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Raymond J. Brassard

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TYING ARRANGEMENTS: REQUISITE ECONOMIC POWER, PROMOTIONAL TIES AND THE SINGLE PRODUCT DEFENSE

In *Fortner Enterprises, Inc. v. United States Steel Corp.*[1] the Supreme Court held that a tie of prefabricated homes to advantageous credit terms constituted an illegal tying arrangement[2] under Section 1 of the Sherman Act.[3] The decision may be interpreted as establishing a strict per se rule of illegality because the Court has arguably eliminated the traditional requirement of proving the seller's "economic power" in the tying product market. The decision also questions the legality of "promotional tying arrangements," tying arrangements in which the tying product is offered at a very low or nominal price. Finally, *Fortner* raises the question of the requirements of a successful "single product defense," a defense to the allegation of tying based upon the position that, since only one product is involved, no tying arrangement exists.

I. *Fortner Enterprises, Inc. v. United States Steel Corp.*

Plaintiff Fortner sought treble damages and an injunction against United States Steel Corporation for violations of Sections 1 and 2 of the Sherman Act.[4] The complaint alleged that United States Steel and its wholly owned subsidiary, United States Steel Homes Credit Corporation, violated Section 1 of the Sherman Act because the latter granted Fortner a loan for the purchase and development of land in the Louisville, Kentucky area only on the condition that Fortner purchase prefabricated homes manufactured by United States Steel for each of the lots in the subdivision. The Credit Corporation had agreed to loan Fortner $2,000,000, of which $1,700,000 was to be used for the purchase and installation of the homes from United States Steel, and the balance for land acquisition and development.[5] Fortner further alleged that the homes supplied by United States Steel were not only of substandard quality, but cost $400 more per home than similar models of United States Steel's competitors. Fortner maintained that it agreed to the tying arrangement only because the Credit Corporation

[1] 394 U.S. 495 (1969).

[2] A tying arrangement is an agreement by a party to sell one product, the tying product, but only on the condition that the buyer also purchase a second, different product, the tied product. For a general discussion of tying arrangements see Austin, The Tying Arrangement: A Critique and Some New Thoughts, 1967 Wis. L. Rev. 88 (1967); 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).

[3] 15 U.S.C. § 1 (1964). 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 . . . ."

[4] 15 U.S.C. § 2 (1964). Section 2 states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor . . . ."

[5] 394 U.S. at 522.

offered it 100 percent financing at a low interest rate, and that these terms were unique because no other credit grantor in the Louisville area would provide such favorable credit terms.

The district court granted summary judgment for the defendants because it found that the requirements for an illegal tie-in were not satisfied: the Credit Corporation did not exercise the requisite economic power in the credit market, and the restraint on competition in the market for homes was not substantial.[6] The court of appeals affirmed, adopting the opinion of the lower court.[7] The Supreme Court, with Justice Black writing for the majority, reversed and remanded the case for trial.[8] The Court held that the pleadings and affidavits of Fortner sufficiently indicated the possibility of the defendants' economic power in the credit market to entitle the plaintiff to go to trial on this issue, that the volume of commerce allegedly foreclosed by the tie was substantial, and that the tie of homes to credit did not constitute a single product. The dissenters maintained that there was no proof offered of United States Steel's economic power in the credit market, that advantageous credit terms were a form of price competition in the homes market, and that the alleged tie of homes to credit constituted a single product.

II. Economic Power and Tying Arrangements

The Court has traditionally opposed tying arrangements because of their "pernicious effect on competition and lack of any redeeming virtue."[9] The anticompetitive effects of tying agreements are twofold:

> They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products.[10]

The seller's economic power in the tying product has been considered a prerequisite to the generation of these anticompetitive effects because economic power in the tying product market is essential to force buyers

[6] Fortner Enterprises, Inc. v. United States Steel Corp., 293 F. Supp. 762, 767-69 (W.D. Ky. 1966).

[7] Fortner Enterprises, Inc. v. United States Steel Corp., 404 F.2d 936 (6th Cir. 1968).

[8] The Court reversed on two grounds. The Court first declared that, contrary to the district court's position the plaintiff did not have to meet the two standards announced in Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958), to prevail on the merits. The Court pointed out that "these standards are necessary only to bring into play the doctrine of *per se* illegality," and that the plaintiff could prevail by proving that the general standards of the Sherman Act have been violated. 394 U.S. at 499-500. Second, the Court stated that the district court "misunderstood" the two controlling standards of *Northern Pacific*, and that the plaintiff "raised questions of fact which, if proved at trial, would bring this tying arrangement within the scope of the *per se* doctrine." 394 U.S. at 500-01.

[9] Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

[10] Id. at 6.

to purchase the tied product, thus precluding other sellers of the tied product from competing.

Although its specific aspects have not been clearly defined, the requirement that the seller exercise some degree of economic power in the tying product market has been persistent in the Supreme Court decisions involving tying arrangements. Early cases largely involved the tie of unpatented products to patented products, and the Court generally invalidated the tie because the seller utilized his monopoly power in the patented tying product market to gain control of the tied product market.[11] The Court also utilized the theory that a patent holder, by imposing a tie-in, unreasonably forecloses competitors from a substantial portion of the tied product market.[12]

In the first major non-patent tying case, *Times-Picayune Publishing Co. v. United States,*[13] the Court set forth standards for determining the legality of tying arrangements under both Section 1 of the Sherman Act and Section 3 of the Clayton Act.[14] Although Section 3 of the Clayton Act specifically proscribes tying arrangements the effect of which "may be to substantially lessen competition or tend to create a monopoly in any line of commerce,"[15] this section applies only to "goods, wares, merchandise, machinery, supplies, or other commodities"[16] and hence tying agreements which involve services or land must be brought under the more general provisions of Section 1 of the Sherman Act. In *Times-Picayune,* the sale of advertising space in New Orlean's only morning newspaper was conditioned upon the purchaser's also buying space in the seller's afternoon newspaper which was in competition with another afternoon daily. Because the sale of advertising space is presumably a service and not a "commodity," the case was decided under Section 1 of the Sherman Act. The Court adopted the following standards for determining the legality of tying arrangements:

[11] See Austin, supra note 2, at 104-06. See, e.g., United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922).

[12] See International Salt Co. v. United States, 332 U.S. 392 (1947). The decision did not discuss the dominance or economic power of International Salt in the salt-dispensing machines market, the tying product market, but only International Salt's foreclosure of competitors from a substantial portion of the salt market, the tied product market. It has been argued that the Court may have been implying that dominance is presumed when the tying product is patented or "distinctive," or that proof of dominance is unnecessary to invalidate a tie-in, or even that dominance is presumed from the existence of a tie-in. See also Turner, supra note 2, at 52-54.

[13] 345 U.S. 594 (1953).

[14] 15 U.S.C. § 14 (1964). Section 3 of the Clayton Act provides in part:

> It shall be unlawful for any person engaged in commerce . . . to . . . make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the . . . seller, where the effect of such . . . 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] 15 U.S.C. § 14 (1964).

[16] Id.

> From the "tying" cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the "tying" product, *or* if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, *per se,* to foreclose competitors from any substantial market," a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met.[17]

The Court analyzed the defendant's quantitative position in the newspaper advertising market in New Orleans, and concluded that the defendant was not "dominant" in the market for the tying product because the sale of advertising space in the morning newspaper accounted for only 40 percent of the total advertising sold in all three dailies. The Court, therefore, considered Times-Picayune's afternoon edition as a competitor to its morning edition in determining this percentage, although it has been observed that, if the relevant market was newspaper advertising in New Orleans, the defendant's quantitative position in the market should have been the combined share of each of its newspapers.[18]

The different tests established by the Court in *Times-Picayune* for the Sherman Act and the Clayton Act were apparently fused into a single standard—"sufficient economic power"—in *Northern Pac. Ry. Co. v. United States.*[19] There the defendant leased or sold its "strategically located" land only on condition that the lessees or vendees ship the commodities produced on the land on its lines. Although the Court held that this tie-in violated Section 1 of the Sherman Act, the Court did not determine whether Northern Pacific had "sufficient economic power" by analyzing the defendant's quantitative position in the relevant land market. Rather, the Court pointed out that the land was "strategically located," and that the testimony of witnesses and "common sense" made it evident that the land was "prized" by those who purchased or leased it. The Court stated that tying arrangements

> 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.[20]

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[17] 345 U.S. at 608-09.

[18] See Turner, supra note 2, at 55 n.21. In the same note, Professor Turner points out that if morning and afternoon advertising were separate markets, the defendant clearly had a 100% monopoly of the morning market.

[19] 356 U.S. 1 (1958).

[20] 356 U.S. at 6.

The Court then indicated that if the tying product is desirable and unique, the requirement of sufficient economic power is satisfied.[21]

In his dissenting opinion in *Fortner*, Justice Fortas argued that

> *Northern Pacific,* in effect, applied the same standards to tying arrangements under the Sherman as under the Clayton Act, on the theory that the anticompetitive effect of a tie-in was such as to make the difference in language in the statutes immaterial.[22]

Although it may be questionable whether *Northern Pacific* actually adopts a single standard for both Acts, a tie involving a service is not inherently different from one involving a commodity, and thus the same tests should be applied under both statutes.[23] Moreover, the sufficient economic power standard is clearly more inclusive than the "dominance" or "monopolistic position" standard of *Times-Picayune,* and reduces the requirements for proving an antitrust violation.

The theory that competition in the market for the tied product can be appreciably restrained by a degree of economic power significantly less than "dominance" was confirmed in *United States v. Loew's, Inc.*[24] There the Court unanimously held that the tying of inferior films to high quality films violated Section 1 of the Sherman Act. The Court pointed out that

> [m]arket dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.[25]

The Court readily struck down the block booking of copyrighted films because "sufficiency of economic power is presumed" when the tying product is patented or copyrighted.[26] In its treatment of the economic power requirement, then, the Court shifted from the requirement of a showing of "monopolistic position" or "dominance" in the market to a showing of "desirability" or "uniqueness" of the tying product.

The Court in *Fortner* purportedly adopted the sufficient economic power standard of *Northern Pacific*. For example, the Court

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21 Austin, supra note 2, at 108-09.

22 394 U.S. at 521. It should be noted, however, that the Court has never made a similar statement. However, it has not indicated since *Times-Picayune* that a different test must be applied to determine the legality of tying agreements under the Clayton Act than is applied under the Sherman Act.

23 For a discussion as to why the difference in language in the two statutes should be immaterial, see Turner, supra note 2, at 58.

24 371 U.S. 38 (1962).

25 Id. at 45.

26 Id.

noted that since Fortner was allegedly paying some $400 more per house than United States Steel's competitors charged for comparable models, "this substantial price differential with respect to the tied product (prefabricated homes) in itself may suggest that respondents had some special economic power in the credit market."[27] The Court therefore suggests that economic power in the tying product can be indicated when the vendee is required to pay more for the tied product than he would have to pay for comparable products of other sellers. This theory is similar to the reasoning in *Northern Pacific* where the Court noted that "[t]he very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints."[28] Both of these theories are based on the premise that a tying agreement is an essentially undesirable business arrangement which vendees will avoid unless they are thereby benefited. Where the vendor has sufficient economic power in the tying product, however, the vendee can be forced to accept the tying arrangement.

The Court in *Fortner* also found that the credit terms offered by United States Steel Homes Credit Corporation reflected the corporation's economic power in the credit market. Fortner presented an affidavit by the president of a Louisville finance company which stated that the Credit Corporation's offer to provide 100 percent financing at a low interest rate was unique in the Louisville area. Fortner maintained that it agreed to the tying arrangement only because the credit terms were so attractive. The Court pointed out that "uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors."[29] The Court speculated that these economic advantages may have been achieved through economies of scale resulting from the nationwide character of United States Steel's operations, or because the legal restrictions faced by banks and loan associations were inapplicable to the Credit Corporation. The Court reversed the summary judgment for the defendants because the pleadings and affidavits sufficiently disclosed the possibility of economic power in the credit market to entitle Fortner to go to trial on this issue.

Although *Fortner* ostensibly applies the sufficient economic power standard by examining the evidence of economic power, some of the Court's reasoning may have defined away the necessity of proving sufficient economic power to invalidate a tie-in. The Court first points out that

> the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appre-

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[27] 394 U.S. at 504.

[28] 356 U.S. at 7-8.

[29] 394 U.S. at 505.

> ciable restraints result whenever the seller can exert some power over some of the buyers in the market . . . .[30]

If any "appreciable" restraint on competition invalidates a tie, and if such restraints are the result of the seller's exercising "some power," then the crucial question clearly becomes what "some power" means. The Court points out that if a seller with "economic power" raises his price,

> some group within the market . . . can be forced to accept the higher prices because of their stronger preferences for the product, and the seller could therefore choose *instead* [of raising prices] to force them to accept a tying arrangement . . . .[31] [Emphasis added.]

The Court thus maintains that "market power" can be exercised in two ways—through the imposition of higher prices or through the imposition of a tie-in. But if economic power is *defined* as the ability to impose a tie-in, then sufficient economic power to appreciably restrain free competition in the market for the tied product means no more than that the seller has the ability to impose a tie-in. It is thus clear that the "sufficient economic power" standard is automatically satisfied whenever a tie-in exists.

All that remains of the standards for per se illegality is the requirement that a "not insubstantial amount of interstate commerce is affected." The Court in *Fortner* appears to establish this standard as the single test for determining the legality of tying agreements:

> [T]he proper focus of concern is whether the seller has the power to raise price, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.[32]

Fortner, therefore, may be interpreted as rendering tie-ins per se illegal whenever they are imposd upon an "apprciable number of buyers." Presumably, this standard is equivalent to the traditional standard that the tie must affect a "not insubstantial" amount of interstate commerce. The Court in *Fortner* had little trouble finding that this standard was satisfied by the plaintiff's allegation that United States Steel's sales policy of utilizing tying arrangements foreclosed competitors from prefabricated homes sales of over $2,000,000 per year from 1960 to 1962.

This "appreciable number of buyers" or "not insubstantial" amount of interstate commerce criterion is precisely one of the tests set forth in *Times-Picayune* for ascertaining the legality of tie-ins under Section 3 of the Clayton Act. In that case the Court considered it sufficient to invalidate a tying agreement under Section 3 of the Clayton Act to show that the agreement affected a substantial amount

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30 Id. at 503.
31 Id. at 503-04.
32 Id. at 504.

of interstate commerce in the tied product. *Fortner* has arguably applied this reasoning to tying agreements brought under Section 1 of the Sherman Act.

Implicit in the Court's elimination of the economic power requirement is the assumption that the anticompetitive effects associated with tying agreements—coercion of the buyer and foreclosure of the seller's competitors in the tied product market—are generated by every tie-in imposed upon an "appreciable" number of buyers. This assumption represents a significant departure from the philosophy of the prior tying cases which was based upon the premise that only some tying agreements generate anticompetitive effects, specifically, those in which the seller has economic power in the tying product market and a not insubstantial amount of interstate commerce is affected. In *Northern Pacific*, for example, the Court pointed out that

> [o]f 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.[33]

In his dissent in *Fortner* Justice White argued that the majority did not adequately treat the requirement of economic power. He concluded that there was no proof that United States Steel had economic power in the credit market and that the anticompetitive effects of tying agreements "depend upon the existence of some market power in the tying product . . . ."[34]

The Court's assumption that the anticompetitive effects associated with tying agreements are generated by all tying agreements is questionable. It is not difficult to hypothesize a tying agreement which is accepted by an "appreciable" number of buyers simply because it is the most economical way to purchase both products. In this situation the buyers are clearly not coerced, and accordingly the competitors of the seller in the tied product market are not foreclosed. In a situation where the defendant possesses no economic power to force the buyers to accept the tie, the Court's assumption that all tying arrangements generate anticompetitive effects is unwarranted.

Justice White also maintains that "extending the per se rule to absolute dimensions" by eliminating the economic power requirement may be undesirable because "tie-ins are not entirely unmitigated evils . . . ."[35] He points out that, absent economic power, certain tie-ins may be justified because they are "beneficial" to the economy. In an oligopolistic market, for example, a tie-in may permit price cutting where ordinarily there would be no price competition at all because of each seller's fear that the other sellers would retaliate, thereby de-

[33] 356 U.S. at 6-7.

[34] 394 U.S. at 514. For a similar argument, see Pearson, supra note 2, at 644-46.

[35] 394 U.S. at 514 n.9.

creasing everyone's profit.[36] If it is no longer necessary to prove economic power in the tying product to invalidate a tie-in, it is clear that such "beneficial" tie-ins will be held illegal if a not insubstantial amount of interstate commerce is affected. Such a result would be incompatible with the promotion of economic efficiency.

The Court in *Fortner*, therefore, modifies the economic power requirement in three ways. First, the Court takes the novel step of defining economic power as the ability to impose a tie-in. Second, the Court suggests that economic power can be inferred from the existence of a tie-in when the seller is able to impose a large number of tie-ins or when the tied product is clearly not priced competitively. Although related to the first, this test is clearly less inclusive. Finally, the Court indicates that a seller's economies of scale and advantageous legal position may be indicia of economic power.

III. Promotional Tying Arrangements

In support of their argument that the Credit Corporation's economic power in the credit market had not been shown, United States Steel and the dissenters contended that offering low-cost credit terms is not an indication of economic power, but is simply a form of price competition that actually constitutes a price reduction in the tied product, prefabricated homes. However, the majority stated that tie-ins serve "no legitimate business purpose that cannot be achieved in some less restrictive way . . . ."[37] The majority argued that the seller can achieve his alleged purpose of competing in the tied product market "without extending his economic power, by simply reducing the price of the tied product itself."[38] Thus, a tie of homes to low priced credit generates anticompetitive effects in the tied product while a simple price reduction in the tied product does not generate these undesirable effects.

Justice White, on the other hand, argued that, absent economic power in the tying product, there are no anticompetitive effects generated by a "promotional" tying agreement where the seller offers the tying product at an unusually low price or gives it away. Buyers are not coerced because they may purchase both products elsewhere at normal terms, and the seller's competitors are not foreclosed from these sales because they can compete by reducing the price of the tied product.[39] The promotional tie-in, in this view, is only another form of price competition. As Justice White pointed out "[t]here is no good reason why U.S. Steel should always be required to make the price cut in one form rather than another . . . ."[40]

In rebuttal to the majority's contention that tying agreements serve no legitimate business purpose because the sale could be made in

[36] Id. In this footnote, Justice White lists other situations in which tie-ins may be beneficial to the economy.

[37] 394 U.S. at 503.

[38] Id. at 508.

[39] Id. at 515.

[40] Id.

a less restrictive way, it can be argued that United States Steel is competing for a submarket of the prefabricated homes market, the Fortner-type market. This market is comprised of the entrepreneur-developer with the idea and ability, but without capital and with little probability of obtaining enough capital at a cost he can afford. To such entrepreneurs, price competition in the form of advantageous credit terms is more attractive than simple price reductions in the cost of the homes. To capture this market, therefore, United States Steel takes a high competitive risk and offers very advantageous credit terms. To compensate for taking such a high risk to reach this submarket, United States Steel raises its price for the tied product: but the buyers willingly accept the tying arrangement because it enables them to do business. Since such a tying arrangement promotes rather than restrains competition, it should not be proscribed under the antitrust laws.

If in the future the courts interpret *Fortner* as requiring only a showing that the tie affects an "appreciable" number of buyers, it is clear that most if not all promotional tying arrangements will be held illegal. This result may be undesirable to the extent that promotional ties constitute a form of price competition and that such ties may enable the seller to effectively reach a submarket of the tied product market.

IV. THE SINGLE PRODUCT DEFENSE

Regarding advantageous credit terms as a form of price competition in the tied product illustrates the close relationship between a product and the credit provided by the seller to purchase it. This close relationship logically suggests the single product defense: if one establishes that the alleged "tying" and "tied" products are not two distinct products but, rather, a single product, then by definition there can be no tying arrangement. Prior to *Fortner* the Supreme Court had discussed the single product defense only once, in *Times-Picayune*. There the Court decided that only one product was involved, the sale of readership to advertisers.[41] But the Court simply asserted there was a single product; it failed to set forth any standard by which this determination should be made.[42]

In *Fortner* both dissents expressed the fear that the majority holding may render illegal the offering of goods for sale on attractive credit terms. The Court recognized this problem and maintained that in the "usual sale on credit . . . the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product."[43] The Court then attempted to distinguish the United States Steel arrangement as being a "far cry" from the usual sale on credit on two grounds. The Court first pointed out that in *Fortner* "the credit [was] provided by

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41 345 U.S. at 613-14.

42 Pearson, supra note 2, at 628.

43 394 U.S. at 507.

one corporation on condition that a product be purchased from a separate corporation."[44] The validity of this distinction is questionable in light of the fact that the Credit Corporation is a wholly owned subsidiary of United States Steel. Furthermore, the Credit Corporation, according to the district court, is merely the financing arm of United States Steel's Homes Division.[45]

The Court further distinguished this arrangement from the usual sale on credit because 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] Although the Court did not cite the case, this distinction is similar to one of the tests employed by the district court in *United States v. Jerrold Electronics Corp.*[47] which involved the alleged tie of a complete master antenna system to a highly innovative booster device—one of many parts in the system. The defendant pleaded that the booster was a part of the master antenna system, a single product. One of the tests employed by the district court to determine if there were two separate products was to examine the uniformity of the alleged single product, the antenna system. The district court found that "hardly any two versions of the alleged product were the same."[48] Similarly, the Court in *Fortner* seems to imply that if the loan had covered only the cost of the homes, it might have been persuaded that there was a single product. Resolving the single product issue in *Fortner* by applying the uniformity test employed in *Jerrold* is inappropriate because the test seems best suited to physical products, the functionally interdependent parts of a machine for example, which are always manufactured in the same numbers. It is unrealistic, however, to expect that the credit provided by a seller will always be a fixed percentage of the price of the goods. Different purchasers will receive more or less credit because of a variety of factors such as the risk involved. Furthermore, although the application of the uniformity test to *Fortner* seems to indicate that there is not a single product, the test should be applied no more dogmatically than it was in *Jerrold*. There the district court recognized that the non-uniformity of the alleged single product was in part attributable to the particular job the system was designed to accomplish.[49]

Similarly, Justice Fortas, in his dissent in *Fortner*, dismissed the financing of the land purchase and development as "ancillary costs connected with the sale . . . ."[50] He vigorously contended that the transaction involved only a single product:

> Provision of special financing to the prospective purchaser of prefabricated houses by the Credit Corporation was in-

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[44] Id.
[45] 293 F. Supp. at 764.
[46] 394 U.S. at 507.
[47] 187 F. Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961).
[48] Id. at 559.
[49] Id.
[50] 394 U.S. at 523.

> timately and exclusively related to the end object of the sale of the houses by the Homes Division. It was not a separate item of "sale."[51]

Since Fortner was a dormant corporation in deficit when the loan agreement was concluded, it could be argued that United States Steel had to finance these costs if it were to make a sale of its homes. In light of Justice Fortas' argument that $300,000 of the $2,000,000 loan was for ancillary costs connected with the sale of the homes, it is difficult to accept the Court's attempt to distinguish the United States Steel arrangement from the usual sale on credit on the ground that the Credit Corporation extended more credit to Fortner than it needed to purchase the homes from United States Steel. Moreover, the Court failed to set forth a standard applicable to the single product defense; it was content to point out two of the factual peculiarities of the case, and conclude that the arrangement involved more than a single product.

In addition to the uniformity test, another test applied by the *Jerrold* Court seems to have some relevance to the problem in *Fortner*—the practice of other competitors in the product market. United States Steel maintained that its Credit Corporation was established solely to provide financing for customers of the Homes Division desiring credit, and that this was done "to compete with other prefabricated house manufacturers . . . and other building material manufacturers who provide such assistance to their customers."[52] Although no evidence was presented on the point, it seems almost certain that these competitors would provide financing to a customer only if he agreed to purchase that seller's homes.

It has been maintained that this conditional provision of credit extends beyond the prefabricated homes market and is typical throughout the economy. In his dissent Justice White stated:

> Provision of credit financing by the seller of a commodity to its buyer is a very common event in the American economy. . . . [T]he seller . . . generally . . . restricts his credit to the purchasers of the commodity which he is principally in the business of selling.[53]

In *Dehydrating Process Co. v. A.O. Smith Corp.*,[54] the Court of Appeals for the First Circuit stated that "[a]rticles, though physically distinct, may be related through circumstances. The sound business interests of the seller . . . may be such a circumstance."[55] It is difficult to imagine a more sound business interest than assuring the sale of goods for which the seller has extended substantial credit.

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[51] Id. at 525.

[52] Brief for Respondents at 5, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

[53] 394 U.S. at 515.

[54] 292 F.2d 653 (1st Cir. 1961).

[55] Id. at 655.

In *Fortner* the Court failed to confront the complexity of the single product defense. This failure is complicated by the fact that the defense is clearly related to the contention that provision of advantageous credit terms is a form of price competition in the homes market. The financing of the sale of a commodity is inextricably bound to the sale of that commodity, and accordingly if one decreases the price of the financing he decreases the price of the commodity. In light of the importance of credit and other ancillary services provided by sellers, it seems almost certain that the Court will have to resolve these issues in the future.

CONCLUSION

The *Fortner* decision represents a significant departure from earlier tying cases under Section 1 of the Sherman Act in that the Court appears to have eliminated the requirement of proving sufficient economic power in the tying product. The new test set out in *Fortner* is whether the tie affects an "appreciable" number of buyers or a "not insubstantial" amount of interstate commerce in the tied product. This standard is overly inclusive and would proscribe tying arrangements which do not generate the anti-competitive effects generally associated with tie-ins. The new standard does, however, achieve consistency between the Sherman Act and the Clayton Act, in view of the holding in *Times-Picayune*[56] that it is sufficient under Section 3 of the Clayton Act to show that the tie affects a substantial amount of interstate commerce in the tied product.

Fortner was probably not the proper case for effecting such a significant change in the law regarding tying agreements. Because the case came before the Court on summary judgment, several important issues were not, and probably could not be, adequately treated by the Court. First, the "appreciable number of buyers" standard could not be adequately formulated or applied in the absence of fact finding below. Secondly, the concept of promotional tying arrangements was not adequately explored to determine if United States Steel was providing attractive credit terms to engage in a form of price competition to reach a new market. Finally, since the tying product was credit, which is closely related to the sale of any product, the Court confused rather than clarified the viability of the single product defense by failing to set forth any standard for its application.

RAYMOND J. BRASSARD

[56] 345 U.S. at 608-09.