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Tying Arrangements—An Update

*Marcus Mattson**

History has demonstrated that section 3 of the Clayton Act has led the Judiciary astray in tie-in cases. As the law of tie-ins has developed, section 3 seems now to have been unnecessary and has, I believe, confused the attainment of a sensible antitrust policy. Certainly mine is not the only criticism of the law of tie-in arrangements. Judge Aldisert of the Third Circuit has wisely said: "[T]he law of tying is becoming a kind of semantic shell game, resting more on key words than on careful analysis."[1] Dealing with the same subject, Professor Day in 1968 sharply criticized the "blind preoccupation with labels in an effort to simplify, or eliminate entirely, problem solving on an *ad hoc* basis—often leading to . . . the 'no-think school' of antitrust jurisprudence."[2]

This game of scrabble to which the law of tying has been subjected has largely avoided the rule of reason. Instead, a per se rule has emerged, with liability depending on the application of a laundry list of almost meaningless key words like

economic power,
dominant position,
coercion,
appreciable number of buyers,
market leverage,
quantitative substantiality,
uniqueness, and
business justification.

Among these a favorite ambiguity calling for the application of the per se rule is *uniqueness*.

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1. Ungar v. Dunkin' Donuts, 531 F.2d 1211, 1222 (3d Cir.), *cert. denied,* 429 U.S. 823 (1976).

2. Day, *Exclusive Dealing, Tying and Reciprocity—A Reappraisal,* 29 OHIO ST. L.J. 539 (1968).

A tying arrangement is a transaction in which the title or the use of one item, the tying product, passes to the customer on condition that the customer take a second item, the tied product, from the seller or lessor. The condition that ties them together may be imposed explicitly or may result implicitly from an economic factor with the same effect. These arrangements are limited only by the ingenuity of the one imposing the tie.

The law of tie-ins had its impetus in the 1914 enactment of section 3 of the Clayton Act. Section 3 sought to prohibit agreements that required a purchaser or lessee not to use or deal in the goods of a competitor of the seller or lessor, provided that the effect of the agreement was to substantially lessen competition.

The Clayton Act might never have been enacted had not the Supreme Court in 1911 made a seemingly innocuous statement: "[A]s the [Sherman Act] had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason."[3] Thus was born the rule of reason with which we have grown to live agreeably. During 1911 and the succeeding three years, opposition to the rule of reason concept was widespread and intense. Criticism of it, by both conservatives and liberals, became part of the national politics of the era. Some maintained that the rule of reason doctrine narrowed the Sherman Act while others argued that it made the Sherman Act unreasonably broad. With differing degrees of emphasis, each of the party platforms in the presidential campaign of 1912, including the "Bull Moose" platform, called for antitrust legislation to specify what actions would violate the antitrust laws. Incumbent President Taft, the losing candidate in 1912, was almost alone in his defense of the rule of reason. He argued that only the "hysterical condition of the public mind" prevented recognition of "the futility and manifest absurdity" of the "demagogic" attack on the rule of reason.[4]

Ultimately, Congress did make the effort to legislate, in the

3. United States v. American Tobacco Co., 221 U.S. 106, 179 (1911). A similar statement was made in Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911).

4. W. Taft, The Antitrust Act and the Supreme Court 94 (1914); *see also,* M. Handler, Antitrust in Perspective 29-48 (1957). Taft was an antitrust activist; during his four-year presidency, the government filed twice the number of antitrust suits filed during Roosevelt's last four years. *William Howard Taft: An Unparalleled Public Servant,* Sup. Ct. Hist. Soc'y Q., Fall 1981, at 10.

Clayton Act, a particularized list of violations of the antitrust laws. However, as Taft had foreseen, the effort was hardly successful. The rule of reason was not supplanted; rather the ambiguous "substantial lessening of competition" was supplied as an alternate standard for determining antitrust violation. This indeterminate standard could not be automatically applied but necessarily required the process of case by case application. Additionally, it is now clear that the Clayton Act was not necessary to deal with tying arrangements: section 1 of the pre-existing Sherman Act is an equally effective and, in fact, more comprehensive source of tie-in law.[5] While under the Clayton Act the tied and tying products must be tangible products, under the Sherman Act the items may also be services and other intangibles.[6] Thus, in cases where section 3 of the Clayton Act is not available, section 1 of the Sherman Act will readily apply similar standards.

Simply stated, under the per se rule all tying agreements involving a patented device or other "unique" product are held to be per se illegal; it is presumed that the purpose and effect of the agreement is economic harm to competition in the market of the tied product. No offer to rebut the presumption was permitted. This rule continues to be applied even though the economics or market effects of a tying agreement may be various. Resorting to a tie-in is not the only way to obtain an advantage over one's competitors, and it may be the least effective or economical way.[7] A seller may gain such an advantage by pricing, advertising, packaging, labeling, quality control, efficient production techniques, or by any number of sales devices which create buyer loyalty. Completely free access to markets by competitors and complete freedom of choice by buyers may be the exception rather than the rule. Every time a manufacturer is able to convince a housewife to buy its giant economy size package, that housewife is for a period not available as a customer, and the manufacturer's competitors are inhibited from selling to her.

Once it appears that the tying product is patented or is *dominant* or *unique*, or has *economic power*, the detrimental effect on competition is assumed without examination of the *tying arrangement's* actual effect on competition. It has even been

5. Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1213-14 (9th Cir. 1977).

6. 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 733, at 257 (1978).

7. *See* Markovits, *Tie-Ins, Reciprocity, and the Leverage Theory*, 80 YALE L.J. 195 (1970).

suggested that an effective trade label may be sufficient to evidence competitive advantage. The use of the per se rule has been occasioned by the almost adamant refusal of the Supreme Court to utilize the rule of reason, which would involve an inquiry into the actual economic consequences of an agreement. In rejecting the rule of reason in tying cases,[8] the Court seems unaccountably compelled to eschew the time-tested principle that a commitment to antitrust is a commitment to the protection of competition rather than the protection of the competitors.

The development of the Court's per se rule can best be updated by a review of the five most-cited Supreme Court tying cases, four brought by the government and the other unsuccessfully pursued by a private litigant. While the court did not always hold tying agreements invalid, it has persisted in applying the per se test, with no inquiry into the actual effect of a tying arrangement. And in each of the five cases it is clear that such a rule of reason inquiry may have disclosed that the actual effect of the tying agreement did not constitute an illegal restraint of trade.

The 1947 case, *International Salt Co. v. United States*,[9] is a favorite of the per se advocates. By summary judgment the government obtained an injunction against International's requirement that the lessees of its salt machines buy from International the salt tablets to be used in the machines. Because the salt machines were patented, the district court, and on direct appeal the Supreme Court, found it extraordinarily easy to say that both section 1 of the Sherman Act and section 3 of the Clayton Act had been violated. This result followed simply from the conclusion that it was unreasonable per se to use a patent "to foreclose competitors from any substantial market."[10] Thus, without examination of the market or the competition therein and without any resort to reason, the Court concluded that the use of the patented device as the tying element compelled the conclusion that the transaction was an unreasonable restraint of trade under the Sherman Act and a lessening of competition under the Clayton Act.[11]

The Court's application of the per se rule to the agreement

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8. The Court has, however, applied the rule of reason in other vertical situations. *See* Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36, 59 (1977).

9. 332 U.S. 392 (1947).

10. *Id.* at 396.

11. *Id.*

because the tying element was patented disregarded the well-known fact that only a small percentage of the vast number of patents issued acquire any market significance. Even in *International Salt* the trial court assumed the availability of competitive machines which International's lessees could have obtained.[12]

The Supreme Court itself has since recognized that a product does not necessarily have market significance simply because it is patented. In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*,[13] the plaintiff claimed a per se antitrust violation, asserting that the defendant's patent had been obtained by fraud. The Supreme Court said that the existence of the patent was not, without more, sufficient to prove economic impact. To establish a Sherman Act violation in the case it would be necessary

> to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition. . . . There may be effective substitutes for the device which do not infringe the patent. This is a matter of proof, as is the amount of damages suffered by Walker.[14]

Nonetheless, the Supreme Court in *International Salt* rejected any suggestion that the competitive situation, in either the salt machine market or the salt market, should be examined. The Court concluded without support that "the tendency of the arrangement to accomplishment of monopoly seems obvious."[15] This basis for the decision has been rather handily disposed of by Professor Bork as follows:

> The tie-in tended to the accomplishment of *what* monopoly? In the machines? Requiring a purchaser to take salt does

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12. 6 F.R.D. 302, 307 (S.D.N.Y. 1946).

13. 382 U.S. 172 (1965).

14. *Id.* at 177-78. See also United States v. Studiengesellschaft Kohle, 670 F.2d 1122 (D.C. Cir. 1981), for a discussion of per se application in a patent license case. The court said:

> While it is possible that some restraints in a patent license, such as tying restrictions, may be illegal *per se* after *Continental TV* and *Broadcasting Music, Inc.*, it would be necessary at least to show that the restraints involved had no purpose except restraining trade, and had unequivocally anticompetitive effects in the vast majority of cases.

Id. at 1130.

15. 332 U.S. at 396.

> not build a monopoly in the machines; it would tend to have the opposite effect. In salt? It is inconceivable that anybody could hope to get a monopoly, or anything remotely resembling a monopoly, in a product like salt by foreclosing the utterly insignificant fraction of the market represented by the salt passing through these leased machines.[16]

If harsher antitrust restrictions are imposed on a patented product than on unpatented products, the effect is to take from the patentee part of the benefits and incentives which are given him by the patent laws. As has been stated by our current Deputy Assistant Attorney General of the Antitrust Division: "While it is conceivable that patent tie-ins might be anticompetitive under peculiar conditions, a general rule prohibiting them is almost certainly counterproductive."[17]

The Supreme Court's next case requiring consideration is the 1949 case, *Standard Oil Co. of California v. United States*,[18] better known as the *Standard Stations* case. In that case the government obtained an injunction in the trial court prohibiting in contracts with gasoline service station operators the inclusion of the requirement that Standard should be the exclusive supplier. While it was a *requirements* case rather than a *tying* case, it has had a significant effect in subsequent tying cases because of Justice Frankfurter's oft-quoted, gratuitous, and unsupported conclusion that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition."[19]

Moreover, while Justice Frankfurter did not explicitly call this requirements contract a per se violation of the antitrust laws, he rejected the necessity of demonstrating economic consequences where the volume of business affected is not "insignificant or insubstantial" and where the perceived effect is to "foreclose competitors from a substantial market."[20] For that purpose he joined in the semantic shell game by coining the phrase, "quantitative substantiality."[21] He justified the rejection of evidence of economic consequences—a rule of reason inquiry—by his statement that requiring such evidence would impose "a

16. R. Bork, The Antitrust Paradox 367 (1978) (emphasis in original).

17. Address by Lipsky, before the ABA Antitrust Section (Nov. 5, 1981). *See also*, Address by Anderwelt, Chief of the Intellectual Property Section, Antitrust Division, before the Houston Patent Law Association (Dec. 3, 1981).

18. 337 U.S. 293 (1949).

19. *Id.* at 305-06.

20. *Id.* at 304 (quoting *International Salt*, 332 U.S. at 396).

21. *Id.* at 298.

standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts."[22] Thus the case stands as an affirmation of the per se principal.[23]

The next case deserving comment is *Times-Picayune Publishing Co. v. United States.*[24] The government sued under the Sherman Act to enjoin defendant's practice of refusing to sell advertising in one of its papers unless the buyer placed his ad in both of defendant's newspapers. In finding no antitrust violation, the Court first applied the *International Salt* test and determined that advertising space in one newspaper was "indistinguishable" from advertising space in the other and that neither had the market "leverage" necessary for an unlawful tying arrangement.[25] Because the tying product was not "dominant," the per se rule did not apply. However, after making that determination, Justice Clark's opinion becomes confusing. He stated that, in fact, this was not a true tying case, that "neither the rationale nor the doctrines evolved by the 'tying' cases can dispose of the Publishing Company's arrangements challenged here and that "International Salt is out of the way."[26] Thus having found the per se rule of *International Salt* irrelevant, Justice Clark proceeded to examine the publishing company's arrangements "under the Sherman Act's general prohibition on unreasonable restraints of trade."[27] Justice Clark reviewed the relevant statistical data in the record and determined, under the rule of reason analysis, that "[t]he record in this case . . . does not disclose evidence from which demonstrably deleterious effects on competition may be inferred."[28]

Thus *Times-Picayune* left the per se rule of *International*

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22. *Id.* at 310.

23. No doubt the case arose because some marketing man in the oil company conceived that the restrictive provision in his contracts would make his job easier. Both his assumption that the restriction would be helpful and the assumption by the Court that competition was thereby restrained have proven erroneous. While the decision effectively eliminated the use of requirements contracts in gasoline marketing, in the succeeding thirty years service station dealers have not as a matter of practice handled more than one brand of gasoline. As an Englishman writing about our antitrust laws and commenting on the *Standard Stations* case has put it: "Certainly it is rare in practice when driving round the United States to come across the petrol equivalent of a 'free house.'" A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 205 n.1 (1960).

24. 345 U.S. 594 (1953).

25. *Id.* at 614.

26. *Id.*

27. *Id.*

28. *Id.* at 621.

Salt undisturbed while at the same time making a confusing application of the rule of reason apart from the rationale and the doctrines of the tying cases. The Court ultimately held that the Times-Picayune advertising agreement was not a tying arrangement. The case has not been helpful to those who would urge rule of reason treatment in tying cases, notwithstanding Justice Clark's statement that "[u]nder the broad general policy directed by § 1 against unreasonable trade restraints, guilt cannot rest on speculation; the Government here has proved neither actual unlawful effects nor facts which radiate a potential for future harm."[29] Why the rule of reason should be applicable to a case under the "Sherman Act's general prohibition" but not under the rationale of the tying cases remains a mystery.

In 1958, *Northern Pacific Railway v. United States*[30] dealt another blow to the proponents of the rule of reason in tying cases. Virtually every defense counsel in a tying case is faced with Justice Black's pronouncement that the per se "vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, *regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not.*"[31]

In 1864 and 1870 the government granted 40 million acres of land to Northern Pacific Railway Company to induce the company to construct a railroad across "great stretches of homeless prairies, trackless forests and unexplored mountains" and to "promote commerce" for the benefit of "the government and the public."[32] With this inducement, the railroad was constructed from Lake Superior to the Pacific coast of Oregon and Washington at enormous cost and with substantial capital risk. The granted lands consisted of checkerboard sections within twenty to thirty miles on each side of the tracks. Obviously, the sale and development of the lands was intended to furnish income for the construction and operation of the railroad which in turn was intended to create and promote interstate commerce.

Northern Pacific's land grants and leases included a preferential routing clause which provided that the grantee or lessee

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29. *Id.* at 622.

30. 356 U.S. 1 (1958). For a scholar's review of the case see Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

31. 356 U.S. at 11 (emphasis added).

32. United States v. Northern Pac. Ry., 256 U.S. 51, 63 (1921). *See also* United States v. Northern Pac. Ry., 311 U.S. 317 (1940).

would ship the commodities produced or manufactured on the land over Northern Pacific if Northern Pacific's rates (and in some instances its services) were equal to those of competing carriers. In 1949 the government brought suit against Northern Pacific, alleging that the preferential routing clause was a tying agreement in restraint of trade. The trial court granted summary judgment, invalidating the existing preferential routing clauses, and enjoining the railroad from using such clauses in any future agreements.[33]

On appeal, the Supreme Court held that conditioning sales and leases of land on the preferential routing agreement was a per se violation of the Sherman Act.[34] However, in refusing to look at whether there actually existed an unreasonable restraint of trade, the Court ignored the economic history of the land grants. At the time of the original grants, the land was practically worthless without the railroad. Only the existence of an operating railroad made the lands unique and salable. Since use of the railroad by the grantee was necessary to the continued maintenance of the railroad, each grantee had an essential interest in the use of the railroad by his neighbors. But Justice Black recognized none of this and as a result the Northern Pacific Railroad will go down in history as a pernicious, inexcusable per se violator of the antitrust laws.

While Justice Black neither identified nor described the competition that the offending agreement foreclosed, he did recognize that he was dealing with a "regulated transportation industry where there is frequently no real rate competition at all."[35] Given this market condition and the historical necessity of a successful railroad operation in a largely uninhabited region, the Court might well have determined that the railroad's action was in promotion of commerce rather than in restraint of it. At least, as Professor Bork has suggested,[36] the Department of Justice "should have placed a telephone call to the Interstate Commerce Commission instead of proceeding with the Northern Pacific case."

The fifth Supreme Court case actually consists of two decisions: *Fortner Enterprises, Inc. v. United States Steel Corp.*

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33. 356 U.S. at 4.
34. *Id.* at 7.
35. *Id.* at 12.
36. R. Bork, *supra* note 16, at 381.

(Fortner I)[37] and *United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II)*.[38] The case arose in early 1960 in Louisville, Kentucky. Plaintiff Fortner was then a dormant corporation with a $16,000 deficit and a fifty-five acre piece of land suitable for residential development. Across the Ohio River, U.S. Steel manufactured prefabricated houses. The two got together. Under their agreement, U.S. Steel was to furnish 100% financing and the prefabricated houses while Fortner was to furnish the land and to be the developer. Realistic businessmen might think of this as a kind of joint venture under which U.S. Steel would receive the profit from manufacturing the houses while the rest of the profit would go to Fortner.

The loan agreement had a number of restrictions no doubt common to such agreements. The restriction material to the case stipulated that while the debt remained unpaid, no dwellings except those purchased from defendant could be used on the fifty-five acres. The restriction did not affect any other land the plaintiff might acquire, and the plaintiff could have been relieved of the restriction at any time, even on the fifty-five acres, by liquidation of the debt. Notwithstanding the generous 100% financing furnished by U.S. Steel, the venture ran into difficulties. Fortner's solution was to file a treble damage antitrust action alleging that the agreement conditioning the loans on the purchase of U.S. Steel's homes was an illegal tying agreement.[39] In 1966 the district court, on summary judgment, reviewed the facts and dismissed the antitrust complaint. Its sensible opinion paid homage to *Northern Pacific* and other Supreme Court pronouncements, but concluded that "[s]imply stated, a plan or proposal for the generous use of the tying product (money) is not equivalent to economic power with respect to the tying product."[40]

In 1968 this determination was affirmed by the United States Court of Appeals for the Sixth Circuit.[41] In 1969 the Supreme Court, five to four, reversed.[42] Justice Black took the dis-

37. 394 U.S. 495 (1969).

38. 429 U.S. 610 (1977).

39. U.S. Steel responded with a counterclaim to foreclose the mortgage securing the debt. The counterclaim was separated from the antitrust action and was resolved by a 1964 judgment which became final without appeal. Fortner Enterprises, Inc. v. United States Steel Corp., 293 F. Supp. 762, 769 (W.D. Ky. 1966).

40. *Id.* at 768, 770.

41. 404 F.2d 936 (6th Cir. 1968).

42. 394 U.S. 495 (1969).

trict court to task for its failure to apply the per se standard of *Northern Pacific* and remanded the case for trial on the issue of whether U.S. Steel had "unique economic ability to provide 100% financing at cheap rates."[43] There followed two district court trials and two trips to the court of appeals, which resulted in a decision in favor of Fortner.[44] Certiorari was again granted by the Supreme Court and the controversy was finally resolved in favor of U.S. Steel by unanimous reversal, the Court concluding:

> Quite clearly, if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit—or to incur greater risks—than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market. . . . The unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses.[45]

Thus, more than ten years after the trial court's original decision—and without Justice Black on the Court to protect his per se doctrine in its full vigor—the Court reached a conclusion adopting the trial court's original reasoning.

While it has been called "far more perceptive about the economic consequences of tie-in sales than any previous opinion of the Court,"[46] *Fortner II* retained the uncertain and unsatisfactory concept of uniqueness in the tying product as the standard for determination of invalidity. *Fortner II* left for another time the question of whether and to what extent the per se doctrine will continue to prevent inquiry into competitive impact.

Perhaps, as suggested in the concurring opinion of the Chief Justice, the *Fortner II* Court felt inhibited under the law of the case doctrine by the unrelenting views expressed by Justice Black in *Fortner I*. But is is discouraging that the Court did not seize the opportunity to take a better step toward the more sensible rule of reason approach available in other vertical situations.

Two recent Northern District of California cases confirm

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43. *Id.* at 505.

44. For a contemporary review, see Note, *The Logic of Foreclosure: Tie-In Doctrine after* Fortner v. U.S. Steel, 79 YALE L.J. 86 (1969).

45. *Fortner II,* 429 U.S. at 621-22. *See* Jones, *The Two Faces of* Fortner, *Comment on a Recent Antitrust Opinion,* 78 COLUM. L. REV. 39 (1978).

46. Baxter, *Placing the Burger Court in Historical Perspective,* 47 ANTITRUST L.J. 803, 816 (1978).

that the litany of semantics continues.[47] In each it was determined that summary judgment could not substitute for trial on the issue of economic power in the tying product sufficient to restrain competition in the tied product.

The more recent of these two cases was *United States v. Mercedes Benz of North America.*[48] It was brought to enjoin the tying of repair parts to the dealer's right to sell Mercedes cars. The government prevailed on summary judgment on all but the issue of the economic power of the tying product. That issue was set for trial, but never tried.

Consistent with most of the case law, the opinion on summary judgment in *Mercedes Benz* paid remarkably little attention to consumers' needs or desires and shows more enthusiasm for simplified assumptions than for realistic market factors. A Mercedes Benz owner might be unhappy to learn that the result would undermine the assumption that one could go to a Mercedes dealer's service department assured of replacement parts identical and compatible with the car as manufactured.

Following the summary judgment proceedings, *Mercedes Benz* was dismissed on March 15, 1982 by stipulation of the parties.[49] This was consistent with recent Department of Justice policy. That policy, according to Assistant Attorney General Baxter, is against the courts' placing "primary emphasis on simplified assumptions about the competitive effects of transactions they are called upon to review," assumptions that have been applied with "unwarranted enthusiam" and without consideration of factors relevant to the realistic assessment of the likely competitive effects of any proposed transaction.[50]

The other Northern District of California case was the multi-district litigation case, *In re Data General Corp. Antitrust Litigation.*[51] In this case, a number of Data General's competi-

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47. United States v. Mercedes-Benz of N. Am., 517 F. Supp. 1369 (N.D. Cal. 1981); *In re* Data Gen. Corp. Antitrust Litigation, 490 F. Supp. 1089 (N.D. Cal. 1980).

48. 517 F. Supp. 1369 (N.D. Cal. 1981).

49. United States v. Mercedes-Benz of N. Am., 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1079, at 390 (N.D. Cal., Aug. 9, 1982).

50. *Hearings on Antitrust Aspects of Small Business Before the Subcomm. on Productivity & Competition of the Senate Comm. on Small Business,* 97th Cong., 1st Sess. 2 (1981) (statement of William F. Baxter, Assistant Attorney General). *See also Hearings Before the Subcomm. on Antitrust, Monopoly and Business Rights of the House Comm. on the Judiciary,* 97th Cong., 2d Sess. 11, 12 (1982) (statement of William F. Baxter, Assistant Attorney General).

51. 490 F. Supp. 1089 (N.D. Cal. 1980), *appeals docketed,* Nos. 82-4162 (9th Cir. Mar. 19, 1982); 81-4671 (9th Cir. Dec. 23, 1981); 81-4667 (9th Cir., Dec. 16, 1981); 81-

tors sued the company for damages, claiming that computer processing units (the tied product) were illegally tied to computer software (the tying product). This case demonstrates the falsity in refusing rule-of-reason treatment and insisting on per se adherence. Judge Orrick, formerly in charge of the Antitrust Division, felt bound to the per se concept by the prior Supreme Court pronouncements, including *Fortner I* and *Fortner II,* and by plaintiffs' persistent limitation of their claims to that doctrine.

If complexity was avoided or time saved by devotion to the per se rule in the *Data General* case, that fact is not evident. The cross-motions for summary judgment involved 600,000 documents, 150 depositions, and hundreds of interrogatories and requests for admissions.[52] On summary judgment all issues, except the existence of economic power in the tying product, were decided in plaintiffs' favor. The subsequent trial of the remaining issue took forty-five trial days. By the end, I imagine that even the participating counsel may have agreed with Judge Orrick, who called the case "exceedingly difficult and complex."[53]

After the jury brought in a verdict for the plaintiffs, Judge Orrick granted a motion for judgment notwithstanding the verdict and entered judgment for the defendant. The perceived critical failure of proof was the insufficient showing of economic power within the general market for the tying product. This resulted from analysis of a number of factors, including the wide range of competitive hardware offerings, intense price competition, ease of entry, rapid growth, and a substantial number of competitors. The examination of these factors with evidence of markets and submarkets seems remarkably close to a rule of reason analysis. Perhaps this occurred because Judge Orrick found that prior cases shed little light on the question of what degree of market proof is required and he was concerned with the necessity of avoiding that which might "effectively eradicate the distinction between rule of reason cases and *per se* cases."[54]

I urge that at some time and in some way the court should forthrightly recognize that any review of a tying arrangement simply requires a determination of whether the grouping or com-

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4628 (9th Cir. Dec. 2, 1981).

52. *In re* Data Gen. Corp. Antitrust Litigation, 529 F. Supp. 801, 805 (N.D. Cal. 1981).

53. *Id.* at 804.

54. *Id.* at 809.

bining of two products as a marketing strategy is procompetitive or anticompetitive and that this requires the application of a realistic rule of reason. The rule of reason approach calls for an analysis of not merely whether the tying product has economic power, but whether the tying arrangement is beneficial or detrimental to competition and whether it enhances interbrand competition without facilitating horizontal detriment.

The basic fallacy in the way the law of tie-ins has developed is not difficult to find. It seems clear to me that the Supreme Court concluded at the outset that there must be something wrong when a seller elects to refuse the sale of one product unless the buyer is also willing to buy a tied product. That conclusion was reached without the necessity of examining why the practice was wrong by saying it was wrong per se. This seemed easy to say where the tying product was patented. But the mere issuance of the patent cannot by itself confer market power or acceptability in the market. Marketing practices involving patented articles should, like practices involving unpatented products, be examined to determine their genuine effect upon the competitive process.

Nonetheless, it became recognized that uniqueness may exist even without its being conferred by a patent. Since the courts have always considered land to be unique in affording equitable remedies, it was conceived that Northern Pacific's land required application of the per se rule. However, with a practice as pernicious as tie-ins, the Court felt the per se rule could not be narrowly limited to statutory advantages and to land. Accordingly, the law of tie-ins was summed up in the recent statement in *Fortner II*: "In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product."[55] And such advantage may exist when the disadvantaged competitor is "simply unable to produce the distinctive product profitably."[56]

The law of tie-ins has itself become unique. For the first time, an antitrust violation now depends upon proof of the relative profitability of the competitors in the market, and parity in production expense is the desired goal. Vince Lombardi, that exponent of vigorous competition, said it well when he said, "Parity insures the ultimate triumph of inefficiency." We should

55. 429 U.S. at 620.

56. *Id.* at 621 (quoting *Fortner I,* 394 U.S. at 505 n.2).

learn from the Japanese whose marketing success results from commending rather than condemning uniqueness.

The concept of *uniqueness* and its equally ambiguous counterparts, *economic power* and *dominant position,* as measures of the harm to the competitive process, should be eliminated. In today's courts, *uniqueness* can be proven and a per se violation shown by the "acceptance of the package by a significant number of customers" absent what are called "other explanations for the willingness of buyers to purchase the package."[57] Acceptance in the marketplace of a marketing practice is usually indicative of the validity of that practice and its consistency with free competition principles.

The basic purpose of the antitrust laws has been and should be the promotion of free competition. If a seller sees possibilities in initiating the creation of a new market by combining for sale two products, he should not be prevented from doing so merely because one product is unique. At least we should discourage the unwarranted enthusiasm with which the courts have embraced simplified labels as the basis for decision in the case of entirely unilateral market decisions. As Assistant Attorney General Baxter has said:

> Current economic analysis demonstrates that an individual firm's choice as to distributional arrangements, such as the granting of franchises or the grouping of goods and services for sale, may simply reflect the firm's judgment about the most efficient way to structure a marketing effort. Manufacturers, dealers, and consumers may benefit from the resulting strengthening of interbrand competition.[58]

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57. 429 U.S. at 618 n.10.

58. *Hearings on Antitrust Aspects of Small Business Before the Subcomm. on Productivity & Competition of the Senate Comm. on Small Business,* 97th Cong., 1st Sess. 6 (1981) (statement of William F. Baxter, Assistant Attorney General). *See also Hearings Before the Subcomm. on Antitrust, Monopoly and Business Rights of the House Comm. on the Judiciary,* 97th Cong., 2d Sess. 11, 12 (1982) (statement of William F. Baxter, Assistant Attorney General).