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Antitrust: Preseason Football Tickets and Tie-Ins
Coniglio v. Highwood Services, Inc., 495 F.2d 1286 (2d Cir. 1974)

Plaintiff, a season ticket holder\(^1\) of defendant's Buffalo Bills football team, instituted a class action, alleging that the requirement that purchasers of regular season tickets also buy exhibition game tickets\(^2\) constituted an illegal tying arrangement under section 1 of the Sherman Act.\(^3\) The federal district court granted defendant's motion for summary judgment.\(^4\) The Court of Appeals for the Second Circuit af-

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2. Season ticket holders had to purchase tickets for one exhibition game in 1966, two in 1968 and three in 1970. *Id.*
   
   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .
   
   Plaintiff argued that because exhibition and regular season games were separate products, and because season and individual game tickets were separate products, Highwood Services, Inc. had created a tie between the season tickets and the exhibition tickets which was either unreasonable or illegal per se. Brief for Appellant at 5-18, Coniglio v. Highwood Servs., Inc., 495 F.2d 1286 (2d Cir. 1974). Plaintiff also alleged that Highwood Services, Inc., the National Football League, and Pete Rozelle (the League's president) had conspired to restrain trade in violation of § 2 of the Sherman Act, 15 U.S.C. § 2 (1970). Brief for Appellant at 26, Coniglio v. Highwood Servs., Inc., 495 F.2d 1286 (2d Cir. 1974).
   
   The district court judge, in a two-paragraph opinion, reasoned that "[b]ecause the buyer is free to buy either a season ticket or individual game tickets, there is no tying problem . . . ." *Id.* The argument assumes that the exhibition games are a separate product from the season games, and that the season game ticket is the sum of the individual game tickets.
   
firmed and held: Since the defendant had monopolies over both the exhibition and regular season game markets, the tying arrangement between the two separate monopolized products had no anticompetitive effect and therefore did not violate the Sherman Act.\(^6\)

The Sherman Act, which proscribes "[e]very contract . . . in restraint of trade,"\(^8\) has been construed to prohibit only unreasonable restraints of trade.\(^7\) Nonetheless, certain arrangements are always considered unreasonable and are thus illegal per se.\(^8\) In *Northern Pacific*

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8. See, e.g., United States v. Sealy, Inc., 388 U.S. 350 (1967) (horizontal territorial restraints); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (boycott); Fashion Originator's Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (boycott); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price fixing agreement). The rationale for the creation of these per se categories is based upon the Court's conclusion that 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 . . . avoids the necessity for an incredibly complicated and prolonged economic investigation . . . .


The creation of the per se categories is the culmination of experience and analysis wherein it has been ascertained that such conduct will be unreasonable, that is, that the conduct involves such an anticompetitive purpose and effect as to outweigh any business justification in the overwhelming proportion of its occurrences and can therefore be found to be illegal after mere identification.

Railway v. United States\(^8\) the Supreme Court held that tying arrangements\(^{10}\) were illegal per se if the party "has sufficient economic power

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10. [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.

*Id.* at 5-6 (footnotes omitted).

The earliest and most common type of tie-in arrangements were agreements under which the owner of a patented article would license another's use of the patent only on the condition that the licensee also purchase certain unpatented articles from the patent owner. At first these agreements were found not to be violative of the Sherman Act. *See, e.g.*, Henry v. A.B. Dick Co., 224 U.S. 1 (1912). Later cases held to the contrary. *See, e.g.*, Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917) (overruling *A.B. Dick*). Patent tying arrangements were also held to constitute violations of § 3 of the Clayton Act, 15 U.S.C. § 14 (1970), because they "necessarily lessen competition." United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457 (1922). "‘The very existence of such restriction suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price.’" Carbice Corp. of America v. American Patents Dev. Corp., 283 U.S. 27, 32 n.2 (1931), quoting Vaughan, Economics of Our Patent System 125-27.

These allegations of patent misuse and antitrust violation, challenging the validity of conditions imposed upon the license of a patent, were generally raised as a defense in patent infringement actions. As a remedy, courts have refused to enforce such conditions. *See, e.g.*, Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944) (combination patent on hot air furnace, tying in fan switch); Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944) (same); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942) (patent on salt depositing machine, tying in salt); Carbice Corp. of America v. American Patents Dev. Corp., *supra*; cf. Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938) (patent on process for using coal emulsion for road construction, tying in coal emulsion).

Finally, in International Salt Co. v. United States, 332 U.S. 392, 396 (1947), the Court found it "unreasonable, per se, to foreclose competitors from any substantial market." This statement was reasserted by the Court in United States v. Columbia Steel Co., 334 U.S. 495, 552 (1948) (dictum): "A restraint may be unreasonable . . . because it falls within the class of restraints that are illegal per se." The results in these two cases are based upon the belief that

[tying arrangements serve hardly any purpose beyond the suppression of competition. . . . In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one.


For a history of tying arrangements, see Abrams, Tying Arrangements and Exclusive Dealing Contracts, 53 CHI. BAR RECORD 75 (1971); McCarthy, Trademark Franchising and Antitrust: The Trouble with Tie-Ins, 58 CALIF. L. REV. 1085 (1970); Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 HARV. L. REV. 50 (1958); Wolfstone, Antitrust Tying Arrangements: Fortner, FTC and Statutory Remedies for Automobile Franchise Abuses, 52 OREG. L. REV. 237 (1973); Note, Tie-out—A Case
with respect to the tying product to restrain appreciably free competition in the market for the tied product and a ‘not insubstantial’ amount of interstate commerce is affected.”

After Northern Pacific, courts recognized a defense to the per se rule. A defendant may claim that there is but one product involved and therefore no tie exists. This fact can be proved in several ways: as a matter of market analysis there is only one product; as a matter


11. 356 U.S. at 6. The requirements have been modified and explained by subsequent cases. Tie-in arrangements may be either unreasonable or illegal per se. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499-500 (1969). Normally, the “‘not insubstantial’ amount of interstate commerce” requirement will be satisfied if the total amount of business foreclosed by the tie is “substantial enough in terms of dollar volume so as not to be merely de minimus.” Id. at 501. The sufficient economic power requirement may be satisfied whenever the seller can exert some power over some of the buyers in the market . . . the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.


For a discussion and brief analysis of the “sufficient power” and “not insubstantial commerce” requirement, see Note, Tie-out—A Case for the Extension of Tying Theory, supra note 8; Note, Per Se Doctrine—Tying Arrangements and the Market Power Requirement, 8 TULSA L.J. 235 (1972).

Tying arrangements may also be found unreasonable per se under § 3 of the Clayton Act, 15 U.S.C. § 14 (1970), but the standards for per se illegality are different. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608-09 (1953). Section 3 of the Clayton Act is limited to “goods, wares, merchandise, machinery, supplies, or other commodities . . . .” Advance Bus. Sys. & Supply Co. v. SCM Corp., 415 F.2d 55, 64 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970) (section 3 of the Clayton Act not applicable when either the tying or tied product is a service).

12. The first case to accept this “single product” defense was Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613 (1953), which assumed that the items sold were fungible. As a federal district court noted, however, this rule is easier to state than to apply because antitrust decisions and literature contain astonishingly little discussion of the criteria to be applied to distinguish between component parts of a single product and a multiplicity of products.

of business practice the tie is necessary to protect the good will of the
business; or as a matter of business practice the tie is necessary to

"The tests for determining when two products, rather than one, are involved in an illegal
tie-in have never been conclusively established by the Supreme Court." Note, Product Separability: A Workable Standard to Identify Tie-in Arrangements Under the Antitrust Laws, 46 S. Cal. L. Rev. 160, 163 (1972). It has been held that morning newspaper advertisements are the same product as evening advertisements, Times-Picayune Publishing Co. v. United States, supra, but that the sponsorship of a television program over ninety-five desirable stations is a separate product from the sponsorship of the same program over another thirty-five undesirable stations, American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848, 850 (S.D.N.Y. 1963), rev'd on other grounds, 446 F.2d 1131 (2d Cir. 1971), cert. denied, 404 U.S. 1063 (1972).


The illogic of adopting a "legitimate reasons" defense to prove a per se violation of the Sherman Act would seem apparent from the rationale of employing the per se test in the first instance. See note 8 supra. The defense merely shifts the burden of proof, under the rule of reason analysis, to the defendant.

Thus it will be seen that the court's decision does not really turn on the question of inseparability. In fact, by basing its decisions on 'sound business reasons' the court would seem to presuppose that there are two separate products.

Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 762 (6th Cir.), cert. denied, 382 U.S. 820 (1965). The courts, however, have accepted the defense only in unique factual circumstances. See, e.g., Dehydrating Process Co. v. A.O. Smith Corp., supra (defendant, who owned a patented glass-lined silo and manufactured unloading equipment for silo, tied equipment into sale of patented silo because no other commercial unloading equipment would operate correctly); United States v. Jerrold Electronics Corp., supra (defendant, who sold community antennas in new industry with new technology and had the only trained workmen for the technology, tied service contract and replacement parts into sale of antenna system). See Abrams, supra note 10; Austin, The Tying Arrangement: A Critique and Some New Thoughts, 1967 Wits. L. Rev. 88 (1967); McCarthy, supra note 10; Wheeler, supra note 8; Wolfstone, supra note 10; Note, Tying Arrangements and the Single Product Issue, 31 Ohio St. L.J. 861 (1970); Note, Product Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws, supra.

13. See, e.g., Susser v. Carvell Corp., 332 F.2d 505 (2d Cir.), cert. denied, 379 U.S.
protect a new industry. If the defendant does not place himself within one of these categories, the arrangement will be held illegal per se and evidence of its reasonableness will not be admitted.

Following the reasoning of the Supreme Court in Northern Pacific, the Second Circuit in Coniglio v. Highwood Services, Inc. found that there were four aspects to a per se illegal tying arrangement:

(1) two separate and distinct products, a tying product and a tied product; (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) anti-competitive effects in the tied market; and (4) involvement of a "not insubstantial" amount of interstate commerce in the tied market.

The court found that the facts of the case easily satisfied the requirements of sufficient economic power and a "not insubstantial" amount


15. Although some commentators have treated these defenses as separate allegations, e.g., Austin, supra note 12; McCarthy, supra note 10; others argue that Jerrold Electronics v. United States, 187 F. Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 561 (1961), stands for the proposition that if the defendant has any "legitimate reasons" for tying items together then those items will be treated as one product, e.g., Wheeler, supra note 8; Wolfstone, supra note 10.


17. 495 F.2d 1286 (2d Cir. 1974).

18. Id. at 1289.

19. The court concluded:

Although the question is indeed a close one, we believe that, despite the relatively large quantity of individual game tickets available here, the district court's conclusion, that as a matter of law the requisite coercive power was absent, is erroneous.

Id. at 1290. Although correct, the court's asserted difficulty in reaching that conclusion is perplexing. The court later stated that Highwood had "a monopoly over the presentation of regular season professional football games." Id. at 1291. Supreme Court decisions have held that the sufficient economic power requirement may be satisfied by a monopoly, United States v. Loew's Inc., 371 U.S. 38 (1962) (copyright); International Salt Co. v. United States, 332 U.S. 392 (1947) (patent), or an inherently unique product, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (land). See Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969). The Coniglio court appears to have defined sufficient economic power in terms of the market demand for the product. To define economic power in this manner, however, simply redefines the phrase in terms of how the power is exercised. If Highwood Services, Inc. had a monopoly on the regular season professional football tickets, then presumably it could have refused to sell any individual game tickets and offered, instead only season tickets includ-
of interstate commerce, and that the distinction between exhibition and regular season games was "sufficiently sharp" to present a triable issue of fact inappropriate for summary judgment. The court reasoned, however, that, since the defendant had monopolized exhibition and season game tickets, the tying arrangement did not foreclose any competition. Because an anticompetitive effect is a necessary element of a per se illegal tying arrangement, the Second Circuit affirmed the summary judgment of the claim.

The court's opinion created a blanket defense to the per se rule for the owner of two separate monopolies. The defense presumes that the coercion of consumers to buy undesired products has no anticompetitive effect. The court recognized the general rule that tying one

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Id. (footnote omitted). The nearest competitor in the professional football market is in Cleveland, Ohio.

23. Many cases have noted that coercion of consumers is one of the evils at which the Sherman Act is directed. See, e.g., United States v. Loew's Inc., 371 U.S. 38, 44-45 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1, 10-11 (1958), quoting Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953):

By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of the buyer's independent judgment as to the "tied" product's merits and insulates it from the competitive stress of the open market.

In Fortner Enterprises, Inc., v. United States Steel Corp., 394 U.S. 495 (1969), the Court, after noting that even a monopolist could not have complete power over the buyer because some buyers would refuse to buy the product, stated:

[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 preferences for the product ...]

Id. at 503-04; accord, Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), cert. denied, 382 U.S. 820 (1965). In all of these cases, however, both coercion and
product to another monopolized product is a violation of the Sherman Act, but asserted that if the first product was also monopolized the arrangement was immune from antitrust prosecution. Although both of the requirements for per se illegality established by Northern Pacific were met, the court avoided a finding of illegality by restricting the coverage of the Sherman Act to instances where actual or potential competitors had been foreclosed. This restriction upon the Sherman Act is difficult to reconcile with the Supreme Court's long-held belief that tying arrangements "serve hardly any purpose beyond the suppression of competition."

Furthermore, the court's decision was inconsistent with analogous cases that hold owners of patents and other government-created monopolies liable for violations of the per se rule against tying arrangements. Presumably, since the defendants in Coniglio were permitted foreclosure of competitors were present. Therefore, Coniglio is a case of first impression: The court asserted, in a case that arguably did not present foreclosure of competition, that when only the coercion of consumers is present no antitrust violation can be found. See Note, Tie-out—A Case for the Extension of Tying Theory, supra note 8.


25. 495 F.2d at 1291-92: "Accordingly, the tying arrangement attacked by Coniglio does not fall within the realm of contracts 'in restraint of trade or commerce' proscribed by Section 1 of the Sherman Act."

26. See text accompanying note 11 supra.

27. The court's finding could be interpreted as establishing a third requirement for per se illegality. The language used by the court, however, see notes 22 & 25 supra, argues to the contrary. In addition, the court concluded, "the propriety of summary judgment in this case rests on Coniglio's total failure to demonstrate an adverse effect on competition, actual or potential . . . ." 495 F.2d at 1292-93. Moreover, the suggested interpretation would render the Coniglio decision inconsistent with all of the per se tie-in cases. See, e.g., Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); United States v. Loew's Inc., 371 U.S. 38 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); International Salt Co. v. United States, 332 U.S. 392 (1947). As the Court held in Fortner, failure to prove a per se violation is not fatal to a plaintiff's case and summary judgment is improper. The better interpretation of the Coniglio decision is that a failure to prove some actual or potential anticompetitive effect will constitute a failure to show that the contract falls under the purview of the Sherman Act. The issue of the contract's reasonableness thus becomes irrelevant.


to tie monopolized products together, the owner of two patents could license his patents in the same manner. Such "package licensing," however, constitutes patent misuse. The decisions have reasoned that the tie constitutes an unlawful extension of the patent monopoly since the patent only protects the invention and "not that invention plus some embellishment... which also happens to be patented." If government-created monopolies may not be tied into a single package, football game monopolies should not be treated differently.

only arguable distinction is that the professional sports leagues are unique enterprises deserving singular treatment under the antitrust laws.\textsuperscript{34} Although some arrangements may be required for the existence of professional sports leagues, a tie-in between season and exhibition game tickets is hardly one of those "necessary arrangements" that would justify distinguishing the patent misuse cases from \textit{Coniglio}.\textsuperscript{35}

In addition, the holding in \textit{Coniglio} is apparently in conflict with \textit{United States v. Loew's Inc.}\textsuperscript{36} In that decision the Supreme Court held that defendant's "block-booking" practice, by means of which certain attractive movies were licensed only in a block with other less attractive films, was a per se violation of the antitrust laws. The Court in \textit{Loew's} noted that per se illegal tie-ins have two possible anticompetitive effects: the coercion of buyers to give up the purchase of substitutes for the tied products, or the destruction of access to the consuming market for competing suppliers of the tied product.\textsuperscript{37} Sufficient

\textsuperscript{34} Authors have suggested that courts have employed a distinct kind of analysis when professional sports associations have been charged with antitrust violations:

\textquote{The courts have generally decided the lawfulness of its arrangements . . . by balancing the alleged economic benefits against the potential evils and have allowed reasonable restraints, even when they fall into a category usually regarded as per se illegal.}

\textit{Note, The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws, 81 HARVA. L. REV. 418, 419 (1967); see Note, Player Control Mechanisms in Professional Team Sports, 34 U. PITR. L. REV. 645 (1973). The alleged practices attacked (e.g., league housekeeping rules, player restraints, and owner restraints) are peculiar and necessary to competitive sports leagues. Some economic cooperation is necessary to insure athletic competition. For example, restrictions on player mobility insures that the less profitable teams will be able to afford the more talented players and therefore be able to compete on an equal basis with the more profitable teams. It was not alleged that the exhibition game tie-in promoted athletic competition nor does it appear that such an argument could successfully defend this practice.}

\textsuperscript{35} \textit{See note 34 supra.}

\textsuperscript{36} 371 U.S. 38 (1962). Loew's had a series of copyrights on a number of movies, some of high quality (\textit{e.g.}, "Gone with the Wind") and some of low quality (\textit{e.g.}, "Getting Gertie's Garter"). These movies were released to television stations only in large blocks which included a variety of high- and low-quality movies. To obtain one of Loew's high-quality movies, stations were forced to pay for a number of other undesirable films.

\textsuperscript{37} 371 U.S. at 45.

\textit{A tie-in contract may have one or both of these undesirable effects when the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item.}

\textit{Id.}
economic power, the first requirement of a per se illegal tying arrangement followed from the copyright, which gave the defendant a "‘monopolistic' position as to each tying product . . . ." The defendant's "monopolistic" position over each product did not mean, however, that there was no anticompetitive effect. The Court reasoned that although each of the desired films "‘was itself a unique product' and not fungible, the less desirable films, while also distinct, were in competition with other films and programming material. This competition was suppressed by the tie-in arrangement.

38. Id. at 48.


40. 371 U.S. at 49. The Court did not explain how to distinguish desirable and undesirable films or films that are in competition with other programing materials and films that are not. The Court simply noted that "the distinctiveness of the copyrighted tied product is not inconsistent with the fact of competition, in the form of other programing material and other films, which is suppressed by the tying arrangements." Id.

41. Id. The most significant aspect of Coniglio was the recognition that similar but separate "monopolized" products have different relevant markets based upon their desirability. The defendant's monopoly of regular season professional football games in the Buffalo area may have been a monopoly over such a unique and distinct product that he had no competition. This does not mean, however, that the defendant's exhibition games monopoly did not experience competition with other kinds of athletic entertainment as a result of a high degree of cross elasticity of demand.

Plaintiff argued that exhibition games were in competition with other types of general entertainment in the Buffalo area. The court rejected the argument as nothing more than the boundless contention that, by extracting extra dollars from season ticket holders, the Bills leave less in their pockets to spend on any other form of diversion . . . . Sufficient to say that the extraordinary breadth of the market encompassing such diverse yet assertedly competitive products is far beyond that ever contemplated for a relevant product market.

495 F.2d at 1292 (emphasis original). The court seems to have suggested that an anticompetitive effect must encompass more than the mere extraction of dollars. The extraction of dollars, however, has been the major consequence of admittedly anticompetitive tie-ins. In Loew's, when Loew's Inc., forced television stations to purchase extra movies, it had done little more than extract extra dollars for the purchase of the higher quality movies to which the lesser quality films were tied. The contract did not prohibit television stations from purchasing other movies. Such extraction has always been held to constitute the kind of activity against which the Sherman Act was directed. The consumer, having been forced to purchase an item he did not want, is not thereafter going to purchase a substitute for the unwanted product. By coercing consumers to purchase the unwanted tied product, the competitors in that market are foreclosed.

Even if one accepts the Coniglio court's assertion that the mere coercion of a consumer to buy an item that he does not desire is an insufficient ground for finding a monopoly tie-in illegal, Loew's suggests that the Coniglio tying arrangement foreclosed competitors of the exhibition football games. Desirable season game tickets, like desirable movies, may be sufficiently distinctive to warrant a label of monopoly. But this determination does not mean that exhibition game tickets, or undesirable movies, also constitute a monopoly and therefore have no competitors. Under the Loew's analysis, since the exhibition games have a lower consumer appeal than season games, the former are in competition with the sale of other products. Consequently, a relevant market broader than "exhibition games" would have been appropriate.

The Second Circuit was the first circuit court of appeals to render a full opinion on the exhibition game tying issue. At the heart of the court's reasoning lies the assumption that coercing consumers into purchasing products they do not want is not violative of the Sherman Act. Sound antitrust policy and the increasing recognition of consumers' rights provide a firm basis for restricting the application of the Coniglio decision.

42. 495 F.2d at 1293.

43. The Coniglio court did not preclude consideration of a smaller relevant market that might have brought the tie-in within the range of the prohibition of the Sherman Act. See 495 F.2d at 1292. For example, a relevant market restricted to athletic entertainment might have been accepted by the court. It would, however, be inconsistent for courts, while employing the test of per se illegality, to become engrossed in extended market analysis to determine how to define the relevant market.

44. Brief for Appellants at 7, Coniglio v. Highwood Servs., Inc., 495 F.2d 1286 (2d Cir. 1974).
