IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-1032

SYSTEMCARE, INC.,

Plaintiff-Appellant,

v.

WANG LABORATORIES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF FOR AMICUS CURIAE UNITED STATES OF AMERICA IN SUPPORT OF REHEARING EN BANC

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States is principally responsible for the enforcement of the Sherman Act, 15 U.S.C. 1 and 2. The erroneous interpretation of Section 1 of the Sherman Act the panel in this case attributed to this Court's decision in City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), cert. denied, 506 U.S. 831 (1992), threatens both public and private enforcement of Section 1 of the Sherman Act. Accordingly, the United States has a strong interest in the proper determination of this appeal.

QUESTION PRESENTED

Whether a contract between a buyer and a seller that embodies a tying arrangement can be a "contract. . . in restraint of trade or commerce" that is unlawful under Section 1 of the Sherman Act, 15 U.S.C. 1, even absent a conspiracy involving a third party to force the agreement upon the buyer.

STATEMENT

1. This is an antitrust case brought by an independent service organization, Systemcare, Inc. ("Systemcare"), against Wang Laboratories, Inc. ("Wang"), a computer manufacturer. Systemcare, which competes with Wang in servicing Wang computers, alleged that Wang, by refusing to sell software services on a desirable contract basis rather than on a less desirable per incident basis unless the buyer also bought hardware maintenance services from Wang, had tied "the sale of its Software Support Services (the tying product) to the purchase of its Hardware Support Services (the tied product)," Complaint ¶ 7, Appellant's Appendix ("Aplt. App.") 3, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Wang moved for summary judgment, arguing a failure of proof on two critical issues, whether Wang had tied software support to hardware maintenance and whether Wang had the requisite market power. (Appellee's Appendix at 17.)

The district court, in granting summary judgment for Wang, did not address these arguments,[1] but instead held that under this Court's then-recent decision in City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), cert. denied, 506 U.S. 831 (1992), Systemcare had failed to show there was a genuine issue of fact as to the critical Section 1

[1]The United States suggested to the panel that the district court be permitted to address these questions for the first time on remand, Brief for Amicus Curiae United States of America in Support of Appellant 4 n.3, and we continue to adhere to that view.

element of concerted action. (D. Ct. Op. 4, Aplt. App. at 58.) It read this Court's cases as holding that "a tying arrangement imposed by a single entity is not proscribed by Section 1 of the Sherman Act" (ibid.), a holding that dictated a judgment for Wang, because "there is no evidence that Wang allied itself with any other party in forcing WSS [i.e., contract software support] customers to accept its hardware services." D. Ct. Op. 4-5, Aplt. App. at 58-59. The court recognized that Systemcare "contends that a conspiracy exists between the WSS customers and Wang because the WSS customers acquiesce to the alleged tying arrangement even though they know that the WSS contract may illegally restrain trade." D. Ct. Op. 5, Aplt. App. at 59. But it held that "[a] contract between a customer and the seller in an alleged tying scheme does not establish a Section 1 conspiracy" under Chanute. D. Ct. Op. 5, Aplt. App. at 59.

The court was troubled by this result. In its view, this Court's holding "seemingly erase[s] the words 'contract' and 'combination in the form of trust or otherwise' from Section 1." D. Ct. Op. 6, Aplt. App. at 60.

2. A panel of this Court unanimously affirmed, rejecting Systemcare's and the government's contentions that the district court had misinterpreted Chanute. It read Chanute to hold that "a tying arrangement imposed by a single entity is not proscribed by section 1 of the Sherman Act, even if that arrangement is embodied in a contract between seller and buyer" (Op. 10). Observing that it was "'bound by the precedent of prior panels absent en banc consideration or a superseding contrary decision by the Supreme Court,'" Op. 11, quoting In re Smith, 10 F.3d 723, 724 (10th Cir. 1993), cert. denied, 115 S. Ct. 53 (1994), the panel affirmed the district court on the ground, not subject to dispute, that "Systemcare has failed to prove concerted action as defined in Chanute." Op. 10 (emphasis added).

ARGUMENT

The Chanute rule, as interpreted by the panel, is an aberration, flatly inconsistent with settled law. As the leading treatise on antitrust law explains:

> There is an "agreement" component to the tie-in offense under Sherman Act §1 and Clayton Act §3, but one that most tie-ins easily satisfy. The "contract, combination, or conspiracy" that triggers §1 is obviously present when the buyer promises to take his requirements of the second product from a supplier as an express quid pro quo for being allowed to buy the tying product. More generally, the purchase of the second product is inherently an agreement. The doubt lies not in whether an "agreement" exists but in whether the seller has conditioned the availability or terms of the tying product on the taking of a second product.

9 Phillip Areeda, Antitrust Law ¶1700i at 12 (1991). The well-established understanding that Professor Areeda describes reflects the plain language of the Sherman Act and of consistent Supreme Court tying cases spanning many decades, as well as the tying cases of every other Circuit. By departing from that understanding and requiring proof of an additional element -- an agreement between the seller and a third party to impose the arrangement -- the Chanute rule threatens to undercut antitrust enforcement and insulate anticompetitive tying arrangements from the reach of the antitrust laws.

I. Section 1 of the Sherman Act Reaches Every Contract In Unreasonable Restraint of Trade, Including Tying Contracts Between Buyer and Seller.

The first sentence of the Sherman Act broadly provides: "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. The Supreme Court long ago concluded that Congress intended only to proscribe arrangements that restrain trade unreasonably, Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911), else the statute "would outlaw the entire body of private contract law," National Society of Professional

Engineers v. United States, 435 U.S. 679, 687-88 (1978). But, subject to that qualification, the statutory language is "broad enough to embrace every conceivable contract . . . which could be made concerning trade or commerce or the subjects of such commerce." Standard Oil, 221 U.S. at 60. A tying contract between buyer and seller is a contract concerning trade or commerce; Section 1 of the Sherman Act by its terms embraces such a contract, and declares it illegal if it unreasonably restrains trade.

II. The Supreme Court Has Long Treated Tying Contracts Between Buyer and Seller As Within The Reach of Section 1.

Contracts between buyer and seller, such as tying contracts and requirements contracts, may unreasonably restrain trade, see, e.g., Standard Oil Co. v. United States, 337 U.S. 293, 305-07 (1949), for they may foreclose access to the market by the seller's competitors. Accordingly, the Supreme Court repeatedly has found tying contracts between buyer and seller that unreasonably restrained trade to violate Section 1 of the Sherman Act. For example, when International Salt Co. distributed its machines under leases that required the lessor to purchase from the company all the salt the machines used, the Court affirmed the district court's imposition of liability under Section 1 of the Sherman Act (as well as Section 3 of the Clayton Act). International Salt Co. v. United States, 332 U.S. 392 (1947). Section 1 liability was based on the restraint in the contract between lessor and lessee. Id. at 396-98. Similarly, in Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958), the Court concluded that sales contracts and leases for land that required the buyer or the lessee to ship the products of the land over the seller's railroad lines were tying contracts that violated Section 1 of the Sherman Act. The Court defined a tying agreement as "an agreement by a party to sell one 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." Id. at 5-6; accord, Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 461-62 (1992). And in United States v. Loew's Inc., 371 U.S. 38 (1962), the court held that several motion picture distributors had individually violated Section 1 of the Sherman Act by means of contracts that licensed one or more feature films to television stations on condition that the stations license other films -- that is, by entering into tying contracts with the buyers of films.

In other cases involving alleged tying contracts, the Supreme Court has found no violation of Section 1 of the Sherman Act, because the Court concluded after elaborate market analysis that the contracts did not unreasonably restrain trade. In these cases, the Court could have disposed of the matter more simply had it held that contracts between buyer and seller are not proscribed by Section 1. Thus, for example, in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 601 (1953), the district court had held that certain contracts between a newspaper and its customers for advertising space were tying contracts that violated Section 1 of the Sherman Act. The Supreme Court reversed, concluding after extensive discussion that there was no unlawful tie because the defendant lacked the requisite market power and because the allegedly tied products were more properly viewed as a single product. Id. at 610-14. It also considered whether the contracts between buyer and seller were unlawful "under the Sherman Act's general prohibition on unreasonable restraints of trade," id. at 614,[2] concluding after a twelve-page discussion of a record "replete with relevant statistical data" (id. at 615), that they were not. Id. at 615-26.[3]

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[2]Many tying arrangements are treated as unreasonable per se, see Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 9-18 (1984), while most other arrangements between buyer and seller are evaluated under the Rule of Reason.

[3]Some of this analysis also supported the Court's brief analysis of liability under Section 2 of the Sherman Act. Times-Picayune, 345 U.S. at 626-27.

None of this discussion would have been necessary to the Court's conclusion that the contracts did not violate Section 1 of the Sherman Act if, as the panel concluded as a matter of Tenth Circuit law, tying contracts between buyer and seller are insufficient as a matter of law to establish a concert of action for purposes of that section.[4]

To be sure, in none of its tying decisions did the Supreme Court squarely hold that a tying contract between buyer and seller is sufficient to establish the element of concerted action for purposes of Section 1. As this Court observed concerning Loew's, the issue "was not presented to the Supreme Court." Chanute, 955 F.2d at 650 n.10. There was no reason for it to be presented, for the statute by its terms reaches "[e]very contract, combination in the form of trust or otherwise, or conspiracy" that unreasonably restrains trade, and the Supreme Court in 1911 confirmed that understanding. See Standard Oil, 221 U.S. at 59-60. Far from indicating that the issue is open, the absence of discussion in more recent cases reflects the clarity of the law.

III. The Other Courts of Appeals Routinely Apply Section 1 to Tying Contracts Between Buyer and Seller.

Like the Supreme Court, the other Courts of Appeals routinely apply Section 1 to alleged tying contracts between buyer and seller. These courts sometimes find the contract to be unlawful, sometimes find it not to be unlawful, and sometimes find there to be no such contract or agreement -- but all without any suggestion that conspiracy with a third party is necessary to

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[4]Similarly, in United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977), the Court reversed a finding that U.S. Steel's tied sale of prefabricated houses and credit to Fortner was per se unlawful under Section 1 of the Sherman Act. It did so because it found that U.S. Steel had not been shown to have sufficient economic power in the tying product market to establish a per se violation. Id. at 622. It would have been simpler to reverse on the ground that a tying contract between a buyer and a seller does not implicate Section 1.

bring Section 1 into play.[5] See, e.g., Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792 (1st Cir. 1988) (tie not per se unlawful because sufficient market power not shown, and not unlawful under rule of reason because anticompetitive effects do not outweigh procompetitive justifications); Capital Temporaries, Inc. of Hartford v. Olsten Corp., 506 F.2d 658, 663 (2d Cir. 1974) (licensor of two franchises, one conditioned on the other, must show "that he was the unwilling purchaser of the tied product"); Allen-Myland, Inc. v. International Business Machines Corp., 33 F.3d 194 (3d Cir.) (reversing and remanding judgment for defendant on tying claim), cert. denied, 115 S. Ct. 684 (1994); Service & Training, Inc. v. Data General Corp., 963 F.2d 680, 685 (4th Cir. 1992) (affirming summary judgment for defendant on tying claim because proof of tying arrangement was lacking); Breaux Bros. Farms v. Teche Sugar Co., 21 F.3d 83 (5th Cir.) (tying arrangement held not unlawful; plaintiff failed to show market power or effect on competition), cert. denied, 115 S. Ct. 425 (1994); Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660 (6th Cir. 1993) (remanding for new trial of tying claim against computer manufacturer who allegedly tied software support and hardware maintenance); Will v. Comprehensive Accounting Corp., 776 F.2d 665, 669-70 (7th Cir. 1985) (Easterbrook, J.) (buyer's unwilling submission to seller's tying arrangement creates joint action required by Section 1), cert. denied, 475 U.S. 1129 (1986); Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1500-01 (8th Cir. 1992) (although illegal tying arrangement may be shown by explicit agreement which conditions purchase of one product upon purchase of the other, or by seller's policy that

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[5]As one leading treatise says, "[t]he vast majority of courts hold . . . that concerted action exists when a seller forces a buyer to accept a tying arrangement." 2 Von Kalinowski, Antitrust Law and Trade Regulation § 6J.02[3] at 6J-26 (1996). The treatise notes that this Circuit holds otherwise, citing Chanute, and comments that this "conclusion is very difficult to defend," id. at 6J-27. The treatise quotes with approval the district court's observation in this case that the Chanute rule appears to insulate some contracts from the Sherman Act "'even though embraced by its express terms.'" Id. n. 56.

makes purchasing the two together "the only viable economic option," plaintiff failed to show either), cert. denied, 506 U.S. 1080 (1993); Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1427 (9th Cir. 1995) ("the 'contract' requirement is satisfied in tie-in cases by the coerced sales contract for the tied item"), cert. denied, 116 S. Ct. 1344 (1996); T. Harris Young & Assoc. v. Marquette Electronics, Inc., 931 F.2d 816 (11th Cir.) (affirming JNOV for defendant on tying claim because for failure of proof that defendant withheld or threatened to withhold one product unless customers bought the other), cert. denied, 502 U.S. 1013 (1991); Foster v. Md. State Sav. & Loan Ass'n, 590 F.2d 928 (D.C. Cir. 1978) (tie allegedly imposed by bank on borrowers found not to exist because two separate products were not involved), cert. denied, 439 U.S. 1071 (1979); Xeta, Inc. v. Atex, Inc., 852 F.2d 1280 (Fed. Cir. 1988) (affirming denial of preliminary injunction where plaintiff did not show likelihood of success in proving asserted tie) (transferred from First Circuit) (tying discussion cites only Supreme Court cases).

Although most of these Court of Appeals cases, like the Supreme Court cases we have cited, merely assume implicitly that Section 1 reaches a contract between buyer and seller, the point is specifically addressed by the Seventh Circuit in Will and the Ninth Circuit in Datagate. In Will, Judge Easterbrook grounded the "essential principle -- that 'unwilling compliance' satisfies the joint action requirement of § 1" on Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968). Will, 776 F.2d at 669-70. He noted that this aspect of Perma Life had survived subsequent Supreme Court decisions overruling other aspects of Perma Life, 776 F.2d at 670, citing in support of this observation Black Gold, Ltd. v. Rockwool Industries, Inc., 732 F.2d 779, 780 (10th Cir.), cert. denied, 469 U.S. 854 (1984).[6]

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[6]As the Third Circuit has explained, in a vertical context (tying contracts are vertical), the requirement that those jointly acting have a unity of purpose or commitment to a common design (continued...)

IV. Chanute, As Interpreted By The Panel, Threatens to Undercut Antitrust Enforcement.

The Supreme Court holds that "certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 9 (1984). It has observed that this rule reflects congressional "concern about the anticompetitive character of tying arrangements." Id. at 10. The Chanute rule, however, would exempt from Section 1 of the Sherman Act all tying arrangements that do not involve conspiracy with third parties. Such an exemption could cripple both public and private antitrust enforcement against these anticompetitive arrangements; the decided cases make clear that ties are frequently implemented without third party conspiracies.

Moreover, tying arrangements are by no means the only anticompetitive arrangements that may be implemented through buyer-seller contracts. Numerous other kinds of contracts between buyer and seller, lacking any element of third party conspiracy, have been found to restrain trade unreasonably in appropriate circumstances. These include, inter alia, exclusive dealing contracts, requirements contracts, resale price maintenance contracts -- more generally, the entire field of what are termed vertical restraints. Thus, acceptance of the Chanute rule would represent a fundamental and unjustified departure from the principles that govern a wide range of vertical practices under the antitrust laws.

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[6](...continued)
does not mean that they must share an anticompetitive motive. To hold otherwise would "render[] section 1 claims unavailable to private litigants suffering antitrust injury as a result of concerted action in a vertical matrix" and "dramatically alter the antitrust landscape in a manner unjustified by either precedent or policy considerations." Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 212 (3d Cir. 1992), cert. denied, 507 U.S. 921 (1993).

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, David Seidman, hereby certify that on this 11th day of June, 1996, I caused two copies of the foregoing Brief For Amicus Curiae United States Of America In Support Of Rehearing En Banc to be served by hand on the following:

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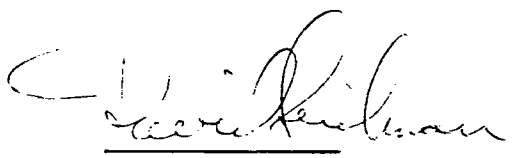

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