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Antitrust: Per Se Doctrine--Tying Arrangements and the Market Power Requirement

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ANTITRUST: PER SE DOCTRINE — TYING ARRANGEMENTS AND THE MARKET POWER REQUIREMENT

Shrouded in a veil of semantical confusion, the *per se* doctrine requirement continues to plague unwary plaintiffs in tying arrangement[1] suits. The standard, which many thought[2] had been effectively consigned to oblivion by Justice Black's decision in *Fortner Enterprises, Inc. v. United States Steel Corp.*,[3] appears to still contain some vestige of life as evidenced by the recent case of *Smith* v. *Scrivner-Boogaart*.[4]

In *Scrivner-Boogaart* the appellant, a wholesaler, alleged that Scrivner-Boogaart, a wholesale-retail grocer and manufacturer, violated Section 1 of the Sherman Act and Sections 3 and 16 of the Clayton Act by means of a sub-lease agreement[5] which required appellee's customers to purchase 65 per cent of their total monthly net sales from appellee and to participate in various services to be rendered by appellee. Thus, appellant contended that he was foreclosed from a substantial segment of the tied product market. The Court of Appeals for the Tenth Circuit sustained the jury's findings

[1] "[A] tying arrangement may be defined as an agreement by a party to sell one product [tying 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." Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

[2] Note, *Antitrust — Tying Arrangements — A Re-examination of the Per Se Rule and Identification of Tying Arrangements*, 48 N.C.L. REV. 309 (1970). *See* Comment, *Tying Arrangements: Requisite Economic Power, Promotional Ties and the Single Product Defense*, 11 B.C. IND. & COM. L. REV. 306 (1970).

[3] 394 U.S. 495 (1969).

[4] 447 F.2d 1014 (10th Cir. 1971), *cert. denied*, 404 U.S. 1059 (1972).

[5] 447 F.2d at 1016 n.1.

that, due to a lack of sufficient evidence, both of merit and of quantity, the appellant failed to meet his burden of proof. This note is concerned solely with what the Tenth Circuit labelled as appellant's first contention — namely, that the tying arrangement of the appellee was a *per se* violation of Section 1 of the Sherman Act.[6]

Initially the court remarks that appellant is basing his first contention on "the rule of *Fortner Enterprises, Inc.* v. *United States Steel Corporation* . . . and cases there cited".[7] The court then states that the lower court's instruction to the jury "was quite sufficient advising in the very language of *Fortner*", and the jury "found that the appellant did not meet the burden of his case under *Fortner*".[8] It is highly apparent at this juncture that this portion of the case at issue was argued and decided on the construction given to the Supreme Court's holding in *Fortner*. Therefore, an analysis of *Fortner* should aid in a determination of what constitutes a *per se* violative tying agreement under the Sherman Act.

In *Fortner* the plaintiff alleged that there was a continuing agreement between the defendants to force the plaintiff and other like-situated persons, as a condition to availing themselves of the services of the United States Steel Homes Credit Corporation, to purchase at artifically high prices only homes manufactured by United States Steel. The Supreme Court held that the Sixth Circuit had mistakenly ruled on whether a question of fact as to a possible violation of the Sherman Act had been raised. The case was remanded on the issue of a determination of market power. Justice Black's majority opinion encompasses the standards expound-

[6] Sherman Antitrust Act, 15 U.S.C. § 1 (1970). This section states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

[7] 447 F.2d at 1016.

[8] *Id.* at 1017.

ed in each of the three major cases involving *per se* illegal tying agreements.

The *International Salt Co.* v. *United States*[9] case, in which the *per se* doctrine was first propounded, involved the leasing of certain patented machines conditioned upon the stipulation that only the lessor's products could be used in the machines. In ruling upon the illegal restrictive leases, Justice Jackson, in his statement of the majority's view of the issue at hand, succinctly enunciated the doctrine that "it is unreasonable, *per se* to forclose competitors from any substantial market."[10] The Court concerned itself principally with the *de minimus* factor — the foreclosure of competition from a substantial portion of the tied product market; the *Fortner* opinion makes several references to *International Salt* for the purpose of examining that factor. However, of even greater import in the *International Salt* opinion is the marked absence of any mention of economic power in the tying product market. This has led to various observations[11] concerning the necessity or value of the market power requirement in tie-in cases. Nevertheless, in *Times-Picayune Publishing Co.* v. *United States*,[12] a major tying arrangement case involving the sale of advertising space in a newspaper, the Court definitively stated, and ruled on the basis of the economic power standard, asserting it to be "a monopolistic position in the market for the 'tying' product".[13]

The *Fortner* majority relied heavily upon the "economic power" standard discussed in *Northern Pac. Ry.* v. *United States*.[14] This case involved the lease or sale of certain par-

[9] 332 U.S. 392 (1947).
[10] *Id.* at 396.
[11] For a discussion of the implications of *International Salt*, *see* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).
[12] 345 U.S. 594 (1953).
[13] *Id.* at 608.
[14] 356 U.S. 1 (1958).

cels of land conditioned on the requirement that the lessees or vendees ship the products of the land on defendant's trains. Regarding tying arrangements, the Court declared:

> They are unreasonable in and of themselves whenever a party has *sufficient economic power* with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected.[15]

In its analysis of the economic power standard, the Court did not enter into a quantitative examination of the tying product market and defendant's relative positive therein; rather, it decided that land, being unique and, in this instance, "strategically located", sufficiently satisfied the market power standard.

United States v. *Loew's Inc.*,[16] the third prominent case which the *Fortner* Court relied on, involved "block booking" — the licensing or sale of films conditioned upon the acceptance of one or more unwanted films. Justice Black, in the *Fortner* opinion, quoted with approval from the dictum of *Loew's* to the effect that:

> 'Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.'[17]

By a process of evolution the Court has, thus, liberalized the economic power standard, once requiring "market dominance", but later declaring that a mere inference from the "desirability" or "uniqueness" of the product is sufficient. It is readily apparent that the Court persisted in this liberalizing trend in *Fortner* as evidenced by the cases cited therein as precedent: one completely ignoring the market power

[15] *Id.* at 6 (emphasis added).
[16] 371 U.S. 38 (1962).
[17] 394 U.S. at 504.

standard,[18] the other two allowing simply "desirability" or "uniqueness" to satisfy the requirement,[19] and not even the merest of allusions to the stringent standards set forth in *Times-Picayune*.[20]

It was thought that the *Fortner* Court, continuing in this tenor, would naturally proceed to the next rational phase by the elimination of the market power criterion, declaring that the very achievement of a tying agreement is adequate proof of a seller's economic power. Although the Court did come very close to ruling that a true, rather than a qualified, *per se* doctrine applies to tying arrangements, it nevertheless refused to do so, and remanded the case for a determination of market power. This continued adherence to the standard has led to much criticism[21] of the opinion, but, even more importantly, has led to a great deal of perplexity.[22]

The lower courts, left adrift in the sea of confusion, are apparently bewildered by the decision as manifested by their varying interpretations of it. In one of the first opinions[23] to construe *Fortner*, the Fourth Circuit Court of Appeals stated:

> Under *Fortner* . . . the "sufficient economic power" test of *per se* illegality is satisfied when it appears that the seller has the power to "impose other burdensome terms such as a tie-in, with respect to

[18] International Salt Co. v. United States, 332 U.S. 392 (1947).

[19] Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); United States v. Loew's Inc., 371 U.S. 38 (1962).

[20] Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

[21] Note, *Credit as a Tying Product*, 69 COLUM. L. REV. 1433 (1969); Handler, *Antitrust*: 1969, 55 CORNELL L. REV. 161 (1969).

[22] *See* Fortas' dissent in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 520 (1969).

[23] Advance Business Syss. & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

> any appreciable number of buyers within the market".[24]

In fact, however, the successful imposition of a tie-in was, in the *Fortner* opinion, held to be no more than an important factor to be considered — a "proper focus of concern"[25] — in the determination of market power. The Supreme Court, contrary to the Fourth Circuit's interpretation,[26] did not go to the extent of stating that an inference of economic power could be based solely upon the existence of a tying agreement.

The Tenth Circuit, ruling in the *Scrivner-Boogaart* case, evidently recognized the above discrepancy and, unlike the Fourth Circuit, refused to approve a less qualified *per se* doctrine.

The Sixth Circuit, deciding *Fortner* on remand,[27] also decided that the Fourth Circuit had misinterpreted the Supreme Court's *Fortner* opinion and stated that:

> If the majority had intended to indicate that acceptance of a tie-in by an appreciable number of customers is sufficient proof of the requisite economic power, it would have been sufficient for Mr. Justice Black to have said so and thus to avoid the exhaustive treatment which he gave to the question of economic power in the tying product set forth in other portions of his opinion.[28]

In addition to its interpretation of the *Fortner* decision, undoubtedly another reason as to why the court in *Scrivner-Boogaart* refused to uphold appellant's first contention is re-

[24] 415 F.2d at 68.
[25] 394 U.S. at 504.
[26] In support of the Fourth Circuit's interpretation, *see* Comment, *Per Se Illegality of Tying Arrangements Involving Credit Financing,* 50 BOSTON U.L. REV. 125 (1970).
[27] Fortner Enterprises, Inc. v. United States Steel Corp., 452 F.2d 1095 (6th Cir. 1971).
[28] *Id.* at 1103.

vealed by the fifth section[29] of the opinion. Here the court mentions that there was evidence of a price-fixing agreement which was neither alleged nor proved by the appellant. Since price-fixing agreements are subject to a true *per se* rule, the court felt no obligation to tread on the quicksand of the *per se* tying arrangement doctrine when the case could easily have been based on firmer ground.

In conclusion, the *Scrivner-Boogaart* case is not, in itself, a noteworthy opinion, which is the reason why it has not been remarked on with any appreciable amount of deference in this article. Although it would appear inevitable that tying arrangements will be subject to a true *per se* doctrine, the Tenth Circuit, as evidenced by this decision, has no intention of being in the vanguard of the movement. Rather, in this evolutionary process of the *per se* doctrine, the value of the case is as an interpretive device. Without such cases as *Scrivner-Boogaart,* one's capacity to comprehend the practical impact, as well as the theoretical import, of the *Fortner* decision would be most lamentably diminished.

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[29] 447 F.2d at 1018.