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Antitrust Violation as a Defense to Breach of Contract: An Expanded Policy Analysis

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CASES NOTED

Antitrust Violation as a Defense to Breach of Contract: An Expanded Policy Analysis

The Second Circuit, in the noted case, delineated the policy considerations in deciding whether to permit an antitrust defense in a contract action. These considerations are: whether enforcement would result in unjust enrichment; whether enforcement would aid and abet the alleged antitrust violation, and; whether the defense would complicate the action. The author contends that the court misapplied the policies set forth on the facts therein for there can be no unjust enrichment where an executory contract is in question; there is an aiding and abetting of a Sherman Act violation by enforcing the contract; and there is no complication of the contract action because the alleged violation is apparently susceptible to ready proof. Upon reaching this conclusion the author contends the antitrust defense should be available against the third party assignee.

Viacom International, Inc. brought an action against Tandem Productions, Inc., producer of the popular television show, "All in the Family," for declaration of its rights as assignee[1] of an exclusive license to distribute and syndicate[2] the television program pursuant to an agreement between Tandem and the Columbia Broadcasting System, Inc. (CBS).[3] In defense, Tandem asserted that CBS could not validly assign the distribution and syndication rights to Viacom,[4] and furthermore, that the contract violated federal antitrust

1. Columbia Broadcasting System, Inc. (CBS) obtained the Federal Communications Commission's (FCC) approval to merge CBS Enterprises, Inc., a subsidiary of CBS which handled the distribution and syndication of television programs, into Viacom through a spin-off transaction whose stock was thereby distributed to the CBS stockholders pursuant to the FCC's directions. *In re* Columbia Pictures Indus., Inc., 30 F.C.C.2d 9, *aff'd sub nom.* Iacopi v. F.C.C., 451 F.2d 1142 (9th Cir. 1971). CBS then assigned all rights it owned to distribute and syndicate television shows to Viacom.

2. The distribution and syndication business is: (a) domestic rerun distribution of programs after their network run is completed and, (b) the foreign distribution at the same time as the network broadcast. Viacom Int'l Inc. v. Tandem Productions, Inc., 368 F. Supp. 1264 (S.D.N.Y. 1974).

3. The district court determined that Tandem and CBS formed a binding oral agreement as of July 10, 1970, in which Tandem granted broadcast, distribution, and syndication rights of "All in the Family" to CBS. *Id.* at 1269.

4. Tandem argued that the oral agreement did not include the right to assign. However,

law,[5] thereby making it unenforceable.[6] Tandem alleged that it was coerced into a "tie-in"[7] of the distribution and syndication rights to broadcasting rights, an arrangement which is illegal under Section 1 of the Sherman Act.[8] Tandem contended this Section 1 violation would preclude Viacom, CBS's assignee, from maintaining the action. Viacom argued that the tying arrangement was "inherently legal" and that the contract constituted an "intelligible economic transaction."[9] Tandem warned that the court's "enforcing the contract would aid and abet the precise conduct made unlawful by the Sherman Act."[10] The district court, upholding the assignment, enjoined Tandem from selling the rights to another and found that the contract was not subject to the defense that it was in violation of the antitrust laws.[11] The Court of Appeals for the Second Circuit *held*, affirmed: A defendant is precluded from interposing the illegality of a contract under the antitrust laws as a defense to an action on a contract where the plaintiff, who would suffer unjustly by the prolonged determination of the defense, was not a party to the ille-

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an assignment clause was added to the final written agreement as a boilerplate clause. Tandem objected to the assignment clause, but CBS refused to omit it. Tandem finally signed the contract in Spring 1971 telling CBS that it had reservations whether CBS could validly assign the rights. The district court, having found a meeting of the minds under the oral agreement, declared this clause was not material, and therefore it was valid and effective as of July 10, 1970, the date of the oral agreement. *Id.* at 1272-73.

5. Section 1 of the Sherman Antitrust Act provides: "Every 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 . . . ." 15 U.S.C. § 1 (Supp. IV, 1974).

6. "A party to an illegal bargain can[not] . . . recover damages for breach thereof . . . ." RESTATEMENT, CONTRACTS § 598 (1932). For exceptions, *see Id.* at §§ 599-609.

7. A tying arrangement is "an agreement by a party to sell [or buy] one product but only on the condition that the buyer [or seller] also purchases [or sells] a different (or tied) product . . ." Northern P. Ry. v. United States, 356 U.S. 1, 5 (1958). *See generally* Baldwin and McFarland, *Tying Arrangements in Law and Economics*, 8 ANTITRUST BULL. 743 (1963).

8. "[T]ying arrangements serve hardly any purpose beyond the suppression of competition." Standard Oil Co. of California v. United States, 337 U.S. 293, 305 (1949). "[Tying arrangements] are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ." Northern P. Ry. v . United States, 356 U.S. 1, 6. *See* Black v. Magnolia Liquor Co., Inc., 355 U.S. 24, 25 (1957); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965); *cf.* Solomon, *An Analysis of Tying Arrangements: The Offer You Can't Refuse*, 26 MERCER L. REV. 547 (1975). *But see* Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW. U. L. REV. 626 (1965).

9. Viacom Int'l Inc. v. Tandem Productions, Inc., 526 F.2d 593, 598 (2d Cir. 1975). *See* Kelly v. Kosuga 358 U.S. 516, 521 (1959).

10. 526 F.2d at 598. *See* Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 261-62 (1909) ("Court will not lend its aid" to an illegal agreement).

11. Viacom Int'l Inc. v. Tandem Productions, Inc., 368 F. Supp. 1264 (S.D.N.Y. 1974).

gality. *Viacom International, Inc. v. Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975).

It is a well-settled rule in contract law that an illegal contract will not be enforced by the courts.[12] As with other rules of law, there are exceptions. The exception considered in *Viacom* is the alleged violation of the federal antitrust laws.

Generally, the acceptance of the defense of antitrust illegality has been at the rather arbitrary mercy of the courts.[13] The courts have done little but give lip service to two overriding policy considerations. The first consideration is whether either of the parties would be unjustly enriched by upholding or dismissing the defense. The second involves a determination of whether dismissal of the defense would make the court a party to the illegality. Instead, the courts have capriciously applied artificial standards,[14] which look to see if the agreement in violation is "collateral,"[15] "severable,"[16] "inherently or intrinsically legal"[17] or "an intelligible economic

12. RESTATEMENT, CONTRACTS § 598 (1932).

13. Since the enactment of the Sherman Act in 1890, the United States Supreme Court has in general not acted favorably toward the use of antitrust violations as a defense in breach of contract actions. The Court has ruled on the defense eight times. It has upheld the defense twice. Boston Store v. American Graphophone Co., 246 U.S. 8 (1918); Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909). It has dismissed the defense six times. Kelly v. Kosuga, 358 U.S. 516 (1959); Bruce's Juices, Inc., v. American Can Co., 330 U.S. 743 (1947); A.B. Small Co. v. Lamborn & Co., 267 U.S. 248 (1925); D.R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165 (1915); Cincinnati Packet Co. v. Bay, 200 U.S. 179 (1906); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).

Although the last Supreme Court case to uphold the defense was decided in 1918, judicial recognition of the availability of the defense can be found more recently. Justice Harlan, in a proceeding on an application for a stay pending certiorari stated:

> The claim that the contract in suit entailed a federally illegal "tying arrangement" cannot be regarded as lacking in substance . . . and does not appear to be precisely controlled by any decision of this Court. The posture of federal law relating to the availability of the asserted antitrust defense in this contract action is to say the least highly debatable.

American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 87 S. Ct. 1, 2 (1966) (mem.).

For an in depth historical survey of the courts' disposition towards the antitrust defense *see* Lockhart, *Violation of Anti-trust Laws as a Defense in Civil Actions*, 31 MINN. L. REV. 507 (1947).

14. The courts' reasons for dismissing the defense have been tenuous in order to preserve the equities they perceived, and at the same time to prevent criticism that they were enforcing the alleged illegality. *See, e.g.*, Kelly v. Kosuga, 358 U.S. 516, 520-21 (1959); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 549 (1902). *See generally* Lockhart *supra* note 13.

15. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 549 (1902).

16. *Id.*; Cincinnati Packet Co. v. Bay, 200 U.S. 179, 185 (1906).

17. D.R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165, 177 (1915); *see*

transaction in itself."[18] Other courts have stated that the antitrust laws provide for exclusive remedies.[19] These practices have served to facilitate the courts' dismissal of the defense, but have not adequately resolved the real conflict between the policy considerations. Furthermore, they have failed to provide for consistent and equitable results.

For example, in *Connolly v. Union Sewer Pipe Co.*,[20] an action to recover on promissory notes given for the purchase of pipe, the Supreme Court rejected the antitrust defense, which alleged that unreasonable prices were fixed by a combination of competitors including plaintiff, and employed the "collateral-severable" standard, stating:

> The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and other corporations whereby an illegal combination was formed for the sale of . . . pipe.[21]

Continental Wall Paper Co. v. Louis Voight & Sons Co.,[22] one of two Supreme Court decisions[23] upholding the defense, recognized that the contract was part of an overall illegal scheme with the effect of

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Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 261 (1909) (overall illegal scheme).

18. Kelly v. Kosuga, 358 U.S. 516, 521 (1959).

19. Chief Justice White, in what appears to be an effort to bury the antitrust defense in *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, *supra* note 17, stated that remedies provided by the antitrust laws were *exclusive* and the responsibility of enforcing its provisions were expressly cast upon the Attorney General. 236 U.S. 165, 173-75 (1915). However, the Chief Justice ignored Section 4 of the Clayton Act, passed 5 months prior to the *Wilder* decision, which authorized private lawsuits by anyone injured by conduct in violation of the antitrust laws. 15 U.S.C. § 15 (1970).

Nevertheless, 10 years later, the Court in *A. B. Small v. Lamborn & Co.*, *supra* note 13, held that "it is only where the invalidity is inherent in the contract that the [Sherman] [A]ct may be interposed as a defense. With that exception the remedies which the act provides for violations of it are exclusive." 267 U.S. 248, 252 (1925); *cf.* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947) (remedies provided by the Robinson-Patman Act are exclusive). *But see id.* at 758-61 (Murphy, J., dissenting, with Black, Douglas & Rutledge, JJ., joining in dissent); United States v. Loew's Inc., 371 U.S. 38, 51 (1962); Tampa Elec. Co. v. Nashville Coal Co., 276 F.2d 766, 783-84 (6th Cir. 1960) (Weick, J., dissenting). *See also* Lockhart, *supra* note 13, at 570 (present antitrust sanctions are inadequate); *Fifty Years of Sherman Act Enforcement* 49 YALE L. J. 284, 298 (1939-40).

20. 184 U.S. 540 (1902).

21. *Id.* at 549.

22. 212 U.S. 227 (1909).

23. The other decision is Boston Store v. American Graphophone Co., 246 U.S. 8 (1918). Here an illegal resale price maintenance contract was held illegal on its face. Therefore, the Court refused to enjoin defendant's violation of the agremement.

restraining trade and commerce. Therefore, the Court refused to become a party to the illegality by enforcing the agreement.[24]

Viacom is significant in that the court of appeals explicitly acknowledged that such standards are "too imprecise"[25] and recognized the arbitrary discretion they give to the courts:

> Whether a court classifies [an agreement] as an "intelligible economic transaction in itself" or as "part of . . . any general plan or scheme that the law condemned;" [citing *Continental*], may well depend on how much of the circumstances surrounding the [agreement] the court is willing to consider. Similarly, a determination of whether a contract . . . is "inherently invalid" may depend on the court's perception of the contract as a separate or "collateral" entity or as an integral part of an attempt to stifle competition, enforcement of which would effectuate "the precise conduct made unlawful" . . . . While application of the doctrine of severability . . . is a possibility, it would be difficult to prove that a finding that the two agreements [referring to illegal tying arrangement] were integrally related was clearly erroneous.[26]

Viacom shifts the emphasis to a consideration and balancing of three competing policy issues and their relation to an independent assignee of the agreement in question: (1) the policy of preventing unjust enrichment;[27] (2) the policy of prohibiting the courts from aiding and abetting the antitrust violations; and (3) the policy of keeping simple contract actions simple.[28]

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24. *Continental* involved an action to recover the purchase price on goods sold and delivered. The Court, in sustaining the antitrust defense, reasoned

> that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

212 U.S. 227, 262. *See* Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963).

The Court in *Kelly v. Kosuga* limited *Continental* to its facts, finding that the defense would be upheld only when the contract was inherently illegal, the enforcement of which would make the courts a party to the carrying out of the restraints forbidden by the Sherman Act. 358 U.S. 516, 520 (1959).

25. 526 F.2d at 598.

26. *Id.* (footnote omitted).

27. *Id.* at 599.

28. *Id.* at 599-600. *See* Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971). *See generally* Sobel, *Antitrust Defenses to Contract Actions: A Question of Policy Priorities*, 16 ANTITRUST BULL. 455 (1971).

Unjust enrichment is a valid concern of the courts. If the defendant refuses to pay for goods delivered[29] or services performed,[30] claiming illegal price fixing as a defense, he would in fact be getting something for nothing if the defense were upheld. Justice Holmes, dissenting in *Continental* put it quite succinctly when he advocated the principle of "preventing people from getting other people's property for nothing when they purport to be buying it."[31]

Generally, where the contracts have been executed, the courts have had no problem in weighing the equities in favor of the plaintiff,[32] but where the contracts were executory, the majority of cases have upheld the defense.[33] Neither party could claim the other had received something for nothing.

The court in *Viacom*, guided by the major and most recent Supreme Court decision to rule on the antitrust defense, *Kelly v. Kosuga*,[34] examined Tandem's claim "that its arrangement with Viacom present[ed] no possibility of unjust enrichment because no distribution or syndication of 'All in the Family' [had] yet occurred and Tandem [had] received no payments for these services."[35] Tandem had raised a valid argument—the contract was still executory and therefore a finding that the contract was invalid could not unjustly enrich them. Furthermore, if the court were to uphold the contract, it would be forcing the parties to carry out the illegality in the future, thereby aiding and abetting the violation of the Sherman Act.[36]

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29. *See, e.g.*, Kelly v. Kosuga, 358 U.S. 516 (1959).

30. *See, e.g.*, Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968).

31. 212 U.S. 227, 271 (1909) (Holmes, J., dissenting).

Generally, the courts have had great difficulty applying this principle, for they have too often forgotten that the plaintiff may be unjustly enriched as well if the defense is not sustained and the contract has not yet been executed.

32. *See, e.g.*, Kelly v. Kosuga, 358 U.S. 516 (1959); Atlantic Richfield Co. v. Malco Petroleum, Inc., 471 F.2d 1258 (6th Cir. 1972); Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968).

33. *See, e.g.*, Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965); Tampa Elec. Co. v. Nashville Coal Co., 276 F.2d 766 (6th Cir. 1960), *rev'd on other grounds*, 365 U.S. 320 (1961); Revlon, Inc. v. Williams Int'l, Inc., 214 N.Y.S.2d 456 (1961). *See also* note 37 *infra*.

34. 358 U.S. 516 (1959). In ruling on the antitrust defense in an action to recover the purchase price on delivered goods, the Court held that "[p]ast the point here the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act, the courts are to be guided by the overriding general policy [of preventing the unjust enrichment of the defendant]." *Id.* at 520-21.

35. 526 F.2d at 599.

36. *See* note 14 *supra* and cases cited note 33 *supra*.

Unpersuaded by the decision in *Associated Press v. Taft-Ingalls Corp.*,[37] which allowed the defendant to prove that the contract it had breached was an illegal tying arrangement, and which refused to enforce the contract which required payment for unwanted *future* services from plaintiff, the court in *Viacom* recognized that even if the distribution and syndication license was executory, Tandem may still obtain unjust enrichment by continuing to receive higher fees for the broadcast rights.[38] On the basis of the district court's findings, however, it was questionable whether the amount of payments for the broadcast rights reflected the fact that CBS was also receiving the distribution and syndication rights.[39]

Even if the consideration for the broadcasting rights had been adjusted to include some compensation for the distribution and syndication rights, the court of appeals failed to adequately consider the coercive nature of this tying arrangement[40] and the objections that Tandem had made to the tying arrangement and assignment of rights to Viacom. An analysis of these factors may show that it was the plaintiff and CBS who were unjustly enriched, for it was they who took advantage of their own anticompetitive economic power.

Tandem, during contract negotiations with CBS, unsuccessfully sought to retain the syndication rights. CBS, one of three national networks, had sufficient economic power[41] over the tying product (broadcasting during prime time), to coerce Tandem to

37. 340 F.2d 753 (6th Cir.), *cert. denied*, 392 U.S. 820 (1965); *accord*, Atlantic Richfield Co. v. Malco Petroleum, Inc., 471 F.2d 1258, 1260-61 (6th Cir. 1972) (distinguishing *Associated Press* on ground that *Associated Press* involved an executory contract and *Atlantic Richfield* involved an executed contract).

38. 526 F.2d at 599.

39. The district court determined that the consideration for the broadcast rights was separate from the consideration for the distribution and syndication rights. Viacom Int'l Inc. v. Tandem Productions, Inc., 368 F. Supp. 1264, 1277 (S.D.N.Y. 1974).

40. "[A]ll tying arrangements are . . . nothing more than the naked application of coercion." Solomon, *An Analysis of Tying Arrangements: The Offer You Can't Refuse*, 26 MERCER L. REV. 547, 548 (1975). "Tying arrangements are abhorred by the courts primarily because they foreclose a substantial quantity of business to competitors and extend preexisting economic power to new markets for no good justification." American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1137 (2d Cir. 1971). *See* note 10 *supra*.

41. Sufficient economic power is required to establish an illegal tying arrangement. Uniqueness may establish sufficient economic power. Television programs have been found to be of a unique nature sufficient to give one of the three major networks leverage to gain power over the tying product. American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848, 850 (S.D.N.Y. 1963).

include the distribution and syndication rights if Tandem wanted the program to have access to prime time television.[42] Tandem was thereby restrained from selling the rights in the open market.[43]

This monopoly power inherent in the major networks[44] has been expressly recognized by the Federal Communications Commission (FCC), but since the FCC has no jurisdiction to impose sanctions for antitrust violations, it promulgated the "financial interest rule," on May 4, 1970 to prevent such tying arrangements.[45] Viacom was fortunate that the effective date of the "financial interest rule" was delayed until July 23, 1971 by actions by the networks challenging the rule,[46] otherwise Viacom would have had no recourse.[47]

It may be argued that Tandem was subjected to further coercion when unduly required to accept the assignment of rights to Viacom.[48] The court of appeals did not view this as additional

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42. Prime time television is virtually the only economically profitable market for television comedy entertainment programs. Viacom Int'l Inc. v. Tandem Productions, Inc., 368 F. Supp. 1264, 1276 (S.D.N.Y. 1974).

43. The court in *Associated Press* recognized that: "One of the evils inherent in any tying arrangement is that it forces the buyer [or seller] to give up his independent judgment as to whether, or where, to purchase [or sell] the tied product." 340 F.2d at 762.

44. The great majority of television shows are produced by independent producers, like Tandem. They are then sold to one of the three major networks who control access to the broadcasting. In 1964, these networks produced 19.8 percent of prime time programs, yet obtained syndication and distribution interest in 75.7 percent of all programs televised that year. Similarly, CBS, in 1968, produced 17.8 percent of the prime time shows it broadcasted, but gained syndication rights to 79.5 percent of the programs carried on prime time. Viacom Int'l Inc. v. Tandem Productions, Inc., 368 F. Supp. 1264, 1276 (S.D.N.Y. 1974).

45. 47 C.F.R. § 73.658(j)(1)(ii) (1972). The "financial interest rule" states

> (j) . . . no television network shall:
>
> (ii) After August 1, 1972, acquire any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network. . . .

46. Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470 (2d Cir. 1971).

47. Had the rule's original date of May 4, 1970 not been stayed, CBS would have been precluded from acquiring the distribution and syndication rights under the contract formed July 10, 1970.

48. Relying on a binding oral agreement and believing all material elements had been negotiated, Tandem moved into CBS's offices and began production. No right to assign had been reserved, therefore Tandem had the right to assume that all syndication and distribution would be performed by CBS or its subsidiary, CBS Enterprises, which normally handled distribution. When CBS presented a draft of the agreement which contained a right of assignment clause, Tandem made numerous objections, but CBS did not relent. Tandem, having begun work on the show and having no other access to prime time, was forced to

coercion, but as a reason for dismissing the antitrust defense. Finding that Viacom was an independent assignee, the court suggested that the antitrust violation "may be vindicated in a separate action . . . . where . . . the alleged wrongdoer under the antitrust laws is not a party to the contract in dispute."[49]

The court in *Viacom* gave short shrift to the coercions inherent in the tying arrangement and the assignment, but implied that the defense could be considered if the plaintiff were CBS,[50] the original party to the contract, since Tandem's rights to distribute were *eliminated* by CBS's tying arrangement—the first coercion. In finding that upon an assignment—the second coercion—Tandem would be unjustly enriched if the defense were upheld, the decision in *Viacom*, in a sense is saying, two wrongs make a right. In other words, a forced assignment will relieve an illegal tying arrangement. The court of appeals has ignored the fact that Tandem will still be the victim of monopoly power, required to carry out an executory contract with an assignee to which it has objected.

Judge Lumbard, articulating the necessary elements to prove an illegal tying arrangement,[51] attempted to justify the court's analysis of unjust enrichment by placing unprecedented emphasis on the policy of keeping simple contract actions simple.[52] Citing *Dickstein v. duPont*,[53] Judge Lumbard reasoned that, " 'such defenses would tend to prolong and complicate contract disputes' and thus convert a facially simple litigation into one involving the complexities of antitrust law."[54]

However, the argument that the antitrust defense will prolong and complicate the litigation is unpersuasive. In all cases where the

succumb. Viacom Int'l Inc. v. Tandem Productions, Inc. 368 F. Supp. 1264, 1270-75 (S.D.N.Y. 1974).

49. 526 F.2d at 598.

50. *Id.* at 600.

51. *Id.* at 599-600. Coniglio v. Highwood Servs., Inc., 495 F.2d 1286, 1289 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974) delineated the essential elements: (1) two separate and distinct products; (2) sufficient economic power in the tying market to coerce the purchase of the tied product; (3) anti-competitive effects in the tied market; and (4) involvement of a substantial amount of interstate commerce in the tied market. These factors were analyzed to determine whether the owners' of the Buffalo Bills policy of conditioning the purchase of season tickets, to a requirement to buy exhibition game tickets, constituted an illegal tying arrangement.

52. This policy consideration has never been expressly relied upon by any Supreme Court decision.

53. 443 F.2d 783 (1st Cir. 1971).

54. 526 F.2d at 599.

defense has been upheld, the violation was "apparently susceptible to ready proof."[55] Furthermore, where the antitrust issue would tend to complicate, etc., the financial burden upon the defendant to prove the defense would be prohibitive in relation to the benefit derived.[56] It should also be noted that the policy of the federal rules favors resolving all disputes between the parties in a single litigation.[57]

The court of appeals assumes that toleration of the antitrust defenses would provide the defendant with his own coercive weapon—the ability to threaten plaintiffs with lengthy and expensive litigation, forcing plaintiff to forego prosecution or make an unsatisfactory settlement.[58] This last consideration appears to have convinced the court that the balance of the equities lay with the plaintiff. Therefore, "rather than force Viacom to meet the vagaries of an antitrust defense action,"[59] the court dismissed Tandem's antitrust defense.

The *Viacom* decision is unique in its extension of the consideration of whether to sustain the defense to a situation where the plaintiff is not an original party to the contract. The weight placed by the court on the policy of keeping contract actions simple, suggests that the burden of proving that one will derive no unjust enrichment from a recognition of the antitrust defense, may be a nearly impossible burden to sustain, thereby depriving the defendant of an equitable result.

The court of appeals' recognition and forthright consideration of the actual policy issues at hand is laudable. In fact, *Viacom* may have eliminated the artificial classifications which have been arbitrarily applied by the courts. Having taken this first step towards a realistic and equitable approach to the consideration of an antitrust defense in a breach of contract action, the court has come up shy. It has failed to take the logical second step and proffer a remedy

55. Lockhart, *supra* note 15 at 573. "[T]he importance of this factor can easily be exaggerated."

56. *Id.* at 574.

57. FED. R. CIV. P. 13.

58. 526 F.2d at 599. *Contra*, Gutor Int'l A.G. v. Raymond Packer Co., Inc., 493 F.2d 938 (1st Cir. 1974). The court considered whether the interposition of an antitrust counterclaim would make for a credible threat to the plaintiff. The court reasoned that since defendant could threaten an independent action, an opportunity to bring the counterclaim did not increase the severity of the threat.

59. 526 F.2d at 600.

satisfactory and equitable to all the parties—restitution to Viacom at a fair price for any services performed and non-enforcement of any executory portions of the contract.[60]

Restitution would not give rise to unjust enrichment, nor complicate the action, yet it would restore Viacom to its original position, suffering no more than a loss of anticipated profits. Such a resolution may serve to negate the anticompetitive abuses incurred by Tandem and simultaneously maintain the integrity of the antitrust laws.

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Sentencing Upon Revocation of Probation in Florida

The Supreme Court of Florida held that a trial court is free to impose any sentence upon revocation of probation which it might have originally imposed despite the fact that the trial court had originally imposed a lesser sentence. In so doing, the court overruled the overwhelming weight of authority exhibited by the lower appellate courts. The author suggests that the defendant's constitutional protection against being twice placed in jeopardy for the same offense and his right to counsel may have been infringed upon in the process.

The defendant pleaded guilty to possession of heroin, issuing a worthless check, and issuing a forged instrument. The trial judge found the defendant guilty and sentenced him to a term of imprisonment of 1 year in the county jail for each offense, to be followed by 5 years probation. All sentences were to be served concurrently. Thereafter, the trial court amended each of the sentences by reducing the period to be spent in the county jail to the 85 days then served, and by suspending the execution of the remainder of the jail sentences; but the court retained the 5 year probationary period. The defendant subsequently violated his probation by committing

60. *See* Comment, *The Defense of Antitrust Illegality in Contract Actions*, 27 U. CHI. L. REV. 758, 776 (1960).