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THE ANTITRUST IMPLICATIONS OF CREDIT INSURANCE TYING ARRANGEMENTS

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I. INTRODUCTION

Credit insurance has become a significant part of credit transactions in this country and represents an important method of reducing risk in debtor-creditor relationships. Attention has been directed toward the practice of conditioning the sale of credit to purchasing credit insurance.¹ Proponents of the practice claim that credit insurance benefits both the creditor and debtor and, in the absence of patent overreaching by the creditor, facilitates the credit transaction. Critics contend that the insurance tie-ins are used to avoid state usury laws and are largely coercive devices imposed solely to protect creditors.²

The insurance industry, like much of the banking credit industry, exists in a regulated environment. State insurance commissions supervise premium rates for credit insurance and state and federal banking agencies monitor credit practices. Notwithstanding the regulatory control, credit insurance tie-ins and other coercive practices are allegedly prevalent abuses of consumer perogatives in markets for credit and may stem from institutional failures and inadequate standard setting and enforcement by regulators.

More recently, the controversy over coercive creditor practices has shifted to a legislative forum, focusing less on protection of consumers and more on competition between the insurance industry and the banking and lending industries.³ This shift in attention has also caused renewed interest in examining the nature and quality of credit institutions and credit insurance regulation.

Legislative attention to the subject of tie-ins of credit insurance, along with some judicial decisions,⁴ has raised pertinent questions for considera-

1. See Baker, 39 ANTITRUST L.J. 433-45 (1970); E.J. Faulkner, *An Underwriter Looks at Insurance in Connection with Lending*, in CREDIT LIFE AND DISABILITY INSURANCE 11 (minutes of the Conference on Personal Fin. Law) (ABA New York 1952-53) [hereinafter cited as Faulkner].

2. Compare Faulkner, *supra* note 1, at 10 with Mors, *Consumer Installment Credit Insurance*, 1956 Ins. L.J. 299 [hereinafter cited as Mors].

3. See generally *Tie-ins of the Sale of Insurance by Banks and Bank Holding Companies: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. (1979) [hereinafter cited as 1979 Hearings].

Historically, the Congress has taken a fairly active interest in alleged abuses in creditor-debtor relationships and the insurance industry, especially tying arrangements. See, e.g., *One Bank Holding Company Legislation of 1970: Hearings on S.1052 Before the Senate Comm. on Banking & Currency*, 91st Cong., 2d Sess. (1970); *Bank Holding Company Act Amendments of 1970: Hearings on H.R.6778 Before the House Comm. on Banking & Currency*, 91st Cong., 1st Sess. (1969); *Consumer Credit Insurance Act of 1969: Hearings on S.1754 Before the Senate Comm. on Banking & Currency*, 91st Cong., 1st Sess. (1969).

4. See, e.g., *Indep. Ins. Agent v. Fed. Reserve Sys.*, 658 F.2d 571 (8th Cir. 1981); *King v.*

tion. A threshold question concerns the existence and degree of coercive tying arrangements in credit insurance markets. Recent reports and studies have vigorously debated the significance of credit insurance tying arrangements in terms of their impact on consumers and competitive conditions in affected markets and their pervasiveness. A second question concerns the effectiveness of state and federal regulatory schemes in recognizing and prohibiting coercive credit practices. Effective regulation on the state and federal levels may preclude the need for antitrust remedies.

A third issue concerns the relationship of antitrust law and policy to credit insurance tying arrangements. Markets for credit are quite varied in their complexity and the range of anticompetitive conduct is very broad. These facts require consideration of a policy of applying antitrust rules to joint sales of credit and credit insurance. Of equal concern, from an antitrust perspective, is the recent pronouncements of the United States Supreme Court, in the *Fortner*⁶ litigation, on the subject of tying arrangements in credit transactions.

This article discusses these issues in the following manner. First, there will be a discussion of the credit and credit insurance markets and a description of the legislative controversy. Central to that controversy, and critical to an understanding of the antitrust issues, are certain studies on the credit tying issue, which will be discussed in detail. Then, consideration will be given to tying analysis under the antitrust laws with special emphasis on the *Fortner* litigation. Finally, the article will consider the question of immunity or exemption from the federal antitrust laws for credit insurance tie-in arrangements because of the McCarran-Ferguson Act and the state action doctrine.

II. THE CREDIT INSURANCE INDUSTRY AND REGULATORY OVERSIGHT

A. The Market for Credit Insurance

There are essentially three forms of credit insurance commonly used in the United States: health and accident insurance for credit purposes; credit life insurance; and individual life insurance which is used for credit purposes.⁶ The first two forms of credit insurance are the most important for purposes of this article, and together the credit life, health and accident insurance industries comprise a multi-billion dollar business.⁷ In its essential

Credithrift of Am., Inc., 1977-2 Trade Cas. (CCH) ¶ 61722 (E.D. Tenn. 1977).

5. United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 61 (1977); *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969).

6. Faulkner, *supra* note 1, at 9; See also CONSUMER CREDIT LIFE AND DISABILITY INSURANCE 16-18 (Study by College of Business Admin., Ohio Univ.) (C. Hubbard ed. 1973) [hereinafter cited as Ohio Study].

7. 1979 Hearings, *supra* note 3, at 542-57 (statement of Golembe Associates); Ohio Study, *supra* note 6, at 8-10; Faulkner, *supra* note 1, at 9.

One source estimated that there was more than \$100 billion of credit life insurance in force

characteristics, credit insurance is a contract of insurance either on the life of a debtor or to provide indemnity for payments becoming due after the debtor becomes disabled or dies.⁸ Because of the financial attractiveness of the sale of credit insurance and because of its obvious relationship to loan and other credit transactions, a great number of institutions routinely offer credit insurance in connection with loans, including banks, finance companies, credit unions, retailers, and the various types of insurance companies.

While the benefits associated with the provision of credit insurance are many and they seem to fall on different classes of debtors equally, it is not altogether clear that the burdens of credit insurance tie-ins fall on all classes equally. An insurance policy benefits debtors by paying off their loans when they die or become disabled and it strengthens borrowers' credit attractiveness by providing a hedge against loss of employment income due to disability, the principal source of loan retirement.⁹ Credit insurance also provides substantial benefits to the lender by reducing the costs of replevin and repossession actions, strengthening the collaterability of the security, expanding the market for the extension of credit to persons otherwise unable to obtain credit and enhancing the goodwill and public relations of the lender.¹⁰ The attractiveness of credit insurance to lenders, however, may encourage implicit or explicit pressure by credit officers to condition the sale of credit on the joint purchase of credit insurance, especially where the prospective debtor is poor or otherwise a bad credit risk or where a credit officer is compensated by receipt of a commission on credit insurance sales.

Given the profitability of sales of credit insurance—approximately 180 million dollars in premiums being written by approximately 400 companies¹¹—it is not surprising that the structure of the credit insurance industry has changed over the years.¹² Banks, bank holding companies, mortgage companies, finance companies, auto dealers and credit unions are today offering credit insurance with the extension of loans and in other credit trans-

in the United States today, with annual premiums of more than a billion dollars. 1979 Hearings, *supra* note 3, at 284 (Statement of National Consumer Law Center). These figures appear consistent with other measurements of credit life insurance sales. See, e.g., 1979 Hearings, *supra* note 3, at 97 (Statement of Lewis N. Goldfarb).

8. A BACKGROUND STUDY OF THE REGULATION OF CREDIT LIFE AND DISABILITY INSURANCE 2-5 (Study by National Ass'n of Ins. Comm'r's) (1970) [hereinafter cited as NAIC Study]; Mors, *supra* note 2, at 299-301.

Credit insurance may be sold either on an individual policy or under a group policy, and the latter comprises the overwhelming portion of policies. Ohio Study, *supra* note 6, at 15. While in major respects, the two types of policies are similar, there are significant differences. On an individual policy, the creditor is an agent of the insurance company and the debtor is the policyholder. On a group policy, the creditor is the policyholder and not an agent of the insurer, even though the creditor often makes the sale. *Id.*

9. Faulkner, *supra* note 1, at 10; NAIC Study, *supra* note 8, at 5-6.

10. Faulkner, *supra* note 1, at 19-11; NAIC Study, *supra* note 8, at 5.

11. Burfeind, *The Outlook for Credit Ins.*, 3 J. RETAIL BANKING 63 (1981).

12. Ohio Study, *supra* note 6, at 8-14.

actions either directly or through subsidiary credit insurance companies. However, notwithstanding the growth in types of credit insurance provided, the credit insurance industry has been experiencing a high rate of concentration and, compared to other industries, is not a particularly competitive industry.¹³ These trends in market structure strongly suggest that the credit insurance industry may be suffering from poor industry performance and may explain, in part, coercive or anticompetitive behavior in the market.

There are essentially three types of problems limiting good performance in the credit insurance industry, and they each have some significance with respect to the antitrust implications of the credit insurance industry. The first is the poor market structure. The industry is becoming increasingly concentrated with fewer firms underwriting risks and with an increase in mergers and acquisitions of banks and savings and loan associations.¹⁴ Furthermore, with increasing frequency, lending institutions are acquiring or forming credit insurance providers as captive insurers to reinsure credit insurance placed with other insurers or to write policies.¹⁵

Captive insurance subsidiaries may create pressures within a holding company or corporate complex to sell credit insurance and to require that debtors purchase credit insurance only from the affiliated firm. The second problem concerns marketing conduct in the industry. Credit insurance is purchased solely in connection with the sale and purchase of credit and it therefore tends to be a "one-shot" or one-time purchase by the debtor. From a marketing perspective, this tends to reinforce the sales oriented nature of the insurance relationship between the lender and debtor to enhance the likelihood of coercive practices in the short term relationship.¹⁶ Because

13. 1979 Hearings, *supra* note 3, at 2-3 (statement of John Heimann, Comptroller of the Currency); *see also* Marcus, *The Undermining of an Antitrust Bank Merger Policy*, 16 DEPAUL L. REV. 59, 59-61 (1968).

Indeed, even the insurance industry, which has generally been considered competitive, has been showing a marked trend toward higher levels of concentration in its principal lines of insurance. 1979 Hearings, *supra* note 3, at 560-63 (Statement of Golembe Associates). Thus, although some of the growth in concentration in the credit insurance industry may be attributed to the more general increased concentration in the insurance industry, there appears to be conditions unique to credit insurance which explains the greater concentration growths in that industry.

14. 1979 Hearings, *supra* note 3, at 2-3 (statement of John Heimann, Comptroller); Burfeind, *supra* note 11, at 65.

15. Ohio Study, *supra* note 6, at 27; Burfeind, *supra* note 11, at 65-66.

Captive insurance companies may provide the lending institution with various internal efficiencies. *See* 1979 Hearings, *supra* note 3, at 588-99 (Statement of Golembe Associates). However, captive insurers may often be used to channel additional profits to the parent lender and to avoid state regulatory limits on compensation to the creditor for the sale of credit insurance. Ohio Study, *supra* note 6, at 27; NAIC Study, *supra* note 8, at 14-15. The availability of these benefits from captive insurance companies enhances the possibility of tie-ins and other coercive behavior; for example, by increasing the number of credit transactions accompanied by the joint sale of credit insurance.

16. 1979 Hearings, *supra* note 3, at 2-3 (statement of John Heimann, Comptroller of the

of this inherent characteristic of the product, various conduct abuses have been reported in the industry. These include tying or coercive joint sales of credit and credit insurance,¹⁷ inadequate truth-in-lending disclosure of the effective cost of insurance, self-dealing by lending institution officers in the receipt of credit insurance commissions, aggressive sales techniques by lending institution officers due to bonuses offered for high volume of credit insurance sales, and relatively high premiums because of "reverse competition."¹⁸

Currency).

This presents a point of some debate and it is not insignificant. The banking industry has claimed that coercive practices by banks on its customers are irrational because customers will seek banking services elsewhere, and that banks attempt to develop stable, long-term relationships with customers. 1979 Hearings, *supra* note 3, at 176-177 (Statement of Lawrence F. Noble), and at 188-195 (Report of Golembé Associates). However, this assertion is conditional on several other factors; including the availability of other sources of credit to the customer, the customer's knowledge that the coercive practice has occurred, the customer's reluctance to incur the costs of searching for another lender, and the actual or prospective longevity of the credit relationship between the institution and the individual, which may be more closely related to customers' attitudes than to bank practices.

Additionally, it should be noted that this assertion by the banking industry does not apply to other lenders, such as finance companies and retail establishments like auto dealerships that do not provide noncredit banking services and which most frequently provide credit on a one-time basis.

17. See NAIC Study, *supra* note 8, at 59-60; Ohio Study, *supra* note 6, at 42.

A joint sale of credit and credit insurance may be beneficial to the purchaser or it may be a tie-in arrangement. The credit or loan is the more highly prized "tying product" and the credit insurance is the "tied product". As discussed in this article, the degree to which a joint sale will be considered a tying arrangement, and therefore subject to the antitrust laws, depends upon the degree of vendor's coercion in the transaction and the vendor's market power in the market for the tying product.

One other relevant consideration concerns the source or vendor of credit insurance. Where a lender requires the debtor to obtain credit insurance but does not sell such insurance, there is no antitrust issue with respect to tie-ins although there may be consumer protection problems related to adequate disclosure. Rather, there are antitrust implications only where tying arrangements are imposed by related or integrated firms which provide both credit and credit insurance and attempt to condition the sale of their credit on the purchase of their credit insurance.

18. See 1979 Hearings, *supra* note 3, at 3-5 (statement of John Heimann, Comptroller of the Currency); Ohio Study, *supra* note 6, at 40-45; NAIC Study, *supra* note 8, at 13-23, 39-52.

There is an obvious and close relationship between the problems of industry structure and the problems of industry conduct, and the closeness of that relationship stems, in large part, from the use of captive insurance subsidiaries of credit institutions providing credit insurance on the loans and credit transactions of the parent or affiliated company. Thus, for example, a course of joint sales or tie-ins and inadequate truth-in-lending disclosures may indicate attempts by the lender to use the related credit insurance as a method of avoiding state usury laws. Similarly, problems of self-dealing and aggressive marketing techniques may often arise from pressures and incentives placed on the lending institution officers by the profitable credit insurance subsidiaries. See 1979 Hearings, *supra* note 3, at 577-87 (Statement of Golembé Associates). It may also result from opportunistic behavior by the lender who perceives that the debtor has a circumscribed range of choice among sources of credit, an inability to understand

The third problem, and the subject of the next section, concerns the degree and nature of regulation by state and federal governmental agencies. At present there is a patchwork of state and federal regulation affecting credit insurance industry structure and conduct. While it is very difficult to draw any conclusions concerning the effectiveness of and, in some instances, the reasons for, the regulation, the extent of regulatory oversight has significance in considering the application of antitrust rules.

B. Industry Regulation

Both the federal government and the various state governments regulate, directly and indirectly, the credit insurance industry. However, both the nature of governmental control and the extent of the control vary to such a degree that it is difficult to predict with confidence the resolution of a tie-in arrangement controversy. The federal government, through the Comptroller of the Currency and the Federal Reserve System, regulates the sale and marketing of credit insurance by banks and bank holding companies and intracorporate relationships between banks and affiliated insurance companies.¹⁹ Additionally, the Federal Trade Commission may, in the exercise of its consumer protection duties, oversee lender adherence to the dictates of the Truth-in-Lending Act which requires, among other things, adequate disclosure of charges for credit life premiums in credit transactions.²⁰

the context and content of transaction documents, or an inability to subsequently renegotiate the terms of the loan. See generally Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981).

"Reverse competition" is a problem which stems from unique market characteristics. In a credit insurance situation, there are three parties: the creditor; an insurance provider from whom the creditor purchases credit insurance; and the debtor. In this circumstance, the creditor is not necessarily interested in obtaining inexpensive or economical insurance because the creditor, in acting as an insurance agent, makes additional profit on the credit transaction by providing the credit insurance which pays the highest commission to the selling agent, even if (as is usually the case) it is the most expensive insurance. Rubin, *Credit Life Insurance and Its Alternatives*, 12 J. CONSUMER AFFAIRS 145 (1978). Therefore, creditors have incentives to bid up the cost of insurance, especially where the creditor is an owner or an affiliate of the insurance company providing the credit insurance. See NAIC Study, *supra* note 8, at 21-22.

19. See Schweitzer and Halbrook, *Insurance Activities of Banks and Bank Holding Companies: A Survey of Current Issues and Regulations*, 29 DRAKE L. REV. 743, 745-46 (1980) [hereinafter cited as Schweitzer and Halbrook].

The tension between federal regulatory statutory schemes, which have tended to restrict the scope of banking practices, and federal regulatory authorities, which have encouraged expansion by banks into traditionally nonbanking areas, is depicted in *Investment Company Institute v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270 (D.C.Cir.1979). The case involved the ability of bank holding companies to engage in investment advice activities, as approved by the Federal Reserve Board, but contested by an association of mutual funds potential competitors in the market for investment advice. *Id.* The context of the case illustrates the significant conflict between Congress and regulatory agency officials, and between actual and potential competitors in markets for financial and insurance goods and services.

20. See 12 C.F.R. §§ 226.17(f), 226.19(a)(18).

The Bank Holding Company Act Amendments of 1970 were the product of an intense confrontation between the banking industry and the independent insurance agents.²¹ The amendments prohibit the extension of credit on the condition that the customer obtain some additional services from the bank, prohibit banks and bank holding companies from acquiring control of nonbanking institutions, and prohibit banks and bank holding companies from engaging in nonbanking activities except where the activity is "closely related to banking" and where the activity performed by the bank will be beneficial to the public.²² The 1970 Amendments did not, however, completely preclude banks and bank holding companies from engaging in insurance activities, including the provision of credit insurance. In fact, the Board of Governors of the Federal Reserve System specifically provided that credit insurance may be a proper incident of and closely related to banking activity.²³

One provision of the 1970 Amendments specifically prohibits explicit tie-ins and permits the use of evidence concerning prior coercive tie-in practices by a bank or affiliated firm in a proceeding to merge with, acquire, or initiate an insurance affiliate.²⁴ Notwithstanding considerable pressure by

21. Schweitzer and Halbrook, *supra* note 19, at 744; *See generally, One-Bank Holding Company Legislation of 1970: Hearings Before the Senate Committee on Banking and Currency*, 91st Cong., 2d Sess. (1970) [hereinafter cited as 1970 Hearings].

22. 1979 Hearings, *supra* note 3, at 3-4 (statement of John Heimann); Schweitzer and Halbrook, *supra* note 19, at 744-745.

The pertinent statutory provision is found at 12 U.S.C. § 1843 (c)(8)(19), which grants the Board of Governors of the Federal Reserve System the power to permit a bank holding company to acquire shares of any other company when the "performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse affects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices." This provision, and the regulations promulgated by the Federal Reserve System to implement the 1970 amendments, generated a great deal of litigation on the issues of closely related activities and beneficial public impact. *See, e.g., Indep. Ins. Agents of Am., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 658 F.2d 571 (8th Cir. 1981); *Ass'n of Bank Travel Bureaus, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 568 F.2d 549 (7th Cir. 1978); *Bank Americard Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 491 F.2d 985 (9th Cir. 1974).

In 1971, the Federal Reserve Board adopted Regulation Y, by which it attempted to augment the basic policy of the 1970 Amendments limiting regulated banks and bank holding companies in their nonbanking activities, such as insurance underwriting and sales. *See* 12 C.F.R. § 225.4(a)(9)-(a)(10) (1981). Regulation Y, as initially written, was ultimately upheld, but not without controversy. *See Ala. Ass'n of Ins. Agents v. Bd. of Governors of the Fed. Reserve Sys.*, 533 F.2d 224 (5th Cir. 1976), *modified*, 558 F.2d 729 (1977), *cert. denied*, 435 U.S. 904 (1978); *See generally* Schweitzer and Halbrook, *supra* note 19, at 747.

23. 12 C.F.R. § 225.4(a)(9) (1981); *See also* Indep. Ins. Agents of Am., Inc. v. Bd. of Governors of the Fed. Reserve Sys., 658 F.2d 571 (8th Cir. 1981).

24. 12 U.S.C.A. § 1972 (1980). In pertinent part, the statute provides:

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing,

the insurance industry, the Comptroller of the Currency and the Board of Governors of the Federal Reserve System have remained adamant that product extension mergers into the insurance industry and initiation of insurance business by banks and bank holding companies may be beneficial for both the banking industry and the public.²⁵ In 1978, the Federal Reserve

on the condition or requirement—

- (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
- (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;
- (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
- (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or
- (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this chapter.

The purpose of the provision is "to eliminate anticompetitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire." S.Rep. No. 1084, 91st Cong., 1st Sess. 45 (1969) (statement of Senator Brook).

The statutory provision prohibiting, *inter alia*, tying arrangements by regulated banks and bank holding companies, has been augmented by regulations and construed by the courts. *See*, 12 C.F.R. § 225.4(c) (1980); *see also* *Indep. Ins. Agents v. Bd. of Governors of Fed. Reserve Sys.*, 658 F.2d 571 (8th Cir. 1981). In that case, the Independent Insurance Agents, in resisting an effort of a bank to initiate a subsidiary to sell insurance, argued that it would lead to "coercive or voluntary tying practices" and that "credit customers would believe, based on either overt or subtle actions by . . . [the applicant] that they would be more likely to receive loans if they purchased insurance through" the subsidiary. *Id.* at 575. The court, reversing the action of the Federal Reserve Board refusing a hearing on the agent's contentions, outlined the detailed factual inquiries incumbent upon the Board in a proceeding under 12 U.S.C. section 1843 to permit a bank's performance of nonbanking activities. *Id.* at 576. The court stated that a factual inquiry into the potential for coercive and voluntary tying was necessitated by the agents' request and the federal regulations. *Id.*

25. 1979 Hearings, *supra* note 3, at 7 (statement of John Heimann, Comptroller of the Currency).

Comptroller of the Currency, John Heimann, concluded in his statement that the benefits to banks and bank holding companies of selling property and casualty insurance were significant enough to recommend their future use. *Id.* at 10. He claimed that the benefits attendant the ability of banks and bank holding companies to sell credit insurance include "one stop" shopping, whereby consumers can obtain both credit and credit insurance at one institution, combined billing for both services and, perhaps more important, enhanced competition in the

Board conducted a research study on the use of tie-in arrangements by banks and bank holding companies.²⁶ The study, which concluded that explicit tie-in arrangements were "practically nonexistent" and that implicit pressures to purchase credit insurance were not particularly strong,²⁷ prompted such a substantial amount of criticism that a congressional hearing was held on the study in 1979. The study and the 1979 hearing are discussed in the following section.

State insurance commissions and agencies are also charged with a duty to control some aspects of the credit insurance market. State regulation, unlike federal regulation by the Federal Reserve Board of banks and bank holding companies, tends to control the level of allowable premium charges for most forms of credit insurance and, to varying degrees, imposes standards of fair dealing between the insurance provider and the customer.²⁸ For example, most states have regulatory legislation governing credit insurance based upon three model bills provided by the National Association of Insurance Commissioners. Typically these bills delineate responsibilities for disclosure and rate filings, submission of forms of contract and issuance of policies, refunds, judicial review and the like. Further, these bills commonly provide that where a creditor requires credit insurance the debtor may satisfy the requirement through existing insurance coverage or through any other insurer that is authorized to provide the coverage in that state.²⁹

Although the model bills tend to address problems in the relationship between the creditor and debtor other than explicit tie-in arrangements,³⁰

market for insurance and an alternative source of access to credit insurance for consumers. *Id.*

These beneficial aspects were underscored by the remarks of J. Charles Partee, Governor of the Federal Reserve Board, who also claimed that it was not uncommon for bank holding companies that were making applications for extension into the area of credit insurance, to agree to hold their premiums below the ceilings established by state regulatory commissions. 1979 Hearings, *supra* note 3, at 8 (statement of J. Charles Partee); See also 1979 Hearings, *supra* note 3, at 588-99 (Statement of Golembe Associates).

26. See 1979 Hearings *supra* note 3, at 15-92 [hereinafter cited as FRS Study].

27. FRS Study, *supra* note 26, at 17.

28. See generally Ohio Study, *supra* note 6, at 36-51; NAIC Study *supra* note 8, at 67-68; Hanson, *The Interplay of the Regimes of Antitrust, Competition and State Insurance Regulation on the Business of Insurance*, 28 DRAKE L. REV. 767 (1978-79).

29. See NAIC Study *supra* note 8, at 52-93; see generally Ohio Study *supra* note 6, at 38-45.

30. J. Seymour, *Trend Towards Insurance Provisions and Small Loan Statutes*, in CREDIT LIFE AND DISABILITY INSURANCE, *supra* note 1, at 16-28.

The early legislation seems to have the following general aims: (1) to provide that the amount of insurance should not exceed the value of the property that is insured; (2) to require that only firms licensed to do business in the state should be permitted to underwrite credit insurance and that they should do so only at administratively established rate levels; and (3) to prevent credit firms from receiving commissions on credit insurance.

The various model regulations prepared by the National Association of Insurance Commissioners, and adopted by many states, commonly permit a choice of insurer by the debtor where the creditor requires credit insurance as additional security on the loan. See, e.g., ARIZ. REV.

some other states have taken a more direct approach to the problem. Some jurisdictions, for example, expressly prohibit explicit tie-ins between the sale of credit and the sale of credit insurance.³¹ In a few circumstances, state insurance regulatory commissions or agencies will actively enforce these express prohibitions on tying arrangements or, perhaps more commonly, will rely on consumer complaints to prompt performance of their regulatory responsibilities. In most states, however, there are no express prohibitions on coercive tying of credit insurance to sales of credit under state law and very little supervision of consumer sales practices by state regulatory agencies.

III. THE 1979 HEARINGS

In 1979, the Senate Committee on Banking, Housing and Urban Affairs, under the leadership of Senator William Proxmire, held hearings on the Federal Reserve System study, and the debate on the issues of the existence and degree of tie-in arrangements in the banking industry was vigorous. Because the issues raised and debated in the hearings bear closely on issues of tie-in arrangements in nonbank markets, which is largely the subject of this article, a careful consideration of the hearings is necessary.³²

STAT. ANN. §§ 20-1601 to 20-1616 (1982); CAL. INS. CODE §§ 779.1-.26 (West 1982).

31. See, e.g., IOWA CODE § 507B.5 (1981); LA. INS. CODE, R.S. 22:1214(9) (West 1978).

For example, the Iowa statute provides in relevant part that:

1. No person may do any of the following: (a) Require, as a condition precedent to the lending of money or credit, or any renewal thereof, that the person to whom such money or credit is extended or whose obligations the creditor is extended or whose obligation the creditor is to acquire or finance, negotiate any policy or contract of insurance through a particular insurer or group of insurers or agent or group of agents or brokers.

IOWA CODE § 507B.5 (1981).

32. Because the Bank Holding Company Amendments of 1970 specifically preclude explicit tie-in arrangements by subject banks and bank holding companies, the range of antitrust law application is circumscribed. As the cases have suggested, with regard to bank and bank holding company explicit ties, the determination of illegality is made by the agency in the first instance, and such determination is subject to review by the federal courts. *See, Indep. Ins. Agents. v. Fed. Reserve Sys.*, 658 F.2d 571, 575 (8th Cir. 1981). While the 1970 Amendments specifically referred to Clayton Act standards in prohibiting credit insurance ties, the matter is essentially one for administrative agency procedures rather than judicial application of antitrust norms, and assertions of illegal tying by bank and bankholding companies usually arise in the context of section 4(c), 12 U.S.C. Section 1843(c)(8) (1980), applications to provide non-banking services. *See Costner v. The Blount Nat'l Bank*, 578 F.2d 1192 (6th Cir. 1978) (identifying similarity between Clayton Act and Bank Holding Company Act standards).

However, it is equally clear that tie-in arrangements are being practiced by institutions unregulated by the federal government, such as finance companies, credit unions, and automobile dealerships. To the extent that these institutions practice explicit tie-in arrangements, they raise important issues of antitrust law, which are addressed, in part, by the 1979 Hearings. Moreover, the issue of implicit tie-ins and their impermissibility under the FRS regulations was not expressly addressed in the 1979 Hearings. To the extent that implicit tying may be actionable under the antitrust laws, the federal courts should have the initial responsibility under the antitrust laws.

A. The FRS Study

In response to growing concern about alleged abuses in the marketing of credit insurance by bank holding companies, the Federal Reserve authorized a study on alleged tie-ins of credit and credit insurance. The study consisted of a report on individual consumers' experience with and attitudes toward credit insurance and a survey of policies and practices of a small number of bank holding companies in marketing credit insurance.³³

The theory of the study methodology was that coercive or involuntary tying arrangements are related to or are expressions of supplier's market power and so the existence of coercive ties would be demonstrated by buyer resentment, poor consumer opinions about the product and complaints about its quality and cost.³⁴ Similarly, the study considered penetration rates in several submarkets for credit where tying may occur and reviewed institutional policies and practices for marketing credit insurance in the hopes of discerning organizational structures conducive to tying.³⁵

In the first instance, the authors surveyed the range of tying situations—from an explicit, involuntary tie to a purely voluntary joint sale of credit and credit insurance.³⁶ For purposes of the study, the authors defined "involuntary" as any joint sale where a degree of implicit pressure from the creditor exists to the extent that a purchaser's insurance decision is influenced or constrained by perceptions of the creditors' market power in the credit business.³⁷ Coercion, the process or perception of implicit or explicit pressure, was thus an essential element of the study's calculation of the existence of tying arrangements. However, discerning coercion is difficult, and the authors of the study suggested a relationship existing among penetration rates, consumer perceptions of pressure to purchase and coercion.³⁸

33. FRS Study, *supra* note 26, at 20-21.

34. *Id.* at 18-19.

35. *Id.* at 21.

Penetration rates represent the number of debtors obtaining credit insurance on credit transactions expressed as a percentage of the total number of credit transactions surveyed. So, for example, a penetration rate of 75% suggests that debtors obtained credit insurance in three out of every four credit transactions.

36. *Id.* at 28.

37. *Id.* at 28-29.

The authors of the study confess uncertainty concerning the ability of existing antitrust standards to reach and declare illegal tying arrangements involving implicit pressures. *Id.* The important point, however, is the nomenclature of decision-making by consumers. A tie-in may be accomplished by an express provision in a contract or agreement and, from a legal perspective, proving such a tie-in is easier where it is explicit. However, a lender can impose a tie in an implicit manner, such as by strongly suggesting the purchase of the tied product or by covertly including credit insurance in the credit transaction without the debtor's knowledge or assent. This presents other legal problems of proof, but does not necessarily alter the definition of a tying arrangement, or, for that matter, its illegality.

38. *Id.* at 29-30

The authors state:

Penetration rates across the credit markets ranged from 39% for retailers extending credit to 75% for finance companies, with banks exhibiting penetration rates of approximately 60%. The cross-industry average was 62%.³⁹ The significance of the datum is that approximately 62% of all bor-

In summary, for joint sales to constitute a potentially serious tying problem a precondition is the existence of significant market power that may lead to supplier conduct resulting in either explicit or implicit pressure on the customer to agree to a tied sale. Systematically, this situation would be expected to result in high penetration rates by the supplier in the tied market and would probably generate considerable consumer resentment in response to the applied pressure. Even when there is no overt conduct on the part of the supplier, an involuntary tying problem can exist if customers perceive significant monopoly power in the tying goods or service and as a result involuntarily tie their purchases. In such a situation, high penetration rates would be expected and significant buyer resentment would probably exist. Presumably this resentment would be directly related to the degree of monopoly power exerted by the supplier through the setting of high prices.

Id. (footnotes omitted).

39. *Id.* at 20.

The authors' study found the following penetration rates:

2. Insurance Status of Credit Transactions, by Type of Lender Number, except as noted

Transactions	Total	Retailer	Bank	Finance company	Credit union
Total	1,099	148	563	155	233
With credit insurance					
Number	684	59	346	116	163
Per cent	62.2	39.9	61.4	74.8	70.0
Without credit insurance	323	68	182	25	48
Does not know or not ascertained	92	21	35	14	22

3. Credit Insurance Status, by Type of Credit and Lender Per cent of loans

Type of credit and insurance status	Bank	Finance company	Credit union	Retailer
<u>New car</u>				
Credit insurance	60.0	87.5	69.0	63.2
No credit insurance	33.7	6.3	20.0	36.8
Does not know	2.6	2.1	9.0	0
Not ascertained	3.7	4.1	2.0	0
<u>Used car</u>				

rowers had purchased credit insurance in connection with their loan or credit transaction. Although the authors conceded that these penetration rates were high, on average and in several submarkets, they concluded that the high rates were not due to coercive or involuntary tying.⁴⁰ The survey of consumer perceptions showed that 16.4% of the consumers surveyed stated that the joint purchase was "required," 8.8% stated that it was "strongly recommended" (apparently by the lender), and 25.7% stated that it was "recommended."⁴¹ Only 1.2% of consumers surveyed claimed to have re-

Credit insurance	66.3	69.0	76.6	52.9
No credit insurance	29.0	17.2	17.0	41.2
Does not know	4.1	10.3	2.1	5.9
Not ascertained	0.6	3.5	4.3	0
<u>Home addition and repair</u>				
Credit insurance	55.6	33.3	55.6	33.3
No credit insurance	36.1	33.3	44.4	66.7
Does not know	5.6	0	0	0
Not ascertained	2.7	33.4	0	0
<u>Durables and recreation</u>				
Credit insurance	61.2	56.7	65.5	35.1
No credit insurance	34.3	36.7	27.6	45.5
Does not know	3.0	6.6	6.9	16.9
Not ascertained	1.5	0	0	2.5
<u>Personal loan</u>				
Credit insurance	59.0	80.0	70.8	32.1
No credit insurance	32.0	11.1	16.7	50.0
Does not know	6.0	8.9	8.3	7.1
Not ascertained	3.0	0	4.2	10.8

Id. at 46-47.

40. *Id.* at 20.

41. *Id.* at 48.

4. Consumer Perceptions of Creditors' Recommendations about Purchase of Credit Insurance

Perception	Number	Percent
Creditor never mentioned insurance	251	21.6
Mentioned but not recommended	192	16.5
Recommended	299	25.7
Strongly recommended	103	8.8
Required	191	16.4
Requested by consumer	14	1.2
Other	14	1.2
Does not know or not ascertained	99	8.5
Total	1,163	100.0

quested credit insurance.⁴²

The consumer study also suggested that a very small proportion of consumers viewed credit insurance as a "bad" service, and that most regarded it as a highly desirable commodity.⁴³ Similarly, most consumers thought that the price was "about right" or even "inexpensive."⁴⁴ Based upon these study results, and the lack of consumer complaints in the files of the Federal Reserve System, the authors concluded that the relatively low proportion of loan customers perceiving pressure to make joint purchases and the high rate of customer approval of credit insurance and its cost suggested that the high penetration rates were due to positive consumer attitudes and the hypothesis that joint purchases were voluntary.⁴⁵

The authors also examined the "supply" side of the loan and credit in-

5. Consumer Perceptions of Creditors' Recommendations about Purchase of Credit Insurance, by Type of Lender

Per cent

Perception	Bank	Finance company	Credit union	Retailer
Creditor never mentioned insurance	20.2	12.3	17.2	40.5
Mentioned but not recommended	18.3	18.7	16.8	8.8
Recommended	28.2	26.5	22.4	23.0
Strongly recommended	11.4	11.6	5.6	4.7
Required	12.1	23.2	26.3	10.8
Requested by consumer	.9	1.3	1.3	1.4
Other	1.2	.6	2.6	0
Does not know or not ascertained	7.6	5.8	7.8	10.8
Total	100.0	100.0	100.0	100.0

Note: Details may not add to 100 per cent because of rounding. *Id.* at 48-49.

42. *Id.* at 48.

43. *Id.* at 20.

The consumer survey showed the following incident of consumer attitudes:

6. Consumer Attitudes toward Credit Insurance

Attitude	Number	Per cent
Good thing	852	73.1
Good with qualifications	136	11.7
Neither good nor bad	52	4.5
Bad with qualifications	13	1.1
Bad	48	4.1
Does not know or not ascertained	64	5.5
Total	1,165	100.0

44. *Id.* at 20.

45. *Id.* at 61-62.

surance transaction to review institutional policies and practices relating to alleged tying. This branch of the report was more narrow than the consumer study in that it only sampled bank holding companies.⁴⁶ The authors concluded that their study of the sample found that penetration rates were relatively low, that the sale of credit insurance occurred after the sale of credit, and that insurance agents in bank holding companies usually received fixed salary compensation, rather than commission compensation.⁴⁷ Therefore, according to the authors, these factors strongly supported their conclusion that it is unlikely that coercive tying is practiced in the credit market serviced by banks.⁴⁸ They also opined that exogenous factors such as state and federal regulatory constraints on the profitability of credit insurance reduced incentives to tie insurance to credit.⁴⁹

B. *The Vaughan Report*

The Senate Committee also received a report prepared by Dr. Emmett J. Vaughan,⁵⁰ criticizing the FRS Study in several important respects. First, Vaughan contended that the FRS Study did not properly consider the effect of implicit pressure on consumers to obtain credit insurance in connection

46. *Id.* at 21.

It is understandable that this aspect of the study was more narrow than the consumer or "demand" portion of the study. The Federal Reserve System, which conducted the study, routinely gathers information on banks and bank holding company policies, procedures, and organizational patterns. Further, the Board of Governors would not have ready access to that information with respect to credit unions, finance companies, retailers, and other submarkets of the credit industry. Moreover, the orientation of the study was to consider the existence of tie-in arrangements in the banking industry, and not necessarily to consider the existence of tie-in arrangements in other credit submarkets.

47. *Id.* at 21.

48. *Id.* at 22-23.

In conclusion, analysis of the surveys suggests that explicit tying between the granting of credit and the sale of credit-related insurance is practically non-existent and that implicit pressures brought by lenders on the borrowers are neither very strong nor widespread in the industry. It does appear that a sizeable minority of credit customers voluntarily places their property and casualty insurance with their lender because they value the convenience of the joint purchase more than the benefits they could obtain by successfully searching for alternative sources of insurance. The proportion of people opting for joint purchases of credit and insurance is even greater among those purchasing credit life and disability insurance probably because the premium costs are small compared with search and shopping costs.

Id.

49. *Id.* at 21-22. The study did not, however, cite any substantial support for their conclusion that regulatory restrictions "limit severely the profitability of insurance sales and blunt the incentive to tie." *Id.*

50. 1979 Hearings, *supra* note 3, at 310-52 [hereinafter cited as *The Vaughan Report*].

Dr. Vaughan, a professor of insurance at the University of Iowa, was retained by the Independent Insurance Agents of America to review the FRS Study and submit his findings to the Senate Committee. *Id.* at 301.

with the purchase of credit.⁵¹ In particular, he contended that banks hold unique power over their customers because the extension of credit is often an ongoing relationship or series of transactions and because credit must sometimes be "rationed" in times of tight supply to the "better" bank customers.⁵² Vaughan also contested the FRS Study conclusion that, on average, 65% of loan customers also purchased credit insurance, and claimed that, based upon other studies and methodological infirmities in the FRS Study, the penetration rate could be as high as 98%.⁵³

The Vaughan Report also attacked the FRS Study on certain critical conclusions drawn by the bank regulators. First, Vaughan strongly disagreed with the FRS conclusion that involuntary tying was "almost non-existent" as drawn from the fact that only 16.4% of consumers perceived credit insurance as "required."⁵⁴ Vaughan, using the FRS statistics, suggested that the inference of implicit, yet coercive, tying may be evidenced by the fact that almost 51% of those surveyed stated that credit insurance was "required" or "strongly recommended."⁵⁵ Professor Vaughan expressed his belief that, in practice, there is little distinction between explicit or coercive tie-ins and implicit ones, and that "customers perceive the implicit threat of deprivation of a needed bank service and submit to the recommendation to purchase the insurance."⁵⁶

Vaughan also attacked the assumption of the FRS Study that a compulsory tie-in requirement produced a negative consumer attitude toward the product. He suggested that such a requirement may produce a negative attitude toward the institution and, further, that the degree of resentment may well reflect the cost of the insurance and the demand or desire for the loan.⁵⁷ To the extent that this is true, it tends to undermine the implication drawn by the FRS Study that there is a highly favorable consumer perception of credit insurance.

In conclusion, Vaughan, using the FRS Study as supporting evidence, argued "that at least one out of every six (and perhaps as many as one out of every four) persons surveyed had been required to purchase credit insurance in conjunction with extensions of credit," and that therefore the

51. *Id.* at 316-17.

52. *Id.* at 316.

53. *Id.* at 334-35.

In particular, Vaughan contended that there may be as many as 9% of the consumers surveyed who had credit insurance but did not know it. *Id.* He also stated that the FRS Study sampled many credit institutions, including some which did not sell any insurance or credit insurance. *Id.* at 333. Obviously, the opportunities for tying are nonexistent in such circumstances. Finally, he noted a government study which found 97.5% of consumers that purchased credit insurance had purchased it through the creditor. *Id.* at 333-34.

54. See *supra* note 41 and accompanying text.

55. Vaughan Report, *supra* note 50, at 336-37.

56. *Id.* at 316-17.

57. *Id.* at 326-31.

Study's conclusion that credit insurance tie-ins are "practically non-existent" merely serves to obscure important policy issues concerning bank practices and federal legislation.⁵⁸

C. The FTC Report

The Federal Trade Commission also filed a brief report which was highly critical of the FRS Study, although for somewhat different reasons than Dr. Vaughan's.⁵⁹ In the first instance, the FTC claimed that the FRS Study penetration rates were "unreliable" and significantly lower than FTC studies on finance companies.⁶⁰ The FTC Report also stated that a consumer study showed that almost 40% of retail credit customers did not know that they had credit insurance when in fact they did.⁶¹ This fact, according to the FTC, suggests that the consumer perception survey in the FRS Report may have significantly understated the penetration rates in many credit submarkets.⁶²

On a more substantive basis, the FTC Report took issue with the FRS Study in two important respects. First, the FTC stated that joint sales when credit is tight do not constitute a "voluntary" tie-in because the consumer perception of the availability of credit is tied to the lender's power over the available supply of loan reserves and, more important, this may constitute an "incipient violation of the antitrust laws."⁶³ Second, the FTC Report sets forth the agency's position that a 25% rate of involuntary or coercive tie-ins "is not only significant but unacceptable."⁶⁴ The FTC, like Dr. Vaughan, expressed grave concern that the FRS Study could be misconstrued to suggest that the likelihood of prevalent tying in markets for credit is low.

58. *Id.* at 352.

59. 1979 Hearings, *supra* note 3, at 122-29 [hereinafter cited as FTC Report].

60. *Id.* at 122.

The FTC attached a recent study of penetration rates collected from consumer finance companies by the Commission staff. The study showed, on a state-by-state basis, penetration rates ranging between 90% and 100%. *Id.* at 123; see 1979 Hearings, *supra* note 3, at 361-62. The FTC explained the substantial discrepancy in penetration rate ranges by pointing to certain methodological errors in the FRS survey. FTC Report, *supra* note 59, at 123. These much higher penetration rates were confirmed by a consumer advocate group. 1979 Hearings, *supra* note 3, at 279 (Statement of Robert Sable).

61. FTC Report, *supra* note 59, at 124.

62. *Id.*

According to the Commission report, the FRS Study treated individuals reporting that they had no credit insurance as not purchasing credit insurance. However, if almost 40% had credit insurance but did not know it, then the FRS penetration rates were vastly understated and, more importantly, the likelihood of coercive tying is significantly understated where as many as 40% of credit insurance sales are made without the purchasers' knowledge. *Id.* See also 1979 Hearings, *supra* note 3, at 278 (Statement of Robert Sable) (adjusting FRS Study penetration rates for misperceiving customers).

63. *Id.* at 126.

64. *Id.*

D. Significance of Senate Hearings

The debate over the FRS Study, and the content of the Study, is significant to an analysis of the antitrust implications of credit insurance tying arrangements. First, and most important, the senate hearings provide some raw data with which to tentatively explore the suitability of antitrust analysis to the joint sale of credit and credit insurance. Penetration rates, levels of misunderstanding by purchasers and consumer perceptions of the desirability of credit insurance are critical facts in understanding not only the likelihood of prevalent credit tying, but also the adaptability of antitrust standards to the consumer credit field. For example, low consumer perceptions of the usefulness of credit insurance in light of high penetration rates of joint sales may be sufficient proof of a coercive tying situation. Similarly, high penetration rates may suggest economic power in one or more markets for credit; conversely, they may merely indicate high consumer acceptance of two complimentary and desired products.

Second, a consideration of tying analysis in the discrete setting of credit and credit insurance transactions may permit a critical analysis of current antitrust standards and a tentative explication of further refinements of those standards. Consumer protection laws, as currently written and enforced, may be insufficient instruments of a policy to protect consumers, and, if there exists some likelihood that competitive market structures and performance were being adversely affected by tying conduct, then a strong argument for antitrust enforcement may be advanced.

Third, the datum also suggests certain conclusions concerning the degree and effectiveness of state and federal regulation of credit and insurance institutions and the prevalence of tying behavior. These conclusions have significance not only from the perspective of appropriate policy choices, but also in considering the applicability of exemptions and immunities from the antitrust laws.

IV. TIE-IN ARRANGEMENTS UNDER THE ANTITRUST LAWS

Tie-in arrangements have long been considered illegal under the federal antitrust laws.⁶⁵ Since *International Salt*,⁶⁶ the courts have consistently

65. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947).

66. 332 U.S. 392 (1947). In *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958), the Court defined a tie-in 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." 356 U.S. at 5-6.

The first, or preferred, product is termed the "tying product," while the conditional product is called the "tied" product. To establish the first element to a tying arrangement, it must be demonstrated that a vendor in fact has "two separate products." See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 507 (1969) [hereinafter cited as *Fortner I*]. This requires a consideration of the relationship between the tying and tied products, the individu-

condemned contracts or agreements by which the sale of one product is conditioned upon the sale of another product. Before finding the contract or agreement illegal, there must be a tie between two separate products,⁶⁷ proof that the defendant's activity has affected a not insubstantial amount of commerce in the market for the tied product,⁶⁸ and evidence that the defendant has substantial economic power in the market for the tying product.⁶⁹ An additional requirement to a *per se* tying case, coercion of the purchaser, is sometimes added by the courts, especially in class action lawsuits.⁷⁰

ally or independent utility of each product, and customer perceptions of, or demand for, the products. *See Hirsch v. Martindale Hubbell, Inc.*, 674 F.2d 1343, 1347-48 (9th Cir. 1982); *Principe v. McDonald's Corp.*, 631 F.2d 303, 311 (4th Cir. 1980). *See generally, Blair & Finci, The Individual Coercion Doctrine and Tying Arrangements: An Economic Analysis*, 10 *F.L.A. St. U.L. Rev.* 531, 535-36 (1983) [hereinafter cited as Blair & Finci].

67. *See, Fortner I*, 394 U.S. at 501, 507.

68. *Id.* at 501.

This requirement in antitrust litigation contemplates a demonstration that the amount of commerce foreclosed to competitors in the market for the tied product is not insubstantial or *de minimis* in dollar amount. The Court, in *Fortner I*, stated that, for effect on commerce purposes, "the relevant figure is total amount of sales tied by the sales policy under challenge, not the portion of this total accounted for the particular plaintiff who brings suit." *Id.* at 502.

Therefore, in an antitrust action brought by an individual debtor claiming that the creditor tied the sale of credit to a sale of credit insurance, the court would look to the creditor's total sales of credit insurance made pursuant to a tie-in policy for purposes of demonstrating interstate commerce. If the creditor has made sales in excess of \$60,000 this will be sufficient to meet this requirement. *See United States v. Loew's Inc.*, 371 U.S. 38, 49 (1962).

69. *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 622 (1977) [hereinafter cited as Fortner II]; *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123 (6th Cir. 1981); *Bogus v. Am. Speech and Hearing Ass'n*, 582 F.2d 277 (3d Cir. 1978).

70. *Compare Bell v. Cherokee Aviation Corp.*, 660 F.2d at 1131, *with Bogus v. Am. Speech and Hearing Ass'n*, 582 F.2d at 287. *See also, Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534, 541-42 (9th Cir. 1983) (coercion doctrine in non-class action context).

Where a tying arrangement is explicitly imposed on the buyer by express contractual terms, proof of coercion is generally not required. *Bogus*, 582 F.2d at 287. There are, however, significant problems concerning proof of a tie-in where the alleged conditioning of the sale of one product to the purchase of another is implicit, unarticulated or inferred. *See Bauer, A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 *VAND. L. Rev.* 283, 308-14 (1980) [hereinafter cited as Bauer, *Simplified Approach*]. *See also Varner, Voluntary Ties and Sherman Act*, 50 *S. CAL. L. Rev.* 271 (1977). The problems are essentially twofold. First, since proof of some agreement or conspiracy is necessary to establish jurisdiction under the Sherman Act, some type of agreement to purchase both goods must be shown. Second, the plaintiff must offer proof that the defendant offered to sell the tying product only on the condition that the plaintiff purchased the tied product; that is, that there was in fact a tie-in arrangement rather than the voluntary purchase of two products by the customer. *See Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534, 541-42 (9th Cir. 1983); *Blair & Finci, supra* note 66, at 556-61.

The issue of commonality in class action litigation has created additional difficulties in proof of coercive or involuntary joint sales and, in many cases, the courts have required more stringent proof of individual coercion prior to class certification. *See, e.g., Ungar v. Dunkin' Donuts of Am., Inc.*, 531 F.2d 1211, 1219 (3d Cir. 1976), *cert. denied*, 429 U.S. 823 (1979). *See*

Once these elements have been established, it is often stated that the plaintiff has established a case of "per se" illegality under the antitrust laws.⁷¹ The per se rule in antitrust litigation is one of expediency and clarity. It is a conclusive presumption that certain types of conduct or restrictive activities have little or no redeeming value and that in most applications the restrictive practices harm competition.⁷² Tying arrangements, however, have been treated somewhat differently than traditional per se offenses because the courts have permitted, in limited circumstances, the assertion of justifications for the tie-in.⁷³ Although the conceptual process of reconciling the existence and availability of justifications with a per se rule is difficult, it is clear that defendants in tying cases will be permitted to assert defenses or justifications for the tying arrangement, as where the tie-in is the least restrictive method of protecting manufacturer goodwill in the tying product,⁷⁴ or where joint use of a competitor's product harms the tying product,⁷⁵ or where a tying arrangement facilitates new entry into a market.⁷⁶ Although these justifications or defenses have been given limited application, their potential use in virtually every tying situation suggests the erosion of the per se rule in tying cases and the advancement of reasonable-

also Note, *Tying Arrangements and the Individual Coercion Doctrine*, 30 VAND. L. REV. 755 (1977).

71. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. at 1.

72. See *Ariz. v. Maricopa County Medical Society*, 102 S. Ct. 2466 (1982).

There are a number of business activities which have been accorded per se illegality treatment under the antitrust laws. These include price-fixing (*United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940)), horizontal territorial divisions (*United States v. Topeco Associates, Inc.*, 405 U.S. 596 (1972)) and group boycotts (*United States v. General Motors Corp.*, 384 U.S. 127 (1966)).

Classically, the per se rule has been defined by the Supreme Court, in *Northern Pacific Railway*, as follows:

However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

356 U.S. at 5.

73. See generally Bauer, *Simplified Approach*, *supra* note 70, at 325-27.

74. See, e.g., *Hyde v. Jefferson Parish Hosp. District*, 686 F.2d 286, 291-92 (5th Cir. 1982); *Moore v. James H. Matthews & Co.*, 550 F.2d 1207, 1217-18 (9th Cir. 1977); *Northern v. McGraw Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976), cert. denied, 429 U.S. 1097 (1977).

75. *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

76. *Id.* See Bauer, *Simplified Approach*, *supra* note 70, at 326-27.

ness analysis.⁷⁷

With this brief background of the antitrust analysis of tying arrangements, attention is directed to elements or aspects of the analysis which are implicated by credit insurance tie-ins to sales of credit. Although other elements of a tying arrangement case may present legal and factual issues in an antitrust action,⁷⁸ there are three principal matters for consideration. The first is an examination of legal and economic theories for imposition of tying arrangements and their application to the credit and credit insurance markets. The second matter involves a more particularized review of economic power in the market for the tying produced. This review requires careful

77. See Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 VA. L. REV. 1235 (1980); Bauer, *Simplified Approach*, *supra* note 70; Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

Unlike the rule of per se illegality, the rule of reason contemplates a detailed analysis of the commercial justifications, historical motivations, and economic effects of the activity, and a more substantial burden of persuasion on the antitrust plaintiff. *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

It is perhaps significant to note that while the per se rule is generally applicable to tying cases, the reasonableness standard is always available to test the appropriateness of joint sales, such as where the plaintiff cannot demonstrate the defendant's market power or coercive behavior. *See Fortner I*, 394 U.S. at 499-500 (1969); *Foremost Pro Color v. Eastman Kodak Co.*, 730 F.2d 534, 541 (9th Cir. 1983).

78. For example, a lender may claim that the credit insurance was not issued by the lender, but rather by an independent insurer. Of course, where different vendors provide the tying and tied products, there is no tying arrangement. If, however, the lender and insurer are in a parent-subsidiary relationship, such as a captive insurer and a finance company or a bank, the courts would conclude that a single vendor is making sales of both credit and insurance. *See Fortner I*, 394 U.S. at 507 & n.4. *See generally* *Independence Tube Corp. v. Copperweld Corp.*, 1981-82 Trade Cas.(CCH) ¶ 64,969 (7th Cir. 1982), *cert. granted*, ____ U.S. ____ (1983). Similarly, where the lender issues credit insurance pursuant to a group life policy, an issue of different sellers may arise. In that situation the creditor is the insurance policy holder and not an agent of the insurer, although the creator is the vendor of the credit insurance. *See supra* note 8. Cases arising in the franchise context where franchisors have committed their franchisees to purchases of materials from third parties indicate that courts will treat the situation as a tie-in arrangement. *See, e.g.*, *FTC v. Texaco, Inc.*, 393 U.S. 223, 228 (1968); *Shell Oil v. FTC*, 360 F.2d 470, 476 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

Another potential issue concerns the amount of interstate commerce in the tied product. However, as previously discussed, it seems unlikely to present a substantial impediment because the aggrieved purchaser can aggregate all sales of the tied product made pursuant to the tying policy and the threshold amount is relatively insignificant. *See supra* note 68.

Finally, questions may arise concerning statutory jurisdiction over a tying arrangement case. Section 1 of the Sherman Act, section 3 of the Clayton Act, and section 5 of the Federal Trade Commission Act are generally applicable to tie-in cases. Bauer, *Simplified Approach*, *supra* note 70, at 285. The broadest statutory vehicle, section 5 of the FTC Act, can only be enforced by the Commission, not private parties. *See Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973). Further, section 3 of the Clayton Act applies only to "goods . . . or other commodities," which would not include financing, insurance or credit transactions. However, section 1 of the Sherman Act has been applied to cases involving intangible products, such as credit. *See Fortner I*, 394 U.S. at 495.

attention to the *Fortner* litigation in the United States Supreme Court and a consideration of economic power in credit markets. Finally, coercion as a substantive issue and a procedural requirement in credit tying cases is considered.

A. Theories of Tying Arrangements

There are several legal and economic theories concerning the reasons for and effects of tying arrangements. As might be expected, these theories are often divergent and conflicting, but they focus attention on the probable anticompetitive, or beneficial, effects of tie-ins. Perhaps more important, the theories require consideration because the Supreme Court has strongly suggested that fundamental to finding a tying arrangement illegal is a cogent explanation of its economic perniciousness.⁷⁹

The Supreme Court, in *Northern Pacific Railway v. United States*,⁸⁰ stated that tying arrangements accomplish two pernicious effects: foreclosure of competitors' access to purchasers and coercion of purchasers. Thus, tying arrangements are frequently condemned for the disparate reasons that they unfairly infringe upon competitive behavior and may impair the maintenance and continuance of economically efficient market structures and performance.⁸¹ It is important to note that the Supreme Court has never

79. *Fortner II*, 429 U.S. at 621-22.

80. 358 U.S. 1, 6 (1958). In *Northern Pacific Railway*, the Court defined those effects as follows:

For our purposes a tying arrangement may be defined 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. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products.

Id. at 5-6 (citations and footnotes omitted).

There are two main manifestations of the foreclosure effect of a tying arrangement. First, it may prevent present competitors from having access to customers, and second, it may impede the development of potential competition in either (or both) product market(s) by erecting entry barriers. Bauer, *Simplified Approach*, *supra* note 70, at 287-88. Opportunities for entry may be limited by the appearance that minimum competitive scale requires the sale of both the tying and tied product, or by the threat of predatory conduct in the market. See Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U.L. Rev. 661, 670 (1982) [hereinafter cited as Craswell, *Tying in Competitive Markets*]; Edwards, *Economics of "Tying" Arrangements: Some Proposed Guidelines for Bank Holding-Company Regulation*, 6 ANTITRUST L. & ECON. REV. 87, 98 (1973) [hereinafter cited as Edwards].

81. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 152, at 445 (1977).

[T]he hostility to tying embodied in the Act and reflected in the cases may have more to do with notions of appropriate competitive behavior (conceptions about fair oppor-

accorded any weight or relative significance between these objectionable effects or, for that matter, suggested that a particular tying arrangement must exhibit both effects before it may be condemned as *per se* illegal.

Economic rationales for tying arrangements are quite varied and fall into four principal categories. First, it has been argued that tying arrangements permit the leveraging of economic power in the market for the tying product into the tied product market.⁸² According to theory, this permits the proponent of the tie to extract a second supracompetitive profit in the market for the tied product and to create a monopoly in that market. Other commentators have argued that the prospect of recovering excessive profits in two markets is very unlikely and that the vendor's ability to garner a second monopoly in the tied product market has nothing to do with its ability to monopolize or exert economic power in the tying product market.⁸³

Second, it has been contended that tying arrangements are convenient methods of capturing consumer surplus caused by differing marginal utilities for the tying product and the legal constraints on price discrimination.⁸⁴

tunity or access) and with the polar concepts of coercion and free choice, than it has to do with the efficiency or allocation consequences of competitive structure and process.

Id.

82. Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957) [hereinafter cited as Bowman, *Leverage Problem*]. See also Bauer, *Simplified Approach*, *supra* note 70, at 292-93, 298-305.

83. See R. BORK, THE ANTITRUST PARADOX 365-81 (1978); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 171-84 (1976); Bowman, *Leverage Problem*, *supra* note 82, at 29-36.

The argument, essentially, is that the ability to monopolize or control prices is directly related to individual demand elasticities for the tying product and the tied product, and absent totally inelastic demand in both markets, an increase in the price of one product will result in the decrease in the price of the other. In other words, the ability to exact supranormal profits or to extend monopoly power into an another market is constrained by individual demands for both products.

It has been argued, however, that the leverage effect occurs in occasional circumstances, and that even without an intention of monopolizing the tied product market, a seller may be able to actualize a strategy of foreclosure. See Bauer, *Simplified Approach*, *supra* note 70, at 298-305. A seller may impose tie-ins as a "revenue-maximization" (or cost-minimization) measure, rather than to achieve a monopoly, but irrespective of the vendor's motive, competitors may be foreclosed from competition in markets and buyers' range of choice may be limited. *Id.*

84. Bauer, *Simplified Approach*, *supra* note 70, at 293-94; Burstein, *A Theory of Full-Line Forcing*, 55 Nw. U.L. Rev. 62 (1960).

The aspects to this theory concern first, that consumer surplus is created whenever the demand schedule for a product is sloping downward and there are marginal utilities for the product above its market price. A second aspect is that price discrimination laws, or rational market behavior, prohibit making sales match marginal utility value, which effectively means that some consumers will purchase the product at a price below their utility value, and in the aggregate, the vendor foregoes the consumer surplus, and additional profits. See POSNER & EASTBROOK, ANTITRUST CASES, ECONOMIC NOTES AND OTHER MATERIALS, 804-09 (2d ed. 1981). Tying arrangements permit the vendor to effect price discrimination and garner the consumer surplus by charging an above normal price for the tied product and a below monopoly price for the tying product. Bauer, *Simplified Approach*, *supra* note 70, at 293-94; Edwards, *supra* note

Therefore, the two-product vendor uses the tied product as a metering device to test the intensity of purchaser interest in the tying product. By charging an above normal price for the tied product, the vendor recoups monopoly profits foregone on sales of the tying product and garners otherwise foregone consumer surplus.⁸⁵

Third, tying arrangements may be useful in avoiding price constraints imposed on the tying product, such as by government-imposed price ceilings or floors, or similarly, in rationing tight supplies of the tying product where normal market mechanisms are inapplicable or superseded.⁸⁶ Finally, tying may permit a multi-product vendor to achieve economies of scale in the selling of two products as a package, and similarly, may enhance protection of the vendor's goodwill in the tying product.⁸⁷

In the specific context of credit insurance tying, several of the theories of tying arrangements may explain the existence and persistence of credit insurance tie-in arrangements. First, joint sales of credit and credit insurance may merely represent a method of lowering transaction costs, such as consumer search costs and lenders' administrative expenses, which are associated with package transactions involving complex goods.⁸⁸ The benefit to lenders of the joint sales is clear in this situation; the consumer savings, however, if any, are less clear. The ability of such joint sales to lower consumer transaction costs presupposes high independent consumer interest in credit insurance, but the Vaughan Study and the FTC Report indicate great customer indifference to, or ignorance of, the existence of credit insurance in their credit transaction.⁸⁹ In other words, ameliorating search and other transaction costs becomes significant only after a consumer has independently expressed a interest in the product.

Second, credit insurance tying, and the growth of affiliated lender and insurance companies, may indicate the operation of a leveraging concept as

80, at 92-96.

85. See Bauer, *Simplified Approach*, *supra* note 70, at 293-94; Craswell, *Tying in Competitive Markets*, *supra* note 80, at 668-69.

86. See Markovits, *Tie-ins and Reciprocity: A Functional, Legal, and Policy Analysis*, 58 Tex. L. Rev. 1363, 1383-85 (1980); Edwards, *supra* note 80, at 89-95; Bowman, *Leverage Problem*, *supra* note 82, at 21.

87. See Bauer, *Simplified Approach*, *supra* note 70, at 296; Bowman, *Leverage Problem*, *supra* note 82, at 29.

88. See 1979 Hearings, *supra* note 3, at 7 (comments of John Heimann, Comptroller of the Currency).

The FRS Study suggests as much in its conclusion "that a sizeable minority of credit customers voluntarily place their property and casualty insurance with their lender because they value the convenience of the joint purchase more than the benefits they could obtain by successfully searching for alternative sources of insurance." FRS Study, *supra* note 26, at 22. The authors concluded that this explanation was even more significant in the case of credit life and disability insurance because the premium costs are small compared with search and shopping costs." *Id.* at 22-23.

89. See *supra* notes 57-61 and accompanying text.

credit providers attempt to extend the market power they hold in markets for credit into the market for credit insurance. However, in a general and national sense, the market for credit appears to have a great many members, such as banks, finance companies, and retailers and many of them provide credit insurance. Given the significant number of credit institutions, a rational objective of gaining and exercising power in the market for credit seems implausible, although it is becoming increasingly important for participants in those markets to maintain product lines of both credit and insurance.⁹⁰ Similarly the growth in captive insurers, whose only function is to insure credit transactions by the affiliated financial institution, may suggest greater opportunities for market leveraging. However, since state usury laws govern credit rates, and state insurance commissions are supposed to monitor agent commission provisions and insurance premium rates, the opportunities for collection of supracompetitive profits in either (or both) markets may be substantially diminished.⁹¹

The fact of regulatory oversight of interest rates, however, suggests a more plausible explanation for credit insurance tying. As suggested by the Vaughan Study and the FTC Report, credit tying may be a method of avoiding interest ceilings imposed by state usury laws.⁹² In a tight market for credit, a debtor would pay the prevailing interest rate on the loan, al-

90. Indeed, the entire background for the 1979 Hearings involves strong insurance industry reaction to a growing movement of banks and bank holding companies into insurance markets. *See Schweitzer & Halbrook, supra* note 19, at 750-59.

The large number of credit providing institutions, and the seeming implausibility of creditor strategies to monopolize national or regional credit market, should not obscure the facts, discussed subsequently, that there are many local or territorial "submarkets" for credit and that antitrust analysis may require careful consideration of both relevant product markets and relevant geographic markets to determine market power and anticompetitive effects. *See Note, Credit As a Tying Product*, 69 COLUM. L. REV. 1435, 1446-47 (1969).

91. *See* 1979 Hearings, *supra* note 3, at 577-80 (Statement of Golembé Associates).

This point is subject to a number of important qualifications. First, some lenders, such as finance companies, are not subject to the same degree of regulatory oversight as other lenders, for example, banks. Secondly, usury laws vary significantly among the states, both with respect to their limits and to their very existence. *See generally Note, Usury Legislation—Its Effects on the Economy and A Proposal for Reform*, 33 VAND. L. REV. 199, 206-8 (1980). Recently, more states are lifting restrictions on credit interest charges on non-revolving credit arrangements. Third, state regulation of insurance practice varies widely, and consistent, strong enforcement is certainly not the norm. These qualifications merely suggest that a leveraging strategy may explain the existence of credit tying arrangements in some discrete situations.

92. *The Vaughan Report, supra* note 50, at 317-18. Vaughan suggests that price ceilings on interest rates may not permit lenders to raise prices to a point where the supply of credit equals its demand, particularly in tight money situations. Obviously, a tight money situation gives a lender with a supply of money some greater economic power over its competitors who do not have such resources. However, because of state usury laws, a lender having an excess supply is unable to take advantage of the relatively inelastic demand for its money unless it can recover the value of the excess demand in some other manner, such as by tying arrangements. *Id.* *See also Klebaner, Credit Tie-ins: Where Banks Stand After the Fortner Decisions*, 95 BANKING L.J. 419, 441 (1979) [hereinafter cited as Klebaner, *Credit Tie-ins*].

though absent the usury ceiling the creditor could obtain a higher market rate, plus some added amount for premiums on the credit insurance. In this situation, assuming that credit insurance premium rates are inordinately high, the creditor-insurer can capture a price on the credit which is above the ceiling price and closer to (and perhaps in excess of) a "market" price. Conclusions concerning the effectiveness of this strategy would require, in each instance, consideration of the relative price of credit insurance from the lender, availability of other sources of credit, and the proximity of the lender's interest rates to usury limits.⁹³

Another plausible theory of tying considers credit insurance sales as a method of price discrimination to impose more stringent credit terms on low-income individuals who are simultaneously more vulnerable to coercive credit practices and less able to find alternative sources of credit.⁹⁴ Thus, although the market for credit may be described as competitive because there are many vendors, for some classes of debtors there may be very little choice with respect to sources of credit. Creditors providing credit to low-income individuals may find it beneficial to impose additional terms or conditions on customers who, as a practical matter, have no (or few) alternative sources of credit.

These theories do not necessarily presuppose that tying occurs for any or all of the suggested reasons. It does, however, suggest that there may be economic reasons for engaging in tying behavior in many consumer credit situations. Whether or not a lender is able to indulge in tying behavior, and make such behavior profitable, depends in significant part upon its market power.

B. Market Power and the Fortner Litigation

In an antitrust case under the Sherman Act, it must be demonstrated that the vendor has substantial economic power in the market for the tying product.⁹⁵ If the purchaser cannot demonstrate that the vendor has appreciable economic power in that market, the case may still proceed under the broader rule of reason analysis.⁹⁶ However, the proof of appreciable eco-

93. See generally Edwards, *supra* note 80, at 95-97.

94. See *infra* notes 148-50.

95. See *Fortner II*, 429 U.S. 610 (1977); *Fortner I*, 394 U.S. 495 (1969); *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 686 F.2d 286 (5th Cir. 1982); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 123 (6th Cir. 1981).

96. *Fortner I*, 394 U.S. at 501; *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980). Cf. Bauer, *Simplified Approach*, *supra* note 70.

In a recent article, it was argued that antitrust tying analysis in competitive, or nearly competitive, markets is too imprecise to accomplish public policy objectives and that consumer protection legislation is more appropriate to control abuses in these markets. Craswell, *Tying in Competitive Markets*, *supra* note 80, at 663-64. Therefore, according to the author, the antitrust laws should be displaced in favor of consumer protection norms and that neither form of antitrust analysis was an appropriate tool of government policy in this area. *Id.* at 700. The

nomic power is neither precise nor uniform, and the courts have considered several indicia of market power as sufficient to demonstrate this element.

In the most obvious instance, economic power may be shown by a patent or copyright on the tying product.⁹⁷ Since an underlying concern of Sherman Act analysis in the area of tying arrangements is the improper exercise of monopoly power, economic power in the tying product may also be demonstrated by "comparative marketing data" showing the vendor's relative dominance in the market.⁹⁸ For example, in *Times-Picayune Publishing Co. v. United States*,⁹⁹ the government attacked, under section 1 of the Sherman Act, a newspaper publisher's requirement that advertisements in the morning paper also be carried in that publisher's afternoon paper. The Court concluded that the vendor's sales of forty percent of newspaper advertising did not confer sufficient market dominance to be actionable.¹⁰⁰

Economic power may also be demonstrated by the vendor's ability to impose the tie in all or many of the transactions involving the tying product. In *Northern Pacific Railway Co. v. United States*,¹⁰¹ the Court found that the Railway, which had been accused of tying transportation agreements to the sales and leases of land adjacent to its tracks, had substantial economic power because "several million acres" of land was subject to the tie-in.¹⁰² The Court held that "the very existence" of the tremendous number of ty-

adequacy of this view is, however, dependent upon a couple of factors. First, the ability to measure, with even rough precision, whether or not a market is "competitive" is relevant. Second, whether market power analysis in any case permits rational and consistent judgments about the applicability of antitrust or consumer protection laws, and by whom will those judgments be made. And, third, the ability of consumer protection laws and enforcement officials to adequately protect consumer choice and competitive entry.

97. See, e.g., *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947). See also *Dam, Fortner Enterprise v. United States Steel: "Neither a Borrower, Nor a Lender Be,"* 1969 Sup. Ct. Rev. 1, 19-23 (1969) [hereinafter cited as *Dam, Fortner I*].

98. See, e.g., *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953).

99. 345 U.S. 594 (1953).

100. *Id.* at 611.

The Court analyzed a broad array of statistical information concerning total and relative sales of advertising lineage by the various newspapers in the New Orleans area, relative foreclosure rates attributable to the defendants' tying policies, and the effect of the policies on revenues. *Id.* at 615-22.

101. 356 U.S. 1 (1957).

102. *Id.* at 7.

The tying arrangement in *Northern Pacific Ry.* was somewhat unique in that the agreements selling or leasing the land contained "preferential routing clauses which compelled the grantee or lessee to ship over its lines all commodities produced or manufactured on the land, provided that its rates (and in some instances its service) were equal to those of competing carriers." *Id.* at 3.

It has been suggested that the provision waiving the tie may have been a device to facilitate collusion by the railroads. Cummings and Ruhter, *The Northern Pacific Case*, 22 J.L. & Econ. 329, 341-43 (1979). It has also been argued that the "preferential routing" clauses were methods of offering rate reductions to potential shippers without running afoul of ICC rate regulations. R. BORK, THE ANTITRUST PARADOX at 376.

ing arrangements was "compelling evidence" of the Railway's economic power.¹⁰³

The requisite market power may be inherent in the nature of the tying product, such as where it has "uniqueness in attributes" or "desirability to customers."¹⁰⁴ For example, in the *Northern Pacific Railway* case, the Court observed that the tying product (land), was adjacent to railroad track facilities and was "strategically located" and "often prized by those who purchased or leased it and frequently essential to their business activities."¹⁰⁵ Similarly, in *United States v. Loew's Inc.*,¹⁰⁶ a case involving block-booking of films, the Court held that a more intuitive, and less rigorous, review of the tying product's appeal to customers may be permissible, and, in that case, it was obvious that artistic variations made each film unique.¹⁰⁷

The theme of a tying product's uniqueness was applied to the market for loans or credit in the *Fortner* litigation.¹⁰⁸ In the 1950's, the Homes Division of United States Steel Corp. (Homes Division), which sold packaged or prefabricated homes, determined to increase its penetration of the housing market in the Louisville, Kentucky, area by, among other things, stressing favorable credit arrangements through its Homes Credit Corporation (Credit Corporation).¹⁰⁹ It approached a local builder and developer, Fortner, to construct a U.S. Steel homes subdivision, and extended discussions and negotiations ensued between Fortner and the Homes Division.¹¹⁰ In essential part, the arrangement contemplated 100% financing of the Fortner's project by U.S. Steel Credit at a six percent interest rate, and the loans were to be made by way of advances to Fortner for use as working capital. Following a deterioration and breakdown in relations between the parties, Fortner filed suit against the Homes Division and Credit Corporation, claiming that they conspired to force him to purchase U.S. Steel homes "at artificially high prices" by tying them to extensions of credit by Credit Corporation.¹¹¹

103. *Northern Pacific Ry. Co. v. United States*, 356 U.S. at 7-8.

104. *United States v. Loew's Inc.*, 371 U.S. at 45.

105. 356 U.S. at 7.

106. 371 U.S. 38 (1958).

107. *Id.* at 45.

108. *Fortner II*, 429 U.S. at 47; *Fortner I*, 394 U.S. at 507. See Klebaner, *Credit Tie-ins*, *supra* note 92.

109. The Credit Corporation, a wholly-owned division of United States Steel, was established in the mid-1950's solely for the purpose of providing financing credit in conjunction with the sale of homes by the Homes Division. However, Credit Corporation financed not only the houses but also the purchase of land upon which the houses were located. See Dam, *Fortner I*, *supra* note 97, at 3.

110. *Id.* at 3-8.

In an influential article on *Fortner I*, Dam makes an important note that Fortner was a skilled and apparently successful businessman who actively negotiated the terms of the agreement with Credit Corporation and the Homes Division. *Id.* at 8.

111. *Id.* at 6-8.

Following discovery, the defendant's motion for summary judgment was granted by the trial court. The United States Supreme Court reversed the grant of summary judgment, in what may be considered a strong admonition against granting summary judgment in complex antitrust cases.¹¹² On the issue of proof of "sufficient market power" in credit, the tying product, the Court utilized a two-pronged review of the lower court decision. First, the Court implied that the defendants may have sufficient economic power merely because they in fact were able to impose the tie-in on "any appreciable number of buyers within the market."¹¹³ More significantly, the Court indicated that the defendant's credit may be "unique" in relation to its competitors' available supply of credit and that the uniqueness may stem from legal limitations on its competition or from the vast size of the parent, U.S. Steel.¹¹⁴ Although not clearly articulated, the Court indicated that universal or wholesale imposition of the tying arrangement was not necessary, but merely that:

despite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—can be forced to accept the higher price because of their stronger preference for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product.¹¹⁵

The Court in *Fortner I* held that summary judgment was inappropriate because the plaintiff should have been given the opportunity to demonstrate that the terms and interest rate of the credit were unique and that the uni-

Apparently, the breakdown in relations between United States Steel and Fortner was precipitated by a substantial number of complaints concerning the prefab houses shipped by the Homes Division. *Id.* Fortner's lawsuit alleged violations of Sections 1 and 2 of the Sherman Act. *Id.* at 7.

112. *Fortner I*, 394 U.S. at 500. See, Note, *Credit as a Tying Product*, 69 COLUM. L. REV. 1435 (1969).

Justice Black, writing for the Court, cautioned that summary dismissal standards are too insensitive for review of antitrust cases. See also *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Notwithstanding the clear pronouncement against summary judgment, the Court did not reverse solely on the procedural standard, but further considered the issue of demonstrating economic power in a tying arrangement case. *Id.* at 504-09.

113. *Fortner I*, 394 U.S. at 504.

114. *Id.* at 505-06.

One theme underscoring the Court's analysis of economic power in the tying product was the vast size of United States Steel. *Id.* at 509. The Court stated that U.S. Steel was a "big company with vast sums of money in its treasury," which perhaps suggests judicial concern about predation in the market for credit by the defendants. *Id.* If predation was a concern, however, it was largely unarticulated by the Court. See Dam, *Fortner I*, *supra* note 97, at 26-28. Instead, the Court's opinion conveys strong, but critically unexamined or explained, concerns about the parent's size in the steel industry. *Id.* at 509.

115. *Fortner I*, 394 U.S. at 503-04.

queness permitted the defendants to force the plaintiff into the simultaneous purchase of prefab homes. The Court also stated that even if the plaintiff could not demonstrate the defendants' market power in the market for credit, the plaintiff must still have an opportunity to prove illegality of the joint sale under the rule of reason.¹¹⁶

Following remand to the district court, which found that the defendants possessed economic power in the market for the tying product, and which was affirmed on appeal,¹¹⁷ the Supreme Court reviewed issues concerning credit as a tying product and the degree of uniqueness necessary for a finding of market power.¹¹⁸ Fortner advanced essentially four arguments concerning the defendants' market power. First, that Credit Corporation was owned by one of the largest firms in the country; second, that Credit Corporation had imposed ties on significant numbers of customers; third, that Homes Division charged a non-competitive price for the prefab homes; and, finally, that the 100% financing was "unique."¹¹⁹

In contradistinction to its decision in *Fortner I*, the Court in *Fortner II* required the plaintiff to prove sufficient theoretical and economic underpinnings for the assertions of economic power.¹²⁰ In the first place, the Court held that there was nothing in the record to suggest that the relationship between the Homes Division and Credit Corporation gave the latter any power in the credit market.¹²¹ In fact the evidence tended to show that Credit Corporation was not particularly profitable and that its real corporate function was a mere accommodation to customers of the Homes Division.¹²² The Court also debunked the argument that power was demonstrated by the significant number of ties by the defendants, although its reasoning was curious.¹²³ Justice Stevens pointed to the prevalent economic

116. *Id.* at 500.

Further, the plaintiffs in *Fortner I* argued that uniqueness could be demonstrated by the terms of credit and financing offered by the defendants. Dam, *Fortner I*, *supra* note 97, at 27. However, Justice Black's opinion carried a note of caution to the plaintiff:

We do not mean to accept petitioner's apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are "unique and unusual." We do mean, however, that uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors.

Fortner I, 394 U.S. at 505. This admonition, and Fortner's failure to heed it, proved to be critical as the litigation progressed back through the federal courts.

117. *Fortner Enter., Inc. v. United States Steel Corp.*, 523 F.2d 961 (6th Cir. 1976).

118. *Fortner II*, 429 U.S. 610 (1977). See generally Klebaner, *Credit Tie-ins*, *supra* note 92, at 420-34.

119. *Fortner II*, 429 U.S. at 614.

120. Dam, *Fortner I*, *supra* note 97, at 8-10.

121. *Fortner II*, 429 U.S. at 615.

122. *Id.* at 615, 617 n.4.

123. *Id.* at 617-18.

The Court first stated that imposition of a significant number of tie-ins by the defendants says nothing concrete about their economic power in the credit market, and that the credit tie-in by the defendants did not fit accepted notions of "economic leverage." *Id.* at 617. It is note-

theory that tie-ins are methods of accomplishing leverage between markets or of accomplishing price discrimination, but concluded that Fortner made no agreement to purchase "varying quantities of the tied product (prefab homes) over an extended period of time."¹²⁴ Clearly, the Court signaled the need for a sound economic rationale underlying a plaintiff's claim of tying, and the plaintiff's burden to produce evidence supporting a claim that the defendant had power in the tying product market.

The Court also attacked Fortner's contention that the relatively high price on the U.S. Steel homes demonstrated market power, by suggesting that this fact may be "consistent with the possibility that the financing was unusually inexpensive and that the price for the entire package was equal to, or below, a competitive price."¹²⁵ Moreover, the Court stated that this possibility remained unchallenged by Fortner, irrespective of the fact that the Homes Division made a number of joint sales.¹²⁶ Instead of relying upon certain quantitative factors which Fortner claimed demonstrated the defendants' market power in credit, the Court tossed additional evidentiary hurdles at the plaintiff, most notably a responsibility to dispel all inferences that the tying arrangements were intended to enhance price competition in

worthy that the Court did not attempt to accommodate the U.S. Steel credit tie to other economic theories of tying. *See supra* notes 84-87 and accompanying text.

However, in discussing Fortner's argument that excessive prices on the homes was evidence of economic power, the Court revised the "host of tying arrangements" approach advanced by the Court in *Northern Pacific Railway*, but held that approach "depends upon the absence of other explanations for the willingness of buyers to purchase the package." *Id.* at 618, n.10. The Court then distinguished the *Northern Pacific Railway* case by stating that "this case differs from *Northern Pacific* because use of the tie-in in this case can be explained as a form of price competition in the tied product, whereas that explanation was unavailable to the *Northern Pacific Railway*." *Id.*

In viewing the tying transaction as a "package purchase of homes and financing," the Court curiously placed an additional burden on the plaintiff to negate any possible inference that the tie-in had procompetitive attributes. *Id.* at 618.

124. *Id.* at 617. Although the Court's recitation of economic theories of leverage and price discrimination as objectives of tying arrangements seems indistinct, (*cf.* Bauer, *Simplified Approach*, *supra* note 70, at 292-96), it did indicate a belief that the joint sale of credit and homes was likely to have as much of a procompetitive effect as an anticompetitive effect. While it seems that this conclusion may be proper in this case, where Fortner had ample warning about sufficient proof of economic power in the credit market, (*see supra* note 116), and failed to do a comprehensive credit market analysis, (*see* Fortner II, 429 U.S. at 622 n.15), it is not altogether clear that the additional proof requirement on antitrust plaintiffs is warranted. Tie-in arrangements are *per se* illegal because, *inter alia*, they foreclose competition in the tied product market. Therefore, and notwithstanding the Court's seeming rigidity on the necessity for sound theoretical underpinnings for the plaintiff's contentions, the tying arrangement foreclosed sales of homes to U.S. Steel's competitors and provided certain benefits to U.S. Steel having nothing to do with the competitiveness of its product. *Cf.* Bauer, *Simplified Approach*, *supra* note 70, at 297-305.

125. Fortner II, 429 U.S. at 618.

126. *Id.*

the market for the tied product.¹²⁷ At the very least, this seems to be a matter of defense to an established case of tying and is unusual in a *per se* case.¹²⁸

Finally, the Court considered *Fortner*'s main argument that the defendants' credit terms were unique and that proof of uniqueness gave rise to a presumption of economic power. Although the Court reiterated that uniqueness can presumptively prove power, the Court also stated that the vendor must have power to raise prices or impose burdensome terms which a seller in a competitive market cannot impose.¹²⁹ Obviously, the Court's recitation of these qualifications undercuts both the concept of an evidentiary presumption and its earlier cases creating such a presumption.¹³⁰ The Court, however, returned to a theme articulated in *Fortner I*, that a tying product's uniqueness may stem either from legal recognition, as demonstrated by patents or copyrights, or from inherent or physical characteristics, such as land, which cannot be shared by competitors.¹³¹ If, as in the case of credit, uniqueness stems from economic considerations, the plaintiff must demonstrate that the tying product possesses some advantage unshared by competitors in the market for the tying product.¹³² According to the Court, *Fortner* failed to demonstrate that Credit Corporation had unique financing capabilities or "cost advantage over its competitors," and therefore the inexpensive credit "proves nothing more than a willingness to provide cheap financing in order to sell expensive houses."¹³³

127. See *supra* note 124.

128. See *supra* notes 123-24.

129. *Fortner II*, 429 U.S. at 620.

In this respect, *Fortner II* seems to retreat from the Court's opinions on economic power in *Northern Pacific Railway* and *Loew's*, by suggesting that while some tying products may be presumptively unique, as where physical or legal attributes confer power, other products may be unique due to "economic" factors and each product must be evaluated *sui generis*. *Id.* at 621. In the case of credit, the Court seemed to suggest that it was not *sui generis*, a unique commodity, and indeed, the favorable rates and terms in that case were not demonstrably unique. *Id.* at 623. That does not mean, however, that interest rates and credit terms can never be unique in an economic sense. They may be very distinct under some circumstances. Such distinctiveness would stem from factors like regulatory controls and rules, supply of credit in the relevant market, uncommitted reserves, and institutional loan policies. See *Costner v. The Blount Nat'l Bank*, 578 F.2d 1192 (6th Cir. 1978); Note, *Credit as a Tying Product*, 69 COLUM. L. REV. 1435, 1445-53 (1969).

130. See *Fortner II*, 429 U.S. at 619 & n.12.

131. *Id.* at 620.

132. *Id.*

133. *Id.* at 622.

The *Fortner II* Court repeatedly returned to the plaintiff's failure of proof.

Quite clearly, if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit—or to incur greater risks—than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market. Yet this is, in substance, all that the record in this case indicates.

Id. at 621-22.

C. Market Power and Credit Insurance Tying

The *Fortner* litigation was helpful in reforming thought concerning the use of credit as a tying device. From that litigation, a number of insights concerning attempts to tie products to the sale of credit have been gained. First, the Court established that credit may be a tying product and a credit transaction may be a tying arrangement.¹³⁴ Second, a plaintiff claiming that a credit institution has imposed a tie-in must articulate and demonstrate a cogent theory concerning the economic utility of the defendant's tying conduct and the anticompetitive effect of the conduct.¹³⁵ Third, the defendant must have economic power in the market for the tying product and that power may be demonstrated by some power over price, some unique characteristics not shared by its competitors, or by data suggesting that the defendant has been able to impose the tie-in arrangement in a vast number of situations. Fourth, even if the plaintiff cannot demonstrate that the defendant has market power in the tying product, the plaintiff may be able to demonstrate that the practice is unreasonable.¹³⁶

A tying arrangement linking the provision of credit insurance to the sale of credit is, in most instances, distinguishable from the tying arrangement in *Fortner* in several important respects. First, the plaintiff in *Fortner* was a competent and self-sufficient businessman who took an active and aggressive part in negotiations with Credit Corporation and the Homes Division over the terms of the agreement. In many, if not most, credit insurance tying situations, the transaction will involve debtors with modest or negligible expertise or experience with debt instruments, insurance terms, and little access to advice on legal duties. Second, the *Fortner* tie-in was explicit; it was set forth in the contract.¹³⁷ In many credit transactions, the tie-in will be

Fortner attempted to demonstrate uniqueness in the credit market by showing that he obtained 6% interest at a time in which the prime rate was 4.5%, that the loans were not personally guaranteed by any officers of Fortner Enterprises, and that Credit Corporation provided 100% financing. See Klebaner, *Credit Tie-ins*, *supra* note 92, at 423-24. However, Fortner failed to produce any evidence of credit terms offered U.S. Steel's competitors, and the Court was unwilling to presume that the credit terms offered by Credit Corporation were unavailable in the market and therefore "unique." *Fortner II*, 429 U.S. at 622 n.15.

134. A major point of contention within the Court was whether there were two separate products being tied, or whether the transaction was a single product. Justice Black, in *Fortner I*, distinguished usual credit sales in which the product and the financing were a single product from the credit transactions in the case. 394 U.S. at 507. See also Dam, *Fortner I*, *supra* note 97, at 13-14 (discussing the dissenting opinion of Justice Fortas in *Fortner I*). This seeming distinction was never adequately resolved in either *Fortner I* or *Fortner II*. See *Fortner II*, 429 U.S. at 622-23 (Burger, C.J., concurring).

An arrangement tying credit with credit insurance is neither a "single product" nor an "ordinary credit sale" because the credit is obtained to purchase some product; the credit insurance transaction is purely ancillary to the product financing arrangement.

135. See *supra* note 123.

136. See *supra* note 77 and accompanying text.

137. See Dam, *Fortner I*, *supra* note 97, at 5-6.

accomplished covertly (for example, where the lenders' officer includes credit insurance without the debtor's knowledge) or verbally (for example, where a loan officer insists upon or otherwise implies the need for credit insurance notwithstanding disclosures required under Truth-in-Lending). Third, U.S. Steel and its Homes Division were not primarily in the business of providing credit; the provision of credit was merely an accommodation to assist the sale of Home Division products. Conversely, in most consumer credit ties, the insurance provider is primarily in the business of selling the tying product, credit. Fourth, in *Fortner* the plaintiff did not, according to the Court, have any cogent theory of the defendants' anticompetitive objective for imposing the tie. However, in most tying arrangements involving consumer credit, the creditor desires to impose a tie for several pertinent reasons, including the accomplishment of illegitimate objectives.¹³⁸ Finally, the *Fortner* Court found that the alleged uniqueness of the credit tying product was merely its inexpensiveness in relation to other sources of credit in the area. Moreover, for many individuals the availability of credit, rather than the relative price of credit, is the critical factor affecting the lender's ability to impose additional terms or conditions on the credit transaction.¹³⁹

The preceding discussion suggests that credit insurance tying arrangements may be subject to the Sherman Act and be held *per se* illegal. However, the *Fortner* litigation compels further attention to proof of economic power in the market for credit, and to judicial application of the *per se* rule. Several matters bear on the proof of economic power. First, the 1979 Hearings demonstrate that lenders are able to obtain joint sales of credit and credit insurance in a significant percentage of credit transactions and that it is probable that a substantial number of these tie-ins are involuntary.¹⁴⁰ Penetration rates of involuntary ties ranged between 45 percent to 95 percent, and even the FRS Study pointed out significantly higher penetration rates for some providers of credit, such as finance companies.¹⁴¹ This "host of tying arrangements" is reminiscent of the Court's approach in *Northern Pacific Railway* and *Loew's*, and presents some credible proof of economic power in a credit insurance tying case where the defendant sells both credit and credit insurance and has a significant number of joint sales.

138. See *supra* notes 88-94 and accompanying text.

139. See *supra* note 94 and accompanying text.

The unavailability of the tying product from any vendor other than the defendant has been recognized as a critical factor by other courts. For example, in *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123 (6th Cir. 1981), the defendant, a fixed-base airport operator subleasing space to the plaintiff, was found to have economic power over the tying product, the available space. *Id.* at 1127-30. The court, distinguishing *Fortner II*, found economic power because there was an absence of proof that anyone would have offered the plaintiff a leasehold on similar terms. *Id.* at 1130. According to the court, the absence of other available space led to an inference that the defendant had economic power in the tying product market. *Id.*

140. See *supra* notes 55-56, 60.

141. See *supra* notes 39, 41.

It may be argued, however, that any lender, particularly in markets for consumer credit, will be constrained by substantial competition in the credit market and will be unable to maintain the tying policy over any appreciable period of time because consumers will respond to coercive practices by going to another creditor.¹⁴² Distinguishing the *Northern Pacific Railway* case, the Court in *Fortner II* held that a supercompetitive price on the tied product or the imposition of the tie-in in a significant number of transactions may be proof of economic power in the tying product in the absence of some credible explanation by the defendant of the procompetitive attributes of the tie-in.¹⁴³ With respect to credit insurance, it has been conceded that the premium rates for most forms of credit insurance are significantly higher than comparable term life, disability and casualty insurance premiums, and that pay-out ratios are below those for comparable forms of insurance.¹⁴⁴ This fairly persistent history of relatively expensive premium rates of credit insurance, in light of the high penetration rates of joint sales of credit and credit insurance, strongly suggests that vendors of credit and credit insurance possess and exercise power in their respective markets to impose onerous terms on debtors.

Moreover, it is not altogether clear whether the ability to provide both credit and credit insurance necessarily accomplishes administrative or other efficiencies, and is, therefore, a procompetitive attribute of the tying arrangement.¹⁴⁵ Rather, it appears more likely that the ability of lenders to

142. See 1979 Hearings, *supra* note 3, at 578-80 (Statement of Golemb Associates); see also *supra* note 16.

143. *Fortner II*, 429 U.S. at 618 n.10.

144. 1979 Hearings, *supra* note 3, at 5 (statement of John Heimann, Comptroller of the Currency), 280-81 (statement of Robert Sable); Ohio Study, *supra* note 6, at 252; Rubin, *Credit Life Insurance and its Alternatives*, 12 J. CONSUMER AFF. 145 (1978).

Although the figures vary somewhat, most credit insurance (and credit life, in particular) is not a good deal for consumers. With pay-out ratios of approximately 25%-35% to price and negligible administrative costs, prices on the insurance should be halved. 1979 Hearings, *supra* note 3, at 288-91 (Statement of National Consumer Law Center). The difference, of course, is reflected in profits and commissions. *Id.* On the issue of profits, it has been authoritatively estimated that overcharges on credit insurance are somewhere in the neighborhood of \$90 million to \$250 million. Ohio Study, *supra* note 6, at 243-54. See also, Mors, *supra* note 2, at 303-08.

145. Compare 1979 Hearings, *supra* note 3, at 589-95 (Statement of Golemb Associates) with 1979 Hearings, *supra* note 3, at 287-91. (Statement of National Consumer Law Center).

Although it seems apparent that joint sales reduce debtors' costs of searching for and comparing premium rates and terms for credit insurance, and that these costs are exacerbated by the inherent complexity to consumers of credit and insurance transactions, there are several factors suggesting that these are not reasons for high penetration rates on joint sales. First, the Vaughan Report and the FTC Study reported significant numbers of debtors who misperceived their purchase (or nonpurchase) of credit insurance. The prospect for high search costs was virtually nonexistent for these consumers. Second, the administrative process associated with applying an existing life or disability policy to a credit transaction is relatively simple and is performed frequently.

sell credit insurance enables them to stabilize earnings during periods of credit supply fluctuation, particularly when supply is short and interest rate limits prevent the achievement of market clearing rates. Similarly, reverse competition and high premium rates present compelling reasons for creditor imposed tie-ins. It also appears that the growth in affiliated insurance providers and captive insurers, as well as the merger trend among bank holding companies and insurers, reflects the credit industry perception of the minimum range of services necessary to enter or compete in a market.¹⁴⁶ In other words, there are no apparent and compelling justifications for compulsory joint sales of credit and credit insurance, and the significant number of such joint sales is more likely to be attributable to developments in industry structure which increasingly require lenders to facilitate credit insurance sales and to the profitability on credit insurance sales.

Lenders may also argue that there is a great diversity of credit providers in the United States and that debtors may freely go to another lender if they find the tying conduct onerous. In other words, before the tying arrangement can be actionable the debtor must demonstrate that the tying lender had some unique characteristic.

There are, however, a number of factors complicating this argument. First, the high penetration rates across the various types of credit providers suggest that tying conduct is pervasive in markets for credit. In other words, the fact that lenders are making a high number of sales of a relatively expensive product permits the conclusion that they have the economic power to impose a tie-in. Second, there are costs of searching for alternative sources of credit and information costs in understanding the terms of the credit transaction, and these costs are especially significant where the debtor does not have an ongoing credit relationship with the lender or where debtors cannot discern the effect of terms.¹⁴⁷ These costs may greatly limit consumer mobility among credit providers.

Third, geographic and demographic factors limit the range of credit providers available to consumers. For example, consumers in rural areas often have far fewer potential lenders than consumers in urban areas.¹⁴⁸ Similarly, low-income consumers of credit often have very few, if any, potential sources of credit, and may therefore be particularly vulnerable to credit insurance tying practices.¹⁴⁹ These factors strongly suggest the segmentation

The main arguments that joint sales of credit and credit insurance are beneficial concern the cost effectiveness of "one-stop shopping" and some administrative efficiencies. However, the achievement of cost efficiencies does not explain the coercive behavior evident in tying arrangements because the cost savings will be passed along in a joint sale and willingly received by the purchaser. Edwards, *supra* note 80, at 101. Nor does the alleged presence of such efficiencies explain the relative expensiveness of most credit insurance.

146. Klebaner, *Credit Tie-ins*, *supra* note 92, at 434-42.

147. See *supra* note 145.

148. See Edwards, *supra* note 80, at 109-10.

149. *Credit in Low-Income Areas: Hearings on S. 2146 & S. 2259 Before the Subcomm.*

of individual consumers, or discrete classes of customers, according to available creditors, and would accord those creditors some degree of economic power with respect to imposing undesirable terms in the credit transaction.

Finally, recent merger cases have demonstrated that there is a definite market segmentation among the various types of lenders and their debtors and that the segmentation is due in large part to the offering of "unique products and services to identifiable classes of customers."¹⁵⁰ In concrete situations these factors can demonstrate economic power in a credit market, irrespective of the presence of other credit providers.¹⁵¹

In an important sense, the Supreme Court's concerns in the *Fortner* litigation are not significant with respect to credit insurance tying. In exam-

on *Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 86 (1974) (Statement of Hon. Hugh Scott) (1970) (Statement of Edward C. Sylvester, Jr.).

In the recent case *Hyde v. Jefferson Parish Hosp. Dist.*, 686 F.2d 286 (5th Cir. 1982), *cert. granted* — U.S. — (1983), the court addressed the significance of precision in defining relevant geographic markets in tying cases. The plaintiff, an anesthesiologist, claimed that the defendant hospital excluded his access to the hospital facilities because of the hospital's exclusive contract with one provider of anesthesia services and a requirement that all patients and physicians use the one provider. *Id.* at 289. The hospital contended that it lacked power to impose the alleged tie-in between operating rooms (tying product) and the one anesthesia service (tied product) because of the presence of twenty other hospitals in the area. *Id.* The court disagreed, concluding that about one-third of the patients in a discrete district, within which the hospital was charged by law to provide services, used the hospital, and therefore, the more limited service district was the appropriate geographic market. *Id.* at 291.

The reasoning in the *Hyde* decision suggests the importance of clear market definition in tying cases. More importantly, it requires market definition on a practical and realistic basis. In a credit insurance tie-in situation, geographic market definition may be delineated by communities or neighborhoods and product market definition arranged by type of creditor. *See Note, Credit as a Tying Product*, 69 COLUM. L. REV. 1435, 1445-47 (1969).

150. *United States v. Household Fin. Corp.*, 602 F.2d 1255, 1265 (7th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

151. The two principal issues bearing on market power in tying cases seem to be the prospects for market segmentation and the demand elasticity for the tying product. Consideration of market segmentation forces attention to a realistic assessment of consumer opportunities for better terms and, reciprocally, the degree of market foreclosure. The demand elasticity for the tying product permits conclusions concerning the receptiveness of the market to monopoly conditions and the ability of purchasers to avoid a seller's behavior. *See Edwards, supra* note 80; *Costner v. The Blount Nat'l Bank*, 578 F.2d 1192 (6th Cir. 1978) (in a Section 106 case, market power demonstrated by plaintiff's inability to get credit elsewhere and market comprised of only two banks).

As previously discussed, the various markets for credit may be segmented, as a matter of proof, according to buying patterns, sales strategies, geographic limitations and regulatory constraints. Similarly, there may be a range of demand elasticities along credit purchasers, based principally along income lines. *Ohio Study, supra* note 6, at 116-18. Generally, demand for credit is relatively inelastic and becomes more inelastic as consumers become less able to obtain credit. *Id.* at 118-21. Thus, a high degree of market segmentation (viz. narrow relevant market definitions) and an inelastic demand for credit should permit a conclusion that a lender with a not insubstantial market share in the relevant markets has economic power, and would provide a plausible explanation for coercive behavior (i.e., extension of power into another market). *See Edwards, supra* note 80, at 107-08.

ining the defendant's economic power in the credit market, the Court in *Fortner II* was attempting to find compatibility between a recognized theory of tying and the defendant's conduct. According to the Court, therefore, since Fortner was unable to marshal evidence demonstrating some economic leveraging or price discrimination, it became probable that the tying arrangement had procompetitive origins and effects.¹⁵²

In the case of credit insurance tying, where the victim is not likely to be an aggressive businessperson, the need for judicial consideration of the coercive effect of tying arrangements becomes greater. As previously discussed, the Supreme Court has condemned tying arrangements for their tendency to force buyers to forego the exercise of free choice among competing products.¹⁵³ Moreover, the changing structure in the market for credit insurance, and the likelihood of competitive disadvantage to lenders who do not offer credit insurance or who do not exhibit high rates of joint sales, suggests the strong possibility of competitive foreclosure, not on the basis of merit, but rather on a willingness to practice coercive behavior. In light of the coercive and foreclosure effects occasioned by prevalent credit tying arrangements, particularly with respect to consumer credit, it may be necessary for the courts to develop appropriate standards to accommodate the issue of economic power in the credit market, paying careful attention to the opportunities for meaningful choice among credit providers.

The *Fortner* litigation is the Court's most recent consideration of tying arrangements as antitrust concerns and there was no indication of a judicial retreat from *per se* analysis in tie-in cases. Credit insurance tie-ins provide another useful opportunity to reconsider application of the *per se* rule and the most principled conclusion is that coercive or involuntary tie-ins should be illegal *per se*. There are no discernably overwhelming attributes or justifications for credit insurance tie-ins—whether accomplished explicitly or implicitly—only some indistinct possibilities of lost savings for consumers.¹⁵⁴ Bank-holding companies were unable to produce any compelling proof of efficiency justifications in the 1979 Hearings, and other lenders would proba-

152. *Fortner II*, 429 U.S. at 617-19.

153. See *Northern Pacific Ry. Co. v. United States*, 356 U.S. at 6.

Bauer persuasively argued that coercion of buyers should alone be sufficient injury to warrant *per se* condemnation of tying arrangements because purchasers have an interest in freedom of choice. Bauer, *Simplified Approach*, *supra* note 70, at 300-03.

154. Nor should the credit or credit insurance industries be entitled to special treatment under the antitrust laws, absent a strong legislative policy otherwise. In *Hyde v. Jefferson Parish Hosp. Dist.*, 686 F.2d 286, 292-94 (5th Cir. 1982), *cert. granted*, ____ U.S. ____ (1983), the court rejected strong arguments from the hospital that the *per se* rule should not be applied to the health care industry. The court's decision was consistent with the Supreme Court's rejection to a similar argument in *Arizona v. Maricopa County Medical Soc.*, 102 S.Ct. 2466 (1982). In considering justifications for tying arrangements and policy reasons for exclusion from the *per se* rule, the credit insurance industry is certainly not entitled to treatment different than the health care industry.

bly have less ability to show justification. More important, credit insurance tie-ins are considered illegal by federal banking authorities and many state insurance regulators.

Further, judicial consideration of procompetitive benefits and comparisons with anticompetitive effects on a case-by-case basis would be costly and unlikely to save many insurance tie-in practices. A bright-line rule is more likely to stifle the coercive conduct than a more flexible standard and may therefore provide more clarity to lenders selling credit insurance. Of course, the 1979 Hearings suggest that state and federal bright-line prohibitions on credit insurance tying have not been extremely effective. However, the deterrent effect of treble damage awards and the prospect of class action lawsuits may move antitrust enforcement to the forefront in efforts to control credit insurance tying.¹⁵⁵

D. Coercion

A recurrent issue in many tying arrangement cases concerns the existence or degree of coercion effected by the seller to accomplish the tie-in. Although the Supreme Court has never expressly required proof of coercion in a tying case, it has suggested the need for proof that the tie-in was not voluntary.¹⁵⁶ In the context of credit insurance tying arrangements, the question of buyer coercion presents some challenging problems of proof because credit insurance tying is often implicit and is often accomplished by subtle threats or veiled promises of continued credit.

In the absence of an express or explicit provision in the agreement, the plaintiff must generally make some showing that there was a tying arrangement rather than a purely volitional joint sale of two products or the mere purchase of a single product.¹⁵⁷ In other words, proof of coercive behavior

155. Craswell makes an important point that courts applying antitrust norms are institutionally incapable of adequately dealing with the wide range of complex issues involved in tying arrangements. Craswell, *Tying in Competitive Markets*, *supra* note 80, at 697-700. The author may, however, be unduly optimistic about the procompetitive aspects of credit insurance tying (even assuming, as he does, that it occurs in competitive markets) and unduly pessimistic about judicial ability to sort complex facts and theories. More important, the author may misperceive both the effect of and potential for consumer protection litigation as a tool for improved performance. The antitrust requirements that the defendant impose the tie-in and have some demonstrable market power permit the fact-finder to ensure that an involuntary tie-in has occurred and that competitive conditions in a market may be impaired. The prospect for treble damage awards in private antitrust actions should provide both deterrence against ongoing violations and incentives for private actions. In most respects, consumer protection legislation and regulatory mechanisms do not provide substantial deterrence or private incentives. Therefore, if involuntary tying is a pervasive problem (which the 1979 Hearings indicate is the case), then perhaps a more deterrence-oriented action, like antitrust causes of action, may be the more appropriate and successful policy.

156. See *Northern Pacific Ry. Co. v. United States*, 356 U.S. at 6. See also, *Blair & Finci*, *supra* note 66, at 557.

157. See *Bell v. Cherokee Aviation Corp.*, 660 F.2d at 1130-32; *Bogus v. Am. Speech and*

by the seller, or involuntary behavior by the purchaser, may be necessary to show that there was, in fact, a tying arrangement. Since proof of coercion is a factual issue, there have been difficulties in consumer class action lawsuits involving tying arrangements in which the plaintiffs must demonstrate common questions of law and fact.¹⁵⁸ In most circumstances, however, there is no special requirement that the antitrust plaintiff make a particularized showing of coercion; rather, the plaintiff must merely allege and prove that the seller sold two distinct products and that the purchase of the tied product was involuntary or unwaanted.

The courts have provided various methods of determining the extent to which an implicit tie-in is coercive, including course of conduct and dealing by the seller,¹⁵⁹ threats or misrepresentation of facts by the seller,¹⁶⁰ or "the seller's success" in imposing the burdensome terms on significantly large numbers of buyers.¹⁶¹ For example, proof of economic power in the market for the tying product may also present sufficient proof that the defendant coerced the joint purchase of the tying and tied products.¹⁶² Finally, proof by the purchaser that there existed a reasonable fear of economic reprisal by the seller if the purchaser refused to purchase the tied product in accompaniment to purchases of the tying product may be sufficient proof of coerciveness by the seller.¹⁶³

These considerations may be applied to credit insurance tying arrangements. As discussed, the high penetration rates of credit insurance in credit transactions may demonstrate both economic power in the credit market and a lender's policy imposing tie-ins. Thus, a high degree of joint sales by a creditor may be probative evidence of coercive behavior, even in the ab-

Hearing Ass'n, 582 F.2d at 287; Heattransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 978 (5th Cir. 1977), cert. denied, 434 U.S. 1087 (1978).

158. See, e.g., *Ungar v. Dunkin' Donuts of Am., Inc.*, 531 F.2d 1211, 1216 (3d Cir. 1976), cert. denied, 429 U.S. 823 (1976). See also *Blair & Finci, supra* note 66, at 557-61; *Bauer, Simplified Approach, supra* note 70, at 313-14; Note, *Tying Arrangements and the Individual Coercion Doctrine*, 30 VAND. L. REV. 755 (1977).

159. See, e.g., *Bell v. Cherokee Aviation Corp.*, 660 F.2d at 1131-32.

160. See, e.g., *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

161. See, e.g., *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1216-17 (9th Cir. 1977). See also, *Blair & Finci, supra* note 66, at 561-62.

162. See, e.g., *Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1353 (2d Cir. 1976). But see *Schweitzer & Halbrook, supra* note 19, at 753-54.

163. See, e.g., *Bogus v. American Speech & Hearing Ass'n*, 582 F.2d 277, 288 (3d Cir. 1978); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 450-51 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

These cases suggest an important perspective on the coercion doctrine. Coercion is largely a matter of proof that the seller imposed a tie-in and that coerciveness (or, reciprocally, involuntariness) may be viewed subjectively and from the purchaser's perception. Thus, if purchasers can demonstrate an implicit or explicit threat of a refusal to deal or termination by the buyer, then that should be sufficient to maintain an antitrust action. See *Blair & Finci, supra* note 66, at 564-66.

sence of direct proof of explicit coercion. Second, fairly high rates of consumer deception concerning the inclusion of credit insurance in the transaction present clear cases of coercion for tying purposes. Whenever a lender, routinely or on an individual basis, subscribes the debtor to a credit insurance policy without the debtor's knowledge or affirmance, a coercive tie-in has occurred.¹⁶⁴ Finally, in a class action context, where debtors can demonstrate a reasonable basis for a belief that they feared they would be denied credit, or that their line of credit would be terminated if they refused credit insurance, there may be sufficient proof of coercion by the seller, especially where the defendant has imposed the tie-in on substantial numbers of purchasers or where the debtor has strong incentives to impose the tie-in.¹⁶⁵

There are no substantial reasons, in law or policy, for refusing to permit an antitrust action where the purchaser alleges, and can subsequently demonstrate, that a vendor conditioned the sale of one product on the purchase of another product by implicit coercion, subtle or explicit threats of refusals to deal further, or other similar manifestations. Obviously, these manifestations may not be enough proof in a case where the plaintiff is incredible, the vendor lacks market power, or there is only one product for sale. The trier-of-fact is most often the best judge of these matters, and a limitation on actions for implicit threats or involuntary purchases obscures important objectives for antitrust law. In class action lawsuits, on the other hand, procedural requirements, and not substantive antitrust requirements, may necessitate a much clearer and more specific articulation of individualized coercion by vendors.

V. IMMUNITY AND EXEMPTION

There are two relevant sources of immunity from the antitrust laws which may operate in credit insurance tying situations. They are, first, the

164. See 1979 Hearings, *supra* note 3, at 288-89 (Statement of National Consumer Law Center).

This sort of conduct violates the federal Truth-in-Lending laws which require accurate disclosure of the consumer's right to refuse credit insurance or obtain it through any vendor selected by the consumer. 12 C.F.R. 226 (1981). The conduct would also violate section 106 of the Bank Holding Company Act Amendments of 1970. See 12 C.F.R. 225.4(c) (1981).

165. See *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 436 (3d Cir. 1977).

For example, the FRS Study reported that approximately 34% of consumers surveyed stated that credit insurance was either "recommended" or "strongly recommended." In considering an individual case or class action involving such a tie-in, the court should consider the relative position of the parties, the defendant's percentage of credit transactions in which credit insurance is sold and the existence of other purchaser complaints of coercive behavior, the interest rate, credit terms and marketing policies of the creditor and the independent desirability of the credit insurance to the purchaser. See generally Bauer, *Simplified Approach*, *supra* note 70, at 311; Blair & Finci, *supra* note 66, at 561-65. Consideration of these factors will suggest the plausibility of a tying strategy by the seller and the probability that joint sales by the defendant were involuntary or coercive.

statutory limitation on the antitrust laws imposed by the McCarran-Ferguson Act; and, second, the more general limitation of the state action doctrine. The effect of these exemptive enclaves may be to shield involuntary tying arrangements from federal antitrust actions. The two exemptions, although sharing their roots in notions of federalism,¹⁶⁶ stem from different sources and the consequences of their application are sufficiently different to justify individual development in the following sections.

A. The McCarran-Ferguson Act and the "Business of Insurance"

In 1944, the United States Supreme Court decided the case of *United States v. South-Eastern Underwriters Ass'n*,¹⁶⁷ which held that the business of insurance is not exempt from the reach of the federal antitrust laws. Prior to that time, it was generally assumed that since the business of insurance, which consisted in large measure of insurance contracts between insurers and policyholders, was conducted pursuant to state contract laws and was not in commerce or subject to the interstate commerce powers of the federal government.¹⁶⁸ In that case, however, the Court held that insurance contracts may have an effect on interstate commerce and therefore would be subject to the federal commerce powers including the antimonopoly restrictions in the Sherman Act.¹⁶⁹

Immediately after *South-Eastern Underwriters Ass'n*, and in response to the criticisms of the decision, Congress passed the McCarran-Ferguson Act.¹⁷⁰ The compromises reached in promulgating the Act, and indeed the

166. See Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 UCLA L. Rev. 265, 291-92 (1979) [hereinafter cited as Sullivan & Wiley]; Note, *The Definition of: "Business of Insurance" Under the McCarran-Ferguson Act After Royal Drug*, 1980 COLUM. L. REV. 1475, 1481-83 [hereinafter cited as "Business of Insurance"].

167. 322 U.S. 533 (1944).

168. See Carlson, *The Insurance Exemption from the Antitrust Laws*, 57 TEXAS L. REV. 1127, 1128-30 (1979) [hereinafter cited as Carlson, *Insurance Exemption*].

The Supreme Court, in the early case of *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), held that an insurance policy transaction was not in interstate commerce. Thereafter, the Court frequently reiterated its basic premise in *Paul v. Virginia* that the process of insurance contracting was an essentially intrastate activity and therefore imperious to federal statutory regulation. Carlson, *Insurance Exemption*, *supra* note 168 at 1129 & n.16.

169. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944).

170. The McCarran-Ferguson Act provides in relevant part:

Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. Provided, that . . . the Sherman Act, and . . . the Clayton Act, and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

array of undercurrents at work in Congress at that time, reflect dual concerns of federalism or state prerogative over perceived local activities, and the institutional concerns engendered by federal courts applying difficult standards of antitrust liability to insurance transactions.¹⁷¹ The bill reflects these concerns by conditioning the immunity from the antitrust laws only where the activity in question is essentially an insurance transaction; that is, the "business of insurance," is regulated by the state authorities and is not a boycott or other act of coercion or intimidation.¹⁷²

All of these considerations are implicated in tying arrangements between credit and credit insurance. In the first place, are credit insurance tying arrangements the "business of insurance" as that statutory term has been construed by Supreme Court decisions? If so, then they may be immune from the Sherman Act. Second, is the practice of credit insurance tying "regulated by State Law" and therefore immune from the antitrust laws? Third, is the protective shield of the McCarran-Ferguson Act lost where a credit insurance tie-in is accompanied by acts characterized as "coercion" and "intimidation"?

Recent decisions of the Supreme Court have articulated standards for determining the existence of the "business of insurance."¹⁷³ In *Union Labor Life Insurance Co. v. Pireno*,¹⁷⁴ the Court summarized the criteria for ascertaining whether a particular practice is the "business of insurance": "[f]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."¹⁷⁵ The Supreme Court did not, however, indicate the relative significance of these criteria, and instead evaluated all three to determine whether the practice constituted the business of insurance.¹⁷⁶

In the specific context of tying arrangements involving credit insurance and credit transactions, it is relatively clear that such tie-ins are not the

Sec. 3 . . .

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

59 Stat. 33-34, as amended, 61 Stat. 448 (codified at 15 U.S.C. §§ 1012-13 (1976)).

171. See *Carlson, Insurance Exception*, *supra* note 168, at 1128-37; Note, "Business of Insurance," *supra* note 166, at 1481-83.

172. See *Sullivan & Wiley*, *supra* note 166 at 274. These elements form the analytic approach commonly used by courts in deciding antitrust issues in an insurance industry context. See, e.g., *Anglin v. Blue Shield of Va.*, 693 F.2d 315, 316 (4th Cir. 1982); *Proctor v. State Farm Mutual Auto. Ins. Co.*, 675 F.2d 308, 312-16 (D.C. Cir. 1982).

173. *Union Labor Life Ins. Co. v. Pireno*, 102 S. Ct. 3002 (1982); *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979).

174. 102 S.Ct. at 3002.

175. *Id.* at 3009.

176. *Id. Cf. Sullivan v. Wiley*, *supra* note 166, at 282-84 & n.77.

business of insurance. In a recent action by the Federal Trade Commission seeking to enforce a civil investigative demand for evidence of possible involuntary tying practices by finance companies, the Fifth Circuit Court of Appeals held that the sale of credit insurance is "purely ancillary to the insurance relationship" and therefore not the "business of insurance."¹⁷⁷ The court in *FTC v. Dixie Finance Co., Inc.* drew a critical distinction between "the actual sale [of insurance] and the fact that the sale is a precondition to the extension of credit. . . ."¹⁷⁸ The court concluded that the relationship which the Commission was seeking to investigate was not the relationship between an insurer and insured and did not directly implicate

177. *FTC v. Dixie Finance Co. Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,160 (5th Cir. 1983).

The Federal Trade Commission has undertaken an extensive review of credit insurance practices by finance companies and has initiated its investigation by the issuance of civil investigative demands seeking information on tying behavior. *See Audubon Life Insurance Co. v. FTC* 1982-2 Trade Cas. (CCH) ¶ 64,911 (D. La. 1982); *FTC v. Manufacturers Hanover Consumer Services, Inc.*, 1982-2 Trade Cas. (CCH) ¶ 64,903 (E.D. Pa. 1982). One court has avoided the McCarran-Ferguson immunity issue, at least preliminarily, while addressing the question of the enforceability of the investigative demands. *General Finance Corp. v. FTC*, 700 F.2d 366 (7th Cir. 1983).

The Fifth Circuit's per curiam opinion in *Dixie Finance Co.*, concluding that tying of consumer credit loans and credit insurance was not the business of insurance because the insurance transaction is ancillary to the credit transaction, was based upon a line of Fifth Circuit cases in which the Truth in Lending Act was applied to credit tying arrangements. *See Cochran v. Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979); *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468 (5th Cir. 1979); *Cody v. Community Loan Corp.*, 606 F.2d 499 (5th Cir. 1979). Those cases concerned premium financing of insurance policies which was insufficiently disclosed, and the Fifth Circuit held that the financing activity was "ancillary to the insurance relationship between the insurance company and the policyholder" and therefore not the "business of insurance." *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d at 470. Furthermore, the court's holding under the McCarran Act that the premium financing arrangements were not the business of insurance was buttressed by analogy to antitrust cases construing section 2(a) of the McCarran Act. *See Note, McCarran-Ferguson Act Immunity from the Truth in Lending Act and Title VII*, 48 U. CHI. L. REV. 730, 740-42 (1981).

178. 1982-83 Trade Cas. at ¶ 71,499-76.

The court recognized that offering insurance policies in a credit transaction may occasion the sale of insurance policies, but held that the marketing characteristics of the transaction were not alone enough to conclude it was the business of insurance. *Id.*

The *Dixie Finance Co.* court did not, however, directly address the issue of whether the tie-in practice has the effect of spreading the policyholders risk. *See supra* note 175 and accompanying text. Credit insurance has an obvious and intended effect on the allocation of risk, but the risk that is being shifted is within the credit transaction and not within the insurance transaction. In other words tying arrangements shift the risk of loss in the credit transaction, both in terms of magnitude and frequency, to the insurance transaction by assuring the performance of the obligation to repay. The effect of the practice would substantially reduce risk in the credit transaction, but would have no effect on risk in the insurance transaction. While this practice may be shrewd for integrated firms providing both insurance and credit, it does not satisfy judicial standards for the "business of insurance." In *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 212 (1979), the Court stressed that the "business of insurance" consists of the spreading or underwriting of risk in an insurance relationship, not its reduction by transactions outside the insurance relationship.

any insurance relationship between the borrower, the lender and the insurer.¹⁷⁹

The decision in *FTC v. Dixie Finance Co., Inc.* appears correct. Although the practice of effecting ties between the loan transaction and the sale of credit insurance has the effect of reducing risk on the financing transaction, the tying arrangement does not directly concern the insurance relationship between the insurer and policyholder. Moreover, credit insurance tying arrangements often include the involvement of finance companies, credit unions and other lenders outside the insurance industry. Indeed, the 1979 Hearings addressed issues raised by increasing non-banking activities by federally regulated banks and bank holding companies, including sales of insurance. Although the credit insurance firms providing insurance are frequently subsidiaries of, or otherwise affiliated with the lenders, the involvement of non-insurance companies in the entire transaction would negate the conclusion that the transaction was purely an insurance one.¹⁸⁰

In other respects it also appears that involuntary tying arrangements in the lending markets would fall outside the immunity of the McCarran-Ferguson Act. Immunity from antitrust liability under Section 2(a) requires that the practice be "regulated by state law." This term has received varied interpretations by the courts, some requiring a general and broad regulation of the insurance industry by the state¹⁸¹ and others demanding a specific and particularized legislative provision authorizing the practice.¹⁸² The former line of cases permits exemption where the state legislation merely prohibits unfair methods competition or provides general guidelines for regulation of the insurance company.¹⁸³ The latter cases, which look for indicia of

179. 1982-83 Trade Cas., at ¶ 71,499-77.

It was the presence of such tripartite relationships—involving insurers, policyholders and non-insurance third parties—that sealed the Court's decisions in *Union Labor Life Ins. Co. v. Pireno and Group Life & Health Ins. Co. v. Royal Drug Co.* that the challenged conduct was not the "business of insurance."

180. *FTC v. Dixie Fin. Co., Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,160 (5th Cir. 1983).

181. See *Klamath-Lake Pharmaceutical Assoc. v. Klamath Medical Serv. Bureau*, 701 F.2d 1276 (9th Cir. 1983); *Anglin v. Blue Shield of Va.*, 693 F.2d 315 (4th Cir. 1982); *Addrissi v. Equitable Life Assurance Society*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

182. See *United States v. Crocker Nat'l Corp.*, 656 F.2d 428 (9th Cir. 1981), *rev'd on other grounds*, *BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (June 8, 1983); *Owens v. Aetna Life & Casualty Co.*, 654 F.2d 218 (3d Cir. 1981) (Slovier, J., dissenting).

183. See, e.g., *Klamath-Lake Pharmaceutical Assoc. v. Klamath Medical Serv. Bureau*, 701 F.2d 1276 (9th Cir. 1983); *Dexter v. Equitable Life Assurance Society*, 527 F.2d 233 (1975).

For the most part, these opinions do not rely on thorough examinations of the McCarran Act's legislative history or on any evolutionary concept of the Act's scope. See, e.g., *Dexter v. Equitable Life Assurance Society*, 527 F.2d at 236; *Addrissi v. Equitable Life Assurance Society*, 503 F.2d 725, 728 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). Rather, the courts have reasoned that the Act was intended to create an environment in which state laws could displace federal antitrust laws and that the exercise of the state powers should be accorded wide latitude and discretion. See *Dexter v. Equitable Life Assurance Society*, 527 F.2d at 236-37. Ac-

state authorization for the specific conduct being challenged and active state regulation, are analytically sounder and more faithful to both the probable legislative intention of the McCarran Act and the evolutionary and progressive nature of the Sherman Act.¹⁸⁴ A reading of the "regulated by state law"

cording to these courts, the scope of state regulation should be liberally construed to exempt from antitrust liability those acts by insurance companies in which the state may have expressed an interest. See *Addrisi v. Equitable Life Assurance Society*, 503 F.2d at 729.

184. See *United States v. Crocker Nat'l Corp.*, 656 F.2d 426, 453 & n.85 (9th Cir. 1981), *rev'd on other grounds*, *BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (1983).

The court in *Crocker Nat'l Corp.* reviewed the legislative history of the McCarran Act and found an intention to immunize insurance actions that were regulated by the state, not merely legislated for or generally covered by state statutes. 656 F.2d at 453-54 & n.88. See also *Carlson, Insurance Exemption*, *supra* note 168, at 1157. Moreover, the recent Supreme Court decision in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978), has been construed to hold that affirmative regulation by the state, not mere legislation, albeit comprehensive, in the field of insurance activity is necessary to find immunity under the McCarran Act. See *Owens v. Aetna Life & Casualty Co.*, 654 F.2d 218, 246 (3d Cir. 1981) (Sloiter, J., dissenting). See also, *Sullivan & Wiley*, *supra* note 166, at 288-89.

The distinction between standards is most apparent in the Ninth Circuit. In *Crocker Nat'l Corp.*, the court held that interlocking directorates between insurance companies and banks were not specifically regulated under state law, and, notwithstanding general state regulation of interlocking directorates and specific regulation of interlocking directorates between other types of firms, held that the McCarran Act was inapplicable. 656 F.2d at 452-53. The court's reasoning was comprehensive and thoughtful. According to the court, the absence of specific regulation of the challenged conduct, against a background of general state legislation and supervision, warranted application of section 8 of the Clayton Act, especially since its application would not impair any state policy. *Id.* at 453. The purpose, language and history of the McCarran Act, the court held, clearly showed that immunity should be granted only where there exists a direct and substantial conflict between federal antitrust norms and state regulated activity. *Id.* at 454 & n.89.

Subsequently, in *Klamath-Lake Pharmaceutical Assoc. v. Klamath Medical Services Bureau*, 701 F.2d 1276, 1287 n.10 (9th Cir. 1983), which involved a claim that the defendant tied a basic prepaid health care contract to a prescription drug benefit plan, the court attempted to confine the rationale of *Crocker National Corp.* to a "general [statutory] scheme of regulation governing insurers' corporate interlocks with banks." The court added that in *Crocker National Corp.* "we distinguished cases where, as here, a general system of regulation might imply an affirmative decision to allow the behavior not specifically prohibited." *Id.* at 1287 n.10, (citing *United States v. Crocker Nat'l Corp.*, 656 F.2d at 453 n.88). In *Klamath-Lake* however, the specific conduct complained of was the alleged tying of one form of insurance coverage to another form of insurance coverage, but the court pointed to general regulatory statutes permitting state regulation of health care service contractors and forbidding unfair or deceptive acts or practices by insurers, and to specific statutes prohibiting tie-ins between insurance and the sale of property, real estate or services. *Id.* at 1287. Incredibly, the court also claimed that the practices in question were regulated by state law because of state antitrust laws which would reach the practices to the extent that they were not subject to state insurance laws. *Id.*

Decisions like *Crocker National Corp.*, which predicate immunity on specific state approval of certain insurance conduct and active state regulation of the conduct, are better formulations of policy. The paramount federal policy expressed in the Sherman Act was intended to be superceded only by clear and specific statements of state law and policy, not by a panorama of general state insurance laws. Moreover, the absence of state supervision over the challenged practice warrants the conclusion that the state insurance policy is insufficiently compel-

requirement in Section 2(b) indicates that to condition immunity upon a showing of close state supervision and an affirmatively expressed state policy in favor of the challenged activity would effectively incorporate the state action doctrine into the McCarran Act. This accommodation of immunity norms under the Act and the state action doctrine may be premised on the identical concerns of federalism underlying both, and would present a more consistent and developed body of law to review questions of immunity.¹⁸⁵ An application of state action doctrine to credit tying arrangements is presented in the next section.

Finally, to the extent that a credit insurance tying arrangement involves involuntary or coercive behavior by the lender, the tying conduct may be outside the protection of Section 2(a) of the Act because it involves an "act of boycott, coercion, or intimidation" prohibited by Section 3 of the Act. Although early cases construed this provision as applying only to "boycotts" or "blacklisting" of insurance agents by insurers,¹⁸⁶ the Supreme Court recently held that the provision was capable of broader application. In *St. Paul Fire and Marine Insurance Co. v. Barry*,¹⁸⁷ a case involving an alleged conspiracy among three medical malpractice insurers to refuse to sell malpractice insurance to physicians previously insured by another insurer, the Court strongly endorsed the lower court's finding that Section 3 applies to relationships between insurers and policyholders, not just to relations be-

ling to justify its supremacy over federal antitrust goals. See *Sullivan & Wiley, supra* note 166, at 288-90; *Carlson, Insurance Exemption, supra* note 168, at 1157.

185. The seminal case on the state action doctrine, *Parker v. Brown*, 317 U.S. 341 (1943), was decided two years before the Congress promulgated the McCarran Act. It is therefore probable that the Congress was aware of the Court's view of the authority to the Sherman Act to reach state regulated activity. *But see Sullivan & Wiley, supra* note 166, at 271-72. Furthermore, the legislative debate on the McCarran Act indicates that the proponents of the act envisioned a federal statutory regime which would exempt insurance activity which was actively regulated by the state, and only when the antitrust laws' application would "invalidate, impair, or supersede" state law. *Carlson, Insurance Exemption, supra* note 168, at 1155-59. *See also supra* note 184. It is therefore arguable that the phrase "regulated by state law" was intended to develop and progress as the state action doctrine (or, more precisely, the underlying notions of federalism and comity between federal and state sovereignties) ripened by judicial review.

This reading of section 2(b) and the state action doctrine in pari materia would not only provide a consistent and predictable framework for analyzing issues of immunity, but would also substantially accomplish one recommendation articulated by the National Commission for the Review of Antitrust Laws and Procedures. The Commission, which was highly critical of the McCarran Act's broad immunity, recommended that the state action doctrine serve as the principal screen for insurance immunity. *Hanson, The Interplay of the Regimes of Antitrust, Competition and State Insurance Regulation on the Business of Insurance*, 28 DRAKE L. REV. 767, 775-76 & n.33 (1978-79) (citing *National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General*, 225 (1979)).

186. *See Addrisi v. Equitable Life Assurance Soc'y* 503 F.2d 725, 729 (9th Cir. 1974); *Meicler v. Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), *aff'g* 372 F. Supp. 509 (S.D. Tex. 1974).

187. 438 U.S. 531 (1978).

tween insurance companies and their agents, and that the term "boycott" in that section should be given a natural and evolutionary definition.¹⁸⁸

The Court in *St. Paul* carefully reviewed the history and the structure of the McCarran Act in concluding that Congress intended that the Sherman Act apply whenever coercive conduct is employed to erect barriers between customers and target competitors and to foreclose competition in any market.¹⁸⁹ The Court was clearly suggesting that the definitional terms in Section 3(b) were capable of growth as commercial practices required and were to be applied to guard against the competitive evils flowing from coercive conduct. Tying arrangements inherently involve coercive behavior intended to foreclose access to alternative sources of supply, and the Court's analysis of the "boycott" provision in Section 3(b) strongly warrants inclusion of conventional tying arrangements in the proscribed category of acts of "coercion, or intimidation."¹⁹⁰

The analytic principles of the McCarran Act are relatively direct, although their application is often difficult. The antitrust laws are intended to apply except in the narrow circumstance of conduct constituting the "business of insurance" and "regulated by state law." Immunity from the antitrust laws is to be narrowly construed to carry out legislative intent.¹⁹¹ Con-

188. *Id.* at 550-53.

The Court in *St. Paul* demonstrated the progressive development of the term and cause of action for "boycott" activity. *Id.* Moreover, the Court stated that the Congress intended that the terms in section 3 be given progressive construction. *Sullivan & Wiley, supra* note 166, at 278-79.

189. 438 U.S. at 553.

190. Cases holding that tying arrangements involving insurance were not boycotts or acts of coercion or intimidation were premised on the contention that section 3(b) did not apply to acts between insurers and policyholders and were decided before the *St. Paul Fire & Marine Insurance Co.* case. See, e.g., *Addrissi v. Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974); *McIlhemny v. American Title Ins. Co.*, 418 F. Supp. 364 (E.D. Pa. 1976).

One of the few cases to examine the argument that acts of coercion or intimidation includes tying arrangements failed to centrally address the issue. *Klamath-Lake Pharmaceutical Assoc. v. Klamath Medical Serv. Bureau*, 701 F.2d 1276, 1287-88 (9th Cir. 1983). In considering the issue of McCarran Act immunity for an alleged tying arrangement between a prepaid health care contract and a prescription drug plan, that court characterized the plaintiff's argument that the defendant's policy "induced policyholders to boycott the local pharmacies by the 'effective economic compulsion' derived from its pharmacy benefits." *Id.* at 1288. This argument, and the court's conclusion that the defendants "offered to the public an attractive package" in which the plaintiff was entitled to participate, does not consider the more plausible contention that tying arrangements are acts of coercion and intimidation as those terms were intended to be construed by the Congress. *Id.*; *Sullivan & Wiley, supra* note 166, at 278-79 & n.59; *contra* *Black v. Nationwide Mut. Ins. Co.*, 429 F. Supp. 458, 462 (W.D. Pa. 1977), *aff'd mem.*, 571 F.2d 571 (3d Cir. 1978); *Carlson, Insurance Exemption, supra* note 168, at 1169 & n.244. A tying arrangement is an exclusionary practice which is often manifested in a foreclosure of a competitor's access to markets. Where a tie-in is accomplished by coercive methods, it should not enjoy immunity from the antitrust laws in actions by foreclosed competitors or by consumers unless the arrangement is essential to the accomplishment of some state policy or objective.

191. *Union Labor Life Ins. Co. v. Pireno*, 102 S. Ct. 3002, 3007 (1982).

gress intended that the Sherman Act apply to coercive and boycotting conduct by insurers even if it is regulated by the state and is the business of insurance. Like the commerce clause and the interstate commerce requirement in the Sherman Act, the proscriptive and exemptive provisions of the McCarran Act are intended to grow and evolve as commercial practices develop.¹⁹² Applying those principles to credit insurance tying arrangements, it seems apparent that the conduct, narrowly construed, is not the business of insurance and is inherently coercive conduct outside the protection of the McCarran Act. Therefore, unless the tying arrangements are exempt under the state action doctrine, there is no immunity for insurance-providing lenders imposing the tie-ins.

B. The State Action Doctrine

In *St. Paul Fire and Marine Insurance Co. v. Barry*, the Court carefully tailored its opinion around the issue of state regulation over the insurance companies' actions, finding that the state of Rhode Island did not authorize the conduct in question.¹⁹³ The Court's care underscores the importance of particularized consideration of state policy and regulation by a federal court applying antitrust norms.

The state action doctrine is premised on judicially articulated concerns of federalism.¹⁹⁴ The doctrine exempts from the reach of the Sherman Act private conduct which exerts an anticompetitive effect but which is undertaken pursuant to some clearly articulated and affirmatively expressed state policy and which is actively supervised by the state.¹⁹⁵

In the context of antitrust cases involving insurance related activities, the McCarran Act exemption has subsumed most of the litigation and there is very little case law on the issue of state action immunity. To the extent that the state action doctrine has been implicated in insurance cases, how-

192. See *supra* notes 185, 188. The concept of the Sherman Act as an evolutionary and progressive charter of economic freedoms and policies is not new, either with respect to the Act's substantive reach or its procedural aspects. In *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 241 (1980), the Court explored the evolutionary relationship between the Sherman Act and the Commerce Clause of the United States Constitution. In *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), the Court described the Sherman Act as a "Magna Charta of free enterprise" and discussed its importance in nurturing "fundamental personal freedoms."

These cases do not decide the issue of the reach of the McCarran Act to tying arrangements, but they do strongly support the notion that the Sherman Act is the principal source for national competition policy, that the Sherman Act is, and should be, viewed as a progressive and evolutionary document. See *Sullivan & Wiley, supra* note 166, at 290.

193. 438 U.S. at 553-54 & n.27.

194. See *Sullivan & Wiley, supra* note 166, at 291-92; *Hanson, The Interplay of the Regimes of Antitrust, Competition and State Insurance Regulation on the Business of Insurance*, 28 DRAKE L. REV. 767, 835 (1978-79).

195. *California Retail Liquor Dealers Assoc. v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

ever, the courts have permitted immunity only where an insurer claiming immunity can demonstrate a compelling and clear state policy being advanced by the allegedly anticompetitive conduct and active supervision by the state.¹⁹⁶

In a more limited situation of tying arrangements, it seems very doubtful that the state action doctrine would exempt them from the antitrust laws. Where the state has very general statutes governing marketing practices by insurers, by permitting debtors to exercise a choice of insurer yet requiring credit insurance on the loan transaction, for example,¹⁹⁷ the courts should consider the state policy relatively "neutral" and not sufficiently affirmative or directive to fall within the state action doctrine. Only legislation which specifically and affirmatively directs involuntary tie-ins should protect private conduct imposing the tie-ins. On the other hand, where the state law expressly prohibits tie-in arrangements, the state action immunity would be inapplicable because the practice contravenes, and does not advance, state policy.¹⁹⁸

To satisfy the second requirement of the state action doctrine, that the state actively supervise and regulate the challenged conduct, an insurer must demonstrate that a state regulatory commission or agency approved contracts, policies or lender practices requiring the purchase of credit insurance with the sale of credit and scrutinized application of the contracts to debtors. It is unlikely that any state agency charged with supervision and enforcement of the state insurance laws would condone a practice such as coercive tying arrangements, but specific and active regulatory oversight may exempt the tie-ins from the antitrust laws.

V. CONCLUSION

Joint sales of credit and credit insurance are a pervasive factor in markets for credit and it appears that a substantial number of these joint sales are accomplished by coercive and involuntary marketing techniques and practices. A government study reported that about sixty-two percent of all credit transactions in the United States are accompanied by a joined sale of credit insurance. The study concluded, however, that involuntary tying

196. See, e.g., *United States v. Title Insurance Rating Bureau*, 700 F.2d 1247, 1252-53 (9th Cir. 1983); *Kartell v. Blue Shield of Mass.*, 542 F. Supp. 782, 786-92 (D. Mass. 1982).

197. See *supra* note 31.

In the context of tying arrangement cases, the state action doctrine could have limited application in a couple of circumstances. First, the doctrine may immunize conduct which is characterized as a boycott or act of coercion or intimidation and, second, it could operate to exempt conduct which is not the "business of insurance." See *Carlson, Insurance Exemption*, *supra* note 168, at 1140.

198. *Carlson, Insurance Exemption*, *supra* 168, at 1146-47.

The state action doctrine is applicable to conduct compelled by the state decision-maker and does not exempt anticompetitive conduct which contravenes state law or regulation. *Sound Inc. v. AT&T*, 631 F.2d 1324 (8th Cir. 1980).

practices are not a significant problem in American lending markets, particularly the banking industry. Critics of the study argued that it vastly understated the pervasiveness of credit insurance tying, which could be as high as ninety percent of credit transactions. Moreover, even the government study strongly indicated that involuntary tying of credit insurance is very prevalent in unregulated markets for credit from some financial institutions.

Against this controversial background of the credit insurance industry, legal doctrines concerning the illegality of tying arrangements were examined to discern the applicability of those doctrines to credit insurance tying arrangements. A lender's economic power in the market for the tying product, an essential element in an antitrust action under Section 1 of the Sherman Act, may be demonstrated in several pertinent ways. High penetration rates, relatively high premium rates for credit insurance, significant markets segmentation, and an inelastic demand among some classes of customers, like the poor, may show significant market power by the lender. The exercise of economic power by a lender in forcing joint sales of credit insurance and loans should be actionable as an illegal tying arrangement. Such practices limit consumers' range of choice in credit and insurance transactions, impairs competitive opportunities by other lenders and insurers, and may alter the structure of the credit and insurance industries. In fact, there is evidence of an increase in concentration in some industries where credit insurance tying is prevalent.

Actions under Section 1 of the Sherman Act for illegal tying arrangements are well suited to prevent these marketing practices and foster competitive behavior and market structures. Indeed, antitrust actions may provide a needed ancillary enhancement to the consumer protection laws and government regulation under banking and insurance laws. A consideration of the degree of coerciveness of tie-ins is useful in antitrust litigation to prove that tying has occurred and to demonstrate the lender's intent to force a tie-in. Attempts to make antitrust actions more difficult by limiting actions only for explicit tying will impair competition policy and the deterrence objectives of private antitrust litigation.

Finally, the Article considered the immunities and exemptions from antitrust litigation for insurance tie-ins under the McCarran-Ferguson Act and the state action doctrine. It appears that a conventional tying arrangement between a loan and credit insurance does not enjoy immunity under either source. It is clearly not the "business of insurance" and it is not authorized or compelled by state law.