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John Dames

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ANTITRUST—TYING ARRANGEMENTS—Conditioning Grant of Credit upon Purchase of Seller's Product Held to be Tying Arrangement and within Per Se Ban of Sec. 1 of the Sherman Act.

Petitioner, Fortner Enterprises, Inc., received a loan of $2,000,000 from a subsidiary of United States Steel Corporation, the United States Steel Homes Credit Corporation, for the purchase and development of certain parcels of land in Louisville, Kentucky. The loan was granted on the condition that Fortner erect upon each of the parcels a prefabricated house manufactured by United States Steel. Of the $2,000,000, $1,700,000 was for the purchase of the prefabricated homes. Petitioner alleged that the price of each home was $400 above the price of comparable models manufactured by competitors of United States Steel. Petitioner explained further that he only accepted the tying condition on the loan because the offer of 100% financing was uniquely advantageous to him as similar terms were not available from other financial institutions in the Louisville area. The plaintiff filed suit alleging that the prefabricated materials were defective and unusable and sought treble damages and an injunction under Sections 1 and 2 of the Sherman Act.[1]

The District Court entered summary judgment for the defendant[2] and held that although this was a tying arrangement of the traditional kind, the petitioner had failed to establish the two prerequisites of illegality under the tying cases. First, the Court stated that United States Steel's contract with the petitioner foreclosed only an insignificant amount of commerce in prefabricated housing. Secondly, the Court held that United States Steel didn't have the requisite economic power over credit, the tying product, because although petitioner established that the loans were uniquely attractive to him, he did not prove that the Credit Corporation enjoyed the same unique attractiveness with respect to buyers generally. The Court of Appeals affirmed.[3]

The Supreme Court reversed[4] stating that the District Court had misinterpreted the two prerequisites of illegality under the tying cases.

1. 15 U.S.C. § 1, 2 (1965).
2. Fortner Enterprises Incorporated v. United States Steel Corporation, 293 F. Supp. 762 (W.D. Ky. 1966).
3. Fortner Enterprises Incorporated v. United States Steel Corporation, 404 F.2d 936 (6th Cir. 1968).
4. Fortner Enterprises Incorporated v. United States Steel Corporation, 394 U.S. 495 (1969).

The Court held that these standards are not necessary for petitioner to prevail on the merits, but are applicable only if he wishes to invoke the doctrine of *per se* illegality. Moreover, the Court went further and held that for the purposes of the motion for summary judgment the two prerequisites were indeed fulfilled. The Court stated that in view of the fact that no other financial institution would risk offering 100% financing and that petitioner would be willing to pay $400 more per home than if he bought homes from United State's Steel's competitors, it could be construed that respondent's uniquely attractive terms reflected economic power. Also, viewing the sales policy of the respondent, rather than merely the specific contract with petitioner, the tying arrangement foreclosed a substantial amount of commerce in the tied product—prefabricated housing.

The decision in *Fortner* clarifies the ambiguity surrounding the Su-. preme Court's application of the *per se* rule of illegality concerning tying arrangements. The two criteria previously required for *per se* illegality in tying cases: market power over the tying product, and foreclosure of a substantial volume of commerce in the tied product are defined in such a manner that the latter criterion is measured in dollar volume rather than in terms of a percentage of the relevant market, and the former criterion is no longer measured by "market dominance" when the tying product is a non-patented and non-copyrighted product. Indeed, the Court uses a "uniqueness" test, i.e. if the tying product is uniquely desirable or attractive to buyers, even though the tying product is a fungible item such as credit, the requisite market power is established. Although this decision seems to represent an extension of the "*per se* rule" from that enunciated by earlier Supreme Court decisions concerning tying arrangements, the Court has not held all tying arrangements, in and of themselves, to be *per se* violations of the Sherman Act. Moreover, the holding of the Court makes it clear that a tying arrangement which does not meet these criteria may still be held to violate the Sherman Act by application of the "Rule of Reason".

Fortner seems particularly significant not only because of its modification of the technical requirements of the *per se* doctrine in tying cases, but also because of the severe economic repercussions which may result from the opinion. The Court's decision raises serious questions as to the validity of conditioning a loan, in any form, upon purchase of a separate product of the lender, particularly where the lending agency is a separate corporate subsidiary of the corporation producing the other product.

THE NATURE OF TYING ARRANGEMENTS

A tying arrangement exists whenever one party agrees to sell a product (the tying product) only if the buyer also purchases a second distinct product (the tied product) or refrains from purchasing that product from any other seller.[5] An obvious consequence of such an arrangement is that the buyer receives two products after making one choice, whereas without a tying arrangement, the buyer would have two independent choices available to him. Theoretically, in the absence of a tying agreement, the decision to purchase each product is made independently and the buyer separately weighs the merits of each product.

A tying arrangement, however, coerces the buyer and restricts his judgment, and to the extent that it is entered into, it forecloses competitors of the seller from the market for the tied product. It also serves as a means of extending the seller's power in the tying product into power in the market for the tied product.[6] In order to successfully compel a buyer to purchase a product that he doesn't desire, the seller must have substantial economic power in the market for the tying product; but if the buyer has no great antipathy to purchasing the tied product, less economic power in the market for the tying product is required.[7] Thus, to adversely affect competing suppliers of the tied product, and to extend a minimum amount of power into the market for the tied product, less than dominance or monopoly in the tying product is required. This illustrates the fact that any rule on the illegality of tying agreements which requires that the seller have a dominant position in the market for the tying product mainly protects prospective buyers from coercion; it does not fully protect competing sellers of the tied product from choices made by diffident sellers. The coercion of buyers is only one facet of the larger problem of market foreclosure in the tied product and the extension of power from one market to another.

The Supreme Court in *Times Picayune v. United States*, stated its reasons for viewing tie-ins with disfavor.[8] Since any superiority in

5. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). *See* Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 WIS. L. REV. 88, 95, where the author suggests that whenever a buyer must purchase one item in order to be able to purchase a second item (regardless of the number of sellers, there is a tying arrangement. This is in contrast to the traditional view which focuses upon a solitary seller.

6. Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW. U.L. REV. 626 (1965).

7. Turner, *The Validity of Tying Arrangements Under The Antitrust Laws*, 72 HARV. L. REV. 50, 60 (1958).

8. 345 U.S. 594, 605 (1952).

the tied product would cause it to be freely chosen over the other products, only the prospect of reducing competition would cause the seller to adopt such a contract, and only the seller's control over the supply of the tying product could coerce a buyer into abdicating his independent judgment.[9]

It is with that view as to the purposes of tying agreements that Justice Black, writing for the majority in *Northern Pacific Railroad Company v. United States*[10] stated:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use . . . among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, group boycotts, and tying arrangements.

THE DEVELOPMENT OF THE "PER SE" RULE AGAINST TYING AGREEMENTS

The traditional statement of the *per se* rule against tying arrangements was first enunciated by Justice Clark in *Times-Picayune v. United States*:[11]

> From the "tying" cases a perceptible pattern of illegality emerges: when the seller enjoys a monopolistic position in the market for the "tying" product, or if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in section 3 of the Clayton Act,[12] because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, per se, to foreclose competitors from any substantial market", a tying arrangement is banned by section

9. Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 29 (1957), disputes this traditional view. He states that the use of a tie-in does not necessarily mean that the seller is attempting to extend monopoly power from one market to another—*i.e.* leverage. Mr. Bowman finds other goals in the formation of a tie-in and he discusses five situations and only one involves leverage. Also, both Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 951 (1952) and Pearson, *supra* note 6, at 644 states that without substantial market power over the tying product there are no anticompetitive effects.

10. 356 U.S. 1, 5 (1958).

11. 345 U.S. 594, 608 (1953).

12. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement, or

1 of the Sherman Act whenever both conditions are met.[13]

The decision of the Supreme Court in *International Salt Co. v. United States*[14] began the development of the present *per se* treatment of tying arrangements. International Salt owned patents on machines for the utilization of salt. The distribution of these machines was conducted through leases which required that the lessees purchase all the unpatented salt and salt tablets used in the machines from International Salt. Justice Jackson writing for the Court stated:

> Appellant contends, however, that summary judgment was unauthorized because it precluded trial of alleged issues of fact as to whether the restraint was unreasonable within the Sherman Act or substantially lessened competition or tended to create a monopoly in salt within the Clayton Act. We think the admitted facts left no genuine issue. Not only is price-fixing unreasonable, *per se*, but also it is unreasonable, per se, to foreclose competitors from any substantial market.[15]

The Court in *International Salt v. United States* did not deem it necessary to examine the economic consequences of the lease arrangement, nor did it inquire whether International Salt Co. occupied a dominant position as a seller of salt utilization machines. What the Court seemed to suggest was that a patent, with its characteristics of a legal monopoly, was the equivalent of market dominance. The Court found that its standard that "it is unreasonable, *per se*, to foreclose competitors from any substantial market", was met under the facts of the instant case by finding that the volume of business affected by the leases of the salt machines, $500,000 could not be called "insignificant" or "insubstantial".[16] Thus, when the Court is confronted by a tying arrangement where the tying product is patented, the rule is virtually a *per se* one. The only requirement that prevents an automatic con-

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understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14 (1965).

13. "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 . . ." 15 U.S.C. § 1 (1965).

14. 332 U.S. 392 (1947).

15. *Id.* at 396.

16. *Id. See* Austin, *supra* note 5, at 107. *But see* Turner, *supra* note 7, at 53, where the author interprets the decision of the Court differently. He argues that the Court presumed that there were other competing machines available, and, thus, the Court would mean that "dominance" is presumed upon a showing that the tying product had some unique aspect. The uniqueness of the tying product was supplied by its patent, and this distinctiveness causes some buyers to prefer it over the competitive machines.

clusion of the illegality of such an arrangement is the necessity that the volume of business foreclosed in the tied product is not insubstantial.

Times-Picayune v. United States[17] dealt with a non-patented tying product, general display and classified advertising. Times-Picayune Publishing Company owned both a morning and an evening newspaper. Buyers of advertising space could not purchase space in only one of the two papers, but were compelled to purchase space in both papers or none at all. The Court held that a tying arrangement did not exist because the products sold were identical and the market was the same.[18] However, the decision did not rest there; the Court went on to deal with the concept of market power. The Court defined the requisite market power as "dominance" in the market of the tying product, and held that "dominance" was to be found by examining comparative market data.[19] There were three newspapers in the New Orleans and the Times-Picayune controlled 40% of the newspaper advertising market. The Court reasoned that since an equal share of the market should be 33 1/3%, 40% could hardly be called "dominance".[20]

Northern Pacific Railroad Company v. United States[21] presented another tying arrangement case involving a non-patented product. Northern Pacific sold and leased several million acres of land, and in the contracts included a preferential routing clause that required the grantees and lessees to ship all the commodities produced on the land over Northern Pacific lines as long as its rates were equal to those of competing carriers. The Government moved for summary judgment and its motion was granted.

Justice Black, writing for the Court, interpreted the concept of "dominance" enunciated by the Court in *Times-Picayune*:

> While there is some language in the *Times-Picayune* opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of per se unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a "not insubstantial" amount of interstate commerce is affected).[22]

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17. 345 U.S. 594 (1953).
18. *Id.* at 614.
19. *Id.* at 611.
20. *Id.* at 613.
21. 356 U.S. 1 (1958).
22. *Id.* at 11.

Although in its interpretation of the concept of "dominance" the Court focused on the power to restrain competition in the tied product, it did not examine what effect, if any, the agreements had produced in the transportation market. Rather, it found that the extensive landholdings of the Railroad were particularly desirable to purchasers, basing this finding on their excellent location and attributes, and on the fact that there were a "host" of these tying arrangements. The Court further stated that the mere presence of such a large number of tying agreements, lacking any adequate contrary explanation, was sufficient to indicate the presence of the requisite power in the tying product.[23] Thus, unlike *Times-Picayune*, the Court did not determine the Railroad's market power by reference to comparative market data, but looked only to Northern Pacific's landholdings.

Northern Pacific should not be interpreted to indicate an abandonment of the concept of market power, Indeed, the opinion declares that:

> Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item, any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.[24]

What was abandoned by the holding in *Northern Pacific v. United States* was the concept of an independent measure of market power. Since, as was stated in *Standard Oil Company v. United States*,[25] only the control of the tying device could induce a buyer to enter into a tying agreement,[26] the Court in *Northern Pacific* reasoned that the existence of a number of tying agreements, in the absence of any other adequate explanation, can only be the result of economic power in the market for the tying product. Viewed from this angle, the requisite power becomes only that which is necessary to persuade a substantial number of buyers to suffer the burdensome terms of a tie-in and to choose the seller's product over other non-tied products. This power could be equivalent to market dominance or it could be equivalent to a desirably located parcel of land.

The question of what constitutes the requisite market power was faced again in *United States v. Lowe's Incorporated.*[27] Loew's Inc. distributed its films to television stations through block booking. A buyer

23. *Id.* at 8. *See* Day, *Exclusive Dealing, Tying and Reciprocity*, 29 OHIO ST. L.J. 539, 544 (1968).
24. 356 U.S. at 6.
25. 337 U.S. 293 (1949).
26. *Id.* at 306.
27. 371 U.S. 38 (1962).

was forced to purchase films of inferior quality if he also desired to purchase films of classic stature. The Supreme Court held the tying arrangements were illegal *per se* under Section 1 of the Sherman Act. As to the standard of market power the Court stated:

> The standard of illegality is that the seller must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in it's attributes.[28]

Although the Court found that there were competing substitutes for the films, it held that sufficient market power had been shown because the films were unique by virtue of their copyrights. Justice Goldberg, writing for the Court, explained that if it is possible to find power from either the unique attributes of a product of from its consumer appeal, it would not then be necessary to examine the relevant market nor to determine the seller's market share.[29]

The Court's decision in *Loew's*, particularly when considered in conjunction with *Northern Pacific*, brodened the scope of the *per se* rule by eliminating the necessity of establishing, on the basis of market data, any preeminence in the tying market. It did not, however, delineate clearly how the lower courts were to determine when a tying product had achieved a sufficiently high level of uniqueness or distinction to merit bringing the case within the purview of the *per se* doctrine of illegality.

Thus, although the Supreme Court's original concept of "market power" has been broadened by its development of the *per se* doctrine in the tying cases, it seems clear that there are still two prerequisites for the application of the *per se* doctrine. First, economic power in the tying product, whether established by "distinctiveness", market dominance, or some other relevant test, must be shown; secondly, a not insubstantial amount of interstate commerce in the tied market must be foreclosed by the agreement.

THE DECISION IN FORTNER ENTERPRISES, INC. V. UNITED STATES STEEL CORP.

The situation presented in *Fortner Enterprises, Inc. v. United States*

28. *Id.* at 45.
29. Id. at 45 n.4. *See* Day, *supra* note 23, at 546.

Steel Corp.[30] differs from that presented in *International Salt* and *Northern Pacific.* In the latter two cases the lower court granted summary judgment for the plaintiffs. The District Court in *Fortner,* however, granted a motion for summary judgment for the defendant. It held that no question of fact was raised as to a possible violation of the antitrust laws, indicating that although a traditional tying arrangement was involved, the two prerequisites for the *per se* illegality of tying arrangements under the Sherman Act had not been established.

The Supreme Court reversed, stating that these prerequisites need not necessarily be satisfied in order to prevail on the merits; the petitioner can still prevail at trial if he can prove that the general standards of the Sherman Act have been violated.[31] Petitioner's complaint was sufficiently broad to encompass such violations as it alleged that:

> [R]espondents conspired together for the purpose of restraining competition and acquiring a monopoly in the market for prefabricated houses.[32]

The Court indicated clearly that where such allegations are made summary judgment can rarely be granted because motive and intent are exceedingly important in antitrust litigation and proof is largely in the hands of the conspirators.[33]

Justice Black, writing for the Court, indicated that the allegation of the complaint not only raised the issues of possible violations of the general provisions of the Sherman Act under the rule of reason,[34] but, if proved at trial, were sufficient to bring the defendant's conduct within the purview of the *per se* doctrine of illegality which had been developed in the Court's previous tying arrangement cases.

The requirement of the *per se* doctrine that a not insubstantial amount of interstate commerce in the tied market be forclosed was not met, in the District Court's judgment, because the contract with Fortner Enterprises foreclosed only a small percentage of the land available for development in the Louisville area. The Supreme Court disapproved of this approach. The relevant figure of the volume of sales foreclosed is not those foreclosed by the specific contract with petitioner, but the total dollar volume of sales tied by the *sales policy* under challenge.[35]

30. 394 U.S. 495 (1969).
31. *Id.* at 500.
32. *Id.*
33. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).
34. Alleged violations of the Sherman Act which do not come within the limits of an area which has been defined as a *per se* offense by the Supreme Court, are tested by a "rule of reason" to determine if the practice involved affected an unreasonable restraint upon interstate trade, United States v. Standard Oil, 221 U.S. 1 (1911).
35. 394 U.S. at 502.

The amount of the sales foreclosed under this standard from 1960-1962 was in excess of $9,000,000. Since in *International Salt v. United States*,[36] the amount foreclosed was $500,000, the Court concluded that the foreclosure present in *Fortner* was certainly not insubstantial.

The District Court held that petitioner's allegations did not establish that the United States Steel Homes Credit Corporation had a dominant position in the credit market.

The Supreme Court, in reversing, reiterated the position it had enunciated in *Northern Pacific* and *Loew's*, i.e. that dominance in the tying market was not necessary for application of the *per se* doctrine and that an appreciable restraint on competition in the tied product could result even though the seller had a lesser amount of economic power.

> In both instances, despite the freedom of some or many buyers from the sellers power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product. Accordingly, 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.[37]

Thus, *Fortner* seems to reinforce the proposition, originally implied by the Court's language in *Northern Pacific*, that evidence of acceptance of burdensome tying arrangements by a substantial number of buyers is, in and of itself, sufficient evidence of power in the tying product to invoke the *per se* doctrine.[38] However, the Court clearly did not base its decision that the requisite power existed in the tying product solely upon Fortner's acceptance of the tie-in. To have done so would require that the Court accept the fact that a single buyer's acceptance of a tying arrangement was sufficient proof that the seller retained economic power over the tying product. In interpreting *Fortner* on this point, the Fourth Circuit Court of Appeals in *Advance Business Systems v. SCM* said:

> Although the Supreme Court reversed the lower court, it recog-

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36. 332 U.S. at 395.
37. 394 U.S. at 503-04.
38. Advance Business Systems and Supply Co. v. S.C.M. Corp., 415 F.2d 55, 62 (4th Cir. 1969), the first court of appeals decision to interpret *Fortner*, discussed this issue, saying: "For the same reason, a seller's successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product."

> nized the validity of its reasoning that no inference could be drawn from a single buyer's acceptance of the tie-in. The Court therefore rested its finding that the seller had sufficient power over the tying product on a factual assessment of the product's "uniqueness" and "desirability" rather than on mere success in imposing the tie-in.[39]

Notwithstanding its discussion of this method of showing power in the tying product, the Court in *Fortner* supported its finding that power in the tying product did, indeed, exist by determining that it was unique and distinctive.

The difficulty that is present in using a uniqueness test to determine economic power in a fact situation such as *Fortner* presents, does not exist when the tying product is patented, copyrighted, or a parcel of land. However, the tying product in *Fortner* was credit and to find credit "distinctive" requires a broadening of the use of the concept of "distinctiveness". The Court did not define uniqueness in terms of the product itself, but in terms of the availability of the product.

> Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, e.g. *International Salt*; *Loew's*, or physical, as when the product is land, e.g., *Northern Pacific*. It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably. . . .[40]

The Court found that during the 1959-1962 period no other lending institution was willing to match the 100% financing terms offered by the United States Steel Homes Credit Corporation. In addition, Fortner Enterprises, Inc., accepted the tying condition even though the tied product—prefabricated houses, was priced $400 over competitive houses. To the Court this suggested that the financing terms were uniquely advantageous to the plaintiff, and this, in turn, indicated the existence of the requisite power necessary to make the tie-in illegal.

Justice White, in a dissenting opinion, drew a different conclusion from the advantageous financing terms offered by the Credit Corporation.

> A low price in the tying product—money, the most fungible item of trade since it is by definition an economic counter—is especially poor proof of market power when untied credit is available elsewhere. In that case, the low price of credit is functionally

39. *Id.* at 67.
40. 394 U.S. at 505 n.2.

equivalent to a reduction in the price of the houses sold.[41]

Justice White maintained that, in such a case, cutting prices should not be viewed as an attempt to acquire power in the tied market, but as an attempt to compete in the tied market. He indicated further that, in effect, the decision of the majority necessarily determines that the Sherman Act, with its policy of fostering competition, can also be used to exclude competition. Justice White did not argue that where there is independent proof of market power such an arrangement should be banned, but without such proof he concluded that the evil of tying arrangements—the acquisition of power in the tied market—is absent.[42]

Justice Black responded to this argument by suggesting that although money is a fungible item, credit, which is granted under varied and differing terms, is not. Thus, a large, efficient corporation could certainly use power in the credit market to acquire power in the tied product.[43]

The element of the *Fortner* case which is potentially its most significant aspect, is the impact the decision will have on large businesses which sell goods on credit. Justice Fortas, writing a dissenting opinion in which he was joined by Justice Stewart, focused on the problem:

> Almost all modern selling involves providing some ancillary services in connection with making the sale—delivery, installation, fixturing, servicing, training of the customer's personnel in use of the material sold, furnishing display material and sales aids, extension of credit. Customarily—indeed almost invariably—the seller offers these ancillary services only in connection with the sale of his own products, and they are often offered without cost or at bargain rates.[44]

If the arrangement in *Fortner* is viewed as a tie, then a question is raised as to the validity of all these arrangements. Justice Fortas, however, viewed the transaction in *Fortner* as the sale of a single product with only the incidental provision of financing. In support of this position, he noted that most of the financing, $1,700,000, was for the cost of the houses, not the cost of the land.[45]

The majority disagreed that there was essentially only one product involved. It distinguished the facts in *Fortner* from the usual sale on credit in that in the latter arrangement a single individual or corporation

41. *Id.* at 515.
42. *Id.* at 519.
43. *Id.* at 509.
44. *Id.* at 525.
45. *Id.* at 522, 523.

comes to an agreement as to when and how much he will be paid for the product.

> Sales such as that are a far cry from the arrangement involved here, where the credit is provided by one corporation on condition that a product be purchased from a separate corporation, and where the borrower contracts to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased.[46]

Thus, although the Court in *Fortner* found that two products were involved, and that the doctrines developed in the tying cases applied, it limited its holding to the fact situation presented there. It is, therefore, entirely possible that where credit is granted only to purchasers of the lender's products, the transaction may not be viewed as a tying arrangement particularly if no separate corporate credit subsidiary is involved, or if the credit is issued solely for the purchase price of the products sold.

CONCLUSION

The Supreme Court by its decision in *Fortner Enterprises v. United States Steel* has taken an additional step in developing the trend it initiated in *Northern Pacific* towards eliminating the requirement of producing an *independent* showing of market power in order to activate the application of the *per se* doctrine of illegality in tying arrangement cases. In doing so, it substituted a finding that because the tying product was uniquely advantageous to the buyer, the requisite economic power existed, at least on the basis of the allegations contained in the plaintiff's complaint. This finding was supported by the inference of economic power which the Court suggests may be drawn from the mere acceptance of the terms of a burdensome tying arrangement by the buyer.

In discussing the second requirement for the application of the *per se* doctrine, foreclosure of a substantial amount of commerce, the Court clearly indicated that this requirement was to be measured by the total sales foreclosed by the defendant's sales policy, not just those involved in its dealings with the plaintiff, or with others in the Louisville area.

Although the Court appears to have significantly facilitated application of the *per se* doctrine, given the existence of a tying arrangement, it has not dispensed completely with the necessity to show economic power in the tying product, and foreclosure of a "substantial" amount of commerce in the tied product.

46. *Id.* at 507.

Possibly the most significant aspect of the *Fortner* decision, at least in terms of its economic ramifications, is its holding that financing provided by a seller upon the condition that the buyer purchase the seller's product, may be a tying arrangement, not, as Justice Fortas argued, simply a sale of one product. It is submitted that the Court properly limited this holding to the facts of the instant case, and that extension of this concept to instances where the lender does nothing more than finance a whole or part of the purchase price of an item would be inadvisable.[47]

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47. Such an extension would have severe economic repercussions in view of the large number of American firms that finance sales of their products, but refuse to extend credit to anyone not purchasing those products. In at least the large majority of these cases, the financing can truly be said to be incidental to the sale, and perfectly adaptable to Justice Fortas' "one product" theory previously mentioned.