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THE TYING CONTRACT AND ITS TREATMENT BY
THE FEDERAL COURTS: A CRITICAL ANALYSIS

One of the major evils which the anti-trust laws attempt to alleviate is the illegal foreclosure of competition from markets for goods and services. It is an economic axiom that barriers to entry maintained by established competitors in a particular market enable these firms (or a single firm) to market products at a cost to the consumer substantially above that which the forces of a truly open market would allow.¹ Market foreclosure is, almost by definition, a highly efficient barrier to entry, and because of the pernicious effect of this practice, it has been consistently condemned by the federal judiciary,² both under the "restraint of trade" concept of the Sherman Act³ and the substantial-lessening-of-competition criteria of the Clayton Act,⁴ the two bulwarks of the anti-trust laws. This has been so even where the foreclosure has not been complete.⁵

Historically, one of the most effective market foreclosure techniques has been the "tie-in," or "tying contract," defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase the product from another supplier."⁶ It can be effective only where the seller exerts sufficient economic influence over the market for the first, or "tying" product to force buyers "to make a less than optimal choice"⁷ in the second, or "tied" product, thus insulating it "from the competitive stresses of the open market."⁸ With regard to competing sellers, the practice enhances the difficulty of market entry, for the would-be competitors will be forced "not only to match existing sellers of the tied product in price

1. See generally C. McCONNELL, *ECONOMICS PRINCIPLES, PROBLEMS, AND POLICIES* chs. 27-30 (4th ed. 1969).

2. See *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949); *United States v. American Linen Supply Co.*, 141 F. Supp. 105, 112 (N.D. Ill. 1956); *Standard Register Co. v. American Sales Book Co.*, 56 F. Supp. 475 (W.D. N.Y. 1944), *aff'd*, 148 F.2d 612 (2d Cir. 1945), *cert. denied*, 326 U.S. 732 (1945); *Lord v. Radio Corp. of America*, 35 F.2d 962 (D. Del. 1929), *aff'd sub nom.*, *Radio Corp. of America v. DeForest Radio Co.*, 47 F.2d 606 (3d Cir. 1931), *cert. denied*, 283 U.S. 847 (1931).

3. 15 U.S.C. §§ 1-7 (1963).

4. *Id.* §§ 12-27 (1963).

5. *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958).

6. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958).

7. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 512 (1969) (dissenting opinion).

8. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953).

and quality, but to offset the attraction of the tying product itself,"⁹ a practice at the most impossible and at the least "significantly more expensive than simple entry into the tied market."¹⁰

While the tie-in doctrine originated under the language of section 3 of the Clayton Act,¹¹ its major development has come with the application to it of the more stringent standards of section 1 of the Sherman Act.¹² The latter was interjected for two reasons, one practical, the other theoretical. On the one hand, since section 3 of the Clayton Act applies only to "goods, wares, merchandise, machinery, supplies, or other commodities,"¹³ it was deemed inapplicable in cases involving products unspecified by the statute.¹⁴ A more important consideration, however, appears to have been the desire of the courts to apply the Sherman Act concept of *per se* illegality to the tying contract. Under section 1 of that act's "all embracing enumeration,"¹⁵ the Supreme Court has recognized "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."¹⁶ Thus, having declared market foreclosure to be an unreasonable *per se* practice,¹⁷ it was inevitable

9. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 513 (1969) (dissenting opinion).

10. *Id.*

11. 15 U.S.C. § 14 (1963): "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, merchandise, machinery, supplies or other commodities whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *See also* *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

12. *Id.* § 1: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ."

13. *Id.* § 14.

14. *See Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969) (credit); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (land); *Advance Business Sys. & Supply v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (services).

15. *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911).

16. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

17. *Fashion Originators Guild v. FTC*, 114 F.2d 80 (2d Cir. 1940), *aff'd mem.*, 312 U.S. 457 (1941).

for the Court to apply the same standard to one of the prime market foreclosure techniques, the tie-in.¹⁸ This has had the advantage of allowing the federal courts to avoid the necessity of the complicated and prolonged economic investigations¹⁹ which would be required under the Clayton Act mandate of proving a substantial lessening of competition.²⁰ The result has been a general merging of standards applicable under the two statutes, with the conclusion being reached by some courts and commentators that there is now no real distinction between them.²¹

The Tying Contract

At this point some mention should be made of the tying contract itself—both of what it is and what it is not. Although most commonly appearing in written form, the federal courts have held that it can also be implied, either from otherwise acceptable wording in a contract,²² or from pressure sales tactics

18. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958); *International Salt Co. v. United States*, 332 U.S. 392, 394-96 (1947); *Transparent-Wrap Mach. Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947); *Carbice Corp. v. American Patents Dev. Corp.*, 283 U.S. 27 (1931); *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965). *See also* *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 556 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961). Mr. Justice Harlan observed that "[i]t is not . . . that under the Sherman Act the tying clause is illegal *per se*; the *per se* illegality results from its use by virtue of a vendor's dominance over the tying interest to foreclose competition from a substantial market in the tied interest." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 14 (1958) (dissenting opinion). At least one writer, however, feels that "the Supreme Court has always stopped short of according *per se* violation status to the tie-in [T]heir conclusions have often involved somewhat extensive market inquiry But at the same time it must be acknowledged that the decisions do reflect a narrowing of the scope of the Court's examination The conclusion to be drawn is that the judicial treatment of the tying arrangement has reached the final stage before the practice becomes a *per se* violation in the strict meaning of the term." Austin, *Tying Arrangement: A Critique and Some New Thoughts*, 1967 WIS. L. REV. 88, 124-25.

19. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

20. *See* *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356-57 (1922); *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 309 F. Supp., 1119, 1126 (E.D. Va. 1970), *rev'd on other grounds*, 438 F.2d 248 (4th Cir. 1971). *Cf.* *Standard Oil Co. v. United States*, 337 U.S. 293, 308, 314 (1949).

21. *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 67 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), *citing* *Fortner Enterprises v. United States Steel Corp.* 394 U.S. 495, 504 (1969). *See also* the dissenting opinion by Justice Fortas, 394 U.S. at 521, stating that this position had been reached by the court in *Northern Pacific*. *But see* *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608 (1953) where the Court made an attempt to differentiate the standards applicable under the Sherman and Clayton acts, a position which *Northern Pacific* and *Fortner* have in effect emasculated; *accord*, Day, *Exclusive Dealing, Tying and Reciprocity—A Reappraisal*, 29 OHIO STATE L.J. 539, 545 (1968).

22. *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *McElhenny Co. v. Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959).

aimed at forcing substantial, though not necessarily all, purchases from a certain source.²³ The major victim of the latter proscription has been the so-called "TBA" (tires—batteries—accessories) contract, involving an express or implied agreement between a petroleum refiner and a manufacturer of tires, batteries, and accessories which requires the former's distributor-affiliate to purchase a specified minimum percentage of TBA from the latter. Although this involves no direct contractual tie between the distributor and the manufacturer, it has been held to result in the same situation "as though" a tying contract actually existed.²⁴

Unlike the considerations of implied tie-ins, a mere refusal to sell has never been deemed by the courts as having by itself the same overtones of illegality. This, however, is only a minor example of what a tie-in is not.²⁵ The most important aspect of this consideration is the distinction between tying contracts, exclusive dealing arrangements, and requirements contracts. Since the scope of this Comment encompasses only the former, discussion of the latter two will only be by way of brief comparison and contrast.

The basic distinction between the tying contract and the other two types of agreements is the "dual product nexus imposed by the vendor."²⁶ This distinguishes the tying contract both "from exclusive dealing—where the vendee makes a total commitment to marketing only the seller's goods—and the requirements contract—where the vendee agrees to purchase his total needs for a given item from the supplier."²⁷ Unlike the tie-in, neither the exclusive dealing agreement²⁸ nor the requirements contract²⁹ are *per se* violative of the anti-trust laws.

23. *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 370-71 (1965); *Osborn v. Sinclair Ref. Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961). *Cf. FTC v. Texaco*, 393 U.S. 223 (1968); *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

24. *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 370-71 (1965).

25. *McElhenny Co. v. Western Auto Supply Co.*, 269 F.2d 332, 337-38 (4th Cir. 1959).

26. Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 *Wis. L. Rev.* 88, 89.

27. *Id.*

28. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

29. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *Anchor Serum Co. v. FTC*, 217 F.2d 867 (7th Cir. 1954). According to *Standard Oil*, "[r]equirements contracts . . . may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. . . . Since these advantages of requirements contracts may often be sufficient to account for their use, the coverage by such contracts of a substan-

History

The early tie-in cases decided by the Supreme Court were patent infringement suits brought by a seller against a buyer or his supplier to enforce licensing restrictions which tied the sale of non-patented supplies or equipment to the sale or lease of the patented product. In *Henry v. A. B. Dick Co.*,³⁰ the Court found contributory patent infringement in a situation involving the sale of ink to the purchaser of a patented rotary mimeograph machine, where the license restriction attached to the machine stated that it could only be used with ink supplied by the patentee. The Court reasoned that there was no difference in principle between a sale subject to specific restrictions of purpose, time, or place of use, "and restrictions requiring a use only with other things necessary to the use of the patented article purchased from the patentee."³¹ The latter, like the former, was as valid a limitation as the patentee's refusal to sell or permit the use of the patented product.³² It took the rather naive position that acceptance in the market place of the patented product on the terms imposed would decide the efficacy of the tie-in,³³ and that sellers of the unpatented, tied product would be substantially as free as ever to market their wares.³⁴

Five years later, the Court reversed its position with regard to the patented tying product. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*³⁵ was a patent infringement suit brought by the assignee of the Edison motion picture projector patent against the defendant film manufacturer and certain purchasers of the Edison projector. There had been attached to each projector sold a plate bearing the restriction that the machine could only be used to show the patented film manufactured by the projector patentee or his assignee and that continued use of this film once its patent had expired—thus presuming its availability from other sources, such as defendant—would constitute patent infringement. Plaintiff based his cause of action upon the Court's

tial amount of business affords a weaker basis for the inference that competition may be lessened than would similar coverage by tying clauses, especially where use of the latter is combined with market control of the tying device." *Id.* at 307.

30. 224 U.S. 1 (1912).

31. *Id.* at 36.

32. *Id.* at 32.

33. *Id.* at 34.

34. *Id.* at 32.

35. 243 U.S. 502 (1917).

decision in *Henry*, but Justice Clarke, for the majority, noted that the explicit language of the Clayton Act³⁶—which had been passed in the interim to supplement the Sherman Act³⁷—was in direct conflict with the Court's prior decision, and *Henry* was accordingly overruled.³⁸ He found the tendency to create monopoly in the manufacture and use of the film, as required by the act, in the fact that the tying product, the projector, was the only machine of its kind in current operation which permitted repeated use of motion picture film without threat of damage to the latter, and that 40,000 of the machines were in use at that time.³⁹

In invalidating the restriction, the Court also echoed the language of Chief Justice White's vigorous dissent in *Henry*, stating that such restrictions as these had the effect of extending the scope of the legal monopoly granted by the patent laws to cover the unpatented "tied" product.⁴⁰ This realization, which has been noted in virtually all subsequent cases involving agreements tying unpatented supplies to patented items,⁴¹ resulted in the recognition by the Court in *Motion Picture Patents* that "[t]he scope of the grant . . . made to an inventor in a patent . . . must be limited to the invention described in the claims of his patent. . ."⁴² and does not involve the materials with which or on which it operated.⁴³

Working in the realm of section 3 of the Clayton Act, the Court, following the decision in *Motion Picture Patents*, found it necessary to couch its disapproval of the tying contract in terms more harmonious with the language of the statute. It was deemed appropriate that specific consideration be given to

36. Clayton Anti-Trust Act § 3, 15 U.S.C. § 14 (1963), refers to sales or leases of "patented or unpatented" products whose effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

37. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 355 (1921). *Cf.* *United Shoe Mach. Co. v. United States*, 258 U.S. 451, 460 (1922).

38. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917).

39. *Id.* at 508.

40. *Id.* at 516; *Henry v. A. B. Dick Co.*, 224 U.S. 1, 51 (1912) (dissenting opinion).

41. *See, e.g.*, *United States v. Paramount Pictures*, 334 U.S. 131 (1948) (copyright); *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458 (1938) (patented process); *Carbice Corp. v. American Patents Dev. Corp.*, 283 U.S. 27 (1931) (patented construction).

42. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917).

43. *Id.*

the extent of influence which the seller exerted over the market for the tying product, which was usually a patented item. Thus, the concept of "market dominance," the first in a series of gauges of economic power, came into being. In *United Shoe Machinery Corp. v. United States*,⁴⁴ it was held that a seller, solely on the basis of his dominant position in the shoe machine industry, had violated section 3 of the Clayton Act by contracts tying the lease of his patented machines to that of certain of his other machines and products. Potential lessening of competition, a necessary finding under section 3, was automatically inferred from the seller's dominant position in the shoe machine industry. This was held to be true despite the fact that specific agreements on the part of the lessees not to use the machinery of competitors were not present, the Court reasoning that the system of tying restrictions was "quite as effective as express covenants could be,"⁴⁵ and practically compelled "the use of the lessor's machinery except upon risks which manufacturers would not willingly incur."⁴⁶

Market dominance as a factually demonstrable concept was a viable standard as long as the applicable law relating to the patent tie-in was section 3 of the Clayton Act, for it was clearly amenable to relevant market criteria, the backbone of any section 3 considerations. However, in 1947, the Court announced a radical change of policy by holding, in *International Salt Co. v. United States*,⁴⁷ that it was a *per se* violation of section 1 of the Sherman Act, as well as a violation of section 3 of the Clayton Act, for the country's largest producer of industrial salt and also the owner of patents on machines for the utilization of salt products to require lessees of such machines to use only the corporation's unpatented products in them.⁴⁸ "Without factual investigation of the lessor's market, which was the crux of illegality in the *Shoe Machine* decision,"⁴⁹ the Court in *International Salt* condemned the tying arrangement on two grounds. First, it found that the volume of business affected by the contracts—in at least one year amounting to one-half million dollars—

44. 258 U.S. 451 (1922).

45. *Id.* at 458.

46. *Id.*

47. 332 U.S. 392 (1947).

48. *Id.* at 394-96.

49. 1955 ATT'Y GEN. NAT'L COMM'N ANTITRUST REP. 140. See also *Standard Oil Co. v. United States*, 337 U.S. 293, 305 (1949).

could not be said to be "insignificant or insubstantial."⁵⁰ Second, in stating that the "[defendant's] patents confer a limited monopoly of the invention they reward,"⁵¹ the Court presumably, but without explanation, inferred the equivalent of market dominance from the patents themselves,⁵² a position consistent with some earlier cases which had drawn a presumption of the requisite economic power from the presence of a patented or copyrighted tying product,⁵³ but which was not compatible with relevant market considerations.

The decision in *International Salt* was thus fraught with ambiguities. Although clearly placing the tying contract, as a market foreclosure device, under the *per se* illegality standard of section 1 of the Sherman Act, it adopted unclear criteria that must be met before the *per se* rule could be applied. Market dominance based on relevant market considerations and demonstrations of economic consequences were abandoned in favor of a patent-inferred dominance concept, and a new standard was announced which called for consideration of the concept only if the volume of business affected was "not insignificant or insubstantial," terms which themselves were not defined in the opinion.

Although the Court, in *Times-Picayune Pub. Co. v. United States*,⁵⁴ reverted to its old language of market dominance⁵⁵ and considered comparative data⁵⁶ to deal with a situation not involving a patented tying product, its return to this quantitative standard was short-lived.⁵⁷ Five years after *Times-Picayune* the

50. 332 U.S. 392, 396 (1947).

51. *Id.* at 395.

52. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 17 (1958) (dissenting opinion).

53. *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944); *Carbice Corp. v. American Patents Dev. Corp.*, 283 U.S. 27 (1931); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

54. 345 U.S. 594 (1953).

55. *Id.* at 610.

56. *Id.* at 611.

57. In *Times-Picayune*, the Court held that contracts under which a newspaper with a morning and evening edition—but having only an evening competitor—required advertisers to buy space in both editions were not violative of the Sherman Act. In determining that, although the *International Salt* criterion of a "not insubstantial" volume of trade in the tied product (332 U.S. at 396) was met, the newspaper's position was not one of dominance, it found the relevant market to be the general and classified advertising of all New Orleans dailies. It reasoned that if the three papers had competed equally for the advertising dollar, each would have accounted for one-third of the market; thus, the actual forty percent of the total attributed to the *Times-Picayune*, an increase of only six and two-thirds

decision in *Northern Pac. Ry. v. United States*⁵⁸ marked the inception of the present approach to the tie-in problem. Citing its ruling in *International Salt* as authority⁵⁹ but giving that case a somewhat strained reading,⁶⁰ the Court held that a railroad's preferential routing provisions in its contracts for the sale and lease of lands, by which the vendee or lessee agreed to ship over the railroad's lines all commodities produced or manufactured on the land (provided its rates were equal to those of competing carriers) were tying contracts violative of section 1 of the Sherman Act. This decision had the effect of erasing any idea which *Times-Picayune* may have implied that the Court was going to treat non-patented products differently from patented ones.

The Court in *Northern Pacific* held that a tying contract was unreasonable in and of itself whenever a party had "sufficient economic power" with respect to the tying product to appreciably restrain free competition in the tied product and a "not insubstantial" amount of interstate commerce was affected.⁶¹ It ruled that the defendant possessed the sufficient economic power by virtue of its extensive landholdings, and, without going into detail,⁶² that the amount of interstate commerce affected met the "not insubstantial" test.⁶³ It discounted any consideration of market dominance, saying that to read the *Times-Picayune* case so as to require such a standard "would be wholly out of accord with the opinion's cogent analysis of the nature and baneful effects of tying arrangements and their incompatibility with the policies underlying the Sherman Act."⁶⁴ The earlier decision, it continued, had merely

"[m]ade an effort to restate the governing considerations in this area as set forth in the prior cases, that the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, regard-

percent over the hypothetical division, did not amount to dominance. 345 U.S. at 612-13.

58. 356 U.S. 1 (1958).

59. *Id.* at 8.

60. *Id.* at 9; but see text at note 51 *supra*.

61. *Id.* at 6.

62. *Id.* at 16 n.3. The only statistics on dominance given in the lower court's opinion were that in 1935-42 appellants' holdings of merchantable timber in Montana, Idaho, and Washington was approximately five percent of the total merchantable timber in those states.

63. *Id.* at 7.

64. *Id.* at 11.

less of the source from which the power is derived and whether the power takes the form of a monopoly or not.”⁶⁵

In a vigorous dissent, Justice Harlan called for a return to the *Times-Picayune* standard of determining *per se* illegality of tying contracts, which he read as requiring “proof of market dominance in the tying interest.”⁶⁶ He castigated the majority’s failure to show the defendant’s dominant position in the relevant land market⁶⁷ and denied the existence of an analogy between a patented tying product which could of itself confer the requisite economic power and the situation here involving parcels of land whose uniqueness was questionable.⁶⁸ The Court’s attempted equation of dominance with what he believed to be a lesser standard of “sufficient economic power” would lead to confusion in disposing of tying clauses under the Sherman Act.⁶⁹ Finally, he argued that to be effective, the new standard needed to be based on a variety of factors not discussed by the majority—the significant percentage control by the seller of the relevant market, the desirability of the tied product to the purchaser, the economic detriment likely to result to the vendee or lessee from the existence of the tying clause, and the uniqueness of the tying product.⁷⁰

Present Approach

As has been previously described, the standards for determination of the illegality of the tying contract have evolved from its treatment under the *Motion Picture Patents* case to the criteria announced in *Northern Pacific Ry.*, namely, that a tying contract is unreasonable in and of itself whenever a party (1) has “sufficient economic power” with respect to the tying product to appreciably restrain free competition in the tied product, and (2) a “not insubstantial” amount of interstate commerce is affected.⁷¹ With regard to the latter criterion, first announced by the Court in *International Salt*,⁷² there has been little controversy. The standard has generally been recognized as a quan-

65. *Id.*

66. *Id.* at 17 (dissenting opinion).

67. *Id.* at 14 (dissenting opinion).

68. *Id.* at 18, 19 (dissenting opinion).

69. *Id.*

70. *Id.*

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

72. 332 U.S. 392, 396 (1947).

titative one⁷³ measured in terms of dollar volume so as to show that more than a *de minimis* amount of commerce has been foreclosed by the tie.⁷⁴ To require more extensive economic data would, according to one court, deny the *per se* illegality approach and "would convert tie-in cases to 'rule of reason' cases with the requirement of public injury."⁷⁵ Finally, the test is measured by the total volume of sales tied by the policy under challenge and is not, in a private anti-trust suit, limited to that portion of the market in which plaintiff and defendant are in actual competition.⁷⁶

The standard of sufficient economic power with respect to the tying product has given the federal judiciary, as Justice Harlan predicted in his dissenting opinion in *Northern Pacific*, the most difficulty. Having effectively discarded any relevant market considerations in its retreat from a market dominance standard, the Court has been forced to find substitute pegs on which to hang its determination of the presence of sufficient economic power.

With regard to *patented* tying products, the difficulty has not been too great. The earlier recognition that the patent or copyright itself conferred market dominance was easily assimilated into the new, less stringent standard. The pre-*Northern Pacific* decision by the Court in *United States v. Paramount Pictures*,⁷⁷ which had termed "distinctiveness" as the key to market dominance in a case involving copyrighted motion pictures, was followed and more fully explained in its post-*Northern Pacific* ruling in *United States v. Loew's, Inc.*⁷⁸ Both cases involved the attempted "blockbooking" of motion pictures, *i.e.*, the offering for license of one feature or group of features on the condition that the exhibitor also license another feature or group of features released by the distributor during a given period, thus preventing competitors from bidding for single features on their relative

73. *Osborn v. Sinclair Ref. Co.*, 286 F.2d 832, 841 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).

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

75. *Osborn v. Sinclair Ref. Co.*, 286 F.2d 832, 841 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).

76. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 502 (1969) (\$2,300,000 annual sales of tied product not insubstantial); *International Salt Co. v. United States*, 332 U.S. 392, 395 (1947) (\$5,000 annual sales); *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 62-63 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (\$7,000,000 annual sales).

77. 334 U.S. 131 (1948).

78. 371 U.S. 38 (1962).

merits.⁷⁹ Both were held to be *per se* Sherman Act section 1 violations, the only distinction being that while *Paramount Pictures* involved the distribution of films to exhibitors, *Loew's* concerned their release to television stations.

The trademark has been recently added to the patent and copyright as evincing the requisite uniqueness to warrant a showing of sufficient economic power.⁸⁰ Taken together, these licensed monopolies cover a significant segment of the area in which the tying contract would otherwise be a viable method of forceful competition. Although *per se* illegality of tying contracts based upon these three is the generally accepted judicial standard, one author considers this approach somewhat naive, at least as far as patents are concerned, in view of such considerations as competition between different patents in the same market, the possible insignificance of the particular patent in the overall makeup of the final product, and the chance that the patented item is not invariably distinctive or unique on a market-wide basis.⁸¹ He has drawn limited justification for his position from Supreme Court dicta which calls for affording a patent "at least *prima facie* evidence of [sufficient economic] control."⁸² However, it is the opinion of this writer that owing to the disfavor with which the federal judiciary views tying contracts in general,⁸³ patents, trademarks, and copyrights will continue to be viewed as providing of themselves the requisite economic power to warrant findings of *per se* illegality when used as the basis of tying contracts.

It is in the area of *non-patented* tying products that the problems entailed in following the "sufficient economic power" cri-

79. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-57 (1948).

80. *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965); *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847 (N.D. Calif. 1970).

81. Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 Wis. L. REV. 88, 112.

82. *Standard Oil Co. v. United States*, 337 U.S. 293, 307 (1949).

83. "[T]ying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way . . ." *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 503 (1969). "Tying agreements serve hardly any purpose beyond the suppression of competition. . . . In the usual case, only the prospect of reducing competition would persuade a seller to adopt such a contract, and only his control of the supply of the tying device . . . could induce a buyer to enter one. . . . The existence of market control of the tying device, therefore, affords a strong foundation for the presumption that it has been or probably will be used to limit competition in the tied product also." *Standard Oil Co. v. United States*, 337 U.S. 293, 305, 306 (1949).

terion, without resorting to relevant market data, have been the most acute. It is submitted that in the only pertinent case to reach the Supreme Court since its decision in *Northern Pacific*, the Court has, true to Justice Harlan's warning, misconstrued the basis of the *per se* illegality of the tie-in and placed itself on dangerous footing from which to judge future tying contracts. *Fortner Enterprises v. United States Steel Corp.*⁸⁴ was a private anti-trust action under sections 1 and 2 of the Sherman Act. Plaintiff sought both treble damages and injunctive relief from the alleged tying contract, by which he contended that defendant was illegally forcing him to purchase prefabricated homes (the tied product) in exchange for favorable credit terms from defendant's wholly owned subsidiary (the tying product) to purchase the land on which the houses were placed.⁸⁵ Plaintiff had been willing to accept United States Steel's terms only because the latter was the sole source which would provide one hundred percent financing of his more than two million dollar investment;⁸⁶ in exchange for this, however, he was forced to pay at least four hundred dollars more per home than the price quoted by United States Steel's competitors.⁸⁷

In a five to four decision reversing the lower court,⁸⁸ the majority mentioned the uniqueness of the credit terms offered by the defendant,⁸⁹ but rested its conclusion that plaintiff had raised questions of fact which, if proven, would bring the tying agreement within the scope of the *per se*⁹⁰ doctrine on other grounds. Specifically, it held that by proving acquiescence in the burdensome terms by an *appreciable number* of customers,⁹¹ sufficient economic power could be shown. The rationale was that "the seller can exert *some power over some of the buyers* in the market, even if his power is not complete over them and all other buyers in the market."⁹² (Emphasis added.) This criterion is a far

84. 394 U.S. 495 (1969).

85. *Id.* at 497.

86. *Id.* at 504.

87. *Id.*

88. Where there has been a full record which includes pre-trial depositions and answers to interrogatories, the Court has granted the motion for summary judgment in tie-in cases. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). Cf. *United States v. Columbia Broadcasting Sys.*, 215 F. Supp. 694 (S.D. N.Y. 1963). But see the dissent by Justice Harlan in *Northern Pacific supra* (356 U.S. at 13) for a disapproval of the procedure.

89. 394 U.S. at 505-06.

90. *Id.* at 500-01.

91. *Id.* at 504.

92. *Id.* at 503.

cry from any concept of market dominance or monopolistic leverage. The Fourth Circuit, in interpreting *Fortner*, has since found this condition to exist with regard to a service contract in which the company reserved the right to cancel its leases of business machines if supplies other than its own were used in them;⁹³ a finding that at least twenty-five percent of the machine owners and lessees in the particular market area had entered into service contracts imposing the tying condition was held to provide the requisite "acquiescence by an appreciable number."⁹⁴

In one of the two dissenting opinions in *Fortner*, Justice White, aside from questioning the efficacy of proscribing "the sale of goods on easy credit terms as an illegal tie without proof of market power in credit,"⁹⁵ also questioned the basic assumption of the new standard, namely that the buyers' acceptance of the tie-in would "always suffice to prove market power in the tying product."⁹⁶ He, as well as Justice Fortas in the other dissent, logically reasoned that the rationale of the majority's decision could lead to the finding of illegal tying contracts merely on the basis of favorable promotional considerations,⁹⁷ lower prices,⁹⁸ or other ancillary attributes of the sale itself.⁹⁹

At the very least, the decision in *Fortner* "casts great doubt on credit financing by sellers."¹⁰⁰ More importantly, it represents a complete departure from the Clayton Act standards on which the *per se* illegality of the tie-in is based.¹⁰¹ It is submitted that, in the sphere of the non-patented tying product, relevant market determinations must be made to determine if the seller's or lessor's provisions are dictated from a position of economic power or are merely the evidence of customer willingness to accept a superior product or service, in a competitive environment, on less than favorable terms. The anti-trust laws, designed to protect competition, should not be used by buyers as a mechanism to protect themselves from bad business choices.

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

94. *Id.* at 69 n.13.

95. 394 U.S. at 511 (dissenting opinion).

96. *Id.* at 518 (dissenting opinion).

97. *Id.*

98. *Id.* at 523 (dissenting opinion).

99. *Id.* at 525 (dissenting opinion). According to Justice Fortas, these so-called "ancillary" features include "delivery, installation, [and] supplying fixtures"

100. *Id.* at 516 (dissenting opinion).

101. *Id.* at 523 (dissenting opinion).

Defenses to the Tying Contract

The Supreme Court has consistently affirmed the illegality of tying agreements found to exist in the context of sufficient economic power, without requiring elaborate inquiry into the business excuse for their use.¹⁰² For this reason, the best defense in a proceeding alleging the presence of a tie-in is for the defendant to deny its very existence, either from the nature of the contract itself or from its failure to meet the *Northern Pacific* standards, particularly with regard to showing a lack of sufficient economic power over the tying product.¹⁰³ Of course, this has become increasingly difficult since the Court's decision in *Fortner*, and, at present, the only sure conclusion that can be reached is that no inference of the requisite economic power can be drawn from a *single* buyer's acceptance of the tie-in.¹⁰⁴

Single Product Defense

The assertion that the tied and tying product in effect are "functionally and physically . . . an indivisible piece of merchandise"¹⁰⁵ is frequently put forward in an attempt to deny the existence of a tying agreement. Although the original standard announced by the Court in *Times-Picayune* was that "a *second distinct* commodity"¹⁰⁶ was required, this has apparently been relaxed by the decision in *Northern Pacific*, which spoke of a tying contract requiring merely "*separate and distinct*"¹⁰⁷ tied products. Although one lower federal court has said that this later language did not overturn the earlier wording,¹⁰⁸ at least one appellate court appears to have taken the position that here, as in other respects, *Northern Pacific* has effectively limited *Times-Picayune* to its precise facts.¹⁰⁹ This conclusion is further

102. *United States v. Loew's, Inc.*, 371 U.S. 38, 51-52 (1962); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

103. 356 U.S. 1, 6 (1958).

104. *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 67 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

105. Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 Wis. L. Rev. 88, 118.

106. 345 U.S. 594, 614 (1953).

107. 356 U.S. 1, 5 (1958).

108. *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 270 F. Supp. 619, 641 (S.D. N.Y. 1967), *rev'd on other grounds*, 388 F.2d 272 (2d Cir. 1967).

109. *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir. 1965), *cert. denied*, 382 U.S. 820 (1965), holding that a contract which forced a newspaper to subscribe to all of a wire service's subject-differentiated wires in order to get one of the services was a tying contract *per se* violative of § 1 of the Sherman Act.

substantiated by the language in *Fortner*, where, despite vigorous dissent and warnings of dire consequences for further customer relations,¹¹⁰ the single product defense was held inapplicable to a credit transaction where the credit was provided by one corporation on the condition that a product be purchased from a wholly owned subsidiary of that corporation.¹¹¹

At least one circuit, however, has taken a somewhat different approach regarding the connection of the sale of electricity with its distribution. In two recent cases courts of the Fourth Circuit have, in one instance, likened distribution to a method of delivery of the product to the consumer¹¹² and, in the other, deemed it "an ancillary and necessary part of the business of producing and selling electrical power."¹¹³ In the latter case, the Fourth Circuit, interpreting *Fortner*, added a new aspect to the requirement of separate and distinct products by recognizing that there be present separate *markets* as well, with the absence of the latter strongly suggesting lack of the former. It found this requirement to have been met in *Fortner*, where there was a separate credit market, but held that there was no separate market for the distribution of electricity without its sale.¹¹⁴ Although this test, if generally accepted, would undoubtedly soften some of the criticism of the *Fortner* decision, it still awaits approval by the Supreme Court at the time of this writing.

A slightly different aspect of the single product defense is the assertion that the tied product is actually a component part of the tying commodity. Although this will be more fully discussed with relation to the defense that the tying contract serves a "legitimate business purpose,"¹¹⁵ some initial observations should be made at this point. While "it is apparent that . . . a manufacturer cannot be forced to deal in the minimum product that is . . . usually sold [o]ne cannot circumvent the anti-trust laws simply by claiming that he is selling a single product."¹¹⁶ Thus, for example, merely because the goods purchased eventually wind up as one product does not allow them to meet

110. *Cf.* 394 U.S. at 525 (dissenting opinion).

111. *Id.* at 507.

112. *Gas Co. of Columbia v. Georgia Power Co.*, 313 F. Supp. 860, 869 (M.D. Ga. 1970).

113. *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 253 (4th Cir. 1971).

114. *Id.*

115. *See* text accompanying notes 120-30 *infra*.

116. *United States v. Jerrold Electronics Corp.*, 137 F. Supp. 545, 559 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961).

the single product test.¹¹⁷ With respect to this aspect of the single product defense, one frequently cited decision has established four criteria of separability, to wit:

“(1) Did competitors of the seller offer all the components of the alleged ‘product’ separately and not exclusively as a single package?

“(2) Was the number of components of the product variable ‘so that hardly any two versions . . . were the same?’

“(3) Was the purchaser charged for each component and not a lump sum for the total product? and

“(4) Did the seller offer similar components for sale separately?”¹¹⁸

Legitimate Business Purpose Defense

One defense which has been used with some success has been the showing that the admitted tying agreement served an otherwise “legitimate business purpose,”¹¹⁹ which the courts have held refutes a finding of the presence of sufficient economic power.¹²⁰ The legitimate purposes accepted have been of two types: to protect the seller’s goodwill through prevention of the use of inferior products with his equipment that could impair its efficiency, and to protect a new product or industry.¹²¹

Although the goodwill defense has been asserted successfully in the lower courts,¹²² its only acceptance by the Supreme Court has been in a case in which it was combined with two other defenses.¹²³ Generally, the courts hold that the publication of specifications for products to be used in conjunction with the seller’s

117. *Susser v. Carvel Corp.*, 332 F.2d 505, 513 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965).

118. *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 270 F. Supp. 619, 642-43 (S.D. N.Y. 1967), *rev'd on other grounds*, 388 F.2d 272 (2d Cir. 1967), *citing* *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 559 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961).

119. *Baker v. Simmons Co.*, 307 F.2d 458, 467-69 (1st Cir. 1962).

120. *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 68 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). *Cf.* *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 504 (1969).

121. *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 68 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

122. *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653 (1st Cir. 1961), *cert. denied*, 368 U.S. 931 (1961); *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935). *Cf.* *Susser v. Carvel Corp.*, 332 F.2d 505, 512 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965).

123. *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961).

or lessor's equipment will adequately protect it and his goodwill from damage, and they will deny the use of the restrictive tie.¹²⁴ According to the Supreme Court, "the only situation . . . in which the protection of goodwill may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practically be supplied,"¹²⁵ a situation which no case has as yet squarely presented.

Successful use of the defense that a legitimate business purpose is served by the tying agreement, in that it merely protects a new product or industry, can be made "only in the early stages of introducing and exposing the product to the public when its newness precludes the existence of competing items."¹²⁶ The leading case on this point is *United States v. Jerrold Electronics Corp.*,¹²⁷ where defendant, the developer of the first workable community antenna system, was able to show that his company's policy of selling only on a full system basis with exclusive parts and service conditions, was, given the state of the art and the need for technical guidance, a reasonable restraint not violative of the anti-trust laws. However, while allowable at the inception of the business, it neither continued to be reasonable throughout its period of use¹²⁸ nor did its approval extend to expansion of original facilities.¹²⁹

Other Defenses

Other attempted defenses to an illegal tying contract have become noteworthy more for their general failure rather than for any success. One exception has been the courts' acceptance of the defense of partial market foreclosure, where the tie-in, though affected, leaves the tied purchaser free to buy the same

124. *International Salt Co. v. United States*, 332 U.S. 392, 397-98 (1947); *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847, 851 (N.D. Calif. 1970). Cf. *Engbrecht v. Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962) for an instance where a dealer was furnished specifications and told he could buy from whomever he wished as long as the specifications were met.

125. *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1948). For support of this position, see 1955 ATTY GEN. NAT'L COMM'N ANTI-TRUST REP. 145.

126. Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 Wis. L. Rev. 88, 119.

127. 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961).

128. *Id.* at 558. See also *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847, 851 (N.D. Calif. 1970) (new business defense to *per se* tying contract not applicable where business begun in 1952 and purchase requirements remained in effect from 1963 to 1970); *General Talking Pictures Corp. v. American Tel. & Tel. Co.*, 18 F. Supp. 650, 666 (D. Del. 1937).

129. 187 F. Supp. 545, 561-62 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961).

product from other sources.¹³⁰ Also, it has been suggested, but never held, that a tie-in might be acceptable when employed by a small company attempting to break into a market.¹³¹

Defenses which have been flatly rejected by the courts have included allegations that business expediency necessitated the practice,¹³² that it provided an expected and normal service to customers,¹³³ that it was justified as an accounting device to compensate for a trademark license,¹³⁴ that the injured party could pass the increased cost brought about by the tying contract onto his customers,¹³⁵ and that the customer could purchase the tied product in the open market if it could do so at a price lower than—but not equal to—the contract price.¹³⁶

Perhaps the least successful defense to the tie-in has been the allegation that lenient enforcement of the contract denies its illegality.¹³⁷ The courts have consistently noted that the power to foreclose is always present¹³⁸ and that laxity in enforcement in no way eliminates the contract's restrictive effect on competition.¹³⁹

Conclusion

In most respects, the standards which have evolved by which the federal courts, particularly the Supreme Court, judge tying

130. *See, e.g.*, *FTC v. Sinclair Ref. Co.*, 261 U.S. 463 (1923); *Miller Motors v. Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958). *But see* *Signode Steel Strapping Co. v. FTC*, 132 F.2d 48, 52 (4th Cir. 1942), where the court denied the defense where it was argued that tying steel strapping wire to leased machinery did not completely foreclose competition since the machines were inexpensive and could be easily purchased from other sources, the court reasoning that, as a practical matter, it would be unrealistic to expect a firm to purchase two machines to accomplish the same task.

131. *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 (1962). *See also* Note, 18 *STAN. L. REV.* 457 (1966).

132. *United States v. Loew's, Inc.*, 371 U.S. 38, 51 (1962); *Baker v. Simmons Co.*, 307 F.2d 458, 468 (1st Cir. 1962).

133. *Signode Steel Strapping Co. v. FTC*, 132 F.2d 48, 53 (4th Cir. 1942).

134. *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847, 850 (N.D. Calif. 1970).

135. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

136. *International Salt Co. v. United States*, 332 U.S. 392, 396-97 (1947).

137. Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 *WIS. L. REV.* 88, 121.

138. *United Shoe Mach. Co. v. United States*, 258 U.S. 451, 458 (1922); *General Talking Pictures Corp. v. American Tel. & Tel. Co.*, 18 F. Supp. 650, 666 (D. Del. 1937).

139. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

agreements have been both consistent with regard to the duty imposed upon the judiciary by the anti-trust laws to foster competition and warranted in their severity owing to the scant justification for the existence of this powerful market foreclosure device in a free economy.¹⁴⁰ The "not insubstantial" test is undoubtedly a proper gauge of the economic impact of the tied product in the open market. Also, with regard to a patented tying product, its own uniqueness, coupled with its monopoly-by-license, should allow it to fall of its own weight into the "sufficient economic power" criterion.

It is submitted, however, that with respect to the non-patented tying product, the courts, led by the Supreme Court, have strayed from the principles underlying the illegality of the tying agreement, so as to relieve the Sherman Act proscription of its Clayton Act basis. This writer does not see how, in this instance, the Court cannot avoid modifying its present approach by allowing relevant market considerations to come into play. Without such modification the idea of basing a finding of sufficient economic power on the acceptance of a tie by a yet undefined "appreciable number" of buyers is a hollow standard. It does not take into consideration the power of the seller, evidenced by his market position, to enforce the tie through the absence of sufficient buyer alternatives, as opposed to the fact that, even with the tying agreement, the buyer may be receiving a "better deal" than is available from comparable sources. As was stated earlier, the Court should be seen not as an organ for protecting bad business judgment, but rather for fostering competition under the anti-trust laws.

If this new approach would cause some modification of *per se* illegality as applied to these particular contracts, it is submitted that the Court should not hesitate to modify this method of consideration. It is basically a procedural tool, and it should not be used merely as a time-saving device when its effect is to thwart the workings of justice. This is particularly true when seen in light of the fact that once a tie-in has been established and the requisite product leverage found, the presently evidenced tightening of standards, combined with a strict application of the *per se* rule, may preclude the success of any

140. See *Stiegel v. Chicken Delight, Inc.*, 311 F. Supp. 847, 850 (N.D. Calif. 1970).

defense to the alleged illegality;¹⁴¹ it thus may be necessary to be able to put forward several concurrent defenses in order to deny the tie.¹⁴²

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USUFRUCTUARY TAXATION— AVOIDING THE ZERO BASIS

The usufruct is a commonly occurring Louisiana property right, primarily due to the effect of article 916 of the Louisiana Civil Code,¹ which establishes, in the case of an intestate decedent, a usufruct in favor of the surviving spouse on the decedent's share of the community property. Because the usufruct is created frequently and since recent amendments to the Internal Revenue Code of 1954 have increased the possibility that the usufructuary will be exposed to income tax liability, it is important that such amendments and their effect be reviewed. Section 1001(e)² of the Internal Revenue Code of 1954,³ which was enacted by section 516(a) of the Tax Reform Act of 1969,⁴ provides in part that the basis for determining gain or loss on a term

141. Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 Wis. L. Rev. 88, 122-23.

142. United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961). The leading case on tie-in defenses, required three: goodwill, single product, and new product.

1. LA. CIV. CODE art. 916: "In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold a [in] usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage."

2. "Sec. 1001(e) CERTAIN TERM INTERESTS.—

"(1) IN GENERAL.—In determining gain or loss from the sale or other disposition of a term interest in property, that portion of the adjusted basis of such interest which is determined pursuant to section 1014 or 1015 (to the extent that such adjusted basis is a portion of the entire adjusted basis of the property) shall be disregarded.

"(2) TERM INTEREST IN PROPERTY DEFINED.—For purposes of paragraph (1), the term 'term interest in property' means—

(A) a life interest in property,
(B) an interest in property for a term of years, or
(C) an income interest in a trust.

"(3) EXCEPTION.—Paragraph (1) shall not apply to a sale or other disposition which is a part of a transaction in which the entire interest in property is transferred to any person or persons." INT. REV. CODE OF 1954, § 1001(e), enacted by H.R. 13270, 91st Cong., 1st Sess. § 516(a) (1969).

3. All references to section numbers are to the Internal Revenue Code of 1954 unless otherwise specified.

4. H.R. 13270, 91st Cong., 1st Sess. (1969).