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LePage's, *Cascade Health Solutions*, and a Bundle of Confusion: What Is a Discounter To Do?

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DISCOUNTS ON BUNDLED PRODUCTS are commonplace. Consumers value and often expect discounts when purchasing a bundle of products. Sellers use bundled product discounts to compete effectively and maximize sales. As one court has observed, "The world's largest corporations offer bundled discounts as their product lines expand with the convergence of industries . . . [and] a street corner vendor with a food cart—a merchant with limited capital—might offer a discount to a customer who buys a drink and potato chips to complement a hot dog."[1] Despite the ubiquity of the practice, however, the law in this area is more than just unsettled—it is a mess. Sellers, customers, and antitrust counselors all hope for improvement, and it will surely come, but it is unclear how long we will have to wait.

The Third Circuit's en banc decision in *LePage's Inc. v. 3M*[2] set the stage. The *LePage's* decision was the first appellate decision to recognize formally a Sherman Act Section 2 claim for bundled discounting even if the discounted prices in question are above any reasonable measure of cost. Having opened the door to potential Section 2 claims against discounters, however, the decision provides little guidance that sellers, antitrust counselors, or courts could use to differentiate procompetitive bundled discounting from unlawful, exclusionary bundled discounting.

The *LePage's* decision has been widely criticized and has led many to recommend alternatives. Unfortunately, no consensus has yet coalesced around a clear alternative standard.[3] The Antitrust Modernization Commission (AMC) recommended an alternative three-part test with a below-cost pricing screen, a requirement of proof of likely recoupment, and a rule of reason analysis to determine whether bundled discounts violate Section 2.[4] The Ninth Circuit in *Cascade Health Solutions v. PeaceHealth*[5] elevated the below-cost price screen of the AMC's recommended three-part test to a standard for legality rather than just a screen, and rejected the other two elements of the AMC recommendation. And the U.S. antitrust enforcement agencies have not contributed to clarity in this area. The Department of Justice Antitrust Division and the Federal Trade Commission failed to agree on a joint report regarding enforcement of Section 2 (which, had they agreed, likely would have included a discussion of product bundle discounts). DOJ issued its own Report unilaterally and adopted the material points of the AMC recommendation,[6] only to withdraw and disavow the report a mere seven months later.[7]

Against this backdrop of multiple conflicting legal standards and shifting enforcement dynamics, what may a discounter do? One thing is clear—regardless of whether the applicable test is *LePage's*, a predatory pricing analysis, *Cascade Health Solutions*, the AMC recommendation, or the disavowed DOJ test, firms without market power with respect to any of the products in a bundle likely need not worry. But firms with market power do not have it so easy. Any firm that arguably possesses market power in the relevant market for at least one of the bundled products is faced with the difficult choice of whether and how to discount the bundle in the face of legal standards under which that discounting just might violate the antitrust laws.

What Is Bundled Discounting and Why Does It Matter?

Product bundle discounts, often referred to generally as "bundled discounts" or even just "bundling," are a pricing strategy that sellers often use to offer consumers an attractive package of products and to increase consumption of certain products in the bundle beyond the level that likely would occur if products were priced individually.[8] Both sellers and consumers expect and rely upon bundled discounts, and they are commonplace in markets of all sorts.

The economic and antitrust literature regarding bundled discounts leaves a generally but not universally favorable impression of the actual impact of bundled discounts on competition.[9] As a matter of theory, the literature concludes that bundled discounts are often procompetitive or competitively neutral. For buyers, discounts on product bundles may represent true discounts that reduce prices below the otherwise prevailing unbundled prices and provide a measure of customer convenience. For sellers, bundled discounts can in some instances provide efficiencies, such as reduced transaction costs and improved economies of scale.[10] Moreover, bundled discounts are tools sellers often use to increase sales by inducing customers to increase consumption of one of the bundled products or to try new products.[11] On the other hand, substantial literature acknowledges and discusses the

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potential for bundled discounting to act as an exclusionary tool in some circumstances.[12]

The economic and competitive significance of bundled discounts means that the ideal antitrust standard for evaluating bundled discounts should, to the greatest extent possible, differentiate between the good and the bad[13] while providing clear guidance to businesses and avoiding undue litigation cost. No rule will be perfect in application, however. Therefore, the development of the applicable legal standard raises a policy question of whether the legal rule should tend to err in favor of or against bundled discounting.[14]

Bundled discounts share certain common elements with other vertical practices, such as exclusive dealing, tying, and predatory pricing, and it is tempting to lean heavily on the body of law that has developed over time for analyzing those restraints. The established antitrust and economic literature applicable to those restraints is only modestly helpful, however, because bundled discounts differ from other vertical restraints in fundamental and important ways and therefore present their own unique antitrust challenges:

- First and foremost, bundled discounts are discounts, though there is some legitimate debate about whether bundled discounts will always result in lower net prices to consumers because this determination would require a careful comparison of the price of a bundle (with discount) against the sum of the prices for the individual products in the absence of the bundle.[15]
- Bundled discounts differ from exclusive dealing arrangements because there is no agreement that the consumer would deal exclusively with the relevant seller, though a particularly attractive bundled discount may cause a consumer to choose to purchase exclusively from a discounter.
- Bundled discounts may differ from tying arrangements because the discount does not necessarily imply or require that the consumer purchase all of the items in the bundle. Assuming the products are sold individually, there may be no coercion at all—though it certainly is possible that a bundled discount could be so substantial as to constitute tying by economic coercion even in the absence of an express requirement that the customer purchase the entire bundle.[16]
- Bundled discounts differ from traditional predatory pricing simply because of the multi-product nature of the bundle. A seller of a multi-product bundle has the flexibility to spread the bundled discount across all the products in the bundle, whereas a single product seller must allocate any discount to its only product. This flexibility means that a seller of a product bundle potentially could exclude single product competitors by discounting the bundle to a net price that is above the seller's aggregate incremental cost for the entire bundle but provides a bundled discount that no equally efficient single product competitor can match when pricing its individual product.

The choice of analogy matters greatly to the overall legal analysis of bundled discounts. Those who believe that predatory pricing is the conduct most similar to bundled discounts generally advocate a legal standard that at least begins with an analysis of whether the seller is offering the bundle, or any product in the bundle, at a price that is below cost. Those who believe that bundled discounts are just one of many types of potential exclusionary conduct generally advocate a legal standard focused on the potential for exclusion of competitors even if there is no contention of below cost pricing.

Aside from theoretical discussion in the academic literature of the exclusionary potential of bundled discounts, there are relatively few documented instances of truly anticompetitive bundled discounts. Moreover, it is not entirely clear that anticompetitive effects are likely to occur in the absence of relatively specific market conditions. The legal standard for evaluating bundled discounts under the antitrust laws should take all of this into account to provide clear guidance to sellers, antitrust counselors and the courts. Unfortunately, we have a long way to go.

Too Many Standards, Not Enough Clarity

There are at least four alternative legal standards for assessing whether a particular bundled discount violates Section 2. Two of the alternatives—the Third Circuit's test first described in *LePage's* and the Ninth Circuit's test first described in *Cascade Health Solutions*—are controlling law in the relevant circuits.

The Third Circuit's "Exclusionary Effects" Test. In *LePage's*, the plaintiff charged that 3M had used a bundled rebate program to acquire and maintain a monopoly in the market for transparent tape (which many retail customers associate simply with 3M's famous Scotch™ brand tape).[17] 3M's challenged program provided rebates to customers who met specific goals for the growth of their purchases from 3M across multiple product categories and product lines. LePage's, which manufactured only private label transparent tape, argued that the rebate program caused customers to shift purchases of private label transparent tape away from LePage's and to 3M. Because of the structure of 3M's rebate program, LePage's alleged (and 3M did not dispute) that a customer who opted to purchase transparent tape from LePage's would have faced the loss of 3M's rebate across all of the 3M product lines that were part of the program and not just the rebates applicable to transparent tape.[18] Consistent with the adage that "hard facts make bad law," 3M also struggled to offer a compelling procompetitive justification for the rebate program and some of the company's internal documents suggested that 3M may have been motivated in part by a desire to prevent private label tape from gaining momentum in the market.[19]

After trial, the jury found that 3M's rebate program was exclusionary and held 3M liable for monopoly maintenance in violation of Section 2.[20] The Third Circuit affirmed en banc.[21] In its decision, the Third Circuit held that a multi-product seller with monopoly power in one or more of the products in the bundle engages in unlawful monopolization or monopoly maintenance when the seller uses a bundled

rebate program that (a) has the effect of expanding the monopolist's share in one or more of the competitive product markets, and (b) lacks a clearly legitimate business justification.[22] While the court recognized that there might be legitimate competitive conduct that would also have the effect of expanding share at the expense of the single product seller, the court did not articulate a clear standard to differentiate between bundled discounts that are permissible and bundled discounts that cross the line. The court also did not require LePage's to demonstrate that it or another hypothetical equally efficient tape competitor could not compete without pricing below cost.

With some care, however, even risk-averse firms can engage in some degree of bundled discounting that would be unlikely to give rise to concerns under any of the potentially applicable legal tests discussed above.

The Third Circuit's decision in *LePage's* principally focuses on harm to competitors, and the legal test seems well suited to prevent that harm. The trade-off with such a test is a lack of clarity and a greater potential for capturing conduct that may harm one or more competitors but that actually benefits consumers through lower prices and more purchasing flexibility. *LePage's* has been heavily criticized and has not been followed by any court outside the Third Circuit.

The* Brooke Group *Predatory Pricing Test. In stark contrast to the Third Circuit's analysis in *LePage's*, many have advocated a legal standard that would effectively treat a bundle as a single "product" and apply the *Brooke Group*[23] predatory pricing test to the aggregate price of the bundle and cost of the bundle. 3M advocated this test in *LePage's*[24] and the court rejected the argument.[25] Others have advocated this approach in amicus briefs to the Supreme Court[26] and in amicus briefs to other courts.[27]

As suggested by 3M and others, the *Brooke Group* predatory pricing test would compare a bundler's total incremental cost for the bundle against its total price for the bundle.[28] The bundled discount would be presumptively lawful unless the price of the entire bundle was less than the cost of the entire bundle. Critics maintain that this approach ignores the "bundling" element of the transaction and treats all of the bundled items as a single product, which they objectively are not.[29] Moreover, it would favor bundles of many products where the aggregation of numerous products would make it easier for a seller to offer above cost bundled discounts or rebates that are proportionately more difficult for a single product seller to match. In any event, while this test has some superficial appeal it has not been adopted or endorsed by any court and the AMC considered and rejected this approach.[30]

The AMC's Discount Attribution Test. After considering and rejecting the *LePage's* test and the *Brooke Group* predatory pricing analysis, the AMC recommended a three-part test that includes a modified predatory price or price/cost "screen." The AMC recommended that bundled discounts should be found unlawful only if the plaintiff can show the following three elements:

(1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product;
(2) the defendant is likely to recoup its short term losses; and
(3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.[31]

The first part of the AMC test is the key differentiator from both *LePage's* and the *Brooke Group* predatory pricing test. The price/cost screen is a clear and understandable tool for antitrust counselors, sellers, and courts. In theory, it would be administrable without tremendously complex factual discovery or analysis (although the proper measure of incremental cost can be a vexing issue in any context). Perhaps most importantly, the price/cost screen is intended to provide comfort to most sellers and capture for further scrutiny only the universe of bundled discounts that would have the potential effect of excluding equally efficient competitors.[32] The rationale is that a price that is above cost on an attributed price/cost basis will exclude only those competitors that are unable to produce and sell the competitive product at a cost as low as the defendant's.[33]

The price/cost screen is only the first part of the AMC recommendation, however, and the AMC believed the other two steps play a critical role in avoiding condemnation of legitimate discounting.[34] Just as the mere sale of an item below cost does not necessarily constitute predatory pricing under *Brooke Group*, the mere offer of a bundled discount that fails the discount attribution test would not constitute unlawful exclusionary conduct under the AMC's recommendation. To establish a claim, a plaintiff would have to demonstrate likely recoupment of losses by showing either that future revenues would offset short term losses on the bundle as a whole, or the price for the entire bundle is sufficiently above incremental cost for the entire bundle that the seller does not suffer any net loss on the bundle.[35] Finally, a plaintiff who satisfies the first two elements must demonstrate unreasonable harm to competition under a traditional rule of reason standard.

Prior to its endorsement by the AMC, the attributed price/cost test had already received some commentator and judicial approval.[36] Since its report, the AMC recommendation has been widely discussed, but no court has incorporated the entire three-part test. The Ninth Circuit adopted the attributed price/cost screen portion of the AMC test and the

DOJ largely adopted the AMC recommendation in its Section 2 Report, which the DOJ subsequently withdrew.[37]

***The Ninth Circuit's* Cascade Health Solutions *Test*.** By the time the Ninth Circuit was confronted with the issue of bundled discounts in *Cascade Health Solutions*,[38] it had the benefit of observing the Third Circuit's *LePage's* decision (and the subsequent criticism of that decision) and the AMC's discussion of the issue and recommendation. With that background, the Ninth Circuit chose a middle course that rejected *LePage's* almost entirely and that adopted the AMC's recommendation to use an attributed price/cost test (but rejected the remainder of the AMC recommendation).

The case concerned a relatively straightforward bundled discount. Cascade and PeaceHealth were the only competing hospitals in a county. Cascade offered primary and secondary care services; PeaceHealth offered primary, secondary, and tertiary care services. PeaceHealth offered discounts on tertiary services if purchasers (insurance companies) made PeaceHealth their exclusive provider for primary, secondary, and tertiary services. Apart from the bundled discounts, PeaceHealth also offered less favorable prices generally to insurance companies that contracted with Cascade as a preferred provider for primary or secondary care services.[39]

The trial court's jury instructions in *Cascade Health Solutions* were based on the *LePage's* test, and the jury found that PeaceHealth's bundled discount violated Section 2.[40] The Ninth Circuit reversed.[41] The Ninth Circuit concluded, first, that bundled discounts are too important a part of normal and procompetitive commercial activity to be subject to an antitrust rule without any clear boundaries.[42] Relying on the Supreme Court's rationale in *Brooke Group*, the Ninth Circuit held that "the exclusionary conduct element of a claim arising under § 2 of the Sherman Act cannot be satisfied by reference to bundled discounts unless the discounts result in prices that are below an appropriate measure of the defendant's costs."[43] For the "appropriate measure of cost," the Ninth Circuit endorsed the AMC's recommended discount attribution test.[44]

The Ninth Circuit declined to adopt the AMC's "probability of recoupment" test or its proposed requirement that a plaintiff demonstrate that the bundled discount unreasonably restrained competition.[45] The Ninth Circuit concluded that the recoupment test is not "analytically helpful" in bundling cases because the multi-product nature of the bundle means that a seller might be able to exclude a single product seller without any short term losses to recoup.[46] The Ninth Circuit concluded that the AMC's recommended rule of reason analysis would be "redundant" and "no different than" the requirement that a plaintiff establish antitrust injury.[47] It remains to be seen whether, and to what extent, the *Cascade Health Solutions* "one part" discount attribution test might yield results different from the AMC's recommended three-part test.

Although the Ninth Circuit clearly attempted to find a thoughtful middle ground that would avoid the criticisms of *LePage's*, the results have been mixed. Some antitrust commentators have criticized *Cascade Health Solutions* as not going far enough to protect discounting from scrutiny that might harm consumer welfare.[48] Others have criticized the decision for creating a safe harbor that may effectively immunize conduct that is exclusionary and that may result in a long term loss of consumer welfare.[49] Unlike *LePage's*, however, the Ninth Circuit's bundled discount test has been followed outside the Ninth Circuit.[50] Unfortunately, no court has yet taken the opportunity to discuss and reconcile *LePage's* and *Cascade Health Solutions*.

What Are the Implications for Multi-Product Sellers Today?

The bottom line today for any multi-product seller who has market power in the market for one of its products is "bundler beware." *LePage's* remains binding precedent in the Third Circuit, and the U.S. antitrust enforcement agencies have done little (except for the quickly withdrawn DOJ Section 2 Report) to clarify their view on the law or approach to enforcement.

With some care, however, even risk-averse firms can engage in some degree of bundled discounting that would be unlikely to give rise to concerns under any of the potentially applicable legal tests discussed above. But this approach, which is less about finding common ground among the competing standards than finding the "lowest common denominator," may impair flexibility and may not be workable for every firm. Nonetheless, firms that wish to offer bundled discounts today should consider the following:

- Does the seller have market or monopoly power in a market for one of the bundled products? If not, the bundled discount is unlikely to give rise to serious issues.
- What are the conditions in the market for the competitive product(s)? If there are multiple competing sellers, at least one or two of which are able to offer a competing bundle, the antitrust risk would diminish substantially.
- Would the bundled discount pass the attributed cost test adopted by the AMC and the Ninth Circuit? Though this standard is not universally accepted, it is law in the Ninth Circuit, has momentum generally, and appears to be the standard most likely to be adopted in new litigation in circuits that have not yet considered the issue.
- What is the rationale for offering the bundled discount and how is it expressed in the business documents? The Third Circuit's *LePage's* decision is partially explained by 3M's problematic business documents and its failure to articulate a persuasive procompetitive justification for its rebate plan. A seller who can point to true efficiencies resulting from the bundle or other precompetitive justification would be in a much stronger position in any circuit.

Finally, even putting aside the lack of clarity in the law, the DOJ's withdrawal of the Section 2 Report and related comments from Assistant Attorney General Christine Varney raise interesting questions regarding future enforcement plans. In

announcing the withdrawal of the Report, AAG Varney criticized the Report's reliance on safe harbors and promised "[v]igorous antitrust enforcement action under Section 2 of the Sherman Act."[51] AAG Varney's speech does not specifically mention bundled discounts, but in light of the withdrawal of the Report and general criticism of the approach that led to the (albeit brief) adoption of an attributed price/cost safe harbor, AAG Varney's silence on the issue is telling. Businesses are left to wonder whether bundled discounts are an enforcement priority for the DOJ or FTC and, if so, what legal standard the enforcement agencies will use internally to screen for appropriate cases and what standard they would advocate in court.

Conclusion

In a decade in which antitrust jurisprudence has been characterized by Supreme Court decisions that have refined and clarified—and some would say narrowed—application of antitrust law to vertical restraints and monopolization claims, bundled discounts remain an outlier. The law is murky, there are competing standards, and the enforcement agencies have not spoken clearly or with one voice. Fortunately, that undesirable situation is not likely to continue indefinitely. In the meantime, however, bundled discounts remain an area of uncertainty and risk for sellers and an area of opportunity for creative plaintiff's lawyers. ■

[1] Cascade Health Solutions v. PeaceHealth, 502 F.3d 895, 905 (9th Cir. 2007).

[2] LePage's, Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003) (en banc).

[3] *See, e.g.*, Richard M. Steuer, *Bundles of Joy*, ANTITRUST, Spring 2008, at 25; Jonathan M. Jacobson, *Exploring the Antitrust Modernization Commission's Proposed Test for Bundled Pricing*, ANTITRUST, Summer 2007, at 23; 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 749a (2008).

[4] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 99 (2007) [hereinafter *AMC Report*].

[5] *Cascade Health*, 502 F.3d 895.

[6] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 101 (2008) [hereinafter *DOJ Section 2 Report*], *available at* http://www.justice.gov/atr/public/reports/236681.pdf.

[7] Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.justice.gov/atr/public/press_releases/2009/245710.htm.

[8] *See* David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie?* 22 YALE J. ON REG. 37, 41 (2005); Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688, 1693 (2005).

[9] *See, e.g.*, Timothy J. Muris & Vernon L. Smith, *Antitrust and Bundled Discounts: An Experimental Analysis*, 75 ANTITRUST L.J. 399 (2008).

[10] Evans & Salinger, *supra* note 8.

[11] *See, e.g.*, Muris & Smith, *supra* note 9; Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 EMORY L.J. 423, 430–43 (2006); Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling by Firms? A Survey of the Economic Literature*, 1 J. COMPETITION L. & ECON. 707 (2005).

[12] *See, e.g.*, Patrick Greenlee, David Reitman & David S. Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts* (U.S. Dep't of Justice Econ. Analysis Group Discussion Paper, EAG-04-13, Oct. 30, 2006); Barry Nalebuff, *Exclusionary Bundling*, 50 ANTITRUST BULL. 321 (2005).

[13] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 593 (7th ed. 2007).

[14] *See* Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993) (discussing policy considerations and costs of erroneous findings of antitrust liability in context of predatory pricing); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 75 (2005) ("Socially desirable antitrust rules would minimize the expected cost of errors resulting from condoning harmful practices or condemning beneficial ones, while maintaining a degree of predictability for businesses and administrative ease for the courts.").

[15] *See* Cascade Health Solutions v. PeaceHealth, 502 F.3d 895, 906 (9th Cir. 2007) ("[B]ecause of the benefits that flow to consumers from discounted prices, price cutting is a practice the antitrust laws aim to promote. . . . Consistent with that principle, we should not be too quick to condemn price-reducing bundled discounts as anticompetitive, lest we end up with a rule that discourages legitimate price competition.") (citations omitted).

[16] The economic "pressure" inherent in offering a bundle discount is rarely sufficient, standing alone, to support a tying claim based on economic coercion unless the discount is so substantial that customers have no economically rational choice but to purchase the bundle and accept the tied product. *See, e.g.*, Marts v. Xerox, Inc., 77 F.3d 1109, 1113 (8th Cir. 1996) (no economic coercion unless unbundled prices are "prohibitively expensive"). Professors Areeda and Hovenkamp suggest that a bundled discount should not be considered economic coercion unless at least some measure of price is below cost. AREEDA & HOVENKAMP, *supra* note 3, ¶ 749d3; *see also Cascade Health Solutions*, 502 F.3d at 911.

[17] LePage's, Inc. v. 3M Co., 324 F.3d 141, 147 (3d Cir. 2003) (en banc).

[18] *Id.* at 154–55.

[19] *Id.* at 164 ("There is considerable evidence in the record that 3M entered the private-label market only to 'kill it.'").

[20] *Id.*

[21] *Id.* at 169.

[22] *Id.* at 163–64.

[23] Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); *see also* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).

[24] *LePage's*, 324 F.3d at 147.

[25] *Id.* at 147.

[26] *See, e.g.*, Brief for Amici Curiae Bellsouth Corporation et al., 3M Co. v. LePage's Inc., 542 U.S. 953 (2004) (No. 02-1865).

[27] *See, e.g.*, Brief of Pac. Bell Tel. Co. and Visa U.S.A. Inc. as Amici Curiae Supporting Reversal, Cascade Health Solutions v. PeaceHealth, 502 F.3d 895 (9th Cir. 2007) (No. 05-35627).

[28] *LePage's*, 324 F.3d at 147.

[29] It is worth noting, however, that Areeda and Hovenkamp endorse this approach in instances in which the other likely competitors can offer the same or similar product bundles. AREEDA & HOVENKAMP, *supra* note 3, ¶¶ 749d3 n.87 & 749d4. In its Section 2 Report (subsequently withdrawn), the DOJ Antitrust Division also endorsed this approach when bundle-to-bundle competition is reasonably possible. *See DOJ Section 2 Report*, *supra* note 6, at 101. In that limited context, the test makes sense because it allows an apples-to-apples comparison or price and cost structure for the plaintiff(s) and defendant.

[30] *AMC Report*, *supra* note 4, at 98–99.

[31] *Id.* at 99.

[32] *Id.* at 100.

[33] Jacobson, *supra* note 3, at 23, 25.

[34] *AMC Report*, *supra* note 4, at 100.

[35] *See* Jacobson, *supra* note 3, at 25–26.

[36] *See, e.g.*, Ortho Diagnostic Sys. v. Abbott Labs., 920 F. Supp. 455, 467–69 (S.D.N.Y. 1996); Information Res., Inc. v. Dun & Bradstreet Corp., 359 F. Supp. 2d 307, 307–08 (S.D.N.Y. 2004).

[37] *DOJ Section 2 Report*, *supra* note 6, at 101, 105–06. The Section 2 report replaces the AMC's "recoupment" test with an analysis of whether competitive single-product rivals remain and are likely to remain in the market.

[38] Cascade Health Solutions v. PeaceHealth, 502 F.3d 895 (9th Cir. 2007).

[39] *Id.* at 902–03.

[40] *Id.* at 908.

[41] *Id.* at 913 ("Given the endemic nature of bundled discounts in many spheres of normal economic activity, we decline to endorse the Third Circuit's definition of when bundled discounts constitute the exclusionary conduct proscribed by § 2 of the Sherman Act.").

[42] *Id.* at 906–07.

[43] *Id.* at 913–14.

[44] *Id.* at 916.

[45] *Id.* at 921 n.21.

[46] *Id.* Note however that the Ninth Circuit may have misunderstood the AMC recommendation, which at least one member of the AMC has suggested would have required a showing of likelihood of recoupment only in those cases where the entire bundle was sold below cost and the defendant did incur a short term loss. Jacobson, *supra* note 3, at 23, 25.

[47] *Cascade Health*, 502 F.3d at 921.

[48] *See, e.g.*, Mark S. Popofsky, *Section 2, Safe Harbors, and the Rule of Reason*, 15 Geo. Mason L. Rev. 1265, 1290–94 (2008) (approving generally the price/cost screen but criticizing PeaceHealth for Ninth Circuit's rejection of a recoupment requirement); Dennis W. Carlton & Michael Waldman, *Safe Harbors for Quantity Discounts and Bundling*, 15 Geo. Mason L. Rev. 1231 (2008).

[49] *See, e.g.*, Einer Elhauge, *Tying, Bundled Discounts, and The Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 461–75 (2009).

[50] *See* Peoria Day Surgery Ctr. v. OSF Healthcare Sys., 2010-1 Trade Cas. (CCH) ¶ 76,870 (C.D. Ill. 2009).

[51] Christine A. Varney, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in This Challenging Era 5 (May 12, 2009), *available at* http://www.justice.gov/atr/public/speeches/245777.htm.