2-1-1970

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Antitrust—Tying Arrangements—A Re-examination of the Per Se Rule and Identification of Tying Arrangements

It is axiomatic to antitrust law that "tying arrangements serve hardly any purpose beyond the suppression of competition."\(^1\) Despite the apparent simplicity of this statement, the problems confronted in identifying tying arrangements and in establishing standards for measuring anticompetitiveness, once a tie-in has been identified, have confounded the courts\(^2\) and antitrust authorities.\(^3\)

Tying arrangements generally have involved a situation in which a single seller markets two separate products (or services) together, with one, the tying item, acting as a lever in the selling of the other, the tied product.\(^4\) As other forms of economic leverage, tying arrangements have been treated by the courts as inherently anticompetitive\(^5\) because


\(^{2}\) Identification of tying arrangement: Compare Carvel Corp., Trade Reg. Rep. ¶ 17,288 (FTC 1965) (defendant's franchise agreements not regarded as tying arrangements because the trademark license could not constitute a "tying product") with Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964) (trademark license could conceptually constitute a "tying product"). See Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (advertising sold by defendant for both morning and evening newspapers only a "single product" and, therefore, no tying arrangement found), and compare, Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir. 1965) (AP's Ohio regional wire circuit held separate and distinct from other AP circuits and AP's argument that the "news" was the only product involved in the agreement rejected).


\(^{5}\) See, e.g., International Salt Co. v. United States, 332 U.S. 392 (1947). Despite the condemnation of tying arrangements, it is clear that they are not always anticompetitive in nature. See Bowman, supra note 3, at 25-29.
the seller's use of economic power in an extraneous market to bring about sales in another market, in which his power may be slight, introduces an artificial element into the competition in that other market. Buyers, who may want to purchase only the tying product from the seller, are forced to purchase, as a package, items that they might rather obtain separately. Thus, they must forego their free choice between competing products. Competitors of the seller in the tied market are faced with an anomalous situation in which they are forced to compete on a basis entirely divorced from the quality or price of the goods that they offer. Because of their smaller size, they may be in no position to offer the similar package; or if they are able to offer the same package, doing so may divert their efforts at improving their single product.

Obviously, the successful tying arrangement has deleterious effects on competition. Thus, the Supreme Court has promulgated a per se rule for determining if a tying arrangement has sufficient impact on competition to bring the seller within the sanctions of sections one and two of the Sherman Act, section three of the Clayton Act, or section five of the Federal Trade Commission Act. At least with respect to actions under the Sherman or FTC Acts, that rule has been stated as follows: "They [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.

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6 See Austin, supra note 3, at 99.
8 Actually, the "per se rule" might more accurately be described as "per se rules"; historically the "rule" has involved different elements depending upon whether the Sherman or Clayton Act was the basis of the action. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608-09 (1953). See also Mattson, Condition that the Lessee or Purchaser Shall Not Deal in the Goods of a Competitor, in AN ANTITRUST HANDBOOK 181-88 (1958).
13 Section 1 of the Sherman Act is subsumed by section 5 of the FTC Act (prohibition of unfair methods of competition). See Austin, supra note 3, at 89; Turner, supra note 3, at 58 n.33. Thus, for purposes of the material examined in this note, it may be assumed that reference to application of the Sherman Act also includes application of the FTC Act, section 5. In fact, there is some authority for the proposition that section 5 is broader in application than section 1, under a "quasi-tying" theory (see Day, supra note 3, at 555-56) or under an "incipiency" doctrine (see Note, Use of Section 5 of the FTC Act to Reach "Incipient" Violations of Section 3 of the Clayton Act, 62 Nw. U.L. Rev. 77, 79-88 (1967)).
is affected." As is often the case with a doctrinal approach, however, establishing this qualified per se rule has done little to alleviate the problems encountered by the Court in dealing with tying arrangements. A recent case, *Fortner Enterprises, Inc. v. United States Steel Corp.* emphasizes the difficulty that courts have in identifying tying arrangements and applying the per se rule. Consequently, the decision also serves to point out the deficiencies in the established doctrine and, thereby, to redirect inquiry into the actual economic problems in the tie-in area.

*Fortner* involved an action by a private party seeking treble damages and an injunction for violations of sections one and two of the Sherman Act. The plaintiff, Fortner Enterprises, alleged that the defendant, U. S. Steel, had instigated an illegal tying arrangement whereby the defendant through its wholly owned credit corporation, U. S. Steel Homes Credit Corporation, required the plaintiff to purchase unreasonably high-priced prefabricated houses, manufactured by the defendant, as a prerequisite for obtaining low-cost, one-hundred-per-cent financing for the purchase and development of land. The agreement required the plaintiff to erect one of the prefabricated houses on each of the lots purchased with the proceeds of the loan. The district court entered summary judgment for the defendant, and held that although the agreement was a tying arrangement, the plaintiff had not alleged sufficient facts to establish the prerequisites for application of the per se rule, “namely sufficient market power over the tying product [credit] and foreclosure of a substantial volume of commerce in the tied product [houses].” The Court of Appeals for the Sixth Circuit affirmed without opinion. The Supreme Court on certiorari reversed and remanded the action for trial on the merits. Justice Black spoke for the five member majority; Justices White and Fortas wrote separate dissents. The Court held that “the conduct challenged . . . involves a tying arrangement of the traditional kind” and that the plaintiff had made sufficient allegations to go to trial on the issue

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16 Id. at 496.
17 Id. at 497.
18 Id.
19 See id.
20 Id. at 497-98.
21 Id. at 498.
22 393 U.S. 820 (1968).
23 394 U.S. at 498.
of unlawful suppression of competition under both the general standards of the Sherman Act\textsuperscript{24} and the per se rule.\textsuperscript{25}

The district court and a majority of the Supreme Court were in agreement that the defendant's conduct could be identified as a tying arrangement. The dissenters, however, were by no means convinced. Justice Fortas, in particular, based his dissent on his conviction that there was no tying arrangement involved in the case.

Whether the credit and houses constituted two separate products was Justice Fortas' chief concern.\textsuperscript{26} In any action allegedly concerning a tie-in, the court's determination of what constitutes the lawful commercial package has the practical effect of molding competition.\textsuperscript{27} For example, if the Court in \textit{Fortner} had established, as Justice Fortas suggested, that the credit and homes were a single unit, U. S. Steel's competitors, in order to compete, would either have had to produce a similar package or else manipulate the sale of homes in such a manner as to entice buyers out of the market for the combined credit-homes package.\textsuperscript{28} Without examining the possible effects of a single-product determination, Justice Fortas concluded that the agreement in question was "... a sale of a single product with the incidental provision of financing. It [was] not a sale of one product on condition that the buyer ... [would] buy the other product exclusively from the seller."\textsuperscript{29} He argued that the facts did not support the conclusion of the majority that the financing was for the purchase and development of land. Rather, he felt that "[t]he financing [was] solely and entirely ancillary to [the defendant's] sale of houses."\textsuperscript{30} His dissent also emphasized the economic

\textsuperscript{24} Id. at 500.
\textsuperscript{25} Id. at 500-01.
\textsuperscript{26} The problem of the "single seller" could have arisen in \textit{Fortner} since U.S. Steel and the credit corporation were separate legal entities, but the Court had held in previous cases that such a subterfuge was not a defense. \textit{See} \textit{Leitch Mfg. Co. v. Barber Co.}, 302 U.S. 458 (1938); \textit{Carbice Corp. of America v. American Patents Dev. Corp.}, 283 U.S. 27 (1931); \textit{cf. Perma Life Mufflers v. International Parts Corp.}, 392 U.S. 134 (1968). Obviously, if the Court were to allow a seller to incorporate subsidiaries to avoid the consequences of imposing a tie-in, the result would be tantamount to repealing all legal prohibitions against tying arrangements. In fact, Justice Black used the separateness of the defendants as an argument for finding separate products. \textit{See} 314 U.S. at 507.
\textsuperscript{28} \textit{See} \textit{Pearson, Tying Arrangements and Antitrust Policy}, 60 \textit{Nw. U.L. Rev.} 626, 627 (1965); \textit{Turner, supra note 3, at 62-64}.
\textsuperscript{29} 394 U.S. at 522 (Fortas, J., dissenting).
\textsuperscript{30} \textit{Id.}; \textit{see} \textit{Denison Mattress Factory v. Spring-Air Co.}, 308 F.2d 403 (5th Cir. 1962) (developing the concept of the reasonably ancillary restriction on a license as a valid method of protecting trademark rights). \textit{See also} \textit{Carvel Corp.,
factors\textsuperscript{31} that might have been involved in the case and questioned whether there would be any opportunity for the defendant at trial to present justification for the arrangement.\textsuperscript{32}

Justice White alluded to the issue of identification of the tying arrangement when he characterized the majority's logic as "dictat[ing] the same result if unusually attractive credit terms had been offered simply for the purchase of the houses themselves."\textsuperscript{33} One possible argument is that allegedly separate products, if sold in fixed proportions, are in fact often economically interdependent and, thus, merely portions of the same product.\textsuperscript{34} Justice Black, however, made clear that he could not view the defendant's arrangement as a single product:

Sales such as [those generally made on credit] 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. Whatever the standards for determining exactly when a transaction involves only a "single product," we cannot see how an arrangement such as that present in this case could ever be said to involve only a single product.\textsuperscript{35}

The importance of a finding that an alleged tying arrangement involves only a single product is obvious under the doctrinal approach; conceptually there can be no way for a product effectively to act as a "lever" for the sale of itself. More precisely, the per se rule rests upon the premise that tie-ins involve an extension of power into a new or second market rather than merely an expansion of power within a market in which the defendant already holds sway.\textsuperscript{36} In reality, however, the

\textsuperscript{31} See Bowman, supra note 3, at 25-27; Turner, supra note 3, at 67-72.

\textsuperscript{32} 394 U.S. at 507 (footnote omitted).

\textsuperscript{33} Bowman, supra note 3, at 19-20. Professor Bowman suggests that "leverage" is an ambiguous term that should be restricted to cases involving extension of the TRADE REG. REP. ¶ 17,298 (FTC 1965); cf. Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964).
cases are replete with examples of conduct that the courts readily could define as involving either a single product or two separate ones. Particularly in those cases involving determination of the appropriate unit of sale for a given product are the courts faced with definitional alternatives. In other cases, a court may have to determine whether a particular item may be deemed so ancillary to the alleged tying product as to form a part of a single product. Thus, the courts are often faced with a dilemma; and doctrines, definitions, and rules provide little, if any, aid.

If a defendant can offer some economic justification for his alleged unlawful conduct, it is advantageous for him to offer it in his argument on the issue of tie-in identification. This approach may provide courts the opportunity to recognize the defendant's policy argument and to apply a balancing test to the rights of the buyer, seller, and the seller's competitors without entering the linguistic maze of the per se rule. Justifications that may prove palatable to the courts include the following: economies in production and marketing of the total package; the need to maintain the 'good will' established for the primary product; price competition within a "hard" market for the tied product; technology into a new or second market. See Day, supra note 3, at 539-41. Professor Day distinguishes between tying arrangements and exclusive dealing on the "second market" basis.


Despite the fact that the majority had no trouble labelling the tying arrangement in Fortner, the identification issue presents an opportunity for the defendant to offer justification, unlike the conclusory procedure involved in application of the per se rule. Cf. United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961); Note, Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives, 18 STAN. L. REV. 457 (1966).

See Bowman, supra note 3, at 29; Turner, supra note 3, at 66-67. Of course there is the concomitant requirement that the economies in cost result in a lower price for the package. See Pearson, supra note 28, at 627. See Goodyear Tire & Rubber Co. v. FTC, 381 U.S. 357 (1965).


See 394 U.S. at 519 (White, J., dissenting). A "hard" market exists when there are only a few sellers in the market, all of whom are powerful, and there is great resistance to price competition among them. (E.g., a price cut by any one of the sellers will be matched by the others.) In such a market, competition must take other forms in order to be effective. The "hard" market consideration should have been particularly relevant in Fortner since there is a likelihood of an oligopolistic market in prefabricated steel houses. Thus, if U.S. Steel's only competitors were the few other giants of the steel industry, it is probable that the credit offered
nological interdependence of the products;\textsuperscript{44} custom and usage within the markets of both products;\textsuperscript{45} patterns of consumer demand;\textsuperscript{46} and, of primary importance, the availability and feasibility of similar techniques for the seller's competitors in the tied market.\textsuperscript{47}

The second major issue in \textit{Fortner}, the application of the per se rule\textsuperscript{48} under the facts (\textit{i.e.}, the examination of the anticompetitive effect of the defendant's conduct, given its identification as a tying arrangement), was the focal point of both the majority opinion and Justice White's dissent. The doctrines established by the Court in prior cases\textsuperscript{49} placed two conditions on the application of the per se rule in "nonpatent, Sherman Act" cases: sufficient economic power of the seller in the tying product's market and a "not insubstantial" amount of commerce affected in the tied market. These two conditions had been set forth as a means of testing the impact of a tying arrangement on competition. Without any impact on the tied market, the tying arrangement could hardly be called anticompetitive because it would be obvious that buyers were not foregoing their freedom of choice among products and competitors were not losing a substantial market. These conditions amount to a cause and effect test of impact: the defendant's power in the tying-product market representing the cause and the amount of commerce affected in the tied-product market indicating the effect.

It is arguable after \textit{Fortner}, as indeed it was arguable after \textit{Northern Pacific Railway v. United States}\textsuperscript{51} and \textit{United States v. Loew's, Inc.},\textsuperscript{52} that the Court has done away with the requirement of "sufficient economic power." Justice Black's opinion provides language to support almost any by U.S. Steel was competition and in no way prejudicial to its competitors with equally "deep pockets." It seems almost incredible that none of the opinions in \textit{Fortner} posed the question of who constituted defendant's competition in the housing market.

\textsuperscript{44} Bowman, \textit{supra} note 3, at 27-29.
\textsuperscript{45} Pearson, \textit{supra} note 28, at 627-31.
\textsuperscript{47} This issue actually forms the basis for inquiry in the tying-arrangements area. See Pearson, \textit{supra} note 28, at 627-31. For an examination of "justifications" in general, see Note, \textit{Business Justification for Tying Agreements: A Retreat from the Per Se Doctrine}, 17 W. RESERVE L. REV. 257 (1965).
\textsuperscript{48} See Turner, \textit{supra} note 3, at 64-75, for an examination of the positive attributes of a per se rule and an explication of when it should apply.
\textsuperscript{49} See Times-Picayune Co. v. United States, 345 U.S. 594 (1953).
\textsuperscript{50} See Turner, \textit{supra} note 3, at 50-55.
\textsuperscript{52} 371 U.S. 38 (1962).
conclusion on the issue. What is still clear after *Fortner* is that the defendant need not dominate the tying market. The effect that the "distinctiveness" or "uniqueness" of the tying product has on the issue of the defendant's power is very unclear. Justice Black quoted with approval the dictum from the *Loew's* case: "[T]he crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." However, later in his opinion, Black offered the following remark: "We do not mean to accept petitioner's apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.'" He attempted to resolve this apparent contradiction by establishing different classifications of "uniqueness."56

Despite the battle of words in the opinion, one clear principle emerges: when the seller establishes an appreciable number of tying arrangements, "sufficient economic power" in the tying product is conclusively presumed. Obviously this principle is based on the number of buyers that a defendant can attract; thus, it is apparent that Justice Black has decreased the possibility for large corporate defendants to avoid the consequences of the per se rule once a tying arrangement has been found.

Similarly, the principle enunciated by *Fortner* on the issue of the amount of commerce necessary for application of the per se rule effectively prejudices large defendants attempting to tie products. What amounts to "not insubstantial" is determined by looking at the total dollar value of the tied products for all similar tying arrangements that the defendant has initiated, regardless of whether the action may be (as in *Fortner*) a private one between the seller and only one buyer. This statement of the "quantitative substantiality" test is quite similar to that previously followed by the Court. However, *Fortner* alters the traditional test in two important ways. First, it dilutes the requirement for a substantial dollar amount by implying that a figure of two hundred thousand dollars (less than half the amount found to be "not insubstantial" in

56 394 U.S. at 502-03.
57 Id. at 503. The confusion arising on the role of "distinctiveness" is probably due to language derived from cases involving a patented tying product. See Turner, supra note 3, at 50-55.
58 394 U.S. at 505.
59 Id. at 505 n.2.
60 See 394 U.S. at 504. See also Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (sufficient economic power shown by the "host" of tying agreements the defendant had entered).
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International Salt Co. v. United States, which had originated the per se doctrine in 1947) would be enough and by explicitly holding that an individual plaintiff in a treble-damages action can lump together all the values of tied products for all arrangements similar to his own. Second, Fortner removes any consideration, in the majority of cases, of the percentage of the "relevant market" for the tied product:

The requirement that a "not insubstantial" amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie. . . . Normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely "de minimis," is foreclosed to competitors by the tie. . . .

Thus, given a reduction in dollar-volume requirement and an expansion of market considerations, one inevitable result of Fortner would seem to be an increase in the size of the class of potential defendants in tie-in cases, with the large nationwide corporation being the most susceptible to suit. Perhaps the Court was heeding the words of Justice Cardozo that "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

The significance of Fortner with respect to the per se rule is obviously quite great. It serves to abolish almost completely the distinctions in application of the Clayton and Sherman Acts to tying arrangement cases. The "missing link" in cases under the Clayton Act had been that the tie-ins of "services" were not subject to the proscriptions of section three while tie-ins of "products" were. This fact would almost

332 U.S. 392 (1947) (five hundred thousand dollars in contracts a "not insubstantial" amount of commerce).
394 U.S. at 502 (dictum).
Id.
Id. at 501 ("relevant market" may be important in cases involving a small dollar volume of commerce if the defendant's sales represented a large percentage of the market).
Id. This holding may have been derived from Northern Pacific, see Day, supra note 3, at 544-45. However, the validity of that precedent had become questionable, see Austin, supra note 3, at 88-95, commenting on the Atlantic Refining cases: Goodyear Tire & Rubber Co. v. FTC, 381 U.S. 357 (1965); Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394 (7th Cir. 1964); Goodyear Tire & Rubber Co., 58 F.T.C. 309 (1961).
Mattson, Condition that the Lessee or Purchaser Shall Not Deal in the Goods of a Competitor, in AN ANTITRUST HANDBOOK 181-88 (1958).
undoubtedly have forced a different result in *Fortner* if the action had been brought under section three.⁶⁷ Since there is no economic distinction between goods and services, experts have universally condemned the artificial distinction in the application of the per se rule, established by *Times-Picayune Publishing Co. v. United States*,⁶⁸ for actions involving products under the Clayton Act and those involving services, necessarily under the Sherman Act.⁶⁹ The distinction resulted in the anomalous situation wherein actions against the tie-ins of services placed a heavier burden of proof on the plaintiff than that required for actions against tie-ins of products.

*Fortner* also makes clear the presumption against large sellers in tying arrangement cases. It now seems doubtful that these sellers will be able to offer any justification for their action sufficient to prevent application of the per se rule once the tying arrangement has been identified.⁷⁰ This conclusion is emphasized by the fact that both the "power" and "amount of commerce" requirements are, after *Fortner*, quantitatively measured. The "number of buyers" test for power and the "dollar volume" test for amount of commerce may best be viewed as twin corollaries of a rule that completely forecloses the tie-in as a marketing technique for large sellers regardless of its competitive effect.

After examining the majority's careful explication of doctrine in *Fortner*, one might seriously ask (as, indeed, Justice White's dissent seems to ask in part)⁷¹ the following question: Although there are now standards established on all fronts, how do these standards relate to

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⁶⁸ 345 U.S. 594 (1953). The Court established the following distinction for application of the per se rule under the Clayton and Sherman Acts:

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 § 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.

Id. at 608-09.

⁷⁰ See, e.g., Turner, supra note 3, at 58.


394 U.S. at 514-18 (White, J., dissenting).
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anticompetitiveness, and what is the actual policy and factual basis for finding the defendant's conduct unlawful? The most blatant answer to this question is that once the standards are fulfilled, anticompetitiveness exists. Obviously, this is an answer based on the sheer power of the courts and made without any conscious attempt to balance interests; but it helps to underscore the conclusory nature of the per se rule as applied in *Fortner.*

The answer that the Court would undoubtedly give is that these standards act as unerrings indicia of the foreclosure of a substantial amount of business to the defendant's competitors in the tied product and that this foreclosure, at the hands of large business, is usually founded on anticompetitive design. Justice Black might also add that, even if there be no anticompetitive design and although there exists justification for the arrangement, this method of competition is so inherently destructive of competition by other, usually smaller, businesses in the tied market that the Court is justified in making the defendant find another method of competition. However, the very problem with this approach is that a seller may well find another method of competition—one that will not be given the label of "tying arrangement" but that will bring about the same effects.

It is suggested that the courts may best be able to effectuate the policies of the Sherman, Clayton, and FTC Acts in the area of tying arrangements by consciously examining and balancing the interests involved: those of the seller, the buyer, and the seller's competitors. The seller may have many motives for conduct similar to that in *Fortner,* some of which may not be anticompetitive in design or practice. Justice White suggested a number of salutary interests that the defendant in *Fortner* may have had: the conduct may have been merely price competition in a different form, effected by a reduction in the economic price of the credit rather than of the houses; the defendant may have been competing in a "hard" market in which there was great practical resistance to price competition; or the defendant may have been expanding the scope of the market by bringing in buyers who would otherwise be unable to purchase the prefabricated homes at any price. In addition

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72 See Austin, supra note 3, at 123.
73 Id. at 122-26.
74 See J. Scott & E. Rockefeller, Antitrust and Trade Regulation Today: 1967, at 78 (1967), suggesting that the Standard Oil case, 337 U.S. 293 (1949), had only resulted in the refiner buying retail locations and then leasing them to retail dealers who were still required to use only the refiner's gasoline.
75 394 U.S. at 516 (White, J., dissenting).
to interests previously examined in relation to identification of tying arrangements, sellers may evince other lawful reasons for their action.\textsuperscript{70} Some, such as business expediency and similar methods used by others in the defendant's situation, are not likely to be accepted by the courts.\textsuperscript{77} Others, particularly the interest of a newcomer to an established market, who is using the tie-in to break into the market,\textsuperscript{78} and the interests of those sellers who are within a nascent, technical market requiring them to have particular expertise,\textsuperscript{79} may prove to have some significance outside personal interest and may thus warrant some type of protection.

Despite the fact that the majority in \textit{Fortner} took pains to show how the interests of the plaintiff-buyer were damaged by the tying arrangement, it seems that, on the whole, the plaintiff was actually benefitted to the extent that he was unable to receive any credit from any source outside the defendant.\textsuperscript{80} Of course, the interests of the buyer are not unimportant; those interests—having a free choice of sellers and products and obtaining quality goods and services at optimum prices—are actually the public-policy bases for maintaining competition.\textsuperscript{81} The problem with examining the buyer's interest is that it may be, as in \textit{Fortner}, so elusive that it merely compounds the difficulties involved in the balancing process.

The most important interest in tying arrangement cases is that of the seller's competitors.\textsuperscript{82} The progenitor of the present per se rule made clear this bias, for in \textit{International Salt} the Court stated that "[i]t is unreasonable, \textit{per se}, to foreclose competitors from any substantial market."\textsuperscript{83} In \textit{Fortner} Justice Black suggested that the defendant's competitors in the market for prefabricated homes might find it not only economically but also legally impossible to provide buyers credit terms similar to those offered by the defendant.\textsuperscript{84} This factual decision should

\textsuperscript{70} Materials cited note 70 \textit{supra}.
\textsuperscript{77} See \textit{Austin}, \textit{supra} note 3, at 122.
\textsuperscript{80} 394 U.S. at 516 (White, J., dissenting).
\textsuperscript{81} See \textit{Austin}, \textit{supra} note 3, at 99.
\textsuperscript{82} See Pearson, \textit{supra} note 28, at 627-38. Cf. Signode Steel Strapping Co. v. FTC, 132 F.2d 48, 53 (4th Cir. 1942).
\textsuperscript{84} 394 U.S. at 505-06 nn.2 & 3. Justice Black suggested that credit agencies may be precluded by law from giving one-hundred-per-cent credit in the \textit{Fortner} situation. He added that this type of competitive pre-emption would invariably be unlawful.
logically have formed the basis of the Court's decision. Thus, had Justice Black not chosen to embark on a tortuous linguistic search for "power," he might well have found the answer to the foreclosure issue by asking three simple questions: Did the defendant's questionable conduct result in any sales within the prefabricated home market? If so, were there enough of these sales to make the defendant's competitors in that market seek to establish a similar mode of conduct? Finally, was that mode of conduct unavailable to these competitors? An affirmative answer to these questions would establish foreclosure; if the defendant were unable to provide some overriding justification, the balance could be logically struck against him, and his conduct declared unlawful.

KENNETH B. HIPP

Attorney and Client—Dealing with Clients' Property—the ABA
Revision of Canon Eleven

Historically, the attorney-client relationship has been one of delicate trust, as observed by Justice Nelson in 1850:

There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit. . . .

A recent Iowa case, Nadler v. Treptow, illustrates the ethical questions arising when an attorney becomes interested in his client's property. Attorney Nadler represented Elease Treptow in, among other matters, a contract for the purchase of real property from the estate of one Pappas. Financial difficulties prevented Mrs. Treptow's meeting her three-hundred-dollar-per-month contractual obligation to the estate. Because the "problem was complicated," Nadler was able to purchase from the Pappas estate at an eight-hundred-dollar reduction the interest that his client had sought. At least one complication of which the court spoke was the prior contract with Mrs. Treptow. Through it, presumably, Nadler learned of the factors that caused the reduction in price: The attorney-client relationship became one of debtor-creditor/contract vendor. Nadler

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2. Iowa ---, 166 N.W.2d 103 (1969).
3. Id. at ---, 166 N.W.2d at 108 (dissenting opinion).
4. Id.