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Bundles of Joy

BY RICHARD M. STEUER

ADVICE ON BUNDLING CAN PROVOKE real passion. Sellers find it hard to understand why they are not always allowed to discount their strongest products by as much as they want in order to convince customers to buy their weaker products. Sellers of a single product or a "short line" of products chaff at competitors besting them by offering discounts on products that the "short liner" cannot match on the condition that customers also order products of the type the short liner carries. Lawsuits have ignited for years and continue to abound. How can such contentiousness persist when vertical restraints supposedly have all made the transition from per se illegality to the rule of reason?

"Gallia in partes tres divisa est." So are vertical restraints. Although the single term "vertical restraints" commonly is used to describe all restraints in agreements between suppliers and customers, vertical restraints really are divided into three parts: (1) restraints on buyers' resales; (2) restraints on buyers' purchases; and (3) restraints on manufacturers' or other suppliers' sales.

The first category includes territorial and customer restraints and resale price maintenance, all of which are now governed by the rule of reason and rarely are being found unreasonable.[1] The third category includes exclusive distributorships, which have long been considered presumptively lawful or even virtually per se lawful.[2]

It is the second category, which includes exclusive dealing and tying, that has continued to foster the largest number of government inquiries, the greatest volume of litigation, and the most controversy. And of all the restraints on purchasing, the one that has provoked the greatest consternation is "bundling"—a cousin of tying and exclusive dealing, but not quite the same as either of them. Counseling on bundling issues can be especially challenging. It requires a penetrating understanding of the nature of the practice, the underlying competitive dynamics, and the legal standards being applied.

Bundling

What Is Bundling? "Bundling" commonly denotes an offer by a supplier to provide quantity discounts based on a customer's combined purchases in more than one product category. Bundling is not the same as a tie-in because, depending on the offer, the purchaser is not necessarily required to buy a second product in order to qualify for a discount if it buys enough of one of the products in the bundle. Bundling is not the same as exclusive dealing because the purchaser is not necessarily prohibited from buying products in the bundled categories from other suppliers. Some bundling arrangements include elements of tying or exclusive dealing, but to constitute "bundling," an arrangement simply needs to provide incentives to purchase more than one product or category of products from the same supplier.

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Bundling Distinguished from Its Cousins. To appreciate exactly where bundling falls in the firmament of vertical restraints, it is necessary to distinguish it from loyalty discounts and full line forcing, as well as from tying and exclusive dealing.

Exclusive dealing refers to an agreement whereby a purchaser agrees with a supplier not to buy a product from any other supplier. The purchaser may be an end-user, which consumes the product,[3] or an intermediary, which resells the product.[4]

Loyalty discounts are discounts conditioned on the purchaser buying all or a specified percentage of its requirements of a particular product, or more than a specified volume of that product, from one supplier.[5] As with exclusive dealing, such an arrangement can apply to a single product. Unlike exclusive dealing, the purchaser need not promise to forgo buying that product from other suppliers, but the amount of the discount earned will depend on the volume it buys from that supplier rather than from competing suppliers.

Full line forcing refers to an agreement between a supplier and a distributor whereby a distributor agrees to buy (and normally to stock) the full line of the supplier's multiple products.[6] Unlike exclusive dealing, the distributor need not agree to forgo buying and carrying competing products, but more than one product necessarily is involved. Unlike loyalty discounts or bundling, however, the prices are not dependent on the volume the distributor buys, either relative to other brands or in absolute quantity.

Tying is an agreement whereby a supplier agrees to sell a product on the condition that the buyer also purchase a second product from that seller (a "tie-in"), or at least not purchase that product from any other supplier (a "tie-out").[7] In a tie-in the buyer need not forgo buying any competing products, and the prices do not depend on the volume purchased. In the less-common "tie-out," the buyer agrees not to purchase the second product from anyone else, but does not necessarily have to buy any of it at all.

Bundling is not quite the same as any of these. As described earlier, bundling does not flatly prohibit customers from buying competing products and does not necessarily require customers to buy more than one product, but it does apply to multiple products, and it does reward customers that buy a higher percentage or greater volume from a single supplier.

Advantages of Bundling. Bundling can provide real efficiencies to both sellers and buyers. For the seller, it promotes the creation of a broader relationship with each customer, fostering the sale of multiple products with one sales call, one shipment, and one bill. For the buyer, it not only saves money by virtue of the discount, but promotes "one-stop-shopping," allowing the buyer to deal with fewer sales calls, fewer deliveries, and fewer accounts payable. In some industries, it also can spare the buyer the time and expense of "qualifying" a greater number of vendors. Moreover, it can provide the most effective means for a buyer of multiple products to leverage its overall purchasing power to exact the lowest prices from suppliers. As a consequence, it is not surprising that it often is the buyer, not the seller, who proposes bundling of multiple products in return for a discount.[8]

Impact of Bundling on Competitors. Of course, the more a purchaser buys from one supplier, the less it is likely to need from other suppliers. Competing suppliers may cry "foul" when one of the products in a bundle is so unique and so essential that purchasers have no real choice but to buy it. The inclusion of such a "must have" product makes it harder for customers to forgo buying other products in the bundle from the same supplier in order to achieve the best prices on everything in the bundle, including the essential product that it needs to buy from that supplier anyway. In this sense, competing sellers that do not offer the same assortment of products may complain that they are being foreclosed from selling to any of the purchasers that choose the bundle unless they can compensate for the entire discount the customer would have to forgo on the "must have" product it cannot supply.

It is not that simple, though. Competing sellers may not make all the products in the bundle, but they may make other products with which they can create their own, different offers that are equally attractive. Alternatively, competing sellers may be able to procure additional products from other sources to complete their bundles, or partner with other manufacturers to create comparable or even better bundles. A lot also will depend on the strength and uniqueness of the "must have" product creating leverage for the original bundle. Is that product the equivalent of the only cure for some widespread dread disease or is it merely a nifty variation of a product that faces competition from other products filling the same need?

Thus, the impact of the bundle will depend on both the strength of the "must have" product (or products) in the bundle and the ability of competitors to counter with offers of their own. It also may depend on the purpose behind the bundling and the efficiencies that bundling achieves. All of these factors have found their way into the legal standard that has evolved, and is still evolving.

The Legal Standard. Bundling, like tying and exclusive dealing, may be challenged as an agreement in restraint of trade under Section 1 of the Sherman Act, as a discount conditioned on not buying competing products under Section 3 of the Clayton Act (assuming that a commodity is involved), or as monopolization or attempted monopolization under Section 2 of the Sherman Act.[9] Courts have not been entirely consistent in their application of these provisions,[10] which can make litigation unpredictable. For purposes of counseling, however, the first issue under every one of these provisions will be the degree of market or monopoly power inherent in the "must have" product, either by virtue of its uniqueness or as reflected in a high market share. A second issue will be the definition and size of the market or markets from which competitors endeavoring to sell the other products in the bundle allegedly are being foreclosed. A third issue will be whether competitors actually are being foreclosed and, if so, the degree of that foreclosure. Foreclosure of competitors has been measured by courts in at least three different ways: (1) The amount of foreclosure resulting from the particular agreement under examination,[11] (2) the amount of foreclosure attributable to all of the seller's agreements together,[12] and (3) the amount of foreclosure resulting from all sellers' agreements combined.[13]

Most of the cases ultimately have been decided under Section 2, based on alleged use of monopoly power over the "must have" product to destroy competition in the markets for the other products in the bundle.[14] The seminal case is *SmithKline Corp. v. Eli Lilly & Co.*,[15] where thirty years ago the Third Circuit held that a bundled discount can constitute an act of monopolization when the supplier holds monopoly power over some but not all of the products in the bundle. Some years later, after the Supreme Court decided *Brooke Group*,[16] this was followed by several cases—most notably *LePage's* and *Ortho v. Abbott*[17]—addressing the argument that a bundled discount cannot be considered predatory unless it results in sales below cost.[18] Suppliers argued that the test should be whether the supplier of a bundle is selling below cost when the entire bundle is taken into account in making that calculation, while competitors argued that the test should be whether a competitor that is able to offer only some of the products in the bundle would be able to convince buyers to purchase those products that it does offer without its having to sell those products below cost, assuming that it is equally efficient in making those products. Several courts largely accepted the latter position, but articulated more than one standard.[19]

More recently, in *Cascade Health Solutions v. PeaceHealth*,[20] the Ninth Circuit—after soliciting comments from any interested party and surveying both the case law and the literature—adopted a "discount attribution" standard under which "the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products," i.e., to the products which both the supplier offering the bundle and its competitors have available to sell. Under this standard, none of the discount is attributed to any "must have" product that competitors are unable to match. "If the resulting price of the competitive product or products is below the defendant's incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2."[21] This means that the defendant need not know anyone's costs but its own in order to calculate whether its prices for the "competitive products" satisfy this test. As the court explained it, this standard "makes the defendant's bundled discounts legal unless the discounts have the potential to exclude a *hypothetical* equally efficient producer of the competitive product."[22]

Bundling also can be challenged under Section 1 of the Sherman Act or Section 3 of the Clayton Act,[23] and as noted earlier the analysis can vary from case to case. The percentages required to establish power in the "must have" category and foreclosure in the other bundled categories has not been entirely uniform and interpretations of the relationship between these provisions and Section 2 of the Sherman Act have not always been consistent.[24] Nevertheless, under any of these provisions the key issues include how much power the manufacturer possesses over its strongest products to coerce the purchase of other products, and how much of the relevant market or markets for those other products the manufacturer actually forecloses to competitors.

Applying the Legal Standard. Assuming that the *PeaceHealth* "discount attribution" standard is followed broadly—and although this standard has been criticized,[25] it appears increasingly likely that some form of discount attribution approach will become generally accepted—the lesson for counseling is that if the discount is such that the manufacturer offering the bundle could apply the entire discount to reducing the prices of the products that competing manufacturers are able to offer, and would still make a profit on those products, there should be no illegality because equally efficient competitors would be able to match the offer and still make money. This sounds straightforward, but requires the manufacturer not only to know its own costs, but to be able to evaluate the strength of its products and deduce which products competing manufacturers actually are able, and not able, to offer in competition against the bundle. The manufacturer also ought to assess the efficiencies created by the bundle and the purpose behind it.

What makes a product a "must have" is not self-evident. Products on which the manufacturer holds a patent or proprietary know-how and enforces those rights to exclude others may qualify as "must have" products if some universe of customers needs those products and cannot reasonably substitute anything else. Patented antibiotics that were hospitals' medication of choice for particular uses were considered "must have" products in *SmithKline*, but as various cases involving bundling and tying demonstrate, the power inherent in a product is a question of fact, often subject to heated debate.[26]

. . . if the discount is such that the manufacturer offering the bundle could apply the entire discount to reducing the prices of the products that competing manufacturers are able to offer, and would still make a profit on those products, there should be no illegality . . .

Products in which the manufacturer possesses a monopoly share of the market also may qualify as "must have" products if enough customers need them and cannot realistically substitute alternatives. If a product's purported market power is premised on its high market share, however, this may reflect its head start to the market rather than its superior qualities. Moreover, some products face no competition but customers can do without them entirely.

Naturally, competitors with inferior products or salesmanship may prefer to view more successful products as "must have" products than to acknowledge the shortcomings in their own products or marketing skills. As with any tying or leveraging case, uniqueness and the strength of demand for a product will be a question of fact in assessing whether a product is a "must have" product or just a nice piece of merchandise. Accordingly, in counseling suppliers that offer bundled discounts, a realistic assessment of the "must have" product's market power is essential.

As for the other products in the bundle, products that competitors actively market clearly will qualify as "competitive products." Products that competitors easily could obtain or begin making if they elect to broaden their product assortment also ought to qualify as competitive products for purposes of assessing foreclosure, but these will be harder to identify.

Finally, the manufacturer will need to calculate the average variable cost of producing each of the products in its bundle, other than the "must have" products. Difficult as this may be, it is a calculation that might well have to be made in litigation after the fact.[27] If it cannot be made concurrently with the introduction of the discounts, it will not be any easier to make after the fact if the discounts are challenged later in litigation.

In some instances, this information will be readily available. In other instances, the manufacturer will need to take a conservative view of which products are "musts," which products competitors can offer, and what its own costs are. Using this information, the manufacturer can prepare a bundled discount schedule assuring that if the discounts are applied entirely to the "competitive products," it still would earn a profit on those products and so would an equally efficient competitor that cannot offer the "must have" products.

Under the "discount attribution" standard, this should be the end of the inquiry, but if courts do not stop there in applying the rule of reason, especially under Section 1 of the Sherman Act or Section 3 of the Clayton Act, they may also take into account the efficiencies created by the bundled discount and the purpose behind it. If the manufacturer offering the bundled discount can document that bundling results in measurable savings, it would have an additional argument, particularly in close cases. Likewise, if it can document that the purpose behind the bundling was to achieve efficiencies or respond to customer requests, rather than to exclude competitors, this also could prove helpful.

With respect to all of these elements—strength of the "must have" product, capabilities of competitors, costs, efficiencies, and purpose—the manufacturer should endeavor to assemble and maintain a record so that it can prove that it took steps to assure compliance before offering its bundled discounts and so that its defenses will not later appear to be after-the-fact, pretextual rationalizations.

What If Competitors Actually Offer Every Product in the Bundle? Sometimes, manufacturers offering bundled discounts face competition from competitors that offer all the products in the bundle. In such cases, there is nothing unfair about requiring competing manufacturers that market comparable lines to compete head-to-head. On the surface, this seems obvious.[28] If competitors all offer comparable bundles, presumably it should be permissible for any of them to offer any discount they choose-so long as this does not result in selling the entire bundle below cost with the intent to recoup the losses later by achieving monopoly power; i.e., any discount that does not flunk the test of *Brooke Group*.[29]

However, one court has indicated that even where a second manufacturer can offer every product in the bundle, the first manufacturer may still possess excessive market power over one or more of the products in the bundle if the second manufacturer, with a smaller share, is not much of a "constraining force" and amounts to a "toothless tiger" with respect to those products.[30] In other words, a manufacturer may wield market power over a product even if it is not the only manufacturer making that product. Consequently, it must be recognized that although a competitor may offer the entire bundle, it still may be treated as a "short liner" for purposes of analysis if the product it sells in competition against the "must have" product has not achieved much success.

What If Some Competitors Offer More Products than Others? A huge complication is that in most industries, no two competitors offer precisely the same assortment of products. What if some competitors offer all the products in the bundle, some competitors offer all the products other than the "must have" products, and still other competitors offer only a single product within the bundle? Does the manufacturer need to attribute the entire discount to that one product and make sure that, on that basis, it is not selling that one product below cost? Is it sufficient that other competitors profitably can sell wider varieties of products, or does a bundled discount need to account for the narrowest product assortment of any competitor—necessarily making that discount much smaller? In any event, is there anything wrong with forcing full line competitors to meet the bundled discounts across the board and thereby afford customers the lowest price, regardless of what short line competitors can afford to offer?

One approach would be to assume that so long as even one competitor offers all the products in the bundle, any discounts that do not result in selling the entire bundle below cost should be considered reasonable.[31] The more conservative approach would be to limit the discount to an amount that would permit even the one-product competitor to compete profitably. This could come close to not having bundled discounts at all, and simply offering quantity discounts product-by-product. An even more conservative approach would be to do just that—forgo bundled discounts and offer a quantity discount on each individual product. This would eliminate the legal issue and the cost of monitoring compliance, but in all likelihood also would eliminate the deepest discounts enjoyed by customers.

There are other solutions. It sometimes is possible to provide a "carve-out" in a bundled discount program so that short line competitors can still compete. One such approach is not to count a customer's purchases of products from competitors that cannot offer the "must have" product in measuring whether the customer has satisfied the requirement to purchase a specified portion of its requirements of products in the bundle from the supplier. Competitors offering all the products in the bundle would still be expected to compete head-to-head on the entire bundle.

In the *Applied Medical* case,[32] for example, the court upheld Johnson & Johnson's sole source agreements with hospital group purchasing organizations for bundles of products where the agreements contained a carve-out for purchases from competitors that did not offer a full line of these products. This allowed competition for the entire bundle against other full-line suppliers, while the carve-out served to negate claims of foreclosure by a short-line supplier.[33] Of course, such a carve-out only makes business sense if some competitors offer all or most of the products in the bundle and would not benefit from the carve-out—otherwise the carve-out would apply to every competitor and the bundled discount would effectively become an unconditional discount.

Another approach is to offer bundled discounts that never require complete exclusivity, so that there is always room for competitors to make inroads. For example, a bundled discount schedule that provides maximum discounts if the customer purchases quantities or percentages that would fill something less than all of its needs, leaving reasonable opportunities for competitors, would accomplish this.[34] Rather than carving out particular competitors based on what they sell, this approach carves out a particular percentage of purchases.

The two approaches also can be combined. The exception for a specified percentage could be limited to competing products sold by "short liners," on the theory that competitors offering every product in the bundle can make a competitive offer to supply the entire bundle. Such a carve-out could provide that the manufacturer will furnish the maximum discounts so long as the customers buys at least X percent of its requirements of the products in the bundle from that manufacturer, provided that its remaining purchases of products in the bundled categories are limited to products sold by competitors that do not offer a full line. Still other variations are possible, tailored to meet the competition existing in each individual market, although it must be recognized that additional levels of complexity can make administration more demanding.

What If a Competitor Does Not Make the "Must Have" Product but Has Other "Must Have" Products? An even more complicated issue is how large a bundled discount a manufacturer may offer against a competitor that cannot match the manufacturer's "must have" product but has other "must have" products of its own. If the competitor is in a position to offer customers equally attractive bundles, albeit consisting of a different assortment of products, logic dictates that it be treated the same as a full-line competitor. There is no good reason for a manufacturer to pull its punches in offering a bundled discount and deprive the customer of the lowest possible prices in competing against a rival that can win most of the customer's business (other than for the manufacturer's "must have" product) with its own strong products.

What If No Competitor Can Offer the Entire Bundle, but Combinations of Competitors Can Offer the Entire Bundle? Another possibility is that no competitor can offer all the products in the bundle, but by partnering to make a joint offer, two or more competitors together or through an intermediary could match every product in the bundle and, if equally efficient, profitably sell them at the same price or less. In such an instance, competitors are not really limited to offering short lines and are foreclosed only if they allow themselves to be foreclosed.[35] Of course, preparing such joint offers may be complicated if the competitors offer some overlapping products in competition with each other. However, if the outcome of such alliances would be to inject additional, attractive offers into the marketplace, such arrangements should be considered procompetitive and lawful.[36]

Does It Make a Difference if the Buyer First Demanded the Bundle? What if it is the customer that demanded a bundled discount? Customers have long understood that they can leverage their purchasing power against manufacturers by offering to purchase their requirements of a product "all or nothing" from a single manufacturer.[37] Customers further understand that they can magnify their leverage to an even greater degree against a manufacturer that makes more than one of the products they purchase by offering to purchase a variety of products from the same manufacturer in return for an even lower price.[38]

This becomes most dramatic where a customer initiates a bidding contest among potential suppliers and insists on selecting only one manufacturer as its sole source for a bundle of products during a specified term. If rival manufacturers offer comparable lines of products and are in a position to make comparable bids so that there is strong "competition for the contract," losing bidders will find it difficult to argue that such contracts are unreasonably anticompetitive even if they result in the winning bidder commanding a high share of the overall market.[39] A sole source contract incorporating a bundled discount may result in only one seller obtaining all the sales to a particular customer during the term of the agreement, but "competition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress."[40] This is especially so where the contracts are for only a limited duration, or are terminable upon the receipt of a more favorable bid.[41]

Where does this leave rival suppliers with "short lines," who are not in a position to bid for all of the products in the bundle? They may claim that they are being effectively foreclosed from the bidding process by having to compete against discounts on the entire bundle. Their interests, however, are not aligned with the objectives of the customer, who wants full-line suppliers to make their most aggressive offers of bundled discounts even if that threatens the future viability of short liners. Customers may not always make choices that turn out to be in their own best interest, but courts should hesitate to substitute their own judgment for that of the customer where the customer is trying to intensify competition and strike the best deal it can.[42] Of course, one never knows whether every court will see it that way,[43] leaving the manufacturer caught between the customer insisting on the lowest price in a "winner take all" bidding contest and short-line rivals threatening to sue if the manufacturer wins the bid.

The solutions to this dilemma are not perfect, but a manufacturer responding to a customer's call for bundled bids—and not wanting to rely for its defense entirely on the fact that the customer insisted on such bids—has choices. It can, of course, submit a bid that does not apply any discount across more than one product category. It also can submit a bid that meets the discount attribution standard articulated in *PeaceHealth*. Alternatively, it can include carve-outs of the type described above, enabling the customer to take advantage of its lowest prices but also enabling the customer to do some business with short-line rivals without penalty. The drawback to this is that it can prove costly to the manufacturer, which undertakes to provide deep discounts without the assurance of getting all the business. Worse, the manufacturer cannot be sure that full-line rivals will make the same judgments, and rival full-liners may submit lower bids if they do not provide carve-outs that could reduce their volumes. Of course, the customer itself may build a carve-out into its bid solicitation, in which case all full liners would compete on a level playing field, and this would afford both the customers and the bidder some protection from liability. Otherwise, the manufacturer faces a choice between submitting a bid that may prove barely profitable if the customer buys too much from short liners, and losing the business altogether.

There may be still another answer. In some bidding situations short liners will have ample opportunity to team with other manufacturers to submit a bid for the entire bundle. In that case, there should be no need for a carve-out and each bidder, whether it has its own full line or not, can be expected to honor the customer's request and submit a bid offering its best bundled discount for "all or nothing." The customer is assured the lowest possible price and, assuming that the winning bid is not below cost, no equally efficient bidder will be excluded by anything but competition itself.

What If the Customer Does Business Around the World? It is easy to compartmentalize some vertical restraints geographically, but restrictions in global supply agreements present special challenges. If a product is the same around the world, and a customer that does business around the world enters into an agreement to purchase a bundle of products from one source in return for a discount, it may be difficult to limit the impact of that arrangement only to certain jurisdictions.

For example, in the European Union, bundling has come in for particular scrutiny[44] and a bundled discount that is permissible in the United States may not be permissible in Europe. The challenge can be to assure that short line competitors in Europe will not be able to demonstrate that a bundled discount lawfully offered to a customer in the United States forecloses that customer's purchases of the same product for use or re-sale in Europe and thereby constitutes abuse of a dominant position there. Options for the manufacturer include taking measures to ensure that products not intended for sale outside the United States will not be sold outside the United States, and then tailoring discount programs to meet the requirements of each relevant jurisdiction. It is beyond the scope of this article to address counseling for sales in every jurisdiction abroad, but it is essential for manufacturers to devote adequate consideration to this issue in structuring bundled discounts and any other discounts that induce exclusivity in supply arrangements. The world may be flat, and shrinking, but the law is not the same everywhere.

How to Counsel? So, how does one counsel a client that wants to offer its customers discounts for buying a bundle of its products? Start with two questions: (1) What is special about any of the products in your bundle? (2) What products do competitors have to offer? Then, ask three more questions: (3) Why do you want to bundle? (4) Do you know your own costs? (5) What impact do you expect bundling to have? Finally, ask one last question: (6) Does the bundled discount affect what the customer buys for use or resale abroad?

Counseling on bundling is easy when the client's products are not unusual or especially attractive and its market share is low, or when competitors can offer customers all the same products. It is counseling about bundles that include unique and highly popular products that can tie counselors into knots. The solutions are not simple, the rules keep evolving, and there are endless variations—but the principles described here can be applied to every situation with appropriate adjustment. Knowing which options exist is the first step to preventing bungled bundles, and bringing joy to the hearts of even the most hardened marketing executives. ■

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1 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). *But see* Jay L. Himes, *New York's Prohibition of Vertical Price-Fixing*, N.Y.L.J., Jan. 29, 2008 (asserting that minimum resale price maintenance remains per se unlawful under certain state antitrust law).

2 United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967) ("a manufacturer . . . may 'franchise' certain dealers to whom, alone, he will sell his goods"), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Electronics Communc's Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, 245 (2d Cir. 1997) ("Such exclusive distribution agreements are presumptively legal."); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 421 (D.C. Cir. 1957) (rule virtually of "per se" legality).

3 *E.g.*, Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

4 *E.g.*, United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005).

5 *E.g.*, Virgin Atl. Airways v. British Airways, 257 F.3d 256, 265 (2d Cir. 2001); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000); Xerox Corp. v. Media Sciences Int'l, Inc., 511 F. Supp. 2d 372, 389-90 (S.D.N.Y. 2007); Dean Milk Co., 68 F.T.C. 710 (1965). *See* ABA Section of Antitrust Law, Antitrust Law Developments 255 n.177 (6th ed. 2007) [hereinafter ALD6] (collecting cases distinguishing loyalty discounts from bundled pricing).

6 *E.g.*, Smith Mach. Co. v. Hesston Corp., 878 F.2d 1290, 1295–98 (10th Cir. 1989).

7 Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462 (1992) (citing Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958)).

8 *See* Richard M. Steuer, *Customer-Instigated Exclusive Dealing*, 68 Antitrust L.J. 239 (2000).

9 Masimo Corp. v. Tyco Health Care Group, L.P., No. 02-4770, 2004 U.S. Dist. LEXIS 26916, at *19–*24 (C.D. Cal. June 9, 2004); *see generally* ALD6 at 216–21, 255–56.

10 *See* ALD6, *supra* note 5, at 249–51, 253–54, 256.

11 *See* United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191–96 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006). Note that exclusive arrangements with intermediaries (such as wholesalers) normally does not result in as much foreclosure of competing suppliers as exclusive arrangements with end-users because a rival supplier selling through only a limited percentage of intermediaries may still be able to reach a much larger percentage of end users. *See* Omega Envt'l, Inc. v. Gilbarco, 127 F.3d 1157, 1162–63 (9th Cir. 1997); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1235 (8th Cir. 1987).

[12] NicSand, Inc. v. 3M Co., Inc., 457 F.3d 534, 554 (6th Cir. 2006), *vacated en banc*, No. 05-3431, 2006 U.S. App. LEXIS 32342, at *1 (6th Cir. Nov. 22 2006).

[13] Standard Oil Co. v. United States, 337 U.S. 293, 295 (1949). *See* Frank M. Hinman & Brian C. Rocca, *The "Aggregation Theory"; A Recent Series of Decisions in Bundled Discounting Cases Threatens to Expand Section One into Uncharted Territory*, ANTITRUST SOURCE, Feb. 2007, http://www.abanet.org/antitrust/at-source/07/02/Feb07-Hinman2=23f.pdf.

[14] Today, it is settled that leveraging monopoly power over one product into the market for another product requires proof of monopolization or attempted monopolization of the second market. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 n.4 (2004); *see* ALD6, *supra* note 5, at 302–06.

[15] 575 F.2d 1056 (3d Cir. 1978).

[16] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). In *Brooke Group* the Supreme Court held that Section 2 violations based on low pricing require proof of sales below cost coupled with the prospect or dangerous probability of recouping the resulting losses by raising prices once competitors have been eliminated.

[17] LePage's, Inc. v. 3M, 324 F.3d 141, 156 (3d Cir. 2003); Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc., 920 F. Supp 455, 471 (S.D.N.Y. 1996).

[18] In *SmithKline* itself, the district court had found that an equally efficient competing firm selling only the competitive product would not have been able to afford to match the bundled price. SmithKline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089, 1108 (E.D. Pa. 1976) ("SmithKline's profitability disappears, even if SmithKline were able to reduce its costs of goods to Lilly's levels."), *aff'd*, 575 F.2d 1056 (3d Cir. 1978).

[19] *E.g.*, J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 2005 U.S. Dist. LEXIS 11676 (S.D. Ohio 2005), *aff'd*, 485 F.3d 880 (6th Cir. 2007); *LePage's*, 324 F.3d at 156; *Ortho*, 920 F. Supp at 471.

[20] 502 F.3d 895 (9th Cir. 2007).

[21] *Id.* at 916. *See also id.* at 920: "To prove that a bundled discount was exclusionary or predatory for the purposes of a monopolization or attempted monopolization claim under § 2 of the Sherman Act, the plaintiff must establish that, after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them."

[22] *Id.* at p. 108, 812.

[23] *See* ALD6, *supra* note 5, at 216–21; Masimo Corp. v. Tyco Health Care Group, L.P., No. 02-4770, 2004 U.S. Dist. LEXIS 26916, at *19–*24 (C.D. Cal. June 9, 2004).

[24] *See* ALD6, *supra* note 5, at 249–51, 253–54, 256. In *PeaceHealth*, the court recognized, but declined to reach, the issue of whether, to establish the "coercion" element of a tying claim through bundled discounting, a plaintiff must prove that the defendant priced below cost, as with a Section 2 claim. 502 F.3d 895, 928 n.30. The duration of an exclusionary arrangement also can be significant, with agreements of relatively short duration often held reasonable. *See* ALD6, *supra* note 5, at 219–20.

[25] *See* Joseph Angland, *Antitrust in the Supreme Court: What Lies Ahead*, ANTITRUST SOURCE, Dec. 2007, http://www.abanet.org/antitrust/at-source/07/12/Dec07-SupremeSymp12-17.pdf; Gary P. Zanfanga, *What's Next for the Supreme Court on Antitrust Issues?* ANTITRUST SOURCE, Dec. 2007, http://www.abanet.org/antitrust/at-source/07/12/Dec07-SupremeSymp 12-17.pdf; Nicholas Economides & Ioannis Lianos, *The Elusive Antitrust Standard on Bundling in Europe and in the United States at the Aftermath of the Microsoft Cases* (NET Inst. Working Paper #07-47, Dec. 2007), http://www.NETinst.org.

[26] *See* Illinois Tool Works v. Indep. Ink, Inc., 126 S. Ct. 1281 (2006); SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1064 (3d Cir. 1978) ("Particularly significant in terms of practical interchangeability is the fact that certain cephalosporins are effective against certain organisms where other anti-infectives are not, and vice versa."); ALD6, *supra* note 5, at 190–98.

[27] If the manufacturer introduces no evidence on its own costs in litigation, the competitor's costs may be accepted as the benchmark for determining whether products in the manufacturer's bundle are being sold below cost.

[28] Invacare Corp. v. Respironics, Inc., No. 1:04CV1580, 2006 U.S. Dist. LEXIS 77312, at *36 (N.D. Ohio Oct. 23, 2006).

[29] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[30] Applied Med. Res. Corp. v. Ethicon Inc., No. 03-1329, 2006 U.S. Dist. LEXIS 12845, at *7–*10 (C.D. Cal. Feb. 2, 2006) (seller "carved out" exception for competitors offering less than a complete bundle, notwithstanding existence of full-line, albeit arguably "toothless," rival bundle).

[31] *See* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 749 (Supp. 2007).

[32] *Applied Med. Res. Corp.*, 2006 U.S. Dist. LEXIS 12845, at *14.

[33] Note again that the court there held out the possibility that a weak full-line supplier might be considered equivalent to a short-line supplier if some of its products have made little impact in the market. *See Id.*

[34] *Cf.* Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000) (less than complete exclusivity required to qualify for maximum discount).

[35] *Cf.* U.S. Dep't of Justice, Antitrust Div., Response to Linen Systems for Healthcare, LLC's Request for Business Review Letter (2006), *available at* http://www.usdoj.gov/atr/public/busreview/217690.htm (approving of proposed joint venture of regional textile maintenance companies jointly to market textile rental and laundry services to specialized healthcare client); U.S. Dep't of Justice, Antitrust Div., Response to Container America, LLC's Request for Business Review Letter (2000), *available at* http://www.usdoj.gov/atr/public/busreview/4287.htm (approving of proposed creation and operation of joint selling and purchasing vehicle for five regional manufacturers of steel drums).

[36] *Cf.* Broadcast Music Inc. v. CBS, 441 U.S. 1 (1979) (price-setting agreements among competitors held reasonable where necessary to expand competition).

[37] *See* NicSand, Inc. v. 3M Co., 457 F.3d 534, 556 (6th Cir. 2006) (Sutton, J., dissenting), *vacated en banc*, No. 05-3431, 2006 U.S. App. LEXIS 32342, at *1 (6th Cir. Nov. 22, 2006); Steuer, *supra* note 8, at 239–40; 244–45.

[38] *See* White & White, Inc. v. Am. Hosp. Supply Corp., 540 F. Supp. 951 (W.D. Mich. 1982), *rev'd on other grounds*, 723 F.2d 495 (6th Cir. 1983).

[39] Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004) ("When the consumers favor a product or practice, and only rivals squawk, the most natural inference is that the complained-of practice promotes rather than undermines competition."); Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42, 45 (7th Cir. 1996); *cf.* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998) (customer may choose to buy from only one supplier even if it is the only customer in the market).

[40] *Menasha Corp.*, 354 F.3d at 663.

[41] Barry Wright Corp. v. ITT Grinnnell Corp., 724 F.2d 227, 237 (1st Cir. 1983); Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1209–10 (W.D.N.C. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990).

[42] Steuer, *supra* note 8, at 251.

[43] For example, compare the panel and en banc decisions in the *NicSand* case. NicSand, Inc. v. 3M Co., Inc., 457 F.3d 534 (6th Cir. 2006), *vacated en banc*, and NicSand, Inc. v. 3M Co., Inc., No. 05-3431, 2006 U.S. App. LEXIS 32342 (6th Cir. Nov. 22 2006).

[44] *See* Case 85/76, Hoffmann-La Roche & Co. v. Comm'n, 1979 E.C.R. 461; *see generally* Hans-Georg Kamann & Ellen Bergmann, *The Granting of Rebates by Market Dominant Undertakings under Article 82 of the EC Treaty*, [2005] EUROPEAN COMPETITION L. REV. 83; EU Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, Dec. 2005, http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf; Economides & Lianos, *supra* note 25. *See also* Commissioner v. Canada Pipe Co., CT-2002-006 (Canadian Competition Tribunal, Dec. 19, 2007) (consent agreement).