Vanderbilt Law Review

Volume 30
Issue 4 *Issue 4 - May 1977* Article 3

5-1977

Tying Arrangements and the Individual Coercion Doctrine

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Recommended Citation
W. Perry Brandt, Tying Arrangements and the Individual Coercion Doctrine, 30 *Vanderbilt Law Review* 755 (1977)
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NOTES

Tying Arrangements and the Individual Coercion Doctrine

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I. INTRODUCTION

The validity of tying arrangements has been considered often hy the courts and commentators.[1] In developing the law of tying, the

1. *See, e.g.,* Austin, *The Tying Arrangement: A Critique and Some New Thoughts,* 1967 WIS. L. REV. 88; McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-ins,* 58 CALIF. L. REV. 1085 (1970); Pearson, *Tying Arrangements and Antitrust Policy,* 60 NW.

Supreme Court has enumerated several explicit prerequisites to the establishment of an illegal tie. In recent years, however, a number of lower courts have formulated an additional requirement that "coercion" influence a purchaser's acquiescence in a tie-in. Subsequent courts have elaborated on this standard in the class action context by requiring that this coercion be proved individually. This corollary, known as the Individual Coercion Doctrine, in most cases operates to deny class certification because individual proof of coercion creates a predominance of individual questions of law and fact contrary to rule 23 of the Federal Rules of Civil Procedure. Although the parameters of the Doctrine are unclear in some respects, it has gained wide acceptance in the federal courts. Nevertheless, the legal and policy bases of the Doctrine were cast into doubt when it was rejected expressly by the district court in *Ungar v. Dunkin' Donuts of America, Inc.*,[2] which found that coercion is not a necessary element of tying law. Although reversal of this decision and the Supreme Court's subsequent denial of certiorari seemingly have confirmed the Individual Coercion Doctrine as a part of antitrust law, its efficacy still remains open to question.

II. The Elements of Tying Law

In *Northern Pacific Railway v. United States*[3] the Supreme Court defined a tying arrangement as "an agreement by a party to sell one 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." By conditioning the sales of products or services on one another, such agreements adversely affect competition by requiring buyers to purchase unwanted items and by forestalling sales by competitors.[4] For these reasons tying arrangements have been declared per se illegal under

U.L. Rev. 626 (1965); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 Harv. L. Rev. 50 (1958); Comment, *Franchise Tie-ins and Antitrust: A Critical Analysis*, 1973 Wis. L. Rev. 847.

2. 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 97 S. Ct. 74 (1976).

3. 356 U.S. 1, 5-6 (1958).

4. The *Northern Pacific* Court recognized these anticompetitive effects:

> Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." . . . They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products.

Id. at 6.

both section 3 of the Clayton Act[5] and section 1 of the Sherman Act.[6] Thus, once the statutory requisites are met, these agreements, like several other vertical restraints, are conclusively presumed to violate the antitrust laws without further examination into their particular circumstances or justifications.[7]

The Supreme Court has stated three basic requirements for the establishment of an illegal tie: (1) there must be separate tying and tied products;[8] (2) the seller must have sufficient economic power in the tying product to appreciably restrain competition in the tied product;[9] and (3) the arrangement must affect a "not insubstantial" amount of commerce, based upon the total volume of sales to all purchasers under the tie.[10] These criteria have received varying ap-

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5. Clayton Act § 3, 15 U.S.C. § 14 (1970), which is directed at tying arrangements, provides:

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

6. Sherman Act § 1, 15 U.S.C. § 1 (Supp. V 1975), provides that

> [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Tying arrangements may also be condemned as unfair methods of competition under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (Supp. V 1975). *See, e.g.*, FTC v. Texaco, Inc., 393 U.S. 223 (1968); Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965); *see* Part V.A. *infra.*

7. As the Court noted in *Northern Pacific,*

> certain agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

356 U.S. at 5; *see* Comment, *supra* note 1, at 851.

Even if a tying arrangement does not meet the statutory requirements for per se illegality, it nonetheless must be scrutinized under the general standards of the Sherman Act. Accordingly, if a more thorough examination of the purposes and effects of the practice finds it unreasonable, a tying arrangement still will be held illegal. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498-500 (1969).

8. That is, there must be a tying product which cannot be obtained without the purchase of a tied product. *See., e.g.,* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 507 (1969); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). For a discussion of the separability of products in tying cases, see Ross, *The Single Product Issue in Antitrust Tying: A Functional Approach,* 23 EMORY L.J. 963 (1974).

9. Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958).

10. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501 (1969); International Salt Co. v. United States, 332 U.S. 392, 396 (1947). Tied sales of as little as

plication, however, due to the jurisdictional and substantive distinctions between the Clayton and Sherman Acts.[11] First, while by its own terms section three of the Clayton Act pertains only to tying arrangements in which both the tying and tied products are "commodities,"[12] the Sherman Act is applicable to all tie-ins. Secondly, although a tying arrangement violates section three of the Clayton Act whenever either "sufficient economic power" is shown or a "not insubstantial" amount of commerce is affected, section one of the Sherman Act bans tie-ins only when both conditions are met.[13] The import of these distinctions has been lessened, however, by the Court's recent blurring of the second and third requirements,[14] and now it is generally agreed that the two statutes should be construed similarly in regard to their prohibitions of tying.[15]

Perhaps the requirement most often considered by the courts is that of economic power in the tying product. The early cases demanded a monopolistic position or market dominance in the seller, measured in terms of market data.[16] In *Northern Pacific,* however, the Supreme Court retreated from this standard for illegality, requiring only "sufficient economic power to impose an appreciable restraint."[17] In a later case, *United States v. Loew's, Inc.,*[18] the

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$60,800, United States v. Loew's, Inc., 371 U.S. 38, 49 (1962), and $190,000, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. at 502, have been found "not insubstantial."

11. *See generally* Comment, *supra* note 1, at 851-53.

12. *See, e.g.,* Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970); Columbia Broadcasting System v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961); note 5 *supra.*

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

14. In Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969), the Supreme Court found tbat "sufficient economic power" could be inferred from the fact that a tying arrangement has been imposed upon an "appreciable number of buyers." *Id.* at 503-04; *see* note 21 *infra* and accompanying text. Since a court may therefore infer "sufficient economic power" if a tying arrangement affects a "not insubstantial amount of commerce," *Fortner* has virtually eliminated the distinctions between the two statutes. *See* Comment, *Physical Tie-ins as Antitrust Violations,* 1975 U. ILL. L.F. 224, 228.

15. *See* Kamenshine, *Competition Versus Fairness in Franchising,* 40 GEO. WASH. L. REV. 197 (1971); Pearson, *supra* note 1, at 653 n.96; Turner, *supra* note 1, at 58.

16. *See, e.g.,* Time-Picayune Publishing Co. v. United States, 345 U.S. 594, 610-13 (1953); United Shoe Mach. Corp. v. United States, 258 U.S. 451, 455 (1922).

17. 356 U.S. at 11. In *Northern Pacific* the tying product was a unique leasehold or ownership of uniquely placed land. Because the land was so strategically located, many lessees and purchasers entered into contracts containing preferential routing clauses that required them to ship over Northern Pacific's lines all commodities produced on the land. The Court concluded that the desirability of the land created sufficient economic power in Northern Pacific. The Court went so far as to say that "[t]he very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power." *Id.* at 7-8.

18. 371 U.S. 38 (1962).

Court held that the requisite power may be inferred from the tying product's uniqueness or desirability.[19] Finally, in *Fortner Enterprises, Inc. v. United States Steel Corp.*[20] the Court reasoned that sufficient economic power can be inferred merely from the very existence of tying arrangements on an "appreciable number of buyers."[21] Thus the cases have reflected a clear liberalization of the quantum of economic power required to establish a per se illegal tying arrangement.[22]

Nevertheless, the mere existence of economic power is not enough. Such power must be used.[23] The seller actually must have employed his leverage to effectuate the tie-in by refusing to sell the tying product separately from the tied product.[24] Unfortunately, the courts have not made entirely clear the meaning of "use," and this uncertainty in part has led to the controversy surrounding the Individual Coercion Doctrine. The concept of use may refer only to the simple achievement of a tie—that the seller must have conditioned the availability of the tying product on the purchase of the tied product. On the other hand, the "use" requirement may also imply that the seller's economic power must have subjectively compelled the complaining purchaser to enter the arrangement against his will.

III. Development of the Individual Coercion Doctrine

A. *Establishment of a Coercion Requirement*

The concept of coercion was first discussed by the Supreme Court in an early non-tying case, *Ford Motor Co. v. United States.*[25] Prior to that case, Ford Motor Co. had entered into a consent decree

19. *Id.* at 45. Loew's conditioned the license or sale of television rights to show its copyrighted feature films upon acceptance of a package of inferior and unwanted films. The Court found the feature films sufficiently desirable to television station customers to warrant a finding of sufficient economic power.

20. 394 U.S. 495 (1969).

21. *Id.* at 504. The subsidiary credit corporation of U.S. Steel conditioned loans upon the purchase of prefabricated houses from U.S. Steel. The tying product (credit) was found unique because 100% financing could not be obtained elsewhere. The Court stated that "the proper focus of concern is whether the seller has the power to . . . impose . . . a tie-in, with respect to any appreciable number of buyers within the market." *Id.*

22. *See* Comment, *supra* note 1, at 854.

23. *See, e.g.,* Capital Temporaries, Inc. v. Olsten Corp., 365 F. Supp. 888, 892 (D. Conn. 1973).

24. *See, e.g.,* Northern Pacific Ry. v. United States, 356 U.S. 1, 7 (1958). *See also* Solomon, *An Analysis of Tying Arrangements: The Offer You Can't Refuse,* 26 MERCER L. REV. 547, 556 (1975).

25. 335 U.S. 303 (1948).

with the Government that restrained various practices by which it had influenced dealers to patronize particular finance companies.[26] The decree provided that it could be modified or suspended if similar restrictions were not imposed upon Ford's chief competitor, General Motors Corp., and that a guilty verdict against GMC would be deemed a determination of the illegality of these practices.[27] After a jury returned a general verdict of guilty against GMC upon instructions that "coercion" of dealers to use certain finance companies was illegal but that mère "persuasion" was not,[28] Ford moved to suspend or modify provisions of its decree forbidding practices falling in the latter category. On appeal, the Supreme Court accepted the distinction between "coercion" and "persuasion" and, finding the latter permissible, affirmed modification of Ford's consent decree with regard to the "persuasive" practices.[29]

Subsequently, the Court began to refer to the notion of coercion in tying cases but failed to clarify the role the concept should play. In *Times-Picayune Publishing Co. v. United States,*[30] for example, the Court observed that

> [b]y conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market.[31]

26. The consent decree (1) precluded Ford from arranging with any finance company that an agent of either Ford or the finance company be present with any dealer for the purpose of influencing the dealer to patronize the finance company; (2) precluded Ford from recommending, endorsing, or advertising any finance company to dealers; and (3) restrained Ford from establishing " 'any practice, procedure or plan . . . for the purpose of enabling . . . any . . . finance company or companies to enjoy a competitive advantage. . . .' " *Id.* at 315-16.

27. *Id.* at 310-11.

28. The trial judge drew a distinction between practices such as cancellation of a dealer's contract or refusal to renew it, which he characterized as "coercion," and other practices for which "persuasion," "exposition," or "argument" were fair characterizations. *See id.* at 316-18 & n.3.

29. The Government had argued that the Court should refuse modification because the "persuasive" acts upheld by the trial judge also were illegal under the Sherman Act. The Court, bowever, found this contention unadmitted and unproven, and stated that its decision was limited to upholding the operation of the consent decree. *Id.* at 320. Nevertheless, Justice Black in dissent argued against the semantic distinctions between "persuasion" and "coercion," and reasoned that the methods of persuasion constituted unreasonable restraints of trade. *Id.* at 325 (Black, J., dissenting).

30. 345 U.S. 594 (1953). In *Times-Picayune* the Court upheld under Sherman Act attack an arrangement whereby classified and general display advertisers in defendant's publications could purchase only combined insertions appearing in both its morning and evening papers, and not in either separately.

31. *Id.* at 605 (emphasis added).

The Court also opined that

> [t]he common core of the adjudicated unlawful tying arrangements is the *forced purchase* of a second distinct commodity with the desired purchase of a dominant "tying" product. . . . [32]

A later case, *United States v. Loew's Inc.*,[33] again alluded to the idea of force in a tying case:

> Television stations *forced* by appellants to take *unwanted* films were denied access to films marketed by other distributors who, in turn, were foreclosed from selling to the stations.[34]

The Court's statements indicate that the essence of a tie-in is the conditioned availability of products and that coercion of the purchaser seems to follow this act. The Court did not specify, however, whether this compulsion always should be presumed from the act of conditioning, or whether it represents an additional prerequisite beyond conditioning. The statement in *Times-Picayune* implies that coercion is a necessary result of conditioning and that no independent showing is required. *Loew's*, however, may inject a subjective factor since the pressure exerted there was successful because the appellants took unwanted films. Consequently, *Loew's* suggests that a tying arrangement is illegal only if the purchaser was compelled to take a product or service against his will.

A number of lower courts subsequently began to dispose of tying cases on the ground that the challenged arrangements were not "coerced," but they did not make clear whether they were requiring anything beyond mere conditioning.[35] In 1971, however, the Second Circuit, in *American Manufacturers Mutual Insurance Co.*

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32. *Id.* at 614 (emphasis added).

33. 371 U.S. 38 (1962). Loew's conditioned the license or sale of television rights to show its copyrighted feature films upon acceptance of other less desirable films. The court invalidated the arrangement under § 1 of the Sherman Act. *See* note 19 *supra* and accompanying text.

34. 371 U.S. at 49 (emphasis added).

35. *See, e.g.*, Broussard v. Socony Mobil Oil Co., 350 F.2d 346, 352 (5th Cir. 1965); McCullough Tool Co. v. Wells Surveys, Inc., 343 F.2d 381, 408 (10th Cir. 1965); Osborn v. Sinclair Refining Co., 286 F.2d 832, 836 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961); American Securit Co. v. Shatterproof Glass Corp., 268 F.2d 769, 777 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959). For example, in *American Securit Co.*, a patent misuse case, the court made this rather cryptic statement:

> Whatever may be the asserted reason or justification of the patent owner, if he *compels* a licensee to accept a package of patents or none at all, he employs one patent as a lever to *compel* the acceptance of a license under another.

268 F.2d at 777 (emphasis added). The court seemingly failed to denote whether the patent owner's compulsion of licensees encompassed activities beyond the simple conditioning of patent purchases.

v. American Broadcasting-Paramount Theatres, Inc.,[36] expanded on the potentially more restrictive standard implied by *Loew's*. In *American Manufacturers* plaintiff claimed that the American Broadcasting Company had required it to sponsor an early evening news program over certain ABC affiliates as a condition to being permitted to sponsor programs over other ABC affiliates whose sponsorship plaintiff desired. The court affirmed dismissal of the complaint, finding that plaintiff could not have been "coerced" because it "did not seriously bargain for the elimination of the alleged unwanted sponsorships."[37] The court relied on *Loew's* and declared that "there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice."[38] The Second Circuit later elaborated on this pronouncement in *Capital Temporaries, Inc. v. Olsten Corp.*,[39] in which plaintiff alleged that in order to operate a franchised temporary personnel business for "white collar" jobs, he was required to establish a "blue collar" operation under another trademark. The court framed the legal issue as whether plaintiff had to prove "actual coercion" outside the franchise agreement.[40] Relying upon *American Manufacturers*, the court proclaimed that before plaintiff could show a per se illegal tying arrangement, he had to prove that he was an unwilling purchaser of an unwanted product.[41] It then concluded that the necessary compulsion could not be established from the instant franchise agreement because its terms merely gave plaintiff an option to operate the "blue collar" service and did not require him to do so.[42] Finding no evidence of extrinsic coercion,[43] the court affirmed dismissal of

36. 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

37. *Id.* at 1133. Plaintiff contended that even under these facts ABC must be found to have coerced it into an illegal tie on the principle that whenever a seller offers a buyer a package, the buyer states that he only desires certain items in the package, and the seller delays at all in offering the items separately, a tie exists. *Id.* at 1136.

38. *Id.* at 1137. The court continued by stating that the economic foreclosure wrought by tying arrangements

> implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie. To adopt [plaintiff's] position would subject businesses to threats of antitrust sanctions whenever they tried by bravado to buttress a sagging market position by initially offering small quantities of desired goods at high prices, in hopes of eliciting a large order without further negotiation. Such bartering ploys are not generally the concern of antitrust laws.

Id.

39. 506 F.2d 658 (2d Cir. 1974), *aff'g* 365 F. Supp. 888 (D. Conn. 1973).

40. 506 F.2d at 661.

41. *Id.* at 662.

42. *Id.* at 665.

43. *Id.* at 661.

the action. Thus from oblique references by the Supreme Court to "coercion" the *American Manufacturers* court derived the requirement that it be present in every case. Although the court failed to explain its use of the concept, it maintained that coercion must "influence" a purchaser's decision to accept a tied item. This shift in concern to the subjective effect on the purchaser is further evidenced by the *Capital Temporaries* court's demand that a purchaser prove his unwillingness to enter into a tying arrangement. Although an individual purchaser could prove in most instances that his will has been overcome, such a requirement raises a serious issue when multiple purchasers attack a tying arrangement. Must this coercion be proved individually, and if so, with what result?

B. The Significance of an Individual Coercion Requirement

American Manufacturers and *Capital Temporaries* set forth the element of coercion only in the context of the single-plaintiff, single-defendant tying action. With increasing frequency, however, class action suits are being utilized in the antitrust area.[44] Tying cases are especially suitable for class action treatment because ties are generally imposed on numerous purchasers.[45] For example, most suits by franchisees against franchisors allege that they have been required to purchase supplies or raw materials from the franchisor or other designated source as a condition of using the franchisor's trademark.[46] Since such tie-ins appear fairly uniform over all franchisees, the class action device might become a significant tool of antitrust enforcement.

To qualify for such treatment, however, a class must meet the formal requirements of rule 23 of the Federal Rules of Civil Procedure. In addition to satisfying the prerequisites for maintenance of a class action stated in subsection (a),[47] a class must fulfill one of

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44. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1781, at 79 (1972) [hereinafter cited as WRIGHT & MILLER].

45. In fact, the Advisory Committee on the Federal Rules of Civil Procedure expressly recognized that class actions are particularly applicable in tying situations:

> [A] patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Notes of Advisory Committee on Rules, 28 U.S.C.A. FED. R. CIV. P., RULES 17 TO 23.2, at 299 (1972).

46. *See* Comment, *supra* note 1, at 850.

47. FED. R. CIV. P. 23(a) states:

> (a) **Prerequisites to a Class Action.** One or more members of a class may sue or

the three conditions set forth in subsection (b).[48] The general view is that most private antitrust actions should be brought under rule 23(b)(3),[49] which requires that questions of law or fact common to the class predominate over issues pertaining only to individual members.[50] Although the rule does not define "predominate," it is clear that common questions need not be dispositive; rather, if one or more of the central issues in an action are common to the class and a common nucleus of operative facts exists, a class action is proper under rule 23(b)(3). In antitrust actions courts generally hold that if the defendant's activities constitute a "common course of conduct," the issue of liability is common and thus a class may be certified under the rule.[51]

The potential impact of the coercion requirement stated by *American Manufacturers* on the maintenance of class tying actions is significant. If a single plaintiff must establish that his acceptance of a tied item was coerced and not voluntary, the question arises whether each member of a class of hundreds, perhaps thousands, of purchasers of the tied item similarly must prove his state of mind.

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be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to tbe class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of tbe class, and (4) tbe representative parties will fairly and adequately protect the interests of tbe class.

48. FED. R. CIV. P. 23(b) provides:

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of tbe class which would establish incompatible standards of conduct for the party opposing tbe class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

49. Because damages are such an important element in antitrust suits, injunctive relief is not predominant; thus rule 23(b)(2) probably is not the proper route. Professor Moore concludes that "[i]n almost all such situations, the suit should be treated under (b)(3)." 3B MOORE, FEDERAL PRACTICE ¶ 23.45, at 23-708 to -709 n.43 (2d ed. 1977).

50. *See* note 48 *supra*.

51. *See* WRIGHT & MILLER, *supra* note 44, § 1778 at 53-54, § 1781 at 79-86.

If so, a second question is raised whether this individual proof of coercion renders individual issues of law and fact predominant over common questions, thereby defeating class action certification under rule 23(b)(3). It is these issues that are the focal point of the Individual Coercion Doctrine, and that have sparked controversy and inconsistent results.

C. *Genesis of the Individual Coercion Doctrine*

In 1970 *Lah v. Shell Oil Co.*[52] first raised the question of individual coercion in the class action context. In *Lah* plaintiff sought to represent a proposed class of Shell dealers, claiming that Shell had conditioned the sale of its gasoline upon the dealers' entry into short-term leases of real estate and the purchase of other unwanted products.[53] The court framed the first of two basic issues as whether Shell had refused to sell gasoline except on the lease condition. The court decided that this was a question of fact which, with respect to 140 dealers, became 140 separate questions of fact.[54] The court therefore concluded that individual inquiry would be required.[55] On the second issue, whether a "dominant" franchisor must coerce its franchisees in order to run afoul of the antitrust laws, the court relied on *Ford Motor* to declare that liability was a question of fact between persuasion and coercion, which again became 140 questions of fact.[56] The court then found that because the resolution of each individual fact question would have no bearing on the others, the predominating questions were individual and not common.[57] Thus the court denied the class action motion.

Lah was followed two years later by a similar case, *Abercrombie v. Lum's Inc.*[58] In *Abercrombie,* plaintiff sought to represent in a class action approximately 400 franchisees of Lum's, a fast food franchise, complaining of a number of ties that imposed purchasing and lease requirements as a condition of using the Lum's trade-

52. 50 F.R.D. 198 (S.D. Ohio 1970).

53. Plaintiff alleged that in forcing short-term leases upon dealers Shell could use its increased bargaining power to tie these other items, such as trading stamps and games. *Id.* at 199.

54. *Id.* at 200.

55. *Id.* The court continued by stating that class actions in the antitrust field generally are limited to cases in which a single question of fact, such as a conspiracy to fix prices, furnishes the basis for the action. *Id.*

56. *Id.*

57. *Id.*

58. 345 F. Supp. 387 (S.D. Fla. 1972).

mark.[59] Because some of the alleged tie-ins were imposed outside of any written agreement and because the franchise agreements in which the others were contained differed in various respects,[60] the court found a proliferation of issues not proper for class treatment. Recognizing, however, that tying arrangements can be proved through conduct extrinsic to an agreement,[61] the court stated that proof of the instant ties could come from an examination of the franchisees' dealings with Lum's.[62] Discussing this possibility, the court relied upon *Ford Motor* for the proposition that to prove illegal tying arrangements arising from such business conduct, the franchisees had to prove that they were coerced, not merely persuaded, into purchasing the tied products. The court then echoed the *American Manufacturers* requirement that "there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice."[63]

The *Abercrombie* court then turned to the question whether such coercion must be shown on an individual basis. The court answered affirmatively, declaring that proof of coercion will always vary from franchisee to franchisee:

> If [plaintiffs] were to establish that they made forced purchases it would not necessarily follow that other franchisees were similarly coerced. . . . Franchisees may have purchased items from defendants for a variety of reasons ranging from convenience, to attractiveness of the product, to, as [plaintiffs] claim, coercion. Determination of the issue requires separate distinct and individual, not common, proof.[64]

Once the court had characterized coercion as an individual issue, it dismissed the class action, relying on *Lah* to hold that coercion raises a predominance of individual questions.[65]

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59. Plaintiff claimed that the franchisees were unlawfully required:

> (a) to purchase signs and equipment from defendants and to purchase furniture, fixtures, supplies, foods, and beverages from defendants or their approved suppliers, (b) to lease their restaurant sites to defendants who would then sublease the sites back to plaintiffs at the same rental paid by defendants plus 5% of their gross sales and, in some cases, other cbarges, (c) in some cases to secure their sites from persons designated by Lum's and to deal with building contractors designated by Lum's, and (d) to permit Lum's, upon termination of the franchise agreement, to repurchase equipment and fixtures from them.

Id. at 388-89.

60. There were some twelve different types of agreements executed by Lum's and its franchisees, none of which contained overt tying arrangements. *Id.* at 390.

61. Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

62. 345 F. Supp. at 391.

63. *See* note 38 *supra* and accompanying text.

64. 345 F. Supp. at 391-92.

65. *Id.* at 392.

While at first glance *Lah* and *Abercrombie* appear identical, closer scrutiny reveals that the latter decision goes much further in articulating the Individual Coercion Doctrine. The *Lah* court expressed no coercion requirement for tying cases; rather, it carefully separated the issues of product tying and franchisor coercion. The court viewed the tying question simply as whether Shell had conditioned the sale of its gasoline upon the dealers' entry into short-term leases and never stated that coercion also would be necessary to prove the tie. Although the court did find *Ford Motor* to demand a showing of coercion in order to establish liability on the part of a dominant franchisor, it did so apart from its examination of the alleged tie-ins. Thus *Lah* declares only that a purchaser must prove conditioning by the seller to show illegal tying and that this limited proof raises a predominance of individual questions. *Abercrombie,* however, does dictate a coercion requirement. Unlike the court in *Lah,* the *Abercrombie* court extended *Ford Motor* into the tying area and found it to necessitate a finding of coercion in tying cases. Furthermore, while *Lah* never inquired into the subjective intentions of the plaintiff franchisees, *Abercrombie* found that the issue of coercion necessarily entails inquiry into the personal motives of complaining purchasers. The reason for *Abercrombie*'s extension of coercion into the class action context is evident. In the two years between *Lah* and *Abercrombie,* the Second Circuit in *American Manufacturers* had established a coercion requirement for all tying cases. Thus it is *Abercrombie* that crystallized the Individual Coercion Doctrine in its present form, requiring individual proof of subjective coercion.

D. *Subsequent Development*

Abercrombie left a predictable aftermath for a number of reasons. First, although it represents the initial case both to state a coercion requirement for all tying cases and to discuss the necessity of its individual proof, its holding appears in logical sequence with *Ford Motor, American Manufacturers,* and *Lah.* Secondly, in addition to the support it derives from these cases, the opinion is tightly reasoned and persuasive in its own right. Finally, and most significantly, the case posits an inviting black-letter rule applicable to all tying cases. Thus it is not surprising that many subsequent courts, when faced with class action suits claiming illegal ties, have denied certification almost automatically, citing *Abercrombie* as support.[66]

66. *See, e.g.,* Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976); Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658 (2d Cir. 1974), *aff'g* 365

Consequently, these courts often have failed to undertake independent analysis of the Individual Coercion Doctrine.

Nevertheless, the cases following *Abercrombie* warrant further examination. Although they involve the same general factual situation as *Abercrombie,* these cases have evidenced several distinct fact patterns that raise questions concerning the parameters of the Doctrine. This subsequent development has to some extent defined the Doctrine's contours, and yet the cases often have reached inconsistent results. Thus the post-*Abercrombie* development in the Individual Coercion Doctrine will be detailed in light of the issues it has presented.

(1) The Nature of Coercion

The most fundamental issue raised by the Doctrine is the proper definition of "coercion." Although the post-*Abercrombie* cases have assumed that coercion is a necessary element of an illegal tying arrangement, they have failed to articulate a consistent practical standard for determining when coercion is present. For example, the standard used by the *American Manufacturers* court was whether coercion "influenced" the buyer's choice; however, it did not indicate the type or degree of influence required. Similarly, the *Capital Temporaries* court formulated the test as whether a plaintiff is the "unwilling" purchaser[67] of the tied product but did not elucidate how such unwillingness could be established. At one extreme, a presumption of coercion might be negated only if a purchaser actually desired and sought out the combination of tying and tied products. At the other extreme, the requisite coercion might be absent when a purchaser apparently accepts a tie willingly despite strong mental reservations against doing so.[68] The problem is further complicated by the fact that the courts have not stated upon whom the burden of proving or rebutting coercion is placed, a question that obviously affects the facility with which tying arrangements can be proved.

F. Supp. 888 (D. Conn. 1973); Hehir v. Shell Oil Co., [1976-1] TRADE REG. REP. (CCH) ¶ 60,928 at 69,042 (D. Mass. 1976); Halverson v. Convenient Food Mart, Inc., 69 F.R.D. 331, 335 (N.D. Ill. 1974); Thompson v. T.F.I. Companies, 64 F.R.D. 140, 147 (N.D. Ill. 1974); Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 376 F. Supp. 1136 (S.D. Fla. 1974); Smith v. Denny's Restaurants, Inc., 62 F.R.D. 459, 461 (N.D. Cal. 1974); Bogosian v. Gulf Oil Corp., 62 F.R.D. 124 (E.D. Pa. 1973); Seligson v. Plum Tree, Inc., 61 F.R.D. 343, 346 (E.D. Pa. 1973); DiCostanzo v. Chrysler Corp., 57 F.R.D. 495, 498-99 (E.D. Pa. 1972); E.B.E., Inc. v. Dunkin' Donuts of America, Inc., 387 F. Supp. 737 (E.D. Mich. 1971).

67. *See* note 41 *supra* and accompanying text.

68. *See* Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65, 112 (E.D. Pa. 1975).

A few courts, however, have mentioned several considerations relevant to making a finding of coercion. First, one court has pointed out the importance of determining whether a complaining purchaser was aware of the challenged tie when he entered into the arrangement, implying that one cannot be coerced by something of which he has no knowledge.[69] Another court, in assessing whether several plaintiffs had unwillingly purchased an allegedly tied product, found it persuasive that the plaintiffs already owned satisfactory versions of the item.[70] Two cases have asked whether the plaintiff ever objected to the imposition of a tying arrangement.[71] The most significant consideration, however, stated in *American Manufacturers*, is whether the complaining buyer ever seriously bargained to eliminate the tie.[72] Based upon this statement it has been argued that coercion can be found only upon a showing that a purchaser actually negotiated to remove a tie-in and that he capitulated only upon the seller's insistence.[73] Nevertheless, these suggested factors have not removed the uncertainty surrounding the notion of coercion, and thus it remains a difficult concept to apply.

(2) Form of the Tying Arrangement

Another query implicit in *Abercrombie* and its progeny is the form to which a tying arrangement must be reduced before individual proof of coercion is unnecessary. *Abercrombie* itself reached the individual coercion issue only because some of the alleged tie-ins were not in written contract form, but the court did not specify how it might have avoided the question.[74] Rather than articulating any consistent standard, the post-*Abercrombie* cases addressing this issue have taken divergent stances. A first group of courts has declared that a contractual provision although it only allegedly effects a tie-in, is still inherently coercive since it is backed by the force of law, and that a class action therefore is appropriate to challenge it.[75] A second set of courts, however, has rejected this presumption

69. Plekowski v. Ralston Purina Co., 68 F.R.D. 443, 451 (M.D. Ga. 1975); *see* text accompanying note 83 *infra*.

70. Hill v. A-T-O, Inc., 535 F.2d 1349, 1355 (2d Cir. 1976).

71. Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1327 (5th Cir. 1976); Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 666 (2d Cir. 1974).

72. *See* note 37 *supra* and accompanying text. *See also* Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 665 (2d Cir. 1974).

73. *See* Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65, 112 (E.D. Pa. 1975).

74. *See* note 60 *supra* and accompanying text.

75. *See, e.g.*, Halverson v. Convenient Food Mart, Inc., 69 F.R.D. 331, 335 (N.D. Ill. 1974); *In re* 7-Eleven Franchise Antitrust Litigation, [1972] TRADE REG. REP. (CCH) ¶ 74,156, at 92,830 (N.D. Cal. 1972); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D.

when the contract terms in question did not in and of themselves constitute tie-ins, and therefore has required an independent showing of compulsion. For example, two cases found that franchise agreements imposing purchasing requirements did not "on their face" constitute tie-ins since the franchisees could purchase elsewhere if certain conditions were met.[76] Similarly, in *Capital Temporaries*[77] the court refused to infer coercion when the "plain language" of a franchise agreement did not absolutely bind the plaintiff to certain business requirements, and thus required independent proof. Also in *Bogosian v. Gulf Oil Corp.*[78] the court refuted plaintiffs' assertion that coercion could be inferred from "*the practical economic effect*" of contracts when their wording did not clearly indicate the existence of a tie.[79]

A third group of courts has rejected the inference of coercion even from clear contractual ties. For example, the *Capital Temporaries* court suggested that even if the instant contract had on its face bound plaintiff to the alleged business requirements, it did not necessarily follow that coercion was present.[80] Similarly, in *Plekowski v. Ralston Purina Co.*[81] the court rejected the presumption of coercion from any contract term, declaring that in all tying cases

> proof of actual coercion "outside of the agreement" must clearly be shown; it is insufficient to prove merely that the purchaser was a party to a contract containing an alleged tying clause.[82]

Cal. 1967), *modified sub nom.*, Chicken Delight, Inc. v. Harris, 412 F.2d 830 (9th Cir. 1969), *on modification*, 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd in part, rev'd in part, and remanded*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

76. Thompson v. T.F.I. Companies, 64 F.R.D. 140, 146 (N.D. Ill. 1974); Smith v. Denny's Restaurants, Inc., 62 F.R.D. 459 (N.D. Cal. 1974).

77. 506 F.2d 658, 665 (2d Cir. 1974), *aff'g* 365 F. Supp. 888 (D. Conn. 1973).

78. 62 F.R.D. 124, 136-37 (E.D. Pa. 1973) (emphasis in original).

79. On the other side of the issue, one court has presumed coercion from a contract that contained an express tying term. Hi-Co Enterprises, Inc. v. ConAgra, Inc., [1976-2] TRADE REG. REP. (CCH) ¶ 61,053, at 69,756 (S.D. Ga. 1976).

80. 506 F.2d 658, 665-66 (2d Cir. 1974). The court reasoned:

> [I]t does not follow that because the contract required the opening of a blue collar operation, it was therefore a tying arrangement. Quite obviously, a franchise agreement, like any contract of sale, may obligate the purchaser to accept numerous commodities, trademarked or not; this does not mean that the purchaser was coerced in any fashion to take some or all to get one or some.

Id. See also Hehir v. Shell Oil Co., [1976-1] TRADE REG. REP. (CCH) ¶ 60,928 (D. Mass. 1976); Bogosian v. Gulf Oil Corp., 62 F.R.D. 124, 135 (E.D. Pa. 1973).

81. 68 F.R.D. 443 (M.D. Ga. 1975). A former customer of Ralston Purina brought an action based on alleged tying of feed purchases to advancement of loans and to deferral of payment for such purchases, and sought to bring the action as a representative of more than 6,500 of Ralston Purina's past and present customers.

82. *Id.* at 450-51 (citation omitted).

Therefore, the court required plaintiffs to show whether they were aware of the challenged contract clauses, whether they were influenced thereby, whether they had attempted to negotiate particular clauses out of their agreements, and whether they had attempted to purchase elsewhere. Because the court found such questions to necessitate individual proof, it denied certification to plaintiff's putative class.[83]

The inconsistency in these cases creates uncertainty as to the correct response to a contract term allegedly imposing a tie. A court might find inherent coercion regardless of the form of the challenged provision; on the other hand, it might require independent proof of coercion despite a boilerplate clause imposing the most overt tie. A court could opt for the middle ground and attempt to make an initial determination whether a contractual provision "on its face" constitutes a tying arrangement. This latter route may be the most difficult since it requires the court, on an early class action motion, to resolve a major issue in a tying suit without full litigation. The task is especially formidable given the obvious lack of consistent standards for this determination. Thus the issue of tie-in form and its relation to the Individual Coercion Doctrine remains open.

(3) Uniformity of the Tying Arrangement

A related issue arising in *Abercrombie* and succeeding cases is how uniform an alleged tying provision must be before coercion will be presumed on a class basis. *Abercrombie* demanded individual proof of coercion in part because a number of different Lum's franchise agreements were in effect, materially varying in several respects.[84] The court, however, did not specify the circumstances under which individual proof would have been obviated. An earlier case, *Siegel v. Chicken Delight, Inc.*,[85] permitted a class action in a suit involving a single standard contract clause. Similarly, the court certified a class of franchisees in *Butkus v. Chicken Unlimited Enterprises, Inc.*,[86] in which it was clear that all potential members had signed one of only two possible contracts upon which their tying claims were based. A post-*Abercrombie* case, *Halverson v. Conven-*

83. *Id.* at 451.

84. *See* notes 60 & 74 *supra* and accompanying text.

85. 271 F. Supp. 722 (N.D. Cal. 1967), *modified sub nom.*, Chicken Delight, Inc. v. Harris, 412 F.2d 830 (9th Cir. 1969), *on modification*, 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd in part, rev'd in part and remanded*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

86. [1971] TRADE REG. REP. (CCH) ¶ 73,780 (N.D. Ill. 1971).

ient Food Mart, Inc.,[87] also found a class action appropriate in a situation in which five different franchise agreement forms were in use and each contained a common exclusive purchase requirement. More recently, the court in *Esposito v. Mister Softee, Inc.*[88] stated that "[w]here claims are founded on violations of franchise agreements which are essentially the same, the franchisees are members of a proper class as defined by F. R. Civ. P. 23."

Several cases, however, have dismissed potential class actions in part because of the number and disparity of challenged contracts. In *Thompson v. T.F.I. Companies*,[89] defendant made available nineteen different operator's license agreement forms for use by its franchisees in negotiating with licensees in a three-tiered franchise system.[90] The particular clauses relating to the selection and approval of suppliers varied significantly. Several of the model forms required licensees to purchase only from sources designated by the defendant franchisor; a second series required purchases only from franchisees or other designated source; a third group made this same requirement but granted licensees the right to purchase from any source if quality specifications were met. Adding to this dissimilarity was the fact that the franchisees were free to modify the model forms.[91] Thus when plaintiff brought a class action tying suit on behalf of all licensees, the court found that the "potentially great disparity" between the contractual provisions resulted in a predominance of individual issues.[92]

Bogosian v. Gulf Oil Corp.[93] presented an even more complicated situation. Plaintiffs sought class certification on behalf of a nationwide class consisting of all present and former retail gasoline service station dealers who had leased their respective stations from any one of fifteen defendants, major oil companies, contending that they were required to buy and sell only the gasoline supplied by their respective lessors. Because it was confronted by over 400 contractual forms containing no common clause supporting plaintiffs' allegations, the court concluded that proof of the exertion of coer-

87. 69 F.R.D. 331, 336 (N.D. Ill. 1974).

88. [1976-1] TRADE REG. REP. (CCH) ¶ 60,887, at 68,868 (E.D.N.Y. 1976).

89. 64 F.R.D. 140 (N.D. Ill. 1974).

90. Defendant T.F.I. Companies wholly owned Tastee-Freez International, Inc., sole owner of the Tastee-Freez trademark. Typically, Tastee-Freez entered into agreements with franchisees whereby the latter assumed responsibility for given territories. In turn the franchisees entered into license agreements authorizing the operation of Tastee-Freez establishments. *Id.* at 143.

91. *Id.* at 144.

92. *Id.* at 146-47.

93. 62 F.R.D. 124 (E.D. Pa. 1973).

cive force on each individual dealer would be necessary.[94] The court went a step further, however, and indicated that even if the disparate agreements had contained a common tying provision, a determination of individual coercion still would have been required.[95]

Synthesis of these cases lends some guidance on the issue of uniformity. When there exists a fairly large number of substantially different contractual forms (*e.g.*, greater that nineteen) containing no common tying provision, individual proof will be necessary. *Thompson* indicates the type of variance in alleged tying clauses that will demand such proof. Conversely, when there are a limited number of similar forms (*e.g.*, less than five) that contain nearly identical tying provisions, coercion generally will be inferred from the contracts themselves. Nevertheless, the difficulty in determining whether sufficient uniformity exists in a given case leaves this question open as well.

(4) Conspiracy or Policy to Tie

Another recurring fact pattern arises in those cases in which plaintiffs have complained of organized conspiracies or policies to impose tying arrangements based upon extrinsic conduct. On the question whether proof of such activity will raise a class-wide inference of coercion, the courts again have reached inconsistent results. The issue first arose in *Abercrombie*, in which plaintiffs argued that there were common questions of law and fact going to the existence of such a conspiracy. The court, however, stated that whether or not a conspiracy in fact existed, "the restraint of trade which must be proven in a tying case is an agreement, express or implied, between *buyer and seller*. . . ."[96] The court reasoned that proof of conspiracy to impose tying arrangements would not establish this requisite agreement since the relationship between buyer and seller necessarily must be shown on an individual basis.[97] The court in *In re 7-Eleven Franchise Antitrust Litigation*[98] reached a similar outcome. In that case convenience grocery store franchisees alleged a nationwide conspiracy by the franchisor to compel them to purchase from designated suppliers and argued that such activity was tantamount to the coercive effect of a contractual provision. The court held this contention unpersuasive, finding that it failed

94. *Id.* at 136-37.
95. *Id.* at 135.
96. 345 F. Supp. at 391 (emphasis in original).
97. *Id.*
98. [1972] TRADE REG. REP. (CCH) ¶ 74,156 (M.D. Cal. 1972).

to take into account the effectiveness of the coercion, which depended upon the relative position of the franchisor and each franchisee, and thus necessitated individual proof.[99]

A different approach was taken in *In re Clark Oil & Refining Corp. Antitrust Litigation,*[100] in which a class action was brought on behalf of retail service station dealers alleging an overall policy of coercive behavior by their branded supplier to force them into tying arrangements. Although defendants argued that proof of individual coercion was required in all cases, the court declared that

> [i]ndividual acts of coercion may be just that—isolated incidents with no implications beyond the specific individuals being coerced—or they may be part of an *overall pattern* which has a coercive impact beyond the particular parties involved.[101]

The court noted that coercive activities aimed at one dealer under some circumstances could have the effect of coercing all dealers. Because the court at that time could not determine whether only individual incidents of coercion were involved, it made a conditional class certification until more facts were known.[102]

In a recent case, *Hill v. A-T-O, Inc.,*[103] the Second Circuit also found coercion in a policy to impose tie-ins. In that case defendant gave purchasers of vacuum cleaners free membership certificates in a buying service, which enabled them to obtain other merchandise at substantial discounts. The district court dismissed the action, holding that plaintiffs had not established "actual coercion." The Second Circuit reversed and remanded, however, because defendants admitted to a policy of never offering buying plan memberships separately from the sale of vacuum cleaners. Clarifying its earlier decision in *Capital Temporaries,* the court stated that

> [a]n unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes the requisite coercion under *Capital Temporaries. . . .* [104]

Thus the more modern view appears to presume the requisite coercion on a class-wide basis from evidence of a concerted policy to impose tying arrangements.

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99. *Id.* at 92,830. *See also* Thompson v. T.F.I. Companies, 64 F.R.D. 140, 147 (N.D. Ill. 1974).

100. [1974-1] TRADE REG. REP. (CCH) ¶ 74,880 (E.D. Wis. 1974). Plaintiffs alleged that Clark Oil had engaged in price-fixing as well as tying.

101. *Id.* at 95,972 (emphasis added).

102. *Id.*

103. 535 F.2d 1349, 1355 (2d Cir. 1976).

104. *Id.*

(5) Acceptance of the Tying Arrangement

McMackin v. Schwinn Bicycle Co.[105] raises a fifth issue: whether coercion can be presumed from the fact that a tie-in has been successfully imposed on many purchasers. In *McMackin* plaintiff sought to represent a class of all Schwinn franchisees, contending that Schwinn's franchise agreements constituted a tying arrangement by requiring dealers to use only Schwinn factory parts and accessories in servicing Schwinn products. Relying on the Supreme Court's statement in *Fortner* that the elements of per se illegality for tie-ins are unnecessary to establish an unreasonable restraint of trade,[106] the court, in an opinion by Judge McLaren, declared that economic power and coercion therefore are not necessary elements of a Sherman Act violation. It then reasoned that inquiry into the purposes and effects of the restraint to determine whether it was unreasonable would be a question common to all class members.[107] Assuming, however, that plaintiffs were attempting to show per se illegality, the court noted *Fortner*'s declaration that the element of sufficient economic power could be shown by the successful imposition of burdensome terms on any appreciable number of buyers.[108] From this statement the instant court reasoned that coercion also could be presumed from the acceptance of a tie-in by a large number of purchasers. Recognizing the *American Manufacturers* had required actual proof of coercion, the court distinguished it on the ground that there was no consideration of acceptance by an appreciable number of buyers in that case. Nevertheless the court warned that in order to obtain class certification plaintiffs must show that alleged tying arrangements are "burdensome," and that proof of burdensomeness will involve common questions of law and fact.[109]

One year later Judge McLaren vacated his prior ruling and held that the "burdensome tie" test could not properly be used in this particular class action.[110] In an abbreviated discussion the court simply stated that in this case

105. [1972] TRADE REG. REP. (CCH) ¶ 74,220 (N.D. Ill. 1972), *vacated,* [1974-1] TRADE REG. REP. (CCH) ¶ 75,047 (N.D. Ill. 1973).

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

107. [1972] TRADE REG. REP. (CCH) at 93,020.

108. *See* note 21 *supra* and accompanying text.

109. [1972] TRADE REG. REP. (CCH) at 93,020. *See also* Moore v. Jas. H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977).

110. [1974-1] TRADE REG. REP. (CCH) ¶ 75,047 (N.D. Ill. 1973).

> the impact ("burdensomeness") upon Schwinn dealers, past and present, of the alleged tie-in clause would have to be determined individually both as to fact and amount of damages.[111]

Where the two *McMackin* rulings left the Individual Coercion Doctrine is unclear, for the argument was not raised again until *Ungar.* Apparently, however, the latter holding would have to be regarded as more influential, especially since it is in line with other cases demanding individual proof of coercion.

(6) Summary

Although analysis of the cases enunciating the Individual Coercion Doctrine reveals that they often have evidenced varied application, the doctrine at this point at least can be summarized. In tying cases in which class certification is sought, the courts have held that in the absence of an overt contractual tie an unlawful tying arrangement cannot be established without proof of "individual coercion." Such proof appears to require a showing by plaintiff of the circumstances surrounding the relationship between the seller and each purchaser in order to demonstrate that the purchaser was "coerced" into the tie. Various types of evidence have been found to establish this coercion. The effect of the individual proof requirement is a predominance of individual questions of law and fact over common questions, resulting in a denial of class certification under rule 23(b)(3).[112]

Despite the minor inconsistencies found in the cases, the blackletter rule first articulated in *Abercrombie* had by 1975 assumed accepted status, if only because of the sheer number of courts following it.[113] Thus it came as a surprise when in that year the District Court for the Eastern District of Pennsylvania refuted the Individual Coercion Doctrine in *Ungar v. Dunkin' Donuts of America, Inc.*[114]

IV. UNGAR V. DUNKIN' DONUTS OF AMERICA, INC.

In 1972 consolidated actions were filed against Dunkin' Donuts, Inc., by fourteen of its present and former franchisees, alleging a wide range of antitrust violations. Plaintiffs averred that Dunkin'

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111. *Id.* at 96,690.

112. *See* Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd,* 531 F.2d 1211 (3d Cir.), *cert. denied,* 97 S. Ct. 74 (1976).

113. *See* note 66 *supra.*

114. 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd* 531 F.2d 1211 (3d Cir.), *cert. denied,* 97 S. Ct. 74 (1976).

Donuts' policy of granting a license to use its trademark only on the condition that the licensee accept certain other items constituted an illegal tying arrangement. Specifically, they contended that five items were illegally tied to the trademark—equipment,[115] supplies,[116] signs,[117] real estate,[118] and advertising.[119] Most of these alleged tie-ins had been reduced to contract form in Dunkin' Donuts' franchise agreements, but were removed in 1970 after *Siegel v. Chicken Delight, Inc.*[120] held similar contractual requirements per se illegal under the antitrust laws. Thus plaintiffs did not rely on the terms of their franchise agreements, but contended that Dunkin' Donuts' policy of imposing these requirements constituted de facto tying.[121]

In bringing this suit, plaintiffs sought to represent over 600 present and former Dunkin' Donuts franchisees, and moved for class action certification under rule 23(b)(3). Defendant, relying upon the Individual Coercion Doctrine, contended that because individual proof of coercion was required, certification should be denied due to

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115. Plaintiffs contended that Dunkin' Donuts made it a condition of purchasing a franchise that the franchisee buy from or through Dunkin' Donuts the equipment necessary to operate the franchisee's store. Prior to 1970 the standard franchise agreement required franchisees to purchase the equipment package solely from Dunkin' Donuts at an allegedly inflated price. Although the franchise agreement was amended in 1970 to grant franchisees a 30-day option to purchase elsewhere, plaintiffs asserted that the 30-day period was insufficient and that Dunkin' Donuts still extrinsically pressured franchisees not to purchase elsewhere, such that the pre-1970 policy was being effectively continued. 68 F.R.D. at 80-81.

116. The post-1966 franchise agreement required franchisees to purchase flour, shortening, fillings, paper products, and coffee either from "approved" vendors or from "nonapproved" vendors who could meet Dunkin' Donuts' specifications. Plaintiffs contended that again defendant exerted pressure on franchisees to purchase only from selected vendors by threats of disenfranchisement and other obfuscatory methods in order to facilitate illegal kickbacks. *Id.* at 81-82.

117. Dunkin' Donuts had maintained a policy that each franchisee locate certain signs in his store. Plaintiffs claimed that defendant subtly coerced franchisees to purchase the signs from selected vendors. *Id.* at 82.

118. Plaintiffs complained that Dunkin' Donuts conditioned the grant of a franchise upon the franchisee's agreement to lease or sublease his premises from Dunkin' Donuts at a substantial markup. *Id.*

119. The Dunkin' Donuts franchise agreement required franchisees to pay 2% of their gross sales into an "Advertising and Sales Promotion Fund" to be disbursed by Dunkin' Donuts. In addition to common law claims, plaintiffs argued that these contributions constituted a tying arrangement under which defendant tied its advertising program to the franchise name and license. *Id.* at 82-83.

120. 271 F. Supp. 722 (N.D. Cal. 1967), *modified sub nom.*, Chicken Delight, Inc. v. Harris, 412 F.2d 830 (9th Cir. 1969), *on modification,* 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd in part, rev'd in part, and remanded,* 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); *see* text accompanying note 85 *supra.*

121. 531 F.2d at 1214-16. Tying arrangements can be proven not only by evidence of an express agreement but also through conduct extrinsic to an agreement. Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970); *see* note 61 *supra* and accompanying text.

the resultant predominance of individual questions. Plaintiffs, however, asserted that no such individual coercion requirement exists in the law of tying and, alternatively, that even if there is such a requirement, common questions still predominated because of the persuasive effect of defendant's policies in franchise dealings.[122] Therefore, the case presented to the district court was one that, based on precedent, would be expected to result in a routine denial of class certification.

A. *The District Court Decision*[123]

In an extensive seventy-three page opinion the district court rejected the Individual Coercion Doctrine and permitted plaintiffs' tying claims to proceed as a class action. The court first made an in-depth examination of the basic principles of tying law, concentrating on the elements of per se illegality.[124] The court focused primarily on the requirement of economic power and its modes of proof,[125] noting that such power must not merely exist, but also must be used.[126] Based on its review, the court perceived the ultimate issue to be

> whether it is sufficient under the law of tying that the plaintiffs show the *use* of (the requisite) economic power, or whether the plaintiffs must, as defendant contends, show that the power was *used coercively* as to each individual in the putative class.[127]

Thus the court set out to resolve whether the Individual Coercion Doctrine is properly a part of antitrust law.

At the outset, the court declared that the Supreme Court has never set forth a coercion requirement in tying cases.[128] Recognizing that the Doctrine arose primarily from *Abercrombie,* the court proceeded to examine that case. The court first considered *Ford Motor, American Manufacturers,* and *Lah,* the cases upon which *Abercrombie* relied, and found them unsupportive of the Doctrine, either because they were distinguishable on their facts or because they were incorrectly interpreted in *Abercrombie.*[129] The court then distinguished *Abercrombie* itself since that case involved multiple

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122. 68 F.R.D. at 77-78.
123. 68 F.R.D. 65 (E.D. Pa. 1975).
124. *Id.* at 84-94; *see* Part II *supra.*
125. 68 F.R.D. at 90-93.
126. *Id.* at 97; *see* notes 23 & 24 *supra* and accompanying text.
127. 68 F.R.D. at 97.
128. *Id.* at 98.
129. *Id.* at 99-105; see text accompanying notes 62 & 63 *supra.*

disparate franchise agreements.[130] That fact alone resulted in a predominance of individual issues, according to the *Ungar* court, and therefore *Abercrombie's* broad statement of the Individual Coercion Doctrine was entirely unnecessary.[131]

After indicating these flaws, the district court turned to two cases that in its view nullified the Doctrine. First, the court discussed *FTC v. Texaco, Inc.*[132] in which the Supreme Court found a quasi-tying arrangement to be an unfair method of competition in violation of section 5 of the Federal Trade Commission Act,[133] even in the absence of overt coercive practices. Because *Texaco* found the relationship between a dominant franchisor and its franchisees "inherently coercive," the *Ungar* court viewed the Individual Coercion Doctrine as fatally undermined.[134] The court then examined *Perma Life Mufflers, Inc. v. International Parts Corp.*,[135] in which the Supreme Court rejected the doctrine of *in pari delicto* as a defense to antitrust actions. Since the Court in *Perma Life Mufflers* permitted recovery even though plaintiffs had entered willingly into a tying arrangement, the *Ungar* court found coercion irrelevant and declared that *Perma Life Mufflers* "emasculates the individual coercion doctrine."[136] Thus the court reasoned that a "voluntary" tie can exist and rejected the coercion requirement.[137]

Based upon this analysis, the court concluded that the proper focus of a tying claim is whether the requisite economic power has been used, not whether it has been used coercively. The court then set out to find the various means by which "use" can be proved. The court first found that the use of economic power to condition the availability of products may be presumed from an express contractual tie, as implied by several post-*Abercrombie* cases.[138] The court then returned to the question of coercion and declared that although coercion is not required in every case, it does represent one mode of proving the required use of economic power. The court recognized, however, that if proof of coercion is the avenue of attack, a class action is inappropriate.[139] Nevertheless, the court discussed two

130. *See* note 60 *supra* and accompanying text.
131. 68 F.R.D. at 105.
132. 393 U.S. 223 (1968).
133. 15 U.S.C. § 45 (Supp. V 1975); *see* note 6 *supra*.
134. For analysis of this rationale, see Part V.A. *infra*.
135. 392 U.S. 134 (1968).
136. 68 F.R.D. at 110. For analysis of this reasoning, see Part V.A. *infra*.
137. 68 F.R.D. at 111-13.
138. *See* note 75 *supra* and accompanying text.
139. 68 F.R.D. at 114-15.

other methods of showing "use" that are applicable to class actions. First, relying on *In re Clark Oil & Refining,*[140] the court found that the requisite use of economic power may be established by evidence of a "firm and resolutely enforced" policy to influence buyers to purchase from the seller or its designated sources. The court further found that a policy merely to persuade is sufficient to show the requisite use because under *Texaco* influence or persuasion is the virtual equivalent of coercion when an unequal relationship between the parties exists.[141] Relying upon Judge McLaren's initial ruling in *McMackin,*[142] the court next stated that "use" also can be inferred from the acceptance by large numbers of buyers of a burdensome or uneconomic tie.[143]

Finally, the court examined the instant facts and found sufficient evidence to create two issues for trial: first, whether Dunkin' Donuts had engaged in an enforced company policy to impose tying arrangements; and secondly whether an appreciable number of franchisees had accepted burdensome tie-ins. Because it found both issues to involve a predominance of common question, the court certified plaintiffs' class with respect to the tying claims.[144]

B. *Response to the District Court Decision*

Ungar evoked mixed reactions. The first response came within two weeks when a similar ruling was handed down in *Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n.,*[145] in which plaintiffs alleged a number of tie-ins centering around grants of mortgages. The court realized that if coercion were an element of tying law, individual questions would predominate, but agreed with *Ungar* that coercion is merely one means of proving the use of economic power. The court further agreed that a class action may proceed if there is a prima facie showing of a uniform policy by defendant of enforcing the tie. Finding that the present plaintiffs had made such a showing with respect to one tying claim, the court certified the class.[146] The court, however, did veer away from *Ungar* in one respect. Although *Ungar* declared that evidence of acceptance of a tie-in by an appreciable number of buyers could prove

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140. *See* notes 100-02 *supra* and accompanying text.
141. 68 F.R.D. at 113, 115.
142. *See* notes 105-09 *supra* and accompanying text.
143. 68 F.R.D. at 115-16.
144. *Id.* at 141-44, 150.
145. 66 F.R.D. 581 (E.D. Pa. 1975).
146. *Id.* at 591.

"use," the *Sommers* court felt that this issue raised more individual than common questions.[147]

The next case to consider the Individual Coercion Doctrine rejected the *Ungar* approach. The court in *Plekowski v. Ralston Purina Co.*[148] initially noted that *Ungar* stood against the clear weight of authority and declared that the Individual Coercion Doctrine was plainly "on the ascendancy." The court argued that coercion remains a requirement of tying law because it is necessary in proving causation.[149]

Considering the controversy surrounding *Ungar*, the court in *Stavrides v. Mellon Bank*[150] avoided an explicit holding on the individual coercion issue by certifying the class before it under rule 23(b)(2) instead of 23(b)(3).[151] The court nevertheless noted that a class action would be improper if proof of individual coercion were required. The court recognized that *Ungar* had been followed in *Sommers*, but realized the *Ungar* was at that time on appeal to the Third Circuit and could be overturned. It also noted that *Ungar* had been repudiated in *Plekowski*.[152]

A more recent case, *AAMCO Automatic Transmissions, Inc. v. Tayloe*,[153] vindicated *Ungar*, although the case involved a single plaintiff rather than a class action. Contrary to defendant's assertion, the court held that coercion as such is not a prerequisite to liability, but is implicit in two other elements of a tying arrangement—a sale on condition and economic power in the seller. The court recognized the existence of the cases establishing a coercion requirement but distinguished them because those cases did not involve sales on condition.[154]

Thus, despite the district court's landmark opinion in *Ungar*, the status of the Individual Coercion Doctrine remained uncertain since the decision met with both acceptance and disapproval. Consequently, final resolution of the status of the Individual Coercion Doctrine awaited *Ungar*'s appeal to the Third Circuit.

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147. *Id.* The court limited this reasoning to the instant case, finding the discovery before it to raise a predominance of individual questions.

148. 68 F.R.D. 443 (M.D. Ga. 1975); *see* notes 81-83 *supra* and accompanying text.

149. 68 F.R.D. at 451. The court based its causation argument on Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). *Id.* at 450.

150. 69 F.R.D. 424 (W.D. Pa. 1975).

151. *Id.* at 435.

152. *Id.* at 432-33.

153. 407 F. Supp. 430 (E.D. Pa. 1976).

154. *Id.* at 435.

C. *The Court of Appeals Decision*[155]

On appeal, the Third Circuit reversed the district court's holding and determined that class certification was improperly granted. The court expressed shock at the district court's statement that the Supreme Court had not set forth a coercion requirement, finding that the concept of coercion had been expressed often in cases such as *Northern Pacific,*[156] *Times-Picayune,*[157] and *Loew's.*[158] Furthermore the court argued that nothing in *Texaco* or *Perma Life Mufflers* militates to the contrary. First, the court contended that as a FTCA § 5 case, *Texaco* is wholly inapplicable to a Sherman Act § 1 tying suit.[159] Secondly, it averred that *Perma Life Mufflers* does not negate the coercion requirement since, in that case, plaintiffs willingly, although involuntarily, participated in the illegal activity.[160]

The court then turned to the question whether coercion must be proved individually. It answered affirmatively, reasoning that

> [w]hat is sufficient to coerce one buyer's choice may not be sufficient to coerce another buyer's choice; an item that one buyer might accept voluntarily, another might accept only if forced to do so. The expressions "coercion" and "individual coercion", in our view, reflect different perspectives on the same phenomenon.[161]

The court therefore held that each plaintiff not relying on express contractual tie-ins must prove that his purchases were coerced in order to establish unlawful tying. This holding resulted in a predominance of individual questions of law and fact, and therefore, the court denied class certification.[162]

D. *Response to the Court of Appeals Decision*

The Third Circuit's holding in *Ungar* has met with a mixed, but generally favorable, reaction. A recent case, *Response of Carolina, Inc. v. Leasco Response, Inc.,*[163] cited *Ungar* with approval. Examining the Supreme Court cases relied upon by *Ungar,* the court agreed that in all tying cases the buyer must show that he was coerced into purchasing an unwanted product. The Third Circuit's *Ungar* deci-

155. 531 F.2d 1211 (3d Cir. 1976).
156. *See* note 3 *supra* and accompanying text.
157. *See* notes 31 & 32 *supra* and accompanying text.
158. *See* note 34 *supra* and accompanying text.
159. 531 F.2d at 1219-21; *see* Part V.A. *infra.*
160. 531 F.2d at 1221-22; *see* Part V.A. *infra.*
161. 531 F.2d at 1219.
162. *Id.* at 1226.
163. 537 F.2d 1307, 1327 (5th Cir. 1976).

sion also has evoked a favorable response from its first analysis by a commentator, who concurred in its finding that coercion is a necessary element of the law of tying.[164] Two cases, however, have cast doubt on *Ungar's* viability. The court in *Molinas v. Amerada Hess Corp.*[165] found that the Second Circuit's determination in *Hill v. A-T-O, Inc.* that coercion could be established by proof of an overall policy of tying seriously undermined the authority of *Ungar.* A very recent Ninth Circuit case, *Moore v. Jas. H. Matthews & Co.,*[166] also criticized the Third Circuit's opinion on the ground that *Moore's* reading of the Supreme Court cases indicated that coercion may be implied from a showing of an onerous effect on an appreciable number of buyers. Significantly, *Moore* raises the specter of a circuit split on the question of individual coercion. Nevertheless, on October 5, 1976, the Supreme Court denied certiorari in *Ungar.*[167]

V. Legal Analysis of the Doctrine

Although the Third Circuit's ruling in *Ungar* and the Supreme Court's subsequent denial of certiorari apparently have gone far in confirming the Individual Coercion Doctrine as a principle of antitrust law, its legitimacy remains subject to considerable doubt. The establishment of a coercion requirement, the phenomenon from which the Doctrine sprung, might be inconsistent with the basic principles of tying law enunicated by the Supreme Court. This coercion requirement also may be based upon a misinterpretation of the precedents it cites for support, and it appears to overlook the Court's holdings in a pair of other cases. Thus a legal analysis is in order to point out the Doctrine's serious, and perhaps fatal, flaws.

A. *Precedential Support for the Doctrine*

The development of the Individual Coercion Doctrine indicates that it draws much of its sustenance from early cases in which the Supreme Court used language connoting coercion in describing tying arrangements.[168] Subsequent courts have interpreted this language as setting forth a requirement in all tying cases that in order to establish an illegal tie, a plaintiff must prove that he was subjectively coerced, not merely persuaded, into purchasing the products

164. Varner, *Voluntary Ties and the Sherman Act,* 50 S. Cal. L. Rev. 271 (1977).
165. [1976-2] Trade Reg. Rep. (CCH) ¶ 61,069, at 68,819 (S.D.N.Y. Aug. 19, 1976).
166. 550 F.2d 1207 (9th Cir. 1977).
167. 45 U.S.L.W. 3250 (U.S. Oct. 5, 1976).
168. *See* text accompanying notes 30-34 *supra.*

at issue.[169] Examination of these Supreme Court precedents, however, reveals that they do not imply such a requirement, and that in fact the state of mind of a purchaser is wholly irrelevant in tying law.

In *Northern Pacific* the Court defined a tie-in as a conditional sale,[170] observing that no tying problem is raised when a purchaser is free to take products by themselves.[171] Significantly, the court did not mention coercion in this definition. In *Times-Picayune* the Court did refer to the concept of coercion in noting that "*[b]y conditioning* his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment."[172] It is clear from these cases, however, that the existence of a tie-in restraint is established simply by a seller's act of conditioning a sale of his products. Instead of finding coercion to be another prerequisite to a tie, the Court stated only that an act of conditioning implicitly causes coercion. Even the *Loew's* Court's reference to the unwanted nature of tied products[173] meant only that these products are undesirable solely because of their forced purchase. Thus the courts imposing the requirement of subjective coercion erroneously have given an independent viability to the concept by confusing coercion and conditioning. By inverted logic these courts have reasoned that in order to establish an illegal tie a plaintiff must show both the act of conditioning *and* that he was affected by the conditioning in a certain way. In referring to the idea of coercion, however, the Supreme Court did not intend that it be a separate element of a tie-in beyond the showing of conditioning. Instead, the Court described coercion as the necessary *effect* or *by-product* of conditioning.[174]

This conclusion is bolstered by the Supreme Court's quite explicit pronouncements on the requisites of per se illegality for tying arrangements—separate tying and tied products, sufficient economic power, and a substantial effect on commerce.[175] The coercion requirement appears to have been aimed at the situation in which one seller conditions the sale of a tied item but other sellers do not,

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169. *See, e.g.*, Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1218-19 (3d Cir. 1976); American Mfrs. Mut. Ins. Co. v. ABC-Paramount Theatres, Inc., 446 F.2d 1131, 1137 (2d Cir. 1971); Abercrombie v. Lum's Inc., 345 F. Supp. 387, 391 (S.D. Fla. 1972).

170. *See* text accompanying note 3 *supra*.

171. 356 U.S. at 6 n.4.

172. 345 U.S. at 605; *see* text accompanying note 31 *supra*.

173. *See* text accompanying note 34 *supra*.

174. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 11, Ungar v. Dunkin' Donuts of America, Inc., No. 75-1636, *cert. denied*, 45 U.S.L.W. 3250 (U.S. Oct. 5, 1976) [hereinafter cited as Petition for Certiorari].

175. *See* Part II *supra*.

in order to preclude a purchaser from treble damage recovery when he had readily available alternatives.[176] Significantly, however, the requirement of economic power in the seller already presumes the coercion that this requirement demands. In *Northern Pacific*, for example, the Court explained that the reason for requiring economic control in the tying product is that control is the means of coercion since it leaves the buyer with no reasonable alternative for obtaining the product.[177] Or as one commentator has stated,

> the existence of leverage implies the power to coerce, and the power to coerce, assuming rational behavior in the market, exists only when the seller has leverage in the market of the tying product.[178]

Thus, once a plaintiff can show a defendant's economic power in the tying product to be sufficient under the standards of per se illegality, coercion should be *assumed*.

The role of coercion in the scheme of tying law therefore becomes clear. The mere existence of a tie-in is established by proof that the seller used his economic power to condition the availability of the tying product on the purchase of the tied product.[179] Coercion is irrelevant at this stage because the tie is not yet illegal. Once the other elements of per se unreasonableness are established, however, the tying arrangement is illegal, and coercion is presumed from the existence of the requisite economic power. Thus, even if coercion is a necessary facet of an illegal tying arrangement, it is automatically present when all the other elements are present.[180] This conclusion seems inescapable when it is considered that had the Court intended coercion to be an independent requirement for per se illegality, it would have expressly so provided.

The Individual Coercion Doctrine also depends in part on the Supreme Court's opinion in *Ford Motor*, which reads the Doctrine as requiring coercion for general antitrust liability as well as tying liability. This reliance, however, is equally misplaced. In *Ford*

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176. *See* Northern Pacific Ry. v. United States, 356 U.S. 1, 7 (1958). The commentator approving of the Third Circuit's holding in *Ungar* agrees with this rationale. Varner, *supra* note 164, at 279.

177. The Court reasoned that:

> Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.

356 U.S. at 6.

178. Comment, *supra* note 1, at 857 n.74.

179. *See* notes 23 & 24 *supra* and accompanying text; Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65, 97 (E.D. Pa. 1975).

180. Petition for Certiorari, *supra* note 174, at 13; Comment, *supra* note 14, at 229.

Motor, the Court distinguished between the concepts of "persuasion" and "coercion,"[181] and the *Abercrombie* court interpreted that distinction to mean that in order to establish a tie-in, purchasers must prove that they were coerced, not merely persuaded, into purchasing the tied product.[182] Yet *Ford Motor* is not a tying case, and in fact, the holding is expressly limited to its very narrow fact situation. The Court's distinction between coercion and persuasion was no more than a means of construing the consent decree between Ford and the Government and certainly was not intended to state a substantive requirement of the antitrust laws.[183]

Therefore, not only do the cases cited in support of the Individual Coercion Doctrine fail to establish a coercion requirement for all tying cases, they actually militate against such a requirement. Even though these cases standing alone invalidate the Doctrine, further evidence that a subjective coercion requirement has no place in tying law is found in the Supreme Court's decisions in *Perma Life Mufflers, Inc. v. International Parts Corp.*[184] and *FTC v. Texaco, Inc.*[185]

B. *The Effect of Perma Life Mufflers*

In *Perma Life Mufflers*, plaintiff Midas Muffler dealers complained that Midas's sales agreements imposed several restraints of trade, including tying the sale of its mufflers to the sale of other products in the Midas line and barring the dealers from purchasing from other sources.[186] The court of appeals affirmed summary judgment for defendant under the doctrine of *in pari delicto*, holding plaintiffs equally at fault because they had "participated" in the restraint. The court based this finding on its observation that plaintiffs had enthusiastically sought to acquire Midas franchises with full knowledge of the challenged contract provisions, and that they had reaped great profits as Midas dealers.[187] The Supreme Court reversed, however, and rejected the *in pari delicto* doctrine as a defense to an antitrust action. In a persuasive passage the Court observed that the state of mind of a purchaser is irrelevant once the tying condition is established:

181. *See* notes 25-29 *supra* and accompanying text.
182. *See* note 63 *supra* and accompanying text.
183. *See* Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65, 102 (E.D. Pa. 1975).
184. 392 U.S. 134 (1968).
185. 393 U.S. 223 (1968).
186. 392 U.S. at 137. Plaintiffs also alleged price-fixing and territorial restrictions.
187. *Id.* at 137-38.

> Moreover, even if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business.[188]

The Court then reasoned that once a plaintiff shows that he has not aggressively furthered a restraint of trade, his mere willing participation is not grounds for denying recovery.[189] Thus *Perma Life Mufflers* establishes that the voluntary acquiescence of a purchaser in a tying arrangement will not preclude its successful challenge.

Equally probative in *Perma Life Mufflers* is Justice White's concurrence, in which he found that the deterrent aims of the antitrust laws outweighed the desirability of preventing recovery by plaintiffs who participate in illegal restraints. Therefore, he argued,

> [w]hen those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of [the antitrust laws], since it will deter those most likely to be responsible for organizing forbidden schemes.[190]

Justice White's statement implies that once a defendant possesses sufficient market power, a tying arrangement can be achieved even by persuasion or influence. The inclusion of these methods certainly indicates that coercion is not the only means of establishing an illegal tie.[191] This conclusion is even more persuasive in light of *Texaco.*

C. *The Effect of Texaco*

In *FTC v. Texaco, Inc.*[192] the Federal Trade Commission proceeded against Texaco under section 5 of the Federal Trade Commission Act,[193] challenging Texaco's sales commission agreements with B.F. Goodrich Co. to sponsor its tires, batteries, and accessories (TBA) that were to be carried by Texaco dealers. The FTC determined that because of the leverage Texaco enjoyed over its dealers, its attempts to influence them to enter the arrangement constituted an unfair method of competition under section 5. The court of appeals, however, set aside the FTC's cease and desist order because Texaco had not "exercised" its dominant power.[194] The

188. *Id.* at 139-40.
189. *Id.*
190. *Id.* at 145 (White, J., concurring).
191. *See* Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65, 111 (E.D. Pa. 1975).
192. 393 U.S. 223 (1968).
193. 15 U.S.C. § 45 (1970); *see* note 6 *supra.*
194. 383 F.2d 942 (D.C. Cir. 1967). The court of appeals relied upon the Supreme

Supreme Court reversed, finding a section 5 violation even in the absence of overt coercive practices because the dominant position of Texaco over its dealers rendered the sales-commission marketing system "inherently coercive."[195] The Court therefore concluded that merely by attempting to influence its dealers to purchase Goodrich TBA, Texaco had used its economic power in a manner tending to foreclose competition.[196]

Although *Texaco* arose under section 5 and thus is not a true tying case, its rationale is instructive.[197] The Supreme Court inferred inherent coercion from Texaco's dominant market position and found that the resulting disparity in bargaining power rendered evidence of mere persuasion or influence sufficient to prove illegality. Carried over to the tying context, dominance exists by virtue of a seller's economic power in the tying product. Therefore, logic implies that if coercion is to be presumed from a seller's economic power, overt coercion need not be shown.[198]

D. *The Use of Economic Power*

This analysis concludes that a coercion requirement is not properly an element of tying law. When a purchaser enters into a tying arrangement, whether or not he does so voluntarily, he should be able to obtain recovery under the antitrust laws if he can show that the seller possessed the required economic power and used that power to condition the sale of his products.[199] This revelation demonstrates how the cases formulating the coercion requirement

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Court's earlier decision in Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965), a similar TBA case in whicb there were found a number of clearly coercive practices.

195. 393 U.S. at 229. The Court reasoned that

> [w]ith the dealer's supply of gasoline, his lease on his station, and his Texaco identification subject to continuing review, we think it fiies in the face of common sense to say, as Texaco asserts, that the dealer is "perfectly free" to reject Texaco's chosen brand of TBA.

Id.

196. 393 U.S. at 228-29.

197. Section 5 of the Federal Trade Commission Act is broader in its coverage than the other antitrust statutes, permitting the FTC to challenge practices that seem harmful or potentially harmful to competition, whether or not they actually violate tbe antitrust laws. Furthermore, in general, judicial deference is given to the FTC's determinations under § 5. *See* P. AREEDA, ANTITRUST ANALYSIS ¶ 158, at 63 (2d ed. 1974).

198. One case, however, has rejected such reasoning. Belliston v. Texaco, Inc., 455 F.2d 175 (10tb Cir. 1972), a similar TBA case, distinguished *FTC v. Texaco, Inc.*, as a § 5 case, and read it as not having found the sales commission arrangement to have constituted a tie-in violating Sherman Act § 1. One commentator has soundly criticized *Belliston*, arguing that the *Texaco* Court had found the arrangement to be a tie-in, but did not so hold only because it was a § 5 proceeding. Solomon, *supra* note 24, at 574.

199. *See* Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65, 114 (E.D. Pa. 1975).

erred. In *American Manufacturers* the court held that plaintiff could not have been "coerced" because it had accepted sponsorship over unwanted stations merely as a bargaining strategy.[200] The court's statement that no tie-in can exist unless "coercion influences the buyer's choice" was irrelevant to such a holding, however, since "bargaining strategy" implies only that no condition was ever placed on the sponsorships.[201] Similarly, in *Capital Temporaries* the court found no coercion because the challenged contract did not require plaintiff to operate a "blue collar" business, but merely gave him an option to do so.[202] The court went too far, however, in concluding that plaintiff could not show that he was the "unwilling purchaser of the tied product" because the fact that the contract gave him an option meant only that no condition existed.[203] Thus, in cases in which there were no tying arrangements because of the absence of conditioning, the courts confused this absence with the resulting lack of coercion.

Given the conclusion that the proper focus of a tying suit is whether the defendant has used his economic power to condition the availability of the tying product on the purchase of the tied product, the question becomes by what methods "use" can be proved. In this regard the district court opinion in *Ungar* is especially instructive, for it states four such means. First, the most flagrant form of tying is the express contractual tie, and the mere existence of such an agreement should adequately prove the use of economic power. Even courts positing the Individual Coercion Doctrine have recognized that contract clauses can automatically constitute tie-ins, arguing that they raise a presumption of coercion.[204] As the *Ungar* court correctly pointed out, however, the required act of conditioning, not coercion, should be presumed from an express contractual tie.[205] Also, if uniformity in challenged contract clauses is sufficiently great, class action treatment obviously is appropriate under this method of proof because of the predominance of this common issue. Secondly, *Ungar* recognized that proof of actual subjective coercion should be sufficient to establish that a seller in fact conditioned the sale of his products since a purchaser certainly would not

200. *See* note 37 *supra* and accompanying text.

201. *See* AAMCO Automatic Transmissions, Inc. v. Tayloe, 407 F. Supp. 430, 435 (E.D. Pa. 1976); Ungar v. Dunkin' Donuts of America, Inc. 68 F.R.D. 65, 103 (E.D. Pa. 1975).

202. *See* note 42 *supra* and accompanying text.

203. *See* AAMCO Automatic Transmissions, Inc. v. Tayloe, 407 F. Supp. 430, 435 (E.D. Pa. 1976); Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65, 106 (E.D. Pa. 1975).

204. *See* notes 75 & 85-88 *supra* and accompanying text.

205. 68 F.R.D. at 114.

otherwise feel compelled to accept an unwanted item. As the Individual Coercion Doctrine holds, however, proof of subjective coercion necessarily raises a predominance of individual issues, and therefore, class action certification is improper if this is the mode of proof.

The district court in *Ungar* also suggested two more novel means by which "use" can be proved. The court first reasoned that a tie-in can be established simply by proof that the defendant seller pursued a policy of imposing tying arrangements,[206] and this independent analysis yields a similar conclusion. A commentator has noted that in determining whether a purchaser can buy a tying product only on the condition that he take a tied product, no difficulty is present where the condition is express. This commentator has observed, however, that in some cases the substance of a condition may exist even if the form does not.[207] The general policy to tie is just such a case since a pervasive practice of tying is almost the equivalent of widespread imposition of contractual ties. Any other conclusion would raise form over substance.[208] Furthermore, as the *Ungar* district court found, this unlawful policy need not be restricted to the attempt to expressly condition sales; rather, in light of *Texaco,* a policy merely to influence or persuade may suffice where the seller's dominance effectively conditions the availability of his products.[209] Because proof of an overall policy to tie is a common question, a class action is especially suitable to this means of establishing "use." Finally, the *Ungar* court stated a fourth mode of proof—evidence that a large number of buyers has accepted an uneconomic tie.[210] Quite clearly this method of proving "use" makes practical sense because the presence of an appreciable number of burdensome tying arrangements in the market raises the inference that the seller actively has taken advantage of his economic power. Since proof of this phenomenon also raises a single common question, class action treatment is proper.

VI. Policy Analysis of the Doctrine

Equally important to a study of the Individual Coercion Doctrine is an analysis of its relationship to antitrust policy, and once again its legitimacy is open to question. First, demanding that a

206. *Id.* at 115.
207. Pearson, *supra* note 1, at 630.
208. 68 F.R.D. at 113.
209. *Id.* at 115.
210. *Id.* at 115-16.

purchaser prove that he was personally influenced by a seller's activities may violate the most basic purposes behind the ban on tying arrangements. Secondly, because requiring individual proof of coercion forestalls class actions in this context, the Doctrine inhibits private enforcement of the antitrust laws. Closer scrutiny of these aspects of the Doctrine lead to the inevitable conclusion that it should be invalidated.

A. Antitrust Policy and the Coercion Requirement

Initially an independent coercion requirement appears consistent with the policies behind the prohibition of tying arrangements. The Supreme Court often has denounced these restraints because they compel buyers to sacrifice alternatives and purchase unwanted products or services at inflated prices.[211] Under this rationale a coercion requirement makes practical sense because it prevents the windfall award of treble damages to those buyers whose purchasing decisions were made freely and who thus were not injured by the seller's practices.[212] Furthermore, demanding a showing of subjective coercion from the buyer insulates the seller from liability for what may constitute no more than aggressive persuasion or salesmanship.[213] This is especially true in the franchise context in which dominant franchisors often wish to persuade franchisees to buy their products and the franchisees are often more than willing to obtain a package of the items necessary to operate the business.[214] Thus were tying law formulated solely to protect buyers, a coercion requirement would be desirable.[215]

Beyond the buyer-seller relationship, however, the Supreme Court has evinced equal, and perhaps greater, concern for the interests of competing sellers in free access to the market since tying arrangements by their very nature foreclose competition in the tied product.[216] As Professor Turner observes, the fact that a seller's

211. *See, e.g.,* Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953); *see* text accompanying note 4 *supra.*

212. *See* Brief for Appellants at 30-31, Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir. 1976).

213. *See* Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1226 (3d Cir. 1976).

214. *Id.* at 1224. One commentator has argued that courts should avoid the overzealous invalidation of tie-ins in the franchise context, because vertical integration and an end to the advantages of franchising may result. Thus courts should balance the coercive effect of tying arrangements against the benefits derived by franchisees from this form of doing business. *See* Comment, *supra* note 1, at 875.

215. *See* Turner, *supra* note 1, at 60.

216. *See, e.g.,* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503

economic power over a tying product may be so slight that buyers are not in fact "coerced" does not lessen the adverse impact on competing sellers.[217] In summarizing the law of tying Justice White also has recognized this feature:

> even if the customer is indifferent among brands of the [tied] product and therefore loses nothing by agreeing to use the seller's brand of the [tied] product in order to get his brand of the [tying product], such tying arrangements may work significant restraints on competition in the tied product.[218]

Thus it is not surprising that in *Fortner* the Supreme Court recognized that because tying arrangements generally serve no useful purpose beyond the suppression of competition, the mere presence of an appreciable restraint on competition alone is sufficient to invalidate a tie.[219]

The Court's increasing concern with foreclosed competitors is perhaps best represented by its trend toward diminishing the amount of economic power necessary to establish an illegal tie. The Court clearly has retreated from its early demand for market dominance to a standard under which sufficient economic power can be inferred almost from the very existence of a tying arrangement.[220] One commentator has argued that this trend represents a distinct move toward characterizing tying arrangements as per se illegal in all cases where an appreciable amount of commerce is affected.[221] If this is true, there exists no logical justification for a coercion requirement that would ratify a serious restraint of trade simply because a buyer was not adversely influenced by a tie. The coercion requirement therefore should be dispensed with.

B. *Antitrust Policy and the Individual Coercion Requirement*

Necessitating individual proof of coercion is equally repugnant

(1969); Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605, 611 (1953); *see* text accompanying note 4 *supra.*

217. Turner, *supra* note 1, at 60-61. In a footnote the Third Circuit in *Ungar* attempted to distinguish between purchasers and competing sellers, and although it expressly reserved its opinion on whether a competing seller might have to prove actual coercion of the purchaser, the court indicated that the seller might not. 531 F.2d at 1221 n.7a. Such a distinction does not salvage the Individual Coercion Doctrine, however, since competing sellers are much less likely to suffer significant loss and therefore in most instances will not find it economically feasible to bring an action against a tying seller. Thus the private action by the purchaser remains necessary to vindicate the rights of competing sellers.

218. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 512-13 (1969) (White, J., dissenting).

219. *Id.* at 503.

220. *See* text accompanying notes 21 & 22 *supra.*

221. Austin, *supra* note 1, at 109.

to antitrust policy because it inhibits private enforcement of the antitrust laws. Among the various means of implementing the antitrust laws, the Supreme Court has characterized private treble damage actions as a "bulwark of antitrust enforcement" because they represent a constant deterrent to antitrust violations.[222] The Court's concern goes beyond the particular plaintiff, for as it has noted, private antitrust litigation is encouraged not only to compensate those who have been injured directly, but also to vindicate the public's interest in free competition.[223] Consequently, a number of Court decisions have enhanced the feasibility of maintaining private actions,[224] causing a boom in treble damage litigation.[225] Class actions particularly have been regarded as a major vehicle of antitrust enforcement.[226] As the Supreme Court observed in *Hawaii v. Standard Oil Co.*,[227] class actions facilitate private actions "by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." These efficiencies are even more prominent in tying cases, in which almost by definition a plaintiff purchaser is confronted by a more economically powerful seller and in which the plaintiff must provide rather extensive market data. Thus, because inhibition of class action tying suits most likely would deter the instigation of single-plaintiff suits, class actions should be facilitated in this area.

The Individual Coercion Doctrine, however, effectively precludes class actions. The courts following the Doctrine almost automatically have found that the necessary showing of subjective coercion on an individual basis creates a predominance of individual questions so that rule 23(b)(3) is unavailable.[228] Although these

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222. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

223. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969).

224. *See, e.g.,* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487-88 (1968) (limiting the "passing-on" defense); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 135-40 (rejecting the *in pari delicto* defense); Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962) (disfavoring the use of summary judgments in antitrust actions); Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power,* 53 TEXAS L. REV. 1180, 1200-01 (1975).

225. For example, during the first 50 years of the Sherman Act, only 175 written court opinions existed in private litigation; in the year ending June 1973, a total of 1,152 private suits were brought in federal courts. *Panel Discussion: Private Actions—The Purposes Sought and the Results Achieved,* 43 ANTITRUST L.J. 73, 77 (1973) (remarks of Mr. Millstein).

226. For a discussion of class actions in the antitrust context, see Note, *Litigating the Antitrust Conspiracy Under Amended Rule 23: Siegel v. Chicken Delight, Inc., and School District v. Harper & Row Publishers, Inc.,* 54 VA. L. REV. 314 (1968).

227. 405 U.S. 251, 266 (1972). *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (1974) (Douglas, J., concurring & dissenting) (quoting N.Y.L.J., May 2, 1972, at 4, col. 3); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 493-94 (N.D. Ill. 1969).

228. *See* text accompanying note 66 *supra.*

cases generally recognize that a class action can be maintained when the alleged tie-in is reduced to a specific contract clause,[229] all a seller need do to insulate himself from class action attack is remove the offensive language while retaining his tying policy.[230] Not only is such a dichotomy legally unsound, it clearly contravenes the policies of both rule 23 and the antitrust laws. Perhaps the Doctrine has arisen in part because of the current hostility of the courts to class actions.[231] Such actions should not be precluded, however, when they are clearly necessary, nor should such a subjective attitude by the courts dictate substantive antitrust law. Thus the Individual Coercion Doctrine should be abolished if only to foster class actions in the tying area.

VII. Conclusion

At the present time the Individual Coercion Doctrine appears strengthened by the Third Circuit's ruling in *Ungar* and the Supreme Court's denial of certiorari in that case. Nevertheless, detailed analysis of the Doctrine demonstrates that despite the Doctrine's rather lengthy development, it is inconsistent with the basic legal principles of the law of tying as well as the more general purposes of the antitrust laws. The courts should again undertake a critical analysis of the Doctrine and, as the district court did in *Ungar,* remove coercion as an independent requirement of tying law. Perhaps in the near future as a result of the present split in the circuit courts of appeals, the Supreme Court itself will make a definitive statement on this controversial issue and set forth the proper role of coercion in antitrust law.

W. Perry Brandt

229. *See* part III.D.(2) *supra.*

230. *See* Petition for Certiorari, *supra* note 174, at 23.

231. *See, e.g.,* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).