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# THE "TOTAL PRODUCT" APPROACH TO ANALYSIS OF ALLEGED TYING ARRANGEMENTS

MICHAEL DORE\*

## Introduction

A tying arrangement has been defined by the Supreme Court as an agreement by a party to sell one product only on the condition that the buyer also purchase a different product.<sup>1</sup> Such agreements have been held to be per se violations of both the Sherman and Clayton Acts.<sup>2</sup>

Of course, before liability for a tying arrangement can be imposed, courts<sup>3</sup> must first determine that two separate products are in fact involved in the transaction.<sup>4</sup> Numerous standards have been suggested<sup>5</sup> and used<sup>6</sup> in making this determination. None of these standards, however, has proved an adequate criterion for both regulating business conduct and resolving the unique factual disputes with which the courts are frequently presented in "tie-in" cases.

The purpose of this paper will be to offer suggestions for refocusing the two-product determination in a manner that will put primary

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<sup>1</sup> Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947) (an agreement by a party that he will sell a product only on the condition that the buyer, if he chooses to buy another product, will purchase this second product only from the same seller, is also considered a tying agreement). See Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd*, 531 F.2d 1211 (3d Cir. 1976), for an exhaustive discussion of the intricacies of tying arrangements.

<sup>2</sup> Fortner Enterprises v. United States Steel Corp., 394 U.S. 495 (1969) (Clayton Act); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (Sherman Act). See text accompanying notes 12-15 *infra*.

<sup>3</sup> There is some dispute in the cases over whether this issue of product separability is properly one for the court or for the jury. Compare Coniglio v. Highwood Serv., Inc., 495 F.2d 1286 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974) (question for jury) and Stavrides v. Mellon Nat'l Bank & Trust Co., 353 F. Supp. 1072, 1076 (W.D. Pa.), *aff'd*, 487 F.2d 953 (3d Cir. 1973) (question for jury) with Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (question for court). This issue can reasonably be viewed as a mixed question of law and fact, but one which should, in the absence of overwhelming evidence, be left for the jury to determine.

<sup>4</sup> Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

<sup>5</sup> See, e.g., Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 67-72 (1958) [hereinafter cited as Turner]; *The Supreme Court*, 1968 Term, 83 HARV. L. REV. 7, 235, 244 (1969) [hereinafter cited as *Supreme Court*].

<sup>6</sup> See cases cited notes 18, 24, 25, and 28 *infra*.

emphasis upon the options and the viewpoint of the individual consumer rather than upon the motives of the seller or the relevant market for the component products involved in the sale.

### *Analysis of Tying Arrangements*

Tying arrangements were a very common business practice at the time that the Sherman Act was enacted.<sup>7</sup> Unlike other common business arrangements,<sup>8</sup> however, tie-ins have met with a good deal of suspicion and opposition by the Court. In *Times-Picayune Publishing Co. v. United States*,<sup>9</sup> the Supreme Court said:

Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rule the marts of trade. . . . By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the "tied" product would convince freely choosing buyers to select it over others, anyway.<sup>10</sup>

This belief that tying arrangements have a strong tendency to distort competitive conditions in the market place<sup>11</sup> has led the Court to hold that these arrangements constitute per se violations of the antitrust laws "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition

<sup>7</sup> See *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

<sup>8</sup> See, for example, Justice Frankfurter's comments concerning requirements contracts:

Requirements contracts . . . may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, enable long term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctuations and—of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibility of a predictable market.

*Standard Oil Co. v. United States*, 337 U.S. 293, 306-07 (1949) (citations omitted).

<sup>9</sup> 345 U.S. 594 (1953).

<sup>10</sup> *Id.* at 605.

<sup>11</sup> *But cf.* *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 510 (1969) (White, J., dissenting).

in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."<sup>12</sup>

This statement of the test for determining a per se violation would apparently exclude many common business relationships based on a lack of sufficient economic power. The Court has held, however, that sufficient economic power does not "require that the defendant have a monopoly or even a dominant position throughout the market for a tying product."<sup>13</sup> Rather, the Court has held that the appropriate question with respect to the issue of economic power is "whether the seller has the power within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product."<sup>14</sup>

The plaintiff of course must also show that a sufficient amount of interstate commerce is involved before per se liability will be found. This requirement, however, does not provide a major stumbling block to antitrust plaintiffs. The Court has held that, in examining the sufficiency of the interstate commerce involved, it will look not to the dollar volume of commerce involved in the particular transaction before it, but rather to the volume of all similar transactions allegedly entered into by the defendant.<sup>15</sup>

Whenever these minimal tests of the requisite economic power and volume of interstate commerce are met, tie-in arrangements are forbidden under the antitrust laws.<sup>15.1</sup> These arrangements have been

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<sup>12</sup> *Id.* at 499, citing *International Salt Co. v. United States*, 332 U.S. 392 (1947); see also *Northern Pac. Ry Co. v. United States*, 356 U.S. 1 (1958).

<sup>13</sup> *United States Steel Corp. v. Fortner Enterprises, Inc.*, Slip Op. at 9, 45 U.S.L.W. 4171 (U.S. Feb. 22, 1977) (No. 75-853).

<sup>14</sup> *Id.* at 9-10.

<sup>15</sup> 394 U.S. at 502. It should also be noted that the Court appeared to find \$200,000 to be a "not insubstantial" sum, whether that figure represented the amount involved in the plaintiff's transaction or the defendant's total volume of sales.

<sup>15.1</sup> There is presently a dispute in the federal courts on the question of whether "individual coercion" is also a separate and distinct element of a tie-in violation. In order to establish this element of individual coercion, a plaintiff is required to demonstrate that the unique facts under which he dealt with a particular seller were such that the plaintiff was forced to submit to the seller's offer of sale of the two distinct products only in conjunction with one another.

This disagreement with respect to the question of whether or not "coercion" is a separate element of a tie-in claim has been quite substantial. Tying arrangements may be either formalized in express written contracts or they may be the product of informal relationships between the party tying the two products and the party purchasing those products. Courts have differed in their analysis of whether individual coercion

so pervasive in business practice, however, that some courts have reverted to the first criterion, the presence of two distinct products, to avoid the automatic imposition of liability in contexts where the unreasonableness of the arrangement is not readily apparent.<sup>16</sup>

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is an element of a tie-in claim depending upon whether or not the claim is based upon an express contractual provision.

The case of *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974), found that even in the face of an express contractual provision which obligated a buyer to purchase two distinct products, individual coercion would have to be demonstrated before a violation of the antitrust laws could be found.

In addition, numerous courts have held that, in the absence of express contractual provisions, the plaintiff must demonstrate individual coercion before he is permitted to recover under the Sherman Act. *Ungar v. Dunkin' Donuts of America, Inc.*, 68 F.R.D. 65 (E.D. Pa. 1975); *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theaters, Inc.*, 446 F.2d 1131 (2d Cir. 1971); *Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387, 391 (S.D. Fla. 1972) ("In order to establish an illegal tying arrangement arising from business conduct, franchisees must prove that they were coerced, not merely persuaded, into purchasing the products at issue here.")

Other cases, however, have affirmatively held that where express contractual provisions require the purchase of more than a single product, coercion may be inferred from the express contractual provisions themselves. *In re 7-Eleven Franchise Antitrust Litigation*, 1972 Trade Cas. ¶ 74,156 (N.D. Cal. 1972); *Milionas v. Amerada-Hess Corp.*, 1976-2 Trade Cas. ¶ 61,069 (S.D.N.Y. 1976).

Finally, some cases have indicated that individual coercion is not in fact a separate element of a tie-in claim even in the absence of an express contractual provision. In *Hill v. A.T.O., Inc.*, 535 F.2d 1349 (2d Cir. 1976), the court found that "unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes direct coercion." 535 F.2d at 1355. Similarly, in *Aamco Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440 (E.D. Pa. 1975), the court held that "coercion, as such, is not a prerequisite to liability. Rather, to the extent that there is an element of coercion in a tie-in situation, it is found in two other necessary aspects of a tie. The first is the sale on condition that the franchisee purchase other items. The second is the economic power of the seller which enables him to impose the tie."

It has been noted that this entire dispute as to whether coercion is an element of a tie-in violation is in fact a dispute over a "term of art." *Aamco Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440 (E.D. Pa. 1975). *Developments in the Law-Class Actions*, 89 HARV. L. REV. 1318, 1509 n. 278 (1976) ("The term 'coercion' may perhaps be best understood here not as a description of the subjective experience of the bargaining process but as a measure of a court's confidence that the evidence before it does indeed establish that a defendant connected the sale of two products—in purchasing the tied product the plaintiff acted so automatically, it was if [sic] he were coerced.")

<sup>16</sup> No court has actually stated that it has engaged in a product separability analysis only because it was impossible under the court's existing criteria to examine the economic reasonableness of the business conduct involved. It is difficult to escape the fact that this is actually what is being done in these cases, however. See cases cited note 24 *infra*, and *Kolene Corp. v. Motor City Metal Treating, Inc.*, 307 F. Supp. 1251, 1270-71 (E.D. Mich. 1969), *cert. denied*, 404 U.S. 886 (1971) ("... there is now found,

*Evaluation of Two-Products Requirements*

Inherent in the concept of a tying arrangement is the requirement that one entity be "tied" to a separate and distinct entity. This basic requirement of the presence of multiple products as a predicate for tie-in liability was recognized by the Supreme Court in *Times-Picayune Publishing Co. v. United States*.<sup>17</sup> While that case recognized the requirement of a finding of the presence of two products, it did little to guide lower courts in determining how this finding was to be made.

The first case which squarely dealt with this issue was *United States v. Jerrold Electronics Corp.*<sup>18</sup> In *Jerrold*, Judge Van Dusen noted that "as a general rule a manufacturer cannot be forced to deal in the minimum product that could be sold or is usually sold. On the other hand, it is equally clear that one cannot circumvent the anti-trust laws simply by claiming that he is selling a single product. The facts must be examined to ascertain whether or not there are legitimate reasons for selling normally separate items in a combined form to dispel any inferences that it is really a disguised tie-in."<sup>19</sup> Thus, the *Jerrold* case established two criteria<sup>20</sup> for determining the presence of two distinct products; the first was a finding that the items were "normally separate," and the second was the absence of "legitimate reasons" for combining these items.<sup>21</sup>

Each of these criteria has been reaffirmed in subsequent judicial

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in amelioration of the adamant application [of] the per se rule to tying contracts in antitrust laws the doctrine of business justification . . .").

<sup>17</sup> 345 U.S. 594, 613 (1953). See also *United States Steel Corp. v. Fortner Enterprises, Inc.*, Slip op. at 13, 45 U.S.L.W. 4171 (U.S. Feb. 22, 1977) (No. 75-853) (Burger, C.J., concurring).

<sup>18</sup> 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961).

<sup>19</sup> 187 F. Supp. at 559. This court was the first to recognize that a finding of an illegal tie-in could in fact result in a judicially coerced sale of a component of a larger product. Some subsequent decisions have apparently not been as cognizant of this danger. See *Fry v. John Hancock Mut. Life Ins. Co.*, 355 F. Supp. 1151 (N.D. Tex. 1973), *modified*, 1976-1 Trade Cases ¶ 60,728 (N.D. Tex. 1975).

<sup>20</sup> It is interesting to note that the court apparently imposed the burden of demonstrating whether or not two products were involved upon the defendants rather than the plaintiff. 187 F. Supp. at 560. The reason for this is not clear, but it is indicative of the suspicion with which the court viewed the two-product argument.

<sup>21</sup> The *Jerrold* case itself involved a television antenna manufacturer's requirement that purchasers of his antennas also acquire a service contract covering the system. The court held that the legitimate reason for the original combination of the antenna and its servicing system precluded the finding of a tie-in sale, but the continuation of this requirement after the original reasons for its institution were no longer present did amount to a tie-in violation.

decisions.<sup>22</sup> The first requirement (that the items be normally separate) has been criticized for not being sufficiently responsive to changes and innovations in the market for the products involved in the tying arrangements.<sup>23</sup> It has, however, continued to be utilized in cases where the relevant market for the tie-in products was beyond dispute.<sup>24</sup>

The second criterion, legitimate business reasons, has remained the basic test for determining the presence of two products.<sup>25</sup> In *Fortner Enterprises, Inc. v. United States Steel Corp.*<sup>26</sup> the Court recognized that every tie-in case involved at the outset "the problem of determining whether two separate products are in fact involved."<sup>27</sup>

In determining whether two products could be found in *Fortner*, the Court pointed to a number of specific factors which indicated that two distinct products were involved.<sup>28</sup> In addition to this specific examination of the "two product" factors, however, the Court also reaffirmed the basic *Jerold* rationale that legitimate business purposes may obviate the finding of two distinct products.<sup>29</sup>

<sup>22</sup> See cases cited notes 24 and 25 *infra*.

<sup>23</sup> Turner, *supra* note 5, at 68.

<sup>24</sup> See *Telex Corp. v. International Business Machines Corp.*, 367 F. Supp. 258, 346-47 (N.D. Okla. 1973) *rev'd on other grounds*, 510 F.2d 894 (10th Cir. 1975); *Forrest v. Capital Bldg. & Loan Ass'n*, 385 F. Supp. 831 (M.D. La. 1973), *aff'd*, 504 F.2d 891 (5th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971).

<sup>25</sup> Perhaps the best expression of the meaning of the term "legitimate reasons" is contained in *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961).

<sup>26</sup> 394 U.S. 495 (1969).

<sup>27</sup> *Id.* at 507.

<sup>28</sup> In the *Fortner* case, a credit subsidiary of United States Steel extended loans to the defendant on highly favorable terms. As a condition of receiving this credit, however, the plaintiff was compelled to purchase certain products from United States Steel. The Court pointed to the presence of two separate corporate entities and the extension of more credit than that needed to purchase the tying product in support of its contention that the transaction involved two products. 394 U.S. at 507. See the discussion of these and other factors in *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971).

<sup>29</sup> 394 U.S. at 506. ("It may turn out that the arrangement involved here serves legitimate business purposes . . ."). It is interesting to note that Justice Fortas in dissent makes the following statement:

At another point the majority even suggests that if U.S. Steel can show "legitimate business purposes" and the absence of "competitive advantage" (ante, at 506) in the credit market, it will have made out a defense. But in an earlier part of the opinion, the majority says explicitly that "it is clear that petitioner raised questions of fact which, if proved at trial, would bring this tying arrangement within

The Court did not go into an extensive analysis of what type of legitimate business purposes would give rise to a finding of the absence of two products. The district court case which first proposed this "two product" test, however, defined these business purposes in terms of the injury which would be suffered by a party who was prevented from requiring that his customers purchase the total product in which he was willing to deal.<sup>30</sup> Naturally, any "injury" suffered by virtue of losing the illegitimate profits derived from the tie-in were to be disregarded in determining whether the business purposes were "legitimate."<sup>31</sup>

In not specifically defining what was meant by legitimate business purposes<sup>32</sup> the Court implicitly adopted the tests proposed in these

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the scope of the per se doctrine." (Ante, at 500-501). If it is this sentence which determines the range of issues open on remand there will be no examination at the trial of the business or economic background of the credit arrangements here attacked or of the effects, if any, of this arrangement on competition in the prefabricated house market.

*Id.* at 524.

This criticism of the Court's use of the phrase "legitimate business purposes" misapprehends the basis for the Court's use of that phrase. Under the holding of the *Fortner* case, after a tying arrangement had been established there would be no examination of whether there were "legitimate business purposes" which would justify the tie. Rather, the seller's "legitimate business purposes" would be examined first in order to determine whether the alleged tying agreement did in fact involve the sale of two separate products. Justice Fortas erroneously believed that the Court intended to permit evidence of "legitimate business purposes" to justify a tie-in arrangement. In fact, the Court would only permit such evidence to establish the absence of a tie-in arrangement. Cf. *Supreme Court*, *supra* note 5, at 245 n.39.

The possibility that "legitimate business reasons" may obviate a finding of liability for an alleged tie-in scheme was also recognized in the Supreme Court's recent comment on tie-in arrangements. In *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110 (1976), Justice Blackmun in his concurring opinion notes that a justification for the alleged tie-in might exist if "the sale of lightbulbs [the tied product] is in any way crucial to the respondent's successful operation." *Id.* at 3127-28.

<sup>30</sup> *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653, 655 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961).

It is of interest to note that the courts seem to be considerably more willing to recognize the presence of these "legitimate business reasons" when the defendant had no economic interest in the "tied" product upon which he allegedly conditioned the sale of his "tying" product. See *Crawford Transport Co. v. Chrysler Corp.*, 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790 (D.N.C. 1957), *aff'd.*, 252 F.2d 441 (4th Cir. 1958). Cf. *Rodrigue v. Chrysler Motors Corp.*, 1976-2 Trade Cas. ¶61,143 (E.D. La. 1976).

<sup>31</sup> A failure to disregard any such injury would of course result in the "justification" of all tie-in arrangements.

<sup>32</sup> The *Fortner* Court pointed to the factors which it considered relevant in this



lower court decisions in determining the sufficiency of the seller's motives. These tests have provided an adequate standard for judicial evaluation of the motives and intentions of individual sellers after the sales have been consummated.<sup>32.1</sup> They have not, however, proved sufficient to enable businessmen, when faced with unique factual situations, to order their economic conduct in conformity with the tie-in proscriptions of the antitrust laws, nor have they always served to foster vigorous competition in the marketplace.

### *Suggestions for Reform*

Although it has not been framed in precisely these terms, the

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particular case, *see* note 28 *supra*, but it did not define the term "legitimate business purposes". This failure to define the term led to some regrettable confusion. *See* note 29 *supra*.

<sup>32.1</sup> *See* *Beefytrail, Inc. v. Beefyking International, Inc.*, 348 F. Supp. 799 (M.D. Fla. 1972) (condemning "circumstances where the franchisor, by an intentional course of conduct, seeks to circumvent the antitrust laws concerning tying arrangements by requiring a franchisee to purchase a restaurant and its equipment previously established"); *Carpa, Inc. v. Ward Foods, Inc.*, 1976-2 Trade Cas., ¶ 60,995 (5th Cir. 1976); *Northern v. McGraw-Edison Co.*, 1976-2 Trade Cas., ¶ 61,091 (8th Cir. 1976).

It should be noted that in examining the motives and intentions of sellers who allegedly imposed tie-in arrangements upon their customers, the courts have been unable to arrive at a consistent position with respect to the issue of tied prices as opposed to tied products. The courts have struggled with the problems raised by the requirement of separate prices for distinct items of commerce for many years. *United States v. Loews*, 571 U.S. 38, 53-55 (1962). Recently, however, a question has arisen as to how far the courts will go in analyzing a defendant's price structure in order to determine his "intention" of tying the sale of two distinct products. In *Hill v. A-T-O, Inc.*, 535 F.2d 1349 (2d Cir. 1976), where a defendant claimed that membership in a buying service was granted "free" to purchasers of his vacuum cleaner, the court stated "although defendants contend that membership in the buying service was 'free', used solely as a 'promotional gimmick' in the sale of vacuum cleaners, we believe this point irrelevant for purposes of tie-in analysis. To hold to the contrary would permit escape from the antitrust proscription against illegal tie-ins by the simple device of offering both products as a unit at a single price, while claiming that one of the two is a 'free giveaway'." *Id.* at 1354. In *SmithKline Corp. v. Eli Lilly & Co.*, 1976-2 Trade Cas., ¶ 61,199 (E.D. Pa. 1976), however, the court was unwilling to evaluate the economic realities of the defendant's pricing policies in order to determine whether a tie-in of two separate products in fact existed. In *SmithKline* the court found that while the defendant's policy of granting discounts in conjunction with the purpose of multiple separate products constituted "economic arm-twisting," it was not tantamount to a tie-in violation because "from an abstract perspective, if one disregards the economics of the marketplace, hospital pharmacists had the 'freedom to choose' any of Lilly's products without having to buy a tied product; thus they were 'free to take either product by itself.' *Id.* The economics of the marketplace precluded that freedom of choice for most hospitals; such a freedom of choice, more prevalent in theory than in operational reality, is enough to circumvent the tie-in prohibitions of the relevant antitrust laws."

basic thrust of the two-product analysis has been an examination of the interest, if any, which a seller retains in the tying product after the tie-in sale has been consummated. If the seller's continued interest in the tying product is substantial and can only be protected through the mechanism of requiring the purchase of products or services in addition to the tying product, no illegal tie-in arrangement will be found.<sup>33</sup> On the other hand, if the seller's interest does not meet this test of continuity and substantiality, an illegal tie-in involving two products will be found. The problem with this analysis is that it examines the arrangement purely from the viewpoint of the seller and fails to evaluate the position of the purchaser or of the marketplace at the time that the alleged tie-in sale is consummated.

What is needed is an analysis of the question of whether the two allegedly separate goods or services do in fact comprise a unique and definable single entity. The inquiry would then be focused not on whether the seller had some "legitimate" reason for combining the products or services at issue in any given case, but rather whether the final "combined" product is so unique and specialized that it is justified in being treated as a single product.<sup>33.1</sup>

Under the present standards, the tying and the tied products are examined separately to see whether there are distinct markets for each of them<sup>34</sup> and whether the relationship between the two *individual* products is such that their combination is "justified".<sup>35</sup> Under the proposed standards a court would not look to the markets and attributes of the individual products, but rather would concentrate upon the claimed uniqueness of the total bundle of goods or services which was the subject of the alleged tie-in sale.

This shift in emphasis would permit a court to evaluate the economic desirability of the transaction as it actually occurred rather

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<sup>33</sup> See *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961); *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961).

<sup>33.1</sup> See *Response of Carolina, Inc. v. Leasco Response, Inc.*, 1976-2 Trade Cas., ¶ 75,182 (5th Cir. 1976).

<sup>34</sup> See cases cited note 24 *supra*.

<sup>35</sup> See cases cited note 33 *supra*.

Some courts have attempted to explain their hesitancy in finding a tie-in violation when the seller is "justified" in offering what appear to be separate products only in conjunction with one another by stating that this "justification" defense is based upon a finding that in such a situation the seller does not exercise "economic coercion" over the buyer. *Rex Chainbelt, Inc. v. Harco Products, Inc.*, 512 F.2d 993, 1002 (9th Cir. 1975). This does not seem to be the case since the economic *motives* of the seller with respect to his product cannot possibly have any relationship whatsoever to the economic *power* of the seller with respect to the purchaser.

than being forced to hypothesize as to whether there would have been a market for the individual products had the alleged "tie-in" never occurred. In addition, this approach would deprive a court of its ability to base its decision upon such extraneous considerations as the "legitimacy" of the motives of the seller.

Abandonment of the evaluation of individual product markets and the motives of particular suppliers would result in a more realistic appraisal of the economic realities of the marketplace. While the leading case in the area has stated that "a manufacturer cannot be forced to deal in the minimum product that could be sold,"<sup>36</sup> this warning has not actually been heeded. In fact, the courts, in concentrating upon the separate components in an alleged tie-in sale have failed to evaluate whether the combined entity constitutes a single separate product by virtue of the fact that it is more than the mere sum of its component parts.<sup>37</sup>

Under this "total product" test, it would be necessary to determine whether a given consumer would be able to enter the marketplace and assemble the same final product that the "tie-in" seller is attempting to market by merely finding a complete substitute for the alleged "tie-in" product. If the consumer could assemble this final product on his own, without the intercession of this particular seller's tying product, there would be a finding of an illegal combination of two separate products. If, on the other hand, the special features or other uniqueness of the "combined" product prevented the consumer from accomplishing this, no tie-in of two "separate" products could be found.<sup>38</sup>

### Conclusion

The doctrine of per se liability in tie-in cases<sup>39</sup> does little to foster an evaluation of the economic realities involved in allegedly illegal tie-in agreements. Such rigorous interpretations of the stric-

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<sup>36</sup> *United States v. Jerrold Electronics Corp.*, 187 F. Supp. at 559.

<sup>37</sup> See *Supreme Court*, *supra* note 5, at 244-45; *Turner*, *supra* note 5, at 67-72. Courts have examined whether the components of an alleged tie-in are so interrelated as to preclude a finding of two separate products. This approach alone, however, does not avoid the danger of requiring the sale of a "minimum product." In order to avoid this pitfall it is necessary to evaluate the "combined" product in order to determine whether it is an economically viable separate entity which a manufacturer has a legitimate right to exploit.

<sup>38</sup> This would permit the jury to determine economic responsibility and result in the imposition of per se liability only when the marketplace had actually been damaged by the conduct of the seller.

<sup>39</sup> *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

tures of the antitrust laws are economically useful only if a court's attention is focused upon the realities of the economic transaction before it.

If a court fails to adopt the "total product" approach in examining the question of whether two products are involved in alleged tie-in arrangements, innovative marketing concepts will be sacrificed in the name of fictitious economic benefits. If a manufacturer is able to associate and combine his products in such a way as to develop an economically unique and useful entity, the fact that the component parts of that entity may be available in segregated units should not result in an automatic finding of a tie-in violation. Only if the allegedly new and unique product is in fact no more than that which the consumer himself could assemble should antitrust liability be imposed. If a manufacturer has in fact created a distinctly new product which is uniquely appropriate for any given consumer, he should not be penalized because he could have marketed this product in some other manner.



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