

Tying Arrangements

Antitrust

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What is tying?

Conditioning the sale of a good or service on the buyer also buying a second good.

Also applies to leases.

Must be two separate products.

Sherman Act §1

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. ...

Clayton Act §3

15 U.S.C § 14

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of ... commodities ... on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect ... may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Under Clayton Act §3:

Subject to rule-of-reason scrutiny if:

- (1) Seller has market power in tying product, *or*
- (2) A substantial amount of commerce is affected.

Under Sherman Act §1:

Subject to per-se illegality if:

- (1) Seller has market power in tying product, *and*
- (2) A substantial amount of commerce is affected.

Affirmative defenses for “per se”
offenses:

- (1) Business justification
- (2) Fledgling industry