

# Antitrust Law, Franchising, and Vertical Restraints

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Once upon a time, antitrust was a central character in the ongoing story “Franchising and the Law.” However, transformative changes in antitrust doctrine beginning in the mid-1970s and continuing into this past decade reconfigured the antitrust landscape relating to distribution restrictions, sharply limiting the feasibility of antitrust theories to franchisees displeased with perceived franchisor overreaching or opportunistic conduct.

As explained in more detail later, antitrust law has receded to what will in all likelihood be a continuing secondary role compared to other legal doctrines affecting the franchisor-franchisee relationship. A much more developed and nuanced understanding of the procompetitive benefits of distribution restrictions has led to elimination of per se standards of illegality in favor of application of antitrust law’s predominant rule of reason. Moreover, the prospects of a successful plaintiff franchisee claim (either under the rule of reason or the special per se rule for tying) will often turn on whether the franchisor possesses economic market power (as distinguished from an imbalance of contractual bargaining power). However, under prevailing standards, proof of franchisor market power will frequently be daunting, inasmuch as franchisors often vie with other brands in highly competitive markets or offer franchises in competition with many other sellers of business opportunities.

Reshaped vertical restraints antitrust doctrine, in areas intersecting squarely with the operations of many franchisors, reduces but certainly does not eliminate antitrust risk. Potential traps still remain for the unwary, including the continuing stricter treatment of horizontal restraints among competitors, application of lock-in theory in tying claims, state law doctrine at variance with federal principles, or even emerging theories on alternative ways in which to prove a franchisor’s market power. Antitrust counseling depends on a thorough understanding of the client’s business, the industry in which it operates, and the underlying business motivations for the strategy under evaluation. Even if not legally required, exploring the feasibility of less restrictive alternatives is very often desirable: why use a howitzer when a rifle will do the job? With this overview in mind, we now turn to considerations impacting particular restraints.

## I. AS THE ANTITRUST WORLD TURNS

Most franchisor-franchisee antitrust controversies have centered on vertical restraints of trade, i.e., “agreements involv[ing] firms at different levels in the chain of



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distribution,” such as a manufacturer and a wholesaler or a franchisor and a franchisee. “Vertical restrictions often limit the conditions under which firms may resell or customers may purchase products.”<sup>1</sup> They include: (a) vertical price restraints setting the prices or range of prices at which franchisees may resell, also known as resale price maintenance (RPM), (b) nonprice distribution restraints (restricting customer or

territorial resale), and (c) purchasing restraints (requiring the franchisee to purchase goods or services from the franchisor in order to obtain the franchise). These practices have been the subject of a plethora of franchisee-initiated antitrust cases, symposium presentations, and legal writing.

At one time or another over the past forty years, contracts, combinations, and conspiracies imposing such restraints have been subjected to a per se standard of antitrust illegality, often on the basis of cases decided in the 1960s. The reduced burden of proof typically required to establish per se violations of Section 1, coupled with the prospect of treble damages resulting from any illegal conduct and of attorney fees for successful private plaintiffs,<sup>2</sup> made these theories legal weapons of choice for many disgruntled franchisees convinced that they were subjected to unfair terminations or other oppressive conduct.

All that changed incrementally during the last twenty-five years, and with increasingly dramatic consequences. Here is the story in snapshots:

- 1977: *Continental T.V., Inc. v. GTE Sylvania, Inc.*<sup>3</sup> Customer and territorial restrictions (and similar nonprice vertical restraints) are judged by the rule of reason and are no longer per se illegal. This case overruled the Court’s 1967 decision in *United States v. Arnold, Schwinn & Co.*<sup>4</sup>
- 1997: *State Oil Co. v. Khan.*<sup>5</sup> Maximum RPM is judged by the rule of reason and is no longer per se illegal. This case overruled the Court’s 1968 decision in *Albrecht v. Herald Co.*<sup>6</sup>
- 2006: *Illinois Tool Works Inc. v. Independent Ink, Inc.*<sup>7</sup> The Court held that the “mere fact that a tying product is patented does not support” a presumption of market power over the tying product, and that “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.” This case reexamined and rejected earlier cases presuming that a copyright or patent

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confers market power, including the Court's 1962 decision in *United States v. Loew's Inc.*<sup>8</sup>

- 2007: *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>9</sup> Minimum RPM is judged by the rule of reason and is no longer per se illegal. This case overruled the Court's 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*<sup>10</sup>

Even before *Khan* and *Leegin*, Supreme Court decisions had sharply circumscribed application of the per se rule against RPM. Thus, in the years between its *GTE Sylvania* (1977) and *Leegin* (2007) decisions, the Court in *Monsanto Co. v. Spray-Rite Serv. Corp.*<sup>11</sup> (1984) and *Business Electronics Corp. v. Sharp Electronics Corp.*<sup>12</sup> (1988) made it more difficult for plaintiffs to prove illegal RPM (than per se illegal). The former clarified the proof necessary to establish an agreement between a supplier and its dealers; the latter defined what constitutes a resale price-fixing agreement (as distinguished from a nonprice agreement).

With respect to tying, the Court observed in *Illinois Tool Works* that “[o]ver the years,” its “strong disapproval of tying arrangements has substantially diminished,” with the result that, “[r]ather than relying on assumptions, . . . its more recent opinions . . . [have] required a showing of market power in the tying product.”<sup>13</sup> The Court referred to its 1977 *U.S. Steel Corp. v. Fortner Enterprises (Fortner II)*<sup>14</sup> and 1984 *Jefferson Parish Hospital District No. 2 v. Hyde*<sup>15</sup> decisions, which had been the basis for many courts' conclusion that suppliers or franchisors did not have sufficient market power over the tying product to invoke per se condemnation. Moreover, other Supreme Court decisions outside the distribution context expressed caution in applying per se rules of illegality.<sup>16</sup> One study of antitrust case filings in the 1970s and 1980s concluded “that the variation in filings was caused by the increase and [then] decrease in the use of per se rules,” most significantly those involving vertical restraints.<sup>17</sup> *GTE Sylvania*, the study's authors assert, “was the beginning of the end of the plaintiffs' picnic.”<sup>18</sup>

## II. RESTRAINTS ON PRICES AND CUSTOMERS

### A. Market Power and the Rule of Reason

#### *How Significant Is Market Power?*

The rule of reason now governs all truly vertical resale restraints challenged under Section 1 of the Sherman Act so that plaintiffs must demonstrate that a restraint has a substantially adverse effect on competition.<sup>19</sup> The usual rule of reason approach involves plaintiffs engaging in a market analysis aimed at showing the requisite anticompetitive effects. This approach generally begins, but does not end, with the definition of the relevant market and a determination of whether the defendant has market power over it. Courts “generally have held that proof of a defendant's market power is a prerequisite for a plaintiff seeking to use market analysis to satisfy its burden of proving likely anticompetitive effect,” with assessment of market power usually focused on a defendant's market share. They rarely find “market power if the defendant's market share is (and likely to remain) under thirty percent.”<sup>20</sup>

Indeed, as noted earlier, in the area of nonprice vertical restraints, such as customer and territorial restrictions imposed on franchisees and dealers, plaintiffs have rarely prevailed since *GTE Sylvania*, often because of the small market shares of the defendant supplier and sometimes because of a procompetitive justification for the restraint.<sup>21</sup> (As discussed below, in some instances, plaintiffs have been successful when they demonstrated that the customer or territorial restraints were adopted at the behest of distributors, and the court considered them to be horizontal in nature and thus subject to per se treatment.<sup>22</sup>)

### **Market Power and RPM**

Not surprisingly, much attention has turned to the fate of minimum RPM after *Leegin*.<sup>23</sup> Four years after the decision, many antitrust counselors are still adopting a wait-and-see approach, awaiting further judicial and legislative developments before using minimum RPM agreements. One major issue involves the extent to which minimum RPM will be scrutinized more carefully than nonprice vertical restraints under the rule of reason, even when the supplier or dealers involved do not have substantial market shares. State antitrust law treatment of minimum RPM may also complicate its nationwide use. Due to these and other considerations, many prefer to rely on pre-*Leegin* doctrine with respect to price-related marketing strategies. They continue to manage a particular price-related strategy so that it withstands antitrust liability even under pre-*Leegin* law, e.g., because there is no contract, combination, or conspiracy within the meaning of Section 1, or because if there is an agreement, it is not a price-fixing agreement but instead involves a nonprice restraint. *Leegin's* rule of reason approach thus becomes a valuable backstop rather than a first line of defense.

Will the supplier's market power or absence of it have the same significance in minimum RPM cases than in nonprice restraints? The *Leegin* Court described certain situations where minimum RPM could be anticompetitive. One area involves cartels: RPM may “facilitate a manufacturer cartel” or “be used to organize cartels at the retailer level.”<sup>24</sup> “To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of horizontal cartel, it, too, would need to be held unlawful under the rule of reason.”<sup>25</sup> Another area involves abusive use of RPM by a powerful manufacturer or retailer. A manufacturer with market power could use minimum resale pricing “to give retailers . . . incentive[s] not to sell the products of smaller rivals or new entrants.” Or a dominant retailer might seek RPM to forestall innovative, cost-reducing distribution that decreases costs, and a supplier may accommodate the retailer's demands if it thinks that access to the retailer's distribution network is necessary.<sup>26</sup>

The Court observed that lower courts can “devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote competitive ones.”<sup>27</sup> Some factors described as “relevant to the inquiry” of whether RPM is anticompetitive include the

following: (1) whether a number of manufacturers make use of the practice (“if many competing manufacturers adopt the practice,” RPM “should be subject to more careful scrutiny”); (2) whether the retailers were the impetus for the restraint (suggesting that it facilitates a dealer cartel “or supports a dominant, inefficient retailer”—the source of the restraint); and (3) whether a dominant manufacturer or retailer using or insisting on RPM has market power.<sup>28</sup>

These observations by the Court indicate that, in any event, market power at the supplier or dealer level is a prominent consideration in analyzing a number of the potentially anti-competitive situations that it described. This is demonstrated by its statement that a dominant manufacturer’s or retailer’s ability to “abuse resale price maintenance may not be a serious concern unless the relevant entity has market power.”<sup>29</sup>

The growing, but still somewhat limited, body of post-*Leegin* cases in the federal courts suggests that the existence of market power will significantly shape RPM analysis, just as in nonprice vertical restraints decisions. As a threshold requirement in market analysis rule of reason cases, courts are insisting on proof of defendants’ market power in properly defined relevant product and geographic markets. The problem for potential plaintiff franchisees is that many, indeed most, franchisors do not have market shares in the end products sold by their systems even approaching the 30 percent level that typically raises an antitrust eyebrow. And in many franchise systems, there is no dominant retailer that could force the franchisor to implement anticompetitive RPM.<sup>30</sup>

The *Leegin* case itself on remand illustrates how courts may well look with a jaundiced eye at franchisee efforts to plead narrow relevant product markets to inflate the defendant franchisor’s market share.<sup>31</sup> In affirming the district court’s dismissal, the Fifth Circuit declared that the “complaint must plausibly define the relevant product and geographic markets” but that the proposed “retail market for Brighton’s women’s accessories” and “wholesale sale of brand-name women’s accessories to independent retailers” markets did not “encompass interchangeable substitute products or recognize the cross-elasticity of demand for Brighton goods.”<sup>32</sup> The court also found that “[a] market-power screen is compatible with [the Supreme Court’s decision in] *Leegin* and [lower court] precedent.”<sup>33</sup> A similar rebuff at the pleading stage of a narrow relevant market is found in the Eleventh Circuit’s split decision in *Jacobs v. Tempur-Pedic International*.<sup>34</sup> Affirming a dismissal of the complaint on the basis of the pleading requirements found in the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*,<sup>35</sup> the court held “that the complaint failed to adequately plead a relevant market and thus did not show actual harm to competition” and in any event did not sufficiently plead actual or potential harm to competition.<sup>36</sup>

By contrast, in an earlier post-*Leegin* decision, *BabyAge*.

*com, Inc. v. Toys “R” Us, Inc.*,<sup>37</sup> plaintiffs successfully withstood a motion to dismiss a complaint alleging pressure by a dominant retailer on its suppliers that they impose RPM on other retailers. The court found that plaintiffs did adequately plead relevant markets, including “high-end baby and juvenile strollers,” “high-end high chairs,” and “high-end breast pumps,” with their allegations concerning interchangeability and cross-elasticity of demand, and did not “clearly” fail “to account for all reasonably interchangeable economically substitutable products.”<sup>38</sup> Plaintiffs’ allegations concerning the anticompetitive nature and effect of the conspiracy also withstood challenge.<sup>39</sup>

RPM complaints based on what at first blush seems to be a relevant market with unduly narrow boundaries will likely be met with judicial skepticism, even at the pleading stage. But assuming their complaints withstand motions to dismiss, plaintiffs still must prove their claims. Expert economic testimony, if not absolutely essential, is usually provided on the relevant market-related issues.<sup>40</sup> And, indeed, courts have rejected narrow relevant markets and granted defendants summary judgment when such markets were not adequately supported by expert testimony.<sup>41</sup>

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### Post-*Leegin* cases suggest the market power issue will significantly shape RPM analysis.

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#### ***Alternative Strategies on the “Market Power” Issue***

Other rule of reason approaches have emerged, however, and plaintiffs may argue that they make it unnecessary to prove the defendant’s market power in the usual way. One method, known as the “truncated” or “quick look” analysis, involves a practice that is “inherently suspect” because it closely resembles a practice that has already been found by the courts to unreasonably restrain trade. If the practice is found to be inherently suspect, the burden may shift to the defendant to provide a reason why “the restraint is unlikely to harm consumers or identify a competitive benefit that plausibly offsets the apparent anticipated harm.”<sup>42</sup> In modifying a pre-*Leegin* RPM consent decree with Nine West Group,<sup>43</sup> the Federal Trade Commission discussed, but did not conclude, whether RPM could be considered “inherently suspect” conduct.<sup>44</sup> Drawing on the Supreme Court’s description of scenarios where RPM may be anticompetitive, the Department of Justice has offered its own “structured rule of reason” analysis for “many RPM arrangements,” identifying “four generally accepted theories,” i.e., manufacturer collusion, manufacturer exclusion, retailer collusion, and retailer exclusion.<sup>45</sup> Its various approaches often include proof of some form of market power or dominance or implicate conduct constituting or resembling horizontal restraints of trade, including retailer collusion, discussed in the next section. Some legal and economic scholars, skeptical of RPM’s benefits and concerned about the price-raising effects of RPM, are offering their own truncated rule of reason frameworks.<sup>46</sup> Their theories may be employed by

plaintiffs attempting to circumvent market power screens.

Another rule of reason method, involving proof that the challenged conduct had actual anticompetitive effects, is based on *FTC v. Indiana Federation of Dentists*,<sup>47</sup> in which “the Supreme Court observed that ‘proof of actual detrimental effects, such as reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effect.’”<sup>48</sup> A plaintiff may argue that because RPM leading to higher resale prices proves or at least on a prima facie basis results in “actual anticompetitive effects,” the plaintiff need not prove a relevant market or market shares. The problem with this approach is the evidentiary weight it gives to the minimum RPM itself. As the Court stated in *Leegin*, plaintiff was “mistaken in relying on pricing effects absent a further showing of anticompetitive conduct,” noting that higher resale prices may nonetheless be procompetitive by efficiently enhancing interbrand competition.<sup>49</sup> The district court in *Jacobs* rejected this actual detrimental effects approach because of insufficient pleading.<sup>50</sup> Largely recognized in horizontal restraints cases with highly suspicious conduct, it faced a cool reception in a leading Seventh Circuit vertical restraints decision.<sup>51</sup>

## B. Horizontal-Related Theories

Depending on the facts, a plaintiff may be able to avoid market power issues by challenging RPM or customer and territorial restrictions as per se illegal horizontal conspiracies. Horizontal price fixing, as well as agreements to allocate or divide customers, remain per se illegal regardless of the market power of the conspirators. Boycotts or collective refusals to deal can also be per se illegal. The per se approach to boycotts “has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor. . . .”<sup>52</sup> Nonetheless, as the Supreme Court indicated in *FTC v. Superior Court Trial Lawyers Association*, boycotts that are used to enforce a price-fixing or other agreement that is itself per se illegal will receive per se treatment.<sup>53</sup>

Horizontal theories typically have been pursued where dealers or franchisees complain as a group to their supplier about a price-cutting competitor. The supplier is accused of terminating or otherwise not dealing with the discounter, at the behest of, and in agreement with, the conspiring group of complaining dealers. Plaintiffs have argued that the conspiracy is illegal because it is one or more of the following: a classic, naked per se illegal boycott; a horizontal price-fixing case (at the dealer level) enforced by a compliant supplier co-conspirator; or a horizontal division of territories enforced by the supplier co-conspirator. In defending cases of this type, the defendant supplier and competitors of the plaintiff have typically contended one or more of the following: (a) there was no horizontal conspiracy between or among the dealers unhappy with the plaintiff dealer’s pricing or other practices; (b) the supplier did not join any such conspiracy but acted unilaterally in terminating or otherwise acting disadvantageously toward the plaintiff; and (c) even if there is collective behavior falling broadly within the definition of a

boycott, it is not a per se illegal boycott or any other per se violation, and, in any event, the agreement does not unreasonably restrain trade. In some cases, plaintiffs were found to have sufficient evidence of a Sherman Act violation to go to the jury without a specific requirement that they prove the supplier’s or franchisor’s market power through the usual “market share in a relevant market” approach.<sup>54</sup>

The Supreme Court in *Leegin* described how RPM might be instituted by a supplier to facilitate a cartel (but did not specifically discuss boycotts). This suggests that if a supplier institutes an RPM program to facilitate a dealer cartel, the program ipso facto violates the rule of reason.<sup>55</sup> In *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*,<sup>56</sup> however, the Third Circuit did not presume that the supplier’s RPM program was automatically illegal because it facilitated a dealer cartel. The court found sufficient evidence of a horizontal agreement among Mack dealers not to compete outside assigned territories of responsibility, which the court noted would be per se unlawful.<sup>57</sup> It also determined that there was sufficient evidence for a jury to conclude that Mack entered into vertical competition-restricting RPM agreements with its dealers that unreasonably restrained trade by supporting their illegal conspiracy. However, the court applied a rule of reason analysis to the manufacturer’s vertical price-fixing agreements, even when the alleged purpose of the vertical agreements was to support an unlawful horizontal agreement among dealers. It found jury questions under the rule of reason in light of the impetus for the restraints and defendant’s market power.<sup>58</sup> Analyzing the impetus for the restraint and evidence of Mack’s market power, the court concluded that there was sufficient evidence that the vertical agreements “‘produced adverse, anti-competitive effects within the relevant product and geographic markets.’”<sup>59</sup> In the next chapter of the *Toledo Mack* story, the jury ultimately ruled against plaintiff on the antitrust claim.<sup>60</sup>

Whether the rule of reason with a market power requirement will be applied in similar situations involving an alleged supplier “vertical” facilitation of a “horizontal” dealer cartel remains to be seen. Of course, the supplier may argue, as Mack did, that it did not conspire with the alleged dealer cartel to impose punitive measures against price cutters but instead acted unilaterally according to *Monsanto* standards. Further, the argument goes, special care should be taken by the courts not to infer a supplier’s agreement to facilitate a dealer cartel merely because the supplier instituted a vertical restraint (price or nonprice) after receiving dealer complaints. In any event, in the post-*Leegin* environment, denials of product by sellers pursuant to what appears to be behavior resembling a boycott may carry significant risks when (a) the victim or victims are price cutters, (b) the plaintiff has at least a colorable argument that the withheld product is desirable or necessary for it to compete effectively, and (c) there is no sustainable business justification.

Another horizontal theory springs from dual distribution, i.e., where the franchisor imposing minimum RPM operates company-owned outlets in competition with its franchisees. A plaintiff franchisee may claim that the RPM program should

be treated as horizontal price fixing given the franchisor's operation at the retail level. The trend with respect to non-price dual distribution situations after *GTE Sylvania* has been to apply the rule of reason. The courts often have done so either because the supplier acted unilaterally as the source of the restraint, or because the restraint's purposes and effects were the same as those associated with vertical restraints imposed by suppliers that are not dual distributors.<sup>61</sup> Post-*Leegin* decisions involving resale prices have followed the same approach,<sup>62</sup> and the courts should continue to apply the rule of reason absent unusual circumstances.

### C. RPM: State Antitrust Law Considerations

A vexing current obstacle to franchisor use of RPM after *Leegin* lies not in the developing case law but in the uncertainty engendered by state antitrust statutes and enforcement activities, including the dogged hostility toward minimum RPM by certain state attorneys general.<sup>63</sup> Depending on the language of their state statutes on substantive violations as well as the deference that must be given to federal antitrust decisions, states may attack minimum RPM under state antitrust law on a per se theory or by advocating some type of shortcut approach to the rule of reason. Some post-*Leegin* decisions have interpreted state law consistent with *Leegin*.<sup>64</sup> However, a 2008 federal court action initiated by New York, Illinois, and Michigan resulted in a consent decree;<sup>65</sup> and in 2009 and 2010, California brought enforcement actions under the state's Cartwright Act that were also resolved by consent decrees.<sup>66</sup> They are evidence that the risk of state enforcement, and perhaps using per se approaches, is not ephemeral and complicates use of RPM strategies on a nationwide basis.<sup>67</sup> Maryland has even enacted legislation specifically prohibiting minimum RPM.<sup>68</sup>

### D. Summary

In sum, various post-*Leegin* cases suggest that plaintiffs in typical franchise situations face formidable challenges in proving that RPM programs violate the federal antitrust laws. Nonetheless, the anti-RPM stance of certain states and the question of the extent to which courts will approach RPM differently than nonprice vertical restraints have understandably led many suppliers to proceed cautiously when minimum RPM issues are implicated and to instead rely on RPM law existing before *Leegin* (which itself increasingly provided more leeway to suppliers).<sup>69</sup> Moreover, any risk analysis must carefully evaluate the extent to which potential plaintiffs may have a viable horizontal theory when either price or nonprice restraints are involved.

Complaints from franchisees or dealers, particularly when those complaints are made in a group setting, can be handled in ways that minimize the risk that the supplier will be found to have agreed with the complainers to take some action against a discounter. Thus, when the subject of another dealer's pricing activities comes up in the setting of a group of dealers, it is a good idea for the supplier to cut off further discussion. The group can be told that the supplier will not discuss the matter and that its relationships with a dealer are

a matter between that dealer and the manufacturer.

Individual complaints from one dealer about another dealer's prices often occur. Antitrust risk can be minimized by the following: (i) informing the complainant that the supplier makes its own decisions based on what is best for its system, (ii) avoiding discussion of one dealer's complaint with other dealers (including the distributor about whom the complaint is made), (iii) not giving any assurances to the complaining dealer that any action will be taken, and (iv) not reporting back to the complaining dealer about what actions were or were not taken. In addition, the parties to such discussions should expressly and repeatedly reaffirm and document their absolute commitment to independent pricing decisions based on their individual assessments of market conditions.

### III. TIE-INS

A major part of the franchise and antitrust law story involves tie-in questions and, more broadly, franchisor control over the sources of supply for a franchisee's purchases of products. For many years, the franchisee legal weapon of choice was the antitrust tie-in claim, i.e., that the franchisor tied the purchase of the desired franchised system to the sale of high-priced and unwanted equipment, goods, or services, with the franchisees damaged by excessive, noncompetitive prices paid for those products. The elements of the peculiar per se illegality for certain tying arrangements include (1) the sale of one product (the tying product) is conditioned on the purchase of another product (the tied product), (2) the tying product and the tied product are separate and distinct, (3) the defendant seller possesses "sufficient economic power" over the tying product to "force" the buyer to purchase the tied product, and (4) a "not insubstantial" amount of commerce is affected.<sup>70</sup>

Consternation for many franchisors began with *Siegel v. Chicken Delight, Inc.*<sup>71</sup> Whether one agrees with its conclusion and reasoning, it is hard to dispute how much *Chicken Delight*, a class action, shaped purchasing requirements in many franchise agreements, particularly those of business format franchisors. The Ninth Circuit affirmed a jury verdict in favor of the plaintiff class, finding as a matter of law that the license to use the Chicken Delight trademark "possessed sufficient market power to bring the case within the Sherman Act."<sup>72</sup>

The floodgates opened with a number of lawsuits in the early to mid-1970s, including class actions, modeled on *Chicken Delight*. Many franchisors responded with various business and legal strategies. In an extensive body of franchise tie-in cases, franchisors argued with varying degrees of success that (1) there was no tie-in because there was no conditioned purchase, i.e., franchisees were neither contractually obligated nor otherwise "coerced" into buying the allegedly tied items from the franchisor instead of a third-party suppliers;<sup>73</sup> (2) notwithstanding *Chicken Delight*, the franchise trademarks and system were not separate and distinct tying and tied items, but instead one product, because of different facts;<sup>74</sup> (3) the franchisor did not have an economic interest

in the tied product;<sup>75</sup> and (4) plaintiff franchisees were not injured by the tie-in and could not recover damages because they could not show that the amount actually paid for both the tying and tied products exceeded the fair market value of both products, an argument actually suggested in *Chicken Delight*.<sup>76</sup>

Ultimately undermining *Chicken Delight*, however, were the Supreme Court's decisions in *Fortner II*, *Jefferson Parish*, and, most recently, *Illinois Tool Works*. In *Illinois Tool Works*, the Court held that (1) the mere fact that a tying product is patented does not support a presumption of market power in a patented product (abrogating a series of earlier decisions on this point, including *Jefferson Parish*); and (2) in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product. The decision focused on the extent to which the requisite market power could be inferred from a patented product. Nonetheless, it cast considerable doubt on the extent to which a franchisor's market power could be demonstrated by some "unique" feature of its trademarked systems or products, rather than by proof of a substantial share in a relevant market.

In a perceptive analysis of the impact of *Illinois Tool Works* on franchising arrangements published in this *Journal* in 2008, the authors concluded that the Court's decision removed the last remaining support for *Chicken Delight*'s doctrine of presumptive power in trademarks and service marks and dispelled the Court's historical hostility toward tie-ins.<sup>77</sup> Their prediction was confirmed in the Ninth Circuit's 2008 decision in *Rick-Mik Enterprises, Inc. v. Equilon Enterprises, LLC*,<sup>78</sup> where the progenitor of *Chicken Delight* skewered that decision with teaching from *Illinois Tool Works*. Plaintiff alleged that defendants tied credit card processing services to gasoline station franchises. The Ninth Circuit specifically rejected the argument that defendants had market power because "'Shell and Texaco-branded gasolines are protected by various trademarks, copyrights and patents,'" stating that *Chicken Delight* is "no longer relevant after *Jefferson Parish* and *Illinois Tool Works, Inc.*"<sup>79</sup> Other post-*Illinois Tool Works* decisions have rebuffed franchisee efforts to meet the market power requirement by narrowly defining the market for the tying product in order to inflate the market share of the defendant franchisor.<sup>80</sup>

An approach used by some franchisees to circumvent the development of more rigorous market power standards involves the so-called lock-in theory, based on the Supreme Court's 1992 decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*<sup>81</sup> They contend that *Kodak*'s recognition of the concept of locked-in customers, single-brand markets, and parts-and-service aftermarkets could be applied to franchise supply disputes. According to this approach, even if a plaintiff franchisee is unable to demonstrate that a franchisor's share of a franchise market (either one for

business opportunities or one in which the franchise system's end product was sold) exceeds *Jefferson Parish*'s 30 percent market share threshold for establishing market power, the plaintiff could perhaps use *Kodak* by shifting the focus of the inquiry to the franchisor's ability to exploit "locked-in franchisees" in a food, equipment, or supplies aftermarket.

Franchisees making these types of *Kodak* aftermarket-based arguments contend, as did plaintiffs in *Kodak*, that they are locked into the franchisor's brand and face high "switching costs," such as long-term franchise agreements, post-term noncompetition covenants, or both. The relevant market, they argue, therefore consists of the defendant franchisor's franchise system. According to these theories, market power should be measured within the product aftermarket; to the extent that the franchisor is the sole supplier to that aftermarket, it has a 100 percent market share, sufficient to meet the *Jefferson Parish* market power threshold.

Much ink has been spilled on franchising and lock-in theory, including thoughtful analyses in this journal, reflecting

strongly held but sometimes divergent views.<sup>82</sup>

Its future as a viable legal theory is increasingly dubious. In a number of cases, courts have concluded that *Kodak* does not apply when the risk of a tie-in is disclosed at

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### The future of lock-in theory as a viable legal doctrine in tie-in cases is increasingly dubious.

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the outset of the franchise relationship. If franchisees were aware of the contractual power that the franchisor reserved over their supply channels when they entered into their arrangements and could have pursued other investment opportunities, then they were not locked in by the purchase of the franchise.<sup>83</sup> Most franchise tie-ins, or the ability to impose tie-ins through approved supplier requirements, are found in contracts, franchise disclosure documents, and other materials given to prospective franchisees so that the disclosure standard to avoid lock-in arguments should meet a threshold "up-front disclosure" test.

More fundamentally, some courts are highly wary of transmuting contract power into market power and would permit use of a *Kodak*-based theory only in the limited circumstances where (a) the franchisee makes a threshold showing that the franchisor had a high market share in a market defined by traditional reasonable substitutability, i.e., cross-elasticity of demand standards, and (b) the franchisor in response argues that competition in another market would nonetheless prevent it from exercising market power.<sup>84</sup>

In light of *Illinois Tool Works*, the sufficient market power element of per se illegal ties presents a high hurdle to plaintiff franchisees in addition to the other elements of such a claim. A plaintiff franchisee faces the challenge of defining an appropriate relevant market in which the franchisor has a substantial market share. Moreover, even a franchisor with a large market share may lack market power because of low barriers to entry.<sup>85</sup> As with RPM cases, plaintiffs in tie-in cases can be expected to plead narrowly defined markets and

face the same obstacles in pleading and proving them.<sup>86</sup> The “uniqueness” approach to proving market power in tying cases may be a vehicle for plaintiffs to prove a narrow market based on highly differentiated products or business opportunities. But courts can be expected to view such arguments with considerable skepticism in light of *Illinois Tool Works* and because plaintiffs must prove that a franchisor offers a unique product that competitors are unable to provide.

Disgruntled franchisees undoubtedly still will consider the lock-in approach discussed above, based on *Kodak*, although previous attempts have proved largely unsuccessful. The underlying presupposition of cases resisting aggressive use of *Kodak* is that the markets for franchise opportunities, the markets in which suppliers of products may sell to franchise systems, and the consumer markets in which franchised retail units operate are all intensely competitive. Post-contractual, relational power is not the same as market power.<sup>87</sup> Antitrust principles need not and should not be distorted in order to provide a remedy for supplier overreaching. Nonetheless, depending on the facts, the lock-in theory may be viable in certain courts, as illustrated by a fairly recent district court case where the court denied a motion to dismiss because of allegations that the franchisor’s change in supplier policy reflected the market power that the franchisor could only now exercise over the franchisee because it was locked into the franchise.<sup>88</sup>

Although the Court in *Illinois Tool Works* declared that tying arrangements are not invariably harmful to competition and “may well be procompetitive,”<sup>89</sup> it did not jettison the per se rule. The basic advantage for a plaintiff under current per se standards is that it need not prove that there is a substantial anticompetitive effect in the market for the tied product from the leveraging features of a tie-in. In the typical franchise tying case, it is highly unlikely that any tie, including one in which the franchisor somehow has market power over the tying product, threatens to substantially injure competition in some related tied market, e.g., one for goods, supplies, or equipment. Per se treatment is also inconsistent with rule of reason standards for evaluating similar vertical restraints on purchasing, such as exclusive dealing and bundling. Within the next ten years, the Supreme Court may well adopt the approach of the four concurring justices in *Jefferson Parish*: all tie-ins should be judged by the rule of reason.

The receding significance of antitrust law to supplier-related controversies does not, of course, eliminate all risk, including franchisee attacks on supplier arrangements based on non-antitrust theories. Attacks based on the lock-in theory may arise in particular circumstances, but appropriate franchisor disclosures can minimize those risks. Consideration of alternatives to tying, such as approved supplier arrangements, may satisfy franchisor needs and minimize legal risks.

#### IV. CONCLUSION

Antitrust risks have diminished in the typical franchise situation because of a number of doctrinal developments discussed in this paper. Moreover, franchisors structured their

relationships so as to substantially reduce antitrust risks, even when legal principles were more plaintiff-friendly. Nonetheless, the greater leeway afforded franchisors under the antitrust laws does not eliminate either the need to consider antitrust risks in a number of recurring situations through an understanding of all the relevant facts, or the desirability of minimizing those risks by use of less-restrictive restraints that satisfactorily meet business objectives. And, of course, legal weapons other than antitrust may be available to challenge franchisor behavior believed to be abusive or overreaching.<sup>90</sup>

#### ENDNOTES

1. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 131 (6th ed. 2007) [ANTITRUST LAW DEVELOPMENTS].
2. Section 4 of the Clayton Act establishes a private cause of action for damages under the federal antitrust laws. It provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15(a).
3. 433 U.S. 36 (1977).
4. 388 U.S. 365 (1967).
5. 522 U.S. 3 (1997).
6. 390 U.S. 145 (1968).
7. 547 U.S. 28, 31, 46 (2006).
8. 371 U.S. 38, 45 (1962) (noting that seller’s market dominance in the tying product is not necessary; the “crucial economic power may be inferred from the tying product’s desirability to consumers or from uniqueness in its attributes,” and the “requisite economic power is presumed when the tying product is patented or copyrighted”).
9. 551 U.S. 877 (2007).
10. 220 U.S. 373 (1911).
11. 465 U.S. 752, 763 (1984) (“Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about ‘in response to’ complaints, could deter or penalize perfectly legitimate conduct.”)
12. 485 U.S. 717, 735–36 (1988). For vertical restraints to be per se illegal, “they must do more than merely affect resale prices; there must be an agreement requiring the distributor to adhere to specific prices or price levels.” ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 134.
13. 547 U.S. 28, 35 (2006).
14. 429 U.S. 610 (1977).
15. 466 U.S. 2 (1984).
16. *See, e.g.*, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8, 19–20 (1979) (per se rules appropriate only for conduct that is “plainly anticompetitive,” that is, conduct “that would always or almost always tend to restrict competition and decrease output”).
17. Douglas H. Ginsburg & Leah Brannon, *Determinants of Private Antitrust Enforcement in the United States*, 1 COMPETITION POLICY INTERNATIONAL 29 (2005), available at <https://www.competitionpolicyinternational.com/file/view/4221>.
18. *Id.* at 39.
19. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967).

20. ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 65–66.

21. *See, e.g.*, *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 315, 316 (8th Cir. 1986) (19.1 percent did not establish market power); *JBL Enters., Inc. v. Jhirmack Enters., Inc.*, 698 F.2d 1011, 1017 (9th Cir. 1983) (2–4 percent share too insignificant to adversely affect competition); *Carlson Mach. Tools, Inc. v. Am. Tool, Inc.*, 678 F.2d 1253, 1259 (5th Cir. 1982) (supplier's share below 10 percent); *Copy-Data Sys., Inc. v. Toshiba Am., Inc.*, 663 F.2d 405, 410–11 (2d Cir. 1981) (insignificant market share minimized anticompetitive effect); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 761 (D. Md. 1980), *aff'd per curiam*, 638 F.2d 15 (4th Cir. 1981) (7.9 percent share does not confer “market power to restrain competition”); *Belton Elecs. Corp.*, 100 F.T.C. 68, 209–10 (1982) (declining market share from 21 percent to 16 percent indicates lack of market power). For a review of the cases treating customer and territorial restraints, see ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 152–60.

22. *See, e.g.*, *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000); *Shulton, Inc. v. Optel Corp.*, 1987-1 Trade Cas. (CCH) ¶ 67,436, at 59,818 (D.N.J. 1986); *Arnold Pontiac-GMC, Inc. v. Gen. Motors Corp.*, 786 F.2d 564, 573–74 (3d Cir. 1986). *See also* note 54, *infra*.

23. *See, e.g.*, *Quentin R. Wittrock & Jeremy L. Johnson, Can Franchisors Control Franchisee Prices?*, 28 FRANCHISE L.J. 199 (2009).

24. 551 U.S. 877, 892, 893 (2007) (citing and quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725–26 (1988)).

25. *Id.* at 893.

26. *Id.* at 893–94.

27. *Id.* at 898–99. The Court further observed that as courts gain experience with RPM restraints “by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure that the rule of reason operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.” *Id.* at 898.

28. *Id.* at 897–98.

29. *Id.* at 898. The Court added, “If a retailer lacks market power, manufacturers can likely sell their goods through rival retailers . . . [a]nd if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.” *Id.*

30. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727 n.2 (1988) (“Retail market power is rare, because of the usual presence of interbrand competition and other dealers.”).

31. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412 (5th Cir. 2010).

32. *Id.* at 418. In this regard, the court stated that “[a]bsent market power, an artificial price hike by Leegin would merely cause it to lose sales to its competitors.” *Id.* It added that “robust competition can exist even in the absence of price competition” and that “[r]etailers may seek to attract customers with better service, more knowledgeable staff, more appealing stores, and other nonprice-oriented strategies.” *Id.* at 419.

33. *Id.* at 418–19.

34. 626 F.3d 1327 (11th Cir. 2010).

35. 550 U.S. 544, 557 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

36. *Jacobs*, 626 F.3d at 1339. Plaintiff alleged that “visco-elastic

mattresses are a distinct submarket within the larger mattress market. . . .” *Id.* at 1337. The court found that the “skimpy allegations of the relevant submarket” did not meet his obligation to plead facts “‘plausibly suggesting’ the relevant submarket’s composition” because it “provides no factual allegations of the cross-elasticity of demand or other indications of price sensitivity that would indicate whether consumers treat visco-elastic foam mattresses differently than they do mattresses in general.” *Id.* at 1338.

37. 558 F. Supp. 2d 575 (E.D. Pa. 2008).

38. *Id.* at 581.

39. *Id.* at 583–84. In connection with pleading harm to competition, the court also referred to plaintiffs’ allegations that Babies “R” Us (BRU) orchestrated the conspiracies to end competition from the smaller retailers undercutting BRU’s prices and that the RPM scheme caused prices for the products to increase beyond competitive levels. Moreover, plaintiffs alleged that the RPM policies “blocked certain sales that would otherwise have been made, and in some cases caused sales to be made less rapidly than they otherwise would have been made, thereby resulting in reduced overall output.” There was also an allegation “that quality has decreased in the form of a decrease in customer service.” *Id.* at 584.

40. *See W. Parcel Express v. UPS*, 65 F. Supp. 2d 1052, 1058 (N.D. Cal. 1998) (“In practice, economists provide the court with expert testimony to explain the relevant market and to measure the impact of the allegedly illegal conduct.”), *aff'd*, 190 F.3d 1421 (9th Cir. 1999).

41. *See, e.g.*, *MLB Props. v. Salvino, Inc.*, 542 F.3d 290, 301, 329–30 (2d Cir. 2008) (expert’s own testimony suggested that the expert was only guessing as to what products would be substitutable for MLB intellectual property licenses without the supporting empirical studies); *Ky. Speedway v. Nat’l Ass’n of Stock Car Auto Racing*, 588 F.3d 908, 916–19 (6th Cir. 2009) (district court did not abuse discretion in excluding plaintiff’s relevant market experts as unreliable because the expert had inadequately examined possible substitutes for the Sprint Cup automobile races, including only Busch series and open-wheeled races as possible substitutes and not considering other sports and forms of entertainment).

42. *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005); *see Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (court indicated that quick look analysis is appropriate “when the great likelihood of anticompetitive effects can easily be ascertained”); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460–64 (1986). In *Indiana Federation of Dentists*, market analysis was not required because the agreement at issue “was a direct restraint on the output of a service that both insurers and patients desired—the provision of X-rays with claim forms to facilitate the insurers’ pretreatment review.” ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 61.

43. *In re Nine W. Group, Inc.*, Docket No. C-3937 (May 6, 2008) (order granting in part petition to reopen and modify order issued Apr. 11, 2000), available at [www.ftc.gov/os/caselist/9810386/071106petition.pdf](http://www.ftc.gov/os/caselist/9810386/071106petition.pdf) (accessed Jan. 11, 2011).

44. *Id.* at 10–14. Instead, it looked to “Leegin factors,” i.e., whether retailers were the impetus for the restraint, RPM programs were ubiquitous in an industry, and the supplier or retailer is a dominant player in the market as “helpful guides to begin an assessment of when RPM deserves closer scrutiny.” *Nine West* did not run afoul of these factors. Of course, one of the *Leegin* factors is market power



or dominance. Moreover, the Supreme Court did not suggest that either “impetus” or “prevalence” would obviate proof of dominance or market power, and *prevalence* suggests collective market power by firms in the market.

45. Christine A. Varney, Assistant Attorney Gen., Antitrust Division, U.S. Dep’t of Justice, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks As Prepared for the National Association of Attorneys General Columbia Law School State Attorneys General Program 7–14 (Oct. 7, 2009), [www.justice.gov/atr/public/speeches/250635.htm](http://www.justice.gov/atr/public/speeches/250635.htm) (accessed Jan. 11, 2011).

46. For example, Warren S. Grimes, in *The Path Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L.J. 467, 493 (2008), argues for a presumption that open distribution restraints such as RPM are unlawful, that could be rebutted “if the defendant shows that it does not operate an open distribution system, for example, by showing that it has substantially limited distribution in order to encourage dealer commitment and loyalty.” See also Marina Lao, *Leegin and Resale Price Maintenance—A Model for Emulation or for Caution for the World?*, 39 INT’L REV. INTELL. PROP. & COMP. L. 253 (2008); John B. Kirkwood, *Rethinking Antitrust Policy Toward RPM*, 55 ANTITRUST BULL. 423 (2010).

47. 476 U.S. 447, 460–61 (1986).

48. ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 63 (quoting *Indiana Federation of Dentists*, 476 U.S. at 460–61 (internal quotation omitted)).

49. 551 U.S. 877, 895 (2007).

50. 2007 WL 4373980, at \*3 (N.D. Ga. 2007).

51. See *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717 (7th Cir. 2004), where the court expressed concern about application of the direct evidence of the anticompetitive effects doctrine without some idea of defendant’s share within some roughly defined relevant market. Because the case involved presumptively legal vertical exclusive distributorships rather than horizontal arrangements, the court stated that it “must be cautious about importing relaxed standards of proof from horizontal agreement cases into vertical cases.” *Id.* at 736. The court imported relevant market-like considerations, stating that “if a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant’s market power—in lieu of the usual showing of a precisely defined relevant market and a monopoly market share.” *Id.* at 737.

52. *Indiana Federation of Dentists*, 476 U.S. at 458; see also *Nw. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 296 (1985) (stating that unless plaintiff showed that “the cooperative possesses market power or exclusive access to an element essential to effective competition,” the expulsion of a member of the co-op should be judged under the rule of reason and not treated as per se unlawful).

53. 493 U.S. 411, 432–33 (1990).

54. See, e.g., *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1376 (3d Cir. 1992) (vacating grant of summary judgment based in part on evidence that defendant’s decision to deny plaintiff a BMW dealership occurred after dealers complained to BMW about the possibility of plaintiff obtaining a dealership); *Arnold Pontiac-GMC, Inc. v. Gen. Motors Corp.*, 786 F.2d 564, 569–70 (3d

Cir. 1986) (decision to deny dealer a new franchise occurred after meeting with existing franchisees); *Aunyx Corp. v. Canon USA, Inc.*, 1990-2 Trade Cas. (CCH) ¶ 69,201, at 64,629 (D. Mass. 1990) (manufacturer imposed territorial restraints with the tacit approval of a dealer advisory group). See also *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966).

55. 551 U.S. 877, 893 (2007).

56. 530 F.3d 204 (3d Cir. 2008).

57. *Id.* at 218–21.

58. *Id.* at 225 & n.8.

59. *Id.* (quoting *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 464–65 (3d Cir. 1998)). There was evidence that the dealers were the impetus of Mack’s policy not to provide sales assistance for sales outside dealers’ areas of primary responsibility and that this policy furthered the dealer’s horizontal agreement not to compete on price. Plaintiff also presented expert testimony that Mack possessed market power in two relevant product and geographic markets for heavy-duty trucks, which, in turn, was sufficient evidence that the alleged agreement had anticompetitive effects. *Id.* at 226.

60. See *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 386 F. App’x 214 (6th Cir. 2010).

61. See ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 159–60.

62. This conclusion is buttressed by cases involving Leegin. Thus, in the Fifth Circuit’s affirmance of the dismissal on remand of the *Leegin* case, the court rejected the argument that in light of dual distribution, Leegin’s RPM should be treated as a horizontal restraint; the court noted that “Leegin is no different from a manufacturer that does not have retail stores” and “would normally seek to minimize retailer margins as much as possible, including at its own retail stores.” *Leegin*, 615 F.3d at 420–21. See also *Jacobs v. Tempur-Pedic Int’l*, 626 F.3d 1327, 1342 (11th Cir. 2010) (dual distribution situation but not alleging a direct agreement to fix prices; allegations failed to meet *Twombly-Iqbal* standards because plaintiff failed to present allegations showing why it is more plausible that defendant and its distributors “would enter into an illegal price-fixing agreement . . . to reach the same result realized by purely rational profit-maximizing behavior”).

63. See Joan Biskupic, *States Try to Counter Supreme Court’s Minimum-Price Ruling*, USA TODAY, available at [www.usatoday.com/money/companies/regulation/2010-12-22-robertscourt22\\_CV\\_N.htm](http://www.usatoday.com/money/companies/regulation/2010-12-22-robertscourt22_CV_N.htm). The relevant statutory and case law landscape is carefully and adroitly reviewed by Richard Duncan and Alison Guernsey in *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 FRANCHISE L.J. 173 (2008).

64. See *Spahr v. Leegin Creative Leather Prods., Inc.*, 2008 WL 3914461, at \*14 (E.D. Tenn. 2008) (no good reason to believe that Tennessee courts would not follow *Leegin* in applying Tennessee law); *O’Brien v. Leegin Creative Leather Prods., Inc.*, No. 04-CV-1668 (8th Jud. Dist., Sedgwick County, Kan. July 9, 2008), *direct appeal to Supreme Court granted*, File No. 101,000 (Oct. 8, 2008) (applying rule of reason in evaluating claim under Kansas antitrust statute).

65. In 2008, New York, Illinois, and Michigan filed a complaint and consent decree in the U.S. District Court for the Southern District of New York alleging illegal minimum RPM agreements between Herman Miller for the Home and its retailers involving high-end, ergonomically designed office chairs. The states’ complaint did not

allege per se illegality but instead claimed that the alleged conduct had an anticompetitive effect by raising prices to consumers “above their competitive levels.” It did not allege other types of facts usually required in a rule of reason analysis (such as a defendant’s market power), and the states’ theory of anticompetitive effects appears to flow largely from the existence of minimum RPM agreements. *New York v. Herman Miller Inc.*, No. 08 CV-02977 (S.D.N.Y. Mar. 25, 2008) (stipulated final judgment and consent decree), available at [www.oag.state.ny.us/bureaus/antitrust/pdfs/Signed\\_FJ.pdf](http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Signed_FJ.pdf).

66. In 2009, the California attorney general’s office filed a state RPM action, *People v. DermaQuest, Inc.*, Case No. RG 10497526 (Cal. Super. Ct., Alameda County Feb. 23, 2010). See 98 Antitrust & Trade Reg. Rep. (BNA) 316 (Mar. 12, 2010). In 2010, the attorney general filed another RPM complaint and consent decree in *People v. Bioelements, Inc.* (Cal. Super. Ct., Riverside County Dec. 30, 2010), available at [http://oag.ca.gov/news/press\\_release?id=2028&](http://oag.ca.gov/news/press_release?id=2028&).

67. As noted above, a private action against Tempur-Pedic International was dismissed for failure to allege adequately a rule of reason claim. In March 2010, New York’s attorney general (NYAG) filed a petition against Tempur-Pedic seeking injunctive relief, restitution, and disgorgement in connection with Tempur-Pedic’s alleged RPM policy. *People v. Tempur-Pedic Int’l, Inc.*, No. 21019, slip op. (N.Y. County Sup. Ct. Jan. 14, 2011). The NYAG did not assert claims under the Sherman Act or under New York’s antitrust statute, the Donnelly Act, but instead argued that the restrictions imposed by Tempur-Pedic violate § 369-a of the NEW YORK GENERAL BUSINESS LAW. Section 369-a provides that a vendor or producer cannot set the minimum price at which its product can be resold. The petition sought relief under NEW YORK EXECUTIVE LAW § 63(12), which empowers the NYAG to obtain equitable relief when the defendant has engaged in repeated fraud or illegal acts in the transaction of business, such as (the NYAG argued) violations of § 369-a. The NYAG took the position that the agreement element of an antitrust claim (whether horizontal or vertical in nature) can be satisfied by applying concepts found in the Uniform Commercial Code, e.g., inferring contract terms from course of dealing, trade usage, or otherwise.

The New York court rejected the NYAG’s arguments in January 2011.

68. MD. CODE ANN., COM. LAW. § 11-204(a)(1) (2009).

69. In this regard, one option used by certain suppliers is a so-called *Colgate* policy based on the Supreme Court’s decision in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), where the Court held that a manufacturer has the right “freely to exercise his own independent discretion as to parties with whom he will deal” and “may announce in advance the circumstances under which he will refuse to sell.” These written policies not only suggest resale prices and the underlying rationale for them but also specifically state a policy of refusing to deal with those who deviate from the suggested prices. The utility of a *Colgate* policy in a long-term franchise or dealer agreement is questionable, however, because the written agreement typically requires the franchisee or dealer to agree to adhere to the policies, thereby arguably creating the very agreement that a *Colgate* policy is designed to avoid. In any event, a supplier needs to evaluate the risks of such a policy, weighing not only the legal subtleties and the limits of the *Colgate* doctrine but also the policy’s workability.

70. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12–13 (1984).

71. 448 F.2d 43 (9th Cir. 1971).

72. *Id.*

73. See, e.g., *Capital Temps., Inc. of Hartford v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976).

74. See, e.g., *Principe v. McDonald’s Corp.*, 631 F.2d 303, 309 (4th Cir. 1980); *Kugler v. AAMCO Automatic Transmissions*, 460 F.2d 1214, 1215–16 (8th Cir. 1972); *In re 7-Eleven Franchise Antitrust Litig.*, 1974-2 Trade Cas. (CCH) ¶ 75,429, at 98,427 (N.D. Cal. 1974).

75. See, e.g., *Midw. Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 712 (11th Cir. 1984); *Olmstead v. Amoco Co.*, 725 F.2d 627, 629–30 (11th Cir. 1984).

76. *Chicken Delight*, 448 F.2d at 52; see also, e.g., *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir. 1985); *Olmstead*, 725 F.2d at 630; *Kypta v. McDonald’s Corp.*, 671 F.2d 1282, 1285 (11th Cir. 1982); *L. Knife & Son v. Banfi Prods.*, 118 F.R.D. 269, 272 (D. Mass. 1987).

77. Arthur I. Cantor & Peter J. Klarfeld, *An Unheralded Stake Through the Heart of Siegel v. Chicken Delight and a New Climate for Franchise Tying Claims*, 28 FRANCHISE L.J. 11, 15 (2008).

78. 532 F.3d 963 (9th Cir. 2008).

79. *Id.* at 974.

80. *Schlotsky’s, Ltd. v. Sterling Purchasing & Nat’l Distribution Co.*, 520 F.3d 393, 407–08 (5th Cir. 2008) (franchisor lacked market power where contractual agreements with franchisees were voluntary and franchisor was small in overall relevant market); *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 595 (7th Cir. 2008) (oil company franchises were not separate market and oil company did not have market power with only 4.3 percent share in national market); *Siemer v. Quizno’s Franchise Co.*, 2008 U.S. Dist. LEXIS 25907, at \*31–32 (N.D. Ill. 2008) (plaintiff franchisees did not suffer antitrust harm because their requirement to purchase products from defendant-affiliated vendors was based on contract and not market power); *Martrano v. Quizno’s Franchise Co.*, 2009 U.S. Dist. LEXIS 52025, at \*48–52 (W.D. Pa. 2009) (“[T]he artificially-narrow definition of the relevant market, not as, e.g., the fast-food franchise market or even the fast-food sandwich franchise market, but as the ‘Quick Service Toasted Sandwich Restaurant’ franchise market, fails to consider ‘reasonable inter-changeability and cross-elasticity of demand’ and ‘does not encompass all interchangeable substitute products.’”); *Arnold v. Petland, Inc.*, 2009 U.S. Dist. LEXIS 120856 (S.D.N.Y. 2009) (holding that the relevant market should have been defined at least as broadly as the market for franchises in general).

81. 504 U.S. 451 (1992). In that case, there was evidence that Kodak had a large market share (more than 80 percent) of sales in the aftermarkets of Kodak parts and servicing of Kodak machines. Kodak argued, however, that “[b]ecause it had no market power in placements of original equipment, . . . its large share” of the parts and servicing markets “gave it no power to increase the prices of its parts or services.” ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 193. In reply to that argument, plaintiffs argued, and the Court agreed, that Kodak’s market power in the alleged tying product markets could not be determined on summary judgment because of evidence that existing owners of Kodak machines could have been

locked in to using Kodak machines, enabling Kodak to charge them supracompetitive prices. *Kodak*, 504 U.S. at 476–77.

82. See, e.g., Allan P. Hillman, *Franchise Tying Claims: Revolution or Just a “Kodak Moment”?*, 21 *FRANCHISE L.J.* 1 (2001); see also Alan Silberman, *The Myths of Franchise “Market Power,”* 65 *ANTI-TRUST L.J.* 181 (1996); Janet L. McDavid & Richard M. Steuer, *The Revival of Franchise Antitrust Claims*, 67 *ANTI-TRUST L.J.* 209 (1999).

83. See, e.g., *Wilson v. Mobil Oil Co.*, 984 F. Supp. 450, 459 (E.D. La. 1997); *Subsolutions, Inc. v. Doctor’s Assocs.*, 436 F. Supp. 2d 348, 355–56 (D. Conn. 2006); *Mumford v. GNC Franchising LLC*, 437 F. Supp. 2d 344, 357 (W.D. Pa. 2006); *Ajir v. Exxon Corp.*, 1992-2 Trade Cas. (CCH) ¶ 72,609, at 85,488–89 (9th Cir. 1992); *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 763 (7th Cir. 1996).

84. See *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1223 (11th Cir. 2002) (“Unlike *Kodak*, the defendant in the instant case has not defended against an otherwise viable antitrust claim (supported by sufficient evidence of the defendant’s high market share in the relevant market) by arguing that market power was lacking, despite its high share of the market, because of the brisk competition in another market. It was because of this defense in *Kodak* that it became relevant whether or not customers could switch to competitors’ equipment.”); see also *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 435 (3d Cir. 1997) (finding that plaintiffs’ claims “implicate principles of contract, and are not the concern of the antitrust law”).

85. See *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir. 1985).

86. See, e.g., *Westerfield v. Quizno’s Franchise Co.*, U.S. Dist. LEXIS 83883, at \*43–44 (E.D. Wis. 2007) (“[P]laintiffs’ assertion that the ‘Quick Service Toasted Sandwich Restaurant Franchise’ market constitutes the relevant market in which to assess Quiznos’ market power is patently absurd. The mere fact that a particular franchise is known for a unique product and way of doing business does not show market power over investors.”).

87. Silberman, *supra* note 82, at 220.

88. *Burda v. Wendy’s Int’l, Inc.*, 659 F. Supp. 2d 928, 935–37 (S.D. Ohio 2009).

89. 547 U.S. 28, 36 (2006).

90. See, e.g., *JOC, Inc. v. Exxon Mobil Oil Corp.*, 2010 WL 1380750, Bus. Franchise Guide (CCH) ¶ 14,352 (D.N.J. 2010) (plaintiffs alleged that Exxon “exercised its discretionary authority over DTW pricing, rental rates, and other decisions arbitrarily, unreasonably, or capriciously and “knew that its . . . prices and other decisions prevented them from receiving the contractual rewards or benefits they reasonably expected”; court denies motion to dismiss claim for breach of the implied covenant of good faith and fair dealing under New Jersey law); *Nat’l Franchise Ass’n v. Burger King Corp.*, 2010 WL 2102993, Bus. Franchise Guide (CCH) ¶ 14,387 (S.D. Fla. 2010) (claim that BKC’s systemwide mandate to offer a double cheeseburger on the \$1.00 value menu violated the duty of good faith).