# PER SE ILLEGALITY OF TIE-INS

## INTRODUCTION

A tie-in is usually defined as an agreement to sell one product (the tying product) subject to a condition that the buyer also purchase another and different product (the tied product).[1] When the seller has some quantum of leverage in the market for the tying product, the tie-in can be held to be a restrictive business practice in violation of the antitrust laws.[2]

Tie-ins are generally prohibited because of what appears to be a visceral reaction by the courts that it is somehow unfair to allow a seller to foreclose competitors in one market (the tied market) through use of market leverage and power developed in another market (the tying market).[3] It is said that the harm caused by tie-ins is that the purchaser is deprived of a free choice based on price and quality, and that competitors are denied access to tied markets for reasons having nothing to do with competition in those markets.[4]

## HISTORICAL BACKGROUND

The tie-in concept and the prohibition against tie-ins originated in the field of patent law where typically a patent owner would use his lawfully granted "patent monopoly"[5] as a lever for forcing his licensee to purchase from the patent owner unpatented components and supplies for use with the patented article or process. Prior to the Clayton Act[6] this practice was upheld[7] as not violating the antitrust laws be-

1 *See, e.g.*, Northern Pacific Ry. v. United States, 356 U.S. 1, 5-6 (1958).

2 *Id.*

3 *See, e.g.*, Note, *The Logic of Foreclosure: Tie-in Doctrine after Fortner v. U.S. Steel*, 79 YALE L.J. 86 (1969).

4 356 U.S. at 6.

5 On the thesis that a patent may not provide the patent owner with an economic monopoly, *see* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 57 (1958).

6 Clayton Act § 3, 38 Stat. 731 (1914), 15 U.S.C. § 14 (1964):

> 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

cause, under the "rule of reason,"[8] any harmful effects of the practice were offset by the beneficial effects flowing from the patent owner's allowing others to use his invention.

A tie-in sale was first held illegal in 1917 by the United States Supreme Court in *Motion Picture Patents Co. v. Universal Film Mfg. Co.*,[9] a case involving patented film projectors which had been sold on condition that they be used only with unpatented films supplied by the patent owner. The Court held that, although a patentee is free to prevent the public from using his patented invention, once he allows it to enter the stream of commerce it is subject to all rules governing that commerce. To allow such conditional sales (tie-ins) would be, in effect, to sanction a patent owner's exercise of a monopoly larger than the one granted by the patent.[10] Although the Clayton Act itself did not apply because it had been passed subsequent to the patent owner's acts, the Court felt its views were nevertheless buttressed by Section 3 of the Act forbidding the lease or sale of goods " '*whether patented or unpatented*' "[11] on the condition or agreement that the lessee or purchaser not use the goods of another " 'where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' "[12]

Five years later, in *United Shoe Machinery Corp. v. United States*,[13] the defendant company was enjoined, under Section 3 of the Clayton Act, from requiring in leases that its patented machines be used only on shoes upon which certain other operations had been performed by other machines made by the defendant shoe machinery company.

In 1936, the Supreme Court found IBM also in violation of Section 3 of the Clayton Act, where IBM had leased tabulating machines upon the condition that the lessees use the machines only with punch cards supplied by IBM.[14] The fact that the machines and the cards both were

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.

7 *See, e.g.*, Henry v. A.B. Dick Co., 224 U.S. 1 (1912).

8 The "rule of reason" was first enunciated by the United States Supreme Court in Standard Oil Co. v. United States, 221 U.S. 1 (1911).

9 243 U.S. 502 (1917).

10 *Id.* at 517.

11 *Id.*

12 *Id.*

13 258 U.S. 451 (1922).

14 International Business Machines Corp. v. United States, 298 U.S. 131 (1936).

patented (albeit in separate patents) was held to be no defense.[15] Nor was IBM's contention that the tie-in was necessary to protect its "goodwill" allowed as a defense.[16] Although the parties and the Court admitted that it was essential to successful performance of the machines that cards used therein conform, with relatively minute tolerances, to specifications as to size, thickness, and other indicia of quality, the "goodwill" defense was not accepted because there was no showing that the aforementioned specifications could not have been set forth by IBM and met by other card manufacturers.[17]

In 1947, in *International Salt Co. v. United States*,[18] the Supreme Court laid the groundwork for an expansion of the prohibition against tie-ins, an expansion to which this paper primarily is addressed. In *International Salt*, the company leased its patented salt dispensing machines only on condition that lessees purchase from it all salt used in those machines, provided the salt company would meet the lowest price of any competitor. This leasing practice was held not only to be in violation of Section 3 of the Clayton Act, but also to be "unreasonable *per se*" under the Sherman Act.[19] The option to purchase salt from others if defendant could not meet their price was held

> not [to] avoid the stifling effect of the agreement on competition. The [defendant] had at all times a priority on the business at equal prices. A competitor would have to undercut [defendant's] price to have any hope of capturing the market, while [defendant] could hold that market by merely meeting competition.[20]

Thus, after *International Salt*, a tie-in wherein the tying product was patented appears to have been joined in a class with horizontal price fixing,[21] horizontal territorial allocation,[22] and group boycotts,[23] a class of restrictive business practices which

> because of their pernicious effect on competition and lack of any

15 *Id.* at 136-37.

16 *Id.* at 138-39.

17 A few courts have allowed such a "good will" defense. *See, e.g.*, Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), where it was shown to the court's satisfaction that specifications for the tied product (soft ice cream) could not reasonably be set forth with sufficient particularity to protect the seller's good will. *See also* Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir. 1961), which held very rigid specifications to be reasonable.

18 332 U.S. 392 (1947).

19 *Id.* at 396.

20 *Id.* at 397.

21 United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

22 United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

23 Fashion Originators' Guild of America, Inc., v. FTC, 312 U.S. 457 (1941).

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.[24]

## EXPANSION AND CONFUSION OF THE DOCTRINE OF PER SE ILLEGALITY OF TIE-INS

Since *International Salt*, a wide variety of tie-ins not involving patented products has been attacked. In *Times-Picayune Publishing Co. v. United States*,[25] the business practice attacked was a unit rate for advertising space whereby advertisers desiring to advertise in the city's sole morning paper were required to advertise also in the same publisher's evening paper, one of two evening papers in New Orleans. Since advertising space was not a "commodity," the practice was not governed by Section 3 of the Clayton Act, which applies only to "goods, wares, merchandise, machinery, supplies or other commodities." And, since no patents were involved to establish monopolistic leverage in the market for the tying product, the Court was constrained to reexamine the basic rationale underlying the prohibition of tie-ins in previous cases to determine the proper standard by which to measure a violation of Section 1 of the Sherman Act. The Court said:

> [T]he essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next.[26]

The relevant standards for illegality were described as follows:

> From the "tying" cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the "tying" product, *or* if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, *per se*, to foreclose competitors from any substantial market," a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met.[27]

As to the requisite degree of leverage over the tying product, the Court found that "[u]nlike other 'tying' cases where patents or copyrights

24 Northern Pacific Ry. v. United States, 356 U.S. at 5.
25 345 U.S. 594 (1953).
26 *Id.* at 611.
27 *Id.* at 608-09.

supplied the requisite market control, any equivalent market 'dominance' in this case must rest on comparative marketing data."[28]

After thus unequivocally setting the standards required to find a Sherman Act Section 1 violation, the Court next proceeded to examine a great mass of comparative market data, finding that the publishing company was not in violation because sufficient market dominance was not proved even though the morning paper was shown to have 40% of the market and the publishing company (with combined morning and evening papers) was shown to have nearly 80% of the market.[29]

As an alternative holding, the Court said the publishing company could not be found guilty of a tie-in because there was no evidence that other than a *single product* was involved. More specifically, in the words of the Court:

> [N]othing in the record suggests that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential. We must assume, therefore, that the readership "bought" by advertisers in the [morning paper] was the selfsame "product" sold by the [evening paper] and, for that matter, the [competitor's paper].
>
> The factual departure from the "tying" cases then becomes manifest. The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market. Here, however, . . . no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same.[30]

Whether the Court was correct in its finding that the record was, as a matter of law, insufficient to sustain the district court's finding of sufficient market control to support a Sherman Act Section 1 violation[31] and whether the Court was correct in finding only a *single product* is less important in the present discussion than the Court's unequivocal ruling that, where patents and copyrights are not involved, (1) market domination in the "tying" product must be shown by comparative market data *and* (2) a substantial volume of commerce in the market of the "tied" product must be shown to have been restrained before a court can find any particular tie-in arrangement to be per se unreasonable under Section 1 of the Sherman Act.[32]

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28 *Id.* at 611.
29 *Id.* at 627.
30 *Id.* at 613-14.
31 *Id.* at 601.
32 *Id.* at 608-09.

*Times-Picayune* marked a high point in the stringency of standards required for showing a tie-in to be a violation of the Sherman Act. Whether such stringent standards were justified by precedent or public policy underlying the antitrust laws is not clear. Inasmuch as the per se unreasonableness of tie-ins has always been expressed in terms of the use of leverage in one market to restrain competition in another market, one might expect, as the Court held, that there must be a showing of some degree of market dominance in the "tying" product to show the existence of leverage.[33] Yet, it would seem as logical to expect also that the requisite leverage could be inferred from the existence of a tie-in arrangement which is shown to effect an appreciable restraint in the "tied" market. This reasoning cannot be supported solely by *Times-Picayune* because of the finding of only a single product and a single market therein.[34]

In 1958, however, the Supreme Court provided support for the inference of leverage in *Northern Pacific Railway Co. v. United States*.[35] In 1864 and 1870 the United States had granted the predecessor of Northern Pacific nearly forty million acres of land to facilitate railroad construction. By 1949 Northern Pacific had sold or leased nearly all that land. In many of its sales contracts and in most of its lease agreements Northern Pacific had inserted preferential routing clauses which compelled the grantee or lessee to ship over its lines all commodities produced or manufactured on the land, provided its rates, and in some instances its service, were equal to those of competing carriers. Since neither the tying product (land) nor the tied product (rail service) was a "commodity" within Section 3 of the Clayton Act, Section 1 of the Sherman Act had to be applied.[36] The Court gave consideration to the *Times-Picayune* opinion requiring "monopoly power" or "market dominance" to be a necessary precondition for application of the rule of per se unreasonableness to tying arrangements and said:

> [W]e do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming . . . that a "not insubstantial" amount of interstate commerce is affected).[37]

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33 *Id.* at 621-22.

34 *Id.* at 613-14. For a more thorough discussion of the single product-single market problem, *see* Note, *Antitrust Law—Tying Arrangements and Per Se Illegality,* 38 U.M.K.C.L. Rev. 483, 497 (1970).

35 356 U.S. 1 (1958).

36 *Id.* at 10-11.

37 *Id.* at 11.

And with respect to providing the requisite "sufficient economic power," the Court stated:

> The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints.[38]

Based on the existence of the numerous tie-ins and on the fact that the land was strategically located with respect to the railroad, the Supreme Court affirmed the lower court's summary judgment that the tie-ins constituted a per se violation by Northern Pacific of Section 1 of the Sherman Act.[39] Thus, the apparent rule of *Times-Picayune* was broadened by reducing the burden of proving sufficient leverage necessary to constitute a prohibited tie-in.

Another aspect of *Northern Pacific* is also of interest. At one portion of the opinion the Court states, as a principal reason justifying the application of the per se rule to tie-ins, that tie-ins are one of those 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.*[40]

But, in another portion of the opinion, the Court suggests that there may be some "explanation . . . for the existence of these restraints" which would negate a finding that a tie-in violated Section 1 of the Sherman Act.[41] This inconsistency in the Court's opinion is troublesome. If a defendant was to be allowed to show an "explanation," *i.e.*, a "business excuse," seemingly this would necessarily mean a return to the "rule of reason" and a concomitant departure from the per se doctrine in tie-in cases.[42]

The next Supreme Court opinion on tie-ins, *United States v.*

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38 *Id.* at 7-8. On the thesis that, whenever there is an appreciable number of tie-ins, "sufficient economic power" will be conclusively presumed, *see* Note, *Antitrust—Tying Arrangements—A Re-examination of the Per Se Rule and Identification of Tying Arrangements*, 48 N.C.L. REV. 309, 316 (1970).

39 356 U.S. at 12.

40 *Id.* at 5 (emphasis added).

41 *Id.* at 8.

42 *See* Note, *Antitrust Law—Tying Agreements, The "Per Se" Rule, and Credit*, 23 Sw. L.J. 907, 911 (1969), which describes the result as "an 'almost' per se test" in which the per se standards of illegality are applied and, in addition, at least some examination is made into the particular harm caused by the agreement.

*Loew's Inc.*,[43] reaffirmed that the per se doctrine was viable, at least in reference to patented or copyrighted tying products. In *Loew's*, the Court held that tie-in arrangements whereby the sale of copyrighted feature films to television stations was tied to one or more other (unwanted) films were in violation of Section 1 of the Sherman Act.[44] The Court refused to accept the distributors' argument that they did not have "dominance" in the market for television exhibition of feature films, stating:

> Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's *desirability to consumers* or from *uniqueness in its attributes*.[45]

Although the above-quoted language, strictly speaking, was dicta,[46] it did at the very least suggest a further expansion of the applicability of per se unreasonableness in tie-in cases. No mention was made of the possibility of any business excuse which might justify the tie-ins.

The expansion suggested in *Loew's* and the retreat from per se unreasonableness based on "business excuse" suggested in *Northern Pacific* both were elevated more nearly to a holding in *Fortner Enterprises, Inc. v. United States Steel Corp.*[47] In *Fortner*, U.S. Steel had established a Homes Division to manufacture and sell prefabricated houses, and had established a separate, wholly-owned subsidiary, U.S. Steel Homes Credit Corporation, for the sole purpose of providing financing to those purchasing houses from the Homes Division. Since developers generally also need financing for site acquisition, the Homes Credit Corporation offered financing for the land as well as for the Homes Division houses to be erected thereon.

In 1959, the Homes Division entered into negotiations with Fortner, a successful real estate developer; and in 1960 it was finally agreed that Fortner would erect Homes Division houses in a substantial development and that the Homes Credit Corporation would provide 100%

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43 371 U.S. 38 (1962).

44 *Id.* at 49-50.

45 *Id.* at 45 (emphasis added).

46 This general language must be considered dicta because the Court also held that the "requisite economic power is presumed when the tying product is patented or copyrighted." *Id.*

47 394 U.S. 495 (1969).

financing for the houses, land acquisition, and the cost of developing the land. Since selling houses was the principal object of the transaction, the loan was subject to the condition that Fortner erect Homes Division houses on the land in question.

As construction proceeded, the quality of the houses proved unsatisfactory. Nails popped out, panels did not align, windows leaked, and closet doors did not fit. Fortner proposed to the Homes Credit Corporation that he would be able to complete the development successfully and pay off the loan only if he were relieved of his obligation to erect Homes Division houses and allowed to erect conventional housing. The Homes Credit Corporation refused.[48]

Although a warranty action based on the contract would have been a more conventional approach, Fortner instead filed suit against U.S. Steel and the Homes Credit Corporation, seeking treble damages under Sections 1 and 2 of the Sherman Act, alleging that the Homes Division and the Homes Credit Corporation had conspired

> "to force corporations and individuals, including the plaintiff, as a condition to availing themselves of the services of United States Steel Homes Credit Corporation, to purchase at artificially high prices only United States Steel Homes . . . ."[49]

After four years of discovery, defendants moved for summary judgment, which was granted.[50] The district court held that plaintiff's allegations failed to raise any questions of fact as to a possible violation of the antitrust laws. The judge believed the agreement involved was essentially a tying arrangement in which "credit" was the tying product and "houses" were the tied product, but held that plaintiff's allegations were insufficient to show the requisite market power over the tying product and foreclosure of a substantial volume of commerce in the tied product.[51] The Court of Appeals for the Sixth Circuit affirmed without opinion.[52]

The Supreme Court, however, reversed and remanded, holding that the agreement was "a tying arrangement of the traditional kind"[53] and that, in view of *Loew's*, it could not be concluded as a matter of law that there was no per se violation since the tying product (100% credit)

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48 *Id.* at 496-97.

49 *Id.* at 497.

50 293 F. Supp. 762 (W.D. Ky. 1966).

51 *Id.* at 768-69.

52 404 F.2d 936 (6th Cir. 1968).

53 394 U.S. at 498. For a discussion of "traditional" tie-ins as involving equipment and supplies used thereon, *see* Baker, *Another Look at Franchise Tie-Ins After Texaco and Fortner*, 14 ANTITRUST BULL. 767 (1969).

was *unique*. There was testimony in the record that no one else offered 100% financing in land development situations like the one at bar.[54]

But, the Court also resurrected the "business excuse" language. It said that at trial Fortner may be unable to sustain his allegations and that:

> It may turn out that the arrangement involved here serves legitimate business purposes and that U.S. Steel's subsidiary does not have a competitive advantage in the credit market.[55]

However, there is little hope in light of the tenor of the opinion that such a finding, if made at trial, would stand on appeal.

*Fortner* illustrates more aptly than any other single opinion (with the possible exception of *Times-Picayune*) the significant definitional problems which arise when courts try to simplify tie-in suits by applying the per se rule. The transaction in *Fortner* is much closer to being an ordinary credit transaction than it is to being a tying transaction, much less a tying arrangement of the "traditional kind," because in *Fortner*, credit (the alleged tying product) was made available *only as a convenience* to those who desired it ancillary to the purchasing of Homes Division houses (the alleged tied product). There was, in effect, only a single product for sale, and that product was houses. As stated by Mr. Justice Fortas in one of two dissenting opinions in *Fortner*, U.S. Steel was not in the business of "selling credit in any general sense. The financing which it agrees to provide is solely and entirely ancillary to its sale of houses."[56] It can hardly be said in a tying case of the "traditional kind," as in *International Salt*, that the sale of the patented salt dispensing machines was purely ancillary to the sale of salt. It seems contrary to common sense to say that, in *Fortner*, U.S. Steel was "tying" its credit to sales when the *only* purpose of making credit available at all was to promote the sale of houses.

Of great significance is the shadow cast by *Fortner* over credit transactions in general.[57] If on these facts U.S. Steel could be found guilty of a tie-in violation, perhaps all credit transactions wherein the lender offers favorable credit terms and approves the collateral are equally subject to attack. This contention was raised by U.S. Steel and by the dissenting opinions; and the majority apparently considered it

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54 *Id.* at 504.

55 *Id.* at 506.

56 *Id.* at 521-22.

57 *See* Note, *Credit as a Tying Product*, 69 COLUM. L. REV. 1435 (1969), which includes an extensive discussion of credit sales and the shadow cast thereupon by *Fortner*. *See also* Tingle, *Financial Assistance as a Tying Product*, 25 BUS. LAW. 121 (1969).

to be sufficiently reasonable and troublesome to require an answer. It said:

> In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product. It will be time enough to pass on the issue of credit sales when a case involving it actually arises. Sales such as that are a far cry from the arrangement involved here, where the credit is provided by one corporation on condition that a product be purchased from a separate corporation, and where the borrower contracts to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased.[58]

Of course, this "answer" does not lead one to feel secure in his cogitations as to what credit sales would not violate the antitrust laws. Quite the contrary, there is no suggestion that any credit sales would be valid, but that the Court will "pass on the issue of credit sales when a case involving it actually arises."

Interestingly, this "answer" is highly suggestive of two additional reasons why the facts in *Fortner* should not be treated as a tie-in. First, the Court distinguished the *Fortner* arrangement from ordinary credit sales in that here "the credit is provided by one corporation on condition that a product be purchased from a separate corporation." This may distinguish ordinary credit sales, but it does not suggest a "traditional" tie-in because in all tying cases prior to *Fortner* both the tying and tied products were supplied by a *single* corporation. In fact, one district court, in *Lee National Corp. v. Atlantic Richfield Co.*,[59] has said that *Fortner* is of significance for broadening the rule of *Loew's* to situations involving two sellers.[60] But situations involving two sellers are not tie-in situations; they are conspiracy situations; and, in fact, it was "conspiracy" that Fortner pleaded, not "tie-in" or "tying."

Secondly the Supreme Court further distinguished *Fortner* in that "[i]n the usual sale on credit the seller . . . simply makes an agreement determining when and how much he will be paid for his product."[61] It seems, however, that this is exactly what U.S. Steel had done; and, if the credit terms are unusually favorable, this would really be just a way of reducing the price of the product. If the resulting price competition manifested price discrimination, it could be and should be dealt

58 394 U.S. at 507.
59 308 F. Supp. 1041 (E.D. Pa. 1970).
60 *Id.* at 1044.
61 394 U.S. at 507.

with forthrightly by application of the Robinson-Patman Price Discrimination Act.[62] This was in fact suggested by the four dissenters in *Fortner* who said that to apply the tie-in rule to the *Fortner* facts was to "distort the [tie-in] doctrine, and, indeed, to convert it into an instrument which penalizes price competition for the article that is sold."[63]

Since the *Fortner* decision seems to defy logic, one might ask what prompted the Court to hold as it did? It is believed the answer lies in facts hinted at in the Court's analysis of the problem. The whole tenor of the majority opinion in *Fortner* suggests that the Court was greatly concerned that the vast economic resources available to U.S. Steel were perhaps being exploited to permit it to expand into the housing market in a manner unavailable to a smaller competitor of lesser means. If so, the transaction should be dealt with as an unfair method of competition under Section 5 of the Federal Trade Commission Act.[64] *Hastings Mfg. Co. v. FTC*[65] is a strong precedent for such an action. In *Hastings*, piston ring manufacturers were found in violation of FTC Section 5 for providing credit on especially advantageous terms to dealers in an attempt to induce private dealers to handle the defendant's piston rings exclusively.[66] But, this type of proceeding must be brought by the FTC, not by a private litigant for treble damages; and the Supreme Court is heavily committed to encouraging private antitrust actions.[67]

This also suggests why the Court would prefer not to find price discrimination if it could find a tie-in. The per se rule is not applicable to price discrimination cases; and thus the private plaintiff would have a greater burden of proof (and a much more costly case in general) if he had to prove price discrimination. This heavier burden of proof and greater expense would undoubtedly tend to deter a private party from bringing an action.

## THE EFFECT OF *Fortner*

Perhaps because *Fortner* is little more than one year old, only one case of significance, *Advance Business Systems & Supply Co. v. SCM*

[62] 15 U.S.C. § 13 (1964).

[63] 394 U.S. at 523 (Fortas, J., and Stewart, J., dissenting); *see id.* at 519 (White, J., and Harlan, J., dissenting).

[64] 15 U.S.C. § 45 (1964). That such action is available, *see* Nelson, *Tying Arrangements Reconsidered: A Review of Fortner Enterprises, Inc. v. U.S. Steel Corp., et al.*, 15 ANTITRUST BULL. 7, 30-31 (1970).

[65] 153 F.2d 253 (6th Cir.), *cert. denied*, 328 U.S. 853 (1946).

[66] *Id.* at 257-58.

[67] *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968), where the Court said, "the law encourages [the private litigant's] suit to further the overriding public policy in favor of competition."

*Corp.*,[68] has applied *Fortner* on a Section 1 Sherman Act charge. *SCM* contains an excellent discussion of the standards for tie-in illegality under both Section 3 of the Clayton Act and Section 1 of the Sherman Act and contains holdings under both Acts. The facts contained transactions subject to the Sherman Act only and transactions subject both to the Clayton and Sherman Acts. At the outset, said the Fourth Circuit, "[t]he standards of illegality under the two statutes are *not* identical."[69] Under Section 3 of the Clayton Act, a tie-in "is *automatically* illegal . . . whenever 'a substantial volume of commerce in the 'tied' product is restrained.' "[70] On the other hand, under Section 1 of the Sherman Act, in view of *Fortner*,

> unless the defendant can show legitimate business reasons for a tie-in, the "sufficient economic power" test of *per se* illegality is satisfied when it appears that the seller has the power to "impose . . . burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market."[71]

Thus, the "legitimate business excuse"[72] doctrine is still alive; and the main effect of *Fortner* is to establish firmly that the doctrine of per se illegality of tie-ins operates to put on defendant a duty to come forward and prove a legitimate business excuse for the tie-in whenever "an appreciable number" of tie-ins is shown. Failing to show such an excuse, he will be found in violation of Section 1 of the Sherman Act. SCM was unable to establish such an excuse and was found in violation of both the Clayton and Sherman Acts.

## CONCLUSION

In view of the foregoing, it seems apparent that a lawyer should never allow his client to use a tie-in where the tying product is patented or copyrighted. Such a tie-in has not been upheld by the Supreme Court since the passage of the Clayton Act in 1914.

Further, the probability of being able to justify any tie-in appears very small. One writer,[73] however, has proposed a limited class of trans-

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68 415 F.2d 55 (4th Cir. 1969).

69 *Id.* at 61 (emphasis added).

70 *Id.* (emphasis added).

71 *Id.* at 68.

72 *See* material cited, *supra* note 17. *See also* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961), which allowed the launching of a new industry with a highly uncertain future as a sufficient excuse to justify a tie-in, but only while the corporation was in its infancy.

73 Comment, *Tie-In Sales, Restricted Combination Sales, and Combination Sales: Legal Differences and Judicial Differentiation*, 43 TEMP. L.Q. 117, 128-31 (1970).

actions which may be justified by a legitimate business excuse. This limited class would include those services or products provided only in response to the demand of a significant number of buyers as a condition for purchasing the principal product. But this limited class may not circumvent *Fortner* because there it *was* the buyer who demanded the unique credit terms as a condition for purchasing the principal product (homes). Thus, it cannot be advised with any certainty that even this limited class of transactions would avoid a tie-in violation.

In addition, the confusion surrounding determination of whether a particular practice is a tie-in is likely to be great.[74] In particular, any credit sale with terms advantageous to the buyer or to the seller must be considered suspect. Also, in view of the aforementioned dictum in *Loew's* and the holding in *Fortner* that "sufficient economic power" may be inferred from the " 'tying product's desirability to consumers or from uniqueness in its attributes,' "[75] any tie-in wherein the tying product is a brand name having more than minimal "product differentiation"[76] must be considered suspect.

Accordingly, in advising business clients, a lawyer should scrutinize any combination sale and any credit sale with a view toward avoiding any possible coloration of a tie-in.

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74 For an exhaustive and critical discussion of the confusion engendered by the *Fortner* decision, *see* Dam, *Fortner Enterprises v. United States Steel: "Neither a Borrower, Nor a Lender Be,"* 1969 SUP. CT. REV. 1 (1969).

75 394 U.S. at 503.

76 A product enjoys "product differentiation" whenever, through patents, trademarks, copyrights, brand names, advertising, secret production techniques, or other variations not freely reproducible, a seller is able to convince some buyers that there is no exact substitute for his product and so creates buyer loyalty within some price range. On the theory that whenever the tying product enjoys product differentiation, the tie-in must be considered likely to violate Clayton § 3 and Sherman § 1, *see* Note, *The Logic of Foreclosure: Tie-in Doctrine After Fortner v. U.S. Steel,* 79 YALE L.J. 86 (1969). *See also* Bodner, *The Expanded Prohibitions Against Tying Arrangements and Exclusive Dealing: The Search for a Viable Legal Alternative,* 37 ANTITRUST L.J. 759, 762 (1968).