) that it could not easily have joined in the earlier litigation, 439 U.S. at 331; (2) that the defendant had every incentive to litigate "fully and vigorously" in the first action, *id.* at 332; (3) that the judgment on which the court relies for collateral estoppel is generally consistent with other judgments on the same operative facts, *id.* at 330; and (4) that the second action does not afford the defendant procedural opportunities that were unavailable in the first action and could cause a different result, *id.* at 331. The first element of the test could pose a substantial problem for a subsequent franchisee-plaintiff. Judicial economy requires that the plaintiff join in the initial litigation, rather than await the outcome of the first lawsuit before filing itself. Allowing the plaintiff to wait would effectively give it two bites at the apple. Whether the plaintiff could have joined in the earlier litigation—particularly in the franchise tie-in cases—largely depends on the number of named plaintiffs a court is willing to accommodate in an action and the court's evaluation of the plaintiff's status as a "wait-and-see" plaintiff that attempts to take advantage of the earlier judgment if it is favorable and avoid it if it is unfavorable. *Id.* If a court finds that judicial economy permits offensive assertion of collateral estoppel, and if the defendant was in a position to understand the consequences of litigating the first case, then the court may permit offensive collateral estoppel even though the plaintiff actually could have joined in the earlier litigation. *See* Carr v. District of Columbia, 646 F.2d 599 (D.C. Cir. 1980); Starker v. United States, 602 F.2d 1341 (9th Cir. 1979); GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203 (S.D.N.Y. 1981); W.J. Roberts & Co. v. S.S. Hellenic Glory, 471 F. Supp. 1022 (S.D.N.Y. 1979). For a general discussion of the uses and limitations of nonmutual, offensive collateral estoppel, see 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4464-4465 (1981). For an extended argument that offensive collateral estoppel is both inefficient and unjust, see Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 ARIZ. ST. L.J. 45.

121. This analysis makes no effort to distinguish between a tying arrangement used as a nondiscriminatory metering device and a tie-in that serves to promote price discrimination. In virtually all franchisee class action tying arrangement cases, *see supra* note 117, the inference is appropriate that price discrimination, and not nondiscriminatory metering, is occurring. Generally, no evidence exists that the defendant's costs varied with the sales volume of each franchise; instead the franchisor used the tying arrangement to obtain a higher rate of return from more profitable franchisees. The price discrimination scheme injured each franchisee by an amount equal to the difference between the price the franchisee actually paid for the tying product (generally the license to use the trademark or trademarks, certain methods of doing business, advertising, and similar benefits) and the profit-maximizing price of the tying product in a nondiscriminatory market. For example, suppose that the nondiscriminatory profit-maximizing price of an ice cream franchisor's license is $100,000 per year. Suppose that the franchisor sells the license to all franchisees at $50,000 but requires each franchisee to purchase all its ice cream from the franchisor at a price $1 higher per gallon than the ice cream's market price. A high volume franchisee that sells 100,000 gallons of ice cream during a particular year would pay $50,000 for the franchise and $100,000 excess profits on the ice cream—or $150,000.

use of collateral estoppel, seems more consistent with current case law and better suited to the problem of overbroad classes than does a class action. This method could become a valuable alternative to class actions in price discrimination tying arrangement cases.

E. Tying Arrangements that Create Efficiency

As the grocery store illustrations discussed in part I suggest,[123] sellers and manufacturers create many tying arrangements simply because the most efficient way to deliver products to consumers is in packages. When a soup company decides to manufacture canned vegetable soup it makes an initial determination about the ingredients for the soup and requires all customers to take everything in the can—carrots, celery, potatoes, and even turnips. If every customer had a legal right to buy a vegetable soup that contained precisely the ingredients desired by the customer, the marketing and production of soup would be inefficient and the soup extremely expensive.

While sales of vegetable soup in cans with predetermined, uniform contents clearly enhance net consumer welfare, the requirement does not increase the welfare of every consumer. Consumers that prefer their vegetable soup without the turnips must purchase the turnips anyway and then go through the time-consuming and inefficient process of removing them. The only available market alternative for

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The price discrimination scheme injures that franchisee in the amount of $50,000. On the other hand, a low volume franchisee that sells only 40,000 gallons of ice cream during the year pays only $90,000. The latter franchisee actually has benefited from the existence of the tying arrangement. In a nondiscriminatory market it either would have paid $100,000 for the license, or it would have opted not to take the franchise. The court should dismiss the claim of this particular franchisee.

122. *See* Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974). Several antitrust opinions have suggested that when a class action is unsuitable hecause of the failure of common question predominance, a "test case" would be an appropriate alternative. One plaintiff or a small group of plaintiffs that could establish most issues for the larger class of potential claimants could sue the defendant and determine liability. Subsequent plaintiffs could then use offensive collateral estoppel for the issues established earlier and prove additional issues as necessary for their own recovery. Such a procedure contains one potential source of unfairness to defendants. Whereas adverse rulings will be binding on the defendant in subsequent proceedings, findings favorable to the defendant will not bind future plaintiffs. In general, adverse findings made in a litigation do not bind nonparties to that action. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971); Hansberry v. Lee, 311 U.S. 32, 40 (1940). Nevertheless, some courts have advocated the "test case" approach as a mechanism to accomplish the "same result" as a class action "witbout involving the court in a morass of individual claims that will bog the court system down interminably." Windham v. American Brands, Inc., 565 F.2d 59, 69 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *see* Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 290 (3d Cir. 1978); Kypta v. McDonald's Corp., 1978-1 Trade Cas. (CCH) ¶ 62,106 (1978).

123. *See supra* text accompanying note 10.

these buyers is either to forego canned vegetable soup, or to find a competitor that manufactures a canned vegetable soup more suitable to their tastes.

Many tying arrangements fall within this category: they create efficiency but injure certain customers in the process.[124] A shoe store's requirement that purchasers buy shoes only in pairs substantially reduces inventory and handling costs that the store would incur if it offered solitary left and right shoes. Hence, the shoe store can offer pairs of shoes at a lower price. The requirement, however, necessarily injures consumers that would prefer to purchase a solitary left or right shoe. Similarly, a newspaper's requirement that purchasers of advertising place their advertisements in both morning and evening editions enables the newspaper to take orders, bill clients, and, more importantly, set type a single time.[125] As a result, the newspaper can produce advertising at a much lower rate. To create the savings, the newspaper must force *all* advertisers to purchase both morning and evening advertising simultaneously, so that it can publish identical morning and evening classified sections. While the newspaper's customers and most of its advertisers benefit from the requirement,[126] certain advertisers suffer a detriment because they prefer to advertise in only one of the two editions but must buy advertising in both.

Similarly, in the area of franchising, the "package" of goods and services the franchisor offers often creates efficiency but harms par-

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124. Obviously, the kind of "efficiency" that the canned soup tying arrangement creates is not Pareto efficiency. One situation, *A*, is Pareto superior to a different situation *B*, if the change from *B* to *A* benefits at least one person and harms no one. A world in which producers standardize canned vegetable soup and sell it to everyone on a take-it-or-leave-it basis is not Pareto superior to a world in which the law gives each purchaser the right to buy a can of vegetable soup with precisely the desired ingredients, because some consumers would be worse off in the former world. Those purchasers that would prefer not to have the turnips would be better off in the world that gives each buyer the right to choose its own ingredients. "Efficient" in the canned soup illustration describes the standard of "potential" Pareto superiority or Kaldor-Hicks efficiency. A situation *A* is Kaldor-Hicks superior to a situation *B* if the beneficiaries of the move from *B* to *A* gain enough to compensate fully the losers from the proceeds from their gains, even though the compensation does not actually take place. Unlike the Pareto efficiency test, the Kaldor-Hicks test permits a netting out of gains and losses and an evaluation of a move as "efficient" if the aggregate gains are greater than the aggregate losses. In general, "efficient" antitrust policy means Kaldor-Hicks, not Pareto, efficiency. *See* R. POSNER, THE ECONOMICS OF JUSTICE 90-92 (1981); Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591 (1980).

125. *See* Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 623 (1953).

126. Since the tying arrangement reduces the cost of advertising, the newspaper will be able to print more ads, and presumably customers will be better off. *Id.* at 623 n.45.

ticular franchisees.[127] Franchises like McDonald's are successful because of their reputation for quality and uniformity. A New Yorker driving through Illinois knows that the McDonald's there will be very similar to the McDonald's at home. A nationwide or statewide franchisor succeeds precisely because its franchisees operate businesses that are nearly identical to one another. The chief value of the nationwide franchise lies in its goodwill: customers that recognize the name know what they are buying, even though they may never have entered a particular franchisee's store before. To the extent that the franchisor and customers benefit because of this enforced uniformity, the franchisees themselves gain an advantage. As the United States Court of Appeals for the Fourth Circuit recently noted in *Principe v. McDonald's Corp.*:[128]

> [McDonald's Corporation's] regime pervades all facets of the business, from the design of the menu board to the amount of catsup on the hamburgers, nothing is left to chance. This pervasive franchisor supervision and control benefits the franchisee in turn. His business is identified with a network of stores whose very uniformity and predictability attracts customers. In short, the modern franchisee pays not only for the right to use a trademark but for the right to become a part of a system whose business methods virtually guarantee his success.[129]

In *Principe* the Fourth Circuit applied the "separate products" test to find that the alleged tying arrangement which McDonald's imposed upon its franchisees was lawful.[130] The Fourth Circuit concluded for a number of reasons that the "package" of goods and services was actually a single product. First, the court found that because of its expertise and experience, McDonald's was in a much better position than its franchisees, most of whom lacked experience, to select new restaurant locations and arrange construction.[131] Second, the court concluded that McDonald's policy of owning its stores and leasing them to franchisees benefited both the franchisor and the franchisees in the aggregate, even though it might injure some individual franchisees. The policy assured that stores would remain within the McDonald's system even though a particular franchisee might retire, die, or go out of business for another reason. The court concluded that a substantial part of McDonald's goodwill existed be-

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127. The "package" substitutes for full vertical integration, in which the franchisor owns outright all its outlets. For the economics of franchising as an alternative to full vertical integration by the franchisor, see McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-ins*, 58 CALIF. L. REV. 1085 (1970); Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223 (1978).

128. 631 F.2d 303 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981).

129. 631 F.2d at 309.

130. *Id.* at 307-11; *see supra* note 28 and accompanying text.

131. 631 F.2d at 310.

cause McDonald's locations had been around for a long time, many sites had become far more valuable than their original cost, and few buildings that displayed the identifiable McDonald's style were currently being used for other purposes.[132] Third, the Fourth Circuit found that by selecting franchise locations and building the stores itself, McDonald's was able to choose franchisees based on their potential for success rather than on their wealth or ability to offer a suitable site. The court stated, "McDonald's policy of owning its own stores reduces a franchisee's initial investment, . . . [which broadens] the applicant base and opens the door to persons who otherwise could not afford a McDonald's franchise."[133] Indeed, the record in *Principe* established that petitioner himself would have been unable to obtain the financing to build his location when he first became a franchisee some ten years earlier.[134] Notably, the disputes in both *Principe v. McDonald's Corp.* and *Kypta v. McDonald's Corp.*[135] began not when the named plaintiffs discovered the economic harm that the McDonald's Corporation's franchise-lease tie-in was causing them, but when they applied to McDonald's for a second or third franchise location and the franchisor denied their request for lack of sufficient administrative experience.[136] Last, the Fourth Circuit observed that the McDonald's Corporation's system of tie-ins was really a form of coinvestment that gave the franchisor and franchisees strong financial incentives to make the new location successful.[137] For example, under the arrangement both the franchisor and the franchisee invested a large amount of money in the new store.

As the *Principe* decision demonstrates, efficiency-creating tying arrangements can produce both losers and winners. Although McDonald's mandatory assignment of restaurant sites benefits the corporation, its customers, and many of its franchisees, the tying arrangement might disadvantage certain franchisees that can afford their own locations.

Many antitrust commentators argue that tying arrangements which create efficiency should not be illegal under the antitrust laws.[138] Occasionally courts have agreed by holding, for example, that

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132. *Id.*

133. *Id.*

134. *Id.* at 310 n.8.

135. 671 F.2d 1282 (11th Cir.), *cert. denied,* 103 S. Ct. 127 (1982).

136. *See* Kypta v. McDonald's Corp., 671 F.2d at 1283; Principe v. McDonald's Corp., 631 F.2d at 304. This fact itself suggests that efficiency-creating tying arrangements are not suitable for class action proceedings. *See infra* text accompanying notes 147-48.

137. Principe v. McDonald's Corp., 631 F.2d at 310-11.

138. *See* R. BORK, *supra* note 10, at 363-81; R. POSNER, *supra* note 11, at 171-84; Bow-

the tying and tied items in a particular case were a single legal "product."[139] If a court can determine before certification that a particular arrangement is efficiency creating and, hence, legal, then class action proceedings pose no problem because the class plaintiffs will have no claim anyway. Unfortunately, most existing law of tying arrangements is not so straightforward. Only a very limited "efficiency" defense exists in tie-in cases. Many tying arrangements that create efficiency are illegal under current law.[140] Courts that condemn efficiency-creating tie-ins tend to blur tbe distinction between tying arrangements which create efficiency and tie-ins that allegedly create leverage by turning a single monopoly into two monopolies. Very few courts have condemned a tie-in that they expressly have acknowledged as efficiency creating. Rather, courts have based a finding of illegality on either the leverage theory or, more commonly, on an unspecified theory.[141]

Before certifying a class in a tying arrangement antitrust case, a court should understand the economic function of the tying arrangement in the defendant's distribution scheme. Otberwise, the court lacks a mechanism for determining which potential plaintiffs have suffered injury from the tying arrangement. If a court determines that price discrimination, predatory pricing, or evasion of price regu-

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man, *supra* note 11.

139. *See* cases cited *supra* note 13.

140. *See, e.g.,* Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286 (5th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3649 (Mar. 7, 1983 U.S.). The Fifth Circuit in *Hyde* held that a tying arrangement which was really an exclusive dealing contract between a hospital and a provider of anesthesiological services was illegal per se. Plaintiff was a competitor in the market for the tied product, anesthesiological services. The court found that since plaintiff had made out the requisite case for a per se tying arrangement under Fifth Circuit doctrine, the application of the per se rule prevented the court from considering defendant's justifications. The court, therefore, refused to consider defendant's arguments that integration of anesthesological services through a single provider helped to reduce the hospital's costs and also enabled the hospital to deliver better service, because the available anesthesiologist was familiar with the hospital and its equipment. *Id.* at 293-94. Continued judicial recognition of a "per se" rule for tying arrangements suggests that many courts still doubt that tying arrangements frequently create efficiency.

141. The three, four, and five part tests that the courts have developed for determining the legality of tying arrangements, *see supra* notes 25-26 and accompanying text, generally permit a court to judge the legality of a tie-in without actually considering the cconomic function that the tying arrangement is playing in the defendant's distribution scheme. As a result, courts commonly condemn tying arrangements without any discussion of the tie-in's functional use. Judges only recently have begun to consider the economic function of the tying arrangement and to employ that functional analysis in their determination of legality. *See* Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343 (9th Cir.), *cert. denied,* 103 S. Ct. 305 (1982); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977); ILC Peripherals Leasing Corp. v. IBM, 448 F. Supp. 228 (N.D. Cal. 1978). The Ninth Circuit has led in this development.

lation are implausible explanations for a particular tying arrangement, then two possibilities remain: The leverage theory or the creation of efficiency. A court that accepts the leverage theory can infer that the tying arrangement injured all purchasers similarly: by a monopoly overcharge. On the other hand, a court might refuse to adopt the leverage theory and might acknowledge that a particular tying arrangement creates efficiency, but nevertheless recognize the possibility of liability. A court might choose the latter course either because it considers itself bound by current case law,[142] which condemns efficiency-creating tying arrangements, or because it believes that the antitrust laws embody goals other than allocative efficiency.[143]

Class certification analysis should acknowledge that efficiency-creating tie-ins, like virtually all efficient practices, create both beneficiaries and victims.[144] Most of McDonald's Corporation's franchisees and perhaps all its customers benefit because McDonald's requires every franchisee to sell Coca-Cola as its soft drink and to lease its retail outlet from the franchisor. Nevertheless, an occasional franchisee, because of its particular position, would have greater success if it did not have to follow the franchisor's requirements.[145] Similarly, in the newspaper advertising illustration, most of the advertisers probably benefit because of the newspaper's requirement that advertisers place the same advertisement in both the morning and evening editions.[146] The arrangement makes advertising substantially

142. For example, some courts that recognize a per se rule of illegality for tying arrangements hold that in per se cases they may not consider the defendant's proferred efficiency defenses. *See* Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286, 294 (5th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3649 (Mar. 7, 1983 U.S.). Other circuits will consider "business justification" defenses, including efficiency, even in per se analysis. *See* Grappone, Inc. v. Subaru of New England, Inc., 534 F. Supp. 1282, 1290-92 (D.N.H. 1982). *See also* Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot,* 66 VA. L. REV. 1235 (1980).

143. *See supra* note 124; *see also* Hovenkamp, *Distributive Justice and the Antitrust Laws,* 51 GEO. WASH. L. REV. ___ (1982) (forthcoming).

144. Even if the court uses the per se rule to determine liability, each plaintiff class member must show fact of injury.

145. *Principe v. McDonald's Corp.* illustrates the problem of establishing fact of damage by common proof, although that particular case was not a class action. Plaintiff in *Principe* was attempting to show an illegal tying arrangement in McDonald's Corporation's requirement that it provide the restaurant location for each franchisee. The record established, however, that at the time plaintiff opened its first restaurant it did not have the financial resources to procure its own location. Defendant's tying arrangement did not injure plaintiff, at least for that location. Principe v. McDonald's Corp., 631 F.2d at 310 n.8; *see* Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir.), *cert. denied,* 103 S. Ct. 127 (1982).

146. *See* Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); *supra* text accompanying note 125.

cheaper. Nevertheless, a few advertisers probably prefer to advertise in only the morning or evening newspaper.

Challenges to efficiency-creating tying arrangements are generally not suitable for class action certification when the plaintiffs are customers of the defendant. First, since the arrangement creates efficiency, the tie-in probably victimizes only a minority of the defendant's purchasers. Second, the availability of treble damages may encourage many potential plaintiffs that actually benefit from the tying arrangement to remain within the class. Whether a plaintiff is a beneficiary or a victim of an efficiency-creating tying arrangement depends largely on the particular party's unique circumstances—for example, its own ability to obtain an equally good restaurant location at a lower price[147] or its own lack of interest in combined morning and evening advertising. Because a court cannot determine fact of injury without examining the position of each plaintiff, class action certification would be inappropriate. In this circumstance careful judicial use of nonmutual offensive collateral estoppel for issues that really are common to all purchasers would be a better way to proceed.[148]

If, on the other hand, the plaintiffs are the defendant's competitors in the market for the tied product, the tying arrangement probably injures all plaintiffs in the same way, and class certification is appropriate, provided that the court is willing to recognize liability for efficiency-creating tie-ins. For example, even if a hospital's practice of using its own anesthesiologists is efficient, that practice uniformly will injure competing anesthesiologists who cannot have access to the hospital's business.[149] Efficient tie-ins, like all other efficiency-creating practices, do not produce gainers and losers among competitors—only losers.

IV. Multipurpose Tying Arrangements

Sellers often create tying arrangements for more than one of the economic reasons described in this Article. For example, McDonald's undoubtedly created the franchise-lease tying arrangement for two quite different economic purposes. First, as the court in *Principe* expressly found, defendant's requirement that it provide sites and buildings to franchisees created efficiency.[150] Second, the rental fee

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147. *See supra* note 145.

148. *See supra* notes 117-22 and accompanying text.

149. *See* Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286 (5th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3649 (Mar. 7, 1983 U.S.).

150. *See supra* notes 128-37 and accompanying text.

contained in the lease varied with the franchisee's gross revenues, which indicates that McDonald's also was engaged in price discrimination.[151] Similarly, in *IBM*[152] defendant probably tied paper punch cards to its computing machines for two reasons. First, IBM may have been trying to avoid excessive maintenance or user dissatisfaction by ensuring that consumers used only cards of IBM design in the machines.[153] If the tying arrangement was the cheapest way to achieve this objective, the tying arrangement created efficiency.[154] Second, IBM almost certainly was engaged in price discrimination.

For the most part, when the creator of a tying arrangement uses it for more than one purpose, courts must analyze separately the resulting injury with respect to each purpose. For example, a tie-in that facilitates price discrimination generally produces one set of gainers and one set of losers. Gainers tend to be low volume users of the defendant's products, and losers tend to be high volume users.[155] If the seller uses the same tying arrangement to create efficiency, as McDonald's did, a new set of gainers and losers emerges. The franchisees in the McDonald's cases collectively benefited from the tie-in because McDonald's could select applicants based on management potential rather than economic resources and because restaurant locations were more permanent than franchisee-owned locations. These results increased the value of McDonald's goodwill to the advantage of both the franchisor and the franchisee. The enhanced goodwill in turn contributed to consumer welfare. Nevertheless, the tie-in probably injured some individual franchisees, and their injuries may have outweighed the goodwill gains they received because of the tie-in. The franchisees harmed by McDonald's creation of efficiency, however, are not the same class as the franchisees injured in McDonald's price discrimination scheme. A court must establish separately whether a particular McDonald's franchisee is a loser as a result of one or both of the tying arrangement's functions.[156] Accordingly, a

151. *See* Principe v. McDonald's Corp., 631 F.2d 303, 304 (4th Cir. 1980), *cert. denied,* 451 U.S. 970 (1981).

152. IBM v. United States, 298 U.S. 131 (1936); *see supra* note 88 and accompanying text.

153. IBM raised this claim as a defense. 298 U.S. at 134, 138-39.

154. The court in the *IBM* case found that IBM simply could have set standards, and no evidence existed that competitors would fail to meet those standards. *Id.* at 139.

155. *See supra* note 101 and accompanying text.

156. The price discrimination scbeme would injure successful franchisees and benefit less successful franchisees. *See supra* note 101. The requirement that McDonald's supply the location for each franchisee, however, might advantage smaller franchisees and harm larger ones, which sometimes would have more capital and be able to purchase their own stores. These groups may or may not be the same.

court should treat certification separately for each functional claim.

V. Conclusion

In 1949 the Supreme Court stated that "[t]ying agreements serve hardly any purpose beyond the suppression of competition."[157] The Supreme Court was wrong. Many forced combined sales create efficiencies in distribution or manufacturing or enable a seller to meter its costs. A tying arrangement's illegality should depend on the economic function of the tie-in in the defendant's distribution scheme. Unfortunately, courts have developed a legal test for tie-ins that fails to elucidate these economic functions. Most judicial economic analysis of tie-ins in the case law exists despite, not because of, the existing test of legality. The economic function of a tying arrangement is important not only in determining the tying arrangement's legality, but also in establishing whom it injures. Different kinds of tie-ins cause different kinds of injuries. Some tying arrangements produce almost nothing but losers. A majority, however, produce both gainers and losers, and any rule that permits a tie-in antitrust case to proceed as a class action must include a mechanism for distinguishing one group from the other.

The "leverage" theory—that the owner of a monopoly in one product can use a tie-in to create a second monopoly and enlarge its monopoly profits—reasonably permits the inference that all customers of the tie-in suffer a common injury. Under the leverage theory all customers are victims of a monopoly overcharge. Unfortunately, however, economists have discredited thoroughly the leverage theory, as courts are beginning to recognize. Nevertheless, if a court is willing to accept the leverage theory as a substantive description of a particular tying arrangement, the court should allow class certification in that case.

Tying arrangements that serve to evade statutory price regulation are generally suitable for class action proceedings. When a seller uses a tying arrangement to evade maximum price regulation, the victims are usually the seller's customers, all of which have similar injuries that present a common question under rule 23(b)(3). When a

157. Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949) ("Standard Stations"). This case declared invalid an arrangement between Standard Oil and its independent dealers. The arrangement required the dealers both to take their full requirements of gasoline and to purchase all their "TBA" (tires, batteries, and accessories) from the oil company. Although the quotation from *Standard Oil* appears often in judicial opinions, most courts today return a judgment for the defendant in similar fact situations. *See* Hamro v. Shell Oil Co., 674 F.2d 784 (9th Cir. 1982); Pugh v. Mobil Oil Corp., 533 F. Supp. 169 (S.D. Tex. 1982).

seller employs a tie-in to evade minimum price regulation, an injury accrues to the defendant's competitors in the market for the tying product. The fact of these injuries is a common question, provided the competitors can show by common proof that they are in the same market for the tying product as the defendant. Finally, whenever a statutory monopolist uses tying arrangements to evade price regulation, whether maximum or minimum, injuries can accrue to competitors of the defendant in the market for the tied product; these injuries are similar and thus are suitable for class action litigation.

Sellers occasionally use tying arrangements to conceal or facilitate predatory pricing. Because of the nature of predatory pricing, however, class action lawsuits in this area are unlikely. The immediate victims of predatory pricing are the competitors of the predator. Predation generally is plausible only when the number of competitors is small enough that class action proceedings would not be necessary. The long term victims of predatory pricing are consumers, which might be sufficiently numerous to warrant class action proceedings. This group, however, probably would not allege an illegal tying arrangement; it would characterize the defendant's conduct as unlawful monopolization under section 2 of the Sherman Act.

Tying arrangements often serve to facilitate price discrimination or nondiscriminatory metering of the tying product's use. Although a tie-in employed as a nondiscriminatory metering device creates efficiency, most courts have not recognized efficiency as a defense in a tie-in case. Whether the use of tie-ins to facilitate price discrimination ought to be illegal is a controversial issue among economists and commentators. The judicial test for the illegality of tying arrangements condemns many tie-ins used for price discrimination, and federal antitrust policy supports this approach. Price discrimination by means of a tie-in is possible only when the seller has sufficient market power. The price discrimination device sometimes enables this seller to reach buyers that are willing to pay the marginal cost of the tying product but unwilling to buy the item at its nondiscriminatory profit-maximizing price. Similarly, the tie-in enables a seller to extract more than the profit-maximizing price from buyers that place a high value on the tying product. Thus, a price discrimination tie-in produces both beneficiaries and victims. The beneficiaries are the customers that would not have purchased the defendant's product at the nondiscriminatory profit-maximizing price but now are able to obtain the tying product at a lower price because of the tie-in. The victims are the customers that could have bought the tying product at its nondiscriminatory profit-maximizing price without the tie-in, but that must pay more as a result of the tie-in.

A court can separate the beneficiaries from the victims only by identifying what the defendant's profit-maximizing price would have been in a nondiscriminatory market. That determination, however, is difficult and complex and virtually forces the court to decide the merits of a tie-in case. Price discrimination tie-ins, therefore, are not suitable for class action proceedings under the current judicial interpretations of rule 23. Rather, the doctrine of nonmutual, offensive collateral estoppel may streamline litigation in these situations.

Many tying arrangements create efficiencies in production or distribution. Like most efficiency-creating arrangements, however, these tie-ins produce both gainers and losers. The arrangement is efficient if the gainers gain more than the losers lose. Although even efficiency-creating tie-ins can be illegal under the prevailing judicial test for illegality of tie-ins, courts increasingly are recognizing that efficient arrangements should not be illegal. In any event, efficiency-creating tie-ins are not suitable for class action proceedings because courts can distinguish the victims and beneficiaries of such tie-ins only by analyzing each case individually. In these situations use of nonmutual, offensive collateral estoppel for common issues would be a more judicious approach.