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## The Individual Coercion Doctrine in Tie-In Analysis: Confusing and Irrelevant

Arthur D. Austin†

*In recent years an increasing number of courts have required plaintiffs alleging tie-ins in violation of the antitrust laws to prove "coercion." Professor Austin describes the origins of the coercion doctrine in the per se rule of tie-in liability. Applying economic theories and legal precedents, he then demonstrates that coercion is an unnecessary element of an antitrust violation in all but a few situations. He argues that coercion thus only further obscures tie-in analysis and makes a satisfactory resolution of this area of law even more difficult.*

A tying arrangement exists whenever a seller conditions the sale of one product upon the purchase of another.<sup>1</sup> The product the purchaser wishes to buy is termed the "tying product"; the product the purchaser must buy in conjunction with the tying product is referred to as the "tied product." Certain tying arrangements are illegal under the provisions of the Sherman Act and the Clayton Act.<sup>2</sup> Tie-ins generally have been considered per se illegal if the seller has sufficient

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1. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958). A tying arrangement also exists where the purchaser agrees not to use products of the seller's competitors. *Id.*

2. Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade. 15 U.S.C. § 1 (Supp. V 1975). Section 3 of the Clayton Act prohibits tie-ins in specific language. 15 U.S.C. § 14 (1970).

economic power over the tying product to appreciably restrain free competition or if a not insubstantial amount of commerce in the tied product is affected by the tying arrangement.<sup>3</sup>

The legal implications of tying arrangements continue to mystify courts, lawyers, and commentators.<sup>4</sup> Most of the academic literature and case law on tie-ins centers on the Supreme Court's formulation of the per se rule. In recent cases, however, a new and equally complex doctrine has emerged. These cases establish a requirement of "individual coercion"—that is, each plaintiff "must prove that his purchases were coerced as an element of establishing a prima facie case of illegal tying."<sup>5</sup> Courts adopting this doctrine have interpreted the definition of a tie-in—the sale of one product conditioned on the purchase of another—to mean that a tie-in exists only if the individual purchaser was "coerced" into buying the tied product. As a result these cases have added a new element to the proof required in a tie-in action.

Although the term "coercion" has long been a part of the tie-in lexicon, the individual coercion doctrine developed as a product of the class action suit. Defendants in such actions often argue that the alleged tie-ins are either voluntary or initiated at the request of the

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3. See, e.g., *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958). For a more extensive discussion of the standard, see notes 135-42, 157-62 *infra* and accompanying text.

The standards differ under the Clayton and Sherman Acts, but the exact differences are not altogether clear. One explanation is provided in *Ungar v. Dunkin' Donuts of America, Inc.*, 68 F.R.D. 65, 85 n.14 (E.D. Pa. 1975), *rev'd*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976). The court noted that § 1 of the Sherman Act is broader linguistically than § 3 of the Clayton Act. The Sherman Act bans all contracts in restraint of trade while the Clayton Act is limited to contracts involving "goods, wares, merchandise, machinery, supplies or other commodities," and both the tied and tying items must fall within this definition. On the other hand, the Sherman Act only applies to actual restraints of trade while the Clayton Act prohibits ties whose effect "may be to substantially lessen competition, or tend to create a monopoly." Thus the Clayton Act strikes at anti-competitive agreements in their incipiency, and suggests less tolerance of tying arrangements. The court further noted that most commentators believe the two statutes should be interpreted similarly.

The Supreme Court has stated that section 1 of the Sherman Act requires proof of both "sufficient economic power" over the tying product and foreclosure in the market for the tied product, but that proof of either element satisfies section 3 of the Clayton Act. A plaintiff who fails to satisfy the per se standards may nevertheless offer evidence under the "rule of reason" to show an unreasonable restraint of trade. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) (Fortner I), *on remand*, 452 F.2d 1095 (6th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972), 523 F.2d 961 (1971), *rev'd*, 429 U.S. 610 (1977) (Fortner II).

4. See generally Dam, *Fortner Enterprises v. United States Steel: "Neither A Borrower, Nor A Lender Be"*, 1969 SUP. CT. REV. 1; Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW. U.L. REV. 626 (1965); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

5. *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1226 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

buyer, and therefore do not constitute illegal arrangements. Defendants further argue that to establish illegality plaintiffs must prove that each buyer negotiated to break through the offer of a package, failed, and then succumbed to "coercion" in agreeing to accept the tie-in. Since each plaintiff must individually prove coercion, questions of fact and law common to all class members are absent. Thus class certification is inappropriate under Rule 23 of the Federal Rules of Civil Procedure.<sup>6</sup>

The significance of the individual coercion doctrine is not limited to class actions, however. Implicit in the doctrine is the proposition that a tie-in can never be illegal if the purchaser voluntarily accepted the tying arrangement. Yet this proposition is itself a matter of continuing controversy.<sup>7</sup> The issue of whether a "voluntary" tie-in is illegal may arise in various contexts. A buyer may accept a tie-in knowing of the uneconomic character of the arrangement, but having decided that it is either useless or against the buyer's best interests to resist overtly. Alternatively, a knowing buyer may accept a tie-in without resistance because the buyer has concluded that the advantages of the arrangement outweigh the disadvantages. A buyer may be unaware of the economic disadvantages of the tie at the time the deal is concluded but later learn the true facts. Similarly, an inexperienced buyer may willingly accept a contract without recognizing that neutral or seemingly innocuous terms can subsequently be used to achieve a tie-in. In each case, the individual coercion doctrine might be applied to block liability for the "voluntary" tie.

The individual coercion doctrine is presently making the rounds in the lower courts; those accepting the requirement<sup>8</sup> significantly outnumber the rejections.<sup>9</sup> Even those courts adopting the coercion doctrine are experiencing difficulty in explaining the underlying rationale

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6. FED. R. CIV. P. 23(b)(3).

7. Seminar On Distribution Problems, 40 ANTITRUST L.J. 122, 133 (1970).

8. Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976); Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir.), cert. denied, 429 U.S. 823 (1976); Cities Service Oil Co. v. Coleman Oil Co., 470 F.2d 925, 930 n.5 (1st Cir. 1972); Olmstead v. Amoco Oil Co., 1977-1 Trade Cas. ¶ 61,487 (M.D. Fla. June 16, 1977); Schuler v. Better Equip. Laundry Center, Inc., 74 F.R.D. 85 (D. Mass. 1977); Dubuque Communications Corp. v. American Broadcasting Co., 432 F. Supp. 543 (N.D. Ill. 1976); Hehir v. Shell Oil Co., 72 F.R.D. 18 (D. Mass. 1976); Halverson v. Convenient Food Mart, Inc., 1975-1 Trade Cas. ¶ 60,254 (N.D. Ill. 1974); Thompson v. T.F.I. Companies, 64 F.R.D. 140 (N.D. Ill. 1974); Abercrombie v. Lum's Inc., 345 F. Supp. 387 (S.D. Fla. 1972); *In re 7-Eleven Franchise Antitrust Litigation*, 1972 Trade Cas. ¶ 74,156 (N.D. Cal. 1972); New Jersey v. Lawn King, Inc., 1977-1 Trade Cas. ¶ 61,444 (N.J. Super. Ct., Mercer County, Apr. 27, 1977).

9. See, e.g., Aamco Automatic Transmissions, Inc. v. Taylor, 407 F. Supp. 430 (E.D. Pa. 1976); Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 66 F.R.D. 581, 591 (E.D. Pa. 1975).

of the rule, in defining its role in tie-in analysis, and in relating it to the facts of particular cases. The source of this difficulty is the courts' failure to identify and distinguish the two primary contexts in which evidence of coercion has been considered—proving the existence of a tie-in agreement and establishing liability.<sup>10</sup> As a result, the coercion doctrine has unnecessarily complicated an already-entangled analysis of tying arrangements.<sup>11</sup>

This Article proceeds in three parts. Part I describes examples of the difficulties the courts encounter in applying the coercion doctrine. Part II applies the Supreme Court's test for establishing the existence of a tie-in to the multifarious types of tying arrangements. It concludes that evidence of coercion is not an absolute prerequisite to proving that a tie-in exists, but may sometimes be relevant to that issue. Part III discusses the prerequisites for tie-in liability as formulated by economists and by the Court. Under either analysis, evidence of coercion has no independent significance.

## I

### DECISIONS IN THE THIRD CIRCUIT: CONFUSION, CONFLICT, AND REVISION

The most influential treatment of the coercion doctrine appears in three opinions from the Third Circuit: *Dunkin' Donuts I*,<sup>12</sup> *Dunkin'*

10. "Coercion" has also been considered relevant to questions of standing and justifications for use of a tie-in.

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages. 15 U.S.C. § 15 (1970). Standing under § 4 is not "merely a collection of technical rules . . . [but instead] is basically the device by which a court determines whether the harm alleged by the plaintiff is of the type which is—or ought to be—entitled to judicial protection." Pollock, *Standing To Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 ANTITRUST L.J. 5, 9 (1966). To prove standing, plaintiffs generally must establish causation. *E.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). At least one court has held that proof of coercion is an element of proximate cause in tie-in cases. *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443, 450-51 (M.D. Ga. 1975). See note 163 *infra*.

The presence of coercion was cited as a basis for rejecting justifications in *Advance Business Systems & Supply Co. v. S.C.M. Corp.*, 415 F.2d 55, 68 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

11. Student commentary has been critical of the rule. See Note, *Tying the Hands of Franchisees—The Individual Coercion Doctrine in Antitrust Class Actions: Ungar v. Dunkin' Donuts of America, Inc.*, 9 CONN. L. REV. 164 (1976); Note, 55 TEXAS L. REV. 343 (1977); Note, *Tying Arrangements and the Individual Coercion Doctrine*, 30 VAND. L. REV. 755 (1977). For support of the doctrine see Varner, *Voluntary Ties and The Sherman Act*, 50 S. CAL. L. REV. 271 (1977). See also *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1508-11 (1976).

12. *Ungar v. Dunkin' Donuts of America, Inc.*, 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

*Donuts II*,<sup>13</sup> and *Bogosian v. Gulf Oil Corp.*<sup>14</sup> A brief survey of these decisions not only illustrates the present confusion surrounding the coercion issue, but also presents three different treatments of the issue, providing a frame of reference for subsequent criticism and discussion.

### A. Dunkin' Donuts I

In *Ungar v. Dunkin' Donuts of America, Inc.*,<sup>15</sup> plaintiffs sought certification of a class of present and former franchisees in an action asserting that they had accepted a franchise package that tied secondary products to defendant's primary product, its trademark and goodwill. The complaint alleged three types of tie-in tactics. First, a thirty day option that permitted franchisees to buy equipment from other suppliers was alleged to function in "practical economic effect" as a tying arrangement for two reasons. Plaintiffs claimed that thirty days was not sufficient time for franchisees lacking experience in obtaining credit to shop around and arrange financing;<sup>16</sup> they also claimed that defendant Dunkin' pressured franchisees to forego the opportunity to seek credit elsewhere.<sup>17</sup> Second, plaintiffs alleged that Dunkin' attempted to prevent franchisees from exercising their option to buy supplies from specified sources through dilatory approval of new suppliers, through furnishing specifications that could not be met by new suppliers, and through threats of disenfranchisement.<sup>18</sup> The third alleged tie-in tactic was that the franchisor pressured persons desiring franchises to lease the premises from Dunkin' and to buy signs from Dunkin' or from an approved supplier, from whom Dunkin' then received a kickback.<sup>19</sup>

In considering the appropriateness of class certification, the court faced the defendant's contention that the plaintiffs were required to demonstrate that each individual franchisee was coerced into accepting a tying arrangement. After an exhaustive evaluation of the decisions cited by the defendant, the court rejected proof of coercion as necessary to proving the existence of a tie-in. *Abercrombie v. Lum's, Inc.*,<sup>20</sup>

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13. *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir.), cert. denied, 429 U.S. 823 (1976).

14. 561 F.2d 434 (3d Cir. 1977).

15. 68 F.R.D. 65 (E.D. Pa. 1975), rev'd, 531 F.2d 1211 (3d Cir.), cert. denied, 429 U.S. 823 (1976).

16. *Id.* at 80.

17. *Id.* at 81.

18. *Id.*

19. *Id.* at 82. Plaintiffs also alleged an express tie, because as a condition to obtaining the franchise, they were contractually bound to pay two percent of gross sales into an advertising fund. The district court found that advertising was not a separate product from the trademark and franchising system. 68 F.R.D. at 143.

20. 345 F. Supp. 387 (S.D. Fla. 1972). For a further discussion of *Abercrombie*, see notes 115-16 *infra* and accompanying text.

considered by Judge Becker to be the source of the individual coercion doctrine, was held inapplicable because the opinion relied on inapposite precedent.<sup>21</sup> After marshalling other precedent,<sup>22</sup> the court summarized

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21. *Ford Motor Co. v. United States*, 335 U.S. 303 (1948), was cited without comment in *Abercrombie*. Judge Becker found the *Ford* case irrelevant because it dealt with the interpretation of a consent decree prohibiting Ford from efforts to influence dealers to patronize favored finance companies. The decree was to be suspended if similar prohibitions were not imposed on General Motors. G.M. was convicted under a jury charge stating that "coercion" but not "persuasion, exposition, or argument" was illegal. Ford sought to have its decree suspended on the basis that G.M. was convicted of charges that did not include conduct prohibited to Ford under the present terms of the order. The Supreme Court subsequently agreed and permitted Ford to have its decree harmonized with the G.M. prohibitions. Judge Becker concluded that the *Ford* holding was not part of tie-in jurisprudence, because the issue was the interpretation of a consent decree rather than the legality of persuasion or the illegality of coercion. 68 F.R.D. at 101, 102.

To further support its position, *Abercrombie* cited the statement from *American Mfrs. Mut. Ins. Co. v. American Broadcasting—Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972), that "there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice." Judge Becker read *American Manufacturers* as registering concern over the possibility that bargaining ploys by the seller might create an antitrust claim. Thus, the reference to coercion was an effort to distinguish between evidence of seller bravado and proof of the use of economic power by the seller. 68 F.R.D. at 102, 103. For a further discussion of *American Manufacturers*, see notes 88-106 *infra* and accompanying text.

The third *Abercrombie* precedent, *Lah v. Shell Oil Co.*, 50 F.R.D. 198 (S.D. Ohio 1970), held that allegations of tie-ins derived from Shell's dominant position over 140 dealers raised separate questions of fact, blocking class certification. Plaintiff alleged two ties: refusal to sell Shell gasoline unless the buyer accepted a one year lease of a Shell station, and the use of the short-term lease and Shell's dominating position to force the dealers to accept unwanted products such as trading stamps and games. Whether Shell compelled each dealer to accept the tie was viewed by the court as requiring separate determinations of fact. The court raised individual coercion by noting that "while a dominant may not coerce—without running afoul of the antitrust laws—nonetheless, the dominant may still persuade, or expose, or argue."

*Lah* was rejected because it relied on the inapposite *Ford Motor Company* decision, and incorrectly read *Federal Trade Commission v. Texaco, Inc.*, 393 U.S. 223 (1968), to hold that a dominant firm may persuade but not coerce. The FTC charged Texaco with violating § 5 of the Federal Trade Commission Act by using its bargaining power over dealers to convince them to purchase tires, batteries, and accessories (TBA) from B. F. Goodrich. The Supreme Court acknowledged the absence of overt coercive acts by Texaco, but nevertheless condemned the plan because "Texaco's dominant economic power was used in a manner which tended to foreclose competition in the marketing of TBA. The sales-commission system . . . is inherently coercive." 393 U.S. at 229. Judge Becker interpreted *Texaco* as involving a "quasi"-tying transaction, which requires proof of sufficient economic power over the tying product, use of the power, and consequent foreclosure of competition. Thus, where the seller possesses an obvious and pervasive bargaining advantage over its dealers, proof of the use of economic power does not depend upon evidence of coercive tactics, but can be demonstrated by proof of persuasion or influence. 68 F.R.D. at 108, 109.

22. The court held that the individual coercion doctrine had been further "emasculated" by *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). In *Perma Life* the Court rejected the defendant's plea of *pari delicto*, even though the

the conceptual difficulties that would be encountered if proof of individual coercion were required. Drawing a line between coercion and a lesser degree of pressure such as persuasion would, according to Judge Becker, plunge the judiciary into "unfathomable metaphysics."<sup>23</sup> In addition, requiring individual coercion would pose "linguistic" problems. Referring to the standard definition of a tie,<sup>24</sup> which speaks of an agreement between the buyer and seller, Judge Becker concluded that "coercion" was not consistent with the dictionary meaning of "agreement." In his view, the term "agreement" suggests "a less strenuous requirement than that of coercion in order to make out a violation of the antitrust laws."<sup>25</sup>

Instead, the court considered a key inquiry in a tie-in action to be whether there was a sufficient nexus between the defendant's economic power in the tying product market and restraint of competition in the tied product market. That is, the defendant must have *used* economic power to create the tying arrangement.<sup>26</sup> The court held that although evidence of coercion helps to prove use of economic power, it is not the exclusive method of proof and, in any case, it is inapplicable in class actions. In a class action, the court stated, proof of the use of economic power over the tying product to establish a tying arrangement can be accomplished in at least two other ways: (1) "firm and resolutely enforced company policy to influence the franchisees to purchase from the franchisors"<sup>27</sup> or (2) acceptance by a large number of buyers of a burdensome or uneconomic tying arrangement. Under this formulation of the proof required to establish a tie-in, there can be an illegal "voluntary" tie, so long as the seller possessed the requisite economic power over the tying product and used it to induce the tie. Judge Becker concluded that since the franchisees would not need to prove that they were individually coerced, common questions—proof of company policy or of a large number of burdensome ties—would predominate, and he certified the class.

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dealers "sought the franchises enthusiastically" and, according to Judge Becker, voluntarily acquiesced in the illegal restraints, including tie-ins. Judge Becker considered *Perma Life* persuasive authority for rejection of the coercion doctrine "for it makes clear that anti-competitive conduct may exist . . . in the absence of coercion, even where the franchisees voluntarily acquiesce in the practices which constitute antitrust violations." 68 F.R.D. at 111.

23. *Id.* at 112.

24. "[A]n agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least *agrees* that he will not purchase that product from any other supplier." 68 F.R.D. at 112 (emphasis added by district court). This was the Court's definition in *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958). See note 52 *infra* and accompanying text.

25. 68 F.R.D. at 112.

26. *Id.* at 114.

27. *Id.* at 115.

### B. *Dunkin' Donuts II*

On appeal the Third Circuit rejected Judge Becker's analysis and conclusions, stating that proof of coercion is "logically and linguistically" implicit "in the concept of leverage upon which the illegality of tying is premised: the seller with market power in one market uses that power as a 'lever' to force acceptance of his product in another market."<sup>28</sup> The court concluded that conditioning the sale of one product on the purchase of another is harmful because it "coerces the abdication of buyers' independent judgment as to the 'tied' products' merits . . . . The common core of . . . unlawful tying arrangements is the *forced* purchase of a second distinct commodity . . . ." <sup>29</sup>

These descriptions of a tie-in indicated to the Third Circuit that coercion is properly an issue under the threshold requirement of proof of the existence of a tie-in. The court stated that existence can be established by express tie-in clauses<sup>30</sup> or "by proof that the purchase of one product, the tied product, was not voluntary, i.e., by proof of coercion."<sup>31</sup> The circuit court emphasized the contrast between its definition of a tie-in and the district court's formulation, which was criticized for only requiring proof of "salesmanship in connection with the sale of two products by a seller . . . with dominant economic power over a buyer."<sup>32</sup> According to the circuit court, every franchisor-franchisee relationship involves some degree of dominance and persuasive sales tactics. Thus, the ultimate effect of the district court's rejection of the coercion doctrine, the circuit court suggested, would be to jeopardize the franchising technique as a viable marketing institution.<sup>33</sup>

28. 531 F.2d 1211, 1218 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

29. *Id.* (quoting *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605, 614 (1953)) (emphasis added).

30. Actually, the court was somewhat ambivalent on this point. See text accompanying notes 57-58 *infra*. On the proof of a tie based on express provisions, see notes 54-69 *infra* and accompanying text.

31. 351 F.2d at 1224.

32. *Id.*

33. *Id.* at 1224-25. Noting that the district court had "perceived" the "substantial" number of decisions adopting the individual coercion rule, the circuit court focused on *Federal Trade Commission v. Texaco, Inc.*, 393 U.S. 223 (1968), and *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968), as the primary basis for Judge Becker's holding. *Texaco* was distinguished because it arose under Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1970), which reaches to the ill-defined outer fringes of unfair conduct. 531 F.2d at 1220. Furthermore, the court stated, the focus of the FTC complaint was on the effect of the agreement in foreclosing other tire suppliers, rather than on the use of illegal tying against franchisees. *Id.* at 1221. Judge Aldisert distinguished *Perma Life* because that case dealt with the issue of *pari delicto* and the right of a plaintiff who had participated in illegal activity to maintain an action, while *Dunkin' Donuts* involved the issues of coercion and class certification. *Id.* at 1221.

### C. Disagreement and Confusion

After considering whether evidence of coercion is needed to prove the existence of a tie-in, the court in *Dunkin' Donuts I* concluded that the appropriate test for existence is whether the seller "used" economic power over the tying product to foreclose competition in the market for the tied product. Applying this test, Judge Becker found that use of economic power could be proven by evidence other than coercive sales tactics.

Although it properly rejects the individual coercion doctrine, the court's resolution of the issue only serves to generate confusion, for the court saw use of market power as establishing the existence of a tie-in, when in fact use of market power relates to the issue of liability. Establishing existence involves only the narrow point of whether one product was sold or leased on the condition that a second item also be purchased or leased.<sup>34</sup> Liability involves the question of economic power. The per se test for liability established by the Supreme Court focuses on whether the seller possessed sufficient economic power over the tying product to appreciably restrain free competition or whether a not insubstantial amount of commerce in the tied product was affected by the tie-in.<sup>35</sup>

The two broad tests the district court formulated for proving the existence of a tie-in through the exercise of economic power continue the confusion. The court stated that one means of proving a tie-in is to demonstrate a "firm and resolutely enforced company policy to influence the franchisees to purchase from the franchisors."<sup>36</sup> This test is too broad, for, as the court of appeals suggested, its effect is to condemn good salesmanship.<sup>37</sup> This standard does, however, at least focus on evidence relevant to the correct inquiry—that is, whether defendant conditioned the sale of the franchise upon the purchase of additional products. The district court also stated that the plaintiffs

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He rejected Judge Becker's view that *Perma Life* had "emasculated" the coercion doctrine, noting that the *Perma Life* opinion had expressly emphasized that the plaintiff's participation in the violations "was not voluntary in any meaningful sense." *Id.* at 1221. Judge Aldisert also pointed out that the *pari delicto* defense considers the extent of the plaintiff's responsibility for the injury, not whether there was in fact an illegal restraint. The court concluded that the coercion doctrine is unrelated to the issue of *pari delicto*, because coercion bears only on the illegality of the defendant's conduct, not on whether the defendant's illegal conduct was shielded by the plaintiff's equally illegal acquiescence. See Varner, *supra* note 11, at 276 n.33.

34. See text accompanying notes 52-117 *infra*.

35. See notes 135-42, 157-61 *infra* and accompanying text.

36. 68 F.R.D. at 115. See text accompanying notes 26-27 *supra*. The district court considered whether an illegal tie existed to be the only issue. Hence, its confusion; it never attempted to find existence before considering liability.

37. 531 F.2d at 1226.

could establish the existence of a tie-in by proving that a large number of buyers had accepted burdensome or uneconomic tying arrangements.<sup>38</sup> Since franchisees would not accept such arrangements if more favorable terms were readily available from defendant's competitors, this test actually considers defendant's market power to foreclose its competitors. Such an inquiry is relevant to establishing liability but is not an appropriate means of proving the existence of a tie-in.

In *Dunkin' Donuts II* the court proceeded in an equally incorrect, albeit different manner. The possibility that the defendant might be punished for being a successful salesman troubled the court.<sup>39</sup> The court also seemed disturbed by the prospect of undeserving franchisees receiving a windfall, even if some of the defendant's dealings were unlawful.<sup>40</sup> Hence the court concluded that the element of coercion must be proved to establish the existence of an illegal tie-in.<sup>41</sup> This requirement of coercion conflicts with the tests established by the Supreme Court, however. Its definition of a tie does not include coercion as an element.<sup>42</sup> Likewise, the Court's per se liability rule does not require proof of coercion; rather, it assumes that a seller possessing the requisite economic power who uses a tying arrangement has used that power in an anticompetitive way.<sup>43</sup>

The concerns of the court of appeals illustrate the impetus behind the coercion doctrine. The per se rule focuses on the defendant's activities rather than the plaintiff's, and allows a plaintiff who can prove the defendant's misconduct to recover treble damages. Lower courts, reluctant to grant windfalls to plaintiffs, naturally wish to inquire into the plaintiff's actions as well. A court is apt to conclude that a plaintiff who voluntarily accepted a tying arrangement, perceiving it to be a favorable deal, does not deserve treble damages.<sup>44</sup> The courts' difficulty stems from the per se rule, which bases liability on the exist-

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38. 68 F.R.D. at 115.

39. 531 F.2d at 1224, 1226.

40. *Id.* at 1222 & n.8, 1223 & n.10. The danger of undeserved windfalls is especially great in the context of the class action suit, for the potential liability may be so great as to threaten the defendant's existence.

41. Actually, the circuit court failed to distinguish between liability and existence, and consequently used quotations from Supreme Court decisions dealing with the rationale for liability together with the *Northern Pacific* definition of existence, eventually concluding that coercion must be shown to prove the existence of a tie-in. See Note, *Tying The Hands Of Franchisees—The Individual Coercion Doctrine in Antitrust Class Actions: Ungar v. Dunkin' Donuts of America, Inc.*, 9 CONN. L. REV. 164 (1976).

42. See notes 135-42, 157-61 *infra* and accompanying text.

43. See Note, 55 TEXAS L. REV. 343, 347 n.40 (1977). See text accompanying notes 135-62 *infra*.

44. Of course, if the tying arrangement was entirely beneficial, the plaintiff would be unable to prove any damage. See Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976).

ence of a tie-in coupled with a certain degree of economic power. So long as the per se rule is the law, however, the lower courts are bound to apply it. A coercion doctrine should not be constructed as a means of evading the Supreme Court's formulation of the test for liability.

#### D. Revision

The Third Circuit altered its perspective in *Bogosian v. Gulf Oil Corp.*<sup>45</sup> Plaintiffs sought class certification upon allegations that Gulf and other gas producers employed a "constellation of lease provisions" to tie gas to leaseholds. Specifically, plaintiffs alleged that short-term leases, provisions prohibiting alterations on stations except with the defendants' permission, rental payments set according to a percentage of gas sales, and the imposition of gas quotas subject to defendants' right to terminate made it practically impossible for lessees to purchase gas from any source other than the defendants.<sup>46</sup>

In the *Bogosian* opinion Judge Seitz interpreted *Dunkin' Donuts II* as *not* holding coercion to be the exclusive means of proving the existence of a tie-in.<sup>47</sup> Rather, the court found that establishing the existence of a tie-in requires evidence of a sale on condition, which may or may not require evidence of coercion. The court stated that "once a plaintiff proves that a defendant has conditioned the sale of one product upon the purchase of another, there is no requirement that he prove that his purchase was coerced by the seller's requirement."<sup>48</sup> Evidence of coercion was held to be relevant where, as in *Dunkin' Donuts*, the claim is based on the use of coercion and the "franchisee claims that the franchisor has created an economic arrangement in which the perceived threat of termination buttresses the franchisor's salesmanship."<sup>49</sup> The court would not require evidence of coercion, however, if the tie-in claim is based upon the practical effect of various contract provisions.<sup>50</sup>

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45. 561 F.2d 434 (3d Cir. 1977).

46. Plaintiffs also alleged that 16 oil producers engaged in conscious parallelism to tie gas to leaseholds: "defendants, through a course of interdependent consciously parallel action, have required all dealers who lease, sublease, or renew such leases or subleases to: (a) license the use of the lessor's trademark; (b) sell only the lessor's gasoline; and (c) not sell gasoline purchased from any other source under the licensed trademark." *Id.* at 439. The trial court's ruling in favor of defendant's motion for summary judgment on plaintiffs' conscious parallelism theory was vacated by the Third Circuit. *Id.* at 447.

47. Judge Aldisert, author of the *Dunkin' Donuts II* opinion, dissented on grounds other than the majority's application of the coercion doctrine. *Id.* at 457.

48. *Id.* at 450.

49. *Id.*

50. If plaintiffs are able to show that the lease agreements in use by all defendants have similar clauses which have the practical economic effect of precluding sale of other than the lessor's gasoline, they will have shown that the

In its revision of *Dunkin' Donuts II*, the *Bogosian* court correctly defined the role of coercion in the tie-in drama.<sup>51</sup> By distinguishing tie-in claims based on threats of termination from those based on the practical effect of contract clauses, the court recognized that tying arrangements can be imposed through a wide variety of tactics. The type of evidence necessary to prove the existence of a sale on condition varies with the type of tie-in alleged.

## II

### ESTABLISHING THE EXISTENCE OF A TIE-IN

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different . . . product, or at least agrees that he will not purchase that product from any other supplier."<sup>52</sup> There are two general classifications of tying arrangements: tie-ins by express agreement, either oral or written, and implied-in-fact ties.<sup>53</sup> The latter category can be subdivided into "practical effect" ties and tie-ins resulting from threats of refusal to deal. Evidence of coercion is one method of proving a refusal-to-deal tie. Proving the existence of other types of tying arrangements should not involve proof of coercion.

#### A. Existence Established by an Express Agreement

Courts have experienced difficulty in adapting the individual coer-

purchase of gasoline was tied in to the lease of the service station.

*Id.* at 451-53.

51. Despite its correct application of the coercion doctrine, Judge Seitz's analysis is open to criticism. In fact, there is no language in *Dunkin' Donuts II* to indicate that its view of coercion was limited to the particular form of tie alleged. Moreover, *Dunkin' Donuts* involved allegations of both practical effect and refusal to deal tie-ins. See notes 15-19 *supra* and accompanying text.

52. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958). The underpinning for definition is § 3 of the Clayton Act, 15 U.S.C. § 14 (1970), which prohibits a lease, sale, or contract "on the condition, agreement or understanding" that the lessee or buyer not use or deal in the commodities of a competitor of the lessor or seller. In *Northern Pacific*, an action under § 1 of the Sherman Act, 15 U.S.C. § 1 (1970), Justice Black explicitly defined the tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different . . . product, or at least agrees that he will not purchase that product from any other supplier." 356 U.S. at 5-6. This provides some support for the argument that ties should be treated identically under the Sherman and Clayton Acts. See note 3 *supra*.

53. Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.

RESTATEMENT (SECOND) OF CONTRACTS § 5, Comment a (Tent. Draft No. 1, 1964).

cion doctrine to situations where the tie-in can be proved by express tie-in contracts. The difficulty arises because the express clause is sufficient to establish a sale on condition. Accordingly, in a class suit the presence of a tie-in clause in a contract applicable to all members of the class should satisfy the common issue requirement for certification.

When faced with an express tie-in clause, a court bent on addressing the coercion issue has three options. The court can find that the express tie-in eliminates the need to prove coercion. Alternatively, it can hold that the express tie-in implies coercion. Finally, a court irrevocably attached to the doctrine might view the express clause as evidentiary but not determinative and still require the plaintiffs to prove that the defendant enforced or attempted to enforce the clause against each of them.

In *Dunkin' Donuts I* the court supported its rejection of the coercion doctrine by relying on *Siegal v. Chicken Delight*.<sup>54</sup> In *Chicken Delight* contracts binding the plaintiff class of franchisees expressly tied the franchise trademark to the supplies for the business. The Ninth Circuit certified the class without mentioning the coercion doctrine.<sup>55</sup> On the assumption that some of the franchisees must have been voluntary parties to the arrangement, Judge Becker read *Chicken Delight* as impliedly rejecting the coercion doctrine.<sup>56</sup> In *Dunkin' Donuts II* the court avoided this issue. After first stating that although a formal agreement is not necessary for proof of a tie "it is sufficient,"<sup>57</sup> Judge Aldisert observed in a footnote: "[w]e do not decide the question whether the individual coercion doctrine would bar a class certification where a potential class of plaintiffs relies on express contractual provisions."<sup>58</sup>

Contrary to the *Dunkin' Donuts I* interpretation of *Chicken Delight*, the Ninth Circuit has adopted the view that express tie-in clauses imply coercion. In *Moore v. Jas. H. Matthews & Co.*,<sup>59</sup> the Ninth Circuit

54. 271 F. Supp. 722 (N.D. Cal. 1967), *modified sub nom.* *Chicken Delight, Inc. v. Harris*, 412 F.2d 830 (9th Cir. 1969), *on modification*, 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd in part, rev'd in part, and remanded*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

55. 412 F.2d 830.

56. [I]f *Siegal II* was correctly decided, as the leading cases upon which the defendant relies assume, what difference does it make whether the tie is articulated in the contract or can be proved at trial as having been imposed *sub silentio* through a pervasive and resolutely enforced company policy as is alleged here? Palpably, the answer is none.

68 F.R.D. at 99.

57. 531 F.2d at 1224.

58. *Id.* at 1226 n.17.

59. 550 F.2d 1207 (9th Cir. 1977).

explained its *Chicken Delight* decision by announcing that although "some modicum of coercion" must be shown, it can be inferred. Apparently rejecting the necessity for proof of "actual coercion" in the face of an express tie, the court indicated that coercion could be inferred from proof that "an appreciable number of buyers have accepted burdensome terms, such as a tie-in, and there exists sufficient economic power in the tying product market."<sup>60</sup>

Thus, at least as to class actions, the Ninth Circuit views proof of coercion as necessary but subsumed under the demonstration of sufficient economic power.<sup>61</sup> The net effect is that the existence of a tying arrangement is to be established through proof of liability—a confusing approach similar to that adopted in *Dunkin' Donuts I*. Moreover, the Ninth Circuit's inference of coercion may be incorrect. Sufficient economic power, proven by an appreciable number of burdensome ties, does not necessarily indicate the use of coercion.<sup>62</sup> Buyers may have voluntarily accepted the tying arrangement for a number of reasons. For example, the franchisor may be sharing the risks of the franchised enterprise with the franchisee or the seller may be the best available source of the tying product.<sup>63</sup>

The Second Circuit has similarly rejected a requirement that evidence of coercion be presented in class actions by assuming that coercion exists in cases involving express tie-in clauses if there is sufficient economic power over the tying product. "An 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 the requisite coercion . . . given foreclosure of a not insubstantial volume of interstate commerce."<sup>64</sup> Since an "unremitting policy" will by definition be satisfied where the plaintiffs in the class rely on express tie-in provisions, the coercion factor is again in effect subsumed under proof of liability.

Some courts require proof of coercion where implied tie-ins are alleged but reject, without explanation, the necessity for proof of coercion where the tie-ins are based on express contractual provisions.<sup>65</sup> One

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60. *Id.* at 1217.

61. The same view was adopted in *McMackin v. Schwinn Bicycle Co.*, 1972 Trade Cas. ¶ 74,220 (N.D. Ill.).

62. Indeed, an appreciable number of burdensome tie-ins does not necessarily raise a conclusive inference of economic power. See *Fortner v. United States Steel Corp.*, 429 U.S. 610 (1977) (*Fortner II*).

63. See text accompanying notes 126-33 *infra*.

64. *Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976).

65. The influential *Abercrombie* decision made this distinction without explanation. *Abercrombie v. Lum's Inc.*, 345 F. Supp. 387, 390 (S.D. Fla. 1972). See also *Schuler v. Better Equip. Laundry Center, Inc.*, 74 F.R.D. 18 (D. Mass. 1977); *Hawkins*

court tried to bridge this inconsistency by explaining: "Coercion remains a necessary element of an unlawful tying arrangement but it is inferred on a class-wide basis; a contractual provision is coercion in and of itself since it is backed by the force of law."<sup>66</sup> This explanation is at best a nonsequitur. That the law provides sanctions for default is irrelevant to whether the tying provision was voluntary, the result of hard bargaining, or a product of adhesion.<sup>67</sup>

Several decisions realistically reject proof of coercion by recognizing the obvious: a contract that embodies a "sale on condition" satisfies the definitional requirements of a tie-in. In the succinct words of one court, "The requisite [sale on] condition appears on the face of the instrument."<sup>68</sup> This "on the face of the instrument" rationale perhaps explains why the coercion argument was not raised or recognized by the Supreme Court in the *Fortner Enterprises Inc. v. United States Steel Corp.* decisions,<sup>69</sup> where the ties were expressly embodied in the contract between the buyer and U.S. Steel.

Courts that adhere to the coercion doctrine because of the problem of treble damage windfalls for undeserving plaintiffs may reject the argument that evidence of coercion is unnecessary or implied where an express tie-in provision exists, however.<sup>70</sup> These courts might instead give evidentiary weight to express tie-in clauses, but still require proof that the buyer was coerced into accepting the arrangements. If this concern is at all valid in light of the per se rule, it certainly bears only on the issue of damages. Thus this concern should not preclude class

v. Holiday Inns, Inc., 1975-1 Trade Cas. ¶ 60,153 at 65,463, 65,464 (W.D. Tenn. 1976).

66. Halverson v. Convenient Food Mart, Inc., 69 F.R.D. 331 (N.D. Ill. 1974) (citing *In re 7-Eleven Franchise Antitrust Litigation*, 1972 Trade Cas. ¶ 74,156 (N.D. Cal.)). See also *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d at 1307 (5th Cir. 1976).

67. The argument with respect to contractual agreements being sufficient to show economic coercion under a tie-in may well be correct. However, it appears to the court that in back of this is a further question as to how the individual plaintiff happened to execute a contract containing this tie-in clause and whether there was individual coercion exercised to force him to sign such a document.

*Stavrides v. Mellon Bank*, 69 F.R.D. 424, 434 (W.D. Pa. 1975).

68. *Aamco Automatic Transmission v. Taylor*, 407 F. Supp. 430 (E.D. Pa. 1975). See also *Esposito v. Mister Softee, Inc.*, 1976-2 Trade Cas. ¶ 61,202, at 70,477 (E.D.N.Y.); *Hi Co. Enterprises, Inc. v. ConAgrfa, Inc.*, 1976-2 Trade Cas. ¶ 61,053 at 69,756 (S.D. Ga.); *Thompson v. T.F.I. Companies, Inc.*, 64 F.R.D. 140, 146 (N.D. Ill. 1974).

69. 394 U.S. 495 (1969) (*Fortner I*), *on remand*, 452 F.2d 1095 (6th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972), 523 F.2d 961 (1975), *rev'd*, 429 U.S. 110 (1977) (*Fortner II*).

70. See text accompanying notes 39-44 *supra*,

action tie-in suits based on express tie-in provisions, since the general procedure for certifying Rule 23(b)(3)<sup>71</sup> classes in antitrust suits is to sever the issues of liability and damages.<sup>72</sup>

### B. *Existence Established Through Implied-in-Fact Agreements*

The barrage of private actions and the steady movement by the courts to an increasingly harsh per se rule educated firms to the dangers of express tie-in clauses. Expunging express provisions has not, however, completely eliminated the tie-in problem. Either as a result of the conscious design of subtle draftsmanship or from negligence in eliminating the taint from old contracts, sellers frequently are confronted with allegations that tie-ins can be implied from the peculiar interaction between a "neutral" contract and the circumstances of the relationship.

#### 1. *Practical Effect Tie-Ins*

Practical effect tie-ins result from contract provisions that ostensibly allow the buyer freedom to shop around but in fact operate to condition the sale of one product on the purchase of another. "Practical effect" agreements were recognized early by the Supreme Court in *United Shoe Machinery Co. v. United States*.<sup>73</sup> That case involved leases providing for termination under specified conditions, such as the lessee's use of rival machinery or the lessee's use of United machinery on shoes that had been worked on by rival machines. The Court noted the practical effect of the provisions: "This system of 'tying' restriction is quite as effective as express covenants could be and practically compels the use of the machinery of the lessor except upon risks which manufacturers will not willingly incur."<sup>74</sup>

Practical effect ties take many forms. Where the franchisee is given the option to purchase supplies from sources to be approved by the seller, dilatory tactics by the seller in responding to inquiries or requests for approval can lead an easily frustrated buyer into the comfortable course of a "voluntary" tie.<sup>75</sup> Another practical effect tying

71. FED. R. CIV. P. 23(b)(3).

72. [3B] MOORE'S FEDERAL PRACTICE ¶ 23.45[2], at 23-758 (2d ed. 1974).

73. 258 U.S. 451 (1922). One commentator has suggested that the term "understanding" in § 3 of the Clayton Act provides the basis for recognizing "practical effect" tying agreements. Wheeler, *Some Observations on Tie-Ins, the Single-Product Defense, Exclusive Dealing and Regulated Industries*, 60 CALIF. L. REV. 1557, 1571 (1972).

74. 258 U.S. at 458.

75. See *Smith v. Denny's Restaurants, Inc.*, 62 F.R.D. 459, 461 (N.D. Cal. 1974). Cf. *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976) (setting artificially high standards for "approval" of suppliers and charging an additional amount for items purchased from unapproved sources). In an unusual complaint of a practical

method is illustrated by the *Dunkin' Donuts* case, where plaintiffs alleged that the thirty day option clause giving them the freedom to buy equipment from suppliers other than Dunkin' constituted a practical effect tie.<sup>76</sup> The complexity of the transaction coupled with the buyer's inexperience and the limited amount of time to seek alternative sources of credit were claimed to make it inevitable that franchisees would purchase equipment from Dunkin'. Two other types of practical effect ties—technology ties and price ties—will be explored in more detail.

#### a. Technology Ties

Practical effect ties can surface in the subtleties of technology.<sup>77</sup> For example, a computer manufacturer may design its operating system software so that it can function well only when used with the producer's own configuration of hardware. The consequence is that as a practical matter buyers are precluded from purchasing hardware from other sources.<sup>78</sup> Similarly, a tying effect might be achieved by designing technology so that the user of the product would have to make costly adjustments in order to use ancillary products manufactured by firms other than the seller.<sup>79</sup>

Allegations of technological tying arrangements are relatively new, which may explain why courts are having difficulty in comprehending that proof of the existence of a tie-in can be derived from the technology of the products. In *Automatic Radio Manufacturing Co. v. Ford Motor Co.*<sup>80</sup> the plaintiff radio producer charged that it was foreclosed from selling to Ford dealers because Ford had redesigned the instrument panel on its Galaxie and Fairlane models in a way that compelled dealers to use radios installed by Ford. The district court, finding neither an implied-in-fact provision nor a tie "effectuated by use of a pre-existing contractual relationship,"<sup>81</sup> rejected plaintiff's tie-in claim. The court noted that Ford's design policy "was independent of its con-

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effect tie-in, plaintiff alleged that defendant builder of swimming pools convinced architects designing pools for public bodies to use defendant's specifications which while ostensibly neutral on their face, described only defendant's products. *George R. Whitten, Jr. Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970).

76. See text accompanying notes 16-17 *supra*.

77. See generally Comment, *Physical Tie-Ins As Antitrust Violations*, 1975 U. ILL. L.F. 224.

78. In *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976) a similar allegation was made but rejected for lack of "evidentiary support." The court indicated, however, that "[i]n some instances, two products might be illegally tied through the technological relationship between them." *Id.* at 1330.

79. See *Telex Corp. v. I.B.M.*, 367 F. Supp. 258, 346 (N.D. Okla. 1973).

80. 242 F. Supp. 852 (D. Mass. 1965).

81. *Id.* at 857.

tractual dealings with its dealers. It was not a matter as to which it consulted them or bargained with them in any way."<sup>82</sup>

Although the court's holding may have been justified on the facts,<sup>83</sup> its assumption that the tying effects of the product's technology must be demonstrated by bargaining between the vendor and the purchaser is not justified. In considering whether a technology tie-in exists, a court should first determine that the technology involves two separate products.<sup>84</sup> It should then consider whether the plaintiff has proved that the technology associated with the tying product had the practical effect of compelling the buyer to purchase a second tied item. Where technology is *purposely* arranged to compel the purchase of ancillary products from the vendor of the primary product, it is reasonable to infer that sale on condition has in fact taken place.<sup>85</sup> This intention to preclude the buyer from using the products of rivals might be inferred where there is no cost<sup>86</sup> or quality control<sup>87</sup> justification for the particular technological factor that creates the tie.

#### b. Price Ties

A firm can style its pricing policy to create a tie-in without resorting to an express clause. One form of price tie-in is the promotional tie, in which the low price for the tying product induces customers to voluntarily accept the tied item. The objective usually is to engage

82. *Id.*

83. The court found "no substance" to the claim that the changed design "so grossly increased the installation-time necessary as to, in effect, exert illegal economic duress on Ford dealers to buy factory-installed radios rather than go to the expense of having their own mechanic install them, and thereby to stop or greatly reduce purchases from plaintiffs." *Id.* at 854.

84. Since this form of tie will necessarily involve a high degree of technological interdependence between the two products, defendants are likely to raise a vigorous "single product" defense. In *Automatic Radio*, the court doubted whether the instrument panel should be considered a separate tying product:

Furthermore, it is difficult realistically to describe the Ford instrument panels as anything other than integral components usually found in automobiles designed for the run of the consumer trade. Thus it is hardly possible to view Ford as forcing on its dealers by contracts of adhesion an item which is not a component part of a car in order to force them also to take radios as accessories. Ford can hardly be accused of tying (in a legal sense) instrument panels to its cars by contract in order to reach the desired goal of tying radios too.

242 F. Supp. at 857.

85. In *Response of Carolina, Inc. v. Leasco Response, Inc.*, the court stated that it would limit technological tie-ins "to those instances where the technological factor tying the hardware to the software has been designed for the purpose of tying the product, rather than to achieve some technologically beneficial result." 537 F.2d 1307, 1330 (5th Cir. 1976).

86. See P. AREEDA, *ANTITRUST ANALYSIS* 571 (2d ed. 1974).

87. See, e.g., *International Salt Co. v. United States*, 332 U.S. 392, 397-98 (1947).

in a form of nonprice competition, "much like the giving of collateral services such as engineering advice or fancy packaging."<sup>88</sup>

Price policy can be used as well for purposes other than promotion. Market power over the tying product may allow a seller to charge \$10 for the tying item and tie to it a second product priced at \$9, producing a total package price of \$19. To avoid the antitrust problems of an express tie-in, such a seller may offer customers two options: either the tying product may be purchased separately for \$12 and the tied product may be purchased for \$9 or customers can buy both for \$19. Charging a comparatively high price for the tying product as a separate item enables the seller to avoid the use of either a formal tie-in provision or overt coercive tactics, but nevertheless channels customers into the tie-in through the package offer.<sup>89</sup>

Demonstrating that price policy is being used to create tying arrangements involves the difficult task of proving that the price charged for the tying product alone is so excessive that buyers will inevitably select the package. Courts may be called on to investigate the often subtle distinctions between competitive and supracompetitive prices in the tying product market.<sup>90</sup> It may be possible to

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88. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 65 (1958). An example is an offer of a razor for one-half price with the purchase of five razor blades. Promotional ties may not always be so innocent. See note 133 *infra*.

89. On these assumptions we may infer that the seller has priced B at the market, but priced A substantially higher than its profit-maximizing price, considered alone, in order to channel most sales of A into the package. We would confirm this inference if we found that the bulk of all sales of A were made in the package.

L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 455 (1977).

90. It must be noted that this test invokes the confusion between existence and liability that is a primary focus for criticism in this Article. The confusion arises in trying to determine when the price of the tying product is so high that the sale of the tying product can be said to be conditioned upon purchase of the tied product. This occurs where purchasing the tied package is the buyer's only rational choice. To evaluate the price a court must examine the tying product market in terms of its competitiveness. If the market is competitive the seller cannot raise the price of the tying product substantially without losing the sale to a competitor in the tying product market. In such a market, that the package carries a lower price than the two components purchased separately does not necessarily signify a tie-in. Rather, it is more likely that the seller is offering two distinct marketing arrangements to meet different needs and desires. A seller who enjoys a great deal of market power in the tying product market, however, can raise the price of the tying product significantly in order to induce a purchase of the package without fear of losing sales to competitors. If the price were raised sufficiently, a tie-in would be created.

Determining whether a price tie exists also requires an analysis of the seller's cost functions. If the lower price on the package indicates no more than the seller's passing cost savings along to the buyer, concluding that a tie-in exists may be improper. Judging the excessiveness of the price charged for the tying product alone requires a comparison of that price with the seller's costs at varying stages of production and levels of out-

account for the difference between the tied package price and the aggregate separate prices of the two items by the increased efficiency in distributing the products as a package. If so, there is no tie,<sup>91</sup> the seller has done no more than market his product in alternative ways. The price disparities may be so extreme, however, that the seller's intention to force the tied product on purchasers of the tying product is obvious. In such a case, an additional inquiry must be resolved at the outset: was the price tie a firm offer or just a bargaining ploy?

The difficulties encountered in proving a covert pricing tie-in are exemplified in *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres*.<sup>92</sup> This case has supplied much of the support for the individual coercion doctrine.<sup>93</sup> Indeed, Judge Kaufman's remark in *American Manufacturers IV* that "there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice"<sup>94</sup> is the most succinct statement of the doctrine. A brief review of *American Manufacturers* indicates, however, that the case does not support a general rule that evidence of coercion is necessary to establish the existence of a tying agreement or to prove liability.

The tie-in allegations in *American Manufacturers* focused on negotiations between Kemper Insurance Company's advertising agency and the American Broadcasting Company concerning sponsorship of an evening news program. Kemper had wanted to eliminate certain stations from the list of television stations originally considered. ABC's insistence that a much higher rate would apply if the undesired stations were eliminated allegedly dissuaded Kemper from cutting these stations. Kemper claimed that a tie-in existed because, as a condition

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put, i.e., would the seller extract excessive profits at the price charged for the tying product. These inquiries are directed at the degree of harm in the particular tying arrangement and the threat to competitive markets posed by the seller's conduct. These inquiries are precisely those to be made when deciding the issue of liability. See Part III *infra*.

Where the price of the tying product is blatantly excessive compared to the price of the tied package, a court may well bypass these rigorous inquiries in making a finding of existence. That fact should not obscure the underlying assumptions in the court's judgment. In effect, a finding that a price tie exists is a finding of liability; the two concepts merge in this situation.

91. L. SULLIVAN, *supra* note 89, at 455.

92. 270 F. Supp. 619 (S.D.N.Y. 1967), *rev'd and remanded*, 388 F.2d 272 (2d Cir. 1967). On remand the district court dismissed Kemper's claim once again. 1970 Trade Cas. ¶ 73,110 (S.D.N.Y.), *aff'd*, 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

93. For example, *American Manufacturers* was relied on in *Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387, 391 (S.D. Fla. 1972) as authority for the individual coercion rule.

94. 446 F.2d at 1137.

to buying time on desired stations, it was forced to accept unwanted stations. The prices offered by ABC made it unrealistic for Kemper to purchase time on just the stations it wanted.<sup>95</sup>

The district court held that under *United States v. Loew's, Inc.*,<sup>96</sup> Kemper had the burden of proving: (1) ABC's price for time on the ninety-five desired stations was "substantially as high" as the price for the tied package of ninety-five desired and thirty-five undesired stations, (2) there was no cost justification for the rate differences, and (3) the rate differential caused Kemper to select the tied package.<sup>97</sup> In holding that Kemper failed to meet the tests from *Loew's*, the district court observed that "the necessary element of coercion, economic or otherwise, has not been proven."<sup>98</sup> In light of the criteria the court set, this comment concerning "coercion" apparently referred to Kemper's inability to prove that ABC made an offer for a tied package and then refused to negotiate further on the possibility of a split sale. Since Kemper had not made an effort to negotiate a lower rate for the desired stations, the court granted ABC's motion for summary judgment.

The Second Circuit reversed on the basis that the evidence was too conflicting to warrant a summary judgment. As to whether Kemper was required to demonstrate further efforts to negotiate after ABC rejected Kemper's order deleting the unwanted stations, Judge Kaufman observed that "the law does not demand that Kemper joust with windmills; it would have been reasonable to require it to negotiate only if there was a chance of success."<sup>99</sup>

On remand the district court found that Kemper's negotiating efforts were too negligible to raise the issue of "jousting with windmills."<sup>100</sup> Kemper appealed the decision. To avoid the lower court's

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95. 270 F. Supp. at 646-47.

96. 189 F. Supp. 373 (S.D.N.Y. 1960), *modified on other grounds*, 371 U.S. 38 (1962).

97. 270 F. Supp. at 647.

98. *Id.* at 649.

99. 388 F.2d at 285.

100. 1970 Trade Cas. ¶ 73,110 (S.D.N.Y.). Kemper failed to press for an offer covering only the desired stations, did not make a counteroffer, never attempted to break down the costs of the ABC package, and therefore failed to prove the existence of a resolute offer that would operate as the basis for a price differential tie. Any argument that Kemper was relieved from making an effort to test the windmills of ABC was resolved against them because of the balance of bargaining power. The court noted that while it might be "inappropriate, in the limited framework of the issue involved . . . to consider whether ABC had sufficient economic power to impose an appreciable restraint . . . in the tied product, it is . . . pertinent to consider the marketability of the program involved." *Id.* at 88,370. The court found that ABC was marketing a "turkey" and that throughout the entire negotiations, Kemper "held the dominant position." *Id.* at 88,374.

adverse finding of fact it argued that, under *Loew's*, whenever a seller offers a buyer a package and the buyer states that only certain items in the package are wanted, "[if] the seller delays at all in offering to sell the designated items at prices which are equivalent to the package price,' taking into account any costs saved by selling the entire package," the seller violates the Sherman Act by imposing a tie-in.<sup>101</sup>

The Second Circuit deemed Kemper's formulation "untenable." Use of such a standard was found to be tantamount to converting "bargaining ploys" into antitrust violations.<sup>102</sup> The court concluded that the proper test for determining the existence of a resolute offer for a price tie-in focuses on whether the seller exerted pressure to accept the package in the face of a serious effort by the buyer to negotiate. Kemper's claim failed because Kemper "never discovered whether it faced a windmill or a bona fide giant . . . [and] did not persevere long enough with its ideal lineup to feel any economic pressure from ABC."<sup>103</sup> Embellishing this viewpoint, Judge Kaufman stated the individual coercion doctrine by remarking: "[T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice."<sup>104</sup>

This observation on coercion was irrelevant to the issue of whether ABC had imposed a price tie. To show the existence of a price differential tie, the purchaser must prove that the separate price for the tying product was so high that the buyer's only rational choice was to purchase the tied package. Both *American Manufacturing* courts realized, however, that they did not have to resolve the difficult question of whether the price differential created a tie-in if the seller had not really insisted on a package offer. As the courts correctly recognized, the plaintiff must prove that the seller's offer is serious and resolute rather than a "mere bargaining ploy." The presence of a large number of package deals would raise an inference that the seller was seriously attempting to establish price differential tie-ins.<sup>105</sup> Since evidence of other tie-ins was unavailable to Kemper, it had to prove the seriousness of ABC's offer through its own efforts to negotiate an untied agreement. Because of its lack of perseverance during the negotiations, Kemper failed to meet this burden.

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101. 446 F.2d at 1136 (emphasis in opinion).

102. The Court criticized Kemper's reliance on *Loew's*, because the rule Kemper proposed was based on the remedy granted by the *Loew's* court rather than its finding of a violation. *Id.* at 1136-37. Judge Kaufman was correct in rejecting the *Loew's* decree as definitive on the issue of when a tie-in has occurred. Decrees characteristically embrace conduct beyond the scope of the complaint and therefore cannot be relied on to embody the substantive holding of the case. See Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 IOWA L. REV. 983, 1000 (1968).

103. 446 F.2d at 1137.

104. *Id.*

105. See note 90 *supra*.

## 2. Tie-Ins Resulting From Threats of Refusal to Deal

Buyers sometimes agree to tying arrangements because the seller has threatened not to deal with the buyer if the buyer refuses to acquiesce.<sup>106</sup> Typically the seller uses superior economic power as a lever to induce the buyer's acceptance of contractual provisions that can later be manipulated in conjunction with threats or other tactics to achieve tying. Thus, a writing neutral on its face "can be supplemented by an extrinsic course of conduct from which the illegal condition . . . might be found."<sup>107</sup> Provisions that render buyers completely dependent on the seller's discretion as to termination of their relationship furnish a ready means of creating a refusal-to-deal tie. For example, a dealer who has invested time and money in a business may be committed to a supply contract containing provisions that allow the seller unilaterally to terminate for minor breaches such as "poor maintenance" or "inadequate housekeeping."<sup>108</sup> Under these conditions, a few words of "advice" or a veiled threat of termination will often suffice to conclude a tying arrangement.<sup>109</sup>

Refusal-to-deal tie-ins are usually proved by evidence derived from an ongoing buyer-seller relationship that is likely to be ripe with tensions.<sup>110</sup> Courts are thus confronted with the task of separat-

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106. Under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), a seller has the theoretical right to announce in advance a policy of dealing only with those who accept the tie-in and to refuse to deal with those who fail to comply with the policy. Subsequent decisions have narrowed, and may have implicitly overruled the *Colgate* doctrine. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960). See Pitofsky & Dam, *Is the Colgate Doctrine Dead?*, 37 ANTITRUST L.J. 772 (1968); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

107. *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959).

108. See *Shell Oil Co. v. F.T.C.*, 360 F.2d 470, 481 (5th Cir. 1966).

109. For example, in *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), a tie-in was proved through evidence that dealers had been warned at annual sales meetings of the consequences of not buying tied products and that dealer purchases were considered in deciding whether to renew yearly leases. Holding up shipments of new cars unless dealers promised to use G.M. financing was one of the refusal-to-deal ploys recognized in *United States v. General Motors Corp.*, 121 F.2d 376, 398-99 (7th Cir. 1941). In *United States v. American Can Co.*, 87 F. Supp. 18 (N.D. Cal. 1949), the government charged that cans were tied to "closing" machines leased at nominal rates. An implied tie was found in the defendant's overall policy, particularly its practice of arranging the length of the leases to run concurrent with contracts for the sale of cans. This arrangement made it possible for American to make and carry out threats to withdraw its closing machines if a customer switched to another can supplier. Other examples of "conveying the message" to stubborn dealers are reducing the length of leases from one year to one month and refusing to make needed repairs. See *Tire Sales Corp. v. Cities Service Oil Co.*, 410 F. Supp. 1222 (N.D. Ill. 1976).

110. This situation is exemplified by the franchisor-franchisee relationship, where

ing threats of refusal to deal channeled through dependency clauses from "normal" or "harmless" salesmanship. This problem evidently troubled the *Dunkin' Donuts II* court, for it applied the coercion doctrine to prevent mere salesmanship from resulting in liability.<sup>111</sup>

Where threats of refusal to deal are involved, coercion is relevant to the existence of a tie-in. A suggestion by a franchisor that a franchisee purchase supplies from an approved supplier would not in itself constitute an antitrust violation. Where the franchisor threatens termination if the franchisee does not purchase supplies from the franchisor, however, the use of coercion indicates the existence of a tying arrangement.

The TBA decisions<sup>112</sup> suggest that where economic bargaining power is clearly skewed in the seller's favor and the contract is liberally dotted with dependency provisions, the plaintiff's burden of proving threats of termination is not as great as it would be if the balance of power were not clearly in the seller's favor.<sup>113</sup> If the seller does not possess significantly greater economic power, the plaintiff must show that specific threats of termination or other forms of coercion resulted in a "sale on condition."<sup>114</sup>

contracts are "usually presented on a take-it-or-leave-it basis, and few of them are negotiated in the legal sense." McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-Ins*, 58 CALIF. L. REV. 1085, 1090 (1970).

111. See text accompanying notes 39-44 *supra*. Although evidence of coercion was relevant to the refusal-to-deal tie in *Dunkin' Donuts*, this was not the only type of tie-in claimed. Practical effect ties were also alleged. See text accompanying notes 15-18 *supra*.

112. Under a typical TBA arrangement, an oil company, in return for a commission on sales, turned over to firms such as Goodyear and Firestone the business of selling tires, batteries and accessories to retail dealers. The TBA suppliers were responsible for warehousing, distribution, and sales to retail service stations. In a series of suits, the FTC attacked the plan as an "unfair method of competition" under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970), in that oil companies participating in such arrangements used their market power to coerce dealers into accepting products from the designated supplier. See *Federal Trade Commission v. Texaco, Inc.*, 393 U.S. 223 (1968).

113. In *Federal Trade Commission v. Texaco, Inc.*, 393 U.S. 223 (1968), the Supreme Court found the leverage deployed in one-year leases to be so pervasively balanced in Texaco's favor as to render improbable the existence of dealer free choice.

At any time during the year a man's lease on his service station may be immediately terminated by Texaco without advance notice if in Texaco's judgment any of the "housekeeping" provisions of the lease, relating to the use and appearance of the station, are not fulfilled. . . . The average dealer is a man of limited means who has what is for him a sizable investment in his station. He stands to lose much if he incurs the ill will of Texaco. As Judge Wisdom wrote in *Shell*, "A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord."

*Id.* at 227. Given these conditions, the Court rejected the need for evidence of overt coercion over the dealers.

114. For example, in *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), defendant's rental contract precluded customers from using sup-

It is quite likely that refusal-to-deal cases gave birth to the individual coercion doctrine. Significantly, the *Abercrombie* decision, one of the first cases employing the doctrine, involved a refusal-to-deal tie.<sup>115</sup> Because this particular type of tie is created through individualized treatment, a class suit is not appropriate with a refusal-to-deal tie-in.<sup>116</sup> The individual coercion doctrine should not be applied to all tie-in actions, however, for the existence of other types of tie-ins does not depend on the presence of coercion.

### C. *The Relevance of Coercion to Proving the Existence of a Tie-In*

Establishing the existence of a tie-in requires proof of the sale or lease of one product on condition that a second product be leased or purchased. Sellers use diverse and sometimes ingenious techniques to effectuate tying arrangements. The type of proof appropriate to establishing the existence of a tie depends on the method the seller used to create the arrangement. In most instances, a sale on condition

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plies that "cause damage or deterioration" to its copy machines. The clause seemed reasonable on its face and the court did not find evidence of coercion in the parties' relative economic power. The court concluded, however, that the defendant's conduct—threats to cancel and false representations to customers that use of plaintiff's supplies would cause severe delays—justified affirmance of the district court's conclusion that "through persistent and deliberate misrepresentations, sabotage, and threats of cancellation, SCM effectively used the 'damage or deterioration' clause in the rental agreement to coerce lessees to use only SCM supplies in their rental machines." 415 F.2d at 64.

115. *Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387 (S.D. Fla. 1975), involved a group of franchisees who alleged that although they were not bound by express tie-in provisions, defendant's conduct extrinsic to the written franchise contract compelled them to purchase certain tied products. The contracts required franchisees to buy equipment or supplies from sources designated or approved by Lum's, but there was no evidence that "dependency" clauses were available as levers for Lum's to exploit. Moreover, unlike *Dunkin' Donuts*, there were no allegations that the franchisor delayed approval of suppliers or that time limitations on the buyer had the "practical effect" of swaying the inexperienced buyer into acceptance of a tie. Under these conditions, the district court was correct in requiring proof of coercion.

*Lah v. Shell Oil Co.*, 50 F.R.D. 198 (S.D. Ohio 1970), which was cited by *Abercrombie* and distinguished in *Dunkin' Donuts I*, also focused on coercion because it involved claims of refusal to deal. The court's sketchy summary of the facts indicates that the plaintiff alleged a refusal-to-deal tie, created as a result of the seller's bargaining power, which had placed plaintiff in a "position of utter helplessness." 50 F.R.D. at 199. Plaintiff pointed to one year leases as creating dependency but apparently could cite no extrinsic behavior to prove the existence of the tie-in.

116. "Any claim that lease provisions which permit cancellation for breach of the franchise agreement could be applied so as to coerce franchisees in the operation of their restaurants would necessitate a review of how the provision was administered as to each franchisee who claimed he was coerced thereby." *Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387 (S.D. Fla. 1975).

can be established without proof that the buyer was coerced. Tie-ins based on agreements expressly linking the purchase of one product to the purchase of another require only proof of such an express provision. Tying arrangements alleged to be derived from price policy, technological design, or "practical effect" clauses can also be proven without evidence that the buyer was "backed against the wall" to force the purchase of the second product. For example, proof that the specifications for tied products cannot realistically be satisfied by rival suppliers coupled with a showing that most buyers did not in fact use other sources of supply should raise an inference of a practical effect tying arrangement. On the other hand, refusal-to-deal tie-ins are based on the buyer's fear that dependency clauses will be used to terminate the relationship if the buyer refuses to purchase the tied product from the seller. Such a tie can best be proven by evidence of coercive tactics and overt intimidation.

Except perhaps in the case of refusal-to-deal ties, the existence of a tie-in can be proved regardless of whether the buyer accepted the tie voluntarily, as a result of coercion, or from some benign motive such as convenience. Indeed, a sale on condition may occur without the buyer being aware of the tie-in. For example, an inexperienced franchisee may not perceive that the specifications for ancillary products are skillfully composed so as to channel buying to the franchisor. Similarly, a buyer may not see through the subtleties of a technology tie. In both cases, regardless of whether the buyer is aware of the tie-in, the seller has caused the buyer to accept a second product and has thus created a tying arrangement.

Under the *per se* rule the buyer's state of mind is irrelevant, because sanctions against tie-ins are intended to influence or punish the seller's actions. As the Third Circuit pointed out in *Bogosian*:<sup>117</sup>

The antisocial conduct which the rule seeks to deter is the *act of the seller conditioning* sale of one product upon purchase of another. One can hardly imagine anything which would vitiate that purpose more than a requirement that the buyer bringing suit prove that he would not have purchased the tied product but for the tie requirement. The issue is whether the seller acted in a certain way, not what the buyer's state of mind would have been absent the seller's action.

Although the individual coercion doctrine contains a grain of truth in the context of establishing the existence of a refusal-to-deal tie, its expansion beyond that narrow sphere is simply wrong.

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117. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 450 (3d Cir. 1977) (emphasis in opinion).

## III

## COERCION AS A FACTOR IN ESTABLISHING LIABILITY

Once the existence of a tying arrangement has been proven, liability depends on a showing that the defendant had sufficient economic power over the tying product to appreciably restrain free competition or that the tying arrangement affected a not insubstantial amount of commerce in the tied product.<sup>118</sup> The Supreme Court's perception of the tying arrangement differs from that of most economists. The Court views the tie-in as an activity that is inherently harmful and without any redeeming purpose, and thus treats it as virtually per se illegal. Economists tend to view the tie as a problem in the use of monopoly power and a form of conduct that will produce adverse effects only under certain conditions.<sup>119</sup> Economic literature is therefore generally skeptical of what economists perceive as indiscriminate prohibition under the per se rule.

Whatever their other differences, however, most economists and the Supreme Court agree that coercion is not a controlling factor in determining liability for tying arrangements. To the economist, exploiting market power through a tie-in is not coercive in an economic sense. Under the Court's formulation of the tests for ascertaining liability, proof of coercion is unnecessary.

*A. The Economist's View of the Tying Arrangements:  
The Leverage Problem*

Economic literature, influenced heavily by the Chicago School, starts from the premise that anticompetitive conduct is harmful only when it adversely affects the marketplace by artificially enhancing the prices consumers pay for goods. These adverse effects occur if product markets are monopolistic so that producers can control prices. Monopolistic producers supply less output than competitive producers, making goods more expensive to consumers than under ideal market conditions. Conversely, so long as competition exists in a product

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118. See text accompanying notes 135-42 *infra*.

119. See E. SINGER, *ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS* 187-204 (1968); R. WARREN, *ANTITRUST IN THEORY AND PRACTICE* 191-204 (1975); Bowman, *Tying Arrangements and the Leverage Problem*, 67 *YALE L.J.* 19 (1957); Director & Levi, *Law and the Future: Trade Regulation*, 51 *NW. U. L. REV.* 281 (1956); Markovits, *Tie-ins, Reciprocity, and the Leverage Theory*, 76 *YALE L.J.* 1397 (1967); Posner, *Exclusionary Practices and the Antitrust Laws*, 41 *U. CHI. L. REV.* 506, 508-15 (1974). While critical of the "legal" approach to tie-ins, some commentators do not reject per se proscription. See Burstein, *A Theory of Full-Line Forcing*, 55 *NW. U. L. REV.* 62 (1960); Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 *LAW & CONTEMP. PROB.* 522 (1965).

market, goods will be priced competitively and resources allocated efficiently.<sup>120</sup>

Most economists analyze tying arrangements as they analyze all antitrust problems: they focus on whether monopolistic markets exist.<sup>121</sup> Under this analysis, if the tying good is available from alternative sources, the tie-in attempt causes no harm, for buyers who find a tie uneconomic will ignore the seller's efforts and purchase elsewhere.<sup>122</sup> If the seller does have monopolistic or market power, its use in tying arrangements has two possible purposes. It may, as some Supreme Court decisions postulate,<sup>123</sup> be used to create a new monopoly in the market for the tied product, or it may provide a means for maximizing revenues. The consensus among economists is that a tie-in should be illegal only when a seller uses a tie to create power beyond existing monopoly power, by using present market power as a lever for conquering new markets. Under this view revenue-maximizing ties should not be considered illegal since they only "utilize the market power already possessed more effectively—in a way that increases the net return from the exercise of that power."<sup>124</sup> If a firm has a monopoly in the tying product market it can extract its monopolist's profit through any marketing scheme it chooses at any point on the production to purchase line. The firm does not need the tie to maintain its monopoly. Consequently, the proper concern of antitrust enforcement should be with the legitimacy of the existing monopoly power over the tying product, not with the seller's use of a tie to maximize monopoly profits.<sup>125</sup>

120. See P. AREEDA, *supra* note 86, at 17.

121. Apart from protection of goodwill, the sole apparent rationale of a monopolistic tying agreement is to exploit a power position in the market for the "tying" commodity by artificially extending the market for the "tied" product beyond the consumer acceptance it would rate if competing independently on its merits and on equal terms.

REPORT OF THE ATTORNEY GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 145 (1955) [hereinafter cited as NAT'L COMM. REPORT].

122. "A competitive supplier, selling at the prevailing price and attempting to impose a tie-in upon a buyer, would merely be displaced by a seller who did not." Bowman, *supra* note 119, at 20.

123. See *e.g.*, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917).

124. Ferguson, *supra* note 119, at 554. The seller readjusts prices by lowering the price of the tying product and raising the price of the tied item compared to the pattern of prices in the absence of the tying arrangement.

This result occurs because, almost without exception, firms with horizontal market power will lose revenue on sales of this tying good if they impose coercive restrictions on their customers. "Such firms would lose revenue because they cannot both obtain the advantage of the original power and impose additional coercive restrictions so as to increase their monopoly power."

*Id.*

125. Bowman, *supra* note 119, at 20.

The literature of the Chicago school suggests that in most instances sellers use tying arrangements to maximize revenues, rather than to enhance monopoly power.<sup>126</sup> Some of the recognized objectives of revenue-maximizing tie-ins include: (1) achieving economies in production or distribution, (2) protecting the goodwill of technologically interdependent products, (3) sharing risks with the buyer, (4) evading price ceilings on the tying product, (5) using the tied product as a counting device to measure the use of the tying product in order to discriminate in prices. In addition the promotional tie may be used as a means of nonprice competition.

In achieving some of these objectives, revenue-maximizing ties can be advantageous to both the buyer and the seller. Where the seller uses ties to cut costs, perhaps through increased efficiency,<sup>127</sup> it is probable that some savings will be passed on to the buyer.

The "goodwill" tie-in, which prohibits buyers from using other manufacturers' inferior or defective products with the seller's tying product, is also advantageous to both buyer and seller. Both parties have a rational interest in maximizing the technological efficiency of the tying product. The necessity for goodwill ties has been questioned. It has been argued that if in fact the products of rival sellers are inferior to those of the tying seller, the tie is unnecessary since buyers, acting in their own interest, would purchase the most efficient combination of products.<sup>128</sup> This analysis ignores the existence of various barriers to the communication of information. Not all buyers will be fully informed of the respective merits of the various products. Since the seller cannot recognize and separate knowledgeable, ignorant, and indifferent buyers, the simplest course is to uniformly utilize a sale on condition.<sup>129</sup>

Using a tie-in as a means of "sharing" risks with buyers may also be favorable to certain purchasers. This usage is particularly relevant to the franchise arrangement. The franchisor's tying product is the

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126. See note 119 *supra*.

127. Dewey points out that in most cases, the use of tie-ins "can be explained in terms of the savings in cost that they achieve—as the defendant invariably points out." D. DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 202 (1964).

128. Bowman, *supra* note 119, at 28; Ferguson, *supra* note 119, at 558.

129. For example, in *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961), the defendant tied glass-lined silos and an unloading device after receiving complaints from customers who had purchased only the unloader. The court permitted the tie under the "legitimate reasons" rationale of *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), noting the number of complaints and the inability of the seller to educate customers on the technology of the tying product.

company's registered trademark and associated goodwill.<sup>130</sup> Presumably the franchisor could extract the desired profit from a sale of the franchise. A high purchase price might, however, prevent some individuals from entering the business. To attract these potential franchisees, the franchisor may instead charge a low initial price for the franchise but also require the franchisee to buy supplies from the franchisor, thereby sharing the rewards of the franchise as well as its risks.<sup>131</sup> Such a tying arrangement can be viewed as a favorable form of price discrimination. Franchisees with the largest sales will eventually produce the largest return for the franchisor. Franchisees who do not fare as well may not return as much to the franchisor as they would have had the franchisor extracted the entire monopoly profit on the sale of the franchise.<sup>132</sup>

The promotional tie is another tying arrangement in which the buyer and seller usually have compatible interests. Competing in an oligopoly and fearful of quick price warfare upon the appearance of direct price competition, a seller may opt to charge the market price for the tying product and a reduced price for the tied items.<sup>133</sup> Coercion is unnecessary with such a tie-in, as the buyers are the beneficiaries of a promotional package.

Although most Chicago school economists argue that revenue-maximizing ties should be legal, they do criticize ties that present the problem of leverage—those which permit monopolists to expand their monopoly power to new markets. Economists believe such ties are rare, but they can occur where the seller ties products that are not used in fixed proportions with the tying product but have a complementary use. In such cases, as the price of the tying product rises, the sales of the tied product fall, and vice versa. By dropping the price of the tying product and utilizing a tie, the monopolist seller can become a substantial competitor in the tied product market without decreasing overall revenues.<sup>134</sup> The seller thus acquires a new product market

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130. See McCarthy, *Trademark Franchising and Antitrust: The Trouble with Ties*, 58 CALIF. L. REV. 1085 (1970).

131. See R. WARREN, *supra* note 119; at 200-01.

132. See P. AREEDA, *supra* note 86, at 571.

133. Promotional ties are not necessarily benign: "If a seller has a substantial monopoly power in the tying product—if that product is greatly desired and has no close substitutes—he may be using the tie-in for the purpose of driving out competitors in the tied product." Turner, *supra* note 88, at 65. For a possible example of fictitious promotional tie-ins, see *Hill v. A-T-O, Inc.*, 524 F.2d 1349 (2d Cir. 1976).

134. "Leverage is present; and the tie-in provides the leverage, since the price and output of one product will necessarily affect the price and output of the other." Bowman, *supra* note 119, at 25-26. See P. AREEDA, *supra* note 86, at 570; R. WARREN, *supra* note 119, at 192-96.

Burstein suggests that leverage can occur under "full-line forcing" conditions since

and potentially increases overall revenues. At the same time, the seller avoids the status of a struggling new entrant in the market for the tied product. This double benefit results because a significant volume of sales is already assured by the tie-in.

In these situations, the existence of competitive harm, warranting liability for the tying seller, is determined by examining the market structures in both the tying and tied products. As with revenue-maximizing tying arrangements, the primary fault lies with the tying product monopoly. The question of whether the buyer was coerced can have no real bearing on the determination of liability. "Coercion" may be used by some courts as a synonym for the seller's market power; the *Dunkin' Donuts I* court apparently attached that meaning to the term. Such terminology should be avoided; it is both erroneous and confusing.

### B. *The Supreme Court's Test for Establishing Liability*

In its initial encounters with tie-ins as part of allegations of contributory patent infringement, the Supreme Court held the restraints invalid on the basis of leverage effects.<sup>135</sup> In subsequent decisions dealing specifically with tie-ins, the existence of leverage was assumed from the proof of monopoly power over the tying product.<sup>136</sup> In *International Business Machines Corp. v. United States*<sup>137</sup> and *International Salt Co. v. United States*<sup>138</sup> the Court apparently assumed that the tying arrangement was both monopoly expanding and revenue maximizing, without distinguishing between the two motives. Subsequent interpretations took the Court's focus further from the leverage principles now espoused by economists. In *Times-Picayune Publishing Co. v. United States* the Court defined the substantive elements of liability as proof of a "monopolistic position in the market for the 'tying' product"<sup>139</sup> or a not insubstantial amount of foreclosure in the tied product. *Northern Pacific Railway Co. v. United States*<sup>140</sup> established what is virtually a per se rule by reducing plaintiff's burden of proof with respect

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buyers will pay more for the package if confronted with the alternative of accepting the tie or getting nothing. Burstein, *supra* note 119.

135. In *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 242 U.S. 502, 518 (1917), the Court noted that tying films to patented exhibiting machines would "create a monopoly in the manufacture and use of moving picture films, wholly outside of the patent in suit and of the patent law as we have interpreted it."

136. *International Salt Co. v. United States*, 332 U.S. 392 (1947); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *United Shoe Mach. Co. v. United States*, 258 U.S. 451 (1922).

137. 298 U.S. 131 (1936).

138. 332 U.S. 392 (1947).

139. 345 U.S. 594, 608 (1953).

140. 356 U.S. 1, 6 (1958).

to market power to "sufficient economic power with respect to the tying product." This per se rule received added refinements in *United States v. Loew's*<sup>141</sup> and in *Fortner Enterprises Inc. v. United States Steel Corp. (Fortner I)*, where Justice Black apparently further diluted the economic power requirement by suggesting that "the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market."<sup>142</sup>

This declension in the standard of proof for the seller's economic power highlights the differences between the view of tie-ins held by economists and the view of the Court. In *Times-Picayune* the Court identified two harmful effects of tying arrangements—foreclosure and coercion. The Court stated that "to the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment."<sup>143</sup> Regarding "coercion" the Court declared: "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."<sup>144</sup> Neither concept speaks directly to what economists consider harmful. Foreclosure focuses on harm to competitors; coercion focuses on harm to purchasers. In contrast, economists emphasize harm to the marketplace and ultimate consumers.

### 1. Foreclosure

Tie-ins are said to produce two types of foreclosure effects. First, existing sellers of the tied product may be fenced out of the market embraced by the tying contracts. Second, ties-ins are claimed to create a barrier to entry in that would-be newcomers without the capacity to sell both products are foreclosed from entry into the market for the tied product.<sup>145</sup>

141. 371 U.S. 38 (1962).

142. 394 U.S. 495 (1969), *on remand*, 452 F.2d 1095 (6th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972), 523 F.2d 961 (1975), *rev'd*, 429 U.S. 610 (1977).

143. 345 U.S. at 605.

144. *Id.*

145. C. KAYSER & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 157 (1965). Protection of the foreclosure interest may be consistent with the purpose of § 3 of the Clayton Act, which one study assumed to be "fundamentally designed to protect the *seller's competitors* from being foreclosed from the market. NAT'L COMM. REPORT, *supra* note 121, at 136 n.28.

By adopting a test that requires proof of only a slight degree of economic power, *Northern Pacific* seemed to assume that foreclosure is the primary vice of the tie. See Turner, *supra* note 88, at 60-62. *Northern Pacific's* concern about foreclosure may have reflected the Warren Court's commitment to "equality of opportunity, free access to mar-

Economists dispute both of these assertions. The barrier to entry argument assumes that newcomers are unable to meet the necessary capital requirements. Economists criticize this assumption as either too speculative or unfounded.<sup>146</sup> As to the effects on existing sellers, criticism takes two forms. Some critics point out that every sales transaction involves foreclosure. Thus tie-ins should not receive special condemnation. "All buyer choice forecloses *less desirable options*, and that indeed, is the necessary consequence of consumer choice in a free market. To inhibit such choices and such contracts would actually be to restrain trade."<sup>147</sup> Other critics argue that foreclosure is not inevitable. For example, when the tying seller's motive is price discrimination, the seller's only interest in the tie is using the tied product as a metering device. If other suppliers can produce the tied item at competitive rates, the tying seller has an incentive to buy the competitively priced goods for repricing.<sup>148</sup> Foreclosure will also be incidental if the tied product has uses other than as a complement to the tying item.<sup>149</sup> Ties will not foreclose competitors if they have other markets where they can sell their products.<sup>150</sup> Moreover, even when foreclosure does occur, it may not be undesirable. For example, while a goodwill tie forecloses, it is based on the efficiency of the combination and thus is economically justified.<sup>151</sup> Further, if the market is

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kets by competing sellers, and complete freedom of choice by buyers." Kauper, *The 'Warren Court' and the Antitrust Laws: Of Economics, Populism and Cynicism*, 67 MICH. L. REV. 325, 332 (1968). *Fortner I*, although a private action, also echoes a concern over the potential foreclosure effect on the rivals of the Credit Corporation, prompting Professor Dam to observe: "A paradox in *Fortner* is that Mr. Justice Black ignores the buyer justification [coercion of the buyer] in reaching a result directly benefiting a buyer while emphasizing at great length the competitor justification in a case where any harm to competitors is totally speculative." Dam, *supra* note 4, at 37. Professor Dam furnishes an explanation for the paradox:

[W]hen the market power criterion is watered down as far as it has been in *Fortner* and applies to as unusual a transaction as a credit sale, the buyer justification is hardly applicable . . . [Moreover] [t]he advantageous terms were not imposed on the plaintiff. It was Fortner himself who, throughout the extended negotiations, demanded easier terms than the Credit Corporation was offering.

The decision in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, — (1977) (*Fortner II*) proved Professor Dam right by in effect recognizing the U.S. Steel tie-in as a promotional tie.

146. Pearson, *supra* note 4, at 638.

147. D. ARMENTANO, *THE MYTHS OF ANTITRUST* 203 (1972).

148. Ferguson, *supra* note 119, at 563; Posner, *supra* note 119, at 509.

149. R. WARREN, *supra* note 119, at 197.

150. Turner, *supra* note 88, at 72.

151. Posner, *supra* note 119, at 509. Lower courts have accepted the "goodwill" argument. *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935); *Phillips v. Crown Cent. Petroleum Corp.*, 1977-1 Trade Cas. ¶ 61,396 (D. Md. Feb. 17, 1977). The Supreme Court, however, has rejected it. *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949). See generally Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 Wis. L. REV. 88, 113-16.

sufficiently competitive, the absence of new entrants or the loss of some competitors is not particularly harmful.

If foreclosure of rival sellers is nevertheless seen as the primary harm caused by tie-ins, the individual coercion doctrine should have no relevance to determining liability. Foreclosure is a ubiquitous phenomenon that can arise from all the various classifications of ties, whether the tie-ins were "coerced" by heavy-handed manifestations of monopoly power, the result of persuasive salesmanship, or the consequence of hard bargaining. Since in each instance the rival seller is "foreclosed" from a market, the problem is to identify the types of foreclosure that should be considered unacceptable. One possible solution would prohibit foreclosure derived from an "unfair advantage." An unfair advantage can exist without coercion, however, for it can arise when the seller has just enough economic power over the tying product to reduce the scope of buyer options and thereby foreclose a rival seller.<sup>152</sup> The rival seller's interest is "adversely affected even though the seller's power over the tying product is slight, so slight that the buyer cannot accurately be said to be 'coerced' into the tying arrangement."<sup>153</sup>

## 2. Coercion

Tying arrangements have also been condemned by the courts because the "seller coerces the abdication of buyer's independent judgment as to the 'tied' product's merits."<sup>154</sup> The buyer thereby loses a measure of freedom. Economists either ignore the coercion claim or view it as irrelevant to the economics of tying. In one sense, no tie can create coercion. A seller without market power can tie products only if buyers find the package deal more favorable than the offers of the seller's competitors. But even if a seller has monopoly power over

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152. An unfair advantage can be derived from a "unique" or highly differentiated product.

Whenever there are some buyers who find a seller's product uniquely attractive, and are therefore willing to pay a premium above the price of its nearest substitute, the seller has the opportunity to impose a tie to some other good. Even assuming that he changes the money price of neither good, there will be some buyers of the tying good who will refuse the package because they have no desire for the tied good. But there will also be some buyers, who previously bought the tied good from the seller's tied-market competitors, who will sacrifice their tied good preference in order to obtain the seller's unique tying product. These buyers are effectively denied to the tied product competitor, and in order to regain them the competitor will have to lower his price or offer some tying product equally attractive to that of the tying sellers.

Note, *The Logic of Foreclosure: Tie-In Doctrine After Fortner v. U.S. Steel*, 79 YALE L.J. 86, 93-4 (1969).

153. Turner, *supra* note 88, at 60-61.

154. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 604 (1953).

the tying product, a buyer will pay the price demanded by the seller only if it does not exceed the value of the products to the buyer. Thus a buyer is never coerced.<sup>155</sup>

Under a more realistic view of coercion, however, a buyer may be coerced into buying a tied product from a seller with market power in the tying product. If the buyer has a significant need for the tying product and the seller is the only source of supply, the buyer may purchase a tied product that has little or no independent utility. In such a case, however, this "coercion" is a result of the seller's market power. Thus the proper focus of inquiry is the seller's market power, not the fact of coercion.

Although the Court has found "coercion" to be a harm caused by tie-ins, it has not required proof of coercion or of other evils associated with tying arrangements to establish liability. Rather, the Court will assume the existence of harm caused by the tie-in upon proof of certain elements under the per se rule. If leverage or coercion of buyers are to be protected against, the per se rule requires proof that the seller has substantial market power over the tying product. If foreclosure is given first priority, proof of slight economic power suffices.<sup>156</sup>

The Supreme Court has recognized certain indicia of economic power as sufficient to prove liability. *Northern Pacific* set the tone by announcing that, absent any other explanation, a "lost" of tying arrangements "is compelling evidence of the defendant's great power."<sup>157</sup> In *Loew's* the Court held that the requisite power could be inferred from the tying product's "uniqueness in its attributes" or "desirability" to customers.<sup>158</sup> Where the tying product is patented or copyrighted, economic power is inherent in the public grant of monopoly and can be presumed.<sup>159</sup>

The continued vitality of these "indicia" is left uncertain by *United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II)*.<sup>160</sup> The

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155. The use of a tie-in does require the buyer to consider the utility of the two products in combination. A buyer who concludes that the tied product is worthless, however, will not pay more for the package than the profit-maximizing price for the tying product. "The net utility derived from the potential purchase must exceed the utility foregone by the expenditure for the combined purchase price of the two items." E. SINGER, *supra* note 119, at 200.

156. See notes 139-41, 146, 152-53 *supra* and accompanying text.

157. 356 U.S. at 8.

158. 371 U.S. at 45.

159. *Id.* Lower courts are split over presuming the requisite economic power from a trademark. C. HILLS, ANTITRUST ADVISOR § 3.13 (Supp. 1974).

160. 429 U.S. 610 (1977). The case involved sales and financing of mobile homes by a subdivision of U.S. Steel. The plaintiff alleged that U.S. Steel tied credit financing plans to sales of its mobile homes. Plaintiff offered four sources suggesting the use of economic power: the fact that the contract required Fortner to pay a higher, "non-com-

Court approved the leverage theory and placed great emphasis on the seller's superiority over competitors in the tying product market. The decision reiterated the standard of "appreciable market power" in the tying product market that had been announced in *Fortner I*,<sup>101</sup> but seemed to apply the test more strictly.<sup>162</sup> If *Fortner II* indicates a shift toward requiring greater proof of market dominance over the tying product, the prevailing "indicia" may be replaced by a burden of proof calling for a clear and convincing showing that the seller enjoys a competitive advantage over rival producers of the tying product. What-

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petitive" price for the tied product, the financing; the defendant's "deep pockets"—its clear economic ability to provide financing; the fact that the defendant had created a credit tie with a "significant" number of customers; and the fact that the financing was "unique."

Justice Stevens rejected each allegation as not meeting the *Fortner I* test of "whether the seller has some advantage not shared by his competitors in the market for the tying product." *Id.* at 868. Evidence of a noncompetitive price was held meaningless because there was no proof that the price for the entire package was not equal to or lower than a competitive price. The "deep pockets" argument failed from lack of proof that U.S. Steel Credit Corporation could produce credit at a cost advantage over rivals.

In discussing a host of tie-ins as an inference of market power over the tying product, Justice Stevens recognized the possibility of leverage effects. He would consider "a disproportionately large volume of sales of the tied product," in connection with "a few strategic sales of the tying product" to "reflect a form of economic 'leverage' . . . probative," of economic power. *Id.* at 866. He added that "if, as some economists have suggested, the purpose of a tie-in is often to facilitate price discrimination, such evidence would imply the existence of power that a free market would not tolerate." *Id.* at — (citing Bowman, *supra* note 119). See also Posner, *supra* note 119, at 508-15. Because the U.S. Steel tie involved fixed proportions, however, Justice Stevens found no prohibited leverage. 429 U.S. at 617.

Plaintiff's allegation that power could be inferred from unique credit terms was rejected as unsupported by the record. To support such an inference, the Court would require "evidence that the Credit Corporation had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected." *Id.* at 869.

161. In discussing *Fortner I*, Justice Stevens observed: "We held that the agreement affected a 'not insubstantial' amount of commerce in the tied product and that Fortner was entitled to an opportunity to prove that petitioners possessed 'appreciable economic power' in the market for the tying product." *Id.* at 863.

162. Justice Stevens' strong emphasis on the necessity for evidence that the seller has a cost advantage over rivals, his approval of the leverage theory, and the citation of early leverage decisions, along with the reference to Professor Bowman's article, see note 160 *supra*, suggest that he was invoking a more stringent "appreciable" power standard. This interpretation can be countered by the fact that the Court also recognized that the requisite power could be derived from "significantly differentiated" financing. This reference tracks the "uniqueness" test from *Loew's*, 371 U.S. at 45, and arguably indicates that the "sufficient economic power" standard remains as the test for per se illegality. Even under this view, however, "inferences" of economic power will not be given the near conclusive effect permitted by the Warren Court but must be supported by persuasive evidence. This is consistent with the Burger Court's view that in antitrust, presumptions will no longer be given a priori effect. See, e.g., *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

ever the ensuing interpretation of *Fortner II*, however, the Court gave no indication in that decision or in previous decisions that proof of coercion was a means of proving the existence of sufficient economic power to establish liability.<sup>163</sup>

#### CONCLUSION

Many courts consider proof of coercion necessary to establish a *per se* illegal tie-in. Judge Kaufman's generalization that "there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice"<sup>164</sup> has become accepted wisdom. Although a fallacious generalization, it will continue to be accepted so long as the courts fail to examine the coercion issue in light of the different criteria for establishing the existence of a tie-in and for proving liability.

A tie-in exists if a "sale on condition" occurs. There is considerable variety in the classes of tie-ins and in the types of evidence necessary to prove existence. Apart from cases involving refusal-to-deal ties, requiring proof of coercion is an unnecessary and confusing distraction. Whether the buyer is committed to the tying restraint as a result of persuasion, coercion, or voluntary acceptance of the tie, the issue is solely whether a sale on condition has taken place.

The Supreme Court has never held that proof of coercion is necessary to establish liability. The substantive elements of liability are economic power over the tying product or foreclosure—not coercion. The *per se* rule assumes that adverse effects are proven through proof of the elements necessary to establish liability.

The Supreme Court assumes three possible adverse effects from tie-ins: leverage, foreclosure, and "coercion." Coercion in this context means that the seller has used market power to require those buyers who prefer its tying item to forego purchasing the tied products elsewhere. In an economic sense, characterizing this as "coercion" is somewhat spurious, since "the consumer is never forced to pay more for a product than it is worth to him."<sup>165</sup> In any event, it obscures the pertinent issue of the seller's power in the tying product market.

Despite its limited significance in proving existence and its irrelevance to establishing liability, coercion has become a ubiquitous factor in tie-in analysis. The doctrine has been recognized in discussions of

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163. Similarly, whether a tie is "coerced" or voluntary should have no relevance to a buyer's standing to allege an illegal tie. The causal connection between the tie-in and the "harm" to the buyer, see note 10 *supra*, is that market power has been used illegally to curtail the plaintiff's opportunities to seek better, or worse, deals elsewhere.

164. *American Mfrs. Mut. Ins. Co. v. A.B.C. Paramount Theatres*, 446 F.2d 1131, 1137 (2d Cir. 1971).

165. R. WARREN, *supra* note 119, at 202.

standing,<sup>166</sup> existence, liability, and justifications.<sup>167</sup> Perhaps Judge Becker is right: "It is possible that by means of linguistic phenomena alone, coercion may have assumed an independent viability in the law."<sup>168</sup>

The prevailing improper use of coercion is unfortunate but predictable. Courts must deal with what is recognized as a "mysterious"<sup>169</sup> per se rule that refuses to acknowledge the economic rationale for tie-ins.<sup>170</sup> The consequence is a "subculture" in the lower courts of justifications, exemptions, and adroit result-oriented maneuvering of the "sufficient economic power" requirement. The use of the coercion rule in *Dunkin' Donuts II* to head off "consequences that in our view would threaten the viability of the franchise system in our economy"<sup>171</sup> is an example. So long as courts are blocked from a more penetrating analysis of the economics of a particular tying arrangement, resort to subterfuges like coercion can be expected.

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166. See notes 10 and 163 *supra*.

167. See note 10 *supra*.

168. 68 F.R.D. at 99.

169. One member wishes to add "both the Congress and the courts have for many years disapproved of 'tying' agreements. Such contracts have been almost universally regarded as monopolistic devices. Upon analysis, however, the matter becomes far from obvious and perhaps should rather be termed mysterious. Whether prohibition of 'tying' improves the allocation of resources is open to question."

NATIONAL COMM. REPORT, *supra* note 121, at 138 n.32.

170. As one economist notes, "[E]ven a generous evaluation of the courts' treatment of such devices must conclude that it has been simplistic." P. ASCH, *ECONOMIC THEORY AND THE ANTITRUST DILEMMA* 361 (1970). According to Professor Dam: "The Court has usually tended to view the market power requirement as a technicality to be manipulated in the particular case in such a way as to sweep the challenged practice within the sphere of the per se rule." Dam, *supra* note 4, at 19.

171. *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1226 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).