FEATURED ARTICLE

CONTROL WITHOUT RESTRAINT –

The Interplay of Antitrust and Trademark Laws in the Franchise Relationship

By Marie Breaux
and K. Todd Wallace [1]

The courts have long recognized that "[t]he cornerstone of a franchise system must be the trademark or trade name of a product."[2] Thus, trademark law plays an integral role in understanding the franchisor-franchisee relationship. Franchisors often impose restrictions on the sources of supplies, products, and other necessities in operating the franchise in an effort to control the quality of the goods and services sold under the owner's mark. Franchisees often challenge these restrictions under the antitrust law's prohibitions against unreasonable restraints of trade.[3]

This article will examine three issues which frequently arise in this type of litigation: (1) the treatment of the trademark as a measure of market power; (2) the effectiveness of preliminary motions to dismiss antitrust claims; and (3) the use of "quality control" as a justification defense to alleged restraints of trade. Recent franchisor success in these areas by no means signals a settled body of case law. To the contrary, each of these issues has drawn intense scholarly debate which will continue to provide fuel for antitrust claims in the franchise arena.

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1 Mr. Wallace is a senior associate with the New Orleans law firm of Liskow & Lewis. Ms. Breaux is a former shareholder with Liskow & Lewis.

2 *Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), *cert. denied*, 381 U.S. 125 (1965).

3 *See* Warren S. Grimes, *Market Definition in Franchise Antitrust Claims: Relational Market Power and the Franchisor's Conflict of Interest*, 67 Antitrust L.J. 259-260, 267-77 (1999) (discussing the inherent conflict within all franchise relationships and the need to balance the franchisor's right to protect franchise goodwill and the franchisee's need to be free of "competition–distorting choices" that are unnecessary to protect franchise trademark or goodwill).

I. TREATMENT OF THE TRADEMARK AS A MEASURE OF MARKET POWER

Franchise litigation often involves allegations of illegal restraint of trade through tying.[4] The essential characteristic of a tying arrangement "lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all," or might have preferred to purchase elsewhere on different – perhaps more economical – terms.[5] Tying violates the antitrust laws when the seller has "appreciable economic power" in the tying product market, and the arrangement effects a substantial volume of commerce in the tied product market.[6] Thus, a plaintiff must define the relevant market and subsequently establish the franchisor's market power in order to succeed on this antitrust claim.[7]

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4 A typical tying arrangement is an agreement by one party to sell a product (the "tying" product) to a buyer, but only on the condition that the buyer also purchase from the seller a different product (the "tied" product). *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461 (1992) (quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958)). The Supreme Court has identified four elements necessary to prove a tying claim: (1) that there are two, distinct products – a tying product and a tied product; (2) a sale or lease of the tying product is conditioned on the sale or lease of the tied product; (3) the seller/lessor possesses sufficient market power over the tying product to enable it to restrain appreciably the competition in the tied product's market; and (4) a "not insubstantial" amount of interstate commerce in the tied product is foreclosed by the tying arrangement. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-18 (1984). *See also, Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1574 (11th Cir. 1991); *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1414 (11th Cir. 1987); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1338-1339 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). For a more recent overview of tying arrangements, *see,* Janet L. McDavid & Richard M. Steuer, *The Revival of Franchise Antitrust Claims*, 67 Antitrust L.J. 209 (1999).

5 *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 922 F. Supp. 1055, 1060 (E.D. Pa. 1996), *aff'd*, 124 F.3d 430 (3d Cir. 1997); *Jefferson Parish Hosp.*, 466 U.S. at 12.

6 *Eastman Kodak Co.*, 504 U.S. at 462. *See also, Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 834-35 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *Moore v. Jas H. Matthews & Co.*, 550 F.2d 1207, 1215 (9th Cir. 1977); *Collins v. International Dairy Queen, Inc.*, 939 F. Supp. 875, 877-78 (M.D. Ga. 1996).

7 Market power exists in three circumstances: (1) where the government has granted seller a patent or similar monopoly; (2) where the seller possesses a unique product; and (3) where the seller possesses a high market share. *See, Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1345-46 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988). *See also,* McDavid & Steuer, *supra* note 4, at 219. Market power is generally measured by market share, but it can be demonstrated by direct evidence that defendants raised prices and drove out competition in the

In this context, franchisees often attempt to define the relevant market in terms of the franchisor's trademark.[8] While franchisees initially had success with this theory, contemporary antitrust jurisprudence and theory have turned decidedly against the use of a trademark as proof of market power.

***Siegel* and its Progeny**

Like most issues involving antitrust law, the effect of a trademark on the franchisor's market power has received different treatment at different times, and conflicts have arisen among the circuits through the years. This issue received heavy scrutiny beginning in 1971 with the Ninth Circuit's decision in *Siegel v. Chicken Delight, Inc.*,[9] which essentially equated trademark ownership with market power and dramatically reduced franchisors' use of tying practices. In fact, in the aftermath of the *Siegel* decision, many franchisors dropped or substantially limited their express tying requirements.[10] By the early 1990's, the percentage of franchise agreements containing tying clauses dropped from nearly 50 to 10 per cent, illustrating not only the impact of *Siegel* but also the franchisees' early success in antitrust claims against the franchisors.[11] In light of *Siegel*, many franchisors informed respective franchisees that, despite the franchise agreement's requirement otherwise, franchisees were no longer required to purchase product and/or ingredients exclusively from the franchisor.[12]

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tied product market. *Breaux Bros. Farms v. Teche Sugar Co., Inc.*, 21 F.3d 83, 87 n.4 (5th Cir. 1994), *cert. denied*, 513 U.S. 963 (1994) (relying on *Eastman Kodak Co.*, 504 U.S. at 481).

8 *See* McDavid & Steuer, *supra* note 4, at 217.

9 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

10 Robert W. Emerson, *Franchising and Consumers' Beliefs About "Tied" Products: The Death Knell for Krehl?*, 45 Fla. L. Rev. 163, 166 (1993).

11 *Id.*

12 *See Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 721-22 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) ("From 1968 to 1971, twelve of the Photovest franchises included a contractual clause prohibiting Photovest from buying processing from anyone other than Fotomat. Then in

In *Siegel*, the plaintiff challenged the franchisor's requirement that all franchisees purchase a specific number of cooking appliances and specific ingredients exclusively from Chicken Delight.[13] The Ninth Circuit considered the market power of the alleged tying product – the franchise trademark – and affirmed the district court's finding that the franchisor's registered trademark, combined with its demonstrated power to impose a tie-in, established the existence of sufficient market power to constitute a per se violation of the Sherman Act.[14] Significantly, the court accepted plaintiff's argument for a presumption of market power based on the mere existence of a trademark.[15] The court noted that, even absent a showing of market dominance, economic power may be inferred from the tying product's (*i.e.*, the trademark's) desirability to consumers or from the uniqueness in its attributes.[16]

The Ninth Circuit premised its adoption of this presumption on a comparison of trademarks to patents and copyrights:

> Just as the patent or copyright forecloses competitors from offering the distinctive product on the market, so the registered trade-mark presents a legal barrier against competition. It is not the nature of the public interest that has caused the legal barrier to be erected that is the basis for the presumption, but the fact that such a barrier does exist.[17]

June 1971, Fotomat wrote to its franchisees, apparently with knowledge of the then recent opinion in *Siegel v. Chicken Delight, Inc.* . . . , advising them that they could use any processor they wished despite the provision in their agreements to the contrary.").

13 *Siegel,* 448 F.2d at 46.

14 *Id.* at 49.

15 *Id*.

16 *Id.* at 49-50 (relying on *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-03 (1969) ("Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market.") ("Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.")).

17 *Siegel*, 448 F.2d at 50.

The court found that, from the standpoint of duration, a trademark provides even more extensive rights than does a patent or copyright because trademark rights have a potentially unlimited lifespan while patent and copyrights subsist for limited times only.[18]

Relying on *Siegel* and its reasoning, other courts throughout the 1970's used trademarks as evidence of market power.[19] For example, both the Seventh and Eighth Circuit Courts of Appeals concluded that a defendant could possess market power as a result of the unique nature of the franchise's trademark.[20] In both of these cases, the courts concluded that the unique nature of the franchisor's trademark resulted in sufficient market power to find violations of the Sherman Act.[21] *Siegel* and the decisions in other circuits applying its logic severely tilted the balance in favor of franchisees because the presumption of market power from the trademark itself effectively and automatically established proof of an essential element of any tying claim.[22]

***Siegel's* Detractors**

The reasoning of *Siegel* and its progeny did not, however, gain universal acceptance.[23] The Fifth Circuit, for example, in *Carpa, Inc. v. Ward Foods, Inc.*, rejected the *Siegel*

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18 *Id*. *See also, United States v. Loew's, Inc.*, 371 U.S. 38, 45-46 (1962) ("The requisite economic power is presumed when the tying product is patented or copyrighted.").

19 *See, e.g., Seligson v. Plum Tree, Inc*., 361 F. Supp. 748, 753 (E.D. Pa. 1973) (holding that the requisite market power is presumed when the tying product is a registered trademark); *Falls Church Bratwursthaus, Inc. v. Bratwursthaus Management Corp*., 354 F. Supp. 1237, 1240 (E.D. Va. 1973) (ruling that, as a matter of law, the license to use the Bratwursthaus service marks possessed sufficient market power to bring the case within the Sherman Act); *Ungar v. Dunkin' Donuts of America, Inc*. 68 FRD 65, 93 (E.D. Pa. 1975) (agreeing with *Siegel* and its progeny).

20 *See, Photovest Corp.*, 606 F.2d at 722; *Northern v. McGraw-Edison Co*., 542 F.2d 1336, 1345 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

21 *Photovest Corp.*, 606 F.2d at 722; *Northern*, 542 F.2d at 1345.

22 *See, e.g., Redd v. Shell Oil Co.*, 1974-2 Trade Cas. (CCH) ¶ 75,390 (D. Utah 1974), *rev'd, in part, set aside, in part*, 524 F.2d 1054 (10th Cir. 1975).

23 In fact, the *Siegel* decision has been sometimes interpreted as relying on Chicken Delight Inc.'s preeminence in the fast-food business, rather than the mere existence of the trademark. *See, Esposito v. Mister Softee, Inc.*, 1976-2 Trade Cas. (CCH) ¶ 61,202 (E.D.N.Y. 1976).

presumption and, instead, held that trademarks are only *persuasive* evidence of market power.[24] That court questioned the reasoning of *Siegel* and noted a basic conceptual difference ignored by the Ninth Circuit: unlike patents or copyrights, which are designed to protect the uniqueness of the process or product itself, a trademark protects only the name or symbol of the product.[25]

Likewise, in *Capital Temporaries, Inc. v. Olsten Corp.*, the Second Circuit rejected the argument that economic power on the part of the defendant franchisor must be presumed by the trademark's existence.[26] The court held that trademarks *do not* establish market power but merely serve to identify the franchisor.[27] The court explained, "[t]here is no such thing as property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed."[28]

The reasoning behind the approach of the Fifth and Second Circuits stemmed from the fact that not all franchise systems are well-established or well known. To illustrate, consider a case where the plaintiff's franchise was the only one issued by the franchisor and the few outlets operated by the franchisor had become unprofitable by the time of trial. In this instance, the franchisor's economic power over the tying product would be "minimal" rather than "appreciable."[29]

The rejection of the *Siegel* presumption did not, however, represent total victory for franchisors. Courts rejecting the Ninth Circuit's *Siegel* presumption still indicated that sufficient

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24 *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 48 (5th Cir. 1976) (relying on *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002, 1015 (5th Cir.), *cert. denied*, 409 U.S. 1086 (1972)).

25 *Carpa, Inc.*, 536 F.2d at 48.

26 506 F.2d 658, 663-65 (2d Cir. 1974). *See also, Susser v. Carvel Corp.*, 332 F.2d 505, 519-21 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965).

27 *Capital Temporaries*, 506 F.2d at 663-65.

28 *Id.* (quoting *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918)).

29 *See, e.g., Watkins v. Kwik Photo, Inc.*, 405 F. Supp. 260, 266-67 (S.D. Miss. 1975).

market power could be based on the trademark in question where the franchise system was well known, financially successful, and enjoyed considerable consumer acceptance.[30]

The Decline of the *Siegel* Presumption

As antitrust market analysis became more sophisticated, the *Siegel* presumption of market power from trademark rights became increasingly untenable. By the 1980's, the presumption of market power in *Siegel* was rarely applied, and courts began consistently holding that the mere presence of a franchisor's trademark did not establish actual market power.[31]

Even the Ninth Circuit has cast doubt on the continuing validity of the *Siegel* presumption of market power. In *Mozart Co. v. Mercedes-Benz of North America, Inc.*, the same circuit – without even mentioning its *Siegel* precedent – held that a prestigious trademark does *not even* constitute persuasive evidence of the economic power necessary to make a tying arrangement illegal.[32] *Mozart* illustrates the central flaw of the *Siegel* rationale: a presumption of market power ignores the obvious difference between patents and trademarks.[33] As the *Mozart* court explained, a patented product is necessarily unique, while a trademarked product is not.[34] The court concluded that market power, if any, is derived from the product itself (in that

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30 *Carpa, Inc.*, 536 F.2d at 48-49.

31 *See Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 798 (1st Cir. 1988) (trademarked product in question does not benefit from the legal market power "uniqueness" that is offered by a copyright); *United States v. Mercedes-Benz of North America, Inc.*, 517 F. Supp. 1369, 1386-87 (N.D. Cal. 1981) (trademark alone is not sufficient to prove market leverage); *Q-T Markets, Inc. v. Fleming Cos.*, 394 F. Supp. 1102, 1109 (D. Colo. 1975) (absent showing of any factor in addition to mere existence of trademark, there is no presumption of coercive market power); *Golden West Insulation, Inc. v. Stardust Inv. Corp.*, 615 P.2d 1048, 1053-54 (1980) (applying Oregon antitrust laws) (a trademark alone "cannot create a presumption of sufficient economic power over the market of tying product"); *see also Queen City Pizza, Inc., v. Domino's Pizza, Inc.*, 922 F. Supp 1055 (E.D. Pa. 1996), *aff'd*, 124 F.3d 430 (3d Cir. 1997) (discussed *infra*).

32 833 F.2d 1342, 1345 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988).

33 *Id.; see also Valley Prods. Co., Inc. v. Landmark*, 128 F.3d 398, 405 (6th Cir. 1997).

34 *Mozart Co.*, 833 F.2d at 1346.

case, cars), not from the name or symbol of the product (in that case, Mercedes-Benz).[35] *Mozart* leaves open for debate whether *Siegel* remains good law even in the Ninth Circuit.[36]

Similarly, in 1992, the Third Circuit, in another case involving brands of automobiles, held that a prestigious trademark is not itself persuasive evidence of economic power. In *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, the court refused to adopt the erroneous *Siegel* comparison of a trademark to a patent.[37] Like the Ninth Circuit in *Mozart*, the Third Circuit observed that a trademark, unlike a patent, protects only the name or symbol and not the product itself, and such protection could never give rise to a presumption of market power.[38] Accordingly, more recent courts have required a distinct showing by the franchisee of "uniqueness," such as the inability of other franchisors to offer comparable franchises at comparable prices.[39]

<u>Current Analysis of Trademarks and Market Power</u>

The present analysis of trademark and market power reflects the increasing sophistication of the courts' understanding of market power. In 1992, in *Eastman Kodak Co. v. Image Technical Services, Inc.* -- an opinion that has generated enormous amounts of analysis in academic journals as well as practice-oriented publications -- the Supreme Court admonished that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." [40] Instead, the Court reaffirmed its preference "to

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35 *Id.* at 1346 (citing Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & Econ. 345, 356 (1985)).

36 *Valley Prods.*, 128 F.3d at 405.

37 959 F.2d 468, 479-480 (3d Cir. 1992), *cert. denied*, 506 U.S. 868 (1992).

38 *Id*.

39 *See, id.* at 479-80; *Mozart*, 833 F.2d at 1346. *See also,* McDavid & Steuer*, supra* note 4, at 219 n. 55.

40 *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466-67 (1992).

resolve antitrust claims on a case-by-case basis" and to "examine[] closely the economic reality of the market at issue."[41] The post-*Kodak* regime of "economic realities," has not supported the use of trademarks as evidence of market power on the part of franchisors.[42]

In defining market power in the franchise context, current cases draw a distinction between a franchisor's power before the franchise agreement is signed and a franchisor's power after the franchise agreement is signed.[43] This approach is illustrated by *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*[44] In that case, plaintiffs alleged that Domino's Pizza possessed monopoly power in the market comprised of Domino's franchisees and that it used that power to coerce franchisees into purchasing ingredients and supplies from a related company.[45] In rejecting the plaintiff's antitrust claims, the court noted that the approach of using the "unique nature of the franchise's trademark" as a basis for market power has been discredited because it fails to make a "key distinction" between a franchisor's pre-contractual market power and its post-contractual power under the franchise agreement.

The court explained the difference in power in these two circumstances as follows:

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41 *Id.* at 467. *See also,* J. Robert Robertson, Editor's Note, *Symposium: The Law of Vertical Restraints in Franchise Cases and Summary Adjudication*, 67 Antitrust L.J. 201, 203 (1999) (explaining the transition from early analysis of market power by presumption to the current *Kodak* requirement of actually proving market power).

42 Numerous articles have addressed the implications of the *Kodak* case in the franchise arena, including most recently Allan P. Hillman, *Franchise Tying Claims: Revolution or Just a "Kodak Moment"?*, 21 Franchise L.J. 1 (2001) (containing citations to many of the most significant articles). For a complete analysis of the current views of the post-*Kodak* regime by leading authorities, see Symposium, *The Law of Vertical Restraints in Franchise Cases and Summary Adjudication*, 67 Antitrust L.J. 201 (1999). Since this article focuses on the interplay of trademark and antitrust law, *Kodak* will not be analyzed at length here.

43 *See, Queen City Pizza*, 922 F. Supp. at 1061-62; *See also, Wilson v. Mobil Oil Corp.*, 984 F. Supp. 450, 460-61 (E.D. La. 1997).

44 922 F. Supp. 1055, *aff'd*, 124 F.3d 430 (3d Cir. 1997). *See also,* McDavid & Steuer, *supra* note 4, at 227-32.

45 *Queen City Pizza*, 922 F. Supp. at 1062.

> The important economic distinction that must be made is between pre- and post-contract economic power. Pre-contract competition among franchisors (such as McDonald's or Kentucky Fried Chicken) to sign up franchisees prevents [a single franchisor] from exercising any economic power in setting contract terms with potential franchisees. [The franchisor], although it possesses a trademark, does not possess any economic power in the market in which it operates – the fast food franchising (or perhaps, more generally, the franchising) market.
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> Post-contract, on the other hand, a franchisor can use the threat of termination to "hold up" a franchisee that has made a specific investment in the marketing arrangement. However, this potential economic power has nothing to do with market power, ultimate consumers' welfare, or antitrust.[46]

In a pre-contractual setting, the franchisor's market power, if any, will derive from its product, not from its trademark or its power to award a franchise.[47] To have market power, the franchisor would need to have the power "to force a potential franchisee to purchase a tied product rather than acquire a franchise to sell a competing brand."[48] Affirming the lower court, the Third Circuit concluded that plaintiffs failed to – and most probably could never – properly allege that Domino's possessed the requisite market power such that it could coerce potential franchisees to purchase tied goods against their will.[49]

The Third Circuit's reliance on this pre-contract analysis further legitimated the approach developed by Benjamin Klein and Lester Saft in their seminal 1985 article, *The Law and Economics of Franchise Tying Contracts*.[50] However, antitrust law remains in constant

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46 *Id.* at 1061-62 (quoting Klein & Saft, *supra* note 35, at 356 (emphasis added)).

47 *Id.* at 1062; *Mozart*, 833 F.2d at 1346.

48 *Queen City Pizza*, 922 F. Supp. at 1062; *Mozart*, 833 F.2d at 1346.

49 *Queen City Pizza, Inc. v. Domino's Pizza*, Inc., 124 F.3d 430, 441-43 (3d Cir. 1997).

50 28 J.L. & Econ. 345 (1985). Klein and Saft strongly criticized the *Siegel* presumption of market power in their 1985 pre-contract analysis. Most courts that subsequently faced market power issues in the franchise tying context specifically accepted the Klein-Saft approach. *See, e.g. Will*

evolution and, as a result, the concept of measuring competition at the pre-contract stage currently faces its own challenge. Until recently, support for the pre-contract analysis of market power was in ascendancy.[51] Now, some commentators question the Klein-Saft approach as being inconsistent with market place realities and with *Kodak*'s new guidelines for post-contract analysis of the product market.[52] This viewpoint concludes that *Kodak* mandates full pre-contract disclosure of all possible franchise requirements by the franchisor to prospective franchisees.[53] After *Kodak*, proponents of the post-contract analysis now suggest that such an approach may be justified in those franchising cases where a tie is imposed after the franchise relationship is established, "for example, where a franchisor required a franchisee to purchase an unwanted product *after* the franchisee had made a substantial investment."[54]

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v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985); *Queen City Pizza*, 922 F. Supp. 1055; *Tominaga v. Shepherd*, 682 F. Supp. 1489.

51 *See,* McDavid & Steuer, *supra* note 4, at 223. *But see* Grimes, *supra* note 3, at 244 (recognizing that "the Klein and Saft thesis had gained only a minimal foothold in lower court decisions" by 1992).

52 *See, id.* at 222-23. *See also,* Grimes, *supra* note 3, at 260-74 (arguing that the appropriate time for assessing the franchisor's market power is post-contractual, "at the point at which the alleged abuse occurs."). Grimes warns that "[t]o force the courts to wear blinders that obscure real market power underlying an abuse that may occur and recur over the potentially indefinite life of a franchise is a revisionist and counter-intuitive notion, albeit one that has found surprising acceptance in recent lower court decisions. Properly framed, the issue under Section 1 of the Sherman Act is not whether there is a contract that shields post-contractual market power abuses but whether there is a contract, combination, or conspiracy that reasonably restrains trade."). *Id*. at 274. *But see,* Benjamin Klein, *Market Power in Franchise Cases in the Wake of Kodak: Applying Post-Contract Hold-Up Analysis to Vertical Relationships*, 67 Antitrust L.J. 283 (expanding and updating the Klein-Saft approach in light of *Kodak*).

53 McDavid & Steuer, *supra* note 4, at 224-25.

54 *Id*. at 225. This interpretation found support in Justice Scalia's dissent in *Kodak*, where he observed that there would have been no illegal tie if Kodak revealed its parts-service tie at the time of market entry since Kodak lacked the requisite power to influence the price of the tied items at that point in time. *Eastman Kodak Co*., 504 U.S. at 491 (Scalia, J., dissenting). McDavid and Steuer suggest that such statements signal that future controversies might revolve around the sufficiency of pre-contract disclosures. *See,* McDavid & Steuer, *supra* note 4, at 225.

Regardless of these distinctive viewpoints,[55] courts now consistently seem to agree that a prestigious trademark is not itself persuasive evidence of economic power.[56] This result has the economic virtue of properly recognizing that a legal right does not necessarily confer economic power.[57] As two noted commentators have suggested, "[p]articularly when there are a number of competing trademarks or franchises, possessing a particular trademark does not create any unique advantage for the franchisee in the marketplace."[58] More practically speaking, in order to prevail on an illegal tying claim, plaintiff franchisees presently have the unenviable task of being required to prove their franchisor's market power in a broad market rather than having the luxury of relying on a presumption based on the franchise trademarks.[59]

II. THE FRANCHISOR'S ABILITY TO OBTAIN RELIEF PRIOR TO THE SUMMARY JUDGMENT STAGE

The loss of a presumption of market power where a unique trademark exists in the franchise system has also dramatically effected the procedural aspects of antitrust litigation. Plaintiff franchisees have always insisted that relevant market determinations are inherently fact intensive, and therefore are inappropriate for disposition on a Rule 12(b)(6) motion.[60] Recently,

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55 For a complete overview of the dichotomy between the pre- and post-contract analyses, *see* Symposium, *supra* note 42, at 201.

56 *See Queen City Pizza, Inc.,* 124 F.3d at 441-43; *Valley Prods. Co*., 128 F.3d at 405; *Town Sound & Custom Tops, Inc.*, 959 F.2d at 479-480; *Grappone, Inc.*, 858 F.2d at 798; *Carpa, Inc*., 536 F.2d at 48; *Susser*, 332 F.2d at 519-21; *Mercedes-Benz of North America, Inc*., 517 F. Supp. at 1386-87; *Q-T Markets, Inc.*, 394 F. Supp. at 1109; *Golden West Insulation, Inc.*, 615 P.2d at 1053-54.

57 *See, e.g*., Gary Myers, *Tying Arrangements and the Computer Industry: Digidyne Corp. v. Data General Corp.*, 1985 Duke L.J. 1027, 1047 (1985).

58 *See,* McDavid & Steuer, *supra* note 4, at 219-20.

59 *Id.* at 209 (recognizing the franchisors' success in most major decisions but warning that "those franchisors that take advantage of their relative power over franchisees still may expose themselves to tying or monopolization claims").

60 *Queen City Pizza, Inc*., 124 F.3d at 436. *See also, Eastman Kodak Co.*, 504 U.S. at 482 (holding that, in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers). Although this article focuses primarily on

though, courts have granted relief to defendant franchisors through a successful motion to dismiss under Fed. R. Civ. P. 12(b)(6).[61] Typically, dismissal is granted when the plaintiffs are unable to establish a franchisor's market power in a relevant market; however, other defenses such as a lack of antitrust injury have also been successfully asserted in preliminary motion practice

Market Power Motions

Defendant franchisors have successfully defeated antitrust suits prior to the summary judgment stage using market power theories. Illustrative of this recent trend is, once again, the Third Circuit's decision in *Queen City Pizza, Inc. v. Domino's Pizza Inc.*[62] There, the franchisees alleged that Domino's "restricted their ability to purchase competitively priced dough."[63] While most franchisees purchased all of their fresh dough from Domino's, plaintiffs attempted to lower costs by making fresh pizza dough on site. Plaintiffs argued that Domino's changed its policies for store-produced dough, thereby eliminating all potential savings.[64]

The plaintiffs further alleged that Domino's refused to sell fresh dough to franchisees unless the franchisees also purchased other items from Domino's. As a result, plaintiffs argued

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franchisors' success with Rule 12(b)(6) motions, franchisors often prevail through summary adjudication. *See,* Margaret M. Zwisler, *The Susceptibility of Vertical Restraints to Summary Adjudication: Procedural Avenues to Substantive Objectives*, 67 Antitrust L.J. 327 (1999).

61 *See, Queen City Pizza*, 124 F.3d at 435-36; *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir. 1992), *cert. denied*, 506 U.S. 999 (1992); *Chawla v. Shell Oil Co.*, 75 F. Supp. 2d 626, 642 (S.D. Tex. 1999); *Re-Alco Industries, Inc. v. National Center for Health Educ., Inc.*, 812 F. Supp. 387, 391-92 (S.D.N.Y. 1993).

62 124 F.3d 430 (3rd Cir. 1997).

63 *Id*. at 434.

64 *Id*. Plaintiffs also alleged that DPI violated federal antitrust laws by prohibiting stores that produce dough from selling their dough to other franchisees, even though the dough-producing stores were willing to sell dough at a price 25% to 40% below DPI's price. *Id*.

that each franchisee store paid between $3000 and $10,000 more per year for ingredients and supplies than it would in a competitive market.

Domino's successfully moved to dismiss the antitrust claims pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that the plaintiffs had failed to allege a valid relevant market.[65] The plaintiffs considered the relevant product market to be the market for ingredients and supplies among Domino's franchisees.[66] The Third Circuit rejected this concept of relevant market and found that antitrust claims predicated upon a relevant market defined by a contractual restraint is not cognizable.[67] The court accepted the franchisor's position that its power to force plaintiffs to purchase ingredients and supplies from them stemmed not from the unique nature of the product – or from its market share in the fast-food franchise business – but from the actual franchise agreement.[68] For this reason plaintiffs' claims implicated principles of contract rather than the federal antitrust laws.[69]

The past decade provides further evidence of the franchisors' ability to obtain relief through a Rule 12(b)(6) motion. In *TV Communications Network, Inc. v. Turner Network Television, Inc.*, the Tenth Circuit affirmed the district court's dismissal of antitrust claims for plaintiff's failure to plead a relevant market.[70] The court found that the proposed relevant market consisting of only one specific television channel (TNT) was defined too narrowly and further

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65 *Id.* at 435.

66 *Id.* at 437.

67 *Id.* at 438. *See United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exch.*, 89 F.3d 233, 236-37 (5th Cir. 1996), *cert, denied*, 519 U.S. 1116 (1997) ("Economic power derived from contractual agreements such as franchises or in this case, the agents' contract with Farmers, 'has nothing to do with market power, ultimate consumers' welfare, or antitrust.'"(relying on Klein & Saft, *supra* note 35, at 356)); *See also, Ajir v. Exxon Corp.*, No. 93-20830, 1995 WL 429234, *3 (N.D. Cal. 1995).

68 *Queen City Pizza*, 124 F.3d at 437-39.

69 *Id.* at 437-38.

70 964 F.2d 1022, 1025 (10th Cir. 1992), *cert. denied*, 506 U.S. 999 (1992).

recognized that a company does not violate the Sherman Act by virtue of a "natural monopoly it holds over its own product."[71] In *Re-Alco Industries, Inc. v. National Center for Health Education, Inc.*, the district court also dismissed the antitrust claims for plaintiff's failure to properly plead a valid relevant market.[72] The court found that plaintiff failed to allege that a specific health education product was unique or attempt to explain why this product was not part of a larger market for health education materials.[73] Finally, in *Chawla v. Shell Oil Co.*, the district court for the Southern District of Texas partially dismissed plaintiff's claims due to its inability to establish market power in a relevant market.[74] The court rejected plaintiffs' argument that the relevant market should be Shell brand gasoline by concluding:

> Plaintiffs' definition of the tying product market makes no reference to cross-elasticity of demand. Plaintiffs' allegations amount only to the contention that consumers may prefer Shell brand gasoline. Plaintiffs do not allege that there are no close substitutes for Shell gasoline. A single product, rarely constitutes a market for antitrust purposes, even if that product is a trademarked product.[75]

The summary dismissal of antitrust claims in similar franchise disputes has also occurred in antitrust cases based on state law.[76]

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71 *Id*. at 1025.

72 812 F. Supp. 387 (S.D.N.Y. 1993).

73 *Id*. at 391-92.

74 75 F. Supp. 2d 626, 642 (S.D. Tex. 1999).

75 *Id*. at 642 (citing *Town Sound & Custom Tops, Inc*. v. *Chrysler Motors Corp.*, 959 F.2d 468, 479 (3d Cir. 1992)).

76 *See, e.g., Ajir v. Exxon Corp.*, No. 93-20830, 1995 WL 429234 (N.D. Cal. 1995); *Exxon Corporation v. Superior Court of Santa Clara County (Koutney)*, No. H015001, 1997 Cal. App. LEXIS 22 (Cal. App. 6th 1997); *Wayman v. Amoco Oil Co.*, 923 F. Supp. 1322 (D. Kan. 1996); *Abbott v. Amoco Oil Co.*, 619 N.E.2d 789 (Ill. App.2d 1993).

Other Antitrust Elements

Courts have also dismissed antitrust suits against franchisors at preliminary stages on grounds other than market power. For example, in *Valley Products Co. v. Landmark*, the Sixth Circuit affirmed the district court's grant of defendant's motion to dismiss for lack of antitrust injury because the plaintiff's damages resulted from the defendant's decision to refrain from selecting plaintiff as a preferred vendor, not from any anticompetitive activity.[77] The plaintiff soap manufacture that had been selling logo-bearing hotel "guest amenities" operated under franchises granted by the defendants.[78] Defendants denied plaintiff's permission to continue use of their trademarks after two competing soap manufacturers became "preferred suppliers", a status denied to the plaintiff.[79] The district court concluded that the plaintiff had not stated a cause of action under the federal antitrust laws, primarily because the plaintiff's factual allegations failed to demonstrate the requisite "antitrust injury."[80]

In affirming the lower court decision, the Sixth Circuit stressed the necessity of a factual showing of an antitrust injury by observing that "[w]ithout antitrust injury, no private antitrust action will lie at law or in equity."[81] Among the factors the court considered in determining whether antitrust injury exists is "the directness or indirectness of the asserted injury."[82] The Sixth Circuit admitted that it has been reasonably aggressive recently in using the antitrust injury doctrine to bar recovery where the asserted injury, although associated with an alleged antitrust

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[77] 128 F.3d 398, 404 (6th Cir. 1997).

[78] *Id*. at 400.

[79] *Id*.

[80] *See, Valley Prods. Co., Inc. v. Landmark*, 877 F. Supp. 1087, 1094 (W.D. Tenn. 1994). *See also,* McDavid & Steuer, *supra* note 4, at 236-37 (recognizing that courts may rely on the "antitrust injury" element to dismiss tying claims).

[81] *Valley Prods. Co*., 877 F. Supp at 1094.

[82] *Valley Prods. Co.*, 128 F.3d at 403 (relying on *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983)).

violation, flows directly from conduct that is not itself in violation of the antitrust laws.[83] Given these pronouncements, the court found that Valley's loss in sales of logoed amenities resulted from the cancellation of its vendor agreement.[84] The Sixth Circuit reasoned that the sales losses would have been suffered as a result of the cancellation whether or not defendants had entered into the alleged tying arrangements with the franchisees.[85]

Defeating Motion to Dismiss May Be Misleading

With the waning acceptance of the use of a trademark to establish market power, came the natural reaction of plaintiffs to plead a broader market to avoid early dismissal of the suit. This approach has proven equally problematic. Where the market is defined broadly, proof of market power is a massive undertaking. Survival beyond the Rule 12(b)(6) motion has not guaranteed the franchisee plaintiffs a trial on the merits.

This development is perfectly illustrated in *Wilson v. Mobil Oil Corp*. Although the district court refused to dismiss the franchisee plaintiffs' claims on a Rule 12(b)(6) motion (*Wilson I*),[86] the franchisor's motion for summary judgment was granted after discovery was completed (*Wilson II*).[87] In *Wilson*, nine SpeeDee Oil Change franchisees alleged that Mobil Oil and the franchisor engaged in illegal tying by requiring the purchase of lubricants, equipment, and financial services from Mobil in order to remain SpeeDee franchises.[88] The relevant market alleged in the complaint was either "SpeeDee registered and statutory trademarks, trade names, and copyrights which possess economic distinctiveness," or "the quick or fast lubricant market

83 *Id*.

84 *Id*. at 404.

85 *Id*.

86 940 F. Supp. 944 (E.D. La. 1996).

87 984 F. Supp. 450 (E.D. La. 1997).

88 *Wilson*, 940 F. Supp. at 946.

providing automobile oil change goods and services."[89] The defendants filed a motion to dismiss asserting that plaintiffs failed to allege sufficient market power in a proper relevant market.[90]

The court rejected the defense's contention that "if the tie-in is disclosed at the outset of the franchise relationship there can be no exercise of market power in the after-market for products used in the franchise if the franchisor does not have a sizable market share in the primary market."[91] The court reasoned that the facts alleged by plaintiffs suggested that the lifecycle costs of the franchise and the tied products could be difficult to predict accurately at the point of purchasing the franchise. The court further observed that it could be difficult "to assess what one's needs for Mobil's products and services would be over a ten-year period."[92] Absent a factual record of this type, the court could not, as a matter of law, find that plaintiffs had failed to allege a sufficient antitrust claim.

Although plaintiffs defeated the motion to dismiss, their success proved short lived. Following discovery, defendants moved for summary judgment.[93] In opposing the summary judgment motion, the plaintiffs abandoned the relevant product markets originally alleged in the complaint.[94] Anticipating the impossible burden of demonstrating market power in the broad product markets asserted in its original complaint, plaintiffs now alleged the relevant market was limited to SpeeDee franchises.[95]

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89 Wilson, 984 F. Supp. at 458.

90 *Id*.

91 Wilson, 940 F. Supp. at 953.

92 *Id*.

93 *Wilson v. Mobil Oil Corp.*, 984 F. Supp. 450, 452 (E.D. La. 1997).

94 *Id.* at 458.

95 *Id*.

The district court rejected the new proposed market and found that the plaintiff had failed to establish that defendants possessed market power in any relevant market.[96] The court ruled that the defendant's market power was properly measured at the pre-contract stage since each franchisee had enough information at that time to properly evaluate the SpeeDee franchise opportunity before being "locked in" to the franchise.[97] The court also reasoned that each franchisee knew at the precontract stage that the franchise agreement was for fifteen years; that there was a single approved brand of lubricants; that only SpeeDee had the right to determine the number and identity of approved brands and suppliers; and that, if a franchisee chose to take advantage of equipment programs offered by the approved lubricant suppliers, the franchisee had to purchase a certain amount of product from the approved suppliers.[98]

Wilson II amply illustrates how a plaintiff franchise, who alleges a broad relevant market to sufficiently defeat a defendant's motion to dismiss, may be merely postponing the inevitable. Pleading a broad relevant market places a heavy – if not impossible – evidentiary burden upon the franchisee plaintiff to demonstrate the franchisor's market power. If the franchisee is unable to narrow the relevant market, successfully defeating a motion to dismiss only delays the same fate suffered by plaintiffs in *Wilson II*.[99]

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96 *Id*.

97 *Wilson*, 984 F. Supp. at 460-61.

98 *Id*.

99 *See,* McDavid & Steuer, *supra* note 4, at 229-30 (discussing plaintiff franchisees' "short lived" victory in *Wilson I* and recognizing setback to all franchisees in light of *Wilson II*).

III. "QUALITY CONTROL" AS A DEFENSE TO TYING CLAIMS

If the plaintiff franchisee establishes a prima facie case of illegal tying, the franchisor may attempt to justify the tie by presenting business justifications as affirmative defenses.[100] These business justifications include the "quality control" or "customer goodwill" defense. This defense maintains that the tying arrangement serves to preserve the value of the franchisor's trademark by insuring uniform appearance and quality at all franchise outlets.[101]

Trademark law requires the trademark holder to control the nature and quality of goods and services.[102] Trademark holders can lose their rights for failure to exercise adequate supervision.[103] Trademark holders must also ensure that their licensees do not use the trademark to deceive the public about the quality of the goods and services bearing the mark.[104] These obligations of trademark holders have not always proven effective shields for franchisors involved in antitrust litigation; however, more recent cases have shown greater deference to the trademark owners' responsibilities.

In the traditional formulation of the "quality control" defense, a tie-in does not violate the antitrust laws "if implemented for a legitimate purpose and if no less restrictive alternative is

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[100] *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 190 (2d Cir. 1992); *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1482 (9th Cir. 1983); *Byars v. Bluff City News Co.,* 609 F.2d. 843, 862 n.52 (6th Cir. 1979). *See also, Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985).

[101] *See, Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570, 576 (5th Cir. 1982); *Tominaga v. Shepherd*, 682 F. Supp. 1489, 1496 (C.D. Cal. 1988); *Seligson v. Plum Tree, Inc.*, 361 F. Supp. 748, 753-54 (E.D. Pa. 1973).

[102] 15 U.S.C. § § 1055 and 1127 (2001). *See also, Susser*, 206 F. Supp. at 641.

[103] *See, e.g.*, *Taco Cabana International, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113 (5th Cir. 1991), *cert. granted in part*, 502 U.S. 1071 (1992), *aff'd*, 505 U.S. 763 (1992).

[104] *See, e.g.*, *Oberlin v. The Marlin American Corp*., 596 F.2d 1322 (7th Cir. 1979).

available."[105] Frequently, less restrictive alternatives do, in fact, exist, and this has severely diminished the availability of the defense.[106] If there are less burdensome alternatives, a franchisor is obligated to employ them rather than engage in the tie.[107] Thus, under a strict application of the defense, the defendant bears an enormous burden in order to establish a viable business justification.[108]

More recently, however, the quality control defense has been viewed with less hostility.[109] Just as the courts have shown increasing sophistication in their assessment of trademarks as evidence of market power, they have become increasingly sophisticated in their assessment of the "alternatives" allegedly available to the franchisor. Rather than simplistically assessing whether "less restrictive" alternatives exist, courts now examine whether less

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[105] *Mozart Co.*, 833 F.2d at 1349. *See also, Phonetele, Inc. v. American Telephone & Telegraph*, 664 F.2d 716, 738-39 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983); McDavid & Steuer, *supra* note 4, at 238.

[106] *See, e.g., Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949); *International Salt Co., Inc. v. United States*, 332 U.S. 392, 397-98; *International Business Machines Corp. v. United States*, 298 U.S. 131, 138-40 (1936); *Carpa, Inc. v. Ward Foods Inc.*, 536 F.2d 39, 46-47 (5th Cir. 1976); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). *But see, Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1354 (9th Cir. 1982) (recognizing the inextricable interrelation between the desirability of the trademark and the quality of the product it represents).

[107] *See, e.g., Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1040 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705 (11th Cir. 1984); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 381 (5th Cir. 1977). Moreover, customer goodwill has been held to justify an automobile manufacturer's requirement that its franchised dealers buy and stock a representative line of the manufacturer's parts and approved accessories. *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790 (M.D. N.C. 1957), *aff'd*, 252 F.2d 441 (4th Cir. 1958). Likewise, the terms of a gasoline service station franchise agreement which provided that the service station must use the pumps and other equipment on the station premises "solely for landlord's products" was not evidence of an illegal tying arrangement since the franchisor's need to protect its goodwill and reputation justified the contract clause. *Pugh v. Mobil Oil*, 533 F. Supp 169 (S.D. Tex. 1982).

[108] This burden however, is not impossible. For example, in *Susser v. Carvel Corp.*, the Second Circuit's concurring opinion agreed with the majority's invocation of the quality control defense. The concurring judges found that the tie of ice cream purchases to a trademark license was legitimate because it would have been difficult to specify contractually "the desired texture and taste of an ice cream cone or sundae." 332 F.2d at 520.

[109] *See, e.g., Mozart Co.*, 833 F.2d at 1349-50.

restrictive, *but effective,* alternatives exist. Moreover, courts have increasingly acknowledged that the two most commonly posited alternatives – specifications and designations of alternate suppliers – may constitute only incomplete or flawed substitutes for the tying arrangement.

The use of specifications as an alternative to tying can be ineffective because, the franchisee may have a financial incentive to "cut corners" or "free ride." Further, the franchisor must monitor compliance with the specifications, and its policing costs in some instances may be substantial, if not prohibitive. Designating particular suppliers,[110] another possible alternative to tying, likewise requires the trademark holder to monitor the substitute manufacturer, which may be just as difficult or as costly as policing at the franchisee level.[111] Moreover, the substitute suppliers may face their own competitive pressures to "cut corners" or to supply low-quality products to franchisees more concerned with cost than quality. Thus the mere fact that it is possible to prepare product specifications or to designate other sources of supply does not necessarily mean that practical or cost-effective quality control will follow.[112]

In *The Mozart Company v. Mercedes-Benz of North America, Inc.*, -- one of the first cases to signal a change in the evaluation of business justification defenses – the Ninth Circuit carefully gauged the effectiveness of the alternatives to tying as quality control tools. In that case, the plaintiff challenged the legality of a franchise requirement to use only Mercedes-Benz parts in the repair and servicing of vehicles. The plaintiffs argued for the rejection of Mercedes-Benz's quality control defense (1) because replacement parts of appropriate design and quality

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110 *See* Grimes, *supra* note 3, at 259 (recognizing that the most often potential abuse arising out of the franchising relationship is a requirement that the franchisee purchase input goods from a designated supplier when this requirement is unnecessary to protect the goodwill or trademark of the franchise system); Klein, *supra* note 52, at 291.

111 *Mozart Co.*, 833 F.2d at 1350.

112 *Id*. at 1349 (relying on Klein & Saft, *supra* note 35, at 351-54).

were available from other sources and (2) because less restrictive alternatives were available.[113] The court, however, found ample evidence that the tying arrangement represented a legitimate means of maintaining franchise quality and of protecting the integrity of the Mercedes-Benz product.[114]

Furnishing design specifications for Mercedes replacement parts would constitute only an imperfect replacement for the tie (required purchase of parts from the manufacturer) because the manufacturer's vigorous testing programs could not be duplicated by individual dealerships.[115] The court also rejected the franchisee's suggestion that Mercedes-Benz could have inspected all replacement products furnished to independents as being impractical and too expensive.[116] As a result, the Ninth Circuit held that there was substantial evidence to support the jury's finding that the only feasible method of maintaining quality control was the use of the tying arrangement.[117]

The quality control defense has also surfaced in litigation between franchisors and terminated suppliers to the franchise system. In *Tominaga v. Shepherd*, the "Pizza Man" franchisor terminated its relationship with an originally authorized distributor of food and packaging products to franchisees.[118] In granting summary judgment to the franchisor, the district court found that the distributor had damaged the pizza company's goodwill, as embodied in the "Pizza Man" service mark by selling substandard merchandise.[119] The franchisor's ability

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113 *Mozart* Co., 833 F.2d at 1350.

114 *Id*. at 1351. Mercedes-Benz, according to the court, maintained an excellent reputation for service and quality replacement parts. In fact, 75% of Mercedes automobile owners are repeat purchasers, and over one-third of the owners return to the dealer for service and repairs – further evidence of the importance of maintaining the Mercedes reputation.

115 *Id*.

116 *Id*.

117 *Id*.

118 682 F. Supp. 1489, 1491-92 (C.D. Cal. 1988).

119 *Id*. at 1492.

to sufficiently prove the quality control justification as a reason for the distributor's termination, along with the distributor's inability to point to any specific evidence that the franchisor "acted in concert to restrain competition," proved fatal to the distributor's antitrust suit.[120]

Most recently, the quality control defense was recognized as a "very strong affirmative defense" on the particular facts of the case.[121] In *Century 21 Region V, Inc. v. Prudential Real Estate Affiliates, Inc.*, plaintiffs alleged illegal tying in requirements that newly-affiliated franchisees use only real estate brokers approved by Prudential.[122] The court recognized the quality control defense and accepted Prudential's argument that it needed to control the quality of the real estate brokers servicing clients under the Prudential name and trademark.[123] Relying on *Mozart*, the court reasoned that Prudential cannot necessarily assure the quality of non-Prudential real estate brokerages and thus, no less restrictive alternatives exist.[124]

Under the traditionally narrow application of the quality control defense, antitrust law appeared at odds with the trademark owner's responsibility to police the use of its mark. The more recent and broader application of this defense, however, represents a more balanced application of the principles of trademark law and competition policy.

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120 *Id.* at 1496.

121 *Century 21 Region V, Inc. v. The Prudential Real Estate Affiliates, Inc.*, 97-203, 1999 U.S. Dist. LEXIS 21091 (C.D. Cal. 1999).

122 *Id*. at *21-22.

123 *Id*.

124 *Id.* Another notable exception to the general rejection of the quality control defense is *United States v. Jerrold Electronics*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). There, the court held that Jerrold's requirement that buyers of its television system also purchase installation and repair service was necessary to protect Jerrold's business reputation. *Id.* at 557-60. However, the court seemed to limit the defense to "nascent" firms entering a technologically complex industry. *Id.* at 560.

Conclusion

Current jurisprudence reflects much more sophisticated analysis of trademark issues in antitrust litigation between franchisors and franchisees. The presumption of market power from the franchise trademark has been replaced with an analysis that more accurately assesses the economic realities of contemporary franchising. As a result, plaintiff franchisees now face, more than ever, a steep road to recovery as they must navigate past the case law developed in granting franchisors' motions to dismiss and in accepting franchisors' quality control defenses.

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