

# The Burger Court Opinion Writing Database

*United States Steel Corp. v. Fortner Enterprises, Inc.*

429 U.S. 610 (1977)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: FEB 15 1977

Re: No. 75-853 - United States Steel Corporation v. Fortner Enterprises, Inc.

MR. CHIEF JUSTICE BURGER, Concurring

I concur in the Court's opinion and write only to emphasize what the case before us does not involve; I join on the basis of my understanding of the scope of our holding. Today's decision does not implicate ordinary credit sales of only a single product and which therefore cannot constitute a tying arrangement subject to per se scrutiny under section 1 of the Sherman Act. In contrast to such transactions, we are dealing here with a peculiar arrangement expressly found by the Court in Fortner I to involve two separate products sold by two separate corporations. 394 U.S. 495, 507. Consequently, I read the Court's assumption that a tie-in existed in this case, required as it is by stare decisis, to cast no doubt on the legality of credit financing by manufacturers or distributors.

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

✓✓  
From: The Chief Justice

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1st DRAFT

Circulated: FEB 17 1977  
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## SUPREME COURT OF THE UNITED STATES

No. 75-853

United States Steel Corpora-  
tion et al., Petitioners, | On Writ of Certiorari to the  
v. | United States Court of Ap-  
Fortner Enterprises, Inc. | peals for the Sixth Circuit.

[February —, 1977]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, concurring.

I concur in the Court's opinion and write only to emphasize what the case before us does *not* involve; I join on the basis of my understanding of the scope of our holding. Today's decision does not implicate ordinary credit sales of only a single product and which therefore cannot constitute a tying arrangement subject to *per se* scrutiny under § 1 of the Sherman Act. In contrast to such transactions, we are dealing here with a peculiar arrangement expressly found by the Court in *Fortner I* to involve two separate products sold by two separate corporations. 394 U. S. 495, 507. Consequently, I read the Court's assumption that a tie-in existed in this case, required as it is by the law of the case, to cast no doubt on the legality of credit financing by manufacturers or distributors.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 21, 1977

RE: No. 75-853 U.S. Steel Corporation v. Fortner  
Enterprises, Inc.

Dear John:

I agree.

Sincerely,

*Bill*

Mr. Justice Stevens

cc: The Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

✓  
January 18, 1977

Re: No. 75-853, U. S. Steel Corp. v. Fortner

Dear John,

Upon the understanding that you plan to make modifications in the last two footnotes, I am glad to join your opinion for the Court.

Sincerely yours,

✓  
J. S.

Mr. Justice Stevens

Copies to the Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543  
✓

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 22, 1977

Re: No. 75-853 - United States Steel Corp. v.  
Fortner Enterprises Inc.

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 21, 1977

Re: No. 75-853, United States Steel Corporation v. Fortner  
Enterprises, Inc.

Dear John:

Please join me.

Sincerely,

*JM*  
T. M.

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

✓✓  
January 24, 1977

Re: No. 75-853 - United States Steel Corporation v. Fortner  
Enterprises, Inc.

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

cc: The Conference

✓✓✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 21, 1977

No. 75-853 U. S. Steel Corp. v.  
Fortner Enterprises, Inc.

Dear John:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Stevens

Copies to the Conference

LFP/lab

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 25, 1977

Re: No. 75-853 - United States Steel Corp. v.  
Fortner Enterprises

Dear John:

Please join me.

Sincerely,

*WR*

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 16, 1977

Re: No. 75-853 - United States Steel Corporation  
v. Fortner Enterprises

Dear Chief:

Please join me in your concurring opinion in this case.

Sincerely,

WR

The Chief Justice

Copies to the Conference

✓  
RS  
Please file in the  
main file

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JAN 18 1977

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 75-853

United States Steel Corporation et al., Petitioners  
 v.  
 Fortner Enterprises, Inc. } On Writ of Certiorari to the  
 United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

Mr. JUSTICE STEVENS delivered the opinion of the Court.

In exchange for respondent's promise to purchase prefabricated houses to be erected on land near Louisville, Ky., petitioners agreed to finance the cost of acquiring and developing the land. Difficulties arose while the development was in progress, and respondent ("Fortner") commenced this treble damage action, claiming that the transaction was a tying arrangement forbidden by the Sherman Act. Fortner alleged that competition for prefabricated houses (the tied product) was restrained by petitioners' abuse of power over credit (the tying product). A summary judgment in favor of petitioners was reversed by this Court. *Fortner Enterprises v. U. S. Steel*, 394 U. S. 495 (*Fortner I*). We held that the agreement affected a "not insubstantial" amount of commerce in the tied product and that Fortner was entitled to an opportunity to prove that petitioners possessed "appreciable economic power" in the market for the tying product. The question now presented is whether the record supports the conclusion that petitioners had such power in the credit market.<sup>1</sup>

<sup>1</sup> As explained at the outset of the opinion, *Fortner I* involved "a variety of questions concerning the proper standards to be applied by a United States district court in passing on a motion for summary judgment in a civil antitrust action." 394 U. S., at 496. Petitioners do not ask us to re-examine *Fortner I*, which left only the economic

pp. 1-2, 11

To: The Chief Justice  
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From: Mr. Justice Stevens

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 75-853

United States Steel Corpora-  
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    v.      } United States Court of Ap-  
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[January —, 1977]

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*Minor stylistic changes*

To: The Chief Justice  
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 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated:

FEB 16 1977

Recirculated:

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 75-853

United States Steel Corpora-  
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[February —, 1977]

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