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NOTES

Business Justification for Tying Agreements: A Retreat from the Per Se Doctrine

IN AN INCREASINGLY COMPLEX economy, continuous attempts by businessmen to gain economic advantages over their competitors has often led to the evolution of unique commercial practices. If these novel practices are to be held within the limits of fair competition, the courts must constantly revise their application of the antitrust laws. Unfortunately, however, the judiciary for many years has been continuously frustrated in its attempts to control even the simplest of these commercial arrangements.

Prominent among the vexatious practices is the tying agreement which has been common to the business world for many years[1] and has frustrated and irritated courts since its inception.[2] The tying agreement is an arrangement by which a supplier conditions the sale of a highly desirable item — the tying product — on the buyer's assent to purchase a separate commodity or service — the tied product.

A tying agreement generates two basic effects which controvert the policy of free competition fundamental to the economy.[3] First,

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[1] United States v. United Shoe Mach. Co., 222 Fed. 349 (D. Mass. 1915), *aff'd*, 247 U.S. 32 (1918).

[2] See, *e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); International Salt Co. v. United States, 332 U.S. 392 (1947); Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942); International Business Mach. Corp. v. United States, 298 U.S. 131 (1936); United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[3] See Northern Pac. Ry. v. United States, *supra* note 2; Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965); Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). As stated in Times-Picayune Publishing Co. v. United States, *supra* note 2, at 605: "Tying agreements . . . flout the Sherman Act's policy that competition rule the marts of trade. Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition." For a more lengthy discussion of the effect of tying agreements on competition, see generally, MILLER, UNFAIR COMPETITION 191-203 (1941); NEAL, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 68-72 (1960); STEVENS, UNFAIR COMPETITION 54-76 (1917); VAUGHAN, ECONOMICS OF OUR PATENT SYSTEM 109-34 (1925); WATKINS, PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE 220-28 (3d ed. 1940); Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913 (1952).

the buyer is forced to give up his right to choose which of several brands of products he will purchase in the market of the tied product. For instance, a buyer who wishes to obtain a sufficient supply of brand *X* picture tubes may be forced by the supplier of these tubes to purchase a certain quantity of the supplier's transistor radios or be denied the picture tubes which the buyer desires. Thus the purchaser must forego his right to freely choose among brands *X*, *Y*, and *Z* transistor radios. This example also illustrates the second evil inherent in tie-ins; that is, the suppliers of brand *Y* and *Z* radios are now foreclosed from a certain portion of the competitive market in that product. Thus a tying agreement not only has an adverse effect on buyers, but also diminishes the number of outlets available to competitors of the supplier. Therefore, the evil effect of a tie-in cannot be eliminated merely by granting the buyer the right to purchase a competitor's goods if they are sold at a lower price than that of the tied product. Such an arrangement does not lessen the burden on the competitors since they still must undercut the supplier's price while he need only meet theirs.[4] In addition, it should be noted that such an arrangement does not completely eliminate the burden on the buyer who may want to purchase goods of the competitor even though these goods are more expensive.

Generally, the courts have been reluctant to permit the use of a tying agreement and have rarely upheld its legality.[5] Recently, however, the courts in some cases have held[6] and in other cases have intimated[7] that a tie-in may not be the intrinsically evil practice which previous decisions had indicated. This uncertainty regarding

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[4] See International Salt Co. v. United States, 332 U.S. 392, 397 (1947).

[5] Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Standard Oil Co. v. United States, 337 U.S. 293 (1949); International Salt Co., v. United States, *supra* note 4; International Business Mach. Corp. v. United States, 298 U.S. 131 (1936)

[6] Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961)

[7] White Motor Co. v. United States, 372 U.S. 253 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Jerrold Electronics Corp. v. Wescoast Broadcasting Co., 341 F.2d 653 (9th Cir. 1965); Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965); Baker v. Simmons Co., 307 F.2d 458 (1st Cir. 1962); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); Albert H. Cayne Equip. Corp. v. Union Asbestos & Rubber Co., 220 F. Supp. 784 (S.D.N.Y. 1963)

the legality of tying agreements has even permeated recent decisions of the United States Supreme Court.[8]

It is the purpose of this Note to examine whether recent decisions do in fact indicate a softening judical approach toward tying agreements. In order to properly understand this problem, it is necessary to examine the policy considerations which would accompany such a trend and to consider whether this apparent leniency is an indication that the doctrine of per se illegality will no longer be controlling in tie-in cases.

I. Congressional Restrictions on Tying Agreements

Businesses employing tying agreements may run afoul of one or more of three federal statutes: the Sherman Act; the Clayton Act; and the Federal Trade Commission Act.[9]

A. *Sherman Act, Section 1*

Section 1 of the Sherman Act[10] states that "every contract in restraint of trade or commerce" is illegal. While this section has been interpreted as barring only "unreasonable restraints" similar to those prohibited under the "rule of reason" test at common law,[11] the courts have, nevertheless, designated certain types of business practices as unreasonable per se. When one of these restraints is shown to exist, the courts will assume the existence of a violation of section 1 notwithstanding the justifications for the particular practice.[12] The harsh treatment accorded to these per se violations is normally explained as being only logical in view of "their pernicious effect on competition and lack of any redeeming virtue."[13]

[8] *Compare* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961), *with* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). The Court's recent opinion in Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965), which involved a vertical arrangement similar to a tie-in, was couched in more definite phraseology than previous decisions. However, the majority of the opinion consists of mere conclusions rather than clear explanations.

[9] Sherman Act § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964); Clayton Act § 3, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 14 (1964); Federal Trade Commission Act § 5, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (a) (1964) State regulations which might be applicable to tying agreements are beyond the scope of this Note. For a concise study of state antitrust provisions see generally Hanson & von Kalinowski, *The Status of State Antitrust Laws with Federal Analysis*, 15 W RES. L. REV. 9 (1963); Note, *State Antitrust Provisions*, 15 W RES. L. REV. 126 (1963)

[10] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

[11] Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911)

[12] United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948).

[13] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

B. *Clayton Act, Section 3*

While the more specific terms of section 3 of the Clayton Act[14] offer a clearer delineation of antitrust restrictions on trade restraints than their counterparts in section 1 of the Sherman Act, the existence of these specific provisions has occasionally resulted in a severe limitation on the scope of the statute's coverage.[15] This limitation is best illustrated by the inapplicability of section 3 to situations where a restraint is placed on "services" as opposed to "commodities" offered by a competitor.[16]

The applicability of section 3 is expressly limited to restraints of trade which "substantially lessen competition or tend to create a monopoly in any line of commerce."[17] This qualifying clause has been interpreted as prohibiting sales conditioned upon the buyer's agreement not to use goods of the supplier's competitors where the supplier is in a position of "market dominance"[18] or where the agreement will foreclose competitors from a substantial share of the line of commerce affected.[19] The latter proviso requires only that the restraint have *a tendency* to lessen competition; no proof of an actual decrease in a competitor's business is necessary.[20]

C. *Federal Trade Commission Act, Section 5*

Section 5 of the Federal Trade Commission Act[21] (FTCA) prohibits "unfair methods of competition in commerce." Included among violations of this section are those which run "counter to

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[14] 38 Stat. 731 (1914), as amended, 15 U.S.C. § 14 (1964). Section 3 states in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares or other commodities on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares 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. *Ibid.*

[15] See, *e.g.*, Standard Oil Co. v. United States, 337 U.S. 293, 297 (1948)

[16] Columbia Broadcasting Sys. v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961), *cert. denied*, 369 U.S. 812 (1962); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[17] 38 Stat. 731 (1914), as amended, 15 U.S.C. § 14 (1964).

[18] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 606-07 (1953) See text accompanying notes 79-89 *infra*.

[19] Standard Oil Co. v. United States, 337 U.S. 293, 299 (1949).

[20] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356-57 (1922).

[21] 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (1964)

the public policy declared in the Sherman and Clayton Acts" of encouraging unrestricted competition.[22] The FTCA grants the Federal Trade Commission and the courts "adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages."[23] Because of the broad terms of section 5, the Commission is often in a position to attack a business practice which, while not an express violation of either the Sherman or the Clayton Acts, still amounts to an unfair method of competition within the terms of the FTCA.[24] The determination of whether a method of competition is unfair has purposely been left to the discretion of the Commission.[25]

II. THE DETECTION OF TYING AGREEMENTS

Generally, a seller's refusal to supply a buyer with product *A* unless the buyer also purchases product *B* constitutes a tying agree-

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[22] Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 463 (1941). The FTCA is "in pari materia" with the Sherman and Clayton Acts. Menzies v. FTC, 242 F.2d 81 (4th Cir.), *cert. denied*, 353 U.S. 957 (1957). For examples of the application of the standards of the Sherman and Clayton Acts to actions initiated by the Federal Trade Commission, see Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965); FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953).

[23] FTC v. Cement Institute, 333 U.S. 683, 693 (1948).

[24] See, *e.g.*, FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953); FTC v. Cement Institute, *supra* note 23. The defendant-respondent in the *Motion Picture* decision, a producer and distributor of movies, had exclusive contracts with forty per cent of the theatres which exhibited the films in the area of respondent's operations. The respondent and three other companies had exclusive contracts with seventy-five per cent of such theatres in the United States. The Court upheld a Commission finding that the exclusive contracts unreasonably restrained competition and tended toward monopoly and that their use was an unfair method of competition. In doing so, the Court thought it necessary to note that "the 'unfair methods of the competition,' which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act." FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394 (1953). See also Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 463 (1941) where the purpose of the FTCA was characterized as an attempt to prevent in their incipiency those practices which would in the future develop into violations of the Sherman or Clayton Acts.

[25] In doing so, the Congress recognized the hopelessness of attempting to define "the many and variable unfair practices which prevail in commerce. . . ." S. REP. NO. 597, 63d Cong., 2d Sess. 13 (1914). The House Report indicated that the legislators realized that the best method of preventing unfair competition was "through the action of an administrative body of practical men . . . who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations." H.R. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914). In Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965), the Court approvingly noted that "in thus divining that there is no limit to business ingenuity and legal gymnastics, the Congress displayed much foresight." *Id.* at 367

ment. However, there are several factors which occasionally make the presence of a tie-in difficult to distinguish.[26]

A. *The Absence of an Express Contractual Provision*

Many agreements which effectively result in a tie-in do not contain express provisions to that effect in the written contract. In these situations the courts will look at the conduct of the respective parties and, in proper circumstances, may infer the existence of a tying agreement. When such an inference is made, the absence of an express provision will not deter the courts from applying antitrust principles to determine the legality of the arrangement.[27]

B. *Agreement Containing Multi-Restraints*

Confusion also results when a single business transaction includes several different restraints on the freedom of the buyer or lessee. For example, the same requirements contract[28] may include both a tying arrangement and an exclusive dealing[29] provision. The difficulties inherent in these situations are somewhat alleviated, however, by the courts' application of the same standards of legality whether a tie-in is the sole restraint present or is combined with another restriction.[30]

C. *The Necessity of Separate Products*

Notwithstanding the uncertainty which the above factors might create in determining the presence of a tying agreement, the prin-

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[26] For an example of the difficulty which courts sometimes experience in identifying tie-ins, see, *e.g.*, Standard Oil Co. v. United States, 337 U.S. 293, 305 n.8 (1949); Susser v. Carvel Corp., 332 F.2d 505, 511 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965).

[27] United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961); McElhenney v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959) Compare Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939), wherein the Supreme Court noted the presence of a conspiracy in violation of the Sherman Act despite the absence of an express contract.

[28] In a requirements contract, the seller and the buyer agree that the buyer will purchase from the seller all of the buyer s requirements of a certain product for a stated period of time. See Lockhart & Sacks, *supra* note 3, at 914.

[29] An exclusive dealing arrangement requires dealers to handle only the goods of a certain supplier to the exclusion of all competing products. See Lockhart & Sacks, *supra* note 3, at 914. See generally Paley, *Antitrust Pitfalls in Exclusive Dealing — Recent Developments Under the Sherman, Clayton and FTC Acts*, 37 NOTRE DAME LAW. 499 (1962).

[30] Susser v. Carvel Corp., 332 F.2d 505, 511 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965).

cipal difficulty experienced in this area is the decision as to whether product *A* is actually separate and distinct from product *B*.[31] If *A* and *B* are not so intimately connected as to make their separation impractical, then any attempt to tie the sale of one to the sale of the other will be subject to close scrutiny by the courts.

The demands of marketing often compel a business to combine two or more products into a single unit for purposes of distribution and sale. Such a situation might occur if a manufacturer markets a very intricate electrical output system which will not yield the desired result unless combined with a specially-designed receiver set. In some circumstances, the manufacturer might properly refuse to sell the output system unless the buyer also purchases the receiver set. Here, the two products might be construed as constituting a single item which must be purchased as a unit. In such a case, no tie-in exists and a finding as to the legality of the arrangement is unnecessary. But distinguishing between those products which are inseparable and those which are not is often a formidable task.[32] A possible solution to this question was suggested in the case of *United States v. Jerrold Electronics Corp.*,[33] wherein the district court set up four criteria by which to determine the severability of products:[34] (1) the practice of others in the same field; (2) the consistency of the composition of each unit; (3) the invoicing system employed by the supplier; and (4) the existence of other related products which are not included in the unit.

(1) The practice of others in the same field.—If competitors of the supplier also sell the products in question as a single unit, this supports the contention that these products do in fact constitute a single item. A contrary practice by others in the field, however, suggests the opposite conclusion.

(2) The consistency of the composition of each unit.—The sale of a consistently homogeneous combination of two products indicates that the products are actually only elements of a single item. But if the combinations vary considerably from one sale to the next,

[31] See International Mfg. Co. v. Landon, Inc., 336 F.2d 723 (9th Cir. 1964), *cert. denied*, 379 U.S. 988 (1965); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[32] See United States v. Loew's Inc., 371 U.S. 38 (1962); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir. 1965).

[33] 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[34] For an application of these four criteria, see Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir. 1965); United States v. Jerrold Electronics Corp., *supra* note 33.

the court may find that the basic products are indeed distinct and are only combined to satisfy a current demand. In the *Jerrold* case,[35] the supplier's contention that the products which he offered as a combination were inseparable, was negated by the fact that the combinations varied from sale to sale.

(3) *The invoicing system employed by the supplier*—The utilization of a lump-sum billing arrangement for the combination indicates that the supplier views the item as a basic product and the elements of the unit as indivisible parts of the complete item. However, if the customer is billed for each particular part of the combination, the inference is that the alleged unit is in fact a conglomeration of separate and distinct products.

(4) *The existence of other related products which are not included in the unit.*—If the supplier markets other items with characteristics similar to the products combined in the unit and yet does not include these other items within the combination, the court might infer that the elements of the combination could be sold separately just as the other products. Similarly, if the seller combines all of his products in one particular field into a single unit, this is an indication that these products are actually indivisible and can legitimately be sold as a unit.

The difficulty confronting the courts in the area of divisibility of products is illustrated by the opposite results reached in two Supreme Court decisions, *Times-Picayune Publishing Co. v. United States*,[36] and *United States v. Loew's Inc.*[37] In *Times*, the Court found that advertising space sold in a morning paper was not separate or distinct from advertising sold in an evening paper where the two publications were "under single ownership at the same place, time, and terms and sell indistinguishable products to advertisers; no dominant 'tying' product exists no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same."[38] The Court in *Loew's* refused to recognize the defendant's contention that so-called "block-booking" of films to the TV stations was not a tie-in since the individual films were inseparable and only elements in one product unit — the whole block of films. Instead, the Court agreed with the district court's finding that each copyrighted film was in

[35] United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 559 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961)

[36] 345 U.S. 594 (1953)

[37] 371 U.S. 38 (1962).

[38] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953).

itself a unique product and held that the "block-booking" was an illegal tying arrangement.[39]

The facts in *Times* and *Loew's* are not so different as to justify opposite conclusions on the question of separability.[40] The dividing line between separable and inseparable products is neither distinct nor unyielding. Thus, an application of the four *Jerrold* criteria to the facts of each case seems to constitute the most desirable approach yet developed to determine the question of separability of products.

The *Jerrold* tests are helpful only in determining the presence of a tie-in. If such an arrangement is found to exist, the more arduous task of finding whether the tie-in violates the antitrust laws remains. However, the question of separability of products should not be forgotten, for it has assumed added importance in some cases by virtue of the fact that it provides the courts with an opportunity to indirectly recognize business justification[41] as a mitigating circumstance for what might otherwise have been an illegal tying agreement.[42]

III. JUDICIAL TREATMENT OF TYING AGREEMENTS

A brief survey of the history of tying arrangements reveals the constant suspicion with which they have been viewed by courts for many decades. This suspicion is undoubtedly based on the theory that the evils inherent in this business practice are normally great enough to outweigh any possible advantages which might result from its employment. Generally, the courts have been so convinced of the lack of any redeeming virtue in tying agreements that they have resorted to testing the legality of these practices through

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39 United States v. Loew's Inc., 371 U.S. 38, 48 (1962). For a detailed discussion of the ramifications of block-booking on the copyright laws, see United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-58 (1948).

40 The Court in *Loew's* did not attempt to distinguish the *Times* holding on separability, apparently feeling that the individual movies included in the Loew's block-booking scheme were not analogous to the particular advertising spaces held not to be separable in *Times*. But it is certainly arguable that advertising in a morning newspaper which will reach a market completely different from that covered by an afternoon paper is as distinct from the afternoon advertising as the movie "Casablanca" is from the film "Tugboat Annie Sails Again."

41 Business considerations which might justify the use of a tie-in may be found in any number of situations, such as breaking into a new area of competition, meeting similar practices by competitors, reducing production costs, etc. See text accompanying notes 94-103 *infra*.

42 See, *e.g.*, Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961).

an application of the controversial per se doctrine. The acceptance of this harsh, unyielding rule in the tie-in cases is only one phase in the swift development of the doctrine in recent years.

A. *The Evolution of the Per Se Doctrine*

Historically, the legality of restraints of trade was tested through an application of the rule of reason.[43] The theory behind such an approach was effectively enunciated in *Chicago Bd. of Trade v. United States.*[44] In recognizing that no inflexible rule could be applied to every restraining business practice, the Supreme Court stated:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.[45]

In judging the reasonableness of a particular restraint, courts have traditionally looked at such considerations as the per cent of business controlled, the strength of the remaining competitors, and the business requirements which prompted the adoption of the arrangement under investigation.[46]

Recently, however, the courts have tended to disregard the rule of reason and have instead resorted to declaring trade practices unreasonable per se whenever these practices had the effect of foreclosing competitors from any substantial market.[47] While the per se doctrine has been a relative "late-bloomer" among antitrust theories, its appearance was at least foreshadowed by the 1927 decision in *United States v. Trenton Potteries Co.,*[48] where the Court stated:

> Agreements which create potential power [of market domi-

[43] Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *modified,* 175 U.S. 211 (1899); von Kalinowski, *The Per Se Doctrine — An Emerging Philosophy of Antitrust Law,* 11 U.C.L.A.L. REV. 569, 570 (1964)

[44] 246 U.S. 231 (1918).

[45] *Id.* at 238.

[46] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 615 (1953); see Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). See also United States v. Twentieth Century-Fox Film Corp., 137 F. Supp. 78 (S.D. Cal. 1955). The rule of reason did not, as is often alleged, emasculate attempts to strike down unlawful restraints of trade. See United States v. General Motors, Inc., 121 F.2d 376, 397 (7th Cir.) *cert. denied,* 314 U.S. 618 (1941) for an example of a case where a tie-in was found unlawful through an application of the rule of reason.

[47] *Cf.* International Salt Co. v. United States, 332 U.S. 392 (1947).

[48] 273 U.S. 392 (1927)

> nance] may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry [into] whether [the practice] is reasonable or unreasonable. [49]

The Supreme Court recently rephrased the per se doctrine in *Northern Pac. Ry. v. United States*[50] wherein it defined the scope of the rule as follows:

> There are certain agreements or practices which 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.[51]

While the harsh doctrine of per se illegality has often been criticized,[52] the rule nevertheless has been applied to numerous varieties of trade restraints.[53] Such practices as price-fixing, market division among competitors, group boycotts, and tying agreements have been prohibited through the application of the rigid per se standard. The courts, after noting the "pernicious effect" which such practices have on competition, further justify their resort to the per se doctrine on two additional grounds. First, by consistently employing the same criterion to determine the legality of certain business practices, the judiciary generates more confidence in the minds of businessmen who are attempting to determine whether procedures which they are contemplating will run afoul of the antitrust laws.[54] If a supplier is previously advised that price-fixing agreements are definitely a violation of the law, he is less likely to attempt to negotiate such arrangements in the first place. The result would not only be a decrease in the amount of litigation involving such practices, but would also be a savings to business of the time and money otherwise spent in developing and defending these illegal practices. Secondly, the courts reason that an application of the per se rule to cases which do reach the litigation stage will free judges from the burden of being forced to determine the "reasonableness" of the particular restraint, a task which normally requires a copious study of voluminous business records and market reports.[55] When a per se violation is alleged, the defendant is barred

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[49] *Id.* at 397.

[50] 356 U.S. 1 (1958).

[51] *Id.* at 5. (Emphasis added.)

[52] See, *e.g.*, von Kalinowski, *supra* note 43, at 591.

[53] See note 68 *infra.*

[54] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

[55] *Ibid.* For an example of the burden which such examinations place on the courts, see United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956).

from any attempt to cloud the real issues through the submission of countless documents demonstrating his justification for the particular practice.[56] Instead, the accused must either deny the alleged facts or show that the facts do not constitute a per se violation. If he fails to do so, summary judgment for the plaintiff will be granted.[57]

Despite the obvious benefits attainable by an application of the per se doctrine, the utilization of such an uncompromising rule has one major disadvantage — the flexibility so vital to antitrust law vanishes entirely. While there are many considerations which might sustain the use of a more adaptable rule, the most tenable argument for flexibility rests in the occasional existence of a legitimate business motive for the imposition of certain trade restraints.[58] A rule which is blind to mitigating circumstances is, at best, of questionable benefit. But whether the drawbacks of the per se doctrine are sufficiently detrimental to occasion a return to the standard of reasonableness remains to be seen. In some recent tie-in cases the criteria of the per se rule and the rule of reason have been intertwined to such an extent that they are incapable of distinction.[59] This indiscriminate intermingling of terminology from both rules has only served to increase the confusion surrounding the application of the per se doctrine to tying agreements.

B. *Tying Agreements and the Per Se Doctrine*

The validity of tying agreements was originally contested under patent law since generally the tying product was protected by a patent monopoly.[60] In two early cases, *Heaton-Peninsular Button-*

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[56] See Van Cise, *Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964).

[57] White Motor Co. v. United States, 372 U.S. 253 (1963). "A trial to show their [per se violations] nature, extent, and degree is no longer necessary." *Id.* at 260. The plaintiff's burden is further diminished by the absence of a necessity of proving a public injury when a per se violation is alleged; such a showing must be made when the "rule of reason" is employed. Reliable Volkswagon Sales & Serv. Co. v. World-Wide Auto Corp., 182 F. Supp. 412, 427 (D.N.J. 1960).

[58] See, *e.g.*, Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[59] See, *e.g.*, Jerrold Electronics Corp. v. Wescoast Broadcasting Co., 341 F.2d 653 (9th Cir. 1965); Crawford Transp. Co. v. Chrysler Corp., *supra* note 58; Dehydrating Process Co. v. A. O. Smith Corp., *supra* note 58.

[60] For a discussion of the historical aspects of tie-ins, see Turner, *Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958) An analysis of the economic aspects of patent tie-ins may be found in Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957)

Fastener Co. v. Eureka Specialty Co.[61] and *Henry v. A.B. Dick Co.*,[62] tie-ins involving a patented tying product were upheld as valid extensions of the patent monopoly; however, such reasoning was ultimately rejected by the Supreme Court in 1917.[63]

Subsequent cases decided under patent law further developed the restrictions on the use of the patent monopoly to force the purchase of other products.[64] The Supreme Court in *International Salt Co. v. United States*[65] ruled that *any* tying agreement utilizing a patented tying product would doubtless have anti-competitive consequences and was thus illegal under the antitrust laws.[66] The Court reasoned that a prospective buyer in these circumstances, would be forced to submit to the terms of the tie-in because of his inability to obtain the patented product elsewhere. Since the decision in *International Salt*, courts have consistently found patent tie-ins to be illegal per se; that is, the patent gave the patentee the sufficient market dominance in the tying product necessary to sustain a holding of per se illegality.[67]

Moreover, the application of the theory of per se illegality has not been confined to tie-ins involving patented products. Tying arrangements where the tying item is non-patented are also subject

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61 77 Fed. 288 (6th Cir. 1896).

62 224 U.S. 1 (1912).

63 Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917).

64 Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938); Carbice Corp. v. American Patent Dev. Corp., 283 U.S. 27 (1931).

65 332 U.S. 392 (1947).

66 *Id.* at 396; see United States v. Loew's Inc., 371 U.S. 38, 46 (1962) *But see* International Mfg. Co. v. Landon, Inc., 336 F.2d 723 (9th Cir. 1964), *cert. denied*, 379 U.S. 988 (1965).

67 See, *e.g.*, Standard Oil Co. v. United States, 337 U.S. 293, 307 (1947); United States v. Griffith, 334 U.S. 100 (1948) *But see* United States v. Loew's Inc., *supra* note 66, at 49-50 where the majority opinion states:

> There may be rare circumstances in which the doctrine we have enunciated under § 1 of the Sherman Act prohibiting tying arrangements involving patented or copyrighted tying products is inapplicable. However, we find it difficult to conceive of such a case.

A less restictive view of the patent's function of establishing automatic market dominance is also taken in the ATT'Y GEN. NAT'L COMM. ANTITRUST REP. (1955). After noting that narrow and unimportant patents may not yield any market power to the patentee, the Report states:

> Accordingly, where the tying product is patented, the patentee should be permitted to show that in the entire factual setting, including the scope of the patent in relation to other patented or unpatented products, the patent does not create the market power requisite to illegality of the tying clause. *Id.* at 238.

to the scrutiny of the per se rule[68] as are other methods of trade restraint.[69] The rapidly-expanding area in which the rule has been applied has served to increase the bitter controversy surrounding the doctrine.[70]

The determination of whether a specific tying agreement is a per se violation of the antitrust laws has perplexed both the courts[71] and legal scholars.[72] Tying agreements generally "fare harshly under the laws forbidding restraints of trade,"[73] because they "serve hardly any purpose beyond the suppression of competition."[74] The inclusion of tie-ins among the group of restraints which have a "pernicious effect" on competition by the Supreme Court in its decision in *Northern Pac. Ry. v United States*[75] seemed to herald the demise of *all* tying agreements. But while the general language in the *Northern Pac.* case indicated the Court's inclination toward an extension of the per se rule, the majority opinion nevertheless utilized the more specific per se criteria previously applied to tie-ins in its decision in *Times-Picayune Publishing Co. v. United States.*[76]

Because of the different terminology contained in the pertinent sections of the Sherman and Clayton Acts, the Court in *Times* promulgated separate criteria for the application of the per se rule under each of the two statutes. The provisions of the Clayton Act which forbid restraints that could potentially lessen competition were interpreted so as to render a tying agreement per se unreasonable if *either* (1) the seller maintains a monopolistic position in the

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[68] See, *e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (transporting services tied to sale of real estate); Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961) (sales of tires, batteries, and accessories tied to granting of gas station franchise).

[69] See United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (vertical price fixing); Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959) (group boycotts), United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (horizontal price-fixing); United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899) (division of markets)

[70] *Compare* von Kalinowski, *supra* note 43, *with* Van Cise, *supra* note 56.

[71] *Compare* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), *with* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[72] Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23 (1964); see 1 TRADE REG. REP. ¶ 124 (1961).

[73] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 606 (1953), citing FTC v. Gratz, 253 U.S. 421 (1920).

[74] Standard Oil Co. v. United States, 377 U.S. 293, 305 (1949) (dictum)

[75] 356 U.S. 1 (1958)

[76] 345 U.S. 594 (1953)

"tying product's" market *or* (2) the particular restraint being practiced affects a substantial volume of commerce in the "tied product." But the Sherman Act's more general terms which prohibit the foreclosure of competitors from any substantial market were found to require that *both* of the above conditions be met in order that a tie-in constitute a per se violation.[77] The Court also noted that a tying arrangement may be a violation of section 5 of the Federal Trade Commission Act's ban on "unfair methods of competition" regardless of the presence or absence of one or both of the two elements.[78] The two characteristics which govern the application of the per se rule to tie-ins — market dominance and influence on a substantial amount of commerce — deserve careful analysis for each is significant in judging the legality of tying agreements.

(1) Market dominance.—The Supreme Court's interpretation of this phrase has varied considerably since the decision in *Standard Oil Co. v. United States*[79] wherein the Court equated "market dominance" with "market control."[80] Subsequent constructions of "market dominance" became less and less demanding[81] until finally in the *Northern Pac.* decision the Court concluded that the requirement demanded nothing "more than sufficient economic power to impose an appreciable restraint on free competition in the tied product . . ."[82] Most recently in *United States v. Loew's Inc.*[83] the Court specified that sufficient economic power could be "inferred from the tying product's desirability to consumers or from unique-

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[77] *Id.* at 608-09. It is important to recall that the Clayton Act restrictions apply only when the tied item is a "commodity" as distinguished from a "service" etc.

[78] *Ibid.*

[79] 337 U.S. 293, 306 (1949).

[80] *Ibid.*

[81] See, *e.g.*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608 (1953) wherein the Court required some type of "monopoly power."

[82] Northern Pac. Ry. v. United States, 356 U.S. 1, 11 (1958); see Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961). In the recent decision of Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965), the Court explained its prior pronouncements on the requirement of economic power. In discussing the inherent power which a gasoline supplier has over its dealers, the Court noted:

> Among the sources of leverage in Atlantic's hands are its lease and equipment loan contracts with their cancellation and short-term provisions . . . . It must also be remembered that Atlantic controlled the supply of gasoline and oil to its wholesalers and dealers. This was an additional source of economic leverage . . . as was its extensive control of all advertising on the premises of its dealers. *Id.* at 368.

See also Simpson v. Union Oil Co., 377 U.S. 13 (1964).

[83] 371 U.S. 38 (1962).

ness in its attributes"[84] and therefore concluded that investigations into such questions as the scope of the relevant market and the supplier's percentage of that market are rarely necessary.[85] Clearly, the more liberal construction of "market dominance" has reduced the proof needed to show the existence of this element of the per se rule to a less than exacting requirement. Such circumstances as the mere presence of a large number of tying agreements,[86] the existence of a patented[87] or copyrighted[88] tying product, or even the presence of a trademark[89] are usually enough to constitute "sufficient economic power."

(2) *Restraint of a substantial volume of commerce.*—In a similar fashion, the proof required to show that the tie-in under investigation affects a "substantial volume of commerce" has been significantly reduced in recent years. Previously, it was necessary that a practice foreclose competitors from a substantial market in order to be labelled a per se violation.[90] Currently, however, a restraint which affects a "not insubstantial" amount of commerce will qualify for per se treatment.[91] The relaxation of this requirement is reflected in the failure of recent decisions to even mention the amount of commerce affected by the particular restraint being attacked.[92]

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84 *Id.* at 45; see Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964) *But see* Brown Shoe Co. v. FTC, 339 F.2d 45 (8th Cir. 1964), *petition for cert. filed,* 33 U.S.L. WEEK 3369 (U.S. May 7, 1965) (No. 1141, 1964 Term; renumbered No. 118, 1965 Term)

85 United States v. Loew's Inc., 371 U.S. 38, 49 (1962).

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

87 International Salt Co. v. United States, 332 U.S. 392 (1947). See text accompanying notes 61-67 *supra.*

88 United States v. Loew s Inc., 371 U.S. 38 (1962); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

89 *Cf.* Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), *petition for cert. dismissed,* 381 U.S. 125 (1965), noted in 63 MICH. L. REV. 550 (1965). See also Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962); Switzer Bros. v. Locklin, 297 F.2d 39 (7th Cir. 1961), *cert. denied,* 369 U.S. 851 (1962); Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358 (2d Cir. 1959); Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954); Temperato v. Horstman, 321 S.W.2d 657 (Mo. Sup. Ct. 1959). For detailed analyses of the relationship of trademarks to tying agreements, see generally Note, *Trademarks and the Antitrust Laws,* 68 HARV. L. REV. 895 (1955); Note, *Antitrust Problems in Trademark Licensing,* 17 STAN. L. REV. 926 (1965).

90 Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608 (1953); Standard Oil Co. v. United States, 337 U.S. 293, 311-12 (1949).

91 Northern Pac. Ry. v. United States, 356 U.S. 1, 11 (1958). The court in Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960), *cert. denied,* 366 U.S. 963 (1961) required only that the practice affect more than a "de minimis" amount of commerce.

92 See, *e.g.,* Lessig v. Tidewater Oil Co., 327 F.2d 459, 468 n.21 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964).

Conceivably, the more liberal construction of the above restrictions could have created an environment hostile to all trade restraints regardless of the existence of any circumstances which might excuse the use of such procedures. Quite to the contrary, however, some courts now seem to be making an increasing effort to determine if tying agreements, even though possessing all of the requisites necessary to be declared unreasonable per se, are somehow justified.[93]

IV Business Justification for Tying Agreements

There are certain instances in which tying agreements may be instituted for purposes other than the stifling of competition. Possible justification for a tie-in may be found in a variety of circumstances. A manufacturer who markets a very complex product may feel that he alone can properly install or service the item.[94] He may doubt that his goods will function properly unless used in conjunction with other of his products.[95] A trademark owner may fear that the inherent value of his mark will decrease unless the mark appears where his own, high-quality products are in use.[96] Each of these situations is an example of a condition in which a manufacturer might attempt to protect the good-will of his business through the use of a tie-in. In each of these cases, while the tying agreement might constitute a per se violation of the antitrust laws, the supplier's business may depend on his continued adherence to this particular practice. Admittedly, there are instances in which the manufacturer can adequately protect his interests through the issuance of specifications for the use of his product or through

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[93] See, *e.g.*, Jerrold Electronics Corp. v. Wescoast Broadcasting Co., 341 F.2d 653 (9th Cir. 1965); Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); Baker v. Simmons Co., 307 F.2d 453 (1st Cir. 1962); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961)

[94] See United States v. Jerrold Electronics Corp., *supra* note 93.

[95] See International Salt Co. v. United States, 332 U.S. 392 (1947); International Business Mach. Corp. v. United States, 298 U.S. 131 (1936); United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922).

[96] See Standard Oil Co. v. United States, 337 U.S. 293 (1949); Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965); Baker v. Simmons Co., 307 F.2d 458 (1st Cir. 1962); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962). For a discussion of the advantages and disadvantages resulting from an adherence to a policy of allowing tie-ins in such circumstances, see Comment, *Tying Arrangements Under the Antitrust Laws: The "Integrity of the Product" Defense*, 62 MICH. L. REV. 1413 (1964)

warnings on the product label.[97] Such procedures, however, while possibly offering some protection to the manufacturer from breach of contract suits, are no guarantee that a dissatisfied customer who failed to heed the warnings will refrain from disparaging the manufacturer's products or business.[98]

The protection of the good-will of a supplier is not the only legitimate purpose which a tie-in might serve. A supplier may require his buyers to sign tying agreements as a protective measure against the supplier's competitors who may be engaging in a similar practice[99] or achieving the same result through procedures not available to the seller.[100] Similarly, a small businessman entering a field of strong competition, may institute tying agreements in order to establish a foothold in the area.[101] In each of these situations, tie-ins used for non-monopolistic purposes may still be subject to the per se rule. However, the courts have occasionally recognized the incongruity of a rule which forces a business to cut its own throat[102] and have refrained from extending the per se rule to situations where its application would be incompatible with an equitable result.[103]

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97 See International Salt Co. v. United States, 332 U.S. 392 (1947). The issuance of detailed specifications was felt to be infeasible by the Court in Standard Oil Co. v. United States, *supra* note 96, at 306. *But cf.* Engbrecht v. Dairy Queen Co., 203 F. Supp. 714 (D. Kan. 1962)

98 See, for example, the court's statement in United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961)

> A wave of system failures at the start would have greatly retarded, if not destroyed, this new industry and would have been disastrous for Jerrold.
> *Id.* at 557

99 See, *e.g.*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

100 See, *e.g.*, Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U.S. 959 (1965). For an example of a situation in which competitors of a supplier are accomplishing the same end without the use of a tie-in, see the discussion of the *Crawford* decision in the text accompanying notes 135-37 *infra.*

101 See Harley-Davidson Motor Co., 50 F.T.C. 1047, 1066 (1954). Note that the small businessman may have sufficient economic power in another field to be subject to the terms of the per se rule. For a further discussion of the merits of these defenses, see generally Stedman, *Tying Arrangements*, 22 A.B.A. ANTITRUST SECTION 64 (1964) Professor Stedman draws an interesting, if not hopeful, analogy in discussing the effect of business justification defenses on the application of the per se doctrine to tie-ins:

> Perhaps the situation is not unlike that which occurs under our speed laws. The speed law may read 30 miles per hour, with no exceptions, but if one is stopped for driving at a 35-mile rate at two o clock in the morning taking his wife to the hospital, he is quite likely to beat the rap. *Id.* at 66.

102 Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961).

103 See, *e.g.*, Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). For a history of

The Supreme Court has demonstrated a marked propensity for inconsistency in its treatment of business justification for tie-ins. In *International Salt Co. v. United States*[104] the Court intimated that a tie-in of salt tablets to the supplier's salt dispensing machines would not have been declared illegal if the supplier could have shown that only his salt tablets were capable of inducing peak efficiency from the machine.[105] This implication was ignored, however, in the *Northern Pac.* decision when the Court ruled that restraints having a pernicious effect on competition could be declared illegal without elaborate inquiry into "the business excuse for their use."[106]

By affirming the decision of the district court in *United States v. Jerrold Electronics Corp.*[107] and thereby recognizing that under certain circumstances tie-ins are essential to maintaining a sound business, the Court seems to have retreated somewhat from the overly harsh view expressed in *Northern Pac.* The defendant in *Jerrold* negotiated tying agreements with buyers of its unique television booster device. The purchasers were required to have the system installed and serviced by Jerrold[108] and, in addition, were obliged to buy a full community television antenna system in order to obtain the boosting device. The district court found that both of the requirements necessary for a per se violation had been proven but ruled that because of "unique circumstances" the tie-in involving the service requirement was reasonable.[109] Considering the stern language used by the Supreme Court in *Northern Pac.*, the *Jerrold* court displayed great boldness in stating that "any judicially, as op-

judicial treatment of business justification see Kintner, *Some Everyday Antitrust Problems in Merchandising*, 19 BUS. LAW. 955 (1964).

[104] 332 U.S. 392 (1947). See also International Business Mach. Corp. v. United States, 298 U.S. 131 (1936).

[105] International Salt Co. v. United States, 332 U.S. 392, 398 (1947).

[106] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

[107] 365 U.S. 567 (1961), *affirming* 187 F. Supp. 545 (E.D. Pa. 1960).

[108] Such a tie-in involving services could be prohibited only under § 1 of the Sherman Act since § 3 of the Clayton Act is applicable only when the tied item is a "commodity."

[109] United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). Among the "unique" circumstances which the court listed were:

(a) The equipment involved in the tie-in was sensitive, unstable and in need of continual adjustments.

(b) Most of the prospective buyers lacked the technical know-how to properly install or service the electronic device.

(c) Most of the purchasers were poorly financed and might refuse to pay the defendant if the system did not function perfectly.

(d) The success of the defendant's business depended heavily on acceptance of this particular product. *Id.* at 556.

posed to legislatively, declared *per se* rule is not conclusively binding on this court as to any set of facts not basically the same as those in the cases in which the rule was applied."[110]

The opinion further noted that a blind application of the per se doctrine to a tie-in which has sufficient "redeeming virtue" would result in a gross injustice.[111] Finally, the court held that the tie-in involving the complete antenna system had been reasonable since *Jerrold* could not have been expected to satisfactorily service a competitor's intricate equipment.[112]

The significance of the Supreme Court's affirmation of the *Jerrold* decision cannot be overestimated,[113] especially when viewed together with statements made in two subsequent cases, *Brown Shoe Co. v. United States*[114] and *White Motor Co. v. United States.*[115] In *Brown Shoe,* the Court implied that a tying agreement used by a small company to break into a market would not constitute a violation of the antitrust laws.[116] Similarly, the Court in *White Motor* noted that tying agreements did not necessarily fall within the category of trade practices which were illegal per se.[117] Such statements have opened the door through which evidence of business justification can be admitted in the lower courts.

The Court's most recent statements in this area are not as encouraging as *Brown Shoe* and *White Motor* seemed to forecast. While *Atlantic Ref. Co. v. FTC*[118] did not involve an actual tie-in, the "central competitive characteristic" of the arrangement involved therein was held to be the same as that inherent in a tying agreement — "the utilization of economic power in one market to curtail competition in another."[119] Atlantic had contracted with the Goodyear Tire & Rubber Co. to sponsor the sale of Goodyear products to Atlantic's wholesale and retail outlets. While Goodyear

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110 *Ibid.*

111 *Ibid.*

112 *Id.* at 560. It should be noted that while it refused to punish Jerrold for the previous use of the tie-ins, the court did enjoin the company from any future use of such agreements. The latter ruling was based on the theory that the unique and extenuating circumstances had disappeared as the product became better known and freely accepted.

113 See, *e.g.*, Kintner, *supra* note 103, at 995.

114 370 U.S. 294 (1962)

115 372 U.S. 253 (1963)

116 Brown Shoe Co. v. United States, 370 U.S. 294, 330 (1962) (dictum)

117 White Motor Co. v. United States, 372 U.S. 253, 261 (1963).

118 381 U.S. 357 (1965).

119 *Id.* at 369.

carried the primary sales responsibility, Atlantic was responsible for promoting the sale of Goodyear's products to the dealers — Atlantic receiving a commission on all such sales.[120] The Federal Trade Commission found the sales-commission plan inherently illegal as "a classic example of the use of economic power in one market . . . to destroy competition in another . . . ."[121] and the court of appeals agreed.[122] The Supreme Court affirmed the lower court's decision that the plan represented an unfair method of competition prohibited by the Federal Trade Commission Act.[123] The Court emphasized this by saying:

> Nor can we say that the Commission erred in refusing to consider evidence of economic justification for the program . . . . Upon considering the destructive effect on commerce that would result from the widespread use of these contracts by major oil companies and suppliers, we conclude that the Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves . . . . The anti-competitive effects of this program are clear on the record and render unnecessary extensive economic analysis of market percentages or business justifications in determining whether this was a method of competition which Congress has declared unfair and therefore unlawful.[124]

Whether the lower courts will interpret this language as an indication that future tie-ins are to be found illegal per se remains to be seen. But two factors would seem to operate against this possibility. First, the Court in *Atlantic* carefully refrained from labelling the arrangement illegal per se. The omission of such language would not have been necessary if the Court intended to imply that tie-ins in the future should be subjected to the rigors of the per se doctrine. Second, the facts of the *Atlantic* case are hardly ideal for arguing the merits of tie-ins. The only justification for Atlantic's procedure was economic advantage; no new industry was involved, no specifications were required, no small businessmen were attempting to enter a market. In short, none of the circumstances favorable to a judicial retreat from the per se doctrine were present. Such a case should not be made the basis for future tie-in decisions involving different fact situations. There is some basis

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120 *Id.* at 360-61.

121 Goodyear Tire & Rubber Co., 58 F.T.C. 309, 367 (1961).

122 Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394 (7th Cir. 1964). An opposite decision on substantially the same facts was rendered in Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964).

123 Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965).

124 *Id.* at 371.

for the hope that the lower courts will not rely on *Atlantic* to completely outlaw tying agreements since prior to that case the district courts and courts of appeal had significantly expanded the scope of the "business justification" theory outlined in the *Jerrold* decision.[125] A particularly interesting approach was adopted by the court in *Dehydrating Process Co. v. A. O. Smith Corp.*[126] in order to allow the defendant to justify its use of a tying agreement. The decision utilized the requirement of separate products[127] to escape the application of the per se rule when the result of such application would have been unfair. As the First Circuit Court stated,

> Articles, though physically distinct may be *related through circumstances.* The sound *business interests* of the seller or, phrasing it another way, a substantial hardship apart from the loss of the tie-in sale may be such a circumstance We must first consider what may be fairly treated by a seller as inseparable.[128]

It has been pointed out that the *Dehydrating* decision recognized business justification despite the fact that the defendant was not a new business like Jerrold but rather was a *going concern* trying to maintain its good reputation.[129]

In addition to the *Dehydrating* decision, the First Circuit in the subsequent case of *Baker v. Simmons Co.*[130] recognized the persuasiveness of business justification as an excuse for a tying agreement. Simmons had been accused of unlawfully requiring motels which desired to display its trademark to also purchase its mattresses. While admitting that Simmons' tie-in of the use of its mattresses by motels

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[125] What could have been the greatest extension of the concept was implied in Albert H. Cayne Equip. Corp. v. Union Asbestos & Rubber Co., 220 F. Supp. 784 (S.D. N.Y. 1963) when the court stated:

> Thus it seems that, despite earlier statements that tying arrangements are illegal *per se*, they are 'not necessarily so.' We conclude therefore that *tying arrangements are not per se violations* of Section 1 of the Sherman Act. *Id.* at 788. (Emphasis added.)

The force of this statement was diluted, however, by the court's subsequent holding that tying agreements were illegal under the Sherman Act when the supplier had sufficient economic power and the agreement affected a not insubstantial amount of commerce. This, of course, is almost a verbatim restatement of the per se rule.

[126] 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961). In *Dehydrating*, the defendant had refused to sell a grain unloader unless it was to be used in conjunction with a silo manufactured by defendant. Defendant justified the tie-in on the basis that prior to its establishment, 50% of the customers purchasing the unloader had complained that it would not work correctly when used on a competitor s silo.

[127] See text accompanying notes 28-39 *supra.*

[128] Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 655 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961). (Emphasis added.)

[129] Kintner, *supra* note 103, at 996.

[130] 307 F.2d 458 (1st Cir. 1962).

to advertising containing its trademark might be contrary to a literal interpretation of section 3 of the Clayton Act, the court held that the company had a legitimate interest in seeing that the public was not confused by the use of the Simmons' trademark[131] and thus was justified in the employment of a tie-in to protect against such confusion.

In *Susser v. Carvel Corp.*[132] the Second Circuit refused to invalidate a tying agreement by which a supplier of ingredients for ice cream which eventually was to be sold under his trademark required the purchase of a machine as a condition to the sale of the ingredients. The supplier contended that the particular machine was essential to the production of ice cream which would conform to the high quality which the public associated with the supplier's mark. In upholding the legality of the arrangement, the court noted that protection of the supplier's goodwill required such an agreement since alternative measures, such as the use of specifications, would be impractical in this situation.[133]

The Sixth Circuit appears to be divided on the question of whether business considerations should be examined in determining the legality of a tie-in.[134] In *Crawford Transp. Co. v. Chrysler Corp.*[135] the plaintiff charged that Chrysler was practicing an unlawful tie-in by requiring its auto distributors to accept the manufacturer's choice of carrier service, for which the dealer eventually paid, as a contingency to the grant of a franchise to distribute Chrysler's automobiles. The court declined to find the tying agreement illegal since Chrysler not only did not directly profit from the tie-in arrangement,[136] but also was forced to adopt this procedure because of business conditions. The latter finding was based on the fact that for years Chrysler's two main competitors had been employing a substantially smaller number of carriers at a considerable savings to themselves. Chrysler's previous practice of allowing its

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131 *Id.* at 469.

132 332 F.2d 505 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965).

133 *Id.* at 519. *But see* Switzer Bros. v. Locklin, 297 F.2d 39 (7th Cir. 1961), *cert. denied*, 369 U.S. 851 (1962). See generally, Note, *Quality Control and the Antitrust Laws in Trademark Licensing*, 72 YALE L.J. 1171 (1963).

134 *Compare* Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 381 U.S. 954 (1965), *with* Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir. 1965).

135 Crawford Transp. Co. v. Chrysler Corp., *supra* note 134.

136 *Id.* at 939. The defendant (Chrysler) used the tie-ins to substantially decrease the number of carriers which previously transported its cars to dealers. The result was a considerable savings to Chrysler. But the court found this to be an indirect profit from the agreement and thus not illegal.

dealers to choose their carriers had resulted in expensive, time-consuming delays because of the large number of carriers shipping Chrysler cars. Since Chrysler was now attempting to reduce the number of its carriers in order to better compete with Ford and General Motors, its use of a tie-in as a means to that end was held to be justified.[137]

Unlike the decision in *Crawford,* the Sixth Circuit failed to consider business justification in *Associated Press v Taft-Ingalls Corp.*[138] The case involved a tying agreement by which the Associated Press attempted to force newspapers desiring to utilize one of its wire services to also accept other less beneficial services. After methodically examining the tie-in for the existence of separate products, sufficient economic power, and influence on a not insubstantial amount of commerce, the court summarily branded the arrangement illegal without considering any mitigating circumstances which might have existed.[139]

In the Ninth Circuit case of *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.,*[140] the court conducted a lengthy investigation into the possible existence of circumstances which might justify the alleged tie-in, but failed to discover any justification and ruled that the agreement was unlawful.[141] The conflict between the per se rule and the rule of reason is clearly distinguishable by the statement in the opinion that while cases such as *Northern Pac.* and *International Salt* might have authorized the finding that the tie-in was illegal per se the court nevertheless declined to find the agreement unlawful before investigating as to whether "there was a bona fide and *reasonable business necessity* for selling his (the supplier's) product only with another product or service."[142]

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[137] Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934, 939 (6th Cir. 1964), *cert. denied,* 380 U.S. 954 (1965). Whether the fact that competitors are practicing the same restraint, or achieving the desired end by means unavailable to the supplier is a mitigating factor in determining the legality of a tie-in, is questionable. *Cf.* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 623-24 (1953); Standard Oil Co. v. United States, 337 U.S. 293, 299 (1949)

[138] 340 F.2d 753 (6th Cir. 1965) The three judges sitting in the *Taft* case differed from those who gave the *Crawford* decision.

[139] *Id.* at 769.

[140] 341 F.2d 653 (9th Cir. 1965)

[141] *Id.* at 663. The defendant has the burden of showing sufficient business justification. United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

[142] Jerrold Electronics Corp. v. Wescoast Broadcasting Co., 341 F.2d 653 (9th Cir. 1965). (Emphasis added.)

V. CONCLUSION

Decisions such as those in *Crawford, Dehydrating Process,* and the two *Jerrold* cases indicate the beginning of a more tolerant judicial attitude toward tying agreements. But this trend is subject to change by future pronouncements of the Supreme Court. The major significance of future decisions will lie not in their ultimate holdings, but rather in their disposition toward business considerations which might be relied upon by the prospective defendants as a justification for the use of a tie-in. Should the Court completely ignore such evidence as it did in the *Atlantic* decision,[143] the applicability of the per se rule to tie-ins will be firmly re-established.

On the other hand, any further indication by the Court that it is retreating from the strict language of *Northern Pac.* may initially have unfortunate consequences. For example, a further decrease in opposition to tie-ins might invite rash attempts by business to capitalize on the developing trend. Few of these efforts will be prompted by reasons other than a desire to monopolize. In order to meet such a possibility, the courts must thoroughly investigate these future practices for evidence of monopolistic intent. It is submitted that such investigations could overcome the initial drawbacks of expressly recognizing business justification for tie-ins and therefore that such recognition should be given by the Court. While the per se rule presents a more inviting alternative because of its easily applied criteria, such a strict doctrine appears to be out-of-place in an area of commerce where complexity is the rule rather than the exception. The burdens which the courts must shoulder under a less restrictive view are necessary to an equitable administration of the antitrust laws. The Supreme Court may have already recognized this with its decision in *Jerrold,* and its statements in *Brown Shoe* and *White Motor* If further relaxation of the application of the per se doctrine is forthcoming, its arrival will be a welcome and entirely justified addition to the interpretation of the antitrust laws.

DALE C. LAPORTE

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[143] Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965).