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I. INTRODUCTION

Few types of antitrust conduct have received as much treatment from the Supreme Court as tying arrangements.[1] This practice, which is unlawful per se when certain prerequisites are met,

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1. There have been 11 Supreme Court opinions in government or private treble damage actions against sellers allegedly employing tying arrangements. United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) [hereinafter referred to as "Fortner II"]; Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) [hereinafter referred to as "Fortner I"]; United States v. Loew's Inc., 371 U.S. 38 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-59 (1948); International Salt Co. v. United States, 332 U.S. 392 (1947); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 456 (1940); International Business Mach. Corp. v. United States, 298 U.S. 131 (1936); United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922); United States v. United Shoe Mach. Co., 247 U.S. 32 (1918).

The Court has also considered conduct highly similar to tying arrangements in three recent actions against sellers by the Federal Trade Commission under § 5 of the FTC Act. FTC v. Texaco, Inc., 393 U.S. 223 (1968); FTC v. Brown Shoe Co., 384 U.S. 316 (1966); Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965). *See also* FTC v. Sinclair Ref. Co., 261 U.S. 463 (1923); FTC v. Gratz, 253 U.S. 421 (1920).

Furthermore, the legality of tying arrangements has been considered by the Supreme Court in numerous actions for patent infringement or patent misuse brought by the holder of a patent who had insisted that its licensee use a particular product in conjunction with the patented product or process. *See, e.g.,* Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944); Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); B.B. Chemical Co. v. Ellis, 314 U.S. 495 (1942); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938); Carbice Corp. v. American Patents Dev. Corp., 283 U.S. 27 (1931); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917); Henry v. A.B. Dick Co., 224 U.S. 1 (1912); Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U.S. 325 (1909); Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U.S. 425 (1894).

Finally, there are important dicta regarding tying arrangements in two other cases, going beyond the learning of the decisions above. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 329-31 (1962); Standard Oil Co. v. United States, 337 U.S. 293, 305-07 (1949).

"may be defined as an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[2] Notwithstanding this extensive Supreme Court attention, there is as much heat as light in this area. The doctrine that has developed is often unpredictable and frequently irrational, and the applicable rules make the analysis far more complicated than necessary. A simpler and more direct approach is long overdue.

Present analysis consists of three steps. First, a court must determine whether there indeed is a tying arrangement—the "existence" question. One variation of this determination is whether there really is a tie at all, or whether the two (or more) things sold are merely parts of one "package." Alternatively, the seller may require the buyer—usually a retailer—simply to stock the entire line of the seller's goods, but will impose no requirement of buying certain fixed quantities of each item in the seller's line. Or, the seller may not coerce the buyer or expressly require the purchase of the tied product; the existence of the tying arrangement will have to be inferred from the conduct of the parties.[3]

Next, the court will have to determine whether this is the particular type of tying arrangement which should be held unlawful—the "liability" question. Although it will be rare to find tie-ins which have procompetitive effects, there nonetheless are three categories of tying arrangements—those which are always unlawful (those unreasonable per se), those which are unlawful only after a rule of reason inquiry, and those which are not unlawful under either approach.[4] Then the crazy quilt continues. Tying arrangements are

2. Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958). As used in this Article, the term "product" includes not only goods or commodities, but also intangibles such as land, money and services. Similarly, references to the buyer and seller also include the lessee and lessor, or licensee and licensor. *Cf.* Bazal v. Belford Trucking Co., 442 F. Supp. 1089, 1094 (S.D. Fla. 1977) ("privilege" of obtaining contract of employment may be "good or service").

3. For example, the seller may merely urge the buyer to take both products, or it may simply offer a lower price for the package than for the separate units, or it may so structure its marketing practices as to make the purchase of both products a practical necessity.

4. The per se rule governing tying arrangements is quite different from that applicable, for example, to price fixing. Once conduct is characterized as price fixing it is always illegal. Tie-ins, however, are illegal per se only when certain conditions are met. Furthermore, even those tie-ins may be found lawful if the conduct falls within certain enumerated defenses. The Court's ambivalence is reflected in a statement in White Motor Co. v. United States, 372 U.S. 253, 262 (1963): "Tying arrangements . . . may fall in [the per se] category, though not necessarily so." *See generally* Baldwin & McFarland, *Some Observations on "Per Se" and Tying Arrangements,* 6 ANTITRUST BULL. 433 (1961); Singer, *Market Power and Tying Arrangements,* 8 ANTITRUST BULL. 653, 655-56, 667 (1963).

The evaluation of the legality of the tie-in involves a determination of whether the seller analyzed under two different antitrust statutes—section 1 of the Sherman Act and section 3 of the Clayton Act.[5] For unexplained reasons, the Supreme Court created different standards for applying the per se rule, depending on the statute used;[6] today, however, there is serious doubt whether there still are two or only one test. Even when one knows the appropriate statute and standard to apply, recent cases have displayed a remarkable level of diversity and confusion in the application of the standard to the facts under consideration. Finally, the Court has recognized occasional defenses even to those tie-ins which would fall under the so-called per se rule. Although the existence of such defenses would appear to be an obvious contradiction in terms, it is nonetheless expressly sanctioned by the cases. It is certainly time to clarify some of these inconsistencies.

This Article will first examine the legal and economic theories applicable to tying arrangements. The Article will then examine the present confused state of the law, and will conclude by proposing a simplified test for evaluating future conduct. The Supreme Court has stated that "tying arrangements serve hardly any purpose beyond the suppression of competition."[7] If this is true, there is no logical justification for the two separate steps of the analysis, distinguishing the "existence" and "liability" issues; therefore, it is proposed that they be combined. In determining whether there is a tie, it may be relevant to determine whether the defendant has market power, and whether it has actually used that power. However, once a tie is found to exist, this should conclusively establish liability. The only remaining issue would be whether the defendant could show special facts that would justify the imposition of the tie-in,

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has "sufficient economic power in the tying product market" and whether a "not insubstantial amount of commerce has been restrained in the tied product market." *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499 (1969).

5. Actually, it would be more accurate to say that there are three controlling statutes, since § 5 of the FTC Act also reaches tying arrangements, and that statute has been held to reach antitrust violations "in their incipiency." *See* notes 205-07 *infra* and accompanying text.

Section 3 of the Clayton Act also proscribes certain exclusive dealing arrangements—situations in which a sale is made only on the condition that the buyer not purchase the products of any of the seller's competitors. Exclusive dealing—not dealt with in this Article—can have many of the same adverse effects on competition as tie-ins. *See, e.g.*, Standard Oil Co. v. United States, 337 U.S. 293, 300-15 (1949); Day, *Exclusive Dealing, Tying and Reciprocity—A Reappraisal*, 29 OHIO ST. L.J. 539 (1968).

6. Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 608-09 (1953).

7. Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305-06 (1949), *quoted in* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498 (1969); United States v. Loew's Inc., 371 U.S. 38, 44 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958).

notwithstanding the strong presumption that all tie-ins injure competition.

This approach is based on the following conclusions: (1) There are a variety of reasons for a seller to impose tying arrangements. However, in some cases, at least one reason the seller wants to impose the tie is to leverage its market power in the tying product to obtain added sales in the market for the tied product. (2) The use of this leverage power will have anticompetitive effects, particularly the foreclosure of competition in the tied product market. (3) Although there are several other reasons a seller may have for imposing the tie, tie-ins in general do not produce any economic benefits, except in certain specific situations, and may lead to other societal losses. (4) Therefore, again with certain specific exceptions, there will be no economic loss from condemning *all* tying arrangements, regardless of the seller's motivations. Condemning them all will provide a clear line for businessmen and courts, and will simplify judicial application of the rule.

II. Effects of the Conduct on Competition

The Supreme Court has recently reminded us to examine the economic realities of all conduct subject to the antitrust laws.[8] At the same time, we must also be mindful of judicial realities. Not only is a per se approach easier, quicker, cheaper and surer for the courts to enforce, it has greater deterrent value, thereby broadening the scope of conduct that never reaches the courts.[9]

This Section will examine why lawyers find tying arrangements improper; why economists find such conduct usually inappropriate for judicial condemnation; and why the attempted economic justifications for lenient treatment of tying arrangements are inadequate.[10] This Section will therefore provide a predicate for the con-

8. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47 (1977). "[D]eparture from the rule-of-reason standard must he based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Id.* at 58-59.

9. For a more detailed description of the advantages of the per se approach, see Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination,* 79 Colum. L. Rev. 685, 694-96 (1979). *See also* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977); United States v. Topco Assocs., Inc., 405 U.S. 596, 607-10 & n.10 (1972); United States v. Container Corp. of America, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

10. For stylistic reasons, I have contrasted the "judicial" view, or the "view of lawyers," with the "economists' position." This shorthand is adopted for the sake of convenience. Although these labels are probably accurate at least for a majority of the occupants of each camp, there is no intention to suggest that the views here are any more monolithic than in any other area of antitrust. Therefore, the qualification "only some lawyers" or "only some economists" should be understood at appropriate places in this Article.

clusion of this Article—that courts ought to continue, or even increase, their strict, per se treatment of tie-ins.

A. *Legal Analysis*

The case law has identified three potential adverse effects of tying arrangements. First, they may injure competitors of the seller for the tied product (the "foreclosure" effect). Second, they may make it more difficult for would-be competitors to compete in both the tying and tied product markets (the "barriers to entry" effect). Third, they may force the buyer either to take goods that it does not want, or to take those goods from a supplier other than the one it might have chosen absent the tie (the "coercion" effect). Present law also recognizes that tying arrangements may occasionally yield advantages to the seller without adversely affecting competition (the "defenses").

Economists argne that tying arrangements rarely have the adverse effects on competition ascribed to them. They argue that sellers who use tie-ins are usually motivated by other objectives, and that these tie-ins have no adverse effect on competition. Finally, economists agree with those cases which recognize as defenses certain specific procompetitive results which flow from some tying arrangements. This Section will examine these two often conflicting views, and will then offer an intermediate synthesis of these two approaches.

1. Effect On Competitors of the Seller (Foreclosure)

The traditional judicial objection to tying arrangements is that they may foreclose competitors of the seller from opportunities to make sales of the tied product.[11] The seller uses the leverage of the tying product to obtain sales in the tied product market, thereby excluding its competitors on grounds unrelated to the inherent qualities of the tied product. For example, in *International Business Machines Corp. v. United States,*[12] the defendant agreed to lease its tabulating and sorting machines only on the condition that lessees also purchase its tabulating cards. The defendant was guaranteed a certain volume of sales in the card market, not based solely on the quality or price of its product, but because of the leverage it could exercise from its power in the tying product market. Competitors of

11. Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958). *See generally* Note and Comment, *The Logic of Foreclosure: Tie-in Doctrine after* Fortner v. U.S. Steel, 79 YALE L.J. 86 (1969).

12. 298 U.S. 131 (1936).

the seller who wished to attempt to sell cards to the lessees were foreclosed from that potential market because of the tying arrangement.[13]

2. Effect on Would-be Competitors (Barriers to Entry)

A second result of a tying arrangement is that it may make it more difficult for a would-be competitor to obtain sales in either the tying or tied product market. Barriers to entry are raised by increasing the probability that the company will have to enter at both levels. For example, in *United Shoe Machinery Corp. v. United States*[14] the defendant, which leased machines to shoe manufacturers only on the condition that they also purchase its supplies, accounted for upwards of ninety-five percent of the shoe machinery market. With the defendant's tying arrangements in existence, if another company wished to enter the supplies market, all of defendant's lessees would have been excluded as potential customers. To enter the supplies market, the potential entrant would also have had to enter the machine market, with the relatively enormous costs of inventing around defendant's product, marketing expenses, and so forth. There is little doubt that, because of capital costs and risks of failure, it is more difficult to enter two markets simultaneously than merely to enter one at a time. Another although admittedly less serious problem is that with that potential manufacturer having been deterred from entry into the supplies market by the tie, if another company wanted to enter the machinery market, there would be fewer supplies sellers available to its potential customers; it, too, would have a greater need to enter on both levels. Therefore, the tying arrangement would diminish the likelihood that the seller would have competition from new entrants in either market.[15]

3. Effect on Buyers (Coercion)

The third traditional evil of tying arrangements is that they force purchases on a buyer who might either prefer to take the tied product from another seller or not to purchase that second product

13. *See also In re* Uranium Antitrust Litigation, 473 F. Supp. 393, 399-403 (N.D. Ill. 1979) (tying arrangements may also foreclose seller's competitors for the *tying* product). *Accord*, P. Areeda & D. Turner, Antitrust Law ¶ 733e (1978).

14. 258 U.S. 451 (1922). Additional facts regarding the company's history, market position and leasing practices are found in United States v. United Shoe Mach. Co., 247 U.S. 32 (1918). *See also* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 509 (1969); *id.* at 513 (White, J., dissenting).

15. C. Kaysen & P. Turner, Antitrust Policy: An Economic and Legal Analysis 157 (1959).

at all.[16] For example, in *Loew's Inc. v. United States,*[17] the defendant movie producer-distributors required television stations to take an entire package of films, rather than to negotiate licenses only for those films they desired. Thus, in order to get *Casablanca,* the station also had to take *Tugboat Annie Sails Again.*[18] The Court held that the antitrust laws afford protection to those purchasers that might want different films from other producers, or might not want to rent additional films at all.[19]

Recent cases, however, suggest that this particular evil is not enough, by itself, to justify finding a tie-in unlawful. There must be some injury to competition—to actual or potential competitors—as well as to the buyer. One source of this narrower view is the latest Supreme Court tie-in case, *United States Steel Corp. v. Fortner Enterprises, Inc.*[20] The plaintiff had obtained a loan from a subsidiary of U.S. Steel on the condition that the money be used to purchase prefabricated homes from another U.S. Steel subsidiary. In its first consideration of this case,[21] the Supreme Court held that the defendant's credit was a separate product from the homes which would be purchased therewith, and that the tie-in would be unlawful if the plaintiff could show that the defendant had market power in the credit (tying product) market. The plaintiff argued that the defendant's credit was unique, since there was no other lender that offered money on similar terms. In *Fortner II,* the Court found that the defendant did not have such market power—even though there was no other company willing to lend money on those terms—since

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16. "At the same time buyers are forced to forego their free choice between competing products." Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958). *Accord,* United States v. Loew's Inc., 371 U.S. 38, 44-45 (1962); Brown Shoe Co. v. United States, 370 U.S. 294, 330 (1962).

17. 371 U.S. 38 (1962).

18. *Id.* at 41-42. This same practice, called "block-booking," has also been condemned in an earlier case, United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-59 (1948). *See generally* Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media,* 32 VAND. L. REV. 1249 (1979).

19. Another interest of the buyer that is limited by tie-ins is in having alternative sources of supply of the tied product, either for diversity, or because the original source may be cut off by a strike or the like.

20. 429 U.S. 610 (1977) (Fortner II), *noted in* Klebaner, *Credit Tie-Ins: Where Banks Stand After The* Fortner *Decisions,* 95 BANKING L.J. 419 (1978).

21. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) (Fortner I). *Fortner I* is discussed in Dam, Fortner Enterprises v. United States Steel: *"Neither a Borrower, Nor a Lender Be,"* 1969 SUP. CT. REV. 1; Handler, *Antitrust: 1969,* 55 CORNELL L. REV. 161-71 (1970); Nelson, *Tying Arrangements Reconsidered: A Review of* Fortner Enterprises, Inc. v. U.S. Steel Corp., 15 ANTITRUST BULL. 7 (1970); Comment, *Credit As a Tying Product,* 69 COLUM L. REV. 1435 (1969); *The Supreme Court, 1968 Term,* 83 HARV. L. REV. 7, 235-47 (1969); 48 N.C.L. REV. 309 (1970).

the plaintiff made no showing that other companies in the tying product market could not have made such loans had they chosen to do so. There was no showing that these other companies, either actual competitors or potential entrants, were foreclosed from the tied product market by the defendant's practices; they had voluntarily chosen to forego that market. The Court, therefore, found no violation of the Sherman Act.

Accepting, as the doctrine of law of the case requires, that there actually was a tie in this situation, then the Court's analysis in *Fortner II* overlooked the fact that, regardless of the lack of foreclosure of competitors, the buyer might have been injured by the tie. The simple fact was that at the time no other seller offered the particularly attractive terms of U.S. Steel. The buyer had to take the defendant's homes to get the credit, although it might have wanted to buy the homes from someone else, or use the money lent for an entirely different enterprise.

It is not sufficient to say, as Mr. Justice White argued in dissent in *Fortner I*,[22] that had U.S. Steel not lent money to Fortner, he would not have had the opportunity to use it for anything. In every tying arrangement, having the tying product facilitates use of the tied product.[23] For example, unless the buyers in *IBM* had taken the defendant's card tabulating machine, they would have had no need for the tied cards. Yet the fact that the machines were unavailable elsewhere—making the defendant the sole source of products compatible with the cards—was not only not justification for the tie-in, but an additional reason for condemning it as an unwarranted attempted extension of the defendant's monopoly.[24]

There is nothing that requires a seller like U.S. Steel to offer its credit at all. But once it does decide to offer credit on certain terms, then, accepting the *Fortner I* premise that this may be part of an illegal tying arrangement, it ought not be able to tie that credit to the purchase of certain other products. Regardless of the exist-

22. 394 U.S. at 516-17 (White, J., dissenting). *But see id.* at 508-09 (Black, J.).

23. Of course, this observation is particularly true with respect to money (or credit).

24. Another recent example of this narrow view of the target of the injury necessary for finding a tie-in unlawful is Coniglio v. Highwood Serv., Inc., 495 F.2d 1286 (2d Cir.), *cert. denied,* 419 U.S. 1022 (1974). The plaintiff challenged a professional football team's requirement that purchasers of regular season tickets (the tying product) also had to purchase tickets to pre-season games (the tied product). The court, although finding two separate products, substantial economic power in the tying product market, and a restraint of a not insubstantial amount of commerce in the tied product market, nonetheless found no violation because no other professional football team competed with the buyer for ticket sales; hence, there was no foreclosure of competition. The court dismissed as irrelevant for tying analysis the fact that the ticket buyer might have used the money spent on exhibition game tickets for another form of entertainment or might even have put it to a completely different use.

ence of competition in the tying product market, and regardless of the attractiveness of one of the products sold by the seller, the buyer is being forced to take something else which may be less desirable. This coercion of the buyer, resulting in foreclosure of opportunities to purchase elsewhere or not at all, should be enough to satisfy the injury requirement of a tying arrangement.[25]

4. Some Defenses Recognized by Case Law

Even those lawyers who condemn most tying arrangements recognize that they occasionally may yield significant benefits to the parties that outweigh the injuries described above. These benefits are described in more detail below.[26] They are recognized exceptions to the general judicial proposition that tie-ins only rarely benefit competition,[27] and hence are accepted defenses to the rule of per se illegality of tie-ins. This Article accepts the premise that certain exceptions to the general rule are appropriate. Defenses should be available when the tie-in promotes efficiency and when less restrictive alternatives to accomplish those same results are not available.

B. Economic Analysis

Most economists take the view that the per se rule against tying arrangements is unwise.[28] They argne that the leverage theory only rarely motivates sellers to engage in tie-ins, and that even if it did, it would rarely be successful; therefore, judicial concern based on the leverage theory is misplaced. Economists suggest that, instead, several other objectives motivate sellers entering into tying arrangements which have benign effects on competition. Finally, they argue that some tie-ins are motivated by efficiency considerations, and that proscription of these would be harmful to the economy.

This Section will describe the different motivations economists ascribe to sellers engaging in tying arrangements. The next Section will suggest why the leverage theory should not be rejected; will

25. The recent case of Reiter v. Sonotone Corp., 99 S. Ct. 2326 (1979), lends additional support to the assertion that this injury to consumers is enough to satisfy this requirement. At issue was whether a consumer who spent more for goods designed for "personal use" than he otherwise might have, because of unlawful price fixing, could maintain a private treble damage action under section 4 of the Clayton Act. In permitting the suit, the Court rejected the argnment that an injury to "husiness or property" required an injury of a commercial or business nature. Similarly, in *Coniglio, see* note 24 *supra,* the foothall fan's spending a greater sum to buy season tickets, and that in *Fortner* the home builder's spending more for prefabricated homes than he otherwise would have, was injurious, regardless of the existence and hence the foreclosure of actual or potential competitors.

26. *See* text accompanying notes 152-63 *infra.*

27. *See* note 7 *supra* and accompanying text.

28. *See, e.g.,* Baldwin & McFarland, *supra* note 4, at 438 (citing other economists).

discuss why even the other objectives ascribed to sellers are not as benign as argued; and will accept, although in somewhat limited form, the suggested procompetitive objectives of tie-ins.

The seller that has a certain amount of monopoly power[29] in one product can have two objectives in its pricing decisions for that product. First, even a monopolist has difficulty in extracting the full potential monopoly profit from its product; it will want to adjust its marketing techniques to increase that profit. Then, it may want to use its market power to obtain not only the full monopoly profit from that product, but may also want to use the "leverage" of that power to obtain some profits in *another* product market as well. Tying arrangements may be useful devices to achieve both of these goals. If the tie is used for the first objective, it will be deemed a "revenue maximizing device"; if it is used for the second objective, it will be deemed a "monopoly creating device."[30]

Many economists argue that tie-ins can be used only rarely as a monopoly creating device.[31] Even the seller with a "true monopoly"—the seller with 100% of sales in the relevant market—cannot change prices without suffering some loss of sales. Before the imposition of a tying arrangement, it will already have set its price at the level at which marginal cost equals marginal revenue. Even though an increase in price may increase revenue per unit, at that point there will be a sufficiently large fall-off in total amount demanded that net profits will decrease. What happens when a tie-in is imposed? If the tied product represents something that the buyer does not want, or that is priced higher than its value to the buyer, the buyer will treat it as an increase in the price of the *tying* product. The economist posits, therefore, that in most cases any increase in the profits realized on the tied product will be completely offset by the loss of profits on the tying product.[32]

To summarize—many economists argne that a seller can never get more than the monopoly price for the tying product. If buyers

29. In this context, monopoly means only that the seller faces a meaningfully downward sloping demand curve. Thus, the price it sets will affect the amount that consumers will buy, and it has the option to set its price higher than its marginal costs.

30. These are the labels used in Professor Bowman's seminal article, Bowman, *Tying Arrangements and the Leverage Problem,* 67 YALE L.J. 19 (1957).

31. *See, e.g.,* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 171-84 (1976); Baldwin & McFarland, *Tying Arrangements in Law and Economics,* 8 ANTITRUST BULL. 743, 766, 778 (1963); Bowman, *supra* note 30; Burstein, *A Theory of Full-Line Forcing,* 55 NW. U.L. REV. 62 (1960). *See also* R. BORK, THE ANTITRUST PARADOX 365-81 (1978).

32. This approach was used by the Court in United States v. United Shoe Mach. Co., 247 U.S. 32, 65 (1918), to uphold tying arrangements in the defendant's lease provisions. Economists believe that deviation from this analysis, in favor of alternate explanations of tie-ins, is the source of the assertedly inappropriate rules applied today.

really want the tying product, they will pay up to the monopoly price to obtain it. If the tied product is undesired, those buyers will not pay any more for the tying product than before, or will not pay more for the tied product than what it is worth (the competitive price).[33] All the tying arrangement can do is reduce the price of the tying product and raise the price of the tied product, leaving the combined price no more than it would have been absent the tie. Economists therefore argue that the leverage theory is an inadequate explanation for tie-ins.[34] Since the case law is based on this analysis of tie-ins, and since this kind of conduct rarely occurs, they argue that the per se rule is inappropriate.

The other justifications for tying arrangements are more widely accepted.[35] Sellers wish to capture the largest possible share of the total profit which at least theoretically inheres in the tying product. The seller's inability to reap this hypothetical maximum profit simply by adjusting its price is the result of two related phenomena. First, as to each individual buyer (and for all buyers in the aggregate), the demand curve is usually negatively sloped; this simply means that the buyer is willing to pay more for the first unit of something than he would pay for the second, and then more for that than the third, and so on. However, normal marketing techniques require that the tenth unit be sold at the same price as the first. Unless the seller can somehow charge more for the earlier units—to take advantage of the higher marginal utility of those units to the buyer—there is said to be "consumer's surplus" in the transaction.[36] Second, some buyers derive different utilities from a product than other buyers. This simply means that some buyers would pay twenty dollars for the same first (or tenth) unit for which others would pay no more than ten dollars. It states the obvious, however,

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33. *See* Pearson, *Tying Arrangements and Antitrust Policy,* 60 Nw. U.L. Rev. 626, 632-34 (1965).

34. *See, e.g.,* Bowman, *supra* note 30, at 29-36 (per se rule particularly inappropriate in patent combination cases); Burstein, *supra* note 31 (but per se rule may nonetheless be appropriate).

35. The economic analysis of these different seller objectives is exhaustively covered in Markovits, *Tie-ins, Reciprocity and the Leverage Theory,* 76 Yale L.J. 1397 (1967).

36. Consumer's surplus is the difference between the total utility of all units purchased—the amount the consumer would have paid for all units—and the amount actually paid. *See* P. Samuelson, Economics 438-40 (10th ed. 1976).

Professor Stigler offers a variation of this goal as an explanation for the desire of movie producer-distributors to offer packages of films to television stations. He argues that the practice enabled the licensors to take account of the different relative values put on each film in the package by individual stations, when a uniform price on each film separately would yield lower revenues either because the total of the separate prices would be lower, or because certain stations would not take the films at higher prices. Stigler, United States v. Loew's Inc.: *A Note on Block-Booking,* 1963 Sup. Ct. Rev. 152.

to say that any price over ten dollars will lose some sales. The seller would want to structure its pricing system so that it can make both sales and still obtain the full utility value ascribed to the goods by each seller. The seller simply wishes to engage in price discrimination.[37]

One effective technique for capturing the consumer's surplus or effecting price discrimination is to impose tying arrangements. The seller will obtain a share of the consumer's surplus if it charges a lower price than might otherwise prevail on the tying product, while at the same time charging a higher price on the tied product, changes in the demand for which will be less sensitive to changes in the price.[38]

Economists assert that the most frequent objective of tying arrangements is to effect price discrimination. These arrangements are designed to extract the full marginal utility ascribed to the tying product by different purchasers by using a separate tied product as a "counting device." The seller charges less than the full monopoly price on the tying product, and charges a super-normal price for the tied product, which is sold in varying quantities to different buyers. The implementation of this technique is best illustrated by the facts of *International Salt Co. v. United States.*[39]

The defendant in that case had patents for machines which would simplify the injection of salt into food products. Food canners would have to purchase salt somewhere, regardless of whether they used the defendant's machine. Assume that a company would have to spend one dollar per thousand cans of food for the labor involved in injecting the necessary ten pounds of salt if it did not have defendant's machine, and only seventy-five cents per thousand cans if it had the use of those machines. Under those facts, the food processor would be willing to spend almost up to twenty-five cents for every thousand cans it manufactures to rent the defendant's salt injecting machine, since any price below twenty-five cents would save it money. Furthermore, it would not matter if this twenty-five cents fee were levied on the machine alone or on some combination of lower price of the machine and higher price for salt, as long as the

37. This kind of price discrimination is unrelated to the kind of conduct covered by the Robinson-Patman Act, 15 U.S.C. § 13 (1976). Here, price discrimination simply means sales at prices matched to the utility put on the goods or services by different buyers.

38. For a detailed discussion of the use of tying arrangements to implement a strategy of capturing a share of the consumer's surplus for the seller, see Burstein, *supra* note 31, at 74-77; Edwards, *Economics of "Tying" Arrangements: Some Proposed Guidelines for Bank Holding-Company Regulation,* 6 ANTITRUST LAW & ECON. REV. 87, 89-95 (1973); Markovits, *supra* note 35, at 1399-1443.

39. 332 U.S. 392 (1947).

total was something less than twenty-five cents per thousand cans. Now further assume that there are two such food processors. Artichoke manufactures one million cans per month, while Broccoli manufactures only 500,000 per month. The saving to Artichoke, if it uses defendant's machine, is $250 per month, while that to Broccoli is only $125 per month. Any rental charge over $125 per month will lose Broccoli's business; any charge under $250 will fail to capture for the lessor the full marginal utility of the machine to Artichoke. Ideally, the lessor would then base the rental fee on the machine's use by, or marginal utility to, the buyer. However, this may not be possible, perhaps because Broccoli would rent the machine from the lessor for $125 and then sublease it to Artichoke (arbitrage), or perhaps because it is difficult for the lessor to calculate in advance the use of the machine, and hence an appropriate rental price. Another alternative is for the lessor to rent the machine at a nominal price—or even allow its free use—on the condition that the lessee use the defendant's salt in connection with the machine. Thus, in our example, both Artichoke and Broccoli would be better off paying up to a fraction less than two and one-half cents per pound above the prevailing market price for salt if they had free use of defendant's machine.[40] The economist would argue that the defendant is getting no more in total return than it would get from charging the full monopoly price on the machine and charging the competitive market price for the tied goods. The tying arrangement is being used merely to facilitate a form of price discrimination by the seller. Since the buyer pays no more for the package, so the argument runs, no one is harmed by the tying arrangement.

The conclusion supposedly to be drawn from this analysis is that tying arrangements that are used as revenue maximizing devices do not alter the competitive relationship between producers; they simply shift resources from one group (consumers) to another group (producers). Since there is nothing that "entitles" consumers to obtain the goods and services at lower prices, there is nothing wrong, the economists argue, in this particular marketing strategy. In fact, it might be argued that in some situations, this use of tying arrangements is societally beneficial, since it may increase the total availability of goods and services. Assume, for example, a tie that is used as a counting device to effect price discrimination among buyers with different utilities for the tying product. For a variety of reasons, more direct counting methods may be undesirable or even

40. Any other combination of machine rental and extra salt charge, adding up to a fraction less than 2.5¢, would yield the same result.

unfeasible.[41] If tie-ins were not available the seller might charge all users a somewhat higher price for the tying product—the price which maximizes the return on that product taken alone—thereby resulting in a lower net usage of that product than would exist with the tie.[42]

Economists assert that tying arrangements may be implemented for other reasons as well. The ties can be methods of avoiding constraints on raising the price of the tying product. These may be the result of government-imposed price ceilings;[43] of a temporary "gray market" situation, when the seller feels it cannot gouge its customers but when it would still like to take advantage of the demand for its product; or of an oligopoly pricing situation, when price changes will quickly be matched by the few other sellers. The tying product will be sold at the appropriate "maximum," but its true "market value" will be captured by forcing the buyer to purchase another product at a higher price, which reflects the difference between that maximum and the true market value.

Tying arrangements may also be imposed for reasons less directly related to price and profit maximization. The seller may be concerned that the failure to use certain related products with its tying product will cause customer dissatisfaction. For example, the manufacturer of a machine may fear that low quality supplies will cause the machine to malfunction, or that the purchase of low quality goods by a retail customer from one franchisee will impair the reputation for quality of the franchisor's trademark. Therefore, to maintain the goodwill of its tying product the seller may require that its own tied products be used in connection with the tying product.[44]

Finally, it may be cheaper to sell the two products as a unit,

41. For example, the user of the tying product will not know in advance its precise volume of usage; because most businesses are risk avoiders, they will be unwilling to pay as much for future uncertain use as they would for present actual use. Alternatively the seller may fear that the purchasers will use fraudulent devices to underreport the volume of use of the tying product. *See* Burstein, *supra* note 31, at 69-72; Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis,* 30 LAW & CONTEMP. PROB. 552, 555-56 (1965); Markovits, *supra* note 35, at 1444.

42. In this situation—where absent a tie-in the seller would not use other counting devices, and so fewer tying products would be sold—there might be injury to some would-be buyers and to society in general. This is a frequently cited example of the procompetitive effects of tie-ins. *See, e.g.,* R. BORK, *supra* note 31, at 375; Baldwin & McFarland, *supra* note 31, at 745; Burstein, *supra* note 31, at 69-72; Edwards, *supra* note 38, at 102-05; Ferguson, *supra* note 41; Markovits, *supra* note 35, at 1444.

43. *See, e.g.,* Coffin-Redington Co. v. Porter, 156 F.2d 113 (9th Cir. 1946). The use of tie-ins to evade price "floors" is suggested in Edwards, *supra* note 38, at 96-97.

44. The existence of these benefits is the premise for the goodwill and business justification defenses, discussed in text accompanying notes 152-63, 196-97 *infra.*

eitber because of economies of scale or particular technological requirements. Regardless of whether this cost savings is passed along partially or entirely to the buyer in the form of a lower price for the two product "package" or is retained by the seller, economic advantages result to at least one of the parties to the transaction from these tie-ins.[45]

C. Synthesis of the Two Approaches

The economist's view is that the courts have based a per se rule on an unrealistic appraisal of the motivations for, and effects of, tying arrangements. They argue that since using tying arrangements as monopoly creating devices is not feasible the concerns about leverage are illusory. Next, the economists assert that the revenue-maximization objective is competitively neutral, since economics does not make any value judgment about who should have the "consumer's surplus" or the full marginal utility of the tying product—the buyer or the seller.[46]

This Article differs in several respects. First, it argues that the use of the leverage of the tying product's market power to obtain some monopoly power in the tied product market in fact does occur in some situations, and that this practice should be of concern under the antitrust laws. Second, even the revenue-maximizing type of tie-in can have anticompetitive effects. Third, although economics may claim itself to be a "value-free" system, one can make *social* or *political* judgments that it is desirable to maximize the distribution of surplus to the buyers rather than to sellers. Finally, the two objectives of tying arrangements[47] are not neatly differentiated; rather, most sellers who engage in tie-ins will be seeking some combination of these two goals. Not only will problems of proof be siguificant, but there will be little benefit from making this distinction. Therefore, continuation of the per se approach for all types of

45. It has been suggested tbat tie-ins may be of some benefit to *purchasers*, for example, to assure them of high quality complementary products, to take advantage of a seller's advertising of an entire range of products, or to enable them to take advantage of quantity discounts. Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 WIS. L. REV. 88, 99. It sbould be obvious, however, that the tie-in itself offers none of these advantages. The buyer is presumably free to buy both products, even absent the tie. If the buyer wished to have the tied product as well as the tying product to reap these advantages, no compulsion or coercion would be necessary. The tie-in, then, by definition, is necessary because the seller fears that, absent the compulsion, the buyer would not take the tied product.

46. There is considerably less disagreement between lawyers and economists on the appropriateness of certain efficiency exceptions or defenses. Any disagreement that does arise is on the definition and breadth of tbese exceptions.

47. *See* text accompanying note 30 *supra*.

tying arrangements is appropriate.

Although some would argue that tie-ins can only rarely be used to extend monopoly power to a second product, economists agree that this leverage effect does occur occasionally.[48] This objective will most frequently prevail when (1) the two products are used in varying proportions; (2) the demands for them are complementary, so that a reduction in the price of the tying product will not only increase demand for it, but will also increase demand for the tied product, even if its price stays unchanged;[49] and (3) the seller has substantial market power in the tying product market, but there is sufficiently vigorous competition in the tied product market that the seller would have no ability to control prices there.[50] When these conditions are present a seller would be willing to take a lower price and, assuming the amount demanded does not increase sufficiently, a lower profit, in the tying product market, if those reduced profits would be more than offset by increase of profits in the tied product market. Given the vigorous competition in the tied product market, however, the seller has no way of insuring, absent the tie, that the lower tying product price will yield it—rather than its competitors—the increased share in the tied product market. The tying arrangement, however, can give the seller this control in both markets. Under these conditions, regardless of the price the seller could have set for the tying product, the total profit realized with the tie will indeed be greater than the seller could have obtained on the tying product alone.[51]

Another objection to the economists' challenge to the leverage theory is that it ignores the fact that there may be foreclosure of competitors even if the seller is not attempting to obtain a

48. *See, e.g.,* Bowman, *supra* note 31, at 20, 32; Burstein, *supra* note 31, at 67-68 n.21, 94; Edwards, *supra* note 38, at 97-98. *See also In re* Uranium Antitrust Litigation, 473 F. Supp. 393, 399-403 (N.D. Ill. 1979) (tying arrangements may also foreclose seller's competitors for the *tying* product); P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 733e (1978).

49. An example would be the demands for coffee and sugar. In contrast, when products are substitutes—coffee and tea—a rise in the price of one will increase sales of the other, even if the second product's price stays constant.

50. E. SINGER, ANTITRUST ECONOMICS 190-95 (1968); Baldwin & McFarland, *supra* note 31, at 769. The cases generally provide little economic analysis to distinguish the various motives for tie-ins. In United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 560-61 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961), the court suggested that the defendant was unlawfully using the tie-in in an attempt to make monopoly profits in the tied product market, beyond what it could have obtained solely by adjusting its price in the tying product market, in which it admittedly had a monopoly. The court held that the defendant had to reap its profits solely from raising prices of the tying product, while recognizing that this would yield a lower total return.

51. *See* Bowman, *supra* note 30, at 25 & n.18.

"monopoly"[52] position in the tied product market. Competition will be injured even if the seller is simply trying to increase the percentage of sales it would make in that arguably competitive market, beyond those it would have made if it could not rely on a tie.[53] Even if the seller is getting no more than the competitive price for the tied product, it is making that sale. The seller is assured of an outlet for an additional product because of the tie. In view of the large expenses that companies undertake for marketing and advertising, having this captive market without undergoing these expenses and without taking the risk that the sale will not be made is certainly of some value. Since the economist defines costs to include a fair return on capital,[54] getting the "competitive" price still means that the company is making at least a "normal" profit. If the seller does not have to incur the marketing costs, it probably will be getting at least some greater than "normal" profit.

After challenging the leverage or monopoly-extension theory, many economists argue that because the three principal objectives of tying arrangements—maximization of consumer's surplus, price discrimination and avoidance of price restraints on the tying product—do not foreclose competing sellers, the rule holding all tie-ins to be per se unlawful is inappropriate. They argue that an examination of the defendant's motives is required, and that tie-ins should be condemned, if at all, only when the defendant's intent, and the effect of its conduct, is shown to be anticompetitive.

Numerous responses can be offered to this assertion—(1) Even tie-ins designed solely for revenue maximization may improperly foreclose competitors and hence injure competition; (2) A buyer

52. One source of this disagreement between lawyers and economists is the definition of "leverage." Economists apply the term only when the tie is used as a monopoly-creating device; the use of the tie for revenue maximization is not thought to be a use of "leverage." *See* Bowman, *supra* note 30; text accompanying note 30 *supra*. Since monopoly in the tied product market means the seller is getting more than a competitive price, economists seemingly imply that a sale made at the competitive price is no different than no sale at all. As the text suggests, the assurance of making such a sale is in fact something to which the seller is hardly indifferent and which furthermore may have important competitive significance.

53. In International Salt Co. v. United States, 332 U.S. 392, 396-97 (1947) and Northern Pac. Ry. v. United States, 356 U.S. 1, 11-12 (1958), defendants argued that their competitors were not foreclosed, and buyers not injured, because the tying contracts expressly allowed the buyers to go elsewhere if the defendants' competitors offered lower prices for the tied products. Yet, it is obvious that by merely matching those prices the defendants would guarantee themselves 100% of the sales to the particular buyers; this assured share is preferable to competition for an uncertain share. Therefore, in both cases the Court properly dismissed this alleged absence of buyer injury as an inadequate defense. *Accord*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 512-13 nn.3, 5 (1969) (White, J., dissenting).

54. Burstein, *supra* note 31, at 66 n.16.

that is deprived of the free choice of whether or from whom to purchase a second product often suffers significant injury; (3) It is not unimportant whether resources are distributed to the seller or to the buyer; (4) The seller's motives are neither clear nor unalloyed; it may be difficult to determine the seller's objectives since it may be seeking monopoly extension as well as revenue maximization; (5) Even if it is true that tie-ins in this second category usually dó not injure competition, they also yield few, if any, benefits to competition. For these five reasons as well as for considerations of deterrence and judicial economy, continued application of a per se rule to this conduct is appropriate.

First, as suggested earlier, even assuming a seller is getting nothing more than a "competitive price" for its product, it is not ambivalent about making a sale. Even if all of the monopoly profit is attributable to the tying product, it is not irrelevant to the seller that it is also making a normal profit on the tied product. For example, even if the International Salt Company could reap no monopoly profits on its salt from the tying arrangement[55] —the buyers were paying no more than the value of the salt injecting machine—the simple fact was that without any marketing or advertising expenses, and without incurring the risk or uncertainty factors from being unable to forecast future demands, this seller knew that it had a captive market, and that its competitors could not take these sales away from it. Thus, if foreclosure is defined as the inability of prospective sellers to compete on equal terms, then the clear *effect* of the arrangement is market foreclosure.[56]

A second effect of all tie-ins is the deprivation of the buyer's free choice. Many economists argue that this simply does not occur—the buyer is simply paying more for the tied product, because it is getting a lower price on the tying product. The buyer will never pay more for the two products than their combined value. Even if this is true, the buyer may still have his purchasing decisions distorted

55. *See* text accompanying notes 39-40 *supra.*

56. Some economists suggest that foreclosure of competitors could not have been the defendant's intent, since the salt subject to the tie-in was only a very small percentage of total salt sales. They argue that the leverage theory is discredited by the fact that this small share could not possibly allow the seller to obtain a monopoly in the tied product market. *See, e.g.,* R. POSNER, *supra* note 31, at 176; Pearson, *supra* note 33, at 637 (foreclosure is de minimis and hence an inadequate basis for per se rule). Yet, the same practice would work, as in *United Shoe Machinery,* when sales of supplies might be a far larger percentage of the total market. Regardless of defendant's motive, and regardless of the percentage of market foreclosed, the fact is tbat the *effect* of the arrangement was *some* foreclosure. Furthermore, although it is true that the seller may not obtain a tied product monopoly in the Sherman § 2 sense, it is deriving monopoly profits for the limited additional amount of the tied product it sells.

by the tie-in. The football ticket cases[57] prove a useful example. Certain professional football teams required the purchaser of seven regular season tickets to purchase three exhibition game tickets as well, each ticket being sold for the price of ten dollars.[58] Assume a fan who would value the regular season game tickets at twelve dollars, and the exhibition game tickets at six dollars. The economist would argue that since he values the total package of ten tickets at $102, he is really better off by being forced to buy all ten at a total of $100. But is he? He values the regular season tickets at eighty-four dollars, and may be fully satisfied with watching only those games.[59] He might want to use the additional sixteen dollars to buy

57. Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321 (5th Cir. 1974); Coniglio v. Highwood Servs., Inc., 495 F.2d 1286 (2d Cir.), *cert. denied,* 419 U.S. 1022 (1974) (discussed in note 24 *supra*); Laing v. Minnesota Vikings Football Club, Inc., 372 F. Supp. 59 (D. Minn. 1973), *aff'd per curiam,* 492 F.2d 1381 (8th Cir.), *cert. denied,* 419 U.S. 832 (1974); Grossman Dev. Co. v. Detroit Lions, Inc., 1973-2 Trade Cas. 95,538 (E.D. Mich. 1973), *aff'd mem.,* 503 F.2d 1404 (6th Cir. 1974); Pfeiffer v. New England Patriots Football Club, Inc., 1973-1 Trade Cas. 93,265 (D. Mass. 1972); Rubin v. Miami Dolphins, Ltd., Civ. No. 74-129-Civ.-CA (S.D. Fla. filed May 22, 1974).

58. The cases make no attempt to identify, from an economic perspective, why the defendants engaged in this conduct. They seem to be classic illustrations of the leverage theory—using the more desirable regular season tickets to sell the less desired exhibition tickets. Even if tbey are no more than a form of price discrimination, however, the illustrations in this note and the text will show that they not only can increase the total revenues of the team, but can also injure both the football fan and the team's competitors for the fan's disposable income.

Using the assumption that each ticket—the seven regular season and the three preseason—costs $10, let us further assume that the stadium has 50,000 seats. The total season revenue will be $5 million. The team management, acting as rational sellers, will have priced the tickets at the profit-maximizing level; this means that any increase in price will result in such a large decrease in purchases tbat the net total revenues will fall. Since the team is interested in total season revenues, it will take a somewhat lower price on regular season tickets if it can make up this amount by greater sales of exhibition game tickets.

Now assume that the exhibition games have a sufficient diminished attraction that only 30,000 fans would attend at $10 a ticket, if there were no tie-in. The economist would then argue that the reason all 50,000 fans buy the tickets is that as to the other 20,000, the regular season tickets are truly worth more than $10, and they are allocating some of the exhibition game ticket price to the regular season ticket. But if the regular season tickets were then priced at this "true value"—which may be $12—and were not made the subject of a tie-in, total sales might fall to only 47,000 tickets, since 3,000 fans might feel that no games are worth the additional $2. Furthermore, at the $12 price, the team might only sell 25,000 exhibition tickets. As a result, its net season revenue has dropped to $4,848,000 (7 games x $12 x 47,000 plus 3 games x $12 x 25,000). Other combinations of prices and fan preferences would also yield lower total net revenues.

The mathematics would be arbitrary, based on the demand curves one would hypothesize. Nevertheless, the use of a tie-in allows the seller to sell its entire product, at a greater total net revenue, by engaging in a form of price discrimination than it could have done if it had to deal with all buyers based on their varying preferences for the different products.

59. The economist might argue that if the exhibition game tickets are worth $6 to that fan, he would be equally well off either watching those games, or selling the tickets for that price. This, however, fails to recognize that others in the marketplace may not value the

hockey tickets, or go to a movie, or perhaps even put that money in a savings account.[60] While forcing him to buy all ten tickets arguably gives him greater net "economic utility" for his money, it nonetheless distorts the spending decisions from those that would have prevailed absent the tie.[61]

Third, the fact that certain forms of tying arrangements might not shift any resources among competing producers, but will merely shift them between sellers and buyers, is nonetheless not irrelevant for antitrust purposes. Economic explanations are said to be value-free; the distribution of resources among buyers and sellers, provided there is no increase or dimunition in total societal resources, is a concern that economists need not address.[62] The legal system ought not be equally value-free.[63] This Article not only proceeds on

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tickets even at $6, so he may find no buyers; or, even if the "market price" for the exhibition tickets is more than $6, and he could sell them, the fan will incur additional transaction costs, such as identifying the potential buyers and consummating the sales.

60. Although the court in *Coniglio* rejected the plaintiff's argument that his other entertainment options were foreclosed—by finding these other choices not to be a part of the "relevant market," 495 F.2d at 1293—it is difficult to understand why the other sport teams in the city might not have been foreclosed by defendant's practices. Furtbermore, if one admits that the tie does foreclose the buyer from making *some* other use of his money, why should it be significant that the alternative is in some other "relevant market," or even that it may be difficult to identify just what the choices were?

61. Another example of this narrow approach is Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648, 673-75 (D.S.C. 1977), *aff'd*, 594 F.2d 979 (4th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3431 (1980). In a reversal of the normal pattern of patent/tie-in cases—in which the patented product is the tying product and the buyer is required to take unpatented products, *see, e.g.*, cases cited in note 1 *supra*—here the defendant required buyers to take a license on its patents in order to obtain the defendant's unpatented machines. In holding this tying arrangement lawful, the court said that since no competitors could have been foreclosed from offering the patented tied products, there could be no restraint of commerce in that market. This analysis fails, however, to measure the potential injury to the plaintiff-buyers. They might have wanted only the unpatented tying product and not the tied products. Yet, because of the tying arrangement, they were required to take both, perhaps increasing their costs or at least allowing the defendants to engage in price discrimination.

62. *See, e.g.*, A. ALCHIAN & W. ALLEN, EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION AND CONTROL 40 (2d ed. 1977); Burstein, *supra* note 31, at 89 n.71; Edwards, *supra* note 38, at 101-02.

63. Professor Markovits includes among the objectives of tie-ins the concealment of the seller's contract or tax fraud. He notes that the seller "could use other methods of obscuring his actual sales of and profits on [the tying product], but the tie-in may increase the probability that [the seller's] fraud will not be detected by providing him witb invoices to substantiate his bookkeeping entries." Markovits, *Tie-ins, Reciprocity,. and the Leverage Theory Part II: Tie-ins, Leverage, and the American Antitrust Laws*, 80 YALE L.J. 195, 229 (1970). Yet even this fact does not seem to persuade him that tying arrangements ought to be unlawful under the antitrust laws, although he concedes that such conduct "may be void under the common law of contracts as *contra bones* [*sic*] *mores.*" *Id.* at 196, n.2. It should not be surprising that others may conclude that although the antitrust laws are principally designed to promote competition, it is not inconsistent with this assertion to say that they are appropriate vehicles for dealing with undesirable conduct for noncompetitive reasons as well.

the premise that it is not of negligible concern whether profit maximization goes to the seller or to the buyer; it makes the explicit value judgment that, all other things being equal, the buyers' interests ought to prevail. For example, there is no need to be equivocal about tie-ins used to evade governmental price ceilings on the tying product, even if they cause no adverse impact on competition. Therefore, if it is asserted that the principal objective of tying arrangements is to achieve this shifting of resources effect, this in itself might be sufficient grounds to hold all tying arrangements unlawful.

Fourth, the objectives of tying arrangements are often intermingled and, in any event, will be difficult to identify. In many cases, sellers will adopt tying arrangements for a variety of reasons rather than just one. Even if the defendant's intent is to use the tie-in solely for revenue-maximization, it may nonetheless also have a monopoly creating effect. For example, the assertion that tying arrangements are used principally to achieve price discrimination—that they are merely convenient counting devices—fails to explain a number of the franchising tie-ins. If the franchisor is not sure how successful the outlet will be, so that it does not want to charge a flat franchise fee, it may want to collect its royalties indirectly, by charging a supernormal price for ancillary products.[64] But, could this not he done effectively by tying one product or group of products? It does not explain why the seller insists on tying sales to a large number of different tied products, often including equipment or the lease of real property as well as supplies consumed in varying volumes. The fact that the buyers are required to take this host of tied products suggests that the seller is not merely trying to maximize profits in the tying product market; it is also trying to extend its monopoly into a number of additional markets.[65] The existence of this possibility as one of the seller's goals is not diminished by the fact that the franchisor often does not manufacture the tied products; the commission it gets on those sales is equally effective to allow it to capture its supernormal profits.

Furthermore, proof of the seller's principal or exclusive motivation will often be exceedingly difficult.[66] The examination of motives will involve conflicting testimony by expert witnesses, which the court (and even more so a jury) simply cannot evaluate satisfacto-

64. *See, e.g.,* Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).

65. In fact, Professor Burstein concedes that at least some tie-in cases are best explained by an extension of monopoly theory. Burstein, *supra* note 31, at 67 n.21, 82 n.51.

66. Bowman, *supra* note 30, at 35-36.

rily. In response to the defendant's assertions that its goals were competitively benign, the plaintiff will have to resort to economic models to show that the defendant's conduct could have, or did have, leverage effects in the tied product market. Mere contemplation of this process suggests that the net result of this attempted examination of the defendant's intent will be quite unsatisfactory.

Finally, the best that defenders of tying arrangements can offer is that they usually have no anticompetitive effects.[67] Aside from the specific defenses to be discussed below, there are few economic efficiencies that can be identified.[68] This, then, is the ideal situation for application of a per se rule. Perhaps the dispute can be distilled to a question of presumptions or of burden of proof. For example, Professor Markovits rejects the per se rule against tying arrangements because "[t]he Court has simply failed to justify its conclusion that the *inevitable (or the exclusive)* function of tie-ins is to reduce competition in the tied-product market."[69] This discussion suggests that tying arrangements can have a wide variety of adverse economic and societal consequences. But, even accepting his assertion, this does not destroy the vitality of the per se rule.

There are numerous advantages of a per se approach. Stating that the conduct is always unlawful will save considerable judicial resources in evaluating the alleged reasonableness of the particular conduct. There will be greater predictability and hence greater deterrence. There will be diminished likelihood that improper conduct will be permitted to continue.[70] Per se rules are appropriate when the courts have examined numerous instances of the conduct in question, and have reached the conclusion that continued reexamination will not yield situations in which the conduct should be permitted to continue. With the exception of *Fortner Enterprises, Inc. v. United States Steel Corp.*[71] and *Times-Picayune Publishing Co. v. United States,*[72] the Supreme Court has sustained challenges to tying arrangements in all cases decided by full opinion.[73] Since in my view *Fortner II* was improperly decided and *Times-Picayune*

67. The example most frequently offered is the use of tie-ins as counting devices. If the direct imposition of varying royalty payments would be lawful, it is argued that the practice ought not be unlawful when it is done in another, indirect manner. Although this method may be more convenient for the seller, it is not so clear that it yields efficiencies or cost savings, and it runs the risk of adversely affecting competition.

68. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 156 (1977). *See also* Ferguson, *supra* note 41, at 564 (economist approving per se rule).

69. Markovits, *supra* note 63, at 205 (emphasis added).

70. *See* note 9 *supra*.

71. United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977).

72. Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953).

73. *See* note 1 *supra*.

may be otherwise explained,[74] the per se rule respecting tying arrangements should be restated and even expanded.[75]

An analogy may be drawn to the rule of price fixing. Price fixing is unreasonable per se, even though this form of conduct may not always injure competition.[76] That rule is justified because price fixing often injures competition; it never benefits competition; and it is simply not a worthwhile expenditure of judicial resources to separate out the injurious from the benign. Similarly, having shown that tie-ins often injure competition, why must one go further to show that they always injure competition, if the defenders of this conduct can come forward with only slight justifications for allowing the conduct to continue, other than the specific benefits which the rule argned for in this Article would recognize as defenses? On the other hand, if the rule argued for by the economists—requiring individual examination of the effects of each tie-in—were accepted, the sellers' hope of persuading the trier of fact of their benign intentions would lead to expansion of tying arrangments.

Having concluded that the per se rule for tying arrangements is sound, and that the attempted defense of this conduct by economists is inadequate, this Article will next proceed to examine the standards created by courts for evaluating tie-ins. After examining the present separate tests for showing the existence and then the illegality of tie-ins, the Article will suggest that this approach is unnecessarily complicated and gives rise to needless confusion. The Article will then conclude with a proposal for a simplified approach to tie-ins, combining the issues of existence and liability.

III. Present Case Law

A. *Existence of a Tie-in*

1. One or two products?

Analytically, the first step in any tying analysis must be whether the sale consisted of two separate products or whether the

74. *See* the criticism of this case at notes 136-45 *infra*, and accompanying text. The other Supreme Court decision upholding a tying arrangement, Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953), can be explained both on the ground that the Court found that the sale involved only "one product," and hence there could be no tie-in, *see* discussion at notes 79-82 *infra*, and accompanying text, and also that the standard for illegality is one which has been modified by the Court since that decision, *see* note 131 *infra* and accompanying text.

75. Solomon, *An Analysis of Tying Arrangements: The Offer You Can't Refuse*, 26 Mercer L. Rev. 547 (1975).

76. National Soc. of Prof. Eng'rs v. United States, 435 U.S. 679 (1978); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

"package sale" ought to be viewed as that of a larger, single product. It is tautological that there can be no tie-in if there is a sale of only one product. The cases often give the illustrations that there is no tie-in if a store insists that the customer purchase a right shoe in order to get the left one, or if an automobile dealer requires a customer to take tires with her new car. Yet, although there have been a number of cases[77] in which the presence of two separate products was a key issue, and despite a number of suggested tests in the legal literature,[78] there is still no satisfactory standard for evaluating this key question.

Much of the blame can be laid on the Supreme Court. In the two cases in which this issue arose, *Times-Picayune Publishing Co. v. United States*[79] and *Fortner Enterprises, Inc. v. United States Steel Corp.*,[80] not only did the Court fail to articulate a clear test, but even worse the Court treated the "one product versus two product" question as a defense to what would be an otherwise unlawful tie-in, rather than as an essential prerequisite to the very existence of a tying arrangement.

In *Times-Picayune*, the Government challenged a requirement by a newspaper publisher that persons wishing to place an advertisement in its morning newspaper also had to place the advertisement in the evening paper. The Court's opinion devoted six pages to a discussion of standards of legality, the effect of the arrangement

77. *See, e.g.*, Foster v. Maryland State Sav. & Loan Ass'n, 590 F.2d 928, 931-33 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); Moore v. James H. Matthews & Co., 550 F.2d 1207, 1214-15 (9th Cir. 1977), *on remand*, 1979-1 Trade Cas. 77,991, 77,992 (D.Ore. 1979); Northern v. McGraw-Edison Co., 542 F.2d 1336, 1345 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); Coniglio v. Highwood Servs., Inc., 495 F.2d 1286, 1291 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252-53 (4th Cir. 1971); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 759-66 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965); Anderson Foreign Motors, Inc. v. New England Toyota Dist., Inc., 475 F. Supp. 973, 981-86 (D. Mass. 1979); Kypta v. McDonald's Corp., 1979-2 Trade Cas. 78,779 (S.D. Fla. 1979); Brown v. Cameron-Brown Co., 1979-1 Trade Cas. 77,702, 77,703-04 (E.D. Va. 1979); Johnson v. Nationwide Indus., Inc., 450 F. Supp. 948, 951 (N.D. Ill. 1978); ILC Peripherals Leasing Corp. v. IBM Corp., 448 F. Supp. 228, 230-34 (N.D. Cal. 1978); N.W. Controls, Inc. v. Outhoard Marine Corp., 333 F. Supp. 493, 501 (D. Del. 1971).

78. *See, e.g.*, Austin, *supra* note 45, at 116-18; Pearson, *supra* note 33, at 627-30; Ross, *The Single Product Issue in Antitrust Tying: A Functional Approach*, 23 EMORY L.J. 963 (1974); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 68-72 (1958); Wheeler, *Some Observations on Tie-ins, The Single Product Defense, Exclusive Dealing and Regulated Industries*, 60 CALIF. L. REV. 1557 (1972); Note, *Tying Arrangements and the Single Product Issue*, 31 OHIO ST. L.J. 861 (1970); Note, *Product Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws*, 46 S. CAL. L. REV. 160 (1972); 85 HARV. L. REV. 670, 674-79 (1972).

79. 345 U.S. 594 (1953); *see* Note, *Definition of the Market in Tying Arrangements: Another Aspect of Times-Picayune*, 63 YALE L.J. 389 (1954).

80. 394 U.S. 495 (1969).

on competition, and so forth,[81] before finally stating that the sale of advertising in the morning and afternoon newspapers constituted only one product.[82]

In *Fortner I,* the key issue that split the five Justice majority and the four Justice dissent was whether credit (the alleged tying product) was a separate product from the goods sold on credit (the alleged tied product). Yet, once again, not only did the Court first devote nine pages to discussion of the standards of legality before reaching this key preliminary issue,[83] but then it again failed to take the opportunity to offer a clear test for making this determination.[84]

In fairness, however, the Court is not entirely responsible for the prevailing confusion. The definition of the relevant unitary product for tie-in purposes depends on a number of factors. It would be inappropriate for this Article to deal with these issues in great detail and then offer yet another general test. The standards suggested in the cases and in the literature are useful beginnings. Courts should look at the prevailing practice by which the product(s) is sold industry-wide; whether the products are sold in fixed or variable quantities; whether there is some cost savings or other efficiency in selling the product(s) together; the practical functions served by selling the items in a package; and the motive of the seller in choosing this method of distribution.[85] One hopes that, at the

81. 345 U.S. at 605-12.

82. *Id.* at 613-14. This conclusion must then render the entire prior discussion pure dictum. Curiously, although the Court had stressed that the market which the defendant allegedly dominated was advertising, not readership (or circulation), *id.* at 610, in reaching the conclusion that the product sold was advertising generally rather than separate advertisements in separate newspapers, the Court relied on the assumption that advertisers (the "purchasers") were primarily concerned with fungible readers, and "that the *readership* 'bought' by advertisers in the Times-Picayune was the selfsame 'product' sold by the States . . . ." *Id.* at 613 (emphasis added). One wonders if the same result would be reached if, for example, Time, Inc., the publisher of such magazines as *Sports Illustrated* and *Fortune,* would require advertisements in both magazines as a condition to the right to advertise in either. Since it is unlikely that the composition of the "readership" of these publications is similar, it would seem inappropriate to treat the readers as fungibles as to which advertisers are indifferent. This conclusion is also inconsistent with the Court's later treatment of "block-booking," United States v. Loew's, Inc., 371 U.S. 38 (1962); *see* notes 17-19 *supra* and accompanying text, in which it assumed without discussion that copyrighted films were separate products.

83. *Compare* 394 U.S. at 498-507 *with* 345 U.S. at 507-09.

84. The Court's opinion shows the unimportance of a definition of the test—"Whatever the standards for determining exactly when a transaction involves only a 'single product.' " *Id.* at 507.

85. An interesting variation on the one product-two product question is raised in certain trademark licensing cases. The seller of a trademarked product, who permits the buyer to use the trademark as an identifying mark in connection with its business, will insist that the buyer not sell the goods of competing manufacturers under that trademark. In these cases courts have held that the trademark is not a separate product from the trademarked goods.

next opportunity, the Court will deal with the issue directly and forthrightly.

2. Express Agreements

Assuming that there are two separate products, the key question facing a court is whether the sale of the tying product actually was conditioned on the purchase of the tied product. The cases have used a variety of phrases to express this requirement—that the purchase of the tied product was "coerced;"[86] that there was a "condition" or "requirement" that both products be taken;[87] that the package was "forced" on the buyer or was taken "involuntarily;"[88] that there was "pressure" or "some modicum of coercion shown;"[89] or, the legally conclusory form, that the purchases were "tied."[90] Yet, these phrases all express the same concept,

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Redd v. Shell Oil Co., 524 F.2d 1054, 1055-57 (10th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976); Barnosky Oils, Inc. v. Union Oil Co., 1979-1 Trade Cas. 77,779, 77,786 (E.D. Mich. 1978). *See also* Kugler v. AAMCO Automatic Transmissions, Inc., 460 F.2d 1214, 1215-16 (8th Cir. 1972) (advertising materials not separate product from franchisee's right to use trademark); Krehl v. Baskin-Robbins Ice Cream Co., 1979-2 Trade Cas. 78,699, 78,706-07 (C.D. Cal. 1979) (trademark of franchisor not separate from product which is "distinctive underlying basis of [franchisor's] business"). In contrast, if the seller—usually a franchisor—requires the buyer to take unrelated equipment or supplies as a condition of using the trademark, courts have usually found two separate products. *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969). *See generally* Levy, *Trademark Franchising and Antitrust Law: The Two-Product Rule for Tying Arrangements*, 69 TRADEMARK REP. 41 (1979).

86. *See, e.g.*, Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 708 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978); Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 377 n.9 (5th Cir. 1977); Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1327 (5th Cir. 1976); Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1222 & n.9 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976) (citing additional cases); McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1242 (E.D. Mich. 1978); Columbia Broadcasting Sys., Inc. v. American Soc'y of Composers, 400 F. Supp. 737, 781 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130, 134 (2d Cir. 1977), *rev'd on other grounds sub nom.* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

87. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); International Bus. Mach. Corp. v. United States, 298 U.S. 131, 135 (1936); Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1173 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1061 n.3 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 450 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (actual coercion unnecessary; "leverage or coercion is implicit when plaintiff proves the conditioning of sales of one product upon purchase of another"); AAMCO Automatic Transmissions, Inc. v. Tayloe, 407 F. Supp. 430, 434 (E.D. Pa. 1976).

88. *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 504 (1969); Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 614 (1953); United States v. Westinghouse Elec. Corp., 471 F. Supp. 532, 544 (N.D. Cal. 1978).

89. *See, e.g.*, United States v. Loew's, Inc., 371 U.S. 38, 40 (1962); Moore v. James H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977).

90. *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 510 (1969) (White, J., dissenting); Hill v. A-T-O, Inc., 535 F.2d 1349, 1355 (2d Cir. 1976)

even if the choice of language does not also convey certain judicial predispositions to the nature of proof required: there can be no tying arrangement unless the buyer unwillingly took the second product in order to be able to take the first product. If the buyer would freely have chosen to take both anyway, the seller cannot be deemed to have imposed a tie-in.

Evidence of the tie can either take the form of an express requirement,[91] or there can be an implied agreement, which can be inferred from the contract itself, from the relationship between the parties and the facts surrounding their bargaining, or from the nature of the products. Although there is case law to the contrary,[92] the sounder view is that an express requirement in the sales agreement, that the buyer must take both products, will be sufficient to prove that the acceptance by the buyer of the tied product was not voluntary.

Because the per se rule applicable to tie-ins separates the existence and liability issues, the outcome of cases involving even express ties has been inconsistent. Today even some express tie-ins are nonetheless not unlawful.[93] This Article will suggest that all express tie-ins should be unlawful, subject only to the same defenses as would apply to tie-ins that result from implied agreements.[94]

3. Implied Agreements

There is a large amount of case law dealing with situations in which courts may infer a tying agreement. This issue is important since if the purchaser had the free choice to buy the tied product elsewhere, but voluntarily chose to buy it from the seller, any of the evils that might be present would not be the result of the seller's conduct or market power. Not only was the buyer not coerced, but the competing sellers were not foreclosed by the seller's conduct, but

("unremitting policy of tie-in"). *Cf.* Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 978 (5th Cir. 1977), *cert. denied,* 434 U.S. 1087 (1978) (in action by competitor in tied product market, jury question presented if evidence shows buyers were " 'persuaded' to buy goods which they otherwise would not buy").

91. "Proof that a seller expressly conditioned the sale of one product upon the purchase of another suffices as proof of the existence of a tie-in without further evidence of coercion." Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 287 (3d Cir. 1978). *Accord,* Anderson Foreign Motors, Inc. v. New England Toyota Dist., Inc., 475 F. Supp. 979, 988 (D. Mass. 1979).

92. *See, e.g.,* Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658 (2nd Cir. 1974). *See generally,* Austin, *The Individual Coercion Doctrine in Tie-In Analysis: Confusing and Irrelevant,* 65 CALIF. L. REV. 1143, 1154-58 (1977); Varner, *Voluntary Ties and the Sherman Act,* 50 S. CAL. L. REV. 271, 284-94 (1977).

93. *See* text accompanying notes 125-59 *infra.*

94. *See* text accompanying notes 164-95 *infra.*

if at all only by the fact that the seller offered two separate attractive products at attractive prices—the very goal of competition. On the other hand, when the purchase is coerced, not only is this free choice lost, but competitors of the seller lose sales, not because of the attractiveness of the tied product but because of the leverage that flows from the seller's power in a different market. The difficulty arises, of course, because there is no clear line that divides voluntary purchases from coercion.[95] Rather, there is a continuum, and the dividing line shifts from case to case.

Absent the express agreement, the existence of the tie-in becomes a question of fact—just what was the bargain struck between the parties. One way of proving an agreement is to infer a tie from the contract itself.[96] For example, although the contract might give the buyer an option of finding an alternate supplier for the tied product within a thirty-day period, the period allowed might, as a practical matter, be so short that the purchaser has no real alternative. Similarly the alleged freedom to purchase from approved suppliers of the tied product may be illusory if the seller has refused to designate such approved suppliers.[97]

Another way of demonstrating a tie-in is to examine the negotiations and relationships between the parties, to show that the defendant's so-called persuasion was so strong that the buyer felt it had no practical alternative other than to take the tied product;[98]

95. Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1226 (3d Cir.), *cert. denied,* 429 U.S. 823 (1976).

96. *Compare* Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 665-66 (2d Cir. 1974) (plaintiff's proof inadequate to infer coercion from contract terms and parties' negotiations) *with* Martino v. McDonald's Sys., Inc., 81 F.R.D. 81, 87-89 (N.D. Ill. 1979) (defendant's policy, coupled with contract terms, permits inference of tie-in).

97. These restrictions were the basis of plaintiffs' assertions in Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd,* 531 F.2d 1211, 1216 (3rd Cir.), *cert. denied,* 429 U.S. 823 (1976), that the defendant subjected them to tying arrangements. *See also* Bogosian v. Gulf Oil Corp., 561 F.2d 434, 450-51 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978) (distinguishing *Ungar*). *Cf.* Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368 (5th Cir. 1977) (no tie-in, when alternative sources of supply for franchises were freely designated).

98. *See, e.g.,* Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 977 (5th Cir. 1977), *cert. denied,* 434 U.S. 1087 (1978) ("best efforts" clause in contract insufficient evidence; court must also "look at the circumstances surrounding the use of these clauses"); Advance Business Sys. & Supply Co. v. SCM Corp., 415 F.2d 55, 64 (4th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970) (inference justified by "persistent and deliberate misrepresentations, sabotage, and threats of cancellation"); Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 118 (C.D. Cal. 1978) (plaintiff may show tie "by proving a course of conduct"); Abercrombie v. Lum's, Inc., 345 F. Supp. 387, 390 (S.D. Fla. 1972). *Cf.* F.T.C. v. Texaco, Inc., 393 U.S. 223, 228-29 (1968) (coercion inherent in relationship between small buyer and multibillion dollar corporate seller).

An early example of a situation permitting the inference of a tying arrangement is United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457-58 (1922). The defendant's lease otherwise, the seller would refuse to do business with the buyer altogether. This method of proof involves balancing several competing interests. Although tying arrangements are thought competitively unhealthy, vigorous bargaining is desirable, since the seller seeks to increase its sales while the buyer seeks lower prices and better service and quality.[99] The buyer clearly may not prove the existence of a tying arrangement simply by showing that the defendant's salesmen vigorously sought to make the sale, and even argued the benefit to both parties of taking additional portions of the seller's line.[100] The line between hard selling and actual coercion, however, is not only narrow and vague, but seems to shift among the reported decisions. Among the factors that courts ought to consider are the relative sizes of the parties; the effect on the buyer of losing the right to sell the tying product—is it just one of the lines that the buyer carries, or is the buyer heavily dependent on those products, as would be true of the typical franchisee; and the economic power of the tying product—if the seller refuses to sell that product to the buyer, are there other similar products to which the buyer can readily turn, or is that tying product particularly desirable or unique.[101] This analysis suggests, for example, that in the typical franchise case, the franchisor may violate the rule against tie-ins by many forms of vigorous bargaining. Although that may place some restraints on its salesmen, this may be necessary to protect not only the competitors of the franchisor for sales of the tied product, but to afford flexibility to the franchisee in choosing its suppliers of those products.[102]

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provisions required, *inter alia,* that the lessee only use the lessor's machines to perform the manufacturing functions of that kind of machine, at the risk of losing the leases on all machines of all types. The Court therefore found that "[w]hile the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessee, the practical effect of these drastic provisions is to prevent such use." *Id.* at 457.

99. The Supreme Court has recently affirmed the primacy of vigorous bargaining in reconciling the goals of the Sherman and Robinson-Patman Acts. United States v. United States Gypsum Co., 438 U.S. 422, 446-59 (1978). *See also* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 511 (1969) (White, J., dissenting).

100. *See, e.g.,* Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1328-30 (5th Cir. 1976); Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1224-25 (3d Cir.), *cert. denied,* 429 U.S. 823 (1976); Davis v. Marathon Oil Co., 528 F.2d 395, 401-02 (6th Cir. 1975), *cert. denied,* 429 U.S. 823 (1976); American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied,* 404 U.S. 1063 (1972); McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1242 (E.D. Mich. 1978).

101. *Accord,* Moore v. James H. Matthews & Co., 550 F.2d 1207, 1217 (9th Cir. 1977). The greater the defendant's market power in the tying product, the greater is the likelihood that it will be able to make its coercion effective. *See* text accompanying notes 164-95 *infra.*

102. For an examination of some of the particular problems raised by tying arrangements in a franchising context, *see, e.g.,* Baker, *Another Look at Franchise Tie-ins after*

Tie-ins may also be inferred when the seller has so structured the combination of products as to make it necessary—even inevitable—that both be taken.[103] This could arise when the technology is such that only the defendant's products will be compatible with its separate tying product, or when the seller has refused to release specifications for the tied product so that no competition can arise for its sale.[104]

Even if the buyer is free not to take the tied product, it has been suggested that a tying arrangement may nonetheless be inferred when the two products are sold together at a significantly lower price—as part of a "package"—than when offered separately. In *Advance Business Systems and Supply Co. v. SCM Corp.*,[105] the defendant sold its photocopier on a "copy service" basis, according to which customers paid a single charge based on the number of copies run on the machine as recorded by a meter; supplies and service were included in the single charge. The defendant argued that there was no unlawful tie, since users could have purchased the machine and the paper and service separately. Tbe court, however, held that the purchase price of $4250 was not equivalent to the defendant's rental at a price of three and one-half cents per copy; therefore it inferred the existence of a tie-in imposed through coercion, because "tie-ins are non-coercive, and therefore legal, only if the components are separately available to the customer on a bais [*sic*] as favorable as the tie-in arrangement."[106]

Texaco *and* Fortner, 14 ANTITRUST BULL. 767 (1969); Harkins, *Tying and the Franchisee*, 47 ANTITRUST L.J. 903 (1978); Kamenshine, *Competition Versus Fairness in Franchising*, 40 GEO. WASH. L. REV. 197, 204-09 (1971); McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-ins*, 58 CALIF. L. REV. 1085 (1970); Zeidman, *The Rule of Reason in Franchisor-Franchisee Relationships*, 47 ANTITRUST L.J. 873, 881-85 (1978); Comment, *Franchise Tie-ins and Antitrust: A Critical Analysis*, 1973 WIS. L. REV. 847. *See also* notes 85 *supra* and 133 *infra*.

103. *See, e.g.*, Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1329-30 (5th Cir. 1976) (theory accepted, but finding that plaintiff's evidence was insufficient).

104. This, of course, assumes that the two components are indeed separate products, rather than part of a unitary package. *Cf.* Automatic Radio Mfg. Co. v. Ford Motor Co., 390 F.2d 113 (1st Cir.), *cert. denied*, 391 U.S. 914 (1968) (automobile manufacturer changed dashboard design in cars sold without built-in radios, to make later radio installation more expensive; competing radio manufacturer's request for injunction denied); *accord*, Dominion Radio Supply, Inc. v. General Motors Corp., 1979-1 Trade Cas. 77,522 (E.D. Va. 1979). *See generally* Comment, *Physical Tie-Ins As Antitrust Violations*, 1975 U. ILL. L. F. 224.

In Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), plaintiff alleged that defendant Kodak had introduced new cameras, which were compatible only with Kodak's new film cartridge, making plaintiff's old film obsolete. The court denied plaintiff's request that, in the future, Kodak be required to reveal in advance specifications of new products so the plaintiff would be able to offer compatible competing film.

105. 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

106. *Id.* at 62. *See also* United States v. Loew's, Inc., 371 U.S. 38, 54-55 (1962) (approving decree prohibiting differentials in price between each film when sold separately, and when

The increased use of the class action device in antitrust litigation has contributed to the confusion regarding the type of proof necessary to show that the buyer was coerced to accept the tying arrangement. Rule 23(b)(3) of the Federal Rules of Civil Procedure, under which most such class actions are brought, requires that the court make a finding "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."[107] In the tying arrangement context, this has given rise to the so-called "individual coercion" doctrine—the plaintiff must prove that it was "required" to take the tied product. Absent an express agreement, the plaintiff then must rely on certain facts which justify the inference that the requirement existed. In opposing the certification of a class, the defendant naturally will argue that the facts that would permit this inference will differ because of its individual relationships with each purchaser, and that therefore certification is improper. The result of this dispute has been a number of cases[108] devoted not to the broader question of

sold as a package, except when price differentials are cost justified). American Mfg. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 283 (2d Cir. 1967); Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648, 697 (D. S.C. 1977), *aff'd* 594 F.2d 979 (4th Cir. 1979), *cert. denied,* 48 U.S.L.W. 3431 (1980).

This theory was extended in SCM Corp. v. Xerox Corp., 463 F.Supp. 983 (D. Conn. 1978). Plaintiff, a manufacturer of low speed paper copiers, complained that defendant—who manufactured both low and high speed paper copiers—had violated the Sherman and Clayton Acts by offering its Machine Utilization Plan (MUP), which allowed users to combine total uses of all their machines, to obtain higher discounts. The plaintiff asserted that MUP was an incentive for those who would only have used the defendant's high speed machine, and competitors' low speed machines, to use all of defendant's machines. The trial court offered a jury instruction, accepting the plaintiff's theory that this was a tying arrangement, even though it was conceded that no customer had to take a low speed machine as a condition of getting a high speed machine; any coercion was purely economic. The instruction read that "a tying arrangement results if the economic realities of the situation effectively coerce the customer into taking one product in order to get another product that he wants." 463 F. Supp. at 1017.

The *Advance Business Systems* approach was limited in Fontana Aviation, Inc. v. Cessna Aircraft Co., 460 F. Supp. 1151, 1155 & n.11 (N.D. Ill. 1978).

107. FED. R. CIV. P. 23(b)(3).

108. Cases in which the court refused to certify the suit as a class action because of failure to satisfy the individual coercion doctrine include Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir.), *cert. denied,* 429 U.S. 823 (1976); Cash v. Arctic Circle, Inc., 1980-1 Trade Cas. 77,438, *aff'd after reconsideration,* 1980-1 Trade Cas. 77,440 (E.D. Wash. 1979); Mortensen v. First Fed. Sav. & Loan Ass'n, 79 F.R.D. 603 (D. N.J. 1978); Schuler v. Better Equip. Launder Center, Inc., 74 F.R.D. 85 (D. Mass. 1977); Halverson v. Convenient Food Mart, Inc., 69 F.R.D. 331 (N.D. Ill. 1974); Smith v. Denny's Rest., Inc., 62 F.R.D. 459 (N.D. Cal. 1974); Abercrombie v. Lum's, Inc., 345 F. Supp. 387 (S.D. Fla. 1972). *See also* Chicken Delight, Inc. v. Harris, 412 F.2d 830 (9th Cir. 1969); Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970).

Cases in which the individual coercion doctrine was raised and which were certified as class actions include Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), *cert. denied,* what evidence would justify the inference of coercion, but rather to the narrow question of what evidence is permitted in a class action, to *generalize* about the existence of that coercion. Because of difficulties of proving, in the class action context, that each individual plaintiff was coerced, a number of cases have held that the matter may not be certified, and the action has been dismissed.[109] A note of caution against reading those cases too broadly must be sounded. They ought not extend to a statement about the underlying existence of the tying arrangements or whether they could have been proved had each seller brought its own lawsuit.[110]

4. Full Line Forcing

A variation on the traditional tying arrangement which is somewhat difficult to reconcile with the absolute per se rule argued for in this Article is "full-line forcing." This technique involves the appointment by a manufacturer of a dealer to carry its line of products; as a condition of the right to purchase a portion of that line, the dealer is required to purchase and offer for resale the manufacturer's complete line of products. Assume that a manufacturer of power tools appoints a hardware store as its dealer. The manufacturer may insist that the store carry not only its drills but also its sanders and saws. It would be difficult to argue that the separate kinds of tools are not two (or more) distinct products. Yet, in most circumstances, the cases suggest that these arrangements should be lawful.[111]

First, the manufacturer has a legitimate interest in having the

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434 U.S. 1086 (1978); Fifth Moorings Condominium, Inc. v. Shere, 81 F.R.D. 712 (S.D. Fla. 1979); Martino v. McDonald's Sys., Inc., 81 F.R.D. 81 (N.D. Ill. 1979); Hill v. A-T-O, Inc., 80 F.R.D. 68 (E.D.N.Y. 1978), *on remand from* 535 F.2d 1349 (2d Cir. 1976); Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108 (C.D. Cal. 1978); and Hi-Co Enterprises, Inc. v. Conagra, Inc., 75 F.R.D. 628 (S.D. Ga. 1976). *See also* AAMCO Automatic Transmissions, Inc. v. Tayloe, 407 F. Supp. 430, 433 (E.D. Pa. 1976); Seligson v. Plum Tree, Inc., 55 F.R.D. 259, 263 (E.D. Pa. 1972).

109. *See* cases cited in note 108 *supra*.

110. *See* Austin, *supra* note 92; Varner, *supra* note 92; Note, *Tying Arrangements and the Individual Coercion Doctrine*, 30 VAND. L. REV. 755 (1977); 9 CONN. L. REV. 164 (1976); 55 TEX. L. REV. 343 (1977). *Cf.* Moore v. James H. Matthews & Co., 550 F.2d 1207, 1217 (9th Cir. 1977) (individual coercion need not be shown in nonclass action context); Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1219 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976) ("coercion" is element of substantive law on tie-ins; "individual coercion" arises only in class action context).

111. *But see* Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 452 (9th Cir. 1979) (summary judgment on § 3 of the Clayton Act inappropriate); Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 708-13 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978) (full-line forcing may violate Sherman Act § 2 as improper use of monopoly power in "tying product").

dealer offer its complete line. If the manufacturer engages in advertising that names the stores that are its authorized dealers, it would complicate marketing if some dealers offered only a portion of the line for sale. More important, these restraints are unlikely to have the anticompetitive effects ascribed to most tying arrangements. The typical foreclosure of competitors is nonexistent.[112] There is nothing about the tie itself that prevents the dealer from also carrying the goods of another competing manufacturer.[113] Furthermore, the other concern of tie-ins—the requirement that the buyer purchase goods that it does not want—is *de minimis*. The full-line forcing clauses do not by themselves require the dealer to purchase any fixed quantity of each product in the line. Thus, the requirement of the clauses would be satisfied if the dealer bought—and offered for resale—only one sander and one saw, purchasing more of these items from the manufacturer only if it resold these products and had to restock its line.[114]

5. Different Sellers of the Tying and Tied Products

Under the classic definition of a tying arrangement,[115] the same company will be offering both the tying and tied products. Three situations in which there are two different sellers deserve discussion. In one variation the sellers of the tying and tied products are different but related—either parent-subsidiary or subsidiaries of the same company. For example, in *Fortner*, the plaintiff, after obtaining a loan from the U.S. Steel Credit Corporation, was required to use the money to buy prefabricated homes from the Company's Homes Division. Not only did the Court have no difficulty dealing with this in the same way as the more traditional tie-in,[116] but this fact became an additional reason for finding that there were two

112. *See generally* Pitchford v. Pepi, Inc., 531 F.2d 92, 100-01 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637, 641 (10th Cir. 1972); L. SULLIVAN, *supra* note 68, at § 158.

113. If there were such requirements, they would be dealt with under the separate although related proscription of certain exclusive dealing arrangements. *See* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961); Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949).

114. Other concerns might be raised if the seller were to impose onerous requirements, including sales quotas, for the right to remain an authorized dealer.

115. *See* text accompanying note 2 *supra*.

116. It is interesting to contrast this approach—treating the two companies as the same seller—with the so-called "bathtub conspiracy" cases, in which even two subsidiaries may be deemed separate persons for the purpose of finding a conspiracy under § 1 of the Sherman Act. *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 215 (1951).

separate products that were capable of being the subject of a tie.[117] A second possible variation typically occurs in franchise cases, in which the franchisee is required to purchase food, supplies or equipment from one or more designated and approved suppliers. Once again, the cases have not treated these differently from the traditional tie-ins. These third party supplier situations have become very common in franchising situations. In fact, in one recent case,[118] the court ahsolved the defendant—a franchisor—because it was selling both the tying and tied products, thereby distinguishing other franchise tie-in cases imposing liability.[119] The third variation—not dramatically different from the second—is found in the so-called "TBA cases."[120] In the 1960s, a number of oil companies adopted programs of "sponsoring" the tires, batteries and accessories of other independent companies. In consideration for inducing its dealers to carry these products, the oil companies were paid a commission (kickback) by the sponsoring company. The courts have generally found these arrangments unlawful.

Clearly, none of these variations would fall within section 3 of the Clayton Act, for that statute only makes it unlawful "for any person . . . to lease or make a sale or contract for sale of goods . . . or other commodities . . . on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods . . . of a *competitor or competitors of the lessor or seller*" (emphasis added). For example, the tire companies were not competitors of the oil companies; rather, the oil companies were allegedly using their sales leverage to channel sales away from certain tire companies, toward the other companies with which they had agreements. In the TBA cases most of the challenges were brought under section 5 of the Federal Trade Commission Act;[121] the Commission alleged that

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117. 394 U.S. at 507 & n.4. *See also* United States Steel Corp. v Fortner Enterprises, Inc., 429 U.S. 610, 613 (1977); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 n.3 (1958).

118. Phillips v. Crown Cent. Petroleum Corp., 602 F.2d 616, 628 (4th Cir. 1979).

119. *See, e.g.,* Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48 n.4 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); Esposito v. Mister Softee, Inc., 1980-1 Trade Cas. 77,414, 77,423-24 (E.D.N.Y. 1979). *See also* Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), *cert. denied,* 440 U.S. 930 (1979) (licensee was required to purchase parts from manufacturers designated by licensor). *Cf.* Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 456 (5th Cir. 1979) (seller must have some financial interest in sales of tied product); *accord* Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 120 (C.D. Cal. 1978).

120. *See, e.g.,* FTC v. Texaco, Inc., 393 U.S. 223 (1968); Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965); Shell Oil Co. v. FTC, 360 F.2d 470 (5th Cir. 1966), *cert. denied,* 385 U.S. 1002 (1967).

121. One such action, FTC v. Texaco, Inc., 393 U.S. 223 (1968), was followed by an unsuccessful treble damage action, brought under § 1 of the Sherman Act. Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir. 1972). *Accord,* Lee Nat'l Corp. v. Atlantic Ricbfield Co.,

these arrangements were "unfair methods of competition." Since that statute reaches "antitrust violations in their incipiency,"[122] this conduct might be unlawful even if it were not condemned under traditional tying arrangement analysis.

In addition to reliance on the FTC Act, there are two approaches that are available under section 1 of the Sherman Act, which broadly condemns all "combinations . . . in restraint of trade." One possibility is that implicitly relied on in *Fortner.* When there is a close relationship between the two sellers—either because of common ownership or payment of commissions—the courts may overlook the separate corporate identities and treat them as one for tying arrangement purposes.[123] Another possibility is to treat the conduct as a conspiracy to restrain trade by the use of the tying arrangement device. Under this theory the seller of the tying product and the seller of the tied product would be viewed as conspirators, seeking to advance an anticompetitive end by the joint use of their market power.[124] Although it would not be necessary under a conspiracy theory, courts that have adopted this approach have insisted that the seller of the tying product have some financial interest in the sales of the tied product.[125]

B. Liability: Is the Conduct Unlawful?

Once there is a finding that the conduct constitutes a tying arrangement, the next step is to determine whether it violates the antitrust laws. It has not been made sufficiently clear why this inquiry should be necessary at all. In part the inquiry arises from the assumption that unless the seller has some significant market power in the tying product market, it will be unable to enforce the tie and hence unable either to coerce the buyer or to foreclose its competitors in the tied product market. This Article suggests that coercion is inherent in any true tie-in; that the inquiry regarding the

308 F. Supp. 1041 (E.D. Pa.), *cert. denied,* 400 U.S. 940 (1970). *But see* Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960), *further opinion on damage issue,* 324 F.2d 566 (4th Cir. 1963), which held that a requirement that a Sinclair gasoline dealer purchase Goodyear TBA constituted an unlawful tying arrangement under § 1 of the Sherman Act.

122. FTC v. Brown Shoe Co., 384 U.S. 316, 320-22 (1966); FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394-95 (1953); Fashion Originators' Guild v. FTC, 312 U.S. 457, 466 (1941).

123. *See, e.g.,* Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 834-35 (7th Cir. 1978), *cert. denied,* 440 U.S. 930 (1979); Johnson v. Nationwide Indus., Inc., 450 F. Supp. 948, 950 (N.D. Ill. 1978). *See generally* Austin, *supra* note 45, at 95.

124. Imperial Point Colonnades Condominium, Inc. v. Mangurian, 549 F.2d 1029, 1043 (5th Cir.), *cert. denied,* 434 U.S. 859 (1977).

125. *See, e.g.,* Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 120 (C.D. Cal. 1978).

defendant's market power should therefore become part of the determination of the existence of the tie, rather than a part of the liability issue; and that any overestimate of this market power will be relatively unimportant, since condemning even noninjurious ties will have little if any adverse societal effects.

The development of the test for determining liability has been uneven. In *Times-Picayune,* the Court indicated that there were four different ways of showing the illegality of a tie. First, if the conduct fell within section 3 of the Clayton Act, a tie would be unlawful per se if "the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained."[126] The Clayton Act, however, is reserved for tying arrangements involving the sale or lease of goods or commodities. If the tie-in involves a license—for example, the right to use a trademark—or if either the tying or the tied product is not a good or commodity—for example, money, land, a service or a trademark—the arrangement would have to be attacked under the Sherman Act.[127]

The second alternative offered in *Times-Picayune* was that if the conduct did not satisfy the Clayton Act, the standard of per se illegality under section 1 of the Sherman Act would be satisfied "whenever *both* conditions are met."[128] Then, "[i]n either case, the arrangement transgresses § 5 of the Federal Trade Commission Act, since minimally that section registers violations of the Clayton and Sherman Acts."[129] Finally, if none of these tests was satisfied, the Court stated that the conduct, while not per se unreasonable, still might be unlawful "under the Sherman Act's general prohibition on unreasonable restraints of trade."[130]

Since *Times-Picayune,* the test has gone through some reformulations. The most significant restatement of the per se approach is in *Northern Pacific Railway v. United States:*

> [Tying arrangements] are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce [in the tied product market] is affected.[131]

126. Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 608 (1953) (emphasis in original).

127. *See, e.g.,* Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 661 n.1 (2d Cir. 1974).

128. 345 U.S. at 609 (emphasis in original).

129. *Id.*

130. *Id.* at 614.

131. Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958). The Court in *Northern Pacific* suggested that "monopolistic position," as used in *Times-Picayune,* meant no more

It is to the treatment of this test over the past two decades that this Article now turns.

1. Tying Product Market

The element of the per se test that has caused the greatest confusion is the requirement that the defendant have "sufficient economic power" in the tying product market. This factor is used to demonstrate that the seller really has the ability to coerce the buyer to take both products. Absent that market power, it simply would have no "leverage" to force the buyer to take the tied product. This power may be demonstrated in a number of ways. *Loew's* and *Fortner I* suggest that the question is whether the tying product is "unique" or "particularly desirable."[132] One way to demonstrate this is simple reliance on the fact that the tying product is patented, copyrighted, or—like real property—otherwise not capable of duplication by the seller's competitors.[133] *Northern Pacific* also states

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than "sufficient economic power." *Id.* at 11. The standard in *Times-Picayune*—that the defendant have a "monopolistic position" in the tying product market—can be harmonized with the standard in *Northern Pacific*—that the defendant have "sufficient economic power" with respect to the tying product—by a broad definition of monopoly. Instead of defining monopoly in the Sherman § 2 sense—which may require at least a 60% share of the relevant market, *see* United States v. Aluminum Co. of America, 148 F.2d 416, 422 (2d Cir. 1945)—Justice Clark in *Times-Picayune* may have meant monopoly power as that term is used by the economist—"a seller with a meaningfully downward-sloping demand curve for his product," *see* Burstein, *supra* note 31, at 74, and therefore whose pricing decisions affect the amount of goods taken. A seller with monopoly power in that sense certainly has "sufficient economic power in the tying product, to effect a restraint of trade in the market for the tied product." 356 U.S. at 19 (Harlan, J., dissenting).

132. "[T]he crucial economic power may be iuferred from the tying product's desirability to consumers or from uniqueness in its attributes." United States v. Loew's, Inc., 371 U.S. 38, 45 (1962), *quoted in* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969).

133. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 505 n.2 (1969); United States v. Loew's, Inc., 371 U.S. 38, 45 & n.4 (1962). This presumptive approach is criticized in Austin, *supra* note 45, at 111-12; Note, *The Presumption of Market Power in Sales of Legally Differentiated Tying Products,* 56 TEX. L. REV. 1305 (1978).

There is some disagreement whether trademarks will also confer this automatic uniqueness. A few cases suggest that a trademark cannot even be a separate tying product. *See, e.g.,* Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1215 n.4 (3d Cir.), *cert. denied,* 429 U.S. 823 (1976) (answer is not "an obvious one"); note 85 *supra.* Although the majority of cases accept the proposition that trademarks may be a part of a tying arrangement, they are divided on the question whether the mere existence of the trademark—which by definition is unique in the sense that no one else may use it for that product without the owner's permission—is almost automatic proof of "sufficient economic power in the tying product." *Compare* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 722 (7th Cir. 1979); Warriner Hermetics, Inc. v. Copeland Refrig. Corp., 463 F.2d 1002, 1012-16 (5th Cir.), *cert. denied,* 409 U.S. 1086 (1972); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 49-50 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); Martino v. McDonald's Sys. Inc., 81 F.R.D. 81, 90 (N.D. Ill. 1979); McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1240-41 (E.D. Mich. 1978); Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 119-20 (C.D. Cal. 1978);

that "[t]he very existence of [a] host of tying arrangements is itself compelling evidence of the defendant's great [market] power, at least where, as here, no other explanation has been offered for the existence of these restraints";[134] the fact that a number of buyers succumbed to the seller's pressure suggests that it had some ability to exert its leverage. Yet, this approach was left in serious doubt by *Fortner II,* which held that a plaintiff must prove not only that the seller offered a unique tying product, but must also prove that, either because of legal barriers, for example, a patent, or because of financial disadvantages, competitors of the seller were unable to offer the same product at the same price.[135]

There has been a great deal of analysis, both in the cases and in the literature, devoted to different factual patterns and different approaches for demonstrating this market power. This Article argues that *Fortner II* and the trend it fostered[136] represent an un-

Joe Westbrook, Inc. v. Chrysler Corp., 419 F. Supp. 824, 835 (N.D. Ga. 1976); AAMCO Automatic Transmissions, Inc. v. Tayloe, 407 F. Supp. 430, 436-37 (E.D. Pa. 1976); Detroit City Dairy, Inc. v. Kowalski Sausage Co., 393 F. Supp. 453, 458-71 (E.D. Mich. 1975); Seligson v. Plum Tree, Inc., 361 F. Supp. 748, 752-53 (E.D. Pa. 1973) (unique trademark creates strong presumption of market power) *with* Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 47-49 (5th Cir. 1976); Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 663-65 (2d Cir. 1974); Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), *cert. dismissed as improvidently granted,* 381 U.S. 125 (1965); Cash v. Arctic Circle, Inc., 1980-1 Trade Cas. 77,438, *aff'd after reconsideration,* 1980-1 Trade Cas. 77,440, 77,442-43 (E.D. Wash. 1979); Esposito v. Mister Softee, Inc., 1980-1 Trade Cas. 77,414, 77,420 (E.D.N.Y. 1979)(trademark merely evidentiary of market power in tying product market). The *Susser* case is discussed in Handler, *Recent Antitrust Developments—1965,* 40 N.Y.U.L. REV. 823, 852-59 (1965); 66 COLUM. L. REV. 405 (1966); 63 MICH. L. REV. 550 (1965). The *Siegel* case is discussed in Note, Siegel v. Chicken Delight, Inc., *What's In a Name?,* 5 GEO. L. REV. 151 (1970); 84 HARV. L. REV. 1717 (1971); 23 HAST. L.J. 1147 (1972). *See generally,* McCarthy, *supra* note 102; Smirti, *Trademarks As Tying Products: The Presumption of Economic Power,* 69 TRADEMARK REP. 1 (1979); Comment, *Tying and Exclusive Dealing Agreements: Protection for Franchise Trademark Licensors,* 45 TULANE L. REV. 1016 (1971).

134. Northern Pac. Ry. v. United States, 356 U.S. 1, 7-8 (1958).

135. United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977). On remand from *Fortner I,* the Circuit Court upheld a judgment for the plaintiff, relying in part on the fact "that an appreciable number of customers accepted the tied product." 523 F.2d 961, 966 (6th Cir. 1975). The Supreme Court rejected this approach, 429 U.S. at 618 & n.10, stating that "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product. Without any such advantage differentiating his product from that of his competitors, the seller's product does not have the kind of uniqueness considered relevant in prior tying-clause cases." *Id.* at 620-21. *See also* Phillips v. Crown Cent. Petroleum Corp., 602 F.2d 616, 628-29 (4th Cir. 1979).

136. *Fortner II* was followed in Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419 (5th Cir. 1978). Defendant provided the service of selling breeder chickens and then buying their eggs only on the condition that plaintiff purchase chicken feed from it. The Fifth Circuit reversed a judgment for plaintiff, which had been based on a finding that plaintiff hought the feed from defendant only because it was the only company providing these services—i.e., the tying product was unique—hecause there was no showing that other feed companies could not have offered this service had they so desired. Although there may have heen no adverse

healthy and inappropriate deviation from prior treatment of tying arrangements. Until *Fortner II,* in each case in which the Court found a tying arrangement present, it also concluded that the conduct violated the antitrust laws.[137] In *Fortner II,* however, the Court found that notwithstanding the existence of the tie-in, there was no injury to competition and therefore no violation. Although the Court had previously stated on several occasions that tying arrangements rarely have any procompetitive value,[138] here it allowed U.S. Steel's practice to stand undisturhed. *Fortner II* is part of the Court's new "economic realism,"[139] under which conduct will not be condemned unless adverse economic effects are clear. Since one of the evils described in earlier cases—foreclosure of competitors—was not present here, the Court found the arrangement lawful. It reached this conclusion by finding that U.S. Steel did not have sufficient economic power in the credit (tying product) market.

This evaluation of the seller's market power is relevant to determine whether it has the ability to impose the tie. It is unclear, however, why it is critical that the seller's competitors might have offered the tying product but chose not to. There should be two key inquiries in tying analysis: Were competitors (and competition) injured? Was the buyer coerced? Even if competitors were not foreclosed, the Court in *Fortner II* ignored another significant evil of tie-ins—that the buyer was forced to take products that it did not want, at least not from that seller.[140] Clearly, U.S. Steel had enough power in the credit market to force Fortner to take its prefabricated homes. Given an admittedly express tie, and given that the buyer was forced to take goods it did not want, it should be unnecessary to evaluate the impact of this conduct on U.S. Steel's competitors.

The Court's fundamental but unstated problem in *Fortner II* was its apparent uneasiness with the earlier holding that there really

effect on the seller's competitors, the injury to plaintiff was far clearer. Yet the court seemed oblivious to the fact that the only choice for the plaintiff-buyer was to pay a supernormal price for the tied product or go out of business.

137. *Times-Picayune* is not inconsistent with this assertion, since in that case the Court found that morning and evening newspaper advertising were "one product." Therefore in that case there was no tying arrangement. *See* notes 79-82 *supra* and accompanying text.

138. *See* note 7 *supra* and accompanying text.

139. *See* note 8 *supra* and accompanying text.

140. The Court made clear its diminished concern for buyer freedom in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 n.21 (1977). Responding to the view that "the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on 'price, quality, and quantity of goods and services,'" the Court said, "Competitive economies have social and political as well as economic advantages, . . . but an antitrust policy divorced from market considerations would lack any objective benchmarks." (citations omitted).

were two separate products and therefore there indeed was a tying arrangement. Chief Justice Burger's concurring opinion makes this clear, suggesting that the finding of the existence of the tie-in really was compelled by the law of the case doctrine rather than any independent analysis in *Fortner II.*[141] Yet, if one accepts the premise that there really was a tie-in, then the Court's adroit gymnastics in expanding the proof required to show "sufficient market power" offer an inadequate explanation for permitting U.S. Steel to have engaged in this particular conduct.

In *Fortner I* the dissent viewed the arrangement—giving cheap credit to promote homes—as nothing more than taking a lower price on the homes themselves.[142] If this was what really happened, then the dissenting Justices were right that there indeed was no tying arrangement. One hardly thinks that his local Chevrolet dealer is tying credit to the sale of the car when it offers the buyer GMAC financing on the car, even if the financing is cheaper than his bank would offer and even if it is absolutely clear that he could not use this financing to buy a Ford.[143] U.S. Steel, however, did more than this. It made a loan of two million dollars to finance the purchase of about $700,000 worth of homes. This, then, would be like the Chevrolet dealer lending the customer $20,000, so that he could get driving lessons and add a garage to his house, but only if he bought the car from the lending dealer. If it is true that the customer—and numerous other persons in his situation—simply cannot get the money to buy driving lessons other than by using the Chevrolet loan, then the Chevrolet dealer has a substantial advantage relative to Ford, and indeed can foreclose Ford from selling some cars. Furthermore, even if Ford could have offered similar terms but simply failed to do so, a large number of buyers will involuntarily have their choice of cars narrowed to Chevrolets. In this situation competition can be adversely affected,[144] and there is no reason for tolerating the arrangement on the theory that Chevrolet could have structured it in another fashion. Similarly, U.S. Steel's market power in the credit market allowed it to transfer its power to another market

141. 429 U.S. 610, 622-23 (1977) (Burger, C.J., concurring); *see also id.*, at 612 n.1 (majority opinion).

142. 394 U.S. 495, 510-20 (White, J., dissenting); *id.* at 520-25 (Fortas, J., dissenting).

143. On the other hand, there would be a tying arrangement if the auto manufacturer sold cars to dealers only if they agreed to offer only the manufacturer's financing to their retail customers. United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941). *See also* Hastings Mfg. Co. v. FTC, 153 F.2d 253 (6th Cir.), *cert. denied,* 328 U.S. 853 (1946).

144. *Accord,* Hi-Co Enterprises, Inc. v. ConAgra, Inc., 75 F.R.D. 628 (S.D. Ga. 1976) (manufacturer of chicken feed lent money to farmers, which was used to purchase chickens, on condition that horrowers purchase its feed).

where it was unable to compete as well on the merits of price and quality.[145]

The next Section of this Article,[146] therefore, suggests that the present examination of the defendant's market power be modified. Rather than being a separate element, relevant to the determination of liability, market power should be relevant to whether the defendant could have, and did, impose a tying arrangement. Proceeding on the premise that tie-ins rarely yield competitive benefits, we can then conclude that if the tie-in was coercively imposed, this should be sufficient for liability.

2. Tied Product Market

Happily, there is one element of tying analysis which is simple and straightforward. Proof of the restraint of a "not insubstantial amount of commerce in the tied product" market is made pursuant to the "quantitative substantiality" test.[147] The plaintiff need simply show that the dollar amount of tied goods purchased was more than *de minimis.*[148] In *International Salt,* this figure was only $500,000,[149] and although the *Loew's* case is not as clear, it suggests that somewhat less than $60,000 may be enough.[150] Furthermore, in a treble damage action, since the theory is that the plaintiff is a

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145. *Cf.* Costner v. Blount Nat'l Bank, 578 F.2d 1192, 1195-96 (6th Cir. 1978). The plaintiff alleged that as a condition of obtaining credit from the defendant bank, it was required to use the bank's services of buying commercial paper at a discount. The court held that the defendant's credit gave it enough leverage in the tying product market to sustain the jury verdict for plaintiff, since the plaintiff had been unsuccessful in obtaining credit elsewhere, and there was evidence that the defendant was able to impose unusual and burdensome conditions on the plaintiff. *See also* United States v. Investors Diversified Services, Inc., 102 F. Supp. 645 (D. Minn. 1951) (credit tied to insurance policy).

146. *See* text accompanying notes 164-95 *infra.*

147. *Cf.* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 299, 314 (1949). As noted above, when the conduct falls under § 3 of the Clayton Act the per se standard is satisfied if either prong of the test is met. *See* notes 126-31 *supra* and accompanying text. Therefore, the inquiry regarding the amount of commerce affected may be unnecessary in Clayton Act actions.

148. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501 (1969).

149. International Salt Co. v. United States, 332 U.S. 392, 395-96 (1947).

150. United States v. Loew's Inc., 371 U.S. 38, 49 (1962) (as to one defendant, its total license fee was $60,800, of which an unspecified "substantial portion . . . represented the cost of the inferior [tied] films which the stations were required to accept"). Curiously, there was no reference to this amount in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501-02 (1969), in which defendant had asserted that plaintiff's annual purchases of the tied product of $190,000 were "insubstantial." Although conceding that this was less than the $500,000 in *International Salt,* the Court merely stated that this amount was nonetheless not "paltry." *See also* AAMCO Automatic Transmissions, Inc. v. Tayloe, 407 F. Supp. 430, 436 (E.D. Pa. 1976) (dictum that $50,000 may be enough).

"private attorney general," the relevant amount is not the purchases of that plaintiff only but of all purchasers subject to the tie.[151]

C. *Defenses*

Tying arrangements rarely yield competitive benefits. Nevertheless, in those situations in which the advantages will outweigh any injury to competition, the courts have recognized specific exceptions to the so-called per se rule.[152] There are four such defenses: (1) preservation of the goodwill of the seller; (2) certain business justifications; (3) special needs of new entrants; and (4) economies realized by combination sales.

1. Goodwill Defense

The goodwill defense was first suggested in 1935 in *Pick Manufacturing. Co. v. General Motors Corp.*[153] Defendant, the seller of Chevrolet cars, insisted that its authorized dealers use only Chevrolet replacement parts in their repair operations, of which it was the sole supplier. The court approved this requirement, on the theory that dealers' use of potentially inferior non-Chevrolet parts could lead to customer dissatisfaction with the automobile itself. The tie was justified so that General Motors could preserve goodwill towards its products. The goodwill defense often reappears in more modern form in the licensing of franchises.[154] Both the franchisor and the franchisees are concerned that all other franchisees offer goods or services of uniform quality; dissatisfaction by a customer with one franchisee may dissuade her from patronizing all other

151. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 62-63 (4th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970).

152. This seeming contradiction—of an apparent per se rule with potential exceptions—has caused some confusion in the lower courts. For example, in Miller v. Granados, 529 F.2d 393, 396 (5th Cir. 1976), the court refused to consider the goodwill defense, *see* text accompanying notes 153-56 *infra,* because "once a tying arrangement is found to exist in context of sufficient economic power, its illegality is established without further inquiry into business excuses for its uses."

153. 80 F.2d 641, 643-44 (7th Cir. 1935), *aff'd per curiam,* 299 U.S. 3 (1936). *See also* FTC v. Sinclair Ref. Co., 261 U.S. 463 (1923), which, while not speaking directly of this defense, was considered in Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 607 (1953) to be an example of "a means of protecting the goodwill of the lessor's branded gas."

154. *See, e.g.,* Northern v. McGraw-Edison Co., 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977); Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 46-47 (5th Cir. 1976); Warriner Hermetics, Inc. v. Copeland Refrig. Corp., 463 F.2d 1002, 1016 (5th Cir.), *cert. denied,* 409 U.S. 1086 (1972); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); Susser v. Carvel Corp., 332 F.2d 505, 517 (2d Cir. 1964), *cert. dismissed as improvidently granted,* 381 U.S. 125 (1965); Esposito v. Mister Softee, Inc., 1980-1 Trade Cas. 77,414, 77,422-3 (E.D.N.Y. 1979).

franchisees. Therefore, the franchisor may insist on selling all supplies and equipment to its franchisees, to guarantee uniformly high quality.[155]

In application, the goodwill defense has been limited by the requirement that it be the least restrictive alternative available to the seller.[156] If specification of the particulars of the tied product could assure the same high level of quality, the defense will not be available. Thus, as a practical matter, the defense should be available only for a specialized and nonfungible tied product, when the specifications would be highly detailed and not subject to quality control, or when the tied product is the subject of a patent or trade secret, so that the seller has a legitimate reason for preventing third parties from its manufacture.

2. Business Justification

The business justification defense is closely related to the goodwill defense. The two products may be so related that use of a product meeting the specifications of the tied product will be necessary for the proper functioning of the tying product. For example, in *International Salt* the defendant claimed that the use of inferior salt in connection with its patented injection machine—the tying product—would cause it to malfunction, which problem the user would then blame on the machine. The Court, in rejecting the defense on the ground that specification of the quality of the salt to be used would have equally assured the proper functioning of the machine, remarked that "it is not pleaded, nor is it argued, that the machine is allergic to salt of equal quality produced by anyone except International."[157]

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155. In fact, if as usually occurs, the franchisor is licensing a trademark, §§ 5 and 45 of the Lanham Act, 15 U.S.C. §§ 1055, 1127 (1976), will impose a requirement of quality control, at the risk of constituting misuse of the trademark. This fact is often used by the seller as an additional justification for tie-ins. *See generally* McCarthy, *supra* note 102, at 1091 n.36, 1111-16; Treece, *Trademark Licensing and Vertical Restraints in Franchising Arrangements,* 116 U. PA. L. REV. 435 (1968); Note, *Antitrust Problems in Trademark Franchising,* 17 STAN. L. REV. 926 (1965).

156. *See, e.g.,* Moore v. James H. Matthews & Co., 550 F.2d 1207, 1217-18 (9th Cir. 1977), and cases cited in note 154 *supra.*

157. International Salt Co. v. United States, 332 U.S. 392, 398 (1947). A similar contention had been made by defendant in International Bus. Mach. Corp. v. United States, 298 U.S. 131, 138-40 (1936), *see* text accompanying note 12 *supra.* Defendant's argument that its machines would he impaired by the use of any cards other than its own was seriously undercut by the fact that it allowed one particular lessee—the government—to use other cards upon a payment of a larger rental fee on the tying product. This made clear that the defendant's principal objective was not to protect its goodwill, but rather to obtain an enhanced combined price for the machine and the cards.

On the other hand, *United States v. Jerrold Electronics Corp.*[158] upheld a requirement by a seller of community television antennas that certain equipment—cables, electronic units, and so forth—had to be purchased from it. Because of the sophisticated nature of these related products and the lack of control over their quality, there was a strong likelihood that inferior products would cause the entire system to malfunction. Once competitive equipment of equal quality became available, however, these restraints were no longer permissible. Thus, once again, the availability of the defense will be tested by whether it is the least restrictive alternative available to the seller.[159]

3. New Entrant

There is some suggestion that a company seeking to enter a new market will be entitled to use a tying arrangement to enable it to stake out a market share.[160] Thus, the holding in *Jerrold* that the fact that the cable television industry was new and that quality defects could result in its collapse might offer an additional justification for use of the tie. On the other hand, *Jerrold* also held that the defense, even if available at one time to the new entrant, did not continue to be available after the company was in operation for a period of time.[161] This approach quite properly attempts to bal-

158. 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

159. "The only situation, indeed, in which protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied." Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 306 (1949).

The business justification defense was successful in Baker v. Simmons Co., 307 F.2d 458, 466-69 (1st Cir. 1962); Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied,* 368 U.S. 931 (1961); Moore v. James H. Matthews & Co., 1979-1 Trade Cas. 77,991 (D. Ore. 1979); Barnosky Oils, Inc. v. Union Oil Co., 1979-1 Trade Cas. 77,779, 77,788-89 (E.D. Mich. 1978) (alternative holding); Teleflex Indus. Prod., Inc. v. Brunswick Corp., 293 F. Supp. 106 (E.D. Pa. 1968). *See also* Englander Motors, Inc. v. Ford Motor Co., 267 F.2d 11, 14 (6th Cir. 1959) (issue must be determined at trial). *See generally* Note, *Antitrust—Tying Arrangements: Tying of Goods and Service Justified by a Sound Business Reason,* 49 CALIF. L. REV. 746 (1961); Comment, *Tying Arrangements Under the Antitrust Laws: The "Integrity of the Product" Defense,* 62 MICH. L. REV. 1413 (1964); Note, Dehydrating Process Co. v. A.O. Smith Corp.—*A Lesson in Identification,* 57 NW. U.L. REV. 107 (1962); Note, *Business Justifications for Tying Agreements: A Retreat from the Per Se Doctrine,* 17 WEST. RES. L. REV. 257 (1965).

160. Brown Shoe Co. v. United States, 370 U.S. 294, 330 (1962) (dictum), *quoted in* White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

161. United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961). *See also* General Talking Pictures Corp. v. American Tel. & Tel. Co., 18 F. Supp. 650 (D. Del. 1937). *Accord,* Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50-51 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972). *See generally* Note, *Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives,* 18 STAN. L. REV. 457 (1960); Note, *The Use of Tie-ins in New Industries,* 70 YALE L.J. 804 (1961).

ance the need for the tie-in with its presumed anticompetitive effect—a traditional rule of reason analysis.

4. Economies of Combination Sales

The economies defense proceeds on the premise that it may be cheaper to produce and sell the two separate products as a package unit than to sell them separately.[162] The forced purchase of the two products is necessary to realize this cost savings. While this defense is appealing and may apply to certain factual situations, it should not be necessary in most cases. If it truly is cheaper to sell the two products in a package rather than as separate components, the seller can adjust its price to take this into account. Presumably, the buyer will appreciate this lower package price and would buy both products without the necessity of the seller's forcing them on it by a tie-in.

Two situations may be exceptions to this proposition. First, it may be necessary for all buyers to take the package to realize the economies; if only some choose the package, there would be cost savings to none. An example is suggested by the facts of *Times-Picayune.*[163] Assume that it was cheaper to set only one page of type for all classified advertisements rather than one advertisement page for the morning newspaper and a different one for the evening paper; deleting only a few advertisements from each page would have eliminated most of the cost savings. At least if the savings are significant, it might be appropriate to require all advertisers to submit to the tie-in. A second exception might be when there is a cost savings, but the seller desires to retain it entirely, rather than pass any portion along to the buyer, so that the "package price" would not be cheaper. Here, there is an "economic" benefit, but absent the tie it would not be realized. There might be some policy justification for holding such attempted ties unlawful, simply to require the seller to pass along at least some portion of the cost savings to the buyer. However, economists would probably argue that it is preferable to have the seller realize these economies than have no one receive them.

162. Alternatively, the cost savings resulting from the aggregation may be a basis for concluding that the components are only "one product," so that there is no tie-in at all. *See, e.g.*, ILC Peripherals Leasing Corp. v. International Bus. Mach. Corp., 448 F. Supp. 228, 232 (N.D. Cal. 1978). *Compare id. with* text accompanying notes 77-84 *supra.*

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

IV. The New Approach

A. Combining the Existence and Liability Issues

The conclusions reached by this Article should now be obvious. Tying arrangements often injure competition; they will only rarely produce procompetitive results. Thus, there is no harm in condemning them outright. The present approach reflects both confusion and timidity. Having concluded that tying arrangements "serve hardly any purpose beyond the suppression of competition,"[164] it is curious that the Court continues with the present bifurcated analysis—first existence, then liability. The factors presently used to determine liability should instead be used to determine whether a doubtful situation really is a tie-in, within the meaning of the per se rule. Having determined that there is a tie-in, there is no reason to shy away from the conclusion that there is a violation of the antitrust laws. The test proposed by this Article would proceed in two steps. The court would first determine whether there is a tying arrangement that affects at least a not insubstantial amount of commerce in the tied product market.[165] Then, if the answer is affirmative, the court would proceed immediately to look at any proffered defenses.[166]

The first step will obviously be both more complicated and more critical than at present. Since a premise of this Article, however, is that tying arrangements deserve harsh treatment, if the plaintiff can show that there is an *express* tie-in contract between the parties, this contract should always be unlawful, subject only to the defenses. In this case, there should be no need to ask if the defendant had some power in the tying product, if it used it, or, again subject to the defenses, even why the tie-in was imposed. The only inquiries would be whether there were two separate products, and if so, whether the contract expressly required the buyer to take both.

In the more usual case the existence of an agreement will have

164. *See* note 7 *supra.*

165. This requirement should be retained to insure that the courts do not have to deal with tie-ins in which the effect on competition, while arguably negative, is really de minimis.

166. Although this approach might appear to make it always easier for the plaintiff to prevail, in fact it may occasionally have the opposite effect. Today, at least in theory, when conduct falls within the Clayton Act, the test of liability could be satisfied without any examination of market power, *see* text accompanying note 126 *supra,* if the sales of the tied product were "not insubstantial"; as noted earlier, *see* text accompanying notes 147-51 *supra,* this is hardly a very strict standard. *But see* note 202 *infra* (suggesting that this less restrictive Clayton Act § 3 test may no longer be good law). In any event, this Article suggests that market power in the tying product should be relevant in all cases, although for different purposes than at present.

to be inferred from the contract or from the bargaining and relationship between the parties. Here, as an aid to the application of the criteria used under existing case law, it will be useful to inquire whether the defendant had the power to make the tie-in effective, and whether the defendant actually used that power.

1. Express Tie-ins

The easier case under this proposed approach would be the express tie—where the nature of the contract made it unequivocally clear that the buyer was required to take the tied product to receive the tying product. This conduct should be tolerated in only a few rare situations.[167] If there is an express tie, the courts should proceed immediately to an examination of any of certain recognized defenses that might be offered.

There are at least two situations that would appear to create difficulties if this approach were adopted. One is the fact pattern in *Fortner*. There was no doubt that U.S. Steel would not have offered credit to Fortner unless he also agreed to purchase its prefabricated homes; the loan of money was clearly restricted to U.S. Steel's tied product. This would certainly appear to be an express tie. Yet the Court held the practice lawful, on the grounds that the seller's competitors could also have offered the same credit terms. Since they had voluntarily forsaken this opportunity, they were not foreclosed and hence competition was not injured. It is apparent that many of the difficulties in that case result from the fact that the tying product was credit with which to buy the tied product. As suggested above,[168] the route adopted to find legality in *Fortner II*—based on the defendant's absence of market power—may have been the only escape from the strictures imposed by the law of the case doctrine.

An alternative, which would have been consistent with the approach argned for in this Article, would have been to conclude that despite the apparent "express" nature of U.S. Steel's requirement, this case still involved only an implied tie, or no tie at all. An underlying theme in tie-in cases is the unwillingness to penalize a seller merely for offering more attractive terms to a buyer. The seller may be a new entrant or a company facing vigorous competition. In order to make more sales, the seller may be willing to accept lower profits or to accept greater risks. This sales strategy may be re-

167. "[T]ying arrangements generally served no legitimate business purpose that cannot be achieved in some less restrictive way . . . ." Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969).

168. *See* notes 135-45 *supra* and accompanying text.

flected in offering a second, related product at a bargain price—so-called promotional pricing. Thus, the fact that a large number of buyers take the "package," standing by itself, may be evidence of an absence of market power, and may prove nothing more than that the buyers were astute enough to recognize a good deal when offered.[169] By itself, it says nothing about the seller's ability to coerce them to take the entire package. Therefore, in *Fortner II,* an alternative conclusion might be that the plaintiff was not buying the prefabricated homes from U.S. Steel because of the asserted requirement, and not because of anything special about the seller's money, but because the combination of credit and homes was particularly attractive. Thus, under this analysis there was no "tie-in" at all, express or implied.

This solution is not only disingenuous, but it is fraught with all the difficulties that flow from attempting to mitigate a perceived overinclusive per se rule by juggling the definition of the conduct.[170] In fact, the defendant was unsuccessful in rebutting Fortner's assertions that he took the defendant's homes only because that was the condition for getting its credit. The preferred alternative is to admit that given the conclusions in *Fortner I,* the *Fortner II* decision was wrong. Notwithstanding the asserted lack of injury to the seller's competitors, the buyer was injured by the tie. This should be enough to result in holding such an express tie-in unreasonable per se. Although this result may appear harsh, it is the inevitable result based upon the conclusion that credit was a separate product from the goods that were purchased with that credit. Furthermore, it should be some comfort that the typical, straightforward sale of goods on credit would not be reached under the *Fortner* rules.[171]

Another example of an express tie-in that might create problems is the fact pattern offered by Justice Black in *Northern Pacific.* His opinion posited that "one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar . . . [while] its competitors were ready and able to sell flour by itself."[172] Black implied that since the seller had no dominance over the tying product, the attempted restraint probably would not be unlawful because "any restraint of trade . . . would obviously be

169. *See* text accompanying note 134 *supra.*

170. For a discussion of the unfortunate effect of such an approach to group boycotts—because some lower federal courts are unhappy with the Supreme Court's statement that all such boycotts are unreasonable per se—see Bauer, *supra* note 9.

171. *Compare* 429 U.S. at 622 (Burger, C.J., concurring), *with* 394 U.S. at 507 ("It will be time enough to pass on the issue of credit sales when a case involving it actually arises.")

172. Northern Pac. Ry. v. United States, 356 U.S. 1, 7 (1958).

insignificant at most."[173]

The analysis offered above as an alternative in *Fortner* could apply here as well. To find the conduct lawful, one might argue that despite the seller's apparently explicit conditioning of the sale of flour on the purchase of sugar, there was no express tie. If an individual chose to buy from that merchant, his choice presumably reflected only the fact that the buyer wanted both products anyway, that he was indifferent as to the seller, and that the seller was as convenient as any of the other eleven merchants.[174] Stated another way, the purchase of the package was voluntary, rather than the result of coercion. If the "condition" on the sale was completely ineffective, that condition could not have produced the package sale; rather, it was the result of the buyer's independent choice, and hence there was no tie-in.

Even in this situation, this Article would treat Justice Black's hypothetical differently: if there were more than a *de minimis* amount of commerce restrained in the tied product market, this arrangement would also be unlawful per se. Although the alternative explanation is perfectly plausible, there is no reason why the antitrust laws should tolerate even this doubtful tie. There is no suggestion that allowing this merchant to market his goods in this way has any benefit to the economy. Furthermore, we cannot be sure that he really is identical to all the other merchants. He may be the only store open on Sunday, or he may be the only merchant offering home delivery, or the only one selling flour in ten pound bags, or, to borrow a page from *Fortner,* the only one who offers more credit to his customers than the amount of groceries they buy.

It is probably true that this particular tie will have no adverse effect on competition, although this is not certain. On the other hand, it almost surely will produce no benefits. If there is a chance that a court will guess wrong, and if in any event large amounts of time and money will have to be expended to examine the exact effect, we are better off with a simple rule outlawing this practice, since that rule will be cost free. Furthermore, having the rule will insure that in the future sellers will never impose these restraints.

2. Implied Tie-ins

Determination of whether certain facts will allow the trier of fact to infer the existence of a tying arrangement—whether there is an implied tie-in—will become far more crucial under the approach

173. *Id.* at 6, *followed in* Hill v. A-T-O, Inc., 535 F.2d 1349, 1355 (2d Cir. 1976).

174. Another possible explanation might be tbat the package price of tbe two products was lower than the prices of the two products when taken separately.

suggested by this Article than under present law, since this inquiry will also determine liability. To avoid a potentially overinclusive definition, courts should examine not only the factors outlined above,[175] but should also consider the existence and use of the defendant's market power in the tying product market.

It is useful to repeat the reason why this power is relevant to the determination of the *existence* of a tie-in. Present law distinguishes between the voluntary choice by the buyer to take both products—which is lawful—and the coerced requirement that both be taken—which may be unlawful. Economic theory posits that the seller will be able to impose the tie only if the buyer has a sufficient desire or need for the tying product that it is willing to bear certain onerous conditions, including, perhaps, the requirement that it also purchase a second, less desirable product.[176] Thus, if there indeed is a tie, the defendant must have had market power to impose it, and must have used that power. Absent that power, the defendant could not have coerced the buyer to take both of its products; rather, the purchase of both products must have been voluntary. Therefore, the analysis of market power is another avenue to determine whether the alleged tie-in was the product of the seller's coercion, that is, whether there is a "tie" in the antitrust sense at all.[177]

The usual approach for determining the defendant's market power is by analysis of whether the tying product is "unique" or "particularly desirable" to a group of potential purchasers.[178] If there are several sellers offering the identical product at identical prices, the seller will be unable to effect a tie-in. If, on the other hand, the seller's product is sufficiently differentiated that at a

175. *See* text accompanying notes 95-110 *supra.*

176. Justice Black's flour-sugar hypothetical is probably an exception to this assertion. Nevertheless, the benefits of a per se rule when dealing with express tie-ins are such as to outweigh any desirability of finding out if the seller really had any market power.

177. Additional confusion has crept in from cases that require proof not only that the defendant had market power but also that it used that power. *See, e.g.,* Capital Temporaries, Inc. v. Olsten Corp., 365 F. Supp. 888, 892 (D. Conn. 1973), *aff'd,* 506 F.2d 658 (2d Cir. 1974). If the seller only offered the tying product on the condition that the tied product be taken as well, and if both products were taken by the buyer subject to that condition, that surely should be enough to prove "use" of the market power. Note, *Tying Arrangements and the Individual Coercion Doctrine,* 30 VAND. L. REV. 755, 759 (1977).

Proof that the buyer was coerced by the defendant's market power to purchase the tied product should be proof that there indeed was a tying arrangement. "[T]he plaintiff must establish that he was the unwilling purchaser of the tied product. If he was not coerced by the economic dominance of the seller, he at least must show that he was compelled to accept the tied product by virtue of the uniqueness or desirability of the tying product, which other competitors could not or would not supply." Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 663 (2d Cir. 1974).

178. *See* text accompanying notes 132-46 *supra.*

given price some buyers want only that product, then the seller has some market power with respect to those buyers. If other competitors cannot, or even simply choose not to, offer that same product which those buyers very much desire, the seller will be able to impose certain conditions on its sale. One way to exercise that market power would be to raise the price of the product. Fundamental economics, however, teaches that even for that unique and desirable product, a rise in price will result in some fall-off in buyer demand. Another option for the seller is to require the buyer to take another product as well.

The difficulty with primary reliance on "uniqueness" or "desirability" to demonstrate the sufficient economic power of the tying product is that it may not give enough information, especially if this is to satisfy both the existence and the liability prongs of the per se test.[179] As the Court has observed in other contexts, in one sense almost every product is unique,[180] if only because of its trademark, the package in which it is sold, and so forth. Yet, just as in the merger or monopolization contexts the courts properly look beyond these facts to determine the relevant product market, so in the tying arrangement context a court ought to look beyond the mere uniqueness of the tying product. The question is whether the product is sufficiently differentiated and desirable to a particular segment of the buying public that an appreciable number of persons will want to have that product even if its price is raised or—the equivalent for our purposes—if a portion of its price includes the added cost of having to take other products in order to purchase that

179. The unsatisfactory results that can occur if sole reliance in determining market power is placed on the "uniqueness" or "desirability" of the tying products are illustrated by the rule applied to patented, copyrighted, or other "inherently unique" products. The Court has held that these legal barriers to competition in the tying product will suffice to demonstrate the seller's market power. *See* note 133 *supra.* Although it is true that patents prevent competition for that very same product, other competitors may have "invented around" the tying product, or its inventiveness may be sufficiently minor as not to command much leverage for its owner. Indeed, in Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305 (1949), the Court had said the following about defendant's patented machines in the earlier *International Salt* case: "[I]t was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition." *See also,* Singer, *supra* note 4, at 660-62. The harsh mechanical treatment of tie-ins involving patented tying products is difficult to explain except perhaps on historical grounds. *See* note 1 *supra.* The elimination of further analysis of the realities of market power for these "inherently unique" tying products, while the Court has raised the levels of proof necessary for other tying products, is further evidence of the great confusion surrounding this subject area.

180. *See, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294, 325-26 (1962) (merger action); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 392-94 (1956) (relevant market in monopolization action).

desired item.[181] Even if a product is "unique," the products of its competitors may also have distinct qualities, so that a significant rise in price or imposition of other burdens will lead to consumer substitutions.

The "uniqueness" test is in considerable disarray today. *International Salt, Northern Pacific,* and *Loew's* stand for the proposition that if other sellers cannot reproduce the tying product—either because, as in the patent or copyright situation, it is legally protected, or like land, it is inherently unique—the plaintiff has met its burden of showing "sufficient economic power." On the other hand, when the product is less differentiated—or like credit, virtually fungible—then the plaintiff's task is far more difficult.

The prior alternate means of satisfying the "uniqueness" test were eroded by *Fortner II.* As noted, the Court held that it is not enough that U.S. Steel may have been the only company offering the particular low interest, 100 percent financing loans. Plaintiff also had to show that "the seller has some advantage not shared by his competitors in the market for the tying product."[182] Yet, for the purpose of evaluating the impact on the potential buyer of the tie—and thus for evaluating the defendant's market power in the tying product—the fact that other competitors chose not to offer the tying product should be irrelevant.[183] All that really matters to the buyer is that the defendant has something that the buyer wants and that no one else will offer. The choice of the buyer is equally foreclosed whether the buyer has a patent or cost advantage in the tying product or the competitors of the seller have voluntarily chosen not to offer the tying product.

Another approach to proof of market power—with which courts and commentators have wrestled for many years—is the evidentiary value to be drawn from the mere fact that one or more buyers have accepted the two products pursuant to the tie.[184] Absent *some* mar-

181. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503-04 (1969).

182. 429 U.S. 610, 620 (1977).

183. One explanation for the imposition of this requirement is suggested by an analogy to certain merger cases, which offered the competitive advantage the merged firm would have over its smaller rivals as a justification for condemning the acquisition under § 7 of the Clayton Act. *See, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962). Indeed, the Court's opinion in *Fortner I* is replete with references to the extensive size of the seller and the advantages this might give it in the credit market. The Court in *Fortner II,* however, stood this antipathy to the competitive advantage of large sellers on its head by making it the principal measure of the uniqueness of an undifferentiated tying product. Moreover, even if the principal concern is with the effect on the seller's competitors, it is obvious that they will be equally foreclosed regardless of the source of the seller's market power in the tying product—whether it is some economic advantage or some other factor such as more clever advertising or willingness to take greater risks. *See* Handler, *supra* note 21, at 168.

184. *See* text accompanying notes 134 & 169 *supra.*

ket power, sellers could never impose a tie-in at all. In cases prior to *Fortner II,* courts suggested that the mere existence of a host of tying arrangements might be sufficient evidence, by itself, to demonstrate this market power, if the defendant could not provide a satisfactory alternative explanation for the buyer's purchase of both products.[185] Yet *Fortner II* rejected this seemingly obvious conclusion. Instead, it stands for the proposition that a host of ties may equally well demonstrate that the seller was offering both products on particularly attractive terms, and that a number of purchasers recognized this and took advantage of the package deal.[186]

This line of inquiry seems merely to have brought the analysis full circle. The large number of tying arrangements is not dispositive of market power because even they may have been voluntary rather than coerced. Although it may be one piece of evidence,[187] the Court said that this still does not answer *why* so many tie-ins were accepted.[188] Therefore, we are required to find other means of demonstrating the existence of the tie-in. The problem with *Fortner II* is that the single alternative it suggests—did the seller have some special edge, of a cost nature or otherwise, or could other sellers have offered the tying product on equal terms if they had chosen to do so[189] —is too narrow, in part because it ignores some of the evils that flow from tying arrangements.[190]

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185. Moore v. James H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977); Advance Business Sys. & Supply Co. v. SCM Corp., 415 F.2d 55, 62, 68 (4th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970); AAMCO Automatic Transmissions, Inc. v. Tayloe, 407 F. Supp. 430, 437 (E.D. Pa. 1976). *See also* L. SULLIVAN, *supra* note 68, at § 152, at 440.

186. United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 618 n.10 (1977). *See also* Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1225 (3d Cir.), *cert. denied,* 429 U.S. 823 (1976).

187. Cases after *Fortner II* continue to view the large numher of ties as some evidence that the seller coercively imposed a tying arrangement. *See, e.g.,* Fifth Moorings Condominium, Inc. v. Shere, 81 F.R.D. 712, 716 (S.D. Fla. 1979).

188. Given these two alternate explanations, it might be appropriate for the courts to adopt a rule that this evidence makes out a prima facie case of the defendant's market power, and that introduction of this evidence shifts the burden of proof to the seller to show that the large number of "package deals" were voluntary.

189. Without any evidence that the Credit Corp. had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected—the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fornter had the burden of proving in order to prevail in this litigation.

429 U.S. at 622.

190. Not only is the *Fortner II* requirement that the tying product's uniqueness must flow—when not the result of some legal barrier—from some financial advantage of the seller too narrow an inquiry; this standard is unworkable and focuses on inappropriate criteria. One wonders whether the Court contemplates the introduction of evidence of the actual cost data of producing the tying product—which would require allocation of various input factors by an integrated producer—and then a comparison of these data with the input costs of the

The earlier discussion[191] suggested a number of factors that would allow the trier of fact to infer the existence of a tying arrangement—examination of the practical implications of the contract itself; information about the parties' bargaining and relationship; technological combinations; and offering the two products at a package price. This Article has urged that the existence and use of market power is another extremely important factor in showing that a tie-in exists. If these previously mentioned factors and the large numbers of tie-ins are not dispositive on this point, what other evidence might be helpful?

One useful approach is to borrow some of the learning of section 2 of the Sherman Act. In determining if the defendant has monopoly power, even if it controls considerably less than 100% of the market, courts look to market structure and performance as well as to the defendant's conduct.[192] Thus, in addition to looking at the defendant's market share, relevant inquiries include abnormally high profit levels, decline in the number of competitors, artificial product differentiation by advertising or the like, high capital or technological barriers to entry, and so forth. Similarly this kind of information would indicate whether the defendant could exercise its leverage to compel purchase of the tied product. This, combined with evidence of the defendant's conduct, should help identify whether the defendant has, and used, its market power.

Other relevant factors that might be considered are the price of the products and whether the two products are sold in fixed or variable proportions. The price of the two products can be strong evidence of a tie-in.[193] If the tying product is less expensive than expected while the tied product is more expensive, this suggests a tie-in, since otherwise the purchaser probably would have elected to take only the tying product from that seller.[194] If the combined price

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seller's competitors. Yet, this enormously complicated, and doubtlessly fruitless, inquiry would be required properly to determine cost advantages. Furthermore, if this evidence is required, this approach would be grossly inconsistent with other antitrust (and general economic) objectives. It suggests that in certain situations, tie-ins will be unlawful only if the seller is more efficient *(i.e.,* has cost advantages), while the less efficient seller could engage in those same practices. *See* Jones, *The Two Faces of* Fortner: *Comment on a Recent Antitrust Opinion,* 78 COLUM. L. REV. 39, 43-47 (1978).

191. *See* text accompanying notes 95-110 *supra.*

192. L. SULLIVAN, *supra* note 68, § 6 at 22-9.

193. *See, e.g.,* Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 48 (5th Cir. 1976); Hill v. A-T-O, Inc., 535 F.2d 1349, 1354 (2d Cir. 1976).

194. *Accord,* Moore v. James H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977); Turner, *supra* note 78, at 63. *But see,* United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 618 (1977) (such pricing may also evidence vigorous competition); Flinn, Fortner: *Sufficient Economic Power Over the Tying Product,* 46 ANTITRUST L.J. 605, 615 (1977). This practice would be consistent with the economist's analysis, *see* text accompanying notes

of both products is higher than a competitive price for the same package, this seems conclusive evidence of a tie-in. Sale of the two products in varying proportions certainly does not preclude the possibility that there is a tie-in. Sale of the two products to all buyers in equal, fixed proportions, however, seems to indicate a tie-in, since one would normally expect that if the buyers were acting completely independently, they would sometimes take different ratios of the two products or not take one or the other at all.[195]

The development of a test for the existence of an implied tie, when the consequence will be per se unreasonableness, will require some case by case explication. In the long run, however, the approach offered above should simplify the analysis. Of equal importance, the discussion of the merits of tying arrangements makes clear that there is no reason for retaining the present two-step analysis.

B. *Defenses*

The significance of the defenses specified above[196] for this proposed new approach can be explained quickly. The defenses embody the exceptions to the general proposition that tying arrangements rarely have procompetitive value. To the extent that a seller can show that the use of tying arrangements will produce specific benefits that outweigh any harm to competition, the ties should be permitted as exceptions to the per se rule. The burden of proof, however, should be on the defendant to show that the same results could not have been achieved by less restrictive alternatives.[197]

C. *Eliminating Certain Anomalies*

Over the years, a number of anomalies have crept into the already confusing rules regarding tying arrangements. When the Court makes the break with the past approach outlined here, it

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28-45 *supra*, of the use of tie-ins to capture a portion of the consumer's surplus or to effect price discrimination. Obviously, lower quality of either product can be the equivalent of higher price.

195. Of course, there are some combinations that are almost always used in fixed proportions. Thus, if the left shoe and the right shoe were deemed separate products, *see* text accompanying notes 77-85 *supra*, almost all purchasers would nonetheless take both. On the other hand, since even here one might expect a small number of persons to take only one or the other, the fact that *all* buyers took them in fixed proportions (here, one-to-one) would at least be evidence of a tie-in.

196. *See* text accompanying notes 152-63 *supra*.

197. If it is clear that there are no reasonable alternatives to the use of tying arrangements to perform the function of a counting device for a tying product used in variable proportions, and if their use would promote greater total output of the tying product, *see* text accompanying notes 41-42 *supra*, this should state another defense to the per se illegality of tie-ins.

should simultaneously make certain additional changes that will simplify the analysis. These difficulties are—(1) although both the Sherman and Clayton Acts apply to tie-ins, different tests of legality are used under these two statutes; (2) the courts have also applied different standards for finding liability based on the nature of the plaintiff; and (3) the rule of reason approach may be attractive in theory, but it has never been implemented and should be expressly discarded.

1. Different Standards Under the Sherman and Clayton Acts

Section 3 of the Clayton Act applies only to tie-ins that involve the sale or lease of goods or commodities. Therefore, if the tie-in takes the form of a license, or if either the tying or tied product is a service, a trademark, money, or land, then section 1 of the Sherman Act is used.[198] Over twenty-five years ago, in the *Times-Picayune* decision, the Supreme Court established different tests for per se illegality depending on whether the conduct falls under the Sherman Act or the Clayton Act.[199] For unexplained reasons, the Court held that the necessary showing of presumptive injury to competition would be made out under the Clayton Act if the transaction had certain effects in the market of either the tying or of the tied product. On the other hand, if the challenge were under the Sherman Act, the plaintiff relying on the per se rule would have to show the requisite effect in *both* markets.

The cases indicate that a stricter standard is appropriate under the Clayton Act, since that statute deals with "incipient" Sherman Act violations.[200] In the tying arrangement context, however, this difference makes no sense. If one agrees that tying arrangements injure competition, and therefore should be proscribed—or, equally, if one argues that the effect of these transactions is trivial—there is no noticeable difference in the level of competitive injury depending on the nature of the products involved or the method by which they are transferred from seller to buyer.[201] Since this particular distinction has no foundation either in the language of either statute or in their legislative histories, there is no reason to retain it. Some courts, in fact, seem to have abandoned the distinction.[202] Instead,

198. *See* note 127 *supra* and accompanying text.

199. 345 U.S. 608-10 (1953). *See* notes 126-28 *supra* and accompanying text.

200. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 323 n.39 (1962) (discussing legislative history of 1950 amendment to § 7 of the Clayton Act); Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 297 & n.4 (1949) (discussing the legislative history of § 3 of the Clayton Act).

201. *See* Turner, *supra* note 78, at 58.

202. Several recent cases have suggested that the difference in standards under § 1 of

they have applied the expanded Sherman Act test to cases brought under the Clayton Act. For the sake of simplicity and consistency, this Article suggests that the approach adopted here be applied to all tying arrangements.[203]

2. Different Standards for Different Plaintiffs

The seller who engages in the tie-in may be sued by at least four different categories of plaintiffs. One reason for the lack of consistent legal standards for evaluating tying arrangements is that courts have applied different standards of liability in each of these categories. The seller who engages in a tying arrangement may be sued by the Antitrust Division of the Department of Justice; by the Federal Trade Commission; by a competitor (or even by a would-be competitor) of the seller in the market for the tied product; or by the buyer who was the object of the tie and was unable to buy the tied product elsewhere (or lost the option to buy nothing at all).[204]

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the Sherman Act and § 3 of the Clayton Act no longer prevails. *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 521 (1969) (Fortas, J., dissenting); Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 428 (5th Cir. 1978); Moore v. James H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977); Advance Business Sys. & Supply Co. v. SCM Corp., 415 F.2d 55, 67 & n.8 (4th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970). *Accord,* Handler, *supra* note 21, at 161 (*Fortner I* "came close to eliminating a long-standing antitrust anomaly"). In addition, in a case involving full line forcing, a variation of tying arrangements discussed in text accompanying notes 111-14 *supra,* a court applied the Sherman Act test of looking to both the tying and tied market effects to a claim asserted under § 3 of the Clayton Act. Pitchford v. Pepi, Inc., 531 F.2d 92, 100-01 (3d Cir. 1975), *cert. denied,* 426 U.S. 935 (1976).

Other recent cases have reiterated without questioning the differing standards. *See, e.g.,* Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 708 n.9 (7th Cir. 1977), *cert. denied,* 439 U.S. 822 (1978); Sulmeyer v. Coca Cola Co., 515 F.2d 835 (5th Cir. 1975) (dictum); Aqua Flame, Inc. v. Imperial Fountains, Inc., 463 F. Supp. 736, 739 (N.D. Tex. 1979); Robbins Flooring, Inc. v. Federal Floors, Inc., 445 F. Supp. 4, 11 (E.D. Pa. 1977).

203. In addition, the FTC may challenge tying arrangements under § 5 of the FTC Act. The standard of illegality is different than that of either the Sherman or Clayton Act. *See* notes 121-22 *supra* and 205-07 *infra* and accompanying text.

204. The shift in enforcement in recent years from government actions to private treble damage actions has been dramatic. In 1964, cases brought by the Antitrust Division accounted for 18.6% of all antitrust suits filed in the courts. By 1977, governmental actions accounted for only 4.6% of all antitrust filings. ANNUAL REPORT OF DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS 1977, at 208, table 20. In the tying arrangement context, this trend is illustrated by the Supreme Court cases. Until 1969, all tying cases against sellers were prosecuted either by the Justice Department or the FTC. Since then, the Court has heard private actions twice—the two appearances of *Fortner*—and no government actions. *See* note 1 *supra.* Similarly, in the lower courts today the overwhelming majority of cases are private actions.

An interesting illustration of this dramatic shift from governmental to private enforcement of tying arrangements is shown by a statement in a recent Justice Department prosecution. In United States v. Westinghouse Elec. Corp., 471 F. Supp. 532, 544 n.41 (N.D. Cal. 1978), the court was moved to remark: "This case is somewhat unique among tying actions because the plaintiff is not the person allegedly required to accept unwanted products or services . . . ."

The Antitrust Division may bring an action under either the Sherman or Clayton Act. The Commission may bring an action under either section 3 of the Clayton Act[205] or under section 5 of the F.T.C. Act. Section 5 has been interpreted not only to include all Sherman section 1 violations—therefore incorporating those standards when the Commission sues—but also to reach "incipient antitrust violations."[206] Therefore, when the Commission brings an action under section 5, it may be able to condemn certain tying arrangements that would not be unlawful under either the Sherman or the Clayton Act.[207]

When the action is brought by a private plaintiff suing pursuant to section 4 of the Clayton Act for treble damages, courts often look to the nature of the injury to the plaintiff to determine what should be a prior inquiry—whether an antitrust violation exists at all. Occasionally this may be part of an effort to prevent private plaintiffs from reaping a "windfall profit." Thus, when a disaffected buyer asserts that the seller engaged in an unlawful tying arrangement, courts have inappropriately asked whether other sellers who also offered the tied product were foreclosed from the market; finding none, the courts hold that there was no antitrust violation.[208] Even if there were no competing sellers, and hence no foreclosure, the buyer may nonetheless have been forced to take the tied product when it would have preferred to take nothing at all. Similarly, suits by competing sellers would be inappropriately rejected if the only ground therefore was that the buyers were indifferent as to the choice of the offeror of the tied product.[209]

In both instances involving the private plaintiff, it is important

205. Section 11(a) of the Clayton Act, 15 U.S.C. 21(a) (1976), specifically authorizes the Commission to enforce § 3 of that Act.

206. *See, e.g.,* FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

207. In FTC v. Brown Shoe Co., 384 U.S. 316 (1966), the respondent had engaged in conduct having overtones both of exclusive dealing and tying arrangements. Brown franchised shoe stores, and in exchange for providing "certain valuable services"—for example, architectural plans, merchandising records, services of a field representative, and a right to participate in group life insurance—it insisted that those franchisees not deal in the shoes of its competitors. Those services—the tying products—were provided only to franchisees executing this exclusive dealing agreement. The Court did not label this conduct in Clayton § 3 terms. Rather, it adopted the Commission's characterization of it as an "unfair method of competition," and then emphasized that FTC Act § 5 could reach this conduct even if it were not unlawful under the antitrust laws. This decision is criticized in Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review,* 76 YALE L.J. 92, 93-101 (1966).

208. *See, e.g.,* Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1221 n.7a (3d Cir.), *cert. denied,* 429 U.S. 823 (1976); United States v. Westinghouse Elec. Corp., 471 F. Supp. 532, 544 & n.40 (N.D. Cal. 1978).

209. *Cf.* Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 32 (7th Cir. 1976) (existence of other potential buyers bar to suit by competing seller).

to recall that treble damage suits are encouraged because the plaintiff is serving as a "private attorney general."[210] By virtue of such suits, enforcement of the antitrust laws is expanded beyond what would occur if only the government were permitted to sue. Therefore, the courts should simply ask whether, if the government were suing, a violation would have been made out. Then, if recovery for the plaintiff would be inequitable, damages might be reduced or even eliminated on the ground that the plaintiff failed to demonstrate the necessary standing[211] or the requisite injury to its trade or business called for by section 4 of the Clayton Act.[212] To shortcut this analysis by holding that in these cases there simply was no violation will only contribute to the confusion prevailing today.

3. Rule of Reason Approach

On several occasions, the Supreme Court has stated that tying arrangements may be unlawful either if they satisfy all of the elements of the per se rule or, even if the per se standard is not satisfied, if the conduct is unreasonable.[213] On its surface, having these two alternatives makes sense. In its application, however, the distinction is meaningless.[214] The author's research has not turned up a single case in which a court first held the conduct lawful under the per se approach, but then condemned it under the rule of reason test.[215]

The classic definition of the considerations applicable to a rule of reason approach is found in Mr. Justice Brandeis' opinion in *Chicago Board of Trade v. United States.*[216] Looking, as he sug-

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210. Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2333-34 (1979); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969).

211. *See, e.g.,* Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934 (5th Cir.), *cert. denied,* 429 U.S. 1121 (1976).

212. Thus, it does seem fair to require the plaintiff to show that it was injured by the defendant's conduct, either by having to pay more for the goods or by receiving lower quality. *See generally,* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 453-56 (5th Cir. 1979); Warriner Hermetics, Inc. v. Copeland Refrig. Corp., 463 F.2d 1002, 1016 (5th Cir.), *cert. denied,* 409 U.S. 1086 (1972); Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 120-23 (C.D. Cal. 1978); Areeda, *Antitrust Violations Without Damage Recoveries,* 89 HARV. L. REV. 1127 (1976).

213. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499-500 (1969); Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 614 (1953).

214. *See generally,* Dam, *supra* note 21, at 32-5.

215. *Accord,* Note, *The Presumption of Market Power in Sales of Legally Differentiated Tying Products,* 56 TEXAS L. REV. 1305, 1305 n.2 (1978). *But see In re* Uranium Antitrust Litigation, 473 F. Supp. 393, 401 (N.D. Ill. 1979) (on motion to dismiss: competitors of sellers for the *tying* product may not rely on per se rule, but may assert action under Rule of Reason); Carlson Cos. v. Sperry & Hutchinson Co., 374 F. Supp. 1080, 1096 (D. Minn. 1973) (Rule of Reason applies to tying arrangements when per se standards are inapplicable).

216. 246 U.S. 231, 238 (1918).

gested, at the history of the tie-in, the defendant's purposes, the evil aimed at, the actual effect on competition, and so forth, it is hard to imagine considerations that a court might adopt that would go beyond the factors already considered in the per se approach. If the economists' view prevails—that tie-ins usually have no adverse effect on competition—then a per se rule is unjustified in the first place. Once the determination is made that a per se approach is appropriate, however, then there is no reason for reconsidering the same factors in individual cases under a purported rule of reason approach. In short, nothing more could be gained because there should be nothing more to consider. Holding out a second chance for success to plaintiffs will be a hoax, wasting the time of the litigants and the court. Therefore, the rhetoric that the rule of reason also applies to tying arrangements should be explicitly discarded. If the Court really meant what it said—that tying arrangements rarely have procompetitive benefits—then there is no reason to shy away from a per se test. The test proposed in this Article still leaves room for appropriate specific defenses.

V. Conclusion

Tying arrangements often harm competition and rarely yield any benefits. The explanation for tie-ins offered by economists may cast doubt on the theory courts have used to explain this conduct, but it does not undermine the appropriateness of the per se approach. Since there is little reason to permit tie-ins, there is no sound justification for a two step analysis—first of existence, then of liability. The test for evaluating the legality of tie-ins should combine the factors presently examined in these two steps. If a tie-in is found to exist, courts should proceed immediately to consideration of any justifications for the conduct.