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FRAMING FRANCHISE ANTITRUST LITIGATION: THE LEGACY OF *KODAK* AND *QUEEN CITY PIZZA*

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INTRODUCTION

A decade ago, many antitrust commentators were predicting a "revival"[1] of franchise antitrust claims flowing in the wake of *Eastman Kodak Co. v. Image Technical Services, Inc.*[2] The thinking was that *Kodak*'s recognition of a claim for monopolization of an "aftermarket" for parts and services separate from each other and from a primary product might be extended to cover franchise relationships in which the franchisee is required to purchase fungible products from its franchisor, even though those products could be purchased elsewhere on more favorable terms. Fairly quickly, though, the Third Circuit decided *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, which held that a *Kodak*-type antitrust claim will not lie for allegations that a franchisor "forced" unwanted—but contractually agreed-to—purchases of products on franchisees in the course of the franchise relationship.[3] That case continues to bedevil franchisees suing under antitrust theories.[4] This Article looks back at the *Queen City Pizza* legacy and where, as a consequence, franchise antitrust litigation stands today.

Franchisees have attacked restrictions on their ability to deal in products purchased from third parties (i.e., from a party other than their franchisor) under a number of overlapping *antitrust* theories (other theories of recovery, like breach of contract, are often alleged as well): improper exclusive dealing, tying, aftermarket monopolization, and price discrimination. Part One sets the historical backdrop against which franchise relationships are formed and—when these relationships sour—allegations of antitrust violations play out. Part Two examines the antitrust

1. *See, e.g.*, Janet L. McDavid & Richard M. Steuer, *The Revival of Franchise Antitrust Claims*, 67 ANTITRUST L.J. 209, 212 (1999); Tony Lin, *Distinguishing* Kodak *Lock-in And Franchise Contractual Lock-in*, 23 S. ILL. U. L.J. 87, 87 (1998) (remarking on the rise in cases post-*Kodak*). *But see* Allan P. Hillman, *Franchise Tying Claims: Revolution or Just a "Kodak Moment"?*, 21 FRANCHISE L.J. 1, 37 (2001) ("Although *Kodak* revived franchise antitrust tying claims, it is likely that this revival will be ephemeral.").

2. 504 U.S. 451 (1992) (addressing the issue of whether Eastman Kodak had unlawfully tied the aftermarket sale of service for Kodak copying machines to the sale of parts for those machines).

3. 124 F.3d 430, 440, 443 (3d Cir. 1997).

4. *See, e.g.*, Schlotzsky's, Ltd. v. Sterling Purchasing and Nat'l Distribution Co., 520 F.3d 393, 408 (5th Cir. 2008) (finding that under *Queen City Pizza* the franchisor's requirement that the franchisee change suppliers "was not an antitrust 'tying arrangement' because it was not an exercise of market power but of contract power"); Beuff Enters. Fla., Inc. v. Villa Pizza, LLC, No. 07-2159, 2008 WL 2565008, at *6 (D.N.J. June 25, 2008) (following *Queen City Pizza* in dismissing plaintiffs' antitrust claims "because Plaintiffs are bound by contract (not by uniqueness) to purchase certain mandated supplies" and therefore "no relevant antitrust market exists").

theories emanating from *Kodak*, as well as a couple of others that are pled from time to time in similar cases, and shows how these theories (1) have developed generally and (2) have been applied in the context of franchise disputes. Part Three moves to a specific discussion of how *Kodak*, when passed through the lens of *Queen City Pizza*, impacts restrictions on a franchisee's ability to deal with third parties.

I. FRANCHISING AND ITS GENERAL BACKGROUND

Franchising, as a method of doing business, traces its roots to the mid-nineteenth century and to the distribution techniques of the Singer Sewing Machine Company.[5] Singer's genius was to yoke product distribution and financing with standardized business methods and quality control. Numerous companies followed Singer's lead, and, by the end of World War II, franchising was a standard way of doing business.[6] But the legal framework was not so quickly established.[7] Even a lay perspective is sufficient to see that there is no bright line to be drawn between a "distributorship" and a "franchise."[8] Accordingly, both state legislatures and federal agencies began in the post-War era to draft regulations designed to clarify what business relations are to be considered "franchises" and those that are not.[9] For example, the Federal Trade Commission defines the term "franchise" to include, among other things, "any continuing commercial relationship" under which a person sells goods or services that carry another person's trade or service mark and the other person has the authority to dictate quality standards and methods of operation.[10] Nonetheless, some regulatory schemes cast the term so broadly as to define

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5. 1 W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 1:8 (2d. ed. 2009).

6. *Id.* § 1:9.

7. *Id.*

8. For example, BLACK'S defines a "distributorship" as "[a] franchise held by a person or company who sells merchandise, usu. in a specific area to individual customers" and it defines a "commercial franchise" as a "franchise using local capital and management by contracting with third parties to operate a facility identified as offering a particular brand of goods or services." BLACK'S LAW DICTIONARY (9th ed. 2009).

9. *See* Thomas M. Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 BUS. LAW. 289, 289, 319 (1989) (discussing the franchise-franchisee relationship under various state laws); *see also* 1 GARNER, *supra* note 5, §§ 5:14-:39 (detailing the franchise laws of a number of states).

10. 16 C.F.R. § 436.1(h) (2010).

away any distinction between a franchise and an ordinary distributorship.[11] For purposes of this Article, the definitional subtleties matter little, and readers will be on safe ground if they focus their thinking on well-known franchise operations that sell fast food or branded products like health supplements.[12] Of signal importance here is that the typical franchise relationship is built around a highly formalized written agreement.

II. *KODAK* AND THE CONCEPT OF ANTICOMPETITIVE AFTERMARKET CONDUCT

In the nearly two decades since the United States Supreme Court announced its decision in *Kodak*,[13] countless plaintiffs have attempted to state claims based on a "lock-in" theory.[14] Very few of these plaintiffs have been successful, in large part because they have too often tried to shoehorn ordinary commercial disputes into the *Kodak* holding.[15] That holding is narrow and—because the case came from the Supreme Court in an unusual

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11. *E.g.*, ARK. CODE ANN. § 4-72-202 (2001) (defining "franchise" to include "a written or oral agreement . . . to sell or distribute goods or services within an exclusive or nonexclusive territory at wholesale or retail . . . ."); FLA. STAT. ANN. § 817.416(b) (West 2006) (including the terms "franchise" and "distributorship" in the same definition).

12. *See* 1 GARNER, *supra* note 5, § 1:2 ("From a legal standpoint, the distinctions between franchises and distributorships are frequently blurred.").

13. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

14. The *Kodak* "lock-in" theory is part of a "tying" claim brought under section 1 of the Sherman Act, 15 U.S.C. § 1 (2006). *See* 2 GARNER, *supra* note 5, §§ 11:24, :27; *see also* discussion *infra* Part II.A. Generally, plaintiffs claim that the defendant exerted its market power to force the plaintiff, for example, to accept supracompetitive prices or purchase tied products. *See* GARNER, *supra* note 5, § 11:27. Since the consumer is already "locked-in" by the agreement and its investment, the cost of switching to a substitute is prohibitive and thus it has no choice but to use the tied product. *See, e.g.*, Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 439 (3d Cir. 1997); Subsolutions, Inc. v. Doctor's Assocs., Inc., No. 3:98-CV-470IAHN, 2001 WL 1860382, at *9 (D. Conn. Apr. 6, 2001) (plaintiffs claimed that franchisor's exclusive arrangement with vendor amounted to lock-in); Exxon Corp. v. Super. Ct., 60 Cal. Rptr. 2d 195, 204 (Ct. App. 1997) (plaintiffs claimed that franchisor's lease requiring them to use only franchisor's brand of gasoline in the leased tanks locked them in and was thus an illegal tying arrangement); *see also* Lin, *supra* note 1, at 96-99 (discussing other post-*Kodak* lock-in cases).

15. *E.g.*, PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 820 (6th Cir. 1997) (finding "lock-in" theory inapplicable because pre-contract disclosure occurred); Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756, 763 (7th Cir. 1996); Allen-Myland, Inc. v. IBM Corp., 33 F.3d 194, 211 (3d Cir. 1994) (vacating verdict and remanding for reconsideration in light of the *Kodak* "lock-in" theory); Virtual Maint., Inc. v. Prime Computer, Inc., 11 F.3d 660, 667 (6th Cir. 1993) (reversing the verdict and remanding for reconsideration in light of the *Kodak* decision); *Subsolutions*, 2001 WL 1860382, at *11 (rejecting plaintiffs' *Kodak*-type lock-in theory for lack of evidence of "supra-competitive prices—the sine qua non of a 'lock-in' claim"); *Exxon*, 60 Cal. Rptr. 2d at 204 (denying plaintiffs' *Kodak*-type lock-in claim since for tying purposes market power must be judged at the pre-contract stage, before any lock-in had arisen).

posture—somewhat ambiguous, as later sharp divisions in the literature and case law reveal.[16] It is thus wise to look carefully at *Kodak*.

After independent service organizations ("ISO"s) began to service copiers that Kodak manufactured, Kodak instituted policies that made it more difficult for ISOs to obtain replacement parts and, consequently, to service Kodak machines.[17] The ISOs sued, alleging that Kodak tied the sale of parts and service and monopolized the parts and service aftermarket.[18] Kodak prevailed on its summary-judgment argument that—because it lacked power in the foremarkets (i.e., copiers and other equipment)—it could not have power in the derivative aftermarkets for parts and services.[19] The appellate court reversed,[20] and the case arrived at the Supreme Court with the issues framed in the context of whether Kodak had proven its case as a matter of law.[21] The Supreme Court approached the factual scenario from two different legal directions:[22] tying under section 1 of the Sherman Act[23] and monopolization under section 2 of the Sherman Act.[24]

A. Tying Under Kodak

To state a tying claim, the ISOs needed to show "that service and parts are two distinct products" and "that [the defendant] has tied the sale of the two products."[25] "For service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for

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16. *See, e.g.*, McDavid & Steuer, *supra* note 1, at 223-41 (discussing the divisions in case law after *Kodak*); Lin, *supra* note 1, at 88 ("The courts that have addressed [*Kodak*] have come to conflicting conclusions."); *see also* discussion *infra* Parts II.C, II.D.

17. *Kodak*, 504 U.S. at 455, 458.

18. *Id.* at 459. The District Court did not actually pass on the tying question presented to the Supreme Court; rather, it determined that there could be no tie between ***equipment*** and ***service***. *Id.*; Image Technical Servs., Inc. v. Eastman Kodak Co., No. C-87-1686-WWS, 1988 WL 156332, at *2 (N.D. Cal. Apr. 18, 1988), *rev'd*, 903 F.2d 612 (9th Cir. 1990).

19. *Kodak*, 504 U.S. at 459.

20. Image Technical Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612, 621 (9th Cir. 1990).

21. *Kodak*, 504 U.S. at 454-55.

22. *Id.* at 462.

23. 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

24. 15 U.S.C. § 2 (2006) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

25. *Kodak*, 504 U.S. at 462.

a firm to provide service separately from parts."[26] The ISOs offered evidence showing this to be the case.[27] In support of the existence of a tie, the ISOs offered evidence that, for instance, Kodak "would sell parts to third parties only if they agreed not to buy service from ISO's."[28]

Having found sufficient evidence of a tying arrangement, the Court next considered "the other necessary feature of an illegal tying arrangement[,] appreciable economic power in the tying market."[29] In a common definition, "[m]arket power is the power 'to force a purchaser to do something that he would not do in a competitive market.'"[30] The ISOs presented evidence that Kodak had power in the parts market sufficient to force the purchase of unwanted (and supracompetitively priced) service.[31] Kodak countered that although it had a large ***share*** of the parts market, it had no ***power*** in that market because it lacked power in the equipment market.[32] Simply put, Kodak argued that it could never have power in the ***parts*** market because it would lose sales in the ***equipment*** market if it charged supracompetitive prices in the parts market.[33]

Kodak offered this argument as a matter of law—i.e., it tendered no evidence that its argument squared with economic reality.[34] This lack of evidence afforded the ISOs an opportunity to offer "a forceful reason why Kodak's theory, although perhaps intuitively appealing, may not accurately explain the behavior of the primary and derivative markets for complex durable goods: the existence of significant information and switching costs."[35] In this connection, the Court noted that many purchasers do not "lifecycle" price (i.e., calculate the total cost of a durable good over its expected life) and that others—including Government purchasers—"often treat service as an operating expense and equipment as a capital expense," with each assigned to a different department.[36] In a second, yet related observation, the Court found that "if the cost of switching is high, consumers who already have purchased the equipment, and are thus 'locked-in,' will tolerate some level of service-price increases before

26. *Id.*
27. *Id.* at 462-63.
28. *Id.* at 463.
29. *Id.* at 464.
30. *Id.* (quoting Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984)).
31. *Kodak*, 504 U.S. at 464-65.
32. *Id.* at 465.
33. *Id.* at 465-66.
34. *Id.* at 466-67.
35. *Id.* at 473.
36. *Id.* at 475.

changing equipment brands."[37] Against this backdrop—and in the absence of any contrary evidence—the Court concluded that there was "a question of fact whether information costs and switching costs foil the simple assumption that the equipment and service markets act as pure complements to one another."[38] This, therefore, defeated Kodak's sole legal defense to the ISO's tying claim.

B. Monopolization Under Kodak

The ISOs also claimed that Kodak monopolized or attempted to monopolize the service and parts markets.[39] "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[40] The Court had no trouble finding that there was a triable issue as to whether Kodak had monopoly power, based on evidence that it controlled "nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes."[41] Kodak's principal defense—*viz.*, that "a single brand of a product or service can never be a relevant market under the Sherman Act"[42]—found no traction: "[B]ecause service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is comprised of only those companies that service Kodak machines."[43]

The second element of a monopolization claim gave the Court no greater pause than did the first—again, given the summary judgment posture of the case. In other words, the Court found that—absent valid business justifications—the ISOs could escape summary judgment because they "presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market."[44]

37. *Kodak*, 504 U.S. at 476.
38. *Id.* at 477.
39. *Id.* at 480-81.
40. *Id.* at 481 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)).
41. *Id.*
42. *Id.*
43. *Kodak*, 504 U.S. at 482.
44. *Id.* at 483.

The Court closed with the admonishment that "Kodak's arguments may prove to be correct."[45] The Court's closing point merely was, then, that the record was too thin to entitle Kodak to summary judgment. This has left post-*Kodak* litigants with theoretical pronouncements that there is such a creature as a "lock-in" tie and that aftermarkets can be separate from foremarkets for monopolization purposes, but with little or no guidance as to how one must plead and prove these violations.[46] Understandably, courts down the road have taken many twists and turns, with some courts appearing to throw up their hands and essentially limit *Kodak* to its facts.[47] We now move to a consideration of more recent cases, first *Kodak* itself, on remand, and second, the most significant post-*Kodak* decisions.

C. *Post-*Kodak *Litigation*

1. *Kodak II*

On remand, the *Kodak* plaintiffs prevailed at trial and largely preserved their $72 million jury verdict on appeal.[48] Before closing arguments, the ISOs withdrew their section 1 tying claim.[49] They then proceeded on only a section 2 monopolization/attempt theory.[50] On appeal to the Ninth Circuit, Kodak raised a host of objections, most of which resolved into two categories relevant to the present discussion: (1) objections to the market power instructions and evidence, including objections to the "exercise" of monopoly power instructions and evidence; and (2) business justifications, including invocation of IP rights.[51]

45. *Id.* at 486.

46. *See, e.g.*, Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381-84 (3d Cir. 2005) (discussing the aftermarket analysis in *Kodak*); SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11, 16-18 (1st Cir. 1999) (interpreting the relevance of the foremarkets and aftermarkets in *Kodak*); *see also* Daniel M. Wall, *Aftermarket Monopoly Five Years After* Kodak, 11 ANTITRUST 32, 32 (Summer 1997) (discussing "the mixed signals of language and holding" in *Kodak* regarding the issue of aftermarket power).

47. *See, e.g.*, *Harrison Aire*, 423 F.3d at 382 ("To create a triable question of aftermarket monopoly power, the plaintiff must produce 'hard evidence dissociating the competitive situation in the aftermarket from activities occurring in the primary market.'" (quoting *SMS Sys. Maint. Servs.*, 188 F.3d at 17)); Xerox Corp. v. Media Scis., Inc., 660 F. Supp. 2d 535, 545 (S.D.N.Y. 2009).

48. Image Technical Servs., Inc. v. Eastman Kodak Co. (*Kodak II*), 125 F.3d 1195, 1200 (9th Cir. 1997).

49. *Id.* at 1201.

50. *Id.*

51. *Id.* at 1202-11, 1214-20.

The Ninth Circuit turned back the "power" objections with a combination of legal arguments set forth in *Kodak* and evidence developed at trial (e.g., that an "aggregate" of all parts—not each part—constituted a market).[52] With respect to the "use" of that power, Kodak's principal complaints were that the ISOs had relied on a "leveraging" theory that the Ninth Circuit had itself previously rejected and that the ISOs were required to prove their monopolization claim under the "essential facilities" doctrine, something that they had not done.[53] The court flatly rejected those arguments before turning to the issue that it—and many subsequent courts—have found most troubling: namely, the interplay between IP rights and antitrust liability.[54]

Kodak argued that the district court failed to instruct the jury that its numerous patents and copyrights provided a legitimate business justification for its alleged exclusionary conduct.[55] As the Ninth Circuit stated the issue, "[W]e must determine the significance of a monopolist's unilateral refusal to sell or license a patented product or copyrighted product in the context of a § 2 monopolization claim based on monopoly leveraging."[56] The fundamental problem for the ISOs was, then, "the right of a patent or copyright holder to refuse to sell or license protected work."[57]

The Ninth Circuit began its analysis with *Kodak*'s footnote twenty-nine and found that "the Court's statement that 'exploit[ing] [a] dominant position in one market to expand the empire into the next' is broad enough to cover monopoly leveraging under § 2."[58] But—according to the Ninth Circuit—footnote twenty-nine did not answer the question presented in *Kodak II* because the Supreme Court did not specifically address the antitrust implications of a unilateral refusal to deal in a patented or copyrighted product.[59] Thus, the issue morphed into one focused on the

52. *Id.* at 1204-06.

53. *Id.* at 1208-11.

54. *Kodak II*, 125 F.3d at 1212-13.

55. *Id.* at 1214.

56. *Id.*

57. *Id.* at 1215.

58. *Id.* at 1216 (quoting Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 479 n.29 (1992) (alterations in original)). Footnote twenty-nine addressed the section 1 claim and the dissent's argument that since Kodak's monopoly was only "inherent," antitrust laws do not apply to its efforts to move into other markets. *Kodak*, 504 U.S. at 479 n.29. Rather, the majority argued that such a "proposal to grant *per se* immunity to manufacturers competing in the service market would exempt a vast and growing sector of the economy from antitrust laws" and, furthermore, has no support in either the "jurisprudence or the evidence in this case." *Id.*

59. *Kodak II*, 125 F.3d at 1216.

nexus between "the definition of the patent grant and the relevant market."[60] And the fact that parts and service "have been proven separate markets in the antitrust context" does not put this issue to rest.[61] The Ninth Circuit was especially troubled that it was assessing a section 2 claim, and that, consequently, it was being asked to attach liability to (potentially procompetitive) ***unilateral*** conduct, which "is the most common conduct in the economy."[62]

To impede the proliferation of claims based on unilateral conduct, the Ninth Circuit adopted a rebuttable presumption that the exercise of IP rights is a legitimate business justification insulating the holder from antitrust liability.[63] Nonetheless, the court went on to find that Kodak's IP-based justification was pretextual.[64] In reaching this conclusion, the court pointed to evidence that Kodak employees gave no thought to IP rights when formulating the parts policy and that the policy applied to ***all*** parts, including unprotected parts.[65]

2. Other Post-*Kodak* Cases

Based on *Kodak I*,[66] plaintiffs have two possible avenues of redress in a foremarket-aftermarket case: a tying claim under section 1 and a monopolization/attempt to monopolize claim under section 2.[67] But despite

60. *Id.* A patent's grant "is limited to the invention which it defines" and patent and copyright law determine the relevant market for determining the patent or copyright grant. *Id.* at 1216-17 (quoting Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 666 (1944)). For antitrust purposes, however, economic conditions determine the relevant markets. *Id.* (citing *Kodak*, 504 U.S. at 462); *see also* Triad Sys. Corp. v. Se. Express Co., 64 F.3d 1330, 1338 (9th Cir. 1995) (noting the distinction between copyright market definition and antitrust market definition), *overruled on other grounds by* Gonzales v. Texaco Inc., No. 07-17123, 2009 U.S. App. LEXIS 18370, at *5 (9th Cir. Aug. 17, 2009).

61. *Kodak II*, 125 F.3d at 1217; *see also id.* at 1203 ("[In Kodak, the Supreme] Court held that service and parts could constitute separate markets.").

62. *Id.*

63. *Id.* at 1218. The addition of the rebuttable presumption is significant, since, as the court notes, "[u]nder current law the defense of monopolization claims will rest largely on the legitimacy of the asserted business justifications." *Id.* at 1217-18 (referring to the jury instructions for section 2 claims endorsed by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596-97 (1985)).

64. *Id.* at 1219 ("Neither the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct." (citation omitted)).

65. *Id.*

66. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

67. For example, in an early and influential post-*Kodak* case, *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 434-35 (3d Cir. 1997), plaintiffs alleged foremarket and

the success of the plaintiffs in *Kodak II*, neither theory has fared well in the federal courts, although there are a few notable exceptions.[68] Many of the failures are attributable to allegations that don't remotely fit within the *Kodak* rubric.[69] Yet other cases, at least facially, do fit within the rubric and, therefore, warrant some notice.

Part of the problem with *Kodak* is that it is very difficult to tell exactly which of its points is of greatest significance. There is general agreement that the uniqueness of aftermarket goods and the presence of switching and information costs are necessary to establish an aftermarket as the "relevant market" for antitrust purposes.[70] But a number of cases hold that these factors are not alone sufficient to state a claim.[71] The most common reasoning is that a *Kodak*-type claim will not succeed absent a showing that the "defendant has actually changed its policy after locking-in some of its customers."[72]

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aftermarket claims under section 1 and section 2 in addition to state law tort and contract claims. The case is discussed in detail below. *See* discussion *infra* Part III.B.

68. *E.g.*, *In re* Apple & AT & TM Antitrust Litigation, 596 F. Supp. 2d 1288, 1305-06 (N.D. Cal. 2008) (finding that, even though the aftermarket was contractually created, there are disputed facts as to whether defendants locked in consumers such that "[p]laintiffs have sufficiently alleged market power and monopolization in the iPhone voice and data services aftermarket . . . to state a claim for violation of § 2 of the Sherman Act"); Red Lion Med. Safety, Inc. v. Ohmeda, Inc., 63 F. Supp. 2d 1218, 1232 (E.D. Cal. 1999); Collins v. Int'l Dairy Queen, Inc., 980 F. Supp. 1252, 1260-61 (M.D. Ga. 1997).

69. *See, e.g.*, Commercial Data Servers, Inc. v. IBM Corp., 262 F. Supp. 2d 50, 67 (S.D.N.Y. 2003) (finding that the plaintiff failed to present evidence of *Kodak* lock-in, e.g., high switching costs, high information costs, and an ability to exploit "ignorant" customers).

70. *See, e.g.*, Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1048-51 (9th Cir. 2008) (analyzing an aftermarket as the "relevant market" under the *Kodak* line of cases using essential criteria such as information and switching costs and uniqueness). Similarly, in *SMS Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 16-18 (1st Cir. 1999), the court ruled that "[A] litigant who envisions the aftermarket as the relevant market must advance hard evidence dissociating the competitive situation in the aftermarket from activities occurring in the primary market," including the role of product uniqueness and of switching costs.

71. *E.g.*, Xerox Corp. v. Media Sci., Inc., 660 F. Supp. 2d 535, 549-50 (S.D.N.Y. 2009) (dismissing antitrust claims against copier manufacturer because there was insufficient evidence that the copier manufacturer "possess[ed] monopoly power in the market for ink sticks for its color workgroup printers" since "additional factors are relevant in the aftermarket context"); *Queen City Pizza*, 129 F.3d at 439 ("*Kodak* does not hold that the existence of information and switching costs alone . . . renders an otherwise invalid relevant market valid.").

72. ID Sec. Sys. Can., Inc. v. Checkpoint Sys., Inc., 249 F. Supp. 2d 622, 642 (E.D. Pa. 2003); *see also* Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 383-85 (3d Cir. 2005) (discussing the effects of "aftermarket policy change" in relation to *Kodak* claims and finding that since defendant's aftermarket policy was "transparent and known" to the defendant during the primary market, summary judgment was proper); *SMS Maint. Servs.*, 188 F.3d at 19 (distinguishing *Kodak* because that case involved "a retroactive change in the rules because many customers had purchased Kodak machines against a background understanding that they would be able to procure parts from ISOs"); Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 783 (5th

Against this weight of authority, there is some—though slight—counterweight, some of which is well reasoned. For instance, in *Red Lion Medical Safety, Inc. v. Ohmeda, Inc.*, the court specifically found that:

> *Kodak I* does not hold that an aftermarket claim is contingent on a change in a manufacturer's parts or service policy; it simply acknowledges that Kodak's ability to make a policy change without suffering losses in the equipment market was evidence that the service market was not disciplined by competition in the equipment market.[73]

In other words, "the policy change did not create lock-in; instead, the existence of lock-in—high switching costs—made it both possible and economically desirable for Kodak to change its policy and exploit aftermarket consumers."[74] By these lights, the majority line of cases has *Kodak* backwards because "the policy change did not create monopoly power; it was merely persuasive evidence that Kodak had market power in parts and engaged in monopolistic conduct in the aftermarket despite competition in the equipment market."[75] Rather, "[t]o insist on a showing of policy change confuses a symptom of market power and a lack of cross elasticity with the underlying condition itself."[76]

Cir. 1999) ("Several circuits have held . . . a change in policy is a crucial factor in establishing an aftermarket monopoly claim."); PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 819 (6th Cir. 1997) ("[T]he change in policy in *Kodak* was the crucial factor in the Court's decision."); Digital Equip. Corp. v. Unique Digital Techs., Inc., 73 F.3d 756, 763 (7th Cir. 1996) ("The material dispute that called for trial was whether the change in policy enabled Kodak to extract supra-competitive prices from customers who had already purchased its machines."); Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1200-03 (N.D. Cal. 2008) (finding that dismissal of the defendant's *Kodak* claim was warranted because the aftermarket for computer operating systems was contractually created by the End User License Agreement, which users would have known limited them to using their Mac operating systems only on Apple computers); Avaya, Inc. v. Telecom Labs, Inc., No. 06-2490, 2008 WL 4117957, at *12-13 (D.N.J. Aug. 29, 2008) (finding that the counterclaim alleged a relevant market where the defendant "made changes to its policies regarding [software] usage so as to make it cost prohibitive for the [plaintiff] system owners to use an ISP in this manner, [the defendant] was making a policy change that targeted the 'locked-in' [plaintiff] system owners and thereby violated the antitrust laws"); Metzler v. Bear Auto. Serv. Equip. Co., 19 F. Supp. 2d 1345, 1359 (S.D. Fla. 1998) ("[P]laintiffs have failed to produce sufficient evidence to permit a reasonable jury to find that the defendants used a change in policy to exact supracompetitive prices from existing customers.").

73. 63 F. Supp. 2d 1218, 1230 (E.D. Cal. 1999).

74. *Id.*

75. *Id.*

76. *Id.* Courts use the concept of cross-elasticity to measure demand and determine whether goods are interchangeable and, thus, are adequate substitutes for one another in the market. *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 469 (1992) (defining "cross-elasticity of demand" and stating that "[t]he extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another . . .").

Another *Kodak* issue arises when a defendant refuses to sell parts to an aftermarket competitor. The refusal-to-deal aspect of this scenario is one to which *Kodak* itself gave little consideration, treating it in an enigmatic footnote: "It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal."[77] Plainly, this leaves open the question whether, for example, a competitor can refuse to sell parts to an aftermarket competitor, if that leads to monopolization of the services market as well. The leading case on the subject, *In re Independent Service Organizations Antitrust Litigation* ("*ISO*"), teaches that it is not a violation, at least if the parts are protected by patents or copyrights.[78]

ISO is—as the case-name suggests—factually and legally similar to *Kodak*. The principal conduct at issue was Xerox's "refusal to sell patented parts and copyrighted manuals and to license copyrighted software . . . ."[79] To support its argument that Xerox illegally sought to leverage its legitimate (by virtue of intellectual property rights) dominance in the equipment and parts market into dominance in the service market, the appellant ISO relied on one of the *Kodak* footnotes: i.e., "[t]he Court has held many times that power gained through some natural and legal advantage such as a patent, . . . can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'"[80] The *ISO* Court deemed the *Kodak* footnote irrelevant, for two reasons. First, the footnote appears in connection with the tying claim, a claim not at issue in *ISO*.[81] Second, "the cited language from *Kodak* does nothing to limit the right of the patentee to refuse to sell or license in markets within the scope of the statutory patent grant."[82] In fact, the court noted that it has "expressly held that, absent exceptional circumstances, a patent may confer the right to exclude competition altogether in more than one antitrust market."[83] Given this legal precedent, the court explicitly held that Xerox did not violate the antitrust laws by refusing to sell parts to ISOs.[84] The

77. *Kodak*, 504 U.S. at 483 n.32.

78. 203 F.3d 1322, 1328-29 (Fed. Cir. 2000).

79. *Id.* at 1324.

80. *Id.* at 1326-27 (quoting *Kodak*, 504 U.S. at 480 n.29).

81. *Id.* at 1327.

82. *See id.*

83. *Id.* (citing B. Braun Med., Inc. v. Abbott Labs., 124 F.3d 1419, 1427 n.4 (Fed. Cir. 1997) (finding that the patentee had the right to exclude competition in both the market for patented valves and the market for extension sets incorporating those patented valves)).

84. *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d at 1328 ("Xerox was under no obligation to sell or license its patented parts and did not violate the antitrust laws by refusing to do so.").

court thereby implicitly held (and it is interesting that the court did not make the statement) that Xerox could refuse to sell parts, even if this meant that, as a consequence, it monopolized the collateral service market.[85] The court then went on to reach a similar holding with respect to the copyrighted materials at issue.[86]

D. Kodak *in the Franchise Context*

As noted at the outset, *Kodak* claims have a very poor record of success.[87] In fact, not many claims of this type have survived summary judgment since *Kodak II*.[88] Some of this is a function of ambiguities in *Kodak* itself; the remainder is attributable to the Supreme Court's narrowing of the definition of exclusionary conduct, coupled with a general suspicion of tying, leveraging, and essential facilities theories.[89] In any

85. *See id.* at 1327-28.

86. *See id.* at 1328-29. In reaching this decision, the court adopted the standard formulated by the First Circuit that "while exclusionary conduct can include a monopolist's unilateral refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers." *Id.* (citing Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147 (1st Cir. 1994), *abrogated on other grounds by* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243 (2010).

Other courts have continued to add interesting wrinkles to the body of law. For example, the Eleventh Circuit's leading post-*Kodak* decision is *Telecom Technical Services, Inc. v. Rolm Co.*, 388 F.3d 820 (11th Cir. 2004). The case arose out of the defendants' refusal to sell parts to ISOs. The ISOs claimed that this conduct constituted a violation of section 2, in that it permitted the defendants to monopolize the service market. *Rolm*, 388 F.3d at 824-25. On appeal, the principal issue with respect to parts was whether the defendants could effectively assert IP rights as a defense to the refusal to deal. *See id.* at 826. The case thus, at least initially, invited the court to navigate a course towards, away from, or in between *ISO* and *Kodak II*. But it did neither, for reasons that could prove decisive in many cases.

True enough, the *Rolm* defendants had refused to sell parts to ISOs. But the prohibition was not absolute because the defendants permitted an equipment owner to order parts for installation by an ISO or to "provide an ISO with a letter of agency such that the ISO may order the part . . . and carry out the installation . . . ." *Id.* at 827. In this circumstance, the court held, "there is not actionable harm to consumers and therefore the ISOs have failed to prove a violation of § 2 of the Sherman Act with respect to the parts policy." *Id.* at 827-28.

87. *See* McDavid & Steuer, *supra* note 1, at 226-31; Lin, *supra* note 1, at 88 (discussing cases of successful and unsuccessful *Kodak* claims).

88. *See, e.g.*, Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Ltd., No. 02-12102-RWZ, 2006 WL 1766434, at *30 (D. Mass. June 28, 2006) (denying defendant's summary judgment on plaintiffs' section 1 claim since "[a] reasonable jury might conclude from this evidence that this case falls more within the ambit of *Kodak* rather than *SMS*, and that the relevant market is properly defined as the service aftermarket rather than the equipment foremarket").

89. *See* Pacific Bell Tel. Co. v. LinkLine Commc'ns, Inc., 129 S. Ct. 1109, 1121-22 (2009) (dismissing a proposed "transfer price test" for presuming a price squeeze by upstream monopolists and noting that "antitrust law does not forbid lawfully obtained monopolies from

event, franchise relationships have added a number of wrinkles to the *Kodak* fabric, each of which becomes apparent upon a review of the cases. Franchisees typically attack restrictions on their ability to deal in products purchased from third parties (i.e., from a party other than their franchisor) under just a few *antitrust* theories (as already indicated, other theories of recovery—like breach of contract—are often alleged as well), most commonly improper exclusive dealing and tying. We will examine the historical development of each of these theories in turn.

1. Do Contractual Restrictions on Product Purchases from Third-Party Vendors Constitute an *Unreasonable* Restraint of Trade?

Exclusive dealing is not unique to the franchise context.[90] Most generally, exclusive dealing occurs when a supplier and its dealer have an agreement under which the dealer will handle only the products of the supplier or, alternatively, that the dealer will not handle products that compete with those of the supplier.[91] This type of arrangement is a non-price, vertical restraint (i.e., between parties at different levels in a distribution chain)[92] and, as such, is evaluated under the rule of reason (i.e., it will be condemned only if the economic disadvantages of the arrangement outweigh its economic advantages).[93] Plaintiffs usually mount

charging monopoly prices"); Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 42-43 (2005) (abrogating the tying *per se* rule that presumed a relevant market when a patent was involved and instead requiring the plaintiff to prove power in the relevant market); Verizon Commc'ns, Inc. v. Trinko, 540 U.S. 398, 414 (2004) (remarking that "applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad'" and, consequently, "[m]istaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect") (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

90. It is, for example, frequently used in distributorships. *See* 2 THEODORE L. BANKS, DISTRIBUTION LAW: ANTITRUST PRINCIPLES AND PRACTICE § 5.01 (2d ed. Supp. 2009).

91. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 2 (1984) (exclusive contract between hospital and anesthesiologists); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 320 (1961) (exclusive agreement between electric utility provider and coal company); *see also* BANKS, *supra* note 90, § 5.01.

92. *E.g.*, Anheuser-Busch, Inc. v. G.T. Britts Distrib., Inc., 44 F. Supp. 2d. 172, 175-76 (N.D.N.Y. 1999) ("Agreements with manufacturers that limit distributors' sales to products made by the manufacturer are not per se violations of antitrust laws.").

93. Courts use the rule of reason test to determine whether a non-price vertical restraint violates antitrust law principles. 2 GARNER, *supra* note 5, § 11:16. As one commentator notes, the test involves four elements the plaintiff must show: "that the defendant contracted, combined, or conspired, that the contract produced adverse anticompetitive effects within the relevant product and geographic markets, and that the objects of conduct resulting from the contract were illegal and that the contract was the proximate cause of the plaintiff's injury." *Id.* § 11:9; *see also* Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co., 472 U.S. 284, 297 (1985)

an attack under section 1 of the Sherman Act (which prohibits agreements in restraint of trade),[94] section 3 of the Clayton Act (which prohibits certain exclusive dealing practices),[95] or—less frequently until very recently—section 2 of the Sherman Act (which prohibits certain monopolies and attempts to monopolize).[96]

Challenges to exclusive dealing arrangements are rarely successful, especially in the context of franchises.[97] This is so because courts in recent years have been quick to accept arguments that ***intra***brand exclusivity can promote ***inter***brand competition by, for example, focusing sales and marketing efforts on franchised products.[98] And because courts are reluctant to recognize single-brand monopolies, section 2 exclusivity claims are difficult to sustain in a market filled with substitute products.[99] This is to be distinguished from a situation in which a supplier holds an extremely high market share (perhaps 75% or so) and its exclusive dealing agreements effectively deny market access to its competitors.[100] Finally, many courts read prohibitions against exclusive dealing quite literally. For example, an arrangement that is not absolutely exclusive is not subject to review under the Sherman or Clayton Acts as an improper "exclusive dealing" agreement.[101] Given these difficulties, plaintiffs have all but abandoned

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(noting that the rule of reason is the appropriate test over the per se test for vertical restraint issues).

94. *See* 15 U.S.C. § 1 (2006). *See, e.g.*, Hesco Parts, LLC v. Ford Motor Co., No. 3:02CV-736-S, 2006 WL 2734429, at *1 (W.D. Ky. Sept. 22, 2006) (section 1).

95. *See* 15 U.S.C. § 14. *See, e.g.*, *Tampa Elec.*, 365 U.S. at 321 (section 3 of the Clayton Act).

96. *See* 15 U.S.C. § 1. *See e.g.*, Hodge v. Vills. of Homestead Homeowners Ass'n, Inc., 726 F. Supp. 297, 298 (S.D. Fla. 1989) (section 2 of the Sherman Act); *see also* 2 BANKS, *supra* note 90, § 5.02 (discussing the statutes and cases dealing with excusive dealing arrangements).

97. *See, e.g.*, Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 666-67 (2d Cir. 1974) (holding that restrictive covenant to enter into "blue collar business" with no evidence of coercion does not amount to exclusive dealing); Joyce Beverages of New York, Inc. v. Royal Crown Cola Co., 555 F. Supp. 271, 279 (S.D.N.Y. 1983) (finding no exclusive dealing under "exclusive efforts" provision prohibiting plaintiff from distributing similar sodas because agreement fostered intrabrand competition).

98. *See, e.g.*, *In re* Super Premium Ice Cream Distrib. Antitrust Litig., 691 F. Supp. 1262, 1267 (N.D. Cal. 1988) (holding that termination of dealer for violating exclusivity arrangement did not injure competition: "Separate distribution has led to increased and successful interbrand competition"), *aff'd sub nom.* Haagen-Dazs Co., Inc. v. Double Rainbow Gourmet Ice Creams, Inc., 920 F.2d 587 (9th Cir. 1990).

99. *See id.* at 1268-69; *see also* 2 BANKS, *supra* note 90, § 7.03[D] (providing a table of cases giving the percentage of market share and the relative outcome for each).

100. *See* United States v. Dentsply Int'l, Inc., 399 F.3d 181, 184-86, 190 (3d Cir. 2005).

101. *See* Stearns v. Genrad, Inc., 752 F.2d 942, 945-46 (4th Cir. 1984) (holding that distributor could not state a claim of exclusive dealing against a manufacturer under section 1 of the Sherman Act based on their distribution agreement because the distributor had had extensive dealings with another manufacturer); Valin Corp. v. Ametek, Inc., No. C-85-200001-WAI, 1986 WL 961, at *2

exclusive dealing as a theory of recovery in franchise aftermarket litigation, at least when the complaint is one involving purchases of ingredients and supplies.

2. Do Contractual Restrictions on Third-Party Purchases, When Coupled with Its Requirement That Franchisees Purchase Certain Products from the Franchisor, Constitute Improper Tying?—Historical Approaches[102]

Franchise systems by their nature depend on the bundling of products and services.[103] For example, most franchise packages include products, trademarks, store designs, real estate, supplies and/or equipment.[104] With varying success, plaintiffs have attacked these packages as unlawful tying arrangements under the antitrust laws.[105]

As already noted, a tying arrangement exists when a seller conditions the sale of one product (the tying product) on the purchase of a separate product or service (the tied product or service).[106] Tying can be illegal under section 1 of the Sherman Act, section 5 of the FTC Act (for which

(N.D. Cal. Apr. 2, 1986) (noting that although the manufacturer did not favor distributors having competing lines, it had no policy of threatening or terminating distributors for doing so); Perington Wholesale, Inc. v. Burger King Corp., 554 F. Supp. 708, 714 (D. Colo. 1982) (noting that franchisee purchases from alternative sources indicated that distributorship was non-exclusive). In a related vein, several states (including but not limited to Hawaii, Indiana, Iowa, Washington, and the District of Columbia) have provisions in their franchise laws that prohibit certain restrictions on a franchisee's sources of supply. I have not analyzed these statutes here, but a franchisor would be well advised to do so before placing aftermarket source restrictions on its franchisees.

102. This historical section loosely follows Chapter 7 of Banks' treatise, DISTRIBUTION LAW, which fairly represents various tacks that courts took to franchise relationships in the pre-*Kodak* era. *See* 2 BANKS, *supra* note 90, § 7.01-11.

103. *See* Rick-Mik Enters., Inc. v. Equilon Enters., LLC, 532 F.3d 963, 974 (9th Cir. 2008) ("Franchises, almost by definition, necessarily consist of 'bundled' and related products or services—not separate products.").

104. *See* Kappas v. United States, 578 F. Supp. 1435, 1438 (C.D. Cal. 1983).

105. *E.g.*, Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 724-25 (9th Cir. 1979) (holding that requirement for franchisees to lease kiosks from the franchisor was an illegal tie-in); Northern v. McGraw-Edison Co., 542 F.2d 1336, 1345 (8th Cir. 1976) (holding that franchisor license of its trademarks to dealer-agents who then assembled complete dry cleaning operations and leased them as "going businesses" to franchisees was an illegal tie-in); Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 46-47 (5th Cir. 1976) (holding that franchisor's required lease of completed restaurant to franchisee was illegal tie-in).

106. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461 (1992) ("A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" (citing N. Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958)).

there is no private cause of action),[107] section 3 of the Clayton Act (where tying is the method of ensuring exclusive dealing), and section 2 of the Sherman Act (where tying is used as a tool for monopolizing).[108] For many years, tying was considered *per se* illegal;[109] in recent years, however, courts have increasingly taken a broad economic approach and considered not only market power but a range of potentially pro-competitive justifications such as production and marketing efficiencies, quality control, and indirect price competition.[110]

In the franchise context, franchisees typically frame a tying claim around an allegation that their franchisor has tied the sale of goods to the purchase of the right to use a trademark.[111] To facilitate an analysis of this type of claim, courts and commentators have created separate rubrics for evaluating franchises according to the type of franchise involved:[112]

<u>Business Format Franchise</u>. In a business format franchise, the franchisor licenses a method of operating a business. Tying allegations arise when the franchisor forces its franchisee to purchase items that are not related to the trademark license (e.g., a fast food franchisor requires its franchisees to purchase generic paper cups from it).

<u>Distribution System Franchise</u>. In a distribution system franchise, the primary purpose of the franchise is the sale of specific trademarked products. Tying disputes arise when the franchisor prohibits the sale of products other than its own.

<u>Package Franchise</u>. In a package franchise, each component (e.g., trademark, real estate lease and products) is designed to further the success of the business. In some ways, this type of franchise is simply a refined and elaborated "business format" franchise, with an overlay of characteristics of a "distribution system" franchise.

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107. 15 U.S.C. § 45 (2006) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

108. 2 BANKS, *supra* note 90, § 7.02.

109. *See, e.g.*, Fortner Enters. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969) ("[T]ying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way."). The elements of a *per se* actionable tying claim are: (1) two separate products; (2) a sale conditioned on purchase of both products; (3) market power in the tied product; (4) a sufficient impact on interstate commerce. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958); *see also* Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 477 (3d Cir. 1992).

110. *See Kodak*, 504 U.S. at 451, 461; Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 33-42 (1984) (O'Connnor, J., concurring), *superseded by statute*, 35 U.S.C §271(d)(5) *as stated in* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 41-46 (2006); Town Sound & Custom Tops, Inc., 959 F.2d at 477-78.

111. *E.g.*, Queen City Pizza, Inc. v. Domino's Pizza, Inc.,124 F.3d 430, 433-34 (3d Cir. 1997).

112. *See* 2 BANKS, *supra* note 90, § 7.10[A]-[C].

One complication here is that courts developed these varied approaches based on franchise type prior to the Supreme Court's landmark tying decision in *Jefferson Parish*.[113] In that case, the Court inquired into the demand for the services at issue to see if there were services from separate markets being tied together.[114] And although the case was not a franchise case, at least one court has opined that its market-demand test has rendered franchise-type tests moot.[115] Other courts disagree, and it seems that franchise-type distinctions are, for some courts, a fair method of evaluating product demand and that, therefore, these distinctions are consistent with the *Jefferson Parish* approach.[116]

a. Business Format Franchises

One early—and paradigmatic—case of this type is *Siegel v. Chicken Delight, Inc.*[117] There, Chicken Delight required its franchisees to purchase certain equipment and packaging from it.[118] The court ultimately held that this requirement constituted an illegal tie between those products and the trademark license.[119] In reaching its holding, the court voiced a concern that the defendant was attempting to "extend the trade-mark protection to common articles (which the public does not and has no reason to connect with the trade-mark)."[120] In other words, the court was opining that consumers have no interest in whether their Chicken Delight chicken is

113. 466 U.S. at 2-3.

114. *Id.* at 39, 43.

115. *See* Casey v. Diet Ctr., Inc., 590 F. Supp. 1561, 1565-66 (N.D. Cal. 1984) ("Characterizing a particular franchise as business format or distributional does not aid in weighing the economic benefits that society is acknowledged to derive from franchises against any potential harm from the tie of component products.").

116. *See, e.g.*, Smith v. Mobil Oil Corp., 667 F. Supp. 1314, 1327 (W.D. Mo. 1987) ("The court finds it difficult to accept the conclusion that [*Jefferson Parish*] overruled the whole flock of [cases using various franchise-type tests] without mentioning even one of them.").

117. 448 F.2d 43, 46-48 (9th Cir. 1971).

118. *Id.* at 46.

119. *Id.* at 47-49. In reaching this decision, the court relied in part on theories that "sufficient economic power is to be presumed where the tying product is patented or copyrighted" and that trademarks do not extend to the tied product. *Id.* at 50. Recently, however, the Ninth Circuit has dismissed these as "old theor[ies]" as "no longer relevant" after the Supreme Court's decision in *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006). Rick-Mik Enterprises, Inc. v. Equilon Enters., LLC, 532 F.3d 963, 974 n.3 (9th Cir. 2008).

120. *Chicken Delight*, 448 F.2d at 49; *see also* Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1353 (9th Cir. 1982) ("[C]onsumers have no reason to associate with the trademark, those component goods used either in the operation of the franchised store or in the manufacture of the end product.").

fried in a fryer distributed by Chicken Delight or by General Electric, so long as the end product is the same.[121]

b. Distribution System Franchises

Some franchises exist solely to sell trademarked products. A common example is a branded new car dealership. A customer enters this dealership expecting, for example, to find new cars made only by Ford at a Ford dealership. In contrast, a customer entering a McDonald's does not expect that the ingredients in his Big Mac were manufactured by McDonald's; rather, he expects that the Big Mac conforms to certain quality standards and is prepared according to a formula. In short, he expects to purchase a sandwich in Tennessee that is indistinguishable from one purchased in Texas. The point of contrast between the two types of franchises is thus readily apparent: when buying from a distribution franchise, consumers expect that their purchases will be of a certain quality ***and*** that those purchases originated with the trademark owner; when buying from a business format franchise, consumers' expectations are limited to quality.

If a franchisor can convince a court that its franchisees are essentially distributors of its products, then it takes only a short step to convince the court that the trademark has no existence apart from the products it identifies. For example, in *Krehl v. Baskin-Robbins Ice Cream Co.*, the court evaluated restrictions on franchisees as to where they obtained ice cream.[122] The court started from the premise that—in a distribution-type arrangement—the franchise is a conduit through which the trademarked goods are delivered to consumers: "'It is to the system and the end product that the public looks with the confidence that the established goodwill has created.'"[123] "Consequently, sale of substandard products under the mark would dissipate this goodwill and reduce the value of the trademark."[124] The prohibition against tying is aimed at a situation in which purchase of an unwanted product is compelled.[125] But in a distribution franchise, the

121. This does not suggest that one must demonstrate consumer perceptions to convince a court that a franchise system is of one type or another. *See, e.g.*, *Smith*, 667 F. Supp. at 1325 ("[A]s a matter of the substantive law of antitrust—specifically, the law concerning franchise-trademark tying arrangements—consumer perceptions are immaterial to deciding the nature of a particular franchise system."). Nonetheless, consumer perceptions are useful in understanding the evolution of the various franchise types.

122. 664 F.2d 1348, 1352-54 (9th Cir. 1982).

123. *Id.* at 1354 (quoting *Chicken Delight*, 448 F.2d at 49).

124. *Krehl*, 664 F.2d at 1354.

125. *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 452 (1992).

trademark identifies a product that a franchisee (and its customers) desire.[126] Given this inextricable relationship between the mark and the quality of the product it represents, there is no second, unwanted product to be tied.[127]

The line between distribution and business-format franchises is not always clear.[128] Indeed a franchise that is predominantly of one type may nonetheless have attributes of the other. For example, as one commentator has concluded, a business-method franchise may have one or two critical products that are key to the success of the enterprise and that cannot be supplied by anyone other than the franchisor, thus mandating that the entire arrangement be treated as a distribution franchise.[129]

Other courts have held that the business-format/distribution franchise distinction is unnecessary.[130] In *Casey v. Diet Center, Inc.*, a subfranchisee alleged that the franchisor illegally tied the purchase of diet supplements to a trademark.[131] The court declined to follow either *Chicken Delight* or *Baskin-Robbins*, finding that neither analytical framework was appropriate under *Jefferson Parish*.[132] Ultimately, the court granted summary judgment for the defendant because the demand for the diet pills was not separate from the franchise (the diet pills were available to consumers only from franchisees).[133] Thus, the court reasoned that treating the diet pills as a separate market would serve no purpose under the antitrust laws.[134] The court went on to hold that even if the mark and diet pills were separate products, the tie was not *per se* illegal absent a showing of market power in

126. *See Smith*, 667 F. Supp. at 1324 ("[T]he Mobil trademark is not, under the law, separate from the gasoline it identifies, but the two are one and the same thing, namely, Mobil-branded gasoline.").

127. *Krehl*, 664 F.2d at 1354; *see also* Cal. Glazed Prods., Inc. v. Burns & Russell Co., 708 F.2d 1423, 1430 (9th Cir. 1983) (concluding that the desirability of the franchisor's glazed blocks was "inextricably interrelated in the consumer's mind in a manner that precludes finding that the trademark is a separate item for tie-in purposes"). At least one commentator has noted that the merger of trademark and product in a distribution contract means that exclusive dealing—rather than tying—analysis is more appropriate. 2 BANKS, *supra* note 90, § 7.10[B] & n.31.

128. *Smith*, 667 F. Supp. at 1322 n.8 ("[T]he term 'franchising' covers a wide range of business relationships, and it seems equally clear that no hard and fast line always may be drawn between one 'type' of franchising arrangement and another.").

129. *See* 2 BANKS, *supra* note 90, § 7.10[B] n.34 (citing KFC Corp. v. Marion-Kay Co., 620 F. Supp. 1160 (S.D. Ind. 1985) (finding that the trademark was not a separate product, but rather means to identify chicken prepared with secret seasoning).

130. One could argue, however, that the *Casey* court was simply endorsing the idea of a "package" franchise, given that it approvingly cited the approach taken in *Principe*. *See Casey*, 590 F. Supp. at 1566 n.6.

131. 590 F. Supp. 1561, 1562-63 (N.D. Cal. 1984).

132. *Id.* at 1565-66.

133. *Id.* at 1566.

134. *Id.* at 1567.

the tying product.[135] And because the trademark carried no presumption of market power and defendant's share of the overall market was less than twenty percent, the court found no actionable restraint of trade.[136]

c. *Package Franchises*

As demonstrated above, a distribution franchise is characterized by the conceptual merger of a trademark and the products that it represents. Some courts have taken this a step further and found that the trademark is inseparable from the franchise itself. *Principe v. McDonald's Corp.* is representative of this line of cases.[137] In *Principe*, the plaintiff alleged an illegal tie among a franchise, a real estate lease, and a security deposit note.[138] The case arose against the backdrop of McDonald's business practice of analyzing potential restaurant sites, developing them, then leasing them to franchisees.[139] The plaintiff argued that the terms of the franchise, lease and the related security deposit were so onerous as to evidence an illegal tie between all these elements and the trademark.[140] But the court disagreed and held, in essence, that cases like *Chicken Delight* were wrongly decided because focusing on a trademark as ***the*** crucial element of a franchise ignores the business realities of modern franchises.[141] That is, franchisors do not merely give a trademark license; they offer a "complete method of doing business."[142] Accordingly, the proper inquiry is whether the allegedly tied products "are integral components of the business method being franchised."[143] The court concluded that a franchisor may lawfully require a franchisee to purchase products and services if "the challenged aggregation is an essential ingredient of the franchised system's formula for success . . . ."[144] In some respects, this standard is an elaboration of that first articulated in the business-method

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135. *Id.* at 1566, 1570.

136. *Id.* at 1569-70.

137. 631 F.2d 303, 311 (4th Cir. 1980); *see also* Bender v. Southland Corp., 749 F.2d 1205, 1215 (6th Cir. 1984); Kugler v. AAMCO Automatic Transmissions, Inc., 460 F.2d 1214, 1215-16 (8th Cir. 1972).

138. *Principe*, 631 F.2d at 304.

139. *Id.* at 305-07.

140. *Id.* at 307.

141. *Id.* at 308-09.

142. *Id* at 309.

143. *Id.*

144. *Principe*, 631 F.2d at 309.

franchise context.[145] The difference, it seems, is that the focus is on the entire ***package*** that a franchisee decides either to accept or decline, rather than on whether a range of products and services are closely related to a trademark:

> Far from merely licensing franchisees to sell products under its trade name, a modern franchisor such as McDonald's offers its franchisees a complete method of doing business. It takes people from all walks of life, sends them to its management school, and teaches them a variety of skills ranging from hamburger grilling to financial planning. It installs them in stores whose market has been researched and whose location has been selected by experts to maximize sales potential. It inspects every facet of every store several times a year and consults with each franchisee about its operations strengths and weaknesses .... This pervasive franchisor supervision and control benefits the franchisee in turn. His business is identified with a network of stores whose very uniformity and predictability attracts customers. In short, the modern franchisee pays not only for the right to use a trademark but for the right to become part of a system whose business methods virtually guarantee his success. It is often unrealistic to view a franchise agreement as little more than a trademark license.[146]

With this backcloth in place, we can move into the post-*Kodak* era and highlight the nexus between franchise structure and operation, on the one hand, and aftermarket theory, on the other.

III. AFTERMARKET CLAIMS IN THE CONTEXT OF POST-CONTRACTUAL CHANGES TO A FRANCHISE SYSTEM OR ILLUSORY THIRD-PARTY PURCHASING RIGHTS

A. *Early Post-*Kodak *Approaches*

In recent years, courts have split into two camps, one holding that a franchisor can have market power[147] sufficient to tie (or, as more rarely alleged nowadays, monopolize an aftermarket for) the purchase of

145. In fact, the court in *Principe* remarked that "the court's emphasis in [*Chicken Delight*] upon the trademark as the essence of a franchise is too restrictive," considering the "realities of modern franchising." *Id*; *see also supra* Part II.D.2.a.

146. *Principe*, 631 F.2d at 309.

147. "Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.' It has been defined as 'the ability of a single seller to raise price and restrict output.' The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market." Eastman Kodak v. Image Tech. Servs., Inc., 504 U.S. 451, 464 (1992) (citations omitted).

supplies,[148] and the other holding the opposite.[149] These cases are fact-sensitive, with market definition being outcome determinative. Two cases at the district court level, *Collins v. International Dairy Queen, Inc.*[150] and *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*,[151] amply illustrate this principle. In *Dairy Queen I*, the court was willing to consider a narrow market definition: "soft-serve ice cream" (in which Dairy Queen was the major franchisor), as opposed to "fast food" (in which Dairy Queen was a minor franchisor).[152] The court ultimately denied Dairy Queen's motion for summary judgment, in part because there was evidence that Dairy Queen had a policy of frustrating its franchisees' contractual right to seek approval of alternative suppliers (which the court viewed as evidence of "coercion").[153] In *Queen City Pizza*, franchisees challenged a requirement that certain products be purchased from an affiliate of the franchisor and—as in *Dairy Queen I*—also alleged that a contractual promise to approve third-party vendors was illusory.[154] The court dismissed these allegations under an ***antitrust*** theory because—in its view—a relevant market could not arise from a franchise agreement.[155] This was so because Domino's had no market power in the *franchise* business. Thus, the only power at issue was power flowing from the franchise agreement; accordingly, disputes arising after the date of the agreement must be resolved under contract law, not antitrust law.[156]

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148. *E.g.*, Collins v. Int'l Dairy Queen, Inc. (*Dairy Queen I*), 939 F. Supp. 875, 883 (M.D. Ga. 1996); Wilson v. Mobil Oil Corp., 940 F. Supp. 944, 949 (E.D. La. 1996); *see also* Lin, *supra* note 1, at 97-99.

149. *E.g.*, Queen City Pizza, Inc. v. Domino's Pizza, Inc., 922 F. Supp. 1055, 1060 (E.D. Pa. 1996), *aff'd*, 124 F.3d 430, 442-43 (3d Cir. 1997); Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1224 n.11 (11th Cir. 2002) (adopting *Queen City Pizza* line of reasoning and rejecting *Dairy Queen I*); Forsyth v. Humana, Inc., 114 F.3d 1467, 1478 (9th Cir. 1997) (adopting a similar line of reasoning as *Queen City Pizza* in a non-franchise setting involving employee health insurance plans); *see also* Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1048-50 (9th Cir. 2008) (remarking that under *Queen City* and *Forsyth* "the law prohibits an antitrust claimant from resting on market *power* that arises solely from contractual rights that consumers knowingly and voluntarily gave to the defendant").

150. *Dairy Queen I*, 939 F. Supp. at 875, 877 (addressing the Sherman Act section 1 tying claims); Collins v. Int'l Dairy Queen, Inc. (*Dairy Queen II*), 980 F. Supp. 1252, 1254 (M.D. Ga. 1997) (addressing the Sherman Act section 2 monopolize or attempt to monopolize claims).

151. 922 F. Supp. at 1055.

152. *Dairy Queen I*, 939 F. Supp. at 880.

153. *Id.* at 884.

154. 922 F. Supp. at 1059.

155. *Id.* at 1062. The court in *Dairy Queen I*, however, explicitly rejected "the view of the *Queen City* court that franchisees under an existing franchise agreement cannot under any circumstance demonstrate the existence of an illegal tying arrangement." 939 F. Supp. at 883.

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

B. More Recent Approaches

To the general conclusion regarding potential tying and aftermarket monopolization claims, one must note, however, one caveat (and a significant one at that): although a franchisor may require purchases of its products and limit direct purchases in the first instance, post-contractual changes in purchasing policies may be problematic. This is so because some courts have more easily found separate markets for purposes of a tying analysis once a party is "locked in."[157] In the franchise context, this means that—once a franchisee has purchased its franchise and invested time and money into its success—the franchisee is no longer truly free to walk away. For example, in *Dairy Queen II*, the court found that:

> Plaintiffs have shown that Dairy Queen franchisees make significant financial investments in their franchises. The franchise agreements are long-term agreements which extend for as long as twenty years and provide for renewal as well as for the opportunity to participate in multiple store option programs at no additional franchise fee. Defendants retain the right to terminate or to refuse to renew a franchise agreement if the franchisee fails to carry the full authorized menu of food products or fails to meet defendants' product quality standards. If defendants terminate or refuse to renew a franchise agreement because of a franchisee's lack of compliance with the limitations imposed by IDQ/ADQ, the franchisee will face the significant costs of abandoning his investments, including the franchise fee and real property or leasehold improvements, and he will lose the multi-store option. If he decides to switch to a competing franchise system, he will be required to make significant additional investments in that system. Thus, the ability of a Dairy Queen franchisee to react to the increase in prices caused by defendants' suppression of competition in the relevant market by switching to a competing franchise or other business opportunity may be curtailed or prevented by financial considerations which lock him in to the existing restrictions and limitations.[158]

Other courts have, however, rejected this analytical approach and deemed *Kodak* inapplicable:

> In *Kodak*, the plaintiff-repair service organizations alleged that Kodak refused to provide them with specialized replacement parts, thereby forcing Kodak equipment owners to use only Kodak's repair services. In

157. *See* Eastman Kodak v. Image Tech. Servs., Inc., 504 U.S. 451, 476-77 (1992); Little Caesar Enters., Inc. v. Smith, 34 F. Supp. 2d 459, 508-09 (E.D. Mich. 1998); *Dairy Queen II*, 980 F. Supp. at 1260-61.

158. *Dairy Queen II*, 980 F. Supp. at 1260; *see also* Subsolutions, Inc. v. Doctor's Assocs., Inc., 62 F. Supp. 2d 616, 626 (D. Conn. 1999) (finding that the plaintiffs "alleged sufficient facts to make out a 'lock-in' claim").

> allowing the plaintiffs' claims to go forward, the Court rejected Kodak's argument that a single brand or product can never be a relevant market for antitrust purposes, holding that, under certain circumstances, "one brand of a product can constitute a separate market." Unlike the present case, however, the service market for Kodak equipment arose due to the unique nature of the Kodak machines, and not by virtue of a valid and binding franchise agreement. And as we have concluded above, antitrust claims predicated upon a "relevant market" defined by the bounds of a franchise agreement are not cognizable. Thus, the amended complaint fails not because the purported relevant market arises from a single brand of a product, but because the "market" was created by virtue of the franchise agreements Plaintiffs freely entered.[159]

In a typical situation, a disgruntled franchisee's argument would be that once it is locked into a franchise, it no longer—as a practical matter—has the ability to walk away if, for instance, a renewal contract or a post-contractual change in company policy requires additional purchases of the franchisor's products (or, conversely, restricts sales of third-party products).[160] Given this uncertainty in the law, a franchisor faces, at a minimum, a significant *litigation* risk (i.e., plaintiffs will likely sue on this type of claim and the franchisor will incur substantial defense costs) from existing franchisees under a lock-in theory. Indeed, it seems that franchise litigation under *Kodak* theories has hardened around the single issue of ***when*** a franchisee learns that it must purchase something from its franchisor that it would prefer to purchase elsewhere.[161]

To understand how courts have arrived at this point, a review of the Third Circuit opinion in *Queen City Pizza* will show how this corner of the law was first staked out.[162] When the dispute arose, Domino's was the second-largest pizza company in the United States, with about 700 company-owned stores and 3500 franchisee-owned stores.[163] The franchisees were all subject to a standard franchise agreement, which provided, among many other things, that the franchisor "may in our sole

159. *Queen City Pizza*, 922 F. Supp. at 1062-63 (citations omitted).

160. *See Little Caesar*, 34 F. Supp. 2d at 462 (declaring that one requirement for a narrowed market definition under *Kodak* is that plaintiff must show that "after a substantial number of customers have sunk significant costs that are not recoverable and face other switching costs, the seller takes some action changing its policy (or acting on a prior undisclosed policy) that takes advantage of its locked in customers' lack of information in order 'to reap supracompetitive profits' by imposing a burdensome tie-in").

161. *E.g.*, *Queen City Pizza*, 124 F.3d at 430; Exxon Corp. v. Super. Ct., 60 Cal. Rptr. 2d 195, 204 (Ct. App. 1997) (holding for tying claim market power must be judged at the pre-contract stage rather than before a lock-in has occurred).

162. 124 F.3d at 433.

163. *Id.*

discretion require that ingredients, supplies and materials used in the preparation, packaging, and delivery of pizza be purchased exclusively from us or from approved suppliers or distributors."[164] Domino's also reserved the right "to impose reasonable limitations on the number of approved suppliers or distributors of any product."[165] All these restrictions were subject to a "reasonable judgment" standard.[166]

Under this system, Domino's sold about ninety percent of $500 million in ingredients and supplies; these sales formed a significant part of Domino's corporate profits.[167] With the exception of dough, Domino's did not manufacture these products; rather, it purchased the products from approved suppliers and resold them to franchisees at a markup.[168] The suit arose because, simply put, Domino's took a series of actions designed to prevent franchisees from purchasing or self-manufacturing dough, other ingredients, and supplies at more favorable prices.[169] As a result, plaintiffs' alleged that each franchisee store paid between $3,000 and $10,000 more for ingredients and supplies than it would in a fully competitive market.[170] Plaintiffs sued under several antitrust theories, including monopolization, tying, and exclusive dealing, none of which enjoyed any success.[171]

As a threshold matter, the court held that each of the plaintiffs' theories required pleading and proof of a relevant market in which Domino's exercised unlawful power.[172] To make this showing, plaintiffs needed to demonstrate that their proposed market definition (*viz.*, "ingredients, supplies, and distribution services used by and in the operation of Domino's stores") included all reasonably interchangeable products.[173] The court held that the proposed definition was far too narrow:

> Here, the dough, tomato sauce, and paper cups that meet Domino's Pizza, Inc. standards and are used by Domino's stores are interchangeable with dough, sauce and cups available from other suppliers and used by other pizza companies. Indeed, it is the availability of interchangeable ingredients of comparable quality from other suppliers, at lower cost, that motivates this lawsuit. Thus, the relevant market, which is defined to

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164. *Id.*

165. *Id.*

166. *Id.* (providing that Domino's Pizza must "exercise reasonable judgment with respect to all determinations to be made by us under the terms of this Agreement").

167. *Id.*

168. *Queen City Pizza*, 124 F.3d at 433-34.

169. *Id.* at 434.

170. *Id.*

171. *Id.* at 436.

172. *Id.* at 438-41.

173. *Id.* at 437.

> include all reasonably interchangeable products, cannot be restricted solely to those products currently approved by Domino's Pizza, Inc. for use by Domino's franchisees. For that reason, we must reject plaintiffs' proposed relevant market.[174]

Plaintiffs sought to save their sinking boat by invoking *Kodak* as an exception to the ordinary strictures of market pleading:

> But *Kodak* does not hold that the existence of information and switching costs alone, such as those faced by the Domino's franchisees,[175] renders an otherwise invalid relevant market valid.[176] In *Kodak*, the repair parts and service were unique and there was a question of fact about cross-elasticity. Judgment as a matter of law was therefore inappropriate. Here, it is uncontroverted that Domino's approved supplies and ingredients are fully interchangeable in all relevant respects with other pizza supplies outside the proposed relevant market. For this reason, dismissal of the plaintiffs' claim as a matter of law is appropriate.[177]

Most important for our discussion, the court went on to distinguish *Kodak* in a temporal way that—at least in cases with well-drafted franchise agreements and clear pre-franchise disclosures—makes it very difficult to proceed with a franchise aftermarket claim:

> The *Kodak* case arose out of concerns about unilateral changes in Kodak's parts and repairs policies. When the copiers were first sold, Kodak relied on purchasers to obtain service from independent service providers. Later, it chose to use its power over the market in unique replacement parts to squeeze the independent service providers out of the repair market and to force copier purchasers to obtain service directly from Kodak, at higher cost. Because this change in policy was not foreseen at the time of sale, buyers had no ability to calculate these higher costs at the time of purchase and incorporate them into their purchase decision. In contrast, plaintiffs here knew that Domino's Pizza retained significant power over their ability to purchase cheaper supplies from alternative sources because that

174. *Queen City Pizza*, 124 F.3d at 438.

175. A franchisee considering exiting one franchise system faces information costs associated with researching alternative investment opportunities and switching costs stemming from the loss of invested funds that may not be recovered if it abandons its current business and start-up costs associated with the new venture. *Id.* at 439 n.9.

176.

> If Kodak repair parts had not been unique, but rather, could be obtained from additional sources at a reasonable price, Kodak could not have forced copier purchasers to buy repair parts from Kodak. This would be true even if the copier purchasers faced information and switching costs that locked them into to use of Kodak copiers. This fact indicates that switching and information costs alone cannot create market power. Rather, it is the lack of a competitive market in the object to be purchased—for instance, a competitive market in Kodak parts—that gives a company market power.

Id. at 439 n.10

177. *Id.* at 439-40.

> authority was spelled out in detail in section 12.2 of the standard franchise agreement. Unlike the plaintiffs in *Kodak*, the Domino's franchisees could assess the potential costs and economic risks at the time they signed the franchise agreement. The franchise transaction between Domino's Pizza, Inc. and plaintiffs was subjected to competition at the pre-contract stage. That cannot be said of the conduct challenged in *Kodak* because it was not authorized by contract terms disclosed at the time of the original transaction. Kodak's sale of its product involved no contractual framework for continuing relations with the purchaser. But a franchise agreement regulating supplies, inspections, and quality standards structures an ongoing relationship between franchisor and franchisee designed to maintain good will.[178]

After *Queen City Pizza*, the break line between sustainable and unsustainable antitrust claims brought under a lock-in theory appears to be whether the franchisor either: (a) concealed its policies at the time of contracting, or (b) changed them thereafter.[179] This is a fact-sensitive issue, and one that is often hotly contested.[180] It thus behooves us to examine in detail a range of recent cases that exemplify one side or the other of the dichotomy. We should also bear in mind that—although courts refer to the situation as one turning on *Kodak*—franchise cases typically do not involve an aftermarket with multiple components (e.g., parts and services, as in *Kodak* itself).[181] The problem no doubt stems largely from the Delphic quality of *Kodak*'s pronouncements, and we must await the further elaboration of higher courts to sort out whether a single-aspect aftermarket should qualify for *Kodak* treatment ***at all***, particularly given that the cases in the (admittedly small) sample of currently active litigation proceed solely on section 1 tying theories. For now, we must simply note that there is a fork in the road and both branches need exploration, representatives of which follow.

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178. *Id.* at 440.

179. *See id.*

180. *See, e.g.*, Mich. Division-Monument Builders of N. Am. v. Mich. Cemetery Ass'n, 524 F.3d 726, 737 (6th Cir. 2008); PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 820 (6th Cir. 1997).

181. Instead, in franchise cases, products identified by a trademark are usually considered to be the same as the products which bear them. *See e.g.*, *Queen City Pizza*, 124 F.3d at 430, 439. This does not stop franchisees, however, from alleging that the franchise trademark and the goods that the franchisor provides in the aftermarket are two separate products. *See, e.g.*, Collins v. Int'l Dairy Queen, Inc. (*Dairy Queen I*), 939 F. Supp. 875, 879 (M.D. Ga. 1996); Wilson v. Mobil Oil Corp., 940 F. Supp. 944, 950 (E.D. La. 1996); *see also* McDavid & Steuer, *supra* note 1, at 217.

Robert Burda began to acquire Wendy's hamburger franchises in the mid-1990s.[182] The parties ultimately executed thirteen separate Unit Franchise Agreements.[183] Although Burda owned the land upon which his franchises were located, an agreement with Wendy's restricted his use of the land solely to the operation of Wendy's stores.[184] Thus, were Burda to cease his franchise enterprise, he could not convert the stores to another use and would have to sell the properties to a buyer that Wendy's approved or to Wendy's itself.[185] According to Burda, this locked him in as a franchisee, a situation that Wendy's was able to exploit by foisting unwanted and supracompetively priced supplies on him.[186]

Prior to 1997, Burda purchased hamburger buns from a bakery of his choosing.[187] But in 1997, Wendy's insisted that he change suppliers and purchase all his buns from a Wendy's subsidiary.[188] Wendy's backed its insistence with a threat to terminate Burda if he refused to comply.[189] Burda claimed that he had no knowledge of a potential obligation to buy buns from the Wendy's-owned bakery and, therefore, he had no way to incorporate the costs of the overpriced buns into his initial calculation of the potential return on investment in his Wendy's franchises.[190] As a result, he and other franchisees saw reduced profits, and competition in the market for hamburger buns was injured.[191] In a similar vein, Burda complained that when he first acquired a Wendy's franchise, there were a number of Wendy's-approved food suppliers, and Burda was able to force competitive bidding between two of them in his region.[192] This competition ended in 2004, when Wendy's granted exclusive food-supply rights to one of those suppliers, to which Wendy's guaranteed a minimum profit and promised to impose a surcharge on food supplies purchased elsewhere.[193] Burda alleged that none of this was at arm's length because Wendy's had an economic

182. Burda v. Wendy's Int'l, Inc., 659 F. Supp. 2d 928, 930 (S.D. Ohio 2009). Because the opinion is drafted in the context of a motion to dismiss, the facts stated are merely alleged, not proven.

183. *Id.* at 930-31.

184. *Id.* at 931.

185. *Id.*

186. *Id.* at 930-32.

187. *Id.* at 931.

188. *Burda*, 659 F. Supp. 2d at 931.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

interest in the exclusive supplier.[194] As with the buns, Burda maintained that he had no knowledge of a potential obligation to buy from an exclusive supplier in pricing his initial investment, an eventuality that raised his food costs by 4 percent and reduced his cash flow by $360,000.[195]

Wendy's responded that none of this stated an antitrust claim because (1) Burda had not adequately pled a relevant market or that Wendy's had market power either generally or under a *Kodak* lock-in theory, (2) Burda's obligation to purchase buns and food supplies from particular vendors arose under contract rather than from market power, and (3) the statute of limitations barred all claims.[196] The first two objections are relevant to our discussion, so we will examine them in turn, but we must remember that they are really just two aspects of a single inquiry: namely, "What does the agreement say?"

Wendy's argued that although Burda had alleged *tied* products, he had not alleged a cognizable *tying* product over which Wendy's had power.[197] Burda countered that the franchise itself was the tying product.[198] The court agreed, finding that—in a lock-in case—market power exists once a purchaser buys one product and is forced to buy another because of the seller's rules.[199] But the court tempered this broad statement with the now-familiar statement that "[t]he assertion of an antitrust claim under a *Kodak* lock-in theory 'requires specific factual allegations in the complaint that the defendant either changed its rules after the initial sale was made or concealed its rules from its customers.'"[200] Wendy's alleged that its agreements with Burda fully disclosed its policies, thus disposing of his claims as a matter of law.[201] Burda argued, to the contrary, that the agreement disclosed nothing going to that point and that a reasonable franchisee reviewing the agreement *ex ante*, "would not have foreseen that

194. *See Burda*, 659 F. Supp. 2d at 931.

195. *Id.* at 932.

196. *Id.* at 933.

197. *Id.*

198. *Id.*

199. *Id.* at 934.

200. *Burda*, 659 F. Supp. 2d at 935 (citing Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass'n, 524 F.3d 726, 737 (6th Cir. 2008)); *see also* PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 820-21 (6th Cir. 1997) (plaintiffs failed to prove *Kodak*-type lock-in theory because there were "no allegations that [the defendant] changed its parts-restrictive policy in order to lock-in customers, nor has [the plaintiff] alleged that [the defendant's] policy was not generally known").

201. *Burda*, 659 F. Supp. 2d at 935.

Wendy's would impose exclusive suppliers of these products on its franchisees."[202] Here's what the agreement said:

> Franchisee shall purchase all food items, ingredients, supplies, materials, and other products used or offered for sale at the Restaurant solely from suppliers . . . who demonstrate, to the continuing reasonable satisfaction of Franchisor, the ability meet Franchisor's then-current standards and specifications for such items; who possess adequate quality controls and capacity to supply Franchisee's needs promptly and reliably; and who have been approved in writing by Franchisor prior to any purchases by Franchisee from any such supplier, and have not thereafter been disapproved. If Franchisee desires to purchase any products from an unapproved supplier, Franchisee shall submit to Franchisor a written request for such approval. Franchisee shall not purchase from ay [sic] supplier until, and unless, such supplier has been approved in writing by Franchisor.[203]

The court agreed with Burda's reading of this provision.[204] The court stated, "There is no language in this section that would put a potential franchisee on notice that Defendants would be able to eliminate all competition by naming an exclusive supplier or that they could impose a surcharge on approved suppliers."[205] Instead, according to the court, "the language suggests that supplier competition was welcome so long as prospective suppliers met Defendants' 'standards and specifications,' and 'possess[ed] adequate quality controls and capacity to supply Franchisee's needs.'"[206] And because the market for supplies was competitive prior to the naming of an exclusive bun supplier and the levying of the surcharge on approved (but disfavored) suppliers, the court held that Burda had satisfied the change-of-policy "requirement" of a *Kodak* claim.[207]

Wendy's second argument—namely, that the forced purchases arose from contract, not market power—was easily dispatched, for the same reasons as the first.[208] Again, this was because the supplier provision in the franchise agreements "did not contain language putting a potential franchisee on notice that Defendants would be able [to] eliminate all competition by naming an exclusive supplier or that they could impose a surcharge on approved suppliers, especially in light of the allegations that

202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 935-36.
207. *Burda*, 659 F. Supp. 2d at 936.
208. *See id.* at 936-37.

the market for these supplies was competitive prior to the alleged tie."[209] In this way, the court found that Burda had slipped the *Queen City Pizza* knot because in its franchise agreement, Domino's reserved the option exclusively to provide its franchisees' supplies (and was in fact under the franchise agreement "the exclusive seller of approximately 90% of the ingredients and supplies used by Domino's franchisees"), whereas in Burda's case Wendy's had done no such thing.[210]

At bottom, then, *Burda* stands for two related propositions. First, a *Kodak* claim will lie when a franchisor takes over an aftermarket for supplies ***and*** the possibility of that takeover was not adequately disclosed in the franchise agreement.[211] Second, a *Queen City Pizza* defense to a *Kodak* claim will not lie in that situation, either.[212] This symmetry suggests that—although courts and litigants will no doubt continue to argue *Kodak* and *Queen City Pizza* as distinct issues—the inquiries are better thought of as a single deep question: namely, "Did the power to force aftermarket purchases arise before or after the parties entered into their franchise agreement?" If the answer is "after," then the antitrust issues will become more complicated, as indeed the *Kodak* line of cases reveal.[213] But if the answer is "before," then, more than likely, that will be the end of the road for the plaintiff as *Queen City Pizza* and an ongoing line of cases brought by Quiznos sandwich-shop franchisees reveal.[214]

Although there are a number of franchise antitrust cases pending against Quiznos,[215] *Westerfield v. Quizno's Franchise Co., LLC* is representative of the antitrust claims brought in the various cases, as well as the approach that the other courts take to them.[216] In *Westerfield*, the

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209. *Id.* at 936.

210. *Id.* at 936-37; *see also* Trane U.S. Inc. v. Meehan, 563 F. Supp. 2d 743, 755-56 (N.D. Ohio 2008) (passing on issue of whether franchisee was locked-in by the franchise agreement, but noting that the Sixth Circuit has not followed *Queen City Pizza* and has instead recognized that "franchise agreements *can* create markets in which the franchisor has market power" because the franchisor did not disclose relevant policies at the time of signing (citing Little Caesar Enters., Inc. v. Smith, 34 F. Supp. 2d 513, 519 (E.D. Mich. 1998)).

211. *Burda*, 659 F. Supp. 2d at 936-37.

212. *See id.*

213. *See* text and accompanying notes *supra* Parts III.A, III.B.

214. *See* text and accompanying notes *supra* Part III.B.

215. A very recent opinion in *Martrano v. Quizno's Franchise Co., LLC*, No. 08-0932, 2009 WL 1704469, at *2-3 & n.6 (W.D. Pa. June 15, 2009), summarizes much of the parallel litigation. Its analysis of the antitrust claims follows *Westerfield. See id.* at *2, *8; *see also Bonanno v. Quizno's Franchise Co., LLC.*, No. 06-cv-02358, 2009 WL 1068744 (D. Colo. Apr. 20, 2009).

216. 527 F. Supp. 2d 840, 856-59 (E.D. Wisc. 2007), *vacated in part*, No. 06-C-1210, 2008 WL 2512467, at *11 (E.D. Wis. Apr. 16, 2008) (vacating the dismissal of plaintiffs' RICO and fraud claims, but not disturbing the dismissal of the antitrust claims).

plaintiffs alleged that "Quiznos illegally tie[d] the sale of their franchises (the tying product) to the subsequent sale of the 'Essential Goods' required to operate the franchises (the tied product)."[217] To buttress this allegation, plaintiffs further alleged that "because Quiznos enjoys substantial market power in the 'Quick Service Toasted Sandwich Restaurant Franchise' market, the tying arrangement under which its franchisees must purchase Essential Goods from its affiliates or approved suppliers is unlawful."[218] Unsurprisingly, then, the court went straight to the issue of markets and market power.[219]

The court took a two-part approach. First, it debunked any notion that Quiznos had power in the franchise market, stating, "In the area of franchises such as Quiznos, the relevant product market would include equivalent investment opportunities."[220] In reaching this conclusion, the court was adopting the position that Alan Silberman had expounded in an influential law-review article a decade before:

> From the perspective of sound analysis and consistency with the fundamental legal principle, it is patent that—at the minimum—a franchisor market power assessment requires reference to all alternatives available to the potential consumer in a broad line of business endeavors. In many cases this will extend to the market for franchises of all types or the employment of capital. For market power to exist there must be something that shows that, pre-contract, the seller had the power to force a potential franchisee to purchase something that would not have occurred in a competitive market—a requirement drawn directly from *Jefferson Parish* [*Hospital District No. 2 v. Hyde*, 446 U.S. 2 (1984)].[221]

For the court, this proposition ended the matter: "Considered in this light, plaintiffs' assertion that the 'Quick Service Toasted Sandwich Restaurant Franchise' market constitutes the relevant product market in which to assess Quiznos' market power is patently absurd."[222] The court's reasoning here was that, *ex ante*, Quiznos had no power to coerce a reasonable investor to choose its franchise over another:

217. *Id.* at 856-57.

218. *Id.* at 857.

219. *See id.* at 857-59.

220. *Id.* at 858.

221. Alan H. Silberman, *The Myths of Franchise "Market Power"*, 65 ANTITRUST L.J. 181, 206 (1996); *see also* George A. Hay, *Is the Glass Half-Empty or Half-Full?: Reflections on the* Kodak *Case*, 62 ANTITRUST L.J. 177, 188 (1993) ("There are literally thousands of franchise opportunities available to prospective investors, and federal law operates to ensure that prospective investors are given information about the likely costs and revenues of a particular franchise opportunity in order to help them make an informed choice.").

222. *Westfield*, 527 F. Supp. 2d at 858.

> It may well be that that Quiznos holds substantial market power for those investors who wish to purchase a fast food franchise that sells toasted submarine sandwiches. But that's like saying that the seller of any franchise known for a particular product has market power over investors who are already determined to sell such a product. That cannot be the test.[223]

Next, the court moved to an examination of plaintiffs' complaint-in-fact: Did Quiznos violate the Sherman Act by directing plaintiffs' aftermarket purchases?[224] It held in the negative and tacitly found that (unlike *Burda*) Quiznos had not changed its aftermarket policies:

> It is true that after plaintiffs became Quiznos franchisees, Quiznos was able to determine the suppliers from whom plaintiffs were required to purchase the products and services needed to operate the franchises. The gist of plaintiffs' complaint is that Quiznos exercised this authority so as to extract exorbitant payments from them. But this was due to the contractual provisions of the Franchise Agreement each of the plaintiffs signed, not Quiznos' market power. This is not the kind of harm the Sherman Act was intended to prevent .... Having chosen to become Quiznos franchisees, plaintiffs are bound by the terms of the franchise agreements they signed.[225]

Thus, following *Queen City Pizza*, the court concluded that a remedy for the alleged overcharges must sound, if at all, in contract, not antitrust.[226]

At bottom, then, franchise lock-in claims will stand or fall according to the source of the complained-of restriction, when it came into being, and whether it was disclosed. In practice, this means that a clear contractual provision will evicerate an antitrust claim brought under a lock-in theory. It's all a matter of timing. For as two recent commentators have put it,

223. *Id.*

224. *Id.* Although the court "le[ft] aside the question of whether a franchise can be a tying product," it appeared to believe that that is a dubious proposition, albeit one that need not be reached in this particular case. *Id.*

225. *See id.* at 859.

226. *Id.* A common variation on this takes place when a franchisee of a branded-products store complains that the franchisor does not permit it to sell non-branded products. Courts have tended to follow *Queen City Pizza* in this situation, which makes good sense. For if a fast-food franchisor can direct its franchisees' purchases of ingredients (of which a rational purchaser would be indifferent, so long as the end product conforms), then, *a fortiori*, a franchisor should be able to limit its franchisees' sales of non-branded products. In addition to the obvious free-rider problem, the franchisor could inherit products-liability claims or suffer image tarnishment from illicit, defective, or scandalous products. For two approaches to *Queen City Pizza* within the branded-product context, see *Mumford v. GNC Franchising LLC*, 437 F. Supp. 2d 344, 359 (W.D. Pa. 2006) and *Bishop v. GNC Franchising LLC*, 403 F. Supp. 2d 411, 420 (W.D. Pa. 2005). In the interest of full disclosure, I was one of counsel in these two cases.

> [F]ranchise and dealership arrangements generally do not give rise to lock-in because the primary and aftermarket obligations are accepted simultaneously. Franchisee or dealership plaintiffs frequently attempt to utilize the lock-in argument to nullify their subsequent contract obligations. But this use of lock-in is misplaced. If a franchisee does not like the aftermarket terms of a franchise agreement, the franchisee is free to reject the contract and is not forced to fulfill undesired contractual obligations. In this respect, the franchisee has information available to him at the time of contracting, which defeats a *Kodak*-style lock-in claim. To put it another way, the fact that in contract claims the decision to enter the aftermarket is made simultaneously with the primary market decision undermines any lock-in claim because the plaintiff is on notice of the extent of its aftermarket obligations at the time of contracting. A lock-in claim cannot succeed if the plaintiff was aware of what the obligations were and then agreed to them.[227]

C. Price Discrimination in the Franchise Context

In addition to claiming that a franchisor has unduly restricted its franchisees' sources and supplies of aftermarket products, franchisees sometimes claim that a dual-distributing franchisor (i.e., one that both franchises and owns stores) unlawfully discriminates in price between its company-owned stores and those of its franchisees.[228] This claim is usually pled as a violation of the Robinson-Patman Act, which—subject to numerous rule-swallowing exceptions—makes it illegal to (1) sell a commodity to two different purchasers at two different prices at the same time, (2) where the effect of the discrimination is to injure competition.[229] If we assume that a plaintiff can plead and prove a case that is otherwise actionable, a single fundamental question remains: is an intercorporate transaction a "sale" for purposes of the Robinson-Patman Act?

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227. David A.J. Goldfine & Kenneth M. Vorrasi, *The Fall of Kodak Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 ANTITRUST L.J. 209, 221 (2004).

228. *See, e.g.*, *Mumford*, 437 F. Supp. 2d at 360-62 (no violation of Robinson-Patman Act when a franchisor sold products to company-owned stores at lower prices than to franchisees because the sales to the company-owned stores were transfers within a single enterprise and thus were not two separate sales as the Act requires). Such claims are however, rather infrequent as there is likely little incentive for franchisors to discriminate against franchisees when the franchisees are their only class of customers. *See* 2 GARNER, *supra* note 5, § 11:34; *see also* Stuart Hershman, *Revisiting the Robinson-Patman Act in the Franchise Supply Setting*, 16 FRANCHISE L.J. 57, 76-77 (1996)

229. 15 U.S.C § 13(a) (2006); Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 219-20 (1993).

To answer this question, we must first look at more general antitrust policy. For most purposes, a parent company and its wholly-owned subsidiary are treated as a single economic entity. This issue first arose when courts were called upon to decide whether a parent and subsidiary could "conspire" in violation of the Sherman Act.[230] The United States Supreme Court eventually brought finality to the debate and held—at least where the subsidiary is wholly owned—that they cannot.[231] Many courts have applied this single-economic-unit line of reasoning to parent-subsidiary transfers.[232] Not surprisingly, then, franchisees have gained little ground when attempting to challenge the prices at which a franchisor "sells" to its wholly-owned stores.[233]

CONCLUSION

The overarching lesson that we must take from recent franchise antitrust litigation is that the *Kodak* Court's *factual observation* that Kodak

230. *E.g.*, Ogilvie v. Fotomat Corp., 641 F.2d 581, 588-90 (8th Cir. 1981); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617-18 (9th Cir. 1979); Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726-27 (7th Cir. 1979). In each case, the courts focused on the "separateness" of the subsidiary from the parent in terms of control, daily operations, officers, and headquarters.

231. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 776 (1984). In *Copperweld*, the Supreme Court stated that when "applied to a wholly owned subsidiary, the so-called 'single entity' test is thus inadequate to preserve the Sherman Act's distinction between unilateral and concerted conduct." *Id.* at 772 n.18. Rather, "the basic fact [is] that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit." *Id.*

232. *E.g.*, Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745 (1st Cir. 1994) (parent and wholly-owned subsidiary are one seller for purposes of Robinson-Patman Act); City of Mt. Pleasant, Iowa v. Associated Elec. Corp., Inc., 838 F.2d 268, 278-79 (8th Cir. 1988) ("To hold that this transfer is a sale under the Robinson-Patman Act would be to make antitrust liability hinge on the happenstance of the enterprise's internal organization . . . ."); Russ' Kwik Car Wash v. Marathon Petroleum Co., 772 F.2d 214, 221 (6th Cir. 1985) ("[T]he parent and subsidiary are a single economic unit. The Robinson-Patman Act is not concerned with transfers between them."); Sec. Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962, 967 (5th Cir. 1979) ("Intra-corporate transfers and transfers between parent and wholly-owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate."). *But see* Zoslaw v. MCA Distribut. Corp., 693 F.2d 870, 879 (9th Cir. 1982) ("Sales to [wholly-owned] subsidiaries . . . do not necessarily remove such transactions from Robinson-Patman jurisdiction.").

233. *See Mumford*, 437 F. Supp. 2d at 360-62 ("sales" to company-owned stores are really transfers and "[t]he coordinated activity of a parent and its wholly owned subsidiary in the form of transfers between them has been read to not support a price discrimination claim under the Robinson-Patman Act"); *Bishop*, 403 F. Supp. 2d at 420-21 (Robinson-Patman Act claim fails because the "transfer of commodities between [a parent and wholly-owned subsidiary is] insufficient to constitute a 'sale' under the Act"). The *Bishop* Court also held that there is no "conspiracy" claim available under the Robinson-Patman Act. *Id.* at 424-25.

had changed its policies with respect to aftermarket parts and services has hardened into a *legal rule* in the context of franchise aftermarket disputes. Whether that rule is wise or whether it will hold over time remains to be seen, but it does lend a present measure of Holmesian predictability to franchise relationships. And the teaching point is a simple one: franchisors wanting to minimize antitrust risk and maintain (or maintain the potential for) aftermarket control should disclose that fact in their offering materials (typically referred to as UFOCs) and specifically contract for that right. Even then, with the relevant legal propositions in mind, the franchisor should carefully consider whether (1) its policies are reasonably necessary to its method of distributing its products, (2) its aftermarket policies can be crafted so that they are not actually "exclusive," and (3) the market for its products is sufficiently competitive and filled with interchangeable products.

Franchisees, on the other hand, should bargain for whatever aftermarket control they want or, failing that, either discount what they are willing to pay for a franchise or walk away and onto the next opportunity. Either way, the parties are then protected by contract law in the case of a dispute, which is a simpler and much more cost-effective method of dispute resolution than is antitrust law.