Tying Arrangement With Trademark as the Tying Item Is Not a Per Se Violation of the Antitrust Laws-*Susser v. Carvel Corp.*

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Several independent franchised soft ice-cream outlets brought suit for treble damages against Carvel Corporation, the franchising company, alleging that the contract between them constituted an illegal tying arrangement[1] in violation of section 3 of the Clayton Act[2] and sections 1 and 2 of the Sherman Act.[3] The contract bound the dealers to purchase from Carvel-appointed suppliers all commodities sold as part of the retail dairy composite. Plaintiffs stipulated that they would rely on per se violations at trial. The district court found that the plaintiffs had failed to show the alleged violations and, in any case, the defendant had proved its defense that the arrangements were necessary to protect the integrity of the product.[4] On appeal, *held,* affirmed. A trademark tie-in, to be per se illegal, must meet the same tests applied in a patent tie-in situation: there must be both market dominance and the affecting of a substantial amount of commerce; here, the plaintiffs had failed to establish either element. One judge dissented in part on the ground that patents and trademarks are sufficiently similar to justify the same presumption of existence of sufficient economic power in the trademark situation as is permitted in the patent setting, leaving only the requirement of affecting a substantial amount of commerce, which he felt was met here. The dissent also disagreed with the district court's finding that the defendant had adequately proved

1. Plaintiffs also alleged that the defendant-supplier contracts were invalid, that the defendant engaged in a price-fixing scheme, and that the contract constituted an illegal exclusive dealing franchise. The first two charges were summarily rejected by the court. The exclusive dealing arrangement was found to be justified by the necessity of protecting the good will of the trademark.

The possibility of construing the patents and patented articles as part of the tying item in the principal case will not be considered in this note.

2. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

3. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958). Both the Sherman and Clayton Acts have been interpreted as prohibiting tying arrangements, with certain qualifications. The Sherman Act is applicable in all tying-arrangement cases, while the Clayton Act is restricted to tie-ins relating to "goods, wares, merchandise, machinery, supplies or other commodities . . . ." 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). Whether the court in the principal case included trademarks within the purview of the latter statute was not stated, but the dissent seemed to assume that the Clayton Act provided the basis for suit. Principal case at 513. Under the holding in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), the legal difference in statutory categories would appear to be immaterial, as emphasized by Mr. Justice Harlan's dissent therein. *Id.* at 13-16 (dissenting opinion).

4. Susser v. Carvel Corp., 206 F. Supp. 636 (S.D.N.Y. 1962). The district court also found that a previous contract between the parties was invalid, but this ruling was not appealed.

that its arrangement was justified to protect the good will of the product. *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. granted,* 33 U.S.L. WEEK 3151 (U.S. Oct. 27, 1964) (No. 355).

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[5] These agreements almost invariably result in a restraint of trade as the buyer is foreclosed from dealing with other potential suppliers of the tied product and those suppliers are denied access to the market.[6] However, a tying arrangement in itself is not illegal; it becomes a per se violation only when it is demonstrated that the defendant has sufficient economic power with respect to the tying product to force the sale of the tied product on the buyer[7] and that a not insubstantial amount of commerce is affected.[8] The courts have always evinced

5. Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958). The tied item must be separate and distinct from the tying item. Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 655 (1st Cir.), *cert. denied,* 368 U.S. 931 (1961).

6. United States v. Loew's Inc., 371 U.S. 38, 45 (1962): "[T]hey [tying arrangements] may force buyers into giving up the purchase of substitutes for the tied product, . . . and they may destroy the free access of competing suppliers of the tied product to the consuming market . . . ." Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949): Tie-ins "serve hardly any purpose beyond the suppression of competition." See also Lessig v. Tidewater Oil Co., 327 F.2d 459, 469-70 (9th Cir. 1964); Bowman, *Tying Arrangements and the Leverage Problem,* 67 YALE L.J. 19 (1957); Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act,* 65 HARV. L. REV. 913, 944 (1952); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 HARV. L. REV. 50 (1958).

7. This requirement is also denominated "market dominance." The burden imposed on the plaintiff to show this element may be lessened by judicial inference of "sufficient economic power" from other facts such as product uniqueness or consumer appeal. United States v. Loew's Inc., *supra* note 6. The majority in *Susser* utilized the "market dominance" and "market control" terminology but did not appear to consider the alternative of inferring economic power from the existence of the trademark. The court's reliance on Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), to validate these contracts would appear to be misplaced. In *Northern Pacific,* the Court held that from the nature of the commodity involved (land), the requisite economic power could be presumed under the Sherman Act, previously interpreted to require a more stringent standard of proof than a proceeding under § 3 of the Clayton Act. It has been implied that the fact of the tying arrangement by itself is enough to show the sufficient economic power over the tying item. Lessig v. Tidewater Oil Co., *supra* note 6, at 470; Lockhart & Sacks, *supra* note 6, at 945; Turner, *supra* note 6, at 64. There are many illustrations of the lack of clarity as to what is meant by the term "market dominance." *Compare* Northern Pac. Ry. v. United States, *supra, with* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). *Compare* United States v. Loew's Inc., *supra* note 6, *with* White Motor Co. v. United States, 372 U.S. 253 (1963).

8. This criterion would seem to be easily satisfied under the dicta in Brown Shoe Co. v. United States, 370 U.S. 294, 329-30 (1962), concerning the amount of commerce that must be shown to be affected in tying arrangements: "Thus, for example, if a particular vertical arrangement, considered under § 3 [of the Clayton Act], appears to be a limited term exclusive-dealing contract, the market foreclosure must generally be significantly greater than if the arrangement is a tying contract . . . . Because such an arrangement [tying] is inherently anticompetitive, we have held that its use by an

a marked hostility toward tying arrangements,[9] but recent decisions have cast doubts on the applicability of the per se rule.[10] The most recent Supreme Court dictum on the subject, that tie-ins "may fall in that category [of per se illegality], though not necessarily so,"[11] sheds little light on the question, and the overall area of the per se illegality of tying clauses is not well defined.[12]

It is clear that a tying arrangement wherein the tying item is patented will be held to be a per se violation of the patent laws under the doctrine of patent misuse.[13] The antitrust laws have supplemented the patent misuse doctrine in preventing the patentee from extending his patent monopoly.[14] The rationale for the strict application of the antitrust laws in this context is that the crucial economic power can be presumed when the tying item is patented, so that only the amount of commerce affected need be demonstrated.[15] The *Attorney General's Report*[16] distinguished between patents involving broad and basic grants to the patentee and those of a more limited character, recommending that only tie-ins with

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established company is likely 'substantially to lessen competition' although only a relatively small amount of commerce is affected." However, the question of whether this test was met also caused disagreement in *Susser*. Principal case at 519 and 514 (dissenting opinion). It is possible that the fulfillment of either of the two requirements will suffice to show illegality. Lessig v. Tidewater Oil Co., *supra* note 6, at 469. Both tests are intended to be methods of determining whether the seller has the power to force the buyer to take the tied product along with the tying product. The per se rule has evolved in the belief that when a substantial amount of commerce is involved in the tied product, this power of coercion can be inferred, thereby saving the litigants and the court the trouble of much unnecessary proof. United States v. Loew's Inc., *supra* note 6, at 45 n.4; Northern Pac. Ry. v. United States, *supra* note 7, at 5. For an analysis of the function of the per se rule in eliminating superfluous proof, see Stedman, *Tying Arrangements*, 22 A.B.A. ANTITRUST SECTION 64 (1964).

9. See, *e.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947); International Business Machs. Corp. v. United States, 298 U.S. 131 (1936); cases and authorities cited notes 6-8 *supra*.

10. See, *e.g.*, White Motor Co. v. United States, 372 U.S. 253 (1963). The emerging business justification defense has further confused the issue. See cases cited in notes 19-25 *infra* and accompanying text. The courts, when enunciating the per se rule, almost invariably use some degree of qualifying language. The *White Motor* decision, while containing only dicta concerning tie-ins, can be interpreted to be a somewhat hesitant and unsure return to the "rule of reason." For comparisons of the rule of reason and per se approaches, see generally Lockhart & Sacks, *supra* note 6; Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23 (1964); Paley, *Antitrust Pitfalls in Exclusive Dealing—Recent Developments Under the Sherman, Clayton and FTC Acts*, 37 NOTRE DAME LAW. 499 (1962); Turner, *supra* note 6; Note, 75 HARV. L. REV. 795 (1962); 31 GEO. WASH. L. REV. 1038 (1963).

11. White Motor Co. v. United States, *supra* note 10, at 262.

12. The semantic and procedural uncertainty surrounding the term "per se violation" is too protracted to be fully treated here. For a partial discussion, see text accompanying notes 45-48 *infra*.

13. See, *e.g.*, Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942).

14. See, *e.g.*, United States v. Loew's Inc., 371 U.S. 38 (1962); Morton Salt Co. v. Suppiger Co., *supra* note 13.

15. See United States v. Loew's Inc., *supra* note 14, at 45.

16. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. (1955).

the former as the tying article be per se illegal and that a broader economic inquiry be instituted to determine the actual power possessed by the patentee.[17] The courts have occasionally mentioned this distinction[18] but have not affirmatively accepted it. Currently, it appears reasonable to conclude that any patent owner is running a serious risk of antitrust illegality in addition to patent misuse if he imposes a tying clause on a licensee, especially if the patent is an invention for which there is no reasonably interchangeable alternative.

When the elements of the per se violation of the antitrust laws have been established, the common trend of judicial antitrust theory admits no possibility of any defense to the proved per se offense in either a patent or non-patent tie-in. But lower courts have taken cognizance of certain situations when the deleterious effects usually assumed to be inherent in tie-ins are outweighed by the desirable aspects of that particular tying arrangement.[19] This still limited area of the "business justification" defense consists of proof that the defendant had an eminently justifiable and compelling reason for imposing the arrangement, namely, protecting the good will or "integrity" of the product.[20] The defense has been upheld in instances when an infant company was attempting to enter the market,[21] when the tying product would function correctly only if used with the tied product,[22] and when specifications for the

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17. *Id.* at 238: "[T]he patentee should be permitted to show that in the entire factual setting . . . the patent does not create the market power requisite to illegality of the tying clause." Professor Handler took cognizance of the congressional criticism of the patents chapter and defended the tying arrangement procedure. Handler, *An Examination of the Chapter on Patent Antitrust Problems in Attorney General's Committee Report*, 1 ANTITRUST BULL. 157, 159-60 (1955). *Cf.* Wood, *Premises and Scope of the Patent Chapter*, 104 U. PA. L. REV. 243 (1955); 24 GEO. WASH. L. REV. 122, 132 (1955).

18. See, *e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 10 n.8 (1958).

19. See, *e.g.*, Baker v. Simmons Co., 307 F.2d 458 (1st Cir. 1962); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

20. For an extensive treatment of the defense, see Comment, *Tying Arrangements Under the Antitrust Laws: The "Integrity of the Product" Defense*, 62 MICH. L. REV. 1413 (1964). See generally Note, 3 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 317 (1962); Note, 49 CALIF. L. REV. 746 (1961); Note, 70 YALE L.J. 804 (1961); Note, 72 YALE L.J. 1171 (1963). There seems to be some uncertainty as to whether the proved defense justifies the otherwise illegal tie-in or whether it renders the tie-in not a violation at all. *Compare* Baker v. Simmons Co., *supra* note 19 *and* Switzer Bros. v. Locklin, 297 F.2d 39 (7th Cir. 1961), *with* United States v. Jerrold Electronics Corp., *supra* note 19 *and* Dehydrating Process Co. v. A. O. Smith Corp., *supra* note 19. As there would be no need for an affirmative defense unless a violation has occurred, the former would appear to be the better view.

21. United States v. Jerrold Electronics Corp., *supra* note 19. (But it is not sanctioned after the company is established in the market.)

22. Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961).

tied product would be so detailed as to be impracticable or impossible to satisfy by a competitor.[23] The Supreme Court, while never fully defining the circumstances in which this defense is allowable, has frequently used language permitting the inference that some tie-ins are excusable,[24] but it has also stated that tying arrangements, if in a context of sufficient economic power, are illegal "'without elaborate inquiry as to . . . the business excuse for their use.'"[25] This latter dictum notwithstanding, it would appear that recognition of the business justification defense would tend to eliminate much of the hardship that a harsh application of the per se rule could conceivably engender in the area of tying agreements.

In *Susser*, the basic issue was whether the per se rule should be applied to a tie-in utilizing a trademark, rather than a patent, as the tying item. The emergence of the business justification defense in patent and other tie-ins might evidence a trend away from the per se rule and argue against any extension of it into the area of trademark tie-ins. Often when expounding the rule of tie-in per se illegality, the Supreme Court has included patent and copyright examples and, whether intentionally or otherwise, has failed to mention trademark examples.[26] The Court has also indicated, in a different antitrust context, that significant differences exist between patents and trademarks.[27] On the other hand, Mr. Justice Goldberg broadly stated in *United States v. Loew's Inc.*,[28] that, "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's *desirability to consumers or from uniqueness in its attributes*."[29] Such language would seem to support an argument that, since some trademarks are unique or highly distinctive in their attributes because they are prominent criteria by which the consumer measures the desirability of the product, sufficient economic power is inherent in the trademark and the tie-ins

23. Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949). In *Susser*, the majority accepted the findings of the district court that specifications would be impracticable to satisfy by a competitor. *But cf.* Engbrecht v. Dairy Queen Co., 203 F. Supp. 714 (D. Kan. 1962). The dissent found the evidence on this point to be unsatisfactory and inconclusive. Principal case at 515 (dissenting opinion).

24. See authorities cited note 20 *supra*.

25. United States v. Loew's Inc., 371 U.S. 38, 51 (1962).

26. *E.g., id.* at 45.

27. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 392-93 (1956). *But cf.* CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 62 (7th ed. 1956). Some writers believe that antitrust implications are rampant in the trademark context, as a result of judicial protection. Borchardt, *Are Trademarks an Antitrust Problem?*, 31 GEO. L.J. 245 (1943); Diggins, *Trade-Marks and Restraints of Trade*, 32 GEO. L.J. 113 (1944); Timberg, *Trade-Marks, Monopoly, and the Restraint of Competition*, 14 LAW & CONTEMP. PROB. 323 (1949). Others stress the competitive element and conclude that trademark protection does not create monopoly problems. Oppenheim, *The Public Interest in Legal Protection of Industrial and Intellectual Property*, 40 TRADEMARK REP. 613 (1950); Comment, 29 U. CHI. L. REV. 371, 379 (1962).

28. 371 U.S. 38 (1962).

29. *Id.* at 45. (Emphasis added.)

should be considered per se illegal whenever a substantial amount of commerce is affected. But generally overlooked in the sparse literature[30] dealing with the problem of the per se rule as applied to trademark tie-ins is the significance of this aspect of "uniqueness." A patent is unique or at least novel, by definition, but any quality of uniqueness or distinctiveness inherent in a trademark is preponderantly derived from its psychic impact on the consumer's mind.[31] Depending on the renown of the mark, this impact could vary to a great degree, although the generalized argument that the owner automatically possesses real market power would seem realistically to have less force than when a patent is the tying item.[32]

Furthermore, the trademark tying arrangement problem is complicated by the Lanham Act,[33] the federal law governing registration of trademarks. Under this act, the trademark owner is under a duty to ensure that the licensee of the mark maintains the quality standards previously characterizing the product.[34] The contention is thereby raised, as it was in *Susser*, that because of this duty to maintain quality standards by controlling the licensee's performance, the licensor should not be subject to the antitrust laws when they obstruct compliance with this provision of the Lanham Act. Although the Lanham Act does not purport to deal directly with anticompetitive effects, it would appear that the argument for an implied partial antitrust exemption neglects to take into account the purposes and prohibitions of the act. Section 33 (b) (7) [35] specifically allows, as a defense in an infringement action, the fact that plaintiff violated the antitrust laws. While this section has been severely criticized as having no bearing on infringement litigation,[36]

30. For a discussion of trademarks in an antitrust context generally, see Schniderman, *Trade-Mark Licensing—A Saga of Fantasy and Fact*, 14 LAW & CONTEMP. PROB. 248, 259-68 (1949); Timberg, *supra* note 27; Comment, 29 U. CHI. L. REV. 371 (1962); Note, 72 YALE L.J. 1171 (1963).

31. In the principal case, the defendant's testimony tended to establish the substantial monetary value inherent in the Carvel name. For the value of trademarks in soft ice-cream franchises generally, see Engbrecht v. Dairy Queen Co., 203 F. Supp. 714 (D. Kan. 1962); Ar-Tik Systems, Inc. v. McCullough, 133 F. Supp. 807 (S.D. Ill. 1955); Medd v. Boyd Wagner, Inc., 132 F. Supp. 399 (N.D. Ohio 1955). The "source" and the "guaranty" theories are the two major conflicting rationales of the nature and function of trademarks. For an exposition and analysis of the comparative effects of the application of the two theories, see 3 CALLMANN, UNFAIR COMPETITION AND TRADEMARKS 976-81 (2d ed. 1950); Timberg, *supra* note 27.

32. See Lockhart & Sacks, *supra* note 6, at 949 n.106.

33. 60 Stat. 427 (1946), as amended, 15 U.S.C. §§ 1051-1127 (1958), as amended, 15 U.S.C. §§ 1051-1127 (Supp. V, 1964).

34. See E. I. du Pont de Nemours & Co. v. Celanese Corp. of America, 167 F.2d 484 (C.C.P.A. 1948); Arthur Murray, Inc. v. Horst, 110 F. Supp. 678 (D. Mass. 1953); Morse-Starrett Prod. Co. v. Steccone, 86 F. Supp. 796 (N.D. Cal. 1949); Schniderman, *supra* note 30, at 264-67.

35. Section 33(b)(7), 60 Stat. 439 (1946), 15 U.S.C. § 1115(b)(7) (1958).

36. See ROBERT, THE NEW TRADE-MARK MANUAL 294-97 (1947); Rogers, *The Lanham Act and the Social Function of Trademarks*, 14 LAW & CONTEMP. PROB. 173

the intent of the legislators to ensure that the trademark licensing provisions would not supersede antitrust proscriptions seems to be clear.[37] Many cases contain generalizations to the effect that the Lanham Act provisions do not condone antitrust violations.[38] Nevertheless, several courts have recently leaned toward the position that the protection of the owner's good will and the duty of quality control take precedence over violations of the Sherman and Clayton Acts:[39] the role of the Lanham Act in requiring quality control is, at least, a relevant consideration in deciding whether per se illegality is appropriate in this area.

Decisions involving situations somewhat analogous to that in *Susser* have reached different results, seemingly because of two conflicting considerations: the need to alleviate the anticompetitive effects inherent in tying arrangements on the one hand and sympathy for the trademark licensor's attempt to preserve the good name of his product and, not incidentally, his financial interest therein on the other hand. In *Baker v. Simmons Co.*,[40] the court stated that tying the use by motels and hotels of its sign carrying both the name of the motel or hotel and the trademark name of the mattress which it manufactured to the purchase of its mattresses by the motel or hotel was not an antitrust violation because it was justified by business reasons. The court in *Anchor Serum Co. v. FTC*,[41] a case that involved a franchise arrangement resembling that

(1949); *but cf.* Ooms & Frost, *Incontestability*, 14 LAW & CONTEMP. PROB. 220, 227 (1949). The ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 260 (1955) recommended the repeal of § 33(b)(7) and the enactment of the following amendment to § 46(a): "The benefit of incontestability under Section 15 of this Act shall not be deemed to affect the jurisdiction of any Government agency to institute proceedings under the antitrust laws of the United States against the owner of such registered mark in any case in which the mark is alleged to have been used or is being used as an instrumentality of violation of the antitrust laws."

37. See 92 CONG. REC. 7636, 7872-74 (1946) (remarks of Senator O'Mahoney). "But it is of such great importance to the public of the United States that restraints of trade shall not be permitted, that the Senate insered [*sic*] this amendment . . . ." *Id.* at 7873. See also H.R. REP. No. 219, 79th Cong., 1st Sess. 3 (1945); S. REP. No. 1333, 79th Cong., 2d Sess. 3 (1946); Timberg, *supra* note 27, at 358-60. For the view of the Department of Justice, see *Hearings on H.R. 82 Before a Subcommittee of the Senate Committee on Patents*, 78th Cong., 2d Sess. 58-71 (1944).

38. See, *e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Switzer Bros. v. Locklin, 297 F.2d 39, 46 (7th Cir. 1961).

39. Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962); Baker v. Simmons Co., 307 F.2d 458 (1st Cir. 1962). These holdings, however, do not seem to be within the permissible area contemplated by the Court in Standard Oil Co. v. United States, 337 U.S. 293 (1949), where it was stipulated that "the only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute [for the tied product] would be so detailed that they could not practicably be supplied." *Id.* at 306. See Note, 72 YALE L.J. 1171, 1173 (1963). See generally Schniderman, *supra* note 30; Comment, 29 U. CHI. L. REV. 371 (1962).

40. *Supra* note 39.

41. 217 F.2d 867 (7th Cir. 1954).

in *Susser*, found an illegal requirements contract[42] instead of a tying arrangement and was vehement in its denunciation of the defendant's coercive use of the "Anchor" tradename. In *Denison Mattress Factory v. Spring-Air Co.*,[43] the court also found a requirements contract but held that it was justified to protect the mark and indicated that a tie-in could be used for the same purpose. *Switzer Bros. v. Locklin*[44] involved materials tied to both trademark and patent licenses, and the court found this to be a per se violation, citing the Lanham Act proscriptions.

An analysis of these cases indicates that the conflict between opposing policy goals has engendered a certain degree of confusion regarding the term "per se violation" as used in the trademark tie-in context. In antitrust litigation the term has come to mean the demonstration by plaintiff of the requisite elements of an offense that usually involves a particularly pernicious effect on competition.[45] The difficulty has arisen when a real and justifiable need to employ the tie-in is alleged.[46] The courts, when confronted with the elements they deem sufficient to establish a per se violation but having a stronger desire to exonerate the owner who is trying to protect his interest, indiscriminately consider both evidence proving the violation and evidence tending to show that the tie-in is justifiable; and, while tacitly admitting that they are allowing a defense to a "per se" violation, they hold instead that no violation has occurred.[47] While this method frequently allows the court to reach a desirable result in the case before it, the overall consequence has been to confuse the determination of which issue is being proved and to mire the proceedings in a welter of statistics, whose evidential relevance is questionable. An important function of the so-called per se rule is to exclude the voluminous and often inconclusive proof of sufficient economic power (market dominance);[48] however, the additional precept that no defense will be heard after the elements of the violation have been shown does not appear necessarily to follow. If courts are unwilling to accept the view that trademarks themselves

42. It is frequently difficult to distinguish between tying arrangements, exclusive dealing arrangements, and requirements contracts. Lockhart & Sacks, *supra* note 6, at 915, 920 n.23. The determination is essential since the last two categories demand a more stringent standard of proof to establish a violation. *Compare* Standard Oil Co. v. United States, 337 U.S. 293 (1949), *with* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961). Full-line forcing, a type of tie-in, requires the purchaser to handle the seller's complete line of products. See generally Burstein, *A Theory of Full-Line Forcing*, 55 Nw. U.L. Rev. 62 (1960).

43. 308 F.2d 403 (5th Cir. 1962).

44. 297 F.2d 39 (7th Cir. 1961).

45. See, *e.g.*, authorities cited note 6 *supra*.

46. For illustrations of the assertion of this defense in its various forms, see the cases cited notes 40, 41, 43, and 44 *supra*.

47. See, *e.g.*, cases cited note 19 *supra*.

48. See cases and authorities cited notes 7-8 *supra*.

do not necessarily indicate sufficient economic power, the situation would at least be improved if an approach were used that employed the per se rule only to the extent of facilitating prima facie proof of plaintiff's case. The burden would then fall on the defendant to show that circumstances justify the use of the particular arrangement. In other words, it should be clear to the courts that the approach is one of "prima facie" illegality rather than "per se" illegality as the latter term is traditionally used in antitrust context.

Susser presents the Supreme Court with the opportunity to elucidate several indistinct areas of antitrust law: namely, the applicability and scope of the per se rule in tying arrangements, the nature of trademarks in antitrust contexts (including the effect of the Lanham Act in antitrust litigation), and the extent to which the good will or integrity of the product defense is allowable in a tie-in situation. If business justification achieves status as a valid defense in an antitrust action, the unique attributes of many trademarks, the proscriptions of the Lanham Act against antitrust illegality, and the general legislative and judicial antipathy toward tie-ins would seem to dictate the extension of the prima facie illegality rule to cover tying clauses involving unique trademarks when a substantial amount of commerce is affected. On the other hand, if the presumption of illegality is treated as tantamount to a per se violation as it has been in the patent cases and no business justification defense is permitted, the important element of quality control, so necessary to a franchise system such as Carvel, will be nearly impossible to maintain.