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Antitrust Law, Spring 2014
University of North Carolina School of Law
Law 226.1

NOTES ON TYING ARRANGEMENTS

1. Definition

"[A]n agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific*.

2. Elements

To establish a violation of **Sherman Act § 1** or **Clayton Act § 3**, plaintiff may prove illegal tying under either a per se or rule of reason theory.

To prevail under a per se theory, the plaintiff must prove that (1) two **separate products** (or service) are involved; (2) the sale of one product is **conditioned** on the purchase of another; (3) the seller has sufficient **market power** in the market for the tying product market to enable it to restrain trade in the market for the tied product; and (4) a not insubstantial amount of **interstate commerce in the tied product is affected**. *Fortner*.

To prevail under a rule of reason theory, the plaintiff must show that the challenged arrangement had an "actual adverse effect on competition" in the tied product market. *Jefferson Parish*.

To establish a violation of **Sherman Act § 2**, plaintiff must also show that the tie has aided, or is likely to aid, the firm imposing the tie in acquiring or maintaining a monopoly in either the tying or tied product market.

3. Separate Products

Two items are considered separate products for purposes of tying doctrine if there is "sufficient consumer demand so that it is efficient for a firm to provide [one] separately from [the other]." *Eastman Kodak*.
(For example, a pair of shoes are not "separate products" because it is not efficient for shoe manufacturers to sell them individually, even though one-legged consumers may prefer that they do so.)

"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." *Jefferson Parish*.
(In *Jefferson Parish*, the Court found surgical services and anesthesiological services to be separate products even though no reasonable patient would want one without the other, and both are delivered in the same physical hospital facilities, in light of testimony that patients often request specific anesthesiologists.
But in *Microsoft*, the D.C. Circuit departed from this principle in refusing to find the operating system and browser services in Windows 98 to be separate products despite credited evidence of separate demand, as both services were provided using many of the same software code libraries.)

4. Conditioning

A conditioned sale need not take the form of a stated tying condition, but may be inferred from the circumstances of the sale. A tying condition may be inferred from the refusal of the defendant to honor requests for separate provision, or from the reasonable belief of customers that such requests would be futile or excessively burdensome. See AREEDA.

5. Market Power

Conduct the standard market definition analysis and determine whether the defendant has the ability "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish*.
(In *Eastman Kodak*, the Court denied summary judgment, allowing the tying claim to be tried on the theory that owners of Kodak copiers could not easily switch to another brand of copier if the cost of Kodak parts and service went up, giving Kodak market power in the markets for Kodak parts and service.
Most courts have limited tying claims under a *Kodak* theory to cases where the manufacturer opportunistically **changes a policy** to exploit customers who have already sunk costs into equipment by raising their overall life-cycle costs (e.g., supplies, parts, maintenance) above what they could have reasonably predicted when making their initial equipment purchase.)

6. Effect on Interstate Commerce

The challenged arrangement must affect a "not insubstantial" dollar volume of commerce in the tied product. The requisite threshold appears to be no higher than $100,000. See, e.g., *Loew's*.