

## BUNDLED DISCOUNTS

### What is a bundled discount?

May be as simple as a package discount (seller charges a lower price for a group of products, than for the products if purchased individually).

Examples: Value Meals, Cars.

May also be a rebate conditioned on purchase targets.

Targets can be volume, or percent of buyer's requirements.

Targets have to cover multiple product lines.

Does not include rebates and discounts based on single product targets (such as at issue in the Intel matter or *Concord Boat*) – although some similar issues arise with single product rebates.

### What is the Antitrust Concern?

Ability to exclude an equally (or more) efficient rival.

This distinguishes bundled discounts from single product discounts.

	Firm A		Firm B
	Room	Golf	Golf
Incremental Cost	\$50	\$60	\$50
Standalone Price	\$100	\$75	\$60
Bundle Price	\$125 Price > \$110 Incremental Cost		Must price < \$25 to compete with bundle

## How to Think about Bundled Discounts

### Bundled Discounts as Predatory Pricing

Traditional approach.

*Brooke Group*: above cost pricing is not illegal.

What is the measure of cost in a bundle? Or, how do you allocate the discount?

Allocate all discounts to the competitive product (the product supplied by the single-product firm).

Used in *Ortho*, *PeaceHealth*, *Lilly*, ...

REPEAT TABLE

### Bundled Discounts as Tying

Bundled discount amounts to an “economic tie.”

Need to show “economic tie.” Can single-product seller compete?

Jefferson Parish test.

- (1) Separate Products
- (2) Coercion or a Forced Sale
- (3) Market Power in the Tying Product
- (4) Not Insubstantial Amount of Commerce

(\*) Anticompetitive Effects in the Tied Market

Requires only market power not monopoly power.

Tying is “*per se*” illegal

Bundled Discounts as Exclusive Dealing

Bundled discounts amounts to an economic exclusivity requirement.

Need to show economic exclusivity. Can single-product seller compete?

Is enough of the market foreclosed?

How many customers buy the bundle versus individual products?

What is the minimum viable (efficient) scale of the single-product firm?

Bundled Discounts as Raising Rivals Costs

Similar to exclusive dealing, but maybe less stringent.

Does the bundle take away enough potential customers of the single-product rival, such that the rival cannot reach minimum efficient scale?

Less than efficient scale may usually measured relative to:

production cost

ability to raise capital

“network effects”

If the discount is given to an intermediary (a distributor for instance) the discount may force rival to use less efficient distribution.

Even if the rival is not “foreclosed” (in the exclusive dealing sense), they may be competitively harmed.

#### Bundled Discounts as Bundled Discounts

*LePages* did not show that it was an equally efficient a producer.

It did not show that it would have to sell below cost to meet the 3M discount.

It only showed (and only needed to show, according to the full appeal court):

- (1) the bundle that buyers needed to purchase to get the discount included products *LePages* did not sell;
- (2) this made it hard for *LePages* to compete; and
- (3) 3M could not show the discounts were “justified” by cost savings.

#### **Lessons:**

Do you have market (monopoly) power?

Do you bundle your “monopoly good” with another good where you face single product competitors?

Allocating all the discount to the competitive good, is the price above your cost?

How many customers purchase the bundle versus the single competitive product? Is this “single product market” large relative to minimum (efficient?, viable?) scale?

(For potential plaintiffs): Are you equally or more efficient? Can they compete against your bundle?

### **Who might be at risk?**

Hospitals

Medical device manufacturers who sell to GPOs.

Vertically integrated firms

Grocery store/gas stations?

Almost anyone?

### **Case Cites:**

*SmithKline Corp. v. Eli Lilly & Co.*; 525 F.2d 1056

*Ortho-Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*; 920 F.Supp 455

*Brook Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)

*3M Company v. LePages Inc.*; 324 F.3d. 141 (en banc 2003).

*Cascade Health Solutions (f/k/a McKenzie Willamette Hospital) v. PeaceHealth*;