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Antitrust Standards Of Illegality For Tying Arrangements

ANTITRUST STANDARDS OF ILLEGALITY FOR TYING ARRANGEMENTS

For a number of years the shoe industry has been undergoing significant economic changes at the manufacturing and retail levels. Although there are approximately 1,000 shoe manufacturers, the four largest make 23 per cent of the nation's shoes. These large manufacturers are no longer merely selling shoes to independent shoe dealers, but they are also acquiring existing retail outlets to assure themselves of available markets.[1]

This acquisition of retail outlets is known as "vertical integration" and is being accomplished by merger, acquisition, or contractual arrangements such as tie-ins.[2] A contractual tying arrangement exists when the procurement[3] of a desired product, called the tying product, is conditioned upon the purchase of another, the tied product, in which the seller has a financial interest.[4]

An undesirable consequence of any vertical integration is that the smaller manufacturers find it difficult to locate truly independent dealers who will sell their product, since they are already committed by ownership or contract to one of the large manufacturers.[5] The

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[1]Brown Shoe Company v. United States, 370 U.S. 294, 300-02, 328-34 (1962); Brown Shoe Co., Docket No. 7606, CCH 1961-1963 Transfer Binder Trade Reg. Rep. ¶ 16, 316 (FTC 1963) (Final order).

[2]It seems clear that tie-ins are contractual vertical arrangements. Kessler & Sterm, possibly through oversight, do not include them in their list of various vertical contractual integrations. Kessler & Stern, Competition, Contract, and Vertical Integration, 69 Yale L.J. 1 (1959). However, McLaren includes both exclusive dealing arrangements (defined infra at note 48) and tie-ins under the heading of "requirements arrangements." McLaren, 45 Ill. L. Rev. 141, 143, 144 (1950).

[3]Often the tying product is leased. International Salt Co. v. United States, 332 U.S. 392 (1947); International Business Mach. Corp. v. United States, 298 U.S. 131 (1936). It is apparently not necessary that a remunerative price be paid for the tying product. International Salt Co. v. United States, supra; cf. FTC v. Sinclair Ref. Co., 261 U.S. 463 (1923); United States v. American Can Co., 87 F. Supp. 18, 23 (N.D. Cal. 1949). Nor is it a defense that nothing was paid for the tying product, but nonpayment will probably insulate the defendant from per se condemnation. Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 65 (1958). It may even be a key characteristic of a tie-in that the price charged for the tying product, if any is charged at all, is lower than would ordinarily be charged without the tie-in. Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19, 21 (1957).

[4]FTC v. Gratz, 253 U.S. 421 (1920); Crawford Transp. Co. v. Chrysler Corp., 388 F.2d 934 (6th Cir. 1964); United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941).

[5]Brown Shoe Co. v. United States, supra note 1 (merger); United States v. Loew's, Inc., 371 U.S. 38 (1962) (contractual tie-in); United States v. DuPont & Co., 357 U.S. 586 (1957) (acquisition); Standard Fashion Co. v. Magrane-Houston Co.,

Supreme Court recognized the evils of a shoe industry vertical merger in *Brown Shoe Co. v. United States*,[6] the "Merger Case," which condemned the merger of the third largest shoe manufacturer with the largest family-style shoe chain.

In the recent case of *Brown Shoe Co. v. FTC*,[7] the Court of Appeals for the Eighth Circuit upheld the legality of a vertical integration based on contractual tying arrangements.[8] During the past thirty years, Brown has offered a "franchise plan" to retail shoe dealers throughout the nation. Under the "plan," dealers receive many "valuable" services[9] without charge[10] enabling them to reduce overhead costs and to modernize selling techniques. The enrolled dealers have shown between 4 and 5 per cent higher profit on their shoe sales than the national retail shoe store average.

In return, the dealer agrees to "concentrate my business within the grades and price lines of shoes representing Brown Shoe... and will have no lines conflicting with Brown...."[11] Brown limits dealer purchases from other manufacturers to 25 per cent of the dealer's total requirements, most of which must be from lines not competing with Brown[12] If the dealer exceeds this percentage, he loses the "plan," although he may still buy shoes from Brown.[13] The attrition from the "plan" has been low.[14]

258 U.S. 346 (1922) (contractual exclusive dealing arrangement). Tie-ins are also objectional because they force an unwanted product, the tied one, on the purchaser thereby eliminating his freedom of choice as to that tied product. United States v. Loew's, Inc., supra.

[6]Brown Shoe Co. v. United States, supra note 1.

[7]339 F.2d 45 (8th Cir. 1964).

[8]The court also found the evidence insufficient to show illegal resale price maintenance. Id. at 56.

[9]These include: architectural plans, a field representative service, merchandising records and advice, retail sales training programs, an accounting system, national and retail meetings, group purchase of insurance and rubber footwear, discounts on certain lines, and loans; extensions of credit are offered by one of Brown's subsidiaries. Brown Shoe Co. v. FTC, supra note 7, at 46, 47; Brown Shoe Co., supra note 1, at 21,146; Brown Shoe Co., Docket No. 7606, CCH 1961-1963 Transfer Binder Trade Reg. Rep. ¶ 15,705 (FTC Feb. 1962) (initial order) 20,534.

[10]Window display props are available at a price from $500 to $600 per year. It is not clear if the enrolled dealer is required to purchase them. Brown Shoe Co. v. F.T.C., supra note 7, at 53.

[11]Id. at 49.

[12]Id. at 50.

[13]The constant availability of the tied product would not seem to constitute a defense by itself, since even in arrangements that have been condemned, the tied product was always available. E.g., Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (freight services); International Salt Co. v. United States, supra note 3 (salt); United States v. American Can Co., supra note 3 (cans).

[14]Thirty-one dealers have been expelled from the plan during a twenty-year period. Brown Shoe Co., supra note 9 (initial order), at 20,534.

Less than one per cent of the total national shoe sales are controlled by the 766 "franchise" dealers of Brown, but this percentage is higher in some 600 small and medium-sized towns.[15] The annual dollar sales to the enrolled dealers exceeds $24,000,000,[16] Brown does not have a monopoly in the tying product, franchise services, or in the tied product, shoes. Several other large shoe manufacturers have similar "plans."[17]

The Federal Trade Commission attacked Brown's franchise plan[18] under section 5 of the Federal Trade Commission Act[19] concerning unfair methods of competition. The Commission held that the Merger Case, decided under section 7 of the Clayton Act,[20] required the Com-

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[15]Brown contended that the nation as a whole should be considered the relevant geographic market, but the Commission declared the relevant geographic market to be each of the 600 small and medium-sized towns. Brown Shoe Co., supra note 9 (initial order), at 20,534-35. The Commission and the Eighth Circuit clearly implied it did not make any difference.

[16]For the fiscal year ending October 31, 1959, the dollar sales were $24,675,617 which far exceeded the total sales of the tenth-ranked shoe manufacturer. Brown Shoe Co., supra note 1, at 21,245.

[17]The Commission mentioned International Shoe Company and General Shoe Company. Id. at 21,245. These plans do not go as far as the Brown plan, but like the Brown plan, they also have a noncompliance penalty. It is not clear if these are the only three plans available to shoe dealers, but if they are, it is significant to note that the manufacturers offering them are among the top four shoe producers. The individual adoption of restrictive arrangements by several major producers in an industry, though not collusive, may have the collective effect of excluding small producers as a whole. Standard Oil Co. v. United States, 337 U.S. 293, 309 (1949); Kessler & Stern, supra note 2, at 30-37.

[18]The Hearing Examiner found the arrangement to be an exclusive dealing arrangement (defined infra note 48), but the Commission abandoned that theory in favor of a tie-in theory. Brown Shoe Co. v. FTC, supra note 7, at 50.

[19]"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 38 Stat. 719 (1914), 15 U.S.C. § 45(a)(1) (1958).

This was probably the only method available to attack this particular arrangement. Under the Sherman Act, the requirements and standards of proof would be too difficult to meet. See notes 37-46 and accompanying text. Under the Clayton Act, services are probably not "commodities." United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 558-59 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961); Northern Pac. Ry. v. United States, supra note 13, at 13; Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609 n.27 (1953); Fleetway, Inc. v. Public Serv. Interstate Transp. Co., 72 F.2d 761 (2d Cir. 1934), cert. denied, 293 U.S. 626 (1935); 58 Colum. L. Rev. 887-88 (1959). Also, a gratuitous offering is not a "sale" or a "lease" under the Clayton Act. See United States v. Investors Diversified Serv., Inc., 102 F. Supp. 645 (D. Minn. 1951), in which a loan was held not to be a "sale" or a "lease" under the Clayton Act.

[20]"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of

mission to examine thoroughly shoe industry conditions to discover whether Brown's tying arrangements had an anti-competitive effect.[21] The Commission analyzed the shoe industry and found that Brown's arrangement, if enforced, would have an adverse effect on competition. Failing to find a distinction between the effect of a vertical merger and the effect of a tying arrangement, the Commission stated that contral over the dealer was still control, and the fact that this control could end tomorrow, as in a mere contractual arrangement, is not important.[22]

The Commission then found that the tying arrangement was enforced[23] and precluded competitors of Brown from selling to dealers enrolled under the Brown "franchise" plan. A cease and desist order was issued stating that the "standards of illegality"[24] under section 5 of the Federal Trade Commission Act had been met. The order further stated that in view of the Merger Case, the standards of section 3 of the Clayton Act[25] had also been met. In effect, this meant the "standards of illegality" in cases arising under section 7 of the Clayton Act were applicable to proceedings under section 3 of that statute, and that those section 7 standards had been met in this case. The Court of Appeals for the Eighth Circuit unanimously reversed the Commission order on two grounds:[26] (1) lack of economic power in the tying product,[27] and (2) vertical contractual arrangements are

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such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ." 38 Stat. 731 (1914), as amended 64 Stat. 1125, 15 U.S.C. § 18 (1950).

[21]Brown Shoe Co., supra note 1, at 21,145.

[22]Id. at 21,142. The Commission stressed the longevity and stability of the program and the low attrition rate.

[23]Apparently, Brown even conceded this before the Commission. Brown Shoe Co., supra note 1, at 21, 137-38. This finding was not disturbed by the Court of Appeals for the Eighth Circuit.

[24]See the definition, infra note 34.

[25]"That 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 any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

[26]See note 47 and accompanying text.

[27]Although a Sherman Act violation was not alleged, it was necessary to discuss whether there was economic power in the tying products because, if proven,

to be distinguished from vertical mergers.[28] The court found the Merger Case "utterly unpersuasive here."[29]

By distinguishing the Merger Case, the court, in effect, held that the standards of illegality as applied by the courts in cases arising under section 7 of the Clayton Act have no place in a Commission proceeding against tying arrangements brought under section 5 of the Federal Trade Commission Act. The court apparently reasoned, therefore, that a thorough examination of the shoe industry was improper. Instead, the percentage of the relevant geographic market foreclosed to other competitors of Brown would be controlling and this percentage was too low to condemn the Brown "plan."

The court did not discuss whether the Commission's approach of thorough market examination could be justified on grounds other than the Merger Case and section 7 of the Clayton Act. The court concluded by comparing the instant case to *Timken Roller Bearing Co. v. FTC*,[30] wherein the court stated:

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such power, by itself, can meet a requirement of illegality under § 3 of the Clayton Act. See note 47 and accompanying text. The court distinguished the following cases dealing with economic power in the tying product; United States v. Loew's, Inc., supra note 5; United States v. Jerrold Electronics Corp., supra note 19; Northern Pac. Ry. v. United States, supra note 13.

This first ground was not strongly urged by the Commission when it condemned the arrangement.

[28]The court held that since arrangements under § 3 of the Clayton Act are based only on contract, the manufacturer has less control over the dealer who can leave the arrangement anytime; whereas a vertical merger or acquisition vests dealer control absolutely in the manufacturer. See Brown Shoe Co. v. FTC, supra note 7, at 55. Other authorities have alluded to this obvious distinction: United States v. Brown Shoe Co., supra note 1, at 332 n.55; Coyle, Brown Shoe: Judicial Reaffirmance of Traditional Clayton Act Standards, 1963 Wash. U.L.Q. 174, 184; Kessler & Stern, supra note 2, at 78. Compare with note 22 and accompanying text.

The Federal Trade Commission has drawn a more theoretical distinction between § 3 and § 7. Section 3 is designed to protect sellers in their immediate right to reach a market, whereas § 7 is concerned with the long range effect of competition generally. Pillsbury Mills, Inc., 50 F.T.C. 555 (1953); 14 Baylor L. Rev. 453, 458 (1962).

[29]Brown Shoe Co. v. FTC, supra note 7, at 55. It is interesting to note that in the Merger Case the Court considered all franchised stores as "'Brown stores'" in defining the relevant geographic market for the horizontal merger: "Brown was able to exercise sufficient control over these stores and departments to warrant their characterization as 'Brown' outlets for the purpose of measuring the share and effect of Brown's competition at the retail level." Brown Shoe Co. v. United States, supra note 1, at 337 n.66.

[30]299 F.2d 839, 42 (6th Cir. 1962), quoting from McElhenny Co. v. Western Auto Supply Co., 167 F. Supp. 949, 954, aff'd 269 F.2d 332 (4th Cir. 1959). The court relied heavily on United States v. Colgate & Co., 250 U.S. 300 (1919). In this Timken case, a roller bearing manufacturer cancelled orders of distributors when the distributors handled competing lines of the manufacturer. This was held not to be an illegal exclusive dealing arrangement absent proof that the dis-

> " 'The anti-trust laws do not prohibit a manufacturer or distributor from selecting dealers who will devote their time and energies to selling the former's product and a manufacturer is not compelled to retain dealers having divided loyalties. . . .' "

Unlike other antitrust violations, which are condemned under only one or two federal statutes, tying arrangements are condemned under three: section 1 of the Sherman Act,[31] section 3 of the Clayton Act,[32] and section 5 of the Federal Trade Commission Act.[33] Under these three statutes the standards of proof, generally referred to as the "standards of illegality,"[34] have not been entirely clarified by the courts.[35]

Section 1 of the Sherman Act. Of the three statutes condemning tying arrangements, section 1 of the Sherman Act carries the most stringent requirements and standards of illegality. For the proponent[36] to prevail, he must establish three requirements:

1. Economic power in the tying product.
2. A substantial amount of commerce in the tied product.

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tributors entered into an "agreement" or "understanding" with the manufacturer to handle exclusively the manufacturer's bearings. In its opinion, the Commission distinguished the Timken Roller Bearing Co. v. FTC, supra, decision by pointing tween the manufacturer and shoe dealer. Brown Shoe Co., supra note 1, at 21,141. out that, unlike that case, there was an "agreement" and "understanding" here be-

[31] "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 hereby declared to be llegal. . . ." 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

[32] See note 25.

[33] See note 19.

[34] A definition of terms is necessary. "Requirements of illegality" are conditions which must be proven in order to find violation. All courts agree as to what these requirements are under the various statutes. The "standards of illegality" or proof concerns the test, method, or approach employed to meet a given requirement. This is the area of confusion.

There is an occasional overlap between requirements and standards, particularly when dealing with § 1 of the Sherman Act.

[35] Some cases involving tie-ins have avoided reference to the standards of illegality by justifying the manufacturer's arrangement on the ground of "product integrity." This emerging defense was early enunciated by the Supreme Court. See International Salt Co. v. United States, supra note 3; International Business Machs. Corp. v. United States, supra note 3; Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3 (1936); United States v. United Shoe Mach. Co., 258 U.S. 451 (1922). Recent cases involving this defense are: United States v. Jerrold Electronics Corp., supra note 19; Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), cert. granted, 379 U.S. 885 (1965); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961). For a general discussion of all these cases, see 63 Mich. L. Rev. 550 (1965); 62 Mich. L. Rev. 1413 (1964).

[36] The Justice Department can proceed on a criminal basis or bring an injunction suit in a federal district court. 26 Stat. 209 (1890), 15 U.S.C. §§ 1, 4 (1958). Private litigants may also sue. Kiefer-Stewart Co. v. Joseph E. Seagram & Son, Inc., 340 U.S. 211 (1951).

3. A "not insubstantial" amount of interstate commerce affected by the transaction.[37]

When these requirements are met, it will have been established that the defendant has sufficient economic power in the tying product to force substantial sales of his tied product.[38]

The first requirement has been the source of much confusion. At one time, economic power in the tying product could be established only upon a showing of absolute monopoly[39] which, in turn, was automatically done whenever the tying product was patented[40] or copyrighted.[41] This was "per se" illegality.[42] The economic power standard was later diluted to require only "sufficient economic power to impose an appreciable restraint on free competition in the tied product."[43]

This weakening of the economic power standard led some authorities to assert that the first requirement could be inferred from the presence of the second requirement. In other words, economic power over the tying product must be present if an "appreciable" number

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[37]Times-Picayune Publishing Co. v. United States, supra note 19. A company owning two of the three daily newspapers in New Orleans, a morning and an evening paper, did not violate the Sherman Act when it required advertisers buying space in one of its papers to purchase also space in the other.

[38]Ibid.

[39]Ibid.

[40]International Salt Co. v. United States, supra note 3; Mercoid Corp v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); B.B. Chem. Co. v. Ellis, 314 U.S. 495 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938); Carbice Corp. v. American Patents Dev. Corp., 283 U.S. 27 (1931); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917). Most of these cases involve patent infringement suits brought by the patent owner. For a general discussion of these cases, see 4 Toulmin, Anti-Trust Laws § 18 (1950).

[41]United States v. Loew's, Inc., supra note 5; United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[42]"A 'per se' rule is one whereby evidence of a few selective facts conclusively settles a different, ultimate issue of fact and/or law." Comment, 65 Yale L.J. 34, 46 n.68 (1955). The best example is an agreement to fix prices under the Sherman Act. Once price fixing is established, a Sherman Act violation exists. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). As to the per se rule in tying arrangements, see generally Turner, supra note 3; 63 Mich. L. Rev. 550 (1965). This comment will not deal further with the per se rules, except to point out that the "quantitative" test (see note 53 and accompanying text) might be considered a per se approach.

[43]Northern Pac. Ry. v. United States, supra note 13, at 11. A tying arrangement was condemned under the Sherman Act when a railroad conditioned the sale of land near railroad tracks upon the buyer shipping his goods over the defendant seller's railroad.

of buyers are willing to enter into the tying arrangement.[44] Apparently, the Supreme Court recognized this reasoning, for in its latest section 1 tie-in case,[45] the Court, in dictum, said: "Even absent a showing of market dominance [in the tying product], the crucial economic power may be inferred from the tying products desirability to consumers or from uniqueness in its attributes."[46]

Section 3 of the Clayton Act. The requirements for illegality under section 3 of the Clayton Act are identical to those of section 1 of the Sherman Act, except that under section 3 it is only necessary that the proponent established either economic power in the tying product or a substantial restraint on commerce in the tied product.[47] Most of the confusion in section 3 tie-in cases[48] results from an attempt to

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[44]Id. at 7, 8 (dictum); Lockhart & Sacks, The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of The Clayton Act, 65 Harv. L. Rev. 913, 945 (1952); Turner, supra note 3, at 65; 63 Mich. L. Rev. 550-51 n.7 (1965).

[45]United States v. Loew's, Inc., supra note 5. The Sherman Act forbids conditioning the sale or license of one copyrighted feature film upon the sale or license of several inferior films. Such a practice is called "block-booking" and had been condemned earlier. United States v. Paramount Pictures, Inc., supra note 41, at 156-58. For a discussion of the reasons a seller or licensor of films adopts such a practice, see Stigler, A Note on Block-Booking, 1963 Sup. Ct. Rev. 152.

[46]United States v. Loew's, Inc., supra note 5, at 45. With regard to the Court's reference to "uniqueness," see the recent case of Susser v. Carvel Corp., supra note 35. In that case, a tying item consisting of a trade-mark was not sufficiently unique to meet, per se, the tying product test. There was a dissent, however, and it is significant to note that the court also found an inconsequential volume of business in the tied product. Futhermore, the arrangement was justified anyway on the basis of "product integrity." The case is discussed in 63 Mich L. Rev. 550 (1965). The court in that case did not state how it is possible for a trade-mark to be a tying product.

At least one federal case has impliedly followed that part of the dictum dealing with consumer "desirability." In Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), it was held that the Sherman Act forbids an oil company conditioning renewal of leases to dealers upon the dealers purchasing all their oil, gasoline, batteries, tires, and other accessories from the oil company. Although relying principally on Standard Oil Co. v. United States, supra note 17, which is factually similar, the court expressly favored the dictum in United States v. Loew's, Inc., supra.

[47]Times-Picayune Publishing Co. v. United States, supra note 19, at 608-09; Lessig v. Tidewater Oil Co., supra note note 46. It is a general maxim that the Sherman Act has a comparatively higher standard of illegality for each of its three requirements than for the two alternative requirements under § 3 of the Clayton Act. Standard Fashion Co. v. Magrane-Houston Co., supra note 5; Pillsbury Mills, Inc., supra note 28; Att'y Gen. Nat'l Comm. Antitrust Rep., 129, 130 (1955). The extent of this comparison cannot be precisely measured. The gap, however, appears to be closing. Kessler & Stern, supra note 2, at 51-61.

[48]Section 3 also covers exclusive dealing arrangements as well as tie-ins. Standard Oil Co. v. United States, supra note 17. An exclusive dealing arrangement is where the buyer agrees not to purchase like products from other sellers. A tie-in is similar to an exclusive dealing arrangement since the buyer in a tie-in is generally

develop a standard of illegality to be applied in meeting the requirement of restraint of commerce in the tied product.[49]

The first section 3 standard of illegality was stated in the landmark decision of *Standard Oil Co. v. United States*,[50] wherein the Court established the "quantitative substantiality" test.[51] under this test, if the proponent[52] shows a sufficient percentage of foreclosure in the tied product, economic harm has been established.[53] Under a strict application of this test, the quantity or percentage of the foreclosure is decisive and the Court makes no further inquiry.

Legal writers criticized this mechanical "quantitative" approach to section 3 proceedings[54] and, thereafter, its rigidity was relaxed.[55]

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precluded, as a practical matter, from buying tied products from anyone except the seller imposing the tying restriction. Times-Picayune Publishing Co. v. United States, supra note 19, at 606 n.23. A "requirements" contract is technically an exclusive dealing arrangement. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1962); Standard Oil Co. v. United States, supra. An exclusive distributorship, on the other hand, is not an exclusive dealing arrangement. White Motor Co. v. United States, 372 U.S. 253 (1963).

[49]The fact that § 3 covers exclusive dealing arrangements as well as tie-ins only adds to the confusion of § 3 standards of illegality. Supreme Court dicta declares that since a requirements contract is often entered into for good business reasons at the behest of the buyer, it will take a "significantly greater" showing to condemn it than if a tie-in is involved. Brown Shoe Co. v. United States, supra note 1, at 329-32. In Standard Oil Co. v. United States, supra note 17, at 305-06 the Court made the oft-quoted statement: "Tying arrangements serve hardly any purpose beyond the suppression of competition."

It is at least clear that the proof required to condemn an exclusive dealing arrangement under § 3 is not less than that required to condemn a tie-in.

[50]Supra note 17. Section 3 of the Clayton Act prevented an oil company from entering into contracts with independent dealers in which the dealers were required to purchase exclusively from the oil company all of the dealers requirements in one or more of the products marketed by the oil company. The contracts affected gross business of $58,000,000 in a seven-state area and comprised 6.7% of the total amount of oil products sold in that area.

[51]At least two writers feel it is inappropriate to cite this case for the "quantitative substantiality" test. Kessler & Stern, supra note 2, at 30-37.

[52]The Justice Department can bring an action for damages or injunction. 38 Stat. 736 (1914), 15 U.S.C. § 25 (1958); 69 Stat. 282 (1955), 15 U.S.C. § 15A (1958). A private suit can be brought in the courts for damages or an injunction. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958); 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958). The Federal Trade Commission also has jurisdiction. 38 Stat. 737 (1914), 15 U.S.C. § 21 (1958).

[53]To state it another way: "[W]hen competitors [of the seller] are foreclosed from a substantial enough share of the market [based on percentages], it is not far-fetched to infer a substantial lessening of competition." Kessler & Stern, supra note 2, at 28.

[54]Handler, Recent Antitrust Developments, 9 Record of N.Y.C.B.A. 171, 182, 183 (1954); Handler, Recent Antitrust Developments, 71 Yale L.J. 75, 84-87 (1961); Kessler & Stern, supra note 2, at 24-37. Other critics are compiled in Bok, The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act, 1961 Sup. Ct. Rev. 267, 275 n.28.

[55]FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953).

In its most recent section 3 case, *Tampa Elec. Co. v. Nashville Coal Co.*,[56] the Supreme Court seems to present a newer and even more flexible approach to section 3. Although less than one per cent of the market was foreclosed,[57] the Court apparently upheld the arrangement not only on that basis, but also thoroughly investigated other market and industry conditions to see if the arrangement had an adverse competitive effect. This market examination evidences a "qualitative" approach to section 3 proceedings.[58]

Section 7 of the Clayton Act. Section 7 of the Clayton Act[59] is not concerned with contractual arrangements but is designed to stop horizontal[60] and vertical mergers and acquisitions "if there is a reasonable probability that the merger will substantially lessen competition."[61] In *Brown Shoe Co. v. FTC,* however, the statute is significant because the Commission held that the standard of illegality under section 7, particularly as enunciated in the vertical aspect of the Merger Case, is applicable to section 3 contractual arrangements.

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[56]Supra note 48. A coal supplier could not avoid a requirements contract under which he was to fill all the coal needs of a public utility for twenty years.

[57]The contract covered only 0.77% of all the coal readily available to Florida purchasers from all suppliers. Tampa Elec. Co. v. Nashville Coal Co., supra note 48, at 333. It has also been pointed out that in the Tampa Electric case, § 3 was set up merely as a defense to a contract suit, brought by a public utilities company. 15 Vand. L. Rev. 617 (1962).

[58]Lessig v. Tidewater Oil Co., supra note 46; Bok, supra note 54, at 273-85; Jones, The New Thrust of the Antimerger Act: The Brown Shoe Decision, 38 Notre Dame Law. 229 (1963); The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 205 (1961); 30 Fordham L. Rev. 493 (1962); 31 Geo. Wash. L. Rev. 504 (1962).

[59]Supra note 20.

[60]A horizontal merger or acquisition is one involving two competitors. The original § 7 proscribed only horizontal stock acquisitions. 38 Stat. 731 (1914); FTC v. Western Meat Co., 272 U.S. 554 (1926).

[61]Brown Shoe Co. v. United States, supra note 1, at 325. The courts and the Commission have jurisdiction in § 7 proceedings. 38 Stat. 731 (1914); as amended, 64 Stat. 1125, 15 U.S.C. § 21 (1958). Proceedings can begin after the proscribed activities have taken place. In United States v. DuPont & Co., supra note 5, the suit was commenced thirty-two years after the stock acquisition. The Commission early adopted a "qualitative" standard of proof in its § 7 proceedings. Pillsbury Mills, Inc., supra note 28; 37 Tul. L. Rev. 109 (1962).

The Federal Trade Commission § 7 case of Brillo Mfg. Co., CCH Trade Reg. Rep. ¶ 27,243 (1958), is a good general illustration of the overlap between the various tests. The Hearing Examiner first applied a "quantitative" test and found a violation. The Commission reversed and remanded to the Examiner to apply a "qualitative" test. The Examiner, on remand, did apply a "qualitative" test and dismissed the complaint. This dismissal was appealed and overruled by the Commission because when the Examiner applied the "qualitative" test on remand, he paid insufficient attention to the percentages of the market foreclosed. Supra ¶ 28,667.

In the Merger Case,[62] the vertical aspect of the merger potentially foreclosed other manufacturers from only a little over one per cent of the total retail dealer purchases, and they were actually foreclosed from only 0.12 per cent.[63] The Court, however, held that the percentage was not *de minimus*[64] and thoroughly examined the shoe industry. This exhaustive inquiry uncovered an industry-wide movement toward concentration, oligopoly, and vertical integration mainly through merger.[65] On the basis of these findings, the merger was condemned.[66]

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[62]Earlier in United States v. DuPont & Co., supra note 5, DuPont had acquired a 23% stock interest in General Motors and thereafter filled half the General Motor's requirements for auto fabrics and finishes. The acquisition was condemned, although it was not clear whether the Court adopted a "quantitative" or "qualitative" aproach to § 7. Handler, Annual Review of Recent Antitrust Developments, 12 Record of N.Y.C.B.A. 411, 425 (1957).

[63]After the merger, Brown supplied 7.9% of all Kinney's requirements, and Kinney sold 1.6% of the total national pairage of nonrubber shoes. Brown Shoe Co. v. United States, supra note 1, at 300, 303. This equals 0.12% actual foreclosure. Wiley, Mergers, Section 7 and Brown Shoe, 43 B.U.L. Rev. 367, 374 & n.19 (1963).

[64]Too insignificant as a matter of law. Even here a "quantitative" floor is put on these percentages.

[65]Despite the *de minimus* floor used by the Court, its overall approach appears to be "qualitative." Jones, supra note 58; 10 U.C.L.A.L. Rev. 637 (1963). The Court itself stated: "Statistics reflecting the shares of the market. . . are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." Brown Shoe Co. v. United States, supra note 1, at 322 n.38.

[66]The recent § 7 cases of United States v. Continental Can Co., 378 U.S. 441 (1964), and the United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), stress percentages above all in condemning the mergers. This stress on percentages casts some doubt on the apparent "qualitative" approach in § 7 proceedings as espoused in the Merger Case. Handler, Recent Antitrust Developments—1964, 63 Mich. L. Rev. 59, 67-78 (1964). Both involved horizontal mergers resulting in approximately 20-30% control of the relevant market after their respective mergers. In one case, this was an increase of 3.1%. United States v. Continental Can Co., supra at 461. In the other case, the increase was about 10-15% United States v. Philadelphia Nat'l Bank, supra, at 331.

The potential foreclosure percentages in these cases, however, are relatively high, and the lower courts were reversed. The Court states that in view of such high percentages, the simplest approach is to condemn the mergers without market analysis. United States v. Continental Can Co., supra, at 461; United States v. Philadelphia Nat'l Bank, supra at 364. In dicta, the Court states that a low percentage would result in a market analysis to see if the merger or acquisition has an anti-competitive effect. United States v. Continental Can Co., supra at 458; see United States v. Philidelphia Nat'l Bank, supra at 364 n.41.

Thus, the Supreme Court seems to be saying that if the percentage of potential foreclosure in a § 7 case is relatively high, a "quantitative" test will be used to condemn the merger; whereas, if the percentage is low, it can still be condemned if a thorough market analysis shows the merger has an anti-competitive effect. Thus, it would seem that when market percentages are low in § 7 proceedings, the courts

Although *Tampa Electric* and the Merger Case seem to adopt a "qualitative" approach to vertical integrations, the rationale of the Merger Case was preferred by the Commission in *Brown Shoe Co. v. FTC,* because the Merger Case more clearly adopted the "qualitative" test, the quantitative percentage of actual foreclosure was lower, and an antitrust violation was established.

The Court of Appeals for the Eighth Circuit overruled the Commission's adoption of the Merger Case and section 7 standards of illegality by distinguishing vertical mergers from vertical contractual arrangements. The Federal Trade Commission, however, may adopt the same line of attack in federal courts outside the Eighth Circuit.

Section 5 of the Federal Trade Commission Act. This act[67] was primarily designed to permit the Federal Trade Commission[68] to enjoin "in their incipiency acts and practices which, when full blown, would violate"[69] the Sherman and Clayton Act. Section 5 also allows the Commission to proceed against tying and exclusive dealing arrangements which technically cannot be attacked under the Sherman or Clayton Acts.[70] Although the Commission claims[71] that it can enjoin these arrangements with a lower standard of proof than applied

will still apply a "qualitative" test to allow a chance for condemning the merger as in the Merger Case.

[67]Supra note 19.

[68]Apparently only the Federal Trade Commission can proceed under § 5 of the Federal Trade Commission Act. Clearly § 5 is definitely not available as a basis for private suits. Moore v. New York Cotten Exch., 270 U.S. 593, 603 (1926); Samson Crane Co. v. Union Nat'l Sales, Inc., 87 F. Supp. 218, 221 (D. Mass. 1949), aff'd per curiam, 180 F.2d 896 (1st Cir. 1950); Kessler & Stern, supra note 2, at 64 n.282. The Justice Department probably does not have jurisdiction under § 5. See Marquette Cement Mfg. Co. v. F.T.C., 147 F.2d 589, 593-94 (7th Cir. 1945), aff'd sub nom. FTC v. Cement Institute, 333 U.S. 683, 701 (1948); Kessler & Stern, supra note 2, at 64 n.281. The Justice Department has not undertaken to proceed under § 5.

[69]FTC v. Motion Picture Advertising Serv. Co., supra note 55, at 394-95. Cf. Fashion Originators Guild v. FTC, 312 U.S. 457, 463, 466 (1941). Apart from standards of illegality, one function of § 5, in addition to protecting competition in general, is to protect individual competitors of the seller-defendant. Thus, § 5 proceedings are not unlike a tort action. Kessler & Stern, supra note 2, at 22, 45-50, 98-100. This may also be true of the Clayton Act. Pillsbury Mills, Inc., supra note 28.

[70]Section 5 is not restricted to "commodities" or a "sale" or a "lease." See note 19; Turner, supra note 3, at 58 & n.33; Att'y Gen., supra note 47, at 148 n.78.

[71]Brown Shoe Co., supra note 1, at 21,144-45; Luria Bros. Co., Docket No. 6156, CCH 1961-1963 Transfer Binder Trade Reg. Rep. ¶ 16,183, p. 20,986 (FTC 1962) (proposed order). Both cases cite FTC v. Motion Picture Advertising Serv. Co., supra note 55.

There appears to be a division of authority among the writers. Compare Handler, Recent Antitrust Developments, 9 Record of N.Y.C.B.A. 171, 182 (1954) with Att'y Gen., supra note 47, at 148 & n.78.

by the courts under section 3 of the Clayton Act, it has not attempted to do so.[72]

The "incipiency" purpose of section 5 and the availability of expert personnel in the Commission contributed to its early adoption of a "qualitative" approach to exclusive dealing and tying arrangements.[73] When the Commission adopted the "qualitative" test, the federal courts were still using essentially the "quantitative" approach in section 3 proceedings. The Commission later found the application of the "qualitative" test to be difficult,[74] and rejected it in 1960 returning to the old "quantitative" approach.[75] Both the courts and the Commission, therefore, would have been using the same test, except that at about the same time that the Commission was rejecting the "qualitative" test, the Supreme Court in *Tampa Electric* was apparently making a "qualitative" test binding on the courts in section 3 proceedings. Thus, different standards were apparently again established in the Commission and the courts.

In *Brown Shoe Co. v. FTC,* the Commission presumably would have been upheld had the Court of Appeals for the Eighth Circuit sanctioned the Commission's adoption of a "qualitative" approach to tying arrangements. By distinguishing section 7 of the Clayton Act and the Merger Case, the court held that the Commission was barred from adopting a "qualitative" approach in tying cases. The reason for this failure does not rest entirely with the lower federal courts. Until the Supreme Court further clarifies the tests and when they are to be applied, the tying arrangement "standards of illegality" will continue to be shrouded in obscurity.

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[72]Exhaustive case lists are found in Kessler & Stern, supra note 2, at 64 & n.281; 15 Vand. L. Rev. 617, 620 n.27 (1962).

[73]Maico Co., 50 F.T.C. 485 (1953).

[74]The Commission seemed to vacillate between the "quantitative" and "qualitative" approaches. E.g., Anchor Serum v. FTC, 217 F.2d 867 (7th Cir. 1954) ("quantitative"); Revlon Prod. Corp., 51 F.T.C. 260 (1954) ("qualitative"); Outboard Marine & Mfg. Co., 52 F.T.C. 1553 (1956) ("quantitative").

[75]Mytinger v. Casselbury, Inc., 1960-1961 CCH, Trade Reg. Rep. 29,091 (1960) (final order), aff'd 301 F.2d 534 (D.C. Cir. 1962) overruling Maico Co., supra note 73. Ironically, this was a classic case for applying a "qualitative" test. Bok, supra note 54, at 280.

Incidentally, the court seemed to interpret Tampa Electric as a "quantitative" case. Mytinger v. Casselbury, Inc., supra at 539. Compare with note 58 and accompanying text.

Apparently, it is within the power of the Federal Trade Commission to switch tests at will without fear of court reversal. Kessler & Stern, supra note 2, at 51 n.244.