The American Bar Association Young Lawyers Division
The 101 Practice Series: Breaking Down the Basics

The Wonderful World of Tying

By: Kate Wallace

A tying arrangement is an agreement between a seller and a buyer under which the seller agrees to sell a product or service (the tying product) to the buyer only on the condition that the buyer also purchases a different (or tied) product from the seller or the buyer agrees not to purchase the tied product from any other seller. Tying arrangements can be used to tie together not only different products but also services, leases, franchises, licenses to intellectual property, or combinations of any of those things.

Tying arrangements may be challenged under Section 1 of the Sherman Act, which prohibits "contracts in restraint of trade," Section 3 of the Clayton Act, which prohibits exclusivity arrangements that may "substantially lessen competition," and Section 5 of the FTC Act, which prohibits "[u]nfair methods of competition." Tying may also constitute conduct supporting a monopolization claim under Section 2 of the Sherman Act.

For many years tying arrangements were thought worthy of *per se* condemnation without examination of any actual competitive effects. But strong disapproval of tying claims has waned over the past few decades, as courts have recognized that tying arrangements may have procompetitive benefits. Tying currently is generally deemed *per se* unlawful only if:

- <u>Separate Products</u>: Two separate products or services are involved;
- <u>Coercion</u>: The sale or agreement to sell one product or service is conditioned on the buyer's agreement to purchase another product or service;
- <u>Market Power</u>: The seller has sufficient power in the market for the tying product to enable it to restrain competition in the market for the tied product; and
- <u>Not Insubstantial Amount of Commerce Affected</u>: The tying arrangement affects a "not insubstantial" amount of commerce.[1]

In addition, some courts have stated that proof of an anticompetitive effect in the market for the tied product is required for *per se* liability.

<u>Separate Products</u>

In order to have a tying arrangement in the first place, there must be two products that the seller can tie together. In many cases it may be easy to determine whether there are two distinct products capable of being tied together. For instance land and transport services[2] or projectors and motion pictures.[3] But sometimes the actual analysis of the

---

[1] While most claims rely on the *per se* rule, ties foreclosing a substantial share of the tied market may also be condemned by the rule of reason.

[2] *See Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 8 (1958).

[3] *Id*.

two separate products or services issue proves much more complex. For example, other combination sales—the car with a preinstalled radio, a washing machine sold at a price including a service contract, or a remote control airplane sold with batteries included—are more ambiguous.

The U.S. Supreme Court has held that “the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of demand for the two items.”[4] Thus, the most important factor in determining whether two distinct products are being tied together is whether customers want to purchase the products separately. If customers are not interested in purchasing the products separately, there is little risk the tie could foreclose any separate sales of the products.

<u>Coercion</u>

A key element of tying is the forced purchase of a second distinct commodity; in other words, purchasing the tied product is mandatory when purchasing the tying product. What distinguishes illegal tying from legal bundling is the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms. Where the buyer is given the option to purchase products individually or as a bundle, and the option to purchase individual products is economically feasible, no tying occurs.

<u>Market Power</u>

For a tying arrangement to be *per se* unlawful, 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.”[5] Under recent jurisprudence, “sufficient economic power” exists only when the defendant has market power.[6] Market power may be present when a seller has a large market share or offers a unique product that competitors are unable to provide. However, no court has inferred the requisite market power from a market share below 30 percent.

<u>Not Insubstantial Amount of Commerce Affected</u>

For a tying arrangement to be illegal under the *per se* approach, "a 'not insubstantial' amount of interstate commerce" in the tied product must be affected.[7] The Supreme Court has said that the relevant question is "whether a total amount of business substantial enough in terms of dollar volume so as not to be merely *de minimis*, is

[4] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19 (1984).

[5] *Northern Pac. Ry. Co.*, 356 U.S. at 2.

[6] *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

[7] *Jefferson Parish*, 466 U.S. at 8.

foreclosed to competitors by the tie-in."[8] In one case, the Supreme Court held that as little as $60,000 was not insubstantial.[9] On the other hand, lower courts have found that the requisite effect on commerce was not established where there was no market for the tied product,[10] where the tied market involved commonly used products such as nuts and bolts,[11] or where the amount affected was merely $12,000 in a multibillion dollar market.[12]

<u>Justifications and Defenses</u>

Even assuming that all of the foregoing elements of an affirmative case have been met, a tying arrangement may still be defended on competitive grounds. That is, notwithstanding its development of a "*per se*" rule against tying, the Supreme Court is, at present, almost always willing to consider a defendant's offered justifications for a tying arrangement. For example, a tie may be justified where bundling reduces production costs, improves product quality or distribution,[13] enables buyers to finance their purchases,[14] or is necessary to meet a buyer's preferences.[15] Ties have also been found competitively justifiable where a small market entrant requires limited duration ties to facilitate its market entry. This is known as the fledgling industry defense.

However, the party seeking to defend a tying arrangement on the basis of competitive justifications bears a heavy burden of proof; the defense is difficult to establish and has been successful only under limited circumstances.

---

[8] *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969).

[9] *United States v. Loew's Inc.,* 371 U.S. 38, 49 (1962). This figure is approximately $450,000 in 2012 U.S. dollars.

[10] *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823, 830 (9th Cir. 1981).

[11] *Stunfence, Inc. v. Gallagher Sec. (USA), Inc.*, No. 01-C-9627, 2002 WL 1838128, at *2 (N.D. Ill. Aug. 12, 2002).

[12] *M. Leff Radio Parts, Inc. v. Mattel, Inc.*, 706 F. Supp. 387, 399 (W.D. Pa. 1988).

[13] *See, e.g., Principe v. McDonald's Corp.*, 631 F.2d 303, 308-10 (4th Cir. 1980).

[14] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

[15] *Id*. at 477-79 & n.27.