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

EN BANC BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

ANNE K. BINGAMAN
Assistant Attorney General

JOEL I. KLEIN
Deputy Assistant Attorney General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530-0001
(202) 514-4510

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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 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), by the district court and the panel in this case 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 satisfies the concerted action element of section 1 of the Sherman Act, 15 U.S.C. 1, or whether satisfaction of that element requires evidence of a conspiracy involving a third party to force agreement on a buyer, City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), cert. denied, 506 U.S. 831 (1992); see McKenzie v. Mercy Hospital of Independence, Kansas, 854 F.2d 365, 367-68 (10th Cir. 1988)

STATEMENT OF THE CASE

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.") at 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 issues critical to a tying claim: 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.

[1]The United States suggested to the panel that the district court be permitted to address them for the first time on remand. Brief for Amicus Curiae United States of America in Support of (continued...)

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 required Section 1 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.)

This result troubled the court. 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

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Appellant 4 n.3.

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). This Court granted rehearing en banc on September 6, 1996.

SUMMARY OF ARGUMENT

Section 1 of the Sherman Act, 15 U.S.C. 1, declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . ." That language by its terms includes buyer-seller contracts in restraint of trade, a reading that is confirmed by consistent Supreme Court precedent, the decisions of every other Circuit, and scholarly commentary.

McKenzie and Chanute provide no adequate rationale for a rule excluding from the coverage of Section 1 buyer-seller tying contracts that are not imposed through an agreement with a third party. The buyer may not share the seller's desire to establish the tie, but even unwilling agreement is nonetheless agreement for purposes of the Sherman Act. Perma Life Mufflers, Inc. v International Parts Corp., 392 U.S. 134 (1968). Certainly the parties need not share the same motivation for entering into an anticompetitive agreement. Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 212 (3d Cir. 1992), cert. denied, 507 U.S. 921 (1993). And because the tied sale pursuant to a sales agreement directly implements the restraint -- foreclosure of sales to rival providers of the tied product -- without the need of further action on the buyer's part, there is no room to argue that the buyer is merely acting unilaterally to comply with the seller's unilaterally adopted policy.

Acceptance of the Chanute rule, as interpreted by the panel, would dramatically and unjustifiably restrict the scope of the Sherman Act. The rule would exempt from Section 1 not only many tying arrangements, but also a variety of other vertical arrangements that may be anticompetitive in particular circumstances. Such a result would contravene well-established precedent recognizing that vertical agreements of the sort that are usually implemented by buyer-seller contracts are subject to Sherman Act scrutiny and frustrate the intent of Congress.

ARGUMENT

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 to proscribe only arrangements that restrain trade unreasonably, Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911); otherwise, 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. Thus, 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 E. Areeda, Antitrust Law ¶ 1700i, at 12 (1991).

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 within the reach of 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] None of this discussion would have been necessary to the Court's

[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.

conclusion that the contracts did not violate Section 1 of the Sherman Act if 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

[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), cert. dismissed, 114 S. Ct. 2700 (1994); 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

[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 Julian von Kalinowski et al., 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. at n. 56.

arrangement may be shown by explicit agreement which conditions purchase of one product upon purchase of the other, or by seller's policy that 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 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. Neither opinion can be reconciled with Chanute, as interpreted by the district court and the panel in this case.

IV. The Buyer's Agreement To A Tying Arrangement Sought Only By The Seller Satisfies The Requirement Of Concerted Action

Neither Chanute nor McKenzie offers specific justification for a rule that buyer-seller tying contracts do not constitute concerted action under the Sherman Act. In both, however, the Court emphasized that the allegedly anticompetitive arrangement at issue reflected the policy of the seller alone. Chanute, 955 F.2d at 650-51; McKenzie, 854 F.2d at 368. Thus, if those decisions establish a general rule, as the panel in this case concluded,[6] that rule apparently rests on the assumption that a restraint sought by only one party cannot be the product of concerted action, even if incorporated in a contract to which both buyer and seller have agreed. But such an assumption is not valid.

A buyer-seller contract by its nature is a compromise between parties whose interests are not identical. See Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 212 (3d Cir. 1992), cert. denied, 507 U.S. 921 (1993). Particular terms may benefit one party primarily or exclusively at the expense of the other, but each party must conclude that the package serves its interests or there will be no contract. Thus, although it is unlikely that a buyer would affirmatively desire to include a term restricting its ability to purchase from other suppliers, it might agree to a contract including such a term because other provisions served its interests. It

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[6]Then-Judge, now Chief Judge, Seymour, concurring in Chanute, expressly rejected such a rule. She concurred on the ground that the seller lacked the power to force the buyer to accept the arrangement, and so the purchase contract did not constitute an illegal tying arrangement. 955 F.2d at 659. Judge Seymour noted that in McKenzie there was no buyer-seller tying contract, for "the plaintiff himself did not and could not agree to the illegal arrangement, nor did he allege that anyone else had done so." Id. at 658 n.1. The United States argued to the panel in this case that McKenzie and Chanute do not hold that buyer-seller tying contracts cannot constitute concerted action. (Brief for Amicus Curiae United States of America in Support of Appellant 9-16.) Because the Court sitting en banc is not bound by prior panel decisions, however, we do not address the point here.

would make little sense to say that the buyer, having agreed to the contract, did not agree to the restriction it includes because the buyer would have preferred a contract that did not include the restriction.[7]

It is established law that an agreement that benefits one party at the expense of the other is nonetheless concerted action for purposes of the Sherman Act. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968). As Judge Easterbrook has observed, Perma Life established the "essential principle -- that 'unwilling compliance' satisfies the joint action requirement of §1." Will, 776 F.2d at 670. Other aspects of Perma Life have been overruled by subsequent Supreme Court decisions, but the unwilling compliance holding remains good law. Chanute, 955 F.2d at 658-59 (Seymour, J., concurring); Black Gold, Ltd. v. Rockwool Industries, Inc., 732 F.2d 779, 780 (10th Cir.), cert. denied, 469 U.S. 854 (1984); Will, 776 F.2d at 670. It does not matter whether the buyer and seller both derive benefit from an anticompetitive tie, so long as both agree to a contract that establishes such an arrangement. Fineman, 980 F.2d at 215.

A sale involving a tying condition will rarely leave doubt about whether there has been a relevant agreement. In this respect, tying is unlike some other kinds of restraints, for which the

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[7]Nor would it make sense to attempt to distinguish among contractual arrangements, for purposes of the concerted action requirement, on the basis of the parties' relative bargaining positions. Market power or other factors affecting the relative strength of the parties' bargaining positions may be relevant in formulating remedies, see 6 Phillip E. Areeda, Antitrust Law ¶ 1408d, at 47-48 (1986), or in assessing the competitive effect of the arrangement, but there can be no contract unless both parties have agreed, whatever their reasons. Indeed, refusing to treat agreements between parties of unequal bargaining power as concerted action under the Sherman Act could have the effect of preventing the weaker party from raising an antitrust defense to enforcement of the contract or otherwise challenging it under the antitrust laws.

scope of the agreement embodied in a sales contract may be problematic; it may be unclear whether there has been an agreement that the buyer will comply with the seller's announced policies, or whether the buyer is unilaterally choosing to comply with the seller's unilateral policies. This problem often arises where resale price maintenance is alleged and a distributor has complied with a manufacturer's policy concerning resale prices. The problem is that a "manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984) (citing United States v. Colgate & Co., 250 U.S. 300 (1919)). If the distributor complies with the demand, there would be nevertheless be no concerted action fixing resale prices, despite the existence of a sales contract between the manufacturer and the dealer, so long as the manufacturer and dealer refrained from entering into an agreement as to resale prices. An agreement (even if tacit) between the manufacturer and dealer setting the dealer's resale prices, on the other hand, would violate the Sherman Act. Monsanto, 465 U.S. at 761. It thus may be difficult to determine whether the buyer has entered into an unwritten agreement with the seller to comply with the seller's announced policies or whether both are acting unilaterally. See generally 6 Phillip E. Areeda, Antitrust Law ¶ 1408a, at 39-41 (1986).[8]

[8]The district judge in this case, apparently drawing too closely on the very different setting of resale price maintenance cases, subsequently characterized his dismissal of Systemcare's claims as resting on the principle that "a business may unilaterally announce the terms by which it will deal," Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F. Supp. 1350, 1363 (D. Col. 1996), and implied that Chanute stood for nothing more than that Section 1 "does not prohibit solely unilateral conduct." Ibid.

Tying agreements typically present no comparable difficulty.[9] The contract may expressly restrict the buyer's freedom to purchase the tied product from other sources. And, in any event, the sale of the tied product pursuant to the contract fully implements the restraint, denying rival suppliers of the tied product the opportunity to make the sale, without any further need for the buyer to comply with the seller's policies. There is thus no need to address whether the buyer has undertaken conduct not provided for by the contract, pursuant to a separate agreement with the seller.[10] As the leading treatise on antitrust law explains:

> In the tying situation [when a bundled sale follows the seller's announcement of a tying condition], by contrast [to the Colgate/Monsanto-type situation], the forced purchase of the bundle itself both immediately implements and thus "accepts" the condition and creates the foreclosure constituting the trade restraint that anti-tying law abhors. There is nothing more that the buyer can do to accept. A promise to accept the bundle that has been purchased would add nothing. Hence, the bundled purchase agreement is a tying agreement.

10 Phillip E. Areeda et al., Antitrust Law ¶ 1754b, at 302 (1996). Thus, whatever the difficulty of distinguishing tacit agreements from unilateral conduct in situations involving actions not expressly provided for by contract, there can be no doubt that buyer-seller tying contracts constitute concerted action for purposes of the Sherman Act.

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[9]There may, of course, be situations in which it is not readily apparent whether the seller has conditioned the sale on the buyer's purchase of some other product from the seller, although the buyer does in fact buy the second product from the same seller. Whether the sale of the first product was so conditioned may be least apparent when the sale of the second product occurs subsequent to the first sale, rather than simultaneously. But this shows only that tacit tying agreements may be difficult to identify or prove.

[10]The fact of agreement on the restraint, of course, does not establish an antitrust violation. Additional evidence (relating to the seller's power to force the buyer to purchase a separate product that it would otherwise have purchased from other suppliers) may be necessary to prove that the agreement unreasonably restrains trade.

V. Excluding Contracts Between Buyers and Sellers From Section 1 Of The Sherman Act Threatens To Undercut Antitrust Enforcement

A rule that buyer-seller contracts do not satisfy the concerted action element of section 1 of the Sherman Act would substantially limit the scope of the Sherman Act. In so doing, it would unjustifiably restrict the protection Congress intended to afford to competition.

One immediate and direct effect of such a rule would be to place many tying arrangements beyond the reach of Section 1, without regard to their competitive effects -- a result that cannot be reconciled with established law or congressional intent. The Supreme Court has held 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).[11] This rule reflects congressional "concern about the anticompetitive character of tying arrangements." Id. at 10. The decided cases make clear, however, that ties are frequently implemented without third party conspiracies.[12]

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[11]Four justices indicated in Hyde that they would prefer to evaluate tying arrangements under the rule of reason, rather than treating them as illegal per se. 466 U.S. at 33-35 (O'Connor, J., concurring). They agreed with the majority, however, that tying arrangements may in some circumstances violate the Sherman Act.

[12]Wang has argued that if such an exemption really would cripple enforcement, there should already be ample evidence of that crippling, because Chanute was decided more than four years ago, while McKenzie was decided eight years ago. (Defendant-Appellee Wang Laboratories, Inc.'s Opposition to Petition for Rehearing with Suggestion for Rehearing En Banc 7.) We suggest that at least McKenzie was not widely perceived as holding what the district court and the panel have more recently read it to hold, and that the proper interpretation of Chanute was disputed until the panel ruled in this case. Thus, one would not expect a substantial effect of these decisions to be evident yet.

Wang also implies that Section 2 of the Sherman Act, which does not require concerted action, amply protects against tying achieved without third party assistance. Id. at 8-9. But Section 2, important as it is, cannot fully replace Section 1, for "[c]oncerted activity subject to

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The implications of the Chanute rule, as interpreted by the panel, moreover, are by no means limited to tying arrangements. Many other kinds of vertical arrangements may violate Section 1 of the Sherman Act in particular circumstances, including, inter alia, resale price maintenance and exclusive dealing contracts. E.g., Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 724 (1988) (resale price maintenance); Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1301-02 (9th Cir.) (exclusive dealing), cert. denied, 459 U.S. 1009 (1982). Such vertical arrangements may have significant anticompetitive effects. See, e.g., Hyde, 466 U.S. at 45 (O'Connor, J., concurring) (discussing potential anticompetitive effects of exclusive dealing contracts). Yet such vertical arrangements may well take the form of a buyer-seller contract, without third party involvement.

Indeed, even if the rule were limited, so as to apply only if the parties to the contract do not derive the same benefits from anticompetitive arrangement or have the same motivation for entering into the agreement, it would still effect a sweeping curtailment of the scope of the Sherman Act, for buyers and sellers will seldom have congruent interests. As the Third Circuit has observed, a rule requiring agreement among parties who share common motives in order to satisfy the concerted action requirement 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

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§ 1 is judged more sternly than unilateral activity under § 2," Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984), with the result that there is a "'gap' in the Act's proscription against unreasonable restraints of trade," id. at 775.

considerations." Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 212 (3d Cir. 1992), cert. denied, 507 U.S. 921 (1993).

CONCLUSION

Because the district court based its grant of summary judgment solely on its erroneous interpretation of Section 1 of the Sherman Act, its judgment should be vacated and the case should be remanded for further proceedings.

Respectfully submitted.

ANNE K. BINGAMAN
Assistant Attorney General

JOEL I. KLEIN
Deputy Assistant Attorney General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530-0001
(202) 514-4510

CERTIFICATE OF SERVICE

I, David Seidman, hereby certify that on this 4th day of October, 1996, I caused two copies of the foregoing EN BANC BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT to be served by hand on the following:

Robert J. Ruyak, Esquire
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

and by Federal Express on the following:

Michael J. Cook, Esquire
Faegre & Benson
2500 Republic Plaza
370 17th Street
Denver, CO 80202

Ronald S. Katz, Esquire
Four Embarcadero Center
Suite 3300
San Francisco, CA 94111

_____
DAVID SEIDMAN