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THE McDONALD'S ANTITRUST LITIGATION: REAL ESTATE TYING AGREEMENTS IN TRADEMARK FRANCHISING

INTRODUCTION

Trademark¹ franchising² is the system whereby the owner of a valuable and recognizable trademark, the franchisor, licenses its use to independent businessmen,³ franchisees, in return for the assurance that retail outlets displaying such trademark will be operated in accordance with the detailed instructions of the franchisor. The popularity of this system stems from the economic advantages offered to both parties. The franchisor is able to rapidly create a vast distribution system,⁴ while the franchisee can operate his own business with a minimal initial capital investment.⁵ Furthermore, the franchisee may avoid the usual difficulties encountered in the development of a new business by acquiring a recognized, immediately established franchise.

Yet, aspects of this aggregate franchising system have collided with modern antitrust laws and must be scrutinized ac-

1. BLACK'S LAW DICTIONARY 1665 (4th ed. 1968) defines trademark as follows: "Generally speaking, a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others."

2. Although several types of franchising exist, notably in distribution or manufacturing forms, this comment deals solely with the retail chain form of franchising, where a franchisor offers a standardized product through local retail outlets. The popular fast-food chains are exemplary. See Garlick, *Pure Franchising, Control and the Antitrust Laws: Friends or Foes?*, 48 J. URB. L. 835, 837-42 (1971). For a history of the franchise system in the United States, see E. LEWIS & R. HANCOCK, *THE FRANCHISE SYSTEM OF DISTRIBUTION* 10-17 (1963).

3. The franchisee has been considered in a unique business position, falling somewhere between an agent and an independent entrepreneur. See McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-Ins*, 58 CALIF. L. REV. 1085, 1086-87 (1970) [hereinafter cited as McCarthy].

4. See J. CURRY, *PARTNERS FOR PROFIT: A STUDY OF FRANCHISING* 95 (1966) (franchisors' major response in survey of franchising advantages).

5. One court has noted that "[t]he franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals to become entrepreneurs." *Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965). Other advantages include market research, product recognition, advertisement, and real estate development. See H. BROWN, *FRANCHISING: TRAP FOR THE TRUSTING* 3-4 (1970).

cordingly.⁶ Many trademark franchising agreements have contained stringent restrictions on the rights of franchisees to acquire necessary supplies and services.⁷ Often, such restrictions have been interpreted as violating the prohibition against tying arrangements under section 1 of the Sherman Act.⁸ Tying arrangements condition the availability of the tying product on purchase of the tied product.⁹ Such an arrangement restricts competition in the tied product market not because of superiority of the tied product item, but because of the leverage exerted by the highly attractive tying product.¹⁰ This has led the Supreme Court to conclude, in an oft-quoted passage, that "tying arrangements serve hardly any purpose other than the suppression of competition."¹¹

Throughout the last decade, many antitrust plaintiffs have alleged that franchisors, in addition to requiring franchisees to purchase needed yet unwanted supplies and services, have forced them to execute long-term leasing agreements as a condi-

6. For an analysis of antitrust problems which have developed in light of the tremendous growth of franchising, see generally D. THOMPSON, *FRANCHISE OPERATIONS AND ANTITRUST* 32 (1971); Comment, *Antitrust Barrier To Franchising*, 61 GEO. L.J. 189 (1972).

7. See, e.g. *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972) (mixes, packaging); *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979) (Coca-Cola); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978) (ice cream products).

8. 15 U.S.C. § 1 (1970) provides: "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. . . ."

The Supreme Court has construed this provision as precluding only those contracts which "unreasonably" restrain trade. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Although tying arrangements are violative of both section 1 of the Sherman Act and section 3 of the Clayton Act, the majority of complaints have been filed under the former. Section 3 of the Clayton Act, in contrast, provides in part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be to *substantially lessen competition* or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14 (1970) (emphasis added).

9. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). In the Supreme Court's initial exposure to the separability problem, the Court rejected an illegal tie-in of advertising claim, finding an afternoon newspaper inseparable from earlier editions. See also Note, *Definition of the Market in Tying Arrangements: Another Aspect of Times-Picayune*, 63 YALE L.J. 389 (1954) (new standard of legality under Sherman Act).

10. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958).

11. *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949).

tion to obtaining the use of their trademarks.¹² It has often been contended that such leasing agreements are laden with onerous terms.¹³ The validity of leasehold agreements in the trademark franchising context must initially be examined in terms of both economic and legal considerations.¹⁴ Through long-term leasehold arrangements, the franchisor has developed a mechanism for deferring the cost of purchasing an established business over an extended period of time.¹⁵ As such, the major advantage of the system to the franchisee, low initial capital investment, can be sustained.¹⁶ However, courts faced with enforcing the Sherman Act¹⁷ have been generally unwilling to differentiate franchising systems from various other market arrangements.¹⁸

The franchising system of the McDonald's Corporation (McDonald's) is currently being challenged in four separate antitrust suits instituted in the United States district courts.¹⁹ Although various antitrust violations have been alleged,²⁰ the central question in all four actions is whether requiring franchisees to execute a lease of the underlying premises as a condi-

12. See, e.g., *Response of Carolina, Inc. v. Leasco Response*, 537 F.2d 1307 (5th Cir. 1976); *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir.), cert. denied, 429 U.S. 823 (1976); *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978). See note 26 *infra*.

13. See note 26 and accompanying text *infra*. See also *Abecrombie v. Lum's, Inc.*, 531 F.2d 775 (5th Cir. 1976) (5% of gross sales).

14. Many commentaries have dealt with the economic and legal implications of tying arrangements in trademark franchising. See, e.g., *Steutermann, Selected Antitrust Aspects of Trademark Franchising*, 60 KY. L.J. 638, 669-70 (1972) (legality of restraints must be viewed in terms of facts and circumstances surrounding franchise system; leverage must be used with utmost caution and must be judged according to its legitimate business purpose); *Comment, Antitrust Barriers to Franchising*, 61 GEO. L.J. 189, 199 (1972) (per se rule inappropriate and potentially harmful to franchisors and consumers alike); *Note, Antitrust Problems in Trademark Franchising*, 17 STAN. L. REV. 926, 941 (1965) (licensor and consumer interests to some extent opposed to licensee and supplier interests).

15. See text accompanying note 24 *infra*.

16. See note 5 and accompanying text *supra*.

17. 15 U.S.C. § 1 (1970).

18. See *Ross, The Single Product Issue in Antitrust Tying: A Functional Approach*, 23 EMORY L.J. 963, 994-1000 (1974) (per se treatment is not unmerited; a trademark which is utilized to compel the purchase of additional products evidences "that particular form of market power justifiably condemned as leverage").

19. *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979); *Kypta v. McDonald's Corp.*, 1979-2 Trade Cas. ¶ 62,827 (S.D. Fla. Sept. 4, 1979); *Principe v. McDonald's Corp.*, No. 78-0601 (E.D. Va. July 27, 1979); *Levine v. McDonald's Corp.*, No. 77-601 (D. Ariz. July 26, 1977).

20. See text accompanying notes 32-45 *infra*. In addition to claims involving the illegal tie-ins of real estate, plaintiffs in the various suits alleged tie-ins of advertising, equipment, Coca-Cola, security deposits, and general supplies. This comment, however, will only deal directly with the real estate claims.

tion to obtaining a franchise coupled with the attendant right to use the McDonald's trademark constitutes a violation of section 1 of the Sherman Act?

This comment will explore the development of each element of a traditional tying claim and ascertain the applicability of such analysis to trademark franchising. Specifically, each element will be analyzed in terms of the particular leasing requirements currently being challenged in the McDonald's antitrust litigation.

THE McDONALD'S ANTITRUST LITIGATION

McDonald's Real Estate Policy

The history of McDonald's real estate policy dates back to 1954 when Ray Kroc entered into an agreement with the McDonald brothers of California to license McDonald's franchises for a fee of 1.9 per cent of gross sales.²¹ As McDonald's corporate profits proved insufficient, the Franchise Realty Corporation was formed in 1956 to obtain sufficient real estate for McDonald's franchises.²² McDonald's would induce property owners to lease their land to the corporation on a subordinated basis; the lessor would take back a second mortgage so that McDonald's could procure a first mortgage with the land being subordinated to building.²³ The first mortgage would be for a maximum period of ten years, whereas the leases by McDonald's on all the properties were for twenty years.²⁴ A formula was devised whereby monthly payments by franchisees covered McDonald's mortgage and other expenses and provided a profit.²⁵ McDonald's received a minimum monthly total or a percentage of the franchisee's gross volume, whichever was greater.²⁶ After the initial ten-year period, McDonald's mortgage was paid off and

21. Conley Deposition at 14, *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979).

22. Prior to 1961, some 25 franchisees neither leased nor subleased from Franchise Realty Corporation. Around this time, however, McDonald's decided that there would be no more exceptions to its policy. *Id.* at 19.

23. R. KROC, GRINDING IT OUT, THE MAKING OF McDONALD'S 83-103 (1977) [hereinafter cited as GRINDING IT OUT] (Ray Kroc's description of the marketing scheme as the stroke of financial genius of Harry Sonnenborne, an early officer of the corporation).

24. *Id.* at 102-03.

25. *Id.* at 83.

26. *Id.* In Mr. Martino's 20 year lease, for example, he was required to pay \$1,100 per month fixed rental or 7% of monthly gross sales in excess of \$15,714.29, whichever was greater, plus all taxes, utilities, and a \$15,000 security deposit. Defendant Realty was paying its lessor a monthly rental of \$766.67. Exhibit 9, *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979).

the income from the franchisee was clear profit.²⁷

McDonald's policy was implemented through execution of franchise letter agreements²⁸ which expressly conditioned the franchise grant upon the execution of an attached license²⁹ and leasing agreement.³⁰ Over the last twenty years, McDonald's real estate policy has generally remained uniform.³¹

The Current Litigation

In the four suits filed in the United States district courts,³² each complaint alleged that McDonald's real estate policy of disallowing the franchisee to rent directly from the property owner constituted a violation of section 1 of the Sherman Act.³³ In *Martino v. McDonald's System, Inc.*,³⁴ the United States District Court for the Northern District of Illinois certified a class consisting of all franchisees who acquired franchises after McDon-

27. See GRINDING IT OUT, *supra* note 23, at 102-03.

28. Provisions of a McDonald's franchise letter agreement read as follows:

McDonald's Corporation . . . and its subsidiaries are *developing a McDonald's restaurant* located at _____. Construction of this restaurant commenced on _____. We are hereby offering you a Franchise to operate *the above-mentioned restaurant*, subject to the terms and conditions set forth below.

1. This Franchise is granted to you *only for the operation of the McDonald's restaurant at the above described address* and the rights granted under the Franchise are *limited to this restaurant location*.

3. . . . *Upon your acceptance of this Franchise Letter Agreement*, you do hereby agree to the provisions of, and do hereby agree to *execute the License and Lease attached hereto as Exhibits A and B* subject to the insertion by McDonald's of dates and commencement and termination when said dates are ascertained and any adjustment of the amounts set forth in paragraph 4(c) hereof as well as a finalized legal description of the property.

Your acceptance of this Franchise Letter Agreement is specifically conditioned upon and subject to your execution of the License and Lease attached as Exhibits A and B, and unless said documents are executed by you and received by McDonald's within fifteen (15) days of the date hereof McDonald's shall, without further action, deem this Franchise Letter Agreement shall be null and void and of no further force and effect.

Exhibit 19, *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979) (emphasis added).

29. The license agreement specifically identifies the location of the franchise in accordance with its legal description. Exhibit 8, *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979).

30. See note 26 *supra*.

31. See Exhibit 25, *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979) (1976 license agreement, similar provisions).

32. See note 19 *supra*.

33. 15 U.S.C. § 1 (1970).

34. 81 F.R.D. 81 (N.D. Ill. 1979).

ald's had uniformly established its real estate policy.³⁵ *Kypta v. McDonald's Corp.*³⁶ was commenced in the southern district of Florida as a class action on behalf of all present and former franchisees in the United States. The district court, however, denied the plaintiffs' motion for class certification regarding their real estate tying claim.³⁷

In *Levine v. McDonald's Corp.*,³⁸ filed in the district court of Arizona on behalf of five area franchisees, plaintiffs alleged a conspiracy to restrain interstate trade and monopolization in violation of sections 1³⁹ and 2⁴⁰ of the Sherman Act, respectively. The complaint alleged that in furtherance of these illegal activities, defendants tied the lease or sublease of the real estate upon which the restaurant was located to the granting of the franchise. The plaintiffs denied, however, that such tying allegation constituted a separate claim.⁴¹

In *Principe v. McDonald's Corp.*,⁴² plaintiffs pleaded violations of section 1 of the Sherman Act,⁴³ alleging the unlawful tying of leaseholds, similar in substance to the Illinois⁴⁴ and Florida⁴⁵ claims. The United States District Court for the Eastern District of Virginia granted defendants' motion for a directed verdict on the real estate tying claim, holding that the grant of a franchise and the leasehold agreement did not constitute two separate products as required by the law of tying.⁴⁶ Alternatively, the district court held that McDonald's did not possess the requisite economic power to fall within the scope of the tying prohibition.⁴⁷

As the final determination of the McDonald's litigation will have a tremendous impact on the franchising industry,⁴⁸ an analysis of the development of tying law and its applicability to the field of trademark franchising is required.

35. *Id.* at 93.

36. 1979-2 Trade Cas. ¶62,827 (S.D. Fla. Sept. 4, 1979).

37. *Kypta v. McDonald's Corp.*, No. 73-678 (S.D. Fla. Aug. 2, 1977).

38. No. 77-601 (D. Ariz. July 26, 1977).

39. 15 U.S.C. § 1 (1970).

40. 15 U.S.C. § 2 (1970).

41. *Levine v. McDonald's Corp.*, No. 77-601 (D. Ariz. July 26, 1977).

42. No. 78-0601 (E.D. Va. July 27, 1979).

43. 15 U.S.C. § 1 (1970).

44. See notes 34-35 and accompanying text *supra*.

45. See notes 36-37 and accompanying text *supra*.

46. *Principe v. McDonald's Corp.*, No. 78-0601 (E.D. Va. July 27, 1979).

47. *Id.*

48. See notes 12-20 and accompanying text *supra*. The Judicial Panel on Multidistrict Litigation denied a motion to transfer the four McDonald's suits for consolidated pretrial proceedings. *In re McDonald's Franchise Antitrust Litigation*, 472 F. Supp. 111 (Jud. Pan. Mult. Lit. 1979).

TYING AGREEMENTS AS PER SE VIOLATIONS
OF THE SHERMAN ACT⁴⁹

The Supreme Court of the United States has explicitly set forth three basic requirements for the establishment of an illegal tie-in: (1) a separate tying and tied product;⁵⁰ (2) possession by the seller of sufficient economic power in the tying product market to appreciably restrain competition in the tied product market;⁵¹ and (3) an agreement that must affect a "not insubstantial" amount of interstate commerce.⁵² In addition, most district courts have recently imposed the requirement of proving that the defendant, by wielding his market power in the tying product, "coerced"⁵³ the plaintiff into taking the unwanted tied product. Finally, courts have required the plaintiff to show "fact of damage"⁵⁴—that he was injured as a result of defendant's antitrust violation.

Tying agreements, once established, have been deemed per

49. See note 8 and accompanying text *supra*. A tying agreement, while subject to per se treatment under section 1 of the Sherman Act, 15 U.S.C. § 1 (1970) and section 3 of the Clayton Act, 15 U.S.C. § 14 (1970), may also be violative of the Federal Trade Commission Act, 15 U.S.C. § 45 (a)(1) & (6) (1970), as an "unfair method of competition," a lesser standard. See *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966). For a discussion of the elements of a tying claim under the Sherman Act, see 14 A.L.R. Fed. 473 (1973).

50. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 507 (1969) (implicit within this element is the fact that availability of tying product must be conditioned on purchase of tied product). See also notes 70-99 and accompanying text *infra*.

51. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958). See notes 100-35 and accompanying text *infra*.

52. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947). See notes 136-45 and accompanying text *infra*.

53. *E.g.*, *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1215 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976) (concept of "coercion" often expressed in leading Supreme Court tying cases); *Abecrombie v. Lum's, Inc.*, 345 F. Supp. 387 (S.D. Fla. 1972) (franchisees had to prove that they were "coerced" and not merely persuaded into taking, purchasing, and leasing requirements as a condition for using Lum's trademark). See notes 146-83 and accompanying text *infra*.

Although not specifically referred to as an element, "coercion" as a requirement in a tying claim can be inferred from various statements made by the Supreme Court in tying cases. See *Times v. Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), where the Court stated that "[b]y conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyer's independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open markets." *Id.* at 605. (emphasis added). See also note 147 *infra*.

54. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (business loss causally related to plaintiff's violation); *Response of Carolina, Inc. v. Leasco Response*, 537 F.2d 1307, 1321 (5th Cir. 1976) (same). See notes 184-200 and accompanying text *infra*.

se⁵⁵ violative of section 1 of the Sherman Act.⁵⁶ Under the per se approach, the imposition of a tie-in is deemed to violate antitrust regulations without examination into the reasons for its use or the anti-competitive effects upon the particular industry.⁵⁷ The Supreme Court in *Northern Pacific Railway v. United States*⁵⁸ explained that “[c]ertain agreements or practices which because of their *pernicious effect on competition and lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse of their use.”⁵⁹ Even where a plaintiff fails to establish that the challenged practice is per se illegal, he may still prevail on the merits by proving that the tie-in unreasonably restrains competition, contravening the general standards of the Sherman Act.⁶⁰

In the trademark franchise setting, the traditional per se approach used in products cases has been modified by allowing the franchisor to justify⁶¹ the imposition of the tie-in. However, courts have agreed that the burden of establishing any such justification rests wholly upon the franchisor.⁶² Usually, franchisors have claimed that tie-ins were needed to ensure that the quality and uniqueness of the trademark product remained uniform throughout the franchise setting.⁶³ This argument has

55. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). The per se analysis adopted in *Northern Pacific* has been regarded by most courts as the fountainhead of modern tying law.

56. 15 U.S.C. § 1 (1970).

57. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498 (1969); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097, *rehearing denied*, 430 U.S. 960 (1977); *Hill v. A-T-O, Inc.*, 535 F.2d 1349 (2d Cir. 1976).

58. 356 U.S. 1 (1958).

59. *Id.* at 5.

60. *E.g.*, *Bogus v. American Speech & Hearing Ass'n*, 582 F.2d 277, 287 (3d Cir. 1978).

61. *See Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847, 850 (N.D. Cal. 1970); *aff'd*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (justification alleged herein was that the arrangement was a reasonable device for measuring and collecting revenue, was due to economic hardships developing a new business and was necessary for the preservation of product distinctiveness); *cf. Susser v. Carvel Corp.*, 332 F.2d 505, 511 (2d Cir. 1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965) (distinguishing tying agreements from other antitrust violations such as price fixing, because a tie-in can be justified on occasion). *See also Comment, Franchise Tie-Ins and Antitrust: A Critical Analysis*, 1973 Wis. L. Rev. 847, 862 (justification an added element in tying doctrine after *Susser* and *Siegel*).

62. *E.g.*, *Susser v. Carvel Corp.*, 206 F. Supp. 636, 654 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965).

63. This is commonly known as the “goodwill” or “quality control” defense. *See generally* Comment, *Trademark Licensing: The Problem of Ade-*

not always found favor with the courts.⁶⁴ As the court in *Siegel*

quate Control, 1968 DUKE L.J. 875 (regulating supplies through "quality control" before and after passage of the Lanham Act). However, the Supreme Court's limitation on the use of this defense will severely curtail its availability in the real estate tying context; ensuring a uniform franchise image requires land development by the franchisor. The Court has stated that "[t]he only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practically be supplied." *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1946). In *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), the court followed this rationale in rejecting a quality control defense for the supply of paper products, holding that although a franchisor has the right and duty to preserve distinctiveness and uniformity surrounding his trademark, "restraint of trade can be justified only in the absence of less restrictive alternatives." *Id.* at 51. Thus, where leasing arrangements can be made to ensure quality, recognition, and uniformity of the trademark franchise, the goodwill defense will have little force. *But see Keener v. Sizzler Steak Houses*, 424 F. Supp. 482 (N.D. Tex. 1977) *aff'd in part, remanded in part on other grounds*, 597 F.2d 453 (5th Cir. 1979), wherein a restaurant franchisor's policy of using a designated construction company was upheld where no interest in the construction business was attributed to defendant, and the contractor had significant experience in construction of "new image" buildings. *See also note 99 infra.*

64. Another form of justification, recognized by even fewer courts, is the "new business defense," used by recently established businesses to stimulate the economy or encourage product development. *See United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (leading case in "new business defense" area). *See also Note, Newcomer Defenses: Reasonable Use of Tie-Ins, Franchise, Territoriality, and Exclusives*, 18 STAN. L. REV. 457, 473 (1966) (defense only applicable until goodwill of industry no longer in danger or less restrictive alternatives become available). However, the severe time limitation generally associated with use of the new business defense, restricts its applicability in the trademark franchising area. *See Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

Another defense which has been raised in the trademark franchise setting, although not a form of justification, is the statute of limitations. Section 4b of the Clayton Act, 15 U.S.C.A. § 15b (1970), requires that treble damage antitrust suits be brought within four years after the cause of action accrues. In determining when a cause of action "accrues" for purposes of the Clayton Act, courts have held that the statute of limitations begins to run "when the injury is inflicted," *Baldwin v. Loew's, Inc.*, 312 F.2d 387, 390-91 (7th Cir. 1963), "when the plaintiff first has the right to bring an action," *Emich Motors Corp. v. General Motors Corp.*, 1955 Trade Cas. § 67,960 (N.D. Ill. 1955, Jan. 13, 1955), *aff'd*, 229 F.2d 714 (7th Cir. 1956), or "when the last overt act causing injury or damage occurs." *Fontana Aviation, Inc. v. Baldinelli*, 418 F. Supp. 464, 468 (W.D. Mich. 1976), *aff'd*, 575 F.2d 1194 (6th Cir. 1978), *cert. denied*, 439 U.S. 911 (1978).

However, in *Imperial Point Collonades Condominium, Inc. v. Mangurian*, 594 F.2d 1029 (5th Cir. 1977), *rev'g* 407 F. Supp. 870 (S.D. Fla. 1976), *cert. denied*, 434 U.S. 859 (1977), the Fifth Circuit held that the continued enforcement of leases constituted acts which established a course of conduct upon which a continued antitrust violation could be based. *Id.* at 1043. The court found that each act of collecting rent gave rise to a new cause of action for conspiracy, even though the defendant selling the tied product was not a party to the tying contract itself but rather a separate legal entity. As such, the corporation could not escape liability under the antitrust laws through the statute of limitations by dividing itself into two

*v. Chicken Delight, Inc.*⁶⁵ noted in examining the parameters of the plaintiff's burden: "The relevant question is not whether the items are essential to the franchise, but whether it is essential to the franchise that the items be purchased *from Chicken Delight.*"⁶⁶

The current McDonald's litigation⁶⁷ has already focused upon each of the major elements of a tying claim. Novel approaches in the field of trademark franchising have been applied,⁶⁸ and inconsistent district court decisions have resulted.⁶⁹ The problems of developing each element in a real estate tying claim must therefore be explored.

THE ELEMENTS OF THE TYING CLAIM IN THE McDONALD'S LITIGATION: DEVELOPMENTS, PROBLEMS, AND INCONSISTENCIES

Two Distinct Products

In order to establish the existence of an unlawful tying agreement, plaintiff must first demonstrate that there are two separate products involved, with the availability of the tying product being conditioned upon purchase of the tied product.⁷⁰

separate entities and requiring the plaintiff, by a contract with one defendant, to buy the tied product from "a legally separate but either controlled or controlling defendant." *Id.* The court wholly rejected the finding below that a plaintiff could sit on his rights while allowing treble damages to accumulate, adhering to the rule that plaintiffs may sue only for damages resulting from acts committed four years prior to commencement of the suit. *Id.* at 1044. For an application of the "Eisen rule," *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1976) (no preliminary inquiry into merits of a suit in order to determine a motion for class certification), in a statute of limitations context, see *Wenning v. Jim Walter Homes, Inc.*, 464 F. Supp. 110, 113 (S.D. Ind. 1978) ("Eisen rule" inapplicable because limitation question involves far lesser inquiry, relates directly to class action determination in that defense may relate only directly to named plaintiff thus destroying "typicality", and question of limitation viewed as procedural under applicable law).

65. 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

66. *Id.* at 49.

67. See notes 32-48 and accompanying text *supra*.

68. See notes 70-99 & 100-35 and accompanying text *infra*.

69. Compare notes 34-35 and accompanying text *supra* with notes 36-37 and accompanying text *supra*.

70. See, e.g., *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) (*Fortner I*). In the *Fortner I* case, for example, a subsidiary corporation of United States Steel conditioned credit availability for the purchase of land by Fortner on the purchase of prefabricated homes manufactured by United States Steel. See also *Foster v. Maryland State Sav. & Loan Ass'n*, 590 F.2d 928 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979), wherein a requirement that borrowers pay attorney's fees even if they retained their own counsel was found to be incidental and inseparable from a loan transaction, and therefore not a "tied product."

In *Principe v. McDonald's Corp.*,⁷¹ defendants were faced with the claim that the requirement that franchisees lease the land and restaurant building from McDonald's affiliate, as a condition to obtaining a franchise, was an illegal tying agreement under section 1 of the Sherman Act.⁷² The court directed a verdict for the defendants, holding that this arrangement did not involve two distinct products because the lease agreement merely formed one part of the "bundle of benefits" that makes up a McDonald's franchise.⁷³ *Phillips v. Crown Central Petroleum Corp.*⁷⁴ was cited as indicating that a franchise must always consist of an aggregation of products, and the court noted that, in McDonald's case, this bundle is tremendous in size and therefore capable of being divided into almost innumerable components.⁷⁵

In *Principe*, the court observed that it is arguable that various products and services are tied to the right to use McDonald's trademark.⁷⁶ The court noted that, although all such items were obviously attainable on the open market, one must look to a tying claim in the franchise field "with a view that is not unduly influenced by everything else that has been written" about the law of tying.⁷⁷ The court concluded that a "franchise agreement" must be differentiated from a "tying agreement" in that the first element of the latter, separability, is absent.⁷⁸ The court felt that any other conclusion would be the death knell for the franchising concept, because franchising necessarily contemplates an aggregation of benefits.⁷⁹

The *Principe* court's carte blanche approval of any and all items as acceptable within a franchise agreement is inconsistent with prior case law. The contention that the commodity sought by the franchisee is an entire package of products is not new to the courts.⁸⁰ In *Siegel v. Chicken Delight, Inc.*,⁸¹ regarded by most courts and commentators as the basis for trademark

71. No. 78-0601 (E.D. Va. July 27, 1979).

72. 15 U.S.C. § 1 (1970).

73. Record of Trial Proceedings, vol. xvii at 2616; *Principe v. McDonald's Corp.*, No. 78-0601 (E.D. Va. July 27, 1979) [hereinafter cited as Record].

74. 602 F.2d 616 (4th Cir. 1979). The *Phillips* case involved an antitrust suit brought by independent gasoline dealers against their wholesale supplier. Horizontal price fixing and an illegal tie-in of Crown brand motor oil were alleged.

75. Record, *supra*.note 73, at 2613.

76. *Id.* at 2615.

77. *Id.* at 2616.

78. *Id.* at 2618.

79. *Id.* at 2619.

80. See, e.g., *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir. 1976) (franchisor claimed that the license to use Dunkin' Donuts trademark along with underlying real estate, equipment, signs, and supplies con-

franchising law in the last decade,⁸² the court was faced with the contention that the trademark and license of the franchisor was not separate and distinct from the equipment, packaging, and mixes used in the franchise.⁸³ Chicken Delight contended that application of the tying doctrine to the sale of a franchise was the equivalent of applying antitrust rules to the "sale of a car with its tires" or "a left shoe with the right."⁸⁴

The *Siegel* court recognized that although trademark licenses did not fit the traditional category of tying products, functionally they were sufficiently similar to constitute a tying product.⁸⁵ It was noted that whereas a trademark had originally been a strict emblem of the source of the product, the widespread commercial growth of trademarks had resulted in a new meaning: representation of product quality and the benefit of good will attached to the trademark.⁸⁶ The *Siegel* court felt that as long as the franchise lived up to the standards represented by the trademark, neither the protection afforded the trademark by law nor its value to the licensee depended upon the source of the components.⁸⁷ Therefore, it concluded that the "sale of a franchise license, with the attendant rights to operate a business in the prescribed manner and to benefit from the goodwill of the trade name, *in no way requires the forced sale by the franchisor of some or all of the component articles.*"⁸⁸

Recently in *Krehl v. Baskin-Robbins Ice Cream Co.*,⁸⁹ the court was faced with a tie-in claim regarding the Baskin-Robbins trademark and ice cream sold thereunder.⁹⁰ The court in-

stituted a "single product"); *Abecrombie v. Lum's, Inc.*, 531 F.2d 775 (5th Cir. 1976) (furniture, fixtures, supplies, and site development).

81. 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

82. *See, e.g.*, *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979). *See also* note 210 *infra*. *But see* notes 89-94 and accompanying text *infra*.

83. 448 F.2d at 47-48.

84. *Id.* at 48.

85. *Id.* at 48-49.

86. *Id.* at 48 (citing *McCarthy*, *supra* note 3, at 1112-13); Note, *Quality Control and The Antitrust Laws in Trade-mark Licensing*, 72 *YALE L.J.* 1171 (1963). *See also* note 1 *supra*.

87. 448 F.2d at 49.

88. *Id.* (emphasis added). Many courts have followed the *Siegel* approach. *See, e.g.*, *McAlpine v. AAMCO Transmissions, Inc.*, 461 F. Supp. 1232 (E.D. Mich. 1978) (trademark separate and distinct); *Chock Full O'Nuts Corp., Inc.*, 83 F.T.C. 575 (1973) (trademark, separately marketable, constitutes tying item).

89. 1979-2 Trade Cas. ¶ 62,806 (C.D. Cal. Aug. 7, 1979).

90. The district court had previously denied a motion for class certification with respect to tying allegations involving store leases, equipment, supplies, and advertising, finding that individual questions predominated under Rule 23 (b) (3) of the Federal Rules of Civil Procedure. *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978). This later deci-

terpreted *Siegel* as holding that a trademark may be a separate product, but "not that as a matter of law it must be."⁹¹ Noting the distinction between cases involving product-origin or identity trademarks and market-format trademarks, the court treated the issue of separability as one of factual inquiry.⁹² The court found that the plaintiffs failed to sustain their burden of proof on the issue of separability, as the case involved a trademark representing a product which was the distinctive underlying basis of the defendant's business.⁹³ Interestingly, the court noted that were it considering a tie-in claim between the trademark and items other than ice cream, a different result might have been reached.⁹⁴

The leasing agreement in the McDonald's antitrust litigation involves precisely the type of tied product the *Krehl* court had contemplated. Even rejecting the separability concept as a matter of law, it is clear that leasing agreements fit squarely within the "market-format" trademark type case. Surely, McDonald's would be hard pressed to persuasively argue that the public envisions a real estate empire when viewing McDonald's golden arches.

It is apparent that the *Principe* decision is inconsistent with the majority of cases that have encountered the separability problem. Furthermore, the *Principe* court's reliance upon *Phillips v. Crown Central Petroleum Corp.*⁹⁵ as to the product separability issue is misplaced. Although the *Phillips* court reversed a district court finding of an existing illegal tying arrangement,⁹⁶ the court based its decision on the absence of sufficient economic power in the tying product market.⁹⁷ Whereas the *Phillips* court noted that the very essence of a franchise is the

sion, considered as a class action, was solely confined to the ice cream claim.

91. 1979-2 Trade Cas. ¶ 62,806 (C.D. Cal. Aug. 7, 1979). See also *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 824, 835 (N.D. Ga. 1976); *Detroit City Dairy, Inc. v. Kowalski Sausage Co.*, 393 F. Supp. 453 (E.D. Mich. 1975).

92. *Krehl v. Baskin-Robbins Ice Cream Co.*, 1979-2 Trade Cas. ¶ 62,806 (C.D. Cal. Aug. 7, 1979).

93. *Id.*

94. *Id.*

95. 602 F.2d 616 (4th Cir. 1979).

96. *Phillips v. Crown Cent. Petroleum Corp.*, 426 F. Supp. 1156 (D. Md. 1977). The district court concluded that the defendant had more than sufficient economic power in the gasoline market to appreciably restrain competition in the market for Crown brand motor oil. See note 74 *supra*.

97. *Phillips v. Crown Cent. Petroleum Corp.*, 602 F.2d 616 (4th Cir. 1979). The court of appeals found the tying product to be the service station leases granted by Crown, rather than gasoline, Crown's principal "business product." This could have constituted a vital determination in the tying claim. The court held, however, that even if gasoline was considered to be the tying product, Crown's share of the market was insufficient to provide "suffi-

purchase of several related products in a single, competitively attractive package, it explicitly stated that the existence of a tying agreement was an uncontested issue.⁹⁸ Even assuming there is an emerging trend in the law of tie-ins, *Phillips* gives no indication that any aggregation of products will be considered a single franchise package⁹⁹ under the Sherman Act. As a matter of law or under factual inquiry, the McDonald's trademark and the underlying lease should be considered as constituting two separate products.

Sufficient Economic Power

Plaintiffs in a tying claim must establish that the defendant has sufficient economic power in the tying product to make coercion effective as to the tied product.¹⁰⁰ The court will focus on whether the seller has sufficient power to raise prices or impose onerous terms which could not have been anticipated in a wholly competitive market.¹⁰¹ The Supreme Court has, however, until recently, gradually decreased the requisite burden of

cient economic power." *Id.* at 629. For a factual discussion of this latter element see note 135 *infra*.

98. 602 F.2d at 628.

99. *Id.* at 627. The "single package" concept often appears to be more intrinsically related to "economic power" determinations than as evidence of separability for purposes of a tying claim. See note 109 *infra*. Nor is the leasing agreement comparable to items which may not be regarded as commodities distinct from the trademark. For example, in *Kypta v. McDonald's Corp.*, 1979-2 Trade Cas. ¶ 62,827 (S.D. Fla. Sept. 4, 1979), the court rejected a claim that a \$15,000 security deposit, allegedly tied to the trademark license, constituted a separate item, holding that such deposit was merely part of the consideration for the franchise. See also note 208 *infra*. In *Beefy Trail, Inc. v. Beefy King Int'l, Inc.*, 348 F. Supp. 799, 805-07 (M.D. Fla. 1972), the court allowed a franchisor to sell his trademark license solely upon the condition that the franchisee also purchase the necessary fixtures. However, although the court recognized this package as an "operating franchise", the decision was narrowed to authorize such an arrangement where the franchise was to be resold after six months, lest it be considered merely an attempt to avoid *Siegel*. But see *In re 7-Eleven Franchise Antitrust Litigation*, 1974-2 Trade Cas. ¶ 75,429 (N.D. Cal), wherein franchisees alleged the illegal tie-in of store locations, equipment, fixtures, signs, advertising, accounting services, and insurance to the grant of the trademark and franchise. The court, emphasizing the importance of maximizing the gross profits of both parties, found that an "overall package" had been bargained for and sold. In granting summary judgment for the defendants on the tie-in claim, the court distinguished *Siegel v. Chicken Delight, Inc.*, as a case in which the franchise right was sold at a flat fee, coupled with an obligation to purchase readily available tied items from the franchisor at an inflated price. For a recent analysis of the role of coercion in the "complete package" context, see note 182 *infra*.

100. *E.g.*, *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) (*Fortner II*).

101. *Cf.* *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) (*Fortner I*).

showing market power within the tying item.¹⁰² Whereas early Supreme Court decisions held that "monopolistic"¹⁰³ or "dominant"¹⁰⁴ positions within the tying market were required, this approach was wholly abandoned in *Northern Pacific Railway v. United States*.¹⁰⁵ In that case, the Court held that a seller must have sufficient economic power to appreciably restrain competition in the tied product market.¹⁰⁶ Although the cornerstone of the presumption of market power in *Northern Pacific* was the desirability and uniqueness of the railroad's extensive land holdings in the northwestern United States,¹⁰⁷ the Court implied that market power could be inferred from the mere existence of numerous tying agreements.¹⁰⁸

It was not until nearly twenty years later that the Supreme Court clarified this position. In *United States Steel Corp. v. Fortner Enterprises, Inc.*,¹⁰⁹ the Court refused to view the tied product in isolation when determining whether burdensome terms existed; rather, it explored the attractiveness of the entire pack-

102. See C. KAYSER & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 157 (1959) (approving of the trend).

103. *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922) (de facto monopoly required).

104. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) (market dominance required).

105. 356 U.S. 1 (1958).

106. *Id.* at 6.

107. In *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958), Northern Pacific leased lands, which it held pursuant to a Congressional grant, solely upon the condition that the lessee ship over railroad lines all commodities produced or manufactured on the land, provided its rates were equal to those of competing railways. These agreements were labeled "preferential routing clauses." *Id.* at 3.

108. The Court felt that the "very existence" of a "host of tying arrangements" is "itself compelling evidence of defendant's great power," absent other explanations. *Id.* at 7-8.

109. 429 U.S. 610 (1977) (*Fortner II*). *Fortner II* rejected any inference of sufficient economic power in United States Steel Corporation in the credit market, despite evidence that a significant number of buyers accepted prefabricated homes, the alleged tied product, as a condition to obtaining extremely attractive financing terms. The Court reasoned that any such inference would necessarily depend on an "absence of other explanations for the willingness of buyers to purchase the package." *Id.* at 618 n.10. The explanation noted here was the price competition in the tied product market. *Id.* at 618. The Court determined that a finding of "economic power" could not be supported unless evidenced by a showing of "some cost advantage over its competitors or significantly different than what other lenders could offer if they so elected. . . ." *Id.* at 622.

The *Fortner II* analysis may in some instances be applied in a trademark franchise context. Where initial franchise fees are very low, defendants can maintain that the desirability of the package, rather than uniqueness of the "tying item," was the determinative factor in the sale. However, in the McDonald's antitrust litigation, such an argument would not appear to be convincing. See notes 114-35 and accompanying text *infra*.

age.¹¹⁰ The Court thus rejected the presumption of market power it apparently had established in its earlier decision in *Fortner Enterprises, Inc. v. United States Steel Corp.*,¹¹¹ where market power was seemingly inferred from an appreciable number of buyers who accepted the combination package.¹¹² However, the test for establishing sufficient market power remained the same; market power could be established "whenever the seller can exert *some power* over *some* of the *buyers* in the market, even if his power is not complete over them and over all other buyers in the market."¹¹³

"Market power" can be established from an alternate source in franchising arrangements, uniqueness of the trademark owned by the franchisor. The court in *Siegel v. Chicken Delight, Inc.*¹¹⁴ extended the presumption of market power that long attached to patents¹¹⁵ and copyrights,¹¹⁶ to trademarks.¹¹⁷ Al-

110. The *Fortner II* Court concluded that "[t]he unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses." 429 U.S. at 622.

111. 394 U.S. 495 (1969) (*Fortner I*).

112. In *Fortner I*, Justice Black stated in an often quoted, and perhaps misinterpreted passage, that "[T]he proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, *with respect to any appreciable number of buyers within the market.*" *Id.* at 504 (emphasis added). The United States Supreme Court has cited Professor Dam's article, *Fortner Enterprises v. United States Steel Corp.: "Neither a Borrower, Nor a Lender Be,"* 1969 SUPREME COURT REV. 1, 25-26, for his insightful analysis of the plaintiff's burden of proof:

One important question in interpreting the *Fortner* decision is the meaning of this language. Taken out of context, it might be thought to mean that, just as the 'host of tying arrangements' was 'compelling evidence' of 'great power' in *Northern Pacific*, so the inclusion of tie-in clauses in contracts with 'any appreciable number of buyers' establishes market power. But the passage read in context *does not warrant this interpretation*. For the immediately preceding sentence makes clear that *market power in the sense of power over price must still exist. If the price could have been raised but the tie-in was demanded in lieu of the higher price, then—and presumably only then—would the requisite economic power exist.*

Fortner II, 429 U.S. at 620 n.13 (emphasis added). For a recent application of *Fortner II* analysis in a trademark setting, see note 124 *infra*. See also Flinn, *Fortner: Sufficient Economic Power Over The Tying Product*, 46 ANTI-TRUST L.J. 605 (1977) (impact of *Fortner II*).

113. *Fortner I*, 394 U.S. at 503.

114. 448 F.2d 43, 50 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

115. *International Salt Co. v. United States*, 332 U.S. 392 (1947). *International Salt* developed a patented salt utilization machine and conditioned any lease upon the obligation to purchase all salt requirements from the company.

116. *United States v. Loew's, Inc.*, 371 U.S. 38 (1962) (conditioning sale of copyrighted films on purchase of inferior films); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (copyrighted motion pictures).

117. "Just as the patent or copyright forecloses competitors from offering the distinctive product on the market, so the registered trademark presents a legal barrier against competition." 448 F.2d at 50.

though strict adherence to the *Siegel* holding could effectively remove the market power issue from the field of trademark franchising, the Supreme Court's reminder in *Fortner II* that "uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves"¹¹⁸ casts doubt upon *Siegel's* "matter of law" approach. Clearly a trademark will not in all cases be associated with a product that can meet this uniqueness criteria.¹¹⁹

Even prior to *Fortner II*, some courts had strongly rejected the presumption theory in search of evidence of the franchisor's preeminence in his particular field. In *Capital Temporaries, Inc. of Hartford v. Olsten Corp.*,¹²⁰ the United States Court of Appeals for the Second Circuit explicitly rejected the *Siegel* approach, maintaining that the Supreme Court has never presumed economic power other than in the patent or copyright contexts.¹²¹ Conversely, the *Olsten* court relied on *United Drug Co. v. Theodore Rectanus Co.*,¹²² where the Court stated that a trademark right is not "a right in gross or at large, like a statutory copyright or a patent for an invention . . . There is no such thing as a property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed."¹²³ As a result, the *Olsten* court found that the trademark merely identified the franchisor and was therefore an insufficient indication of dominance over the tying product "to qualify for per se treatment under the *Northern Pacific*

118. 429 U.S. at 621 (citing *Fortner I*, 394 U.S. 495, 505 n.2).

119. See *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976) *aff'd in part, rev'd in part, and remanded in part on other grounds*, 567 F.2d 1316 (1978) (en banc), wherein the franchisor of a seafood restaurant chain required franchisees to purchase the underlying premises and all equipment and supplies in order to receive the license to use the franchise trademark. The court held that the trademark, in itself, was insufficient to establish "sufficient economic power" within the tying item. *Id.* at 48. Factors which the court considered were the trademark as a legal barrier to competition, the goodwill attached to the mark, and the fact that the franchisor was able to require franchisees to purchase goods at prices substantially higher than market value. *Id.* at 50-51. See also Langley, *Trying a Tying Case*, 46 ANTI-TRUST L.J. 619, 623 (1977) (sufficient economic power should always be a requirement outside the trademark). *Contra* *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002, 1015 (5th Cir. 1972), *cert. denied*, 409 U.S. 1086 (1972) (sufficient economic power from mere existence of a trademark).

120. 506 F.2d 658 (2d Cir. 1974). *Capital Temporaries*, licensee of employment service businesses, alleged an illegal tie-in of a blue collar operation in order to obtain the exclusive license and use of the operator's trade name and trademark to operate a white collar franchise.

121. *Id.* at 663.

122. 248 U.S. 90 (1918).

123. *Id.* at 97.

rubric."¹²⁴ After looking beyond the trademark, it was determined that the defendant's business was not attractive, unique, or effective enough to warrant a finding of market power in the tying product market.¹²⁵

Under either approach for establishing market power, it is difficult to understand the utilization in *Principe v. McDonald's Corp.*¹²⁶ of a lack of sufficient economic power as an alternative basis for directing a verdict for the defendants.¹²⁷ The court chose to search for the relevant market, only to find a lack of proof of McDonald's dominance.¹²⁸ This question was routinely disposed of in *Martino v. McDonald's System, Inc.*¹²⁹ by following *Siegel* and holding that the McDonald's trademark was sufficiently unique to presume that proof of market dominance existed on a classwide basis.¹³⁰ In *Krehl v. Baskin-Robbins Ice Cream Co.*,¹³¹ although the court was unwilling to rely entirely on the use of presumptions, it found that the Baskin-Robbins trademark, when coupled with "such nationwide preeminence in the retail sale of ice cream market," provided sufficient economic power as a matter of law.¹³² Even assuming the McDonald's trademark is not sufficiently unique in the *Fortner* sense¹³³

124. 506 F.2d at 663.

The United States District Court for the Eastern District of Washington recently rejected the *Siegel* matter of law approach in denying a motion for class certification. *Cash v. Arctic Circle, Inc.*, 1980-1 Trade Cas. ¶ 63,094 (E.D. Wash. Aug. 28, 1979). The court distinguished the goals of patents and copyrights, which confer economic power upon those who have created unique products, from the goal of trademarks, which prevent the piracy of trade names from competitors. *Id.* at 63,095. The court expressly relied on *Fortner II*, 429 U.S. 610, 619-22, in determining that sufficient economic power is a jury question unless the evidence warrants a directed verdict.

125. 506 F.2d at 663.

126. No. 78-0601 (E.D. Va. July 27, 1979).

127. Record, note 73, at 2618.

128. *Id.* For a similar problem with a different result, see *Esposito v. Mister Softee, Inc.*, 1980-1 Trade Cas. ¶ 63,089 (E.D.N.Y. Dec. 14, 1979), where the court rejected a contention that the relevant market that a soft ice cream truck franchisor would be measured against was the entire retail ice cream market in the franchisor's area. The court, believing that the defendants were seeking to blur the distinction between mobile units and retail stores and between franchisees and owner-operators, found that "such distinctions are crucial to appreciating the economic power which Mister Softee could exert over prospective franchisees."

129. 81 F.R.D. 81 (N.D. Ill. 1979).

130. *Id.* at 90.

131. 78 F.R.D. 108 (C.D. Cal. 1978).

132. *Id.* at 120.

133. It would appear that a court's proper focus in a tying claim after *Fortner II* would not be whether the franchisor possesses a trademark, but whether such a trademark will be so unique that at least some buyers will be influenced thereby to accept the tied product item in lieu of a higher price for the trademark license. See Flinn, *Fortner: Sufficient Economic Power Over The Tying Product*, 46 ANTITRUST L.J. 605, 617-18 (1977) (Mr.

to presume its market dominance, surely when coupled with consideration of McDonald's share of the fast-food chain market,¹³⁴ economic power could be inferred as a matter of law.¹³⁵

A "Not Insubstantial" Amount of Interstate Commerce

The next tying claim requirement is establishing that a "not insubstantial" amount of interstate commerce is affected in the market for the tied item.¹³⁶ The "not insubstantial" test, however, does not refer to percentage or market share but is measured solely in terms of total dollar volume of tied sales.¹³⁷ The minimum dollar amount in the tied product market has so drastically declined that any past difficulty in showing a significant effect upon interstate commerce may be presently ignored.¹³⁸

The substantiality test as set forth by the Supreme Court in *Fortner Enterprises, Inc. v. United States Steel Corp.*,¹³⁹ provided: "[N]ormally the controlling consideration is simply

Flinn, who represented United States Steel Corp. in *Fortner II*, stresses the importance of showing economic power in the sense of some "power over price," a showing which would necessarily depend upon the particular trademark involved).

134. In 1976, McDonald's share of the fast-food chain market was 19.6%, more than twice that of its nearest competitor, Kentucky Fried Chicken, 8.4%. See BUSINESS WEEK 56 (July 11, 1977).

135. In *Phillips v. Crown Cent. Petroleum Corp.*, 602 F.2d 616 (4th Cir. 1979), the court declined to find sufficient market power in a 4% share of service station business, holding that a prior ruling, *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960) (10%), represented a showing close to the permissible minimum. 602 F.2d at 629. Interestingly, in the trademark franchising context, in *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977), Kentucky Fried Chicken conceded that its economic power was sufficient to satisfy tying requirements. *Id.* at 377. See note 134 *supra*. In *McAlpine v. AAMCO Transmissions*, 461 F. Supp. 1232 (E.D. Mich. 1978), the court held that "sufficient economic power" will be satisfied when the trademark offered is "well known" and "uniquely desirable."

136. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958). The connection to be shown with interstate commerce may be established by demonstrating that the anticompetitive conduct occurred *in* interstate commerce or by showing that the conduct, although wholly intrastate, had a not insubstantial effect on interstate commerce. *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 825, 836 (N.D. Ga. 1976).

137. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 841 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).

138. See, e.g., *International Salt Co. v. United States*, 332 U.S. 392, 395 (1947) (\$500,000 minimum to justify per se treatment). See text accompanying note 141 *infra*. But see *Susser v. Carvel Corp.*, 332 F.2d 505, 519 (2d Cir. 1964), *cert. dismissed as improvidently granted*, 391 U.S. 125 (1965) (tied sales of \$1,354,599 held insubstantial as a result of one per cent capture of ice cream market). See also notes 134-35 and accompanying text *supra*. The market percentage test was expressly rejected, however, by *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969).

139. 394 U.S. 495 (1969).

whether a total amount of business, substantial enough in terms of dollar volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie. . . ."¹⁴⁰ The Court held that sales of \$190,000 in prefabricated homes, the tied product, were not insubstantial.¹⁴¹ The *Fortner I* decision further lessened plaintiffs' burden by holding that substantiality was to be measured by the "total volume of sales tied by the sales policy," rather than solely by the portion of this total plaintiff's practice accounted for.¹⁴² Additionally, the existence of tying arrangements with an appreciable number of buyers, although no longer a viable method of showing sufficient economic power,¹⁴³ should permit an inference that a "not insubstantial" amount of interstate commerce was affected.¹⁴⁴

The question in the McDonald's antitrust litigation of whether a "not insubstantial" amount of interstate commerce was affected is readily determinable. The imposition of twenty-year leasehold agreements upon franchisees has by Mr. Kroc's admission catapulted the Franchise Realty Corporation from a \$1,000 paid-in capital corporation to a \$170 million interest.¹⁴⁵ Franchise Realty buys property, establishes leases, and collects rentals in interstate commerce. Participation is based upon the tied product imposed upon McDonald's franchisees. The effect on interstate commerce is clearly not insubstantial.

ADDITIONAL REQUIREMENTS: COERCION AND FACT OF DAMAGE

Coercion

Although reference has been made in numerous cases to "coercion" on the part of the seller¹⁴⁶ this concept's precise role within the law of tying remains undefined. Early Supreme Court cases indicated that the crux of an unlawful tying arrangement was the "forced purchase"¹⁴⁷ of tied products with the de-

140. *Id.* at 501.

141. *Id.* at 501-02.

142. *Id.* at 502.

143. See notes 107-12 and accompanying text *supra*.

144. *Fortner II* dealt exclusively with the issue of whether United States Steel had sufficient economic power in the credit market. The *de minimus* test established in *Fortner I* is geared solely to total dollar volume and therefore allows inference from an appreciable number of buyers.

145. See GRINDING IT OUT, *supra* note 23, at 82-83.

146. See note 53 *supra*. Some commentators have expressed the opinion that coercion, neither legally nor in terms of economic policies, should be a requisite element in the law of tying. See, e.g., Note, *Tying Arrangements and the Individual Coercion Doctrine*, 30 VAND. L. REV. 755, 783-94 (1977) (legal and antitrust policy basis). *Contra* Varner, *Voluntary Ties and The Sherman Act*, 50 S. CAL. L. REV. 271, 299 (1977) (necessary requirement).

147. See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594

sired tying items. Lower courts have subsequently established such rules as "coercion must influence the buyers choice"¹⁴⁸ and the plaintiff must be "the unwilling purchaser of the tied product."¹⁴⁹ However, insufficient practical guidelines were offered regarding the buyer's unwillingness and how he must be influenced.¹⁵⁰ Possibilities have ranged from the mere acceptance of a conditional sale¹⁵¹ to outright objection¹⁵² or negotiation for alternatives.¹⁵³

The use of presumptions in establishing coercion is similarly marked by confusion. The major line of cases has held that when contractual provisions contain an unlawful tie-in, "coercion" can be inferred since it is backed by the force of law.¹⁵⁴

(1953), where the Court stated that "[t]he common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product. . . ." *Id.* at 614. See generally notes 9 & 53 *supra*; see also *United States v. Loew's, Inc.*, 371 U.S. 38 (1962). The *Loew's* Court stated that "[t]elevision stations forced by appellants to take unwanted films were denied access to films marketed by other distributors who, in turn, were foreclosed from selling to the stations." *Id.* at 49 (emphasis added).

148. *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). The court dismissed an alleged tie-in claim surrounding a requirement that plaintiff sponsor an early evening news program in order to obtain a desired sponsorship over other ABC affiliated stations.

149. *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 663 (2d Cir. 1974). The franchise agreement in *Olsten* did not expressly require the tied product item but merely gave the plaintiff an option to buy; the court, therefore, refused to presume coercion, and no evidence of extrinsic coercion was presented. See note 120 *supra*.

150. See, e.g., *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974) (court did not decide the question of when the buyer is actually "unwilling"). But see *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). The court noted that the plaintiff did not "seriously bargain" for the elimination of the unwanted sponsorships and determined that the franchisee was not "influenced" by the alleged tie-in. *Id.* at 1133.

151. E.g., *Bogus v. American Speech & Hearing Ass'n*, 582 F.2d 277, 287 (3d Cir. 1978) (express condition sufficient without further evidence of coercion); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 708 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978) (conditioning one product on sale of another).

152. See *Response of Carolina v. Leasco Response, Inc.*, 537 F.2d 1307, 1327 (5th Cir. 1976) (inquiring as to whether plaintiff expressly objected to imposition of tied product); *Davis v. Marathon Oil*, 528 F.2d 395 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (coercion requires more than aggressive salesmanship).

153. See *Ungar v. Dunkin' Donuts of America, Inc.*, 68 F.R.D. 65, 112 (E.D. Pa. 1975), *rev'd*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976) (posing the question of whether active negotiations are essential to a showing of coercion).

154. See, e.g., *Hi-Co Enterprises v. Can-Agra, Inc.*, 1976-2 Trade Cas. ¶ 61,053 (S.D. Ga. July 26, 1976); *Halverson v. Convenient Food Mart, Inc.*, 1975-2 Trade Cas. ¶ 60,254 (N.D. Ill. Oct. 31, 1974); *In re 7-Eleven Franchise Antitrust Litigation*, 1974-2 Trade Cas. ¶ 75,429 (N.D. Calif. Dec. 23, 1974).

However, when alternative sources might be used under prescribed conditions, courts may be unwilling to employ blanket presumptions.¹⁵⁵ The minority view has rejected any presumption of coercion, even when tie-ins were explicitly found in contracts, and requires a showing of coercion outside of the agreement.¹⁵⁶ In some cases an inference of coercion has been drawn from the existence of a "uniform policy" to impose tying arrangements.¹⁵⁷ In *Hill v. A-T-O, Inc.*,¹⁵⁸ the defendant's uniform practice of selling vacuum cleaners along with buying plan memberships led to a reversal of a lower court finding of an absence of coercion.¹⁵⁹ The decision in *Fortner II*,¹⁶⁰ however, seems to militate against such a finding in future cases.¹⁶¹

*Ungar v. Dunkin' Donuts of America, Inc.*¹⁶² is presently the major precedent on the requirement of coercion in tying cases. Plaintiffs alleged that the defendant granted franchises on the condition that the franchisees also purchase equipment and supplies and sublease the underlying premises at a substantial markup.¹⁶³ Interestingly, the *Ungar* court noted that the "equipment package" provision was removed from the franchise agreements in response to the litigation in *Siegel v. Chicken De-*

155. See note 149 *supra*. But see *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1216 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976). The court closely examined the alternatives offered to the franchisee and found such sources "woefully inadequate." Plaintiffs were given a 30 day option to obtain an equipment package elsewhere, were pressured into non-exercise of such option, and had only one approved equipment vendor other than the franchisor, and there was evidence he would not deal directly with plaintiffs.

156. See *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443, 450-51 (M.D. Ga. 1975), *appeal dismissed*, 557 F.2d 1218 (5th Cir. 1977) (in action alleging tying of feed supplies to advancement of loans, court found a contractual fee insufficient absent a showing of "actual coercion outside of contractual provisions"); *accord*, *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 665-66 (2d Cir. 1974) (dictum).

157. *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81, 88-89 (N.D. Ill. 1979) (uniform policy along with contractual provisions gave rise to class-wide inference of coercion); see *Kentucky Fried Chicken v. Diversified Packaging*, 549 F.2d 368, 377 (5th Cir. 1977) ("A tie claimant establishes a tie when it proves that a franchisor makes a practice of coercing franchisees into purchasing supplies or other products from the franchisor.").

158. 535 F.2d 1349 (2d Cir. 1976).

159. *Id.* at 1355.

160. *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977).

161. See notes 109 & 110 *supra*. Although the *Fortner II* Court dealt specifically with "sufficient economic power," its emphasis in looking beyond the availability of the "tied product" in favor of examining the attractiveness of the package, means that "coercion" should not be presumed merely from the mode of the franchisor's offer.

162. 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd* 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

163. 531 F.2d at 1215.

*light, Inc.*¹⁶⁴ The district court¹⁶⁵ in *Ungar* had found that plaintiffs needed only to show that economic power had been used by the seller, not that it was used coercively.¹⁶⁶ The court based its findings on *FTC v. Texaco, Inc.*,¹⁶⁷ a non-tying case¹⁶⁸ where the Supreme Court found the relationship between franchisor and franchisee inherently coercive,¹⁶⁹ and *Perma Life Muffler, Inc. v. International Parts Corp.*,¹⁷⁰ in which the Court permitted the plaintiff to recover although it had willingly entered into a tying

164. *Id.* at 1215-16 (citing *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967), *modified sub nom.* *Chicken Delight, Inc. v. Harris*, 412 F.2d 830 (9th Cir. 1969), *on modification*, 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd in part, rev'd in part, and remanded*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). *See also* *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 721 (7th Cir. 1979) (franchisor Fotomat, apparently with knowledge of *Siegel*, wrote a letter to Photovest advising that they could use any processor they wished despite express contractual provisions to the contrary).

165. *Ungar v. Dunkin' Donuts of America, Inc.*, 68 F.R.D. 65 (E.D. Pa. 1975).

166. *Id.* at 97. In the recent decision of *Esposito v. Mister Softee, Inc.*, 1980-1 Trade Cas. ¶ 63,089, (E.D.N.Y. Dec. 14, 1979), the district court, commenting that all which could be said with absolute certainty regarding the concept of coercion was that it proved to be "elusive," stated that coercion was not a separate element in a tying claim. The court then went on to find, however, that clearly, under the facts in *Esposito*, defendants engaged in a course of conduct "designed to coerce the plaintiffs into adhering to the tie-in arrangement," and that plaintiff purchased the tied products "only reluctantly" and "because of fear of franchise termination or other reprisal." Under the court's analysis, *Hill v. A-T-O, Inc.*, 535 F.2d 1349 (2d Cir. 1976), stood for the proposition that only an unremitting policy to impose a tie-in must accompany sufficient market power in the tying product market, and that such an unremitting policy need not necessarily translate into "coercion." For a different interpretation of *Hill*, see notes 157-59 and accompanying text *supra*.

167. 393 U.S. 223 (1968). The FTC challenged Texaco's sales commission agreements, with B.F. Goodrich Co., to sponsor its tires, batteries, and accessories to be used by Texaco dealers.

168. Suit was brought under the Federal Trade Commission Act, 15 U.S.C. § 45 (1970), alleging an unfair method of competition based upon the leverage Texaco enjoyed over its dealers.

169. *See* *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968). The Court stated that "[w]ith the dealer's supply of gasoline, his lease on his station, and his Texaco identification subject to continuing review, we think it flies in the face of common sense to say, as Texaco asserts, that the dealer is 'perfectly free' to reject Texaco's chosen brand of TBA." *Id.* at 229. (emphasis added). *But see* *Dubuque Communications Corp., v. American Broadcasting Cos.*, 432 F. Supp. 543, 546 (N.D. Ill. 1977) (coercion not inferable from economic inequalities of parties to a contract).

170. 392 U.S. 134 (1968), *rev'g* 376 F.2d 692 (7th Cir. 1967). Midas dealers alleged the tie-in of Midas' mufflers to other products in their line. The court of appeals affirmed summary judgment for defendants based on the doctrine of *in pari delicto*, finding plaintiffs equally at fault based upon their participation in the alleged restraint. The Supreme Court reversed, finding nothing in the language of the antitrust laws which indicated that Congress intended to make the *in pari delicto* doctrine an antitrust defense. 392 U.S. at 138.

arrangement.¹⁷¹ The Third Circuit¹⁷² reversed the district court, thereby rejecting *Texaco*¹⁷³ and *Perma Life Mufflers*¹⁷⁴ as support for the position that coercion was not required in the tying context. The Supreme Court's denial of certiorari¹⁷⁵ technically reaffirmed the requirement of showing some form of coercion in a tying claim.

In the McDonald's litigation, the defendant corporation expressly required franchisees to lease the underlying premises pursuant to the franchise agreement.¹⁷⁶ This provision existed in the franchise agreement when the litigation began.¹⁷⁷ Furthermore, corporate officers testified that since 1961 McDonald's had a uniform and unremitting policy of subleasing real estate through the Franchise Realty Corporation.¹⁷⁸ In *Martino v. McDonald's System, Inc.*,¹⁷⁹ the court found that this arrangement was precisely the type where coercion could be inferred on a classwide basis.¹⁸⁰ Noting that exceptions were allowed prior to

171. *Id.* at 139-40. The Court distinguished furthering restraint of trade from willing participation in a tying agreement. Justice White concurred, stating:

When those with market power and leverage *persuade, coerce, or influence* others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of the antitrust laws, since it will deter those most likely to be responsible for organizing forbidden schemes.

Id. at 145 (White, J., concurring) (emphasis added). One could logically infer from this statement that coercion is not required under antitrust policy when "persuasion" or "influence" exists.

172. 531 F.2d 1211 (3d Cir. 1976).

173. *Id.* at 1219-21 (*Texaco* inapplicable to tying claim under § 1 of Sherman Act, 15 U.S.C. § 1 (1970)).

174. 531 F.2d at 1221-22. (plaintiffs in *Perma Life Mufflers* willingly cooperated in tie-in, yet not entered voluntarily, therefore coercion still required).

175. *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

176. *See* note 28 *supra*.

177. *See* note 31 *supra*.

178. *See* note 22 *supra*.

179. 81 F.R.D. 81 (N.D. Ill. 1979).

180. *Id.* at 89. Establishing the element of coercion on a class-wide basis presents problems for the antitrust plaintiff. In proving that class-wide coercion exists, along with other elements of the claim, the court must determine whether common questions predominate over individual questions, in accordance with Rule 23(b)(3) of the Federal Rules of Civil Procedure.

It is the burden of the plaintiff to show that the requirements of Rule 23(b)(3) are satisfied. *Baxter v. Minter*, 378 F. Supp. 1213, 1215 (D. Mass. 1974). Even where express tie-in provisions can be found within the terms of the franchise agreement, a further inquiry must be made into whether such provisions are uniform throughout the class. It is clear that the existence of substantially varying contracts among a large segment of franchisees may defeat a class action by requiring individual proof of coercion. In *Hehir v. Shell Oil Co.*, 72 F.R.D. 18 (D. Mass. 1976), for example, the court denied a motion for class certification by service station operators charging

1961, the class was limited to persons acquiring franchises thereafter.¹⁸¹ The *Martino* decision is clearly in line with precedents inferring coercion. Provisions in McDonald's agreements explicitly conditioned the grant of franchise upon the lease and license, and no exceptions were permitted.¹⁸² Yet, under the narrowest interpretation of coercion, actual force shown

oil companies with illegal tying arrangements. Plaintiffs relied upon express tie-in provisions in leases to sell only Shell gasoline to protect the trademark. The court, noting that such provisions were contained in at least 35 types of documents, found that the potential variation among the types of contractual forms was sufficient to defeat the contention that common questions predominated. "[E]ven *small variations* in contractual language can have *large antitrust consequences*." *Id.* at 21 (emphasis added). See *Bogosian v. Gulf Oil Corp.*, 62 F.R.D. 124 (E.D. Pa. 1973) (rejecting class certification which would have necessitated inspection of over 400 different contractual forms); *cf. Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443 (M.D. Ga. 1975), *appeal dismissed*, 557 F.2d 1218 (5th Cir. 1977) (40 different forms); *Abecrombie v. Lum's, Inc.*, 345 F. Supp. 387 (S.D. Fla. 1972) (12 Forms). See also *Cash v. Arctic Circle, Inc.*, 1980-1 Trade Cas. ¶ 63,094 (E.D. Wash. Aug. 28, 1979), wherein the court denied a motion for class certification because four different franchise agreements, embodied in seven different contractual forms, existed among its franchisees. A major consideration, however, was that portions of the proposed class were allowed to select alternative sources of supply when supplied by franchisor. *But see Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81, 88-89 (N.D. Ill. 1979) (class certified even though contract forms necessarily changed over years, policy remained essentially same).

Where no express tying provisions are found within the terms of a franchise agreement, some courts have rejected a motion for class certification based upon uniform business policy, finding individual proof of coercion is required. In *Halverson v. Convenient Food Mart, Inc.*, 69 F.R.D. 331 (N.D. Ill. 1974), the court certified a class as to a product tying claim, when finding existence of a product tie-in franchise agreement, but it rejected class certification as to an alleged leasing tying claim based upon business practices. The court, relying on *Ford Motor Co. v. United States*, 335 U.S. 303 (1948), held that in order to establish an illegal tying arrangement arising from business conduct, the franchisees must prove they were coerced and not merely *persuaded* into purchasing the unwanted product. Because franchisees signed both a franchise agreement and a leasing agreement, the former not mentioning the latter, the court felt the case was not one of interpreting the legal effect of one standard clause of a contract. The court noted that determining the antitrust consequences of the alleged lease tie-in required a factual determination regarding each lease, in order to establish the requisite coercion. Establishing such proof, the court declared, "will *necessarily vary* from franchise to franchise." 69 F.R.D. at 336 (emphasis added). Proof that franchisees were coerced did not establish coercion as to others, and therefore individual questions predominated.

181. 81 F.R.D. at 89.

182. In *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), the Seventh Circuit rejected the franchisor's contention that despite express contractual language imposing a tie-in, no coercion existed because the franchisees desired a complete package. *Id.* at 724-25. Defendants were charged with tying the leasing of Kiosks for photo processing to the trademark franchise. The court held that even if franchisees had desired a complete package, this would "not alter the proposition that were it not for its desire to obtain the franchise it would not have agreed to the leasing provision." *Id.* at 725. The court further noted that the franchisor "could have offered a 'complete package' without conditioning the franchise on the leas-

"outside the agreement,"¹⁸³ McDonald's may claim that franchisees voluntarily accepted the franchise package, and, therefore, no coercion existed. This argument, however, seems tenuous at best.

Fact of Damage

The final element in a tying claim is a showing of "fact of damage."¹⁸⁴ This requirement entails proof that the plaintiff had actually suffered "some injury" that was causally related to the defendant's antitrust violation.¹⁸⁵ Although section 4 of the Clayton Act¹⁸⁶ allows recovery by "any person who shall be injured," courts as a matter of policy have imposed a standing-type requirement, limiting private actions to plaintiffs whose injury is not remote, indirect, or incidental.¹⁸⁷ However, if standing exists, the court is still limited to a factual inquiry on whether plaintiff has suffered some loss as a consequence of defendant's violation.¹⁸⁸

Plaintiffs do not have to show that the violation was the sole cause of injury but only that it was a material one.¹⁸⁹ However, showing that the violation was a material cause may not be based upon speculation; the casual connection must be proved factually with a fair degree of certainty.¹⁹⁰ There is no requirement, however, that such loss be personal or unique to the plaintiff as long as he has suffered some business or property loss.

ing agreement." *Id.* (emphasis added). One alternative suggested by the court was to make the leasing arrangement optional. *Id.*

183. See note 156 and accompanying text *supra*.

184. See, e.g., *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979); *accord*, *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978).

185. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (action alleging unlawful tie-in of gas station sites to gasoline purchases); *cf.* *Abecrombie v. Lum's, Inc.*, 531 F.2d 775 (5th Cir. 1976) (allowing enforcement of fixed rentals not enforcing precise conduct made unlawful under antitrust laws).

186. 15 U.S.C. § 15 (1970).

187. *Bogus v. American Speech & Hearing Ass'n*, 582 F.2d 277 (3d Cir. 1978) (initial determination of whether plaintiff can recover); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (policy expressed under the rubric of standing); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) (business was in "target area" of defendants' illegal acts).

188. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 257-60 (1946). See also Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 Nw. U. L. Rev. 691, 706-07 (1962) (approval of "target area" principle as aiding analysis of whether direct injury is present).

189. *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1321 (5th Cir. 1976).

190. *Id.*

Proof of "fact of damage is not concerned with any policy of limiting liability."¹⁹¹

In the McDonald's litigation, proof of fact of damage in the real estate tying claim should be simplified due to the substantial markup of the leases¹⁹² afforded to individual franchisees. The court in *Martino v. McDonald's System, Inc.*¹⁹³ was faced with the claim that this markup included not only rent but also constituted consideration for the entire package of operating rights, services, and assistance received from the franchisor. The following test was promulgated for use in determining fact of damage in the context of a real estate tying claim in trademark franchising:

The plaintiffs can attempt to prove what the promotional and supervisory support provided by McDonald's is generally worth to a franchisee. If after subtracting this sum the plaintiffs can prove that the rent charged by McDonald's was still substantially higher than what the franchisee would pay to a third party, then the fact of damage requirement would be satisfied.¹⁹⁴

Pragmatically, fact of damage will usually be an evaluation of the terms of the lease in conjunction with the relevant market value. Where rentals blatantly exceed market values, a factor easily determined, courts will be more inclined to routinely find that fact of damage exists. However, where rental levels more closely approach market value, other considerations may preclude a finding of fact of damage. *Krehl v. Baskin-Robbins Ice Cream Co.*¹⁹⁵ is illustrative of the latter situation. In *Krehl*, the court denied a motion for class certification based upon an alleged tie-in of a sublease requiring a ten dollar per month "administrative surcharge."¹⁹⁶ It found that such a surcharge would not, taken by itself, assist the plaintiffs in showing fact of damage.¹⁹⁷ The court stated that the intermediate step in showing that plaintiff was damaged was to determine whether the franchisee could have obtained the same or an equivalent site at the rate at which the franchisor secured the prime lease.¹⁹⁸ It was noted that "the size and reputation of a tenant is a *vitally important factor* in determining the terms of a commercial lease."¹⁹⁹ Thus, *Krehl* is a forewarning that courts should look beyond the

191. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

192. *See* note 26 *supra*.

193. 81 F.R.D. 81 (N.D. Ill. 1979).

194. *Id.* at 91-92.

195. 78 F.R.D. 108 (C.D. Cal. 1978).

196. *Id.* at 121.

197. *Id.* at 120.

198. *Id.* at 120-21.

199. *Id.* at 121.

terms of a lease and evaluate the economic reality of doing business on a large scale basis. Nevertheless, since the leases offered by McDonald's exceeded market value by 30 per cent or more, a finding of fact of damage, at least to individual franchisees,²⁰⁰ is wholly warranted.

CONCLUSION

The role of the law of tying agreements in the trademark franchise context should be clearly delineated by final disposition of the McDonald's litigation. The framework of McDonald's franchise system is unique in several ways. Because McDonald's expressly provides for the imposition of a leasehold agreement within its franchise agreement,²⁰¹ coercion, even in the strictest sense of the term, can be readily implied.²⁰² Furthermore, because of the tremendous amount of business generated by the Franchise Realty Corporation, it is immediately apparent that a "not insubstantial amount of commerce" has been affected in the tied product market.²⁰³ In addition, proof of fact of damage can be inferred from the substantial markup in the realty.²⁰⁴

The elements of substantial economic power and "two separate products" pose more significant problems for the McDonald's franchisees. Although it is not clear that courts have stopped presuming sufficient economic power from the ownership of a trademark,²⁰⁵ such a presumption is not supported by the *Fortner II* decision.²⁰⁶ A trademark in itself, unlike a patent or copyright, does not necessarily impart upon the seller *uniqueness per se* in the product market needed to provide the economic power to impose non-competitive prices. As such, small franchisors may not have sufficient economic power under *Fortner*. However, it is difficult to believe that McDonald's, the un-

200. A potentially recurring problem in class action tying claims is that proof of fact of damage will be so individualized and complex that individual questions will predominate under Rule 23(b)(3) of the Federal Rules of Civil Procedure. See note 180 *supra*. In *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979), the court granted plaintiff's motion for class certification, finding that the alleged markup was sufficient to obviate the need for individual proof, yet the court in *Kypta v. McDonald's Corp.*, 1979-2 Trade Cas. ¶ 62,827 (S.D. Fla. Aug. 2, 1977), found that despite the apparent markup, the class action would nevertheless be unmanageable.

201. See note 28 *supra*.

202. See note 154 and accompanying text *supra*.

203. See text accompanying note 145 *supra*. See notes 136-145 and accompanying text *supra*.

204. See note 26 *supra*. See notes 184-200 and accompanying text *supra*.

205. See note 119 *supra*. See notes 120-25 and accompanying text *supra*.

206. *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977). See note 133 *supra*.

disputed leader in fast-food franchising, does not possess sufficient power over pricing to at least influence some buyers to accept the tied product. As such, the required showing of sufficient economic power should be established.

The ultimate question posed by the McDonald's litigation is whether to adopt a black letter rule that a franchise necessarily includes a "single combination package," regardless of the type of items comprising the package.²⁰⁷ Finding that a trademark constitutes a separable product as a matter of law is unwarranted in the franchise setting. The trademark simply represents the uniform quality of the underlying product, and where the alleged tied-item is the distinctive underlying basis of the trademark, it is unrealistic to assume that a franchisee would want or anticipate anything other than the combination package. Competition is not foreclosed in any manner distinguishable from other market situations. Therefore, a single product should be found to exist as a matter of law.²⁰⁸ Where products allegedly tied to the trademark are related thereto but seemingly accessible on the competitive market, the added element of justification, and its requisite burden, is placed upon the franchisor.²⁰⁹ However, where a product is wholly accessible on the competitive market,²¹⁰ but only required through the franchisor's power to impose non-competitive prices, no basis

207. The argument that such a "combination package" is more convenient in that a franchisee may invest in a business enterprise in which all components are marketed together in one inseparable package was, even if shown to be true, found insufficient to justify a tying arrangement. *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097, *hearing denied*, 430 U.S. 960 (1977).

208. In *Kugler v. AAMCO Automatic Transmissions, Inc.*, 460 F.2d 1214 (8th Cir. 1972), *aff'g* 337 F. Supp. 872 (D. Minn. 1971), the Eighth Circuit affirmed summary judgment for a franchisor who allegedly tied national advertising sales to the right to use the AAMCO trade name. The court approvingly cited the district court's determination that "[a]dvertising was not tied to the purchase of the license; it was the essence of the license." *Id.* at 1215. Because the court agreed that the franchisee paid for AAMCO's good name and the business resulting from being known on a national scale, the court determined that "[f]or a stated consideration, AAMCO agreed to provide, in a single package, a means and method of operating and merchandising a transmission repair shop." *Id.* (emphasis added). While affirming, the court noted that summary judgment should be used sparingly in complex antitrust litigation. *Compare* this statement with cases cited in note 99 *supra*.

209. *See* notes 61-64 and accompanying text *supra*.

210. *See* *Esposito v. Mister Softee, Inc.*, 1980-1 Trade Cas. ¶ 63,089 (E.D.N.Y. Dec. 14, 1979). The court, following *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), held that paper goods and novelties not manufactured by the defendant, wholly accessible from outside dealers, and which the public had no reason to connect to the trademark, constituted an illegal tie-in under the Sherman Act. *See also* text accompanying notes 81-88 *supra*.

exists for distinguishing the arrangement from traditional tying-tied product analysis. The McDonald's leasehold requirement fits squarely within this latter category. Only a finding that franchising methods enjoy general immunity from traditional tying restrictions should insulate the corporation from liability.

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