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COMMENTARY

Exploring the Antitrust Modernization Commission's Proposed Test for Bundled Pricing

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BUNDLED PRODUCT PRICING STRATEGIES ARE pervasive. Razors and blades cost less as a package than if purchased separately. Software comes at a discount if pre-loaded on a PC. Parts and service cost less when purchased together. Pricing products as a package is usually an effective strategy for waging competition and is typically beneficial to consumers. Most customers today expect (and in some cases demand) a package price when purchasing two or more items at the same time from a single seller. Yet it is also true that package discounts can make it difficult for single-product rivals to compete; and, in unusual cases, if single-product rivals are sufficiently marginalized, bundling may permit multi-product firms to obtain or increase market power. Sound antitrust policy should permit the detection and prevention of these rare but harmful strategies while, at the same time, allowing beneficial bundled pricing practices to proceed unimpeded.

Sadly, the law governing bundled pricing today is standardless and unworkable. The most significant appellate decision, *LePage's Inc. v. 3M*,[1] found liability in a context where the defendant's prices were above cost, no matter how measured, and did so in an opinion that provides no guidance to business firms or their counselors as to which bundled pricing strategies are permissible and which are not. The lower court cases are in conflict.[2] And commentators cannot agree.[3]

The Antitrust Modernization Commission, created by Congress in 2002 to analyze and report on the nation's antitrust laws, was asked specifically by the Senate's antitrust subcommittee to study the prevailing judicial standards for vertical restraints and exclusionary conduct by dominant firms.[4] The Commission determined that "[s]tandards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate."[5] But the Commission singled out bundling as one area in serious need of additional clarity, concluding that "[t]he lack of clear standards regarding bundling . . . may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare."[6] The Commission recommended that the following standard be applied:

> Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (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 these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.[7]

This article will expand on the rationale, from one Commissioner's perspective, for the AMC recommendation and the mechanics of its application. It will also compare the AMC's proposed test with the tests others have proposed and attempt (at least) to demonstrate that, given the state of knowledge today, the AMC test is the best one available.

Characteristics of Bundled Product Pricing Arrangements

Bundled pricing involves aspects of three more familiar practices—predatory pricing, tying, and exclusive dealing. Bundled pricing resembles predatory pricing because it involves a form of price cutting that may be designed to exclude rivals in order to enhance market power. It resembles tying in that power in one product might be used to attract added patronage of another. And it resembles exclusive dealing in that customers might be induced to patronize the defendant exclusively.

These analogies are imperfect, however. Bundled pricing is *unlike* predatory pricing in that the multi-product seller may exclude rivals without short-term losses by lowering the package price to a level that is above its total (incremental) cost but that provides discounts in amounts that equally efficient single-product sellers cannot meet. It is unlike tying because there may be no element of coercion. And it is unlike exclusive dealing because there may be no agreement, express or implied, requiring the customer to take any portion of its requirements from the defendant. Any rule of law directed at bundled pricing must be sensitive both to the similarities to these other practices and to the differences.

Bundled pricing *can* be harmful to consumers. If multi-product discounts from a multi-product firm shrink the available sales opportunities for the "competitive product" sold by single-product rivals so that their costs increase because of diminished economies of scale (or so that they exit the competitive product's market altogether), the multi-product firm may gain (or

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increase) market power over the competitive product and raise prices to consumers. Exclusion of rivals in the competitive product market may also raise barriers to entry in the monopoly product market, enhancing (or protecting) the multi-product firm's power in that market as well. The academic literature makes clear that adverse effects of this type can occur in normal and expected market scenarios, and are not unrealistic.[8] Thus, for example, in a number of instances, a multi-product seller may raise (or effectively raise) the stand-alone price for the monopoly product—but then offer a "reduced" price in the context of a package discount so that the price of the package approximates the monopoly price for both the competitive product and the monopoly product. Under those circumstances, the bundling will unambiguously reduce consumer welfare.[9]

In addition, the efficiencies associated with bundled pricing arrangements are often insignificant. There often will be some transaction cost savings, shipping cost savings, and some marketing cost savings attributable to the package sale. But these are efficiencies associated with the combined selling and shipping of multiple products, not the bundled pricing arrangement. Wholly unlike exclusive dealing, where the agreement will almost always be associated with significant efficiencies not otherwise achievable,[10] all the savings associated with bundling can typically be achieved by other means—for example, by reducing prices on the bundled items separately, rather than through bundling, to achieve enhanced sales. Products in a package can always be priced separately. The efficiencies from conditioning discounts on the purchase of a bundle are therefore typically small.

Notwithstanding the potentially harmful nature of some bundled discounts, and the typical insignificance of cost-saving efficiencies, rules of law for bundling must be crafted in a way that acknowledges that harmful bundles are rare. The number of well-documented instances of anticompetitive bundled pricing arrangements is very few, and even the cases where bundles have been successfully challenged in court remain controversial. Conversely, the number of benign bundled pricing arrangements is vast. Bundled pricing arrangements are ubiquitous, and complaints are few and far between. Customers, importantly, desire them. Customers ask for discounts when purchasing two products rather than one and are disappointed not to receive them. In actual practice, bundled pricing is often a negotiating tactic of customers—not suppliers—designed to lower the prices they pay. Even where bundling is not unambiguously beneficial to consumers as a form of price cutting, it is often competitively neutral. As Dennis Carlton has emphasized, bundling is often used as a method of price discrimination. When it is, the competitive effects are ambiguous.[11]

Suggested Tests

There are four principal approaches that have been employed or proposed for analyzing the legality of bundled pricing arrangements, each with its own series of variants.

***1.* LePage's.** The *LePage's* decision focused primarily on harm to rivals. The court held that, where a bundled pricing arrangement is used by a multi-product firm that has monopoly power in one (or more)[17] of the relevant product markets, the use of bundled pricing to expand the firm's share of the competitive product is an unlawful use of monopoly power—at least if a jury so concludes. Liability under *LePage's* appears to have been based, not on the actual or potential effect on consumers, but on the fact that the single-product firm was unable to provide a set of products as diverse as the defendant's. The decision articulated no actual "test" for courts to apply.[12]

The *AMC Report* was highly critical of *LePage's* for two principal reasons. First, the Third Circuit had focused primarily, and incorrectly, on the harm to LePage's as a competitor rather than on whether there was any harm to consumers.[13] Second, perhaps even more significantly, the opinion had articulated no legal standard—let alone an administrable standard—leaving multi-product firms no practical ability to defend themselves in litigation and no basis for lawyers to advise their clients on what package discounts will violate the antitrust laws.[14] The AMC's critique of *LePage's* was neither unusual nor unexpected. Defenders of the decision are few.

2. Aggregate Price-Cost Test. At the other extreme, telecom providers (and some others) have advocated an "aggregate" price-cost test. Under this approach, one would look at the multi-product seller's total revenues from the sale of all the products in the bundle and compare that value with the incremental cost (e.g., marginal or average variable cost) of producing all those products. If the aggregate price exceeds the aggregate cost, the defendant prevails. If the relevant sales are below cost on this basis, the plaintiff would then have to demonstrate probable recoupment.[15]

The aggregate rule has the advantage of relative ease of administration. But it is analytically unsound because it ignores completely the bundling aspects of the multi-product seller's conduct and, if followed, would render bundling as such lawful per se. Under the Supreme Court's decisions in *Brooke Group*[16] and *Weyerhaeuser*,[17] a general predatory pricing analysis would compare the defendant's aggregate revenues against its aggregate costs whether the products were bundled or not. Application of the aggregate cost rule, therefore, makes the bundling aspects of the defendant's conduct irrelevant. The AMC had no difficulty in deciding to reject the aggregate cost rule unanimously.

3. Consumer Welfare Effects Test. The consumer welfare effects test—or the rule of reason as many prefer to call it—is the general test for determining whether conduct violates the antitrust laws. It asks directly the one question U.S. antitrust law truly cares about: is the net effect of the conduct harmful to consumers? By avoiding proxies and shortcuts, its singular desire is to get the right answer.[18]

The consumer welfare effects test has a major role to play in the analysis of bundled sales. As discussed below, in contexts in which a package sale is more appropriately characterized as a tie-in or exclusive dealing arrangement, the consumer welfare effects test should be the sole determinant of illegality.[19] Even where, in the more typical case, bundled pricing is challenged because of its price effects, the consumer welfare test remains the basic test that most agree should be applied to all arrange-

ments that fall outside whatever safe harbors are designated.

The real question to be addressed is whether the consumer welfare test, without any safe harbors, is the *only* test to be applied to price bundling. The AMC unanimously answered that question "no." The fundamental reason is that bundled discounts, while not so uniformly procompetitive as to warrant per se legality under the aggregate cost rule, are nevertheless ubiquitous and predominantly a form of price reduction that customers and consumers desire. Because they are so often a form of price competition, some type of screen or safe harbor is appropriate largely for the same reasons that motivated the below-cost pricing and recoupment safe harbors established in *Brooke Group* and reconfirmed in *Weyerhaeuser*: price competition is important, and legal rules should be careful to avoid mistaking aggressive price competition for exclusionary conduct.

4. Attributed Price-Cost Test. The test that has gained the broadest consensus among commentators and at least some courts is the "attribution" test. That test asks whether, "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."[20]

The attributed price-cost test, at least when used as a screen rather than as the determinant of illegality, has a number of key benefits. First, it provides a basis for counseling and for companies to be able to separate the safe from the potentially risky. Second, it avoids protecting inefficient competitors from legitimate competition. A price that is above cost on an attributed price-cost basis will exclude only those rivals who are unable to produce the competitive product at costs as low as the defendant's. Third, it permits the condemnation of exclusionary discounts in circumstances where consumers are likely to be harmed. These benefits have led a wide range of commentators and a number of lower courts to endorse the attributed price cost test in one form or another.[21]

Applying the AMC Test

The Modernization Commission's test has three parts, each of which must be satisfied for a bundled pricing strategy to be condemned as violating the antitrust laws. The first part is the attributed price-cost test; the second is recoupment of any actual losses from the below-attributed cost pricing; and the third is harm to competition.

1. Attribution. The first part of the AMC test is the attributed price-cost test just described. If prices are above cost on this basis, the multi-product seller prevails. So this part of the test acts as a screen or safe harbor.

In applying the attributed price-cost test, one examines all the products in the package. Consequently, even if there are products in the package other than the "monopoly" product and the competitive product, the total discount attributed to *all* products is subtracted from the stand-alone price for the competitive product. This approach is necessary to ensure that the potentially exclusionary aspects of the bundling are not masked by being spread out over many products. It also avoids complex questions of which products should be included in the calculation and which should not.

The *AMC Report* refers to "incremental" cost as the appropriate price-cost standard.[22] This articulation ensures consistency with the marginal or average variable cost standard for predatory pricing that prevails in most federal circuits.[23] And as in predatory pricing analysis, the price-cost test should be applied to the competitive product line as a whole, rather than to sales to individual customers.[24]

Application of the attributed price-cost test requires knowledge of the stand-alone (or unbundled) price for the competitive product because it is from that price that the aggregated discounts are subtracted to calculate the "price" in the price-cost test. There may be cases, however, where the competitive product is not sold on a stand-alone basis and an unbundled price, therefore, cannot be calculated. Where that is so, as discussed further below, the package should be evaluated as a tying or exclusive dealing arrangement rather than as a bundled product pricing practice.

The AMC recognized that the attributed price-cost safe harbor will fail to screen out a number of package discounts that pose little risk to competition. When that occurs, however, the discounts should nevertheless be upheld under part three of the test. Use of the attribution screen alone as "the test" would permit many beneficial pricing practices to be condemned, but as a screen it serves quickly to remove a vast number of benign arrangements from further scrutiny and provides businesses an important vehicle to devise pricing strategies that are completely safe.[25]

2. Recoupment. Part two of the AMC test requires proof that "the defendant is likely to recoup [the] short-term losses" from the "below-cost" pricing identified (using the attribution method) in part one. This part of the test also operates as a safe harbor. If the plaintiff cannot demonstrate probable recoupment, the defendant prevails.

The recoupment part of the test might be conducted in two ways. One would be to determine whether the defendant would be likely to recoup by comparing future revenues to costs for the competitive product only, and to do so under the same attributed revenue basis as applied under part one of the test. The other would be to determine whether the bundled pricing strategy as a whole would result in recoupment of the attributed losses. The AMC test is based on the latter approach. Under that approach, the recoupment requirement will come into play only in those circumstances where the bundled pricing arrangement fails the first screen of the AMC test *and* is such that the price of the bundle is below the incremental cost of all the products in the bundle. Otherwise, there will be no *actual* losses for the defendant to try to recoup. The upshot, therefore, is that a bundled pricing arrangement that fails the first safe harbor because it is below cost under the attribution test, but for which recoupment is simultaneous because the total price of the bundle exceeds the total incremental cost of all the products in the bundle, will fall outside the safe harbor of part two of the AMC test—and will be analyzed under the rule of reason analysis applicable under part three.

There are two reasons underlying any recoupment requirement. The first focuses on possible competitive effects—ensuring that the structures of the affected markets are ones in which higher prices could be imposed on consumers once the predatory pricing (which benefits consumers in the short run) has ceased. The second focuses on incentives—whether the strategy is one that is profitable for the multi-product seller and therefore likely to be pursued.

If part one of the AMC test looks at the cost (on an attribution basis) of the competitive product only, why does the recoupment part of the test look at the bundle as a whole? The alternative approach of analyzing recoupment on the competitive product only would have much to commend it. It would parallel the "below-cost" aspect of the test, and makes the recoupment screen more robust by focusing on the likelihood of consumer harm in the market for the competitive product. In the end, though, the approach of viewing recoupment from the perspective of the bundle as a whole is superior for several reasons.[26]

First, a narrow focus on the competitive product only for recoupment purposes might unwittingly protect arrangements harmful to consumers. That is because bundled pricing arrangements can harm consumers by leading to higher prices than would otherwise be charged for the monopoly product, not just the competitive product. The alternative approach would ignore those effects. Second, by considering the profitability of the bundled product pricing strategy as a whole, the AMC's test captures both of the rationales underlying the recoupment requirement. Focusing on recoupment limited to the competitive product, in contrast, would effectively ignore the incentives rationale. That is because, in many instances, the defendant will have a strong incentive to engage in a below-attributed-cost bundled pricing strategy because recoupment will occur immediately. The AMC approach recognizes that reality.[27] Third, the competitive-product-only approach would be difficult to apply and administer. In particular, where the price bundle as a whole exceeds total incremental costs, and is therefore profitable, there is no obvious or accepted way for a court to look to see where, if, when, and how recoupment on the competitive product might occur. If rivals in the competitive product market are excluded or marginalized, the defendant could recoup by charging customers of the competitive product higher prices for other products within the bundle. Determining whether higher prices in that context are a means for recoupment on the competitive product or are based on other considerations would necessarily be a very difficult task. And fourth, the main benefit of the competitive-product-only approach—ensuring the presence of probable adverse effects in an appropriate relevant product market—is something the AMC's approach captures fully in part three of its test.

3. Harm to Competition. The most important component of the AMC's test is its third part, the requirement of actual or probable harm to competition—i.e., a basic rule of reason test. Given that many package discounts will fail both the below-cost and recoupment safe harbors, it is especially important to ensure in applying the third part of the test that there be solid evidence that competition in a relevant market, considered as a whole, has been or will be harmed. This means proof that market prices have increased or will increase, or that market output has been or will be reduced, or other material consumer harm.[28]

Competitive effects analysis will typically focus on the "competitive product" market, where the impact on rivals and consequent threat of increased market concentration is most often seen. In some cases, however, the bundled pricing arrangement may also enhance (or facilitate the exercise of) the multi-product firm's power in the "monopoly product" market.[29] Proof of significant harm to competition in either market would satisfy the third part of the AMC test.

Application of the harm to competition prong of the AMC test should be straightforward. As articulated by the D.C. Circuit's en banc decision in *Microsoft*, the plaintiff bears the initial burden of proving that the bundled pricing strategy has had or is likely to have a substantially adverse effect on competition—by proof of a material enhancement to the defendant's market power or demonstrable actual or probable effects on price, quantity, or quality. If the plaintiff meets this initial burden, the burden shifts to the defendant to negate the plaintiff's evidence or to produces its own evidence of the procompetitive efficiencies attributable to the bundle. If the defendant produces such evidence, then the plaintiff must show that the challenged conduct is not reasonably necessary to achieve the stated objective or that the anticompetitive effects nonetheless substantially outweigh the efficiency justifications. The ultimate question in each case is whether the net effect of the practice has been to cause or is likely to cause significant consumer harm. If the evidence does not support such a showing, the bundled product pricing offer must be deemed lawful.[30]

The analysis of harm to competition under this structured rule of reason approach is one that need not be complex. As the Supreme Court has recognized, "the rule of reason can sometimes be applied in the twinkling of an eye."[31] Appropriate rule of reason cases are often resolved on summary judgment.[32] Businesses, therefore, do not face unusual litigation risk if legitimate pricing strategies are nevertheless challenged in litigation. And while counseling under a rule of reason analysis is of course not a simple matter of "yes you can, no you can't," businesses generally understand how to avoid practices that will increase prices to their customers. The upshot is that counselors can generally determine which strategies will be entirely safe and which will entail undue risk.

Tying and Exclusive Dealing. The test adopted by the AMC is designed for (and limited to) challenges to bundled *pricing* practices. As the AMC made clear, "[t]he Commission is not recommending application of this [three-part] test outside the bundled pricing context, for example in tying or exclusive dealing cases."[33]

This limitation is important. Cases may arise involving sales practices that are literally "bundling" but in which bundled product pricing analysis is simply inapt. Assume, for example, a case in which there is a technological tie-in of a product that is not practicably available separately—as in *Microsoft*. Application of a price-cost test would not be possible because there is no stand-alone price from which the attributed price-cost test could

be computed. Similarly, if a defendant were selling multiple products A, B, and C, but A was made available only if customers purchased A exclusively from the defendant, the bundling of B and C, and the relationship between the defendant's prices and its costs in connection with the bundle, would not be relevant. The relevant question would simply be whether the exclusive dealing restrained competition unreasonably in the relevant market.

Accordingly, in those cases where the plaintiff can demonstrate that the practical effect of the discount is to effectuate a tying or exclusive dealing arrangement, then normal tying or exclusive dealing standards should apply.[34] Operationally, this would mean that, if the defendant's contract terms lead to exclusive or quasi-exclusive arrangements covering an appropriately large portion of the relevant market (typically in excess of 40 percent), the plaintiff could present the case as one of exclusive dealing. Similarly, if the defendant has significant market power in the market for one product and its contractual arrangements are such that customers have no practical choice but to take a distinct second product from the defendant as a condition of getting the first, the arrangement is appropriately regarded as tying and normal tying rules should apply.[35] Some package discounts may legitimately be characterized as exclusive dealing or tying if these strict requirements are met. The vast majority, however, likely will not.

Comparing the AMC Test to Others

The AMC test has demonstrable advantages over each of the other leading tests that have been proposed.

The aggregate price-cost test effectively renders bundled product pricing by monopolists legal per se by ignoring entirely the fact that separate products are being sold at a discount only to those who purchase the package. If package pricing is uniformly procompetitive, application of this aggregate cost rule might make sense. But that proposition is unsupported. Bundled product pricing can harm consumers under many realistic market contexts and, as discussed above, is associated with only minor cost-saving efficiencies. A rule of virtual per se legality is not justified.

The open-ended standard of *LePage's* is even worse. There are numerous multi-product firms today with strong positions in one or more products that could, depending on market definition and other factors, be found to have market power. Under *LePage's*, almost any package discount they offer brings significant antitrust litigation risk—even if customers strongly desire the package discount (as they often do) and even if the package pricing poses little or no risk of consumer harm. *LePage's* focused primarily on harm to rivals. This approach inevitably discourages proconsumer behavior. Businesses need some standard on which to plan their conduct without running afoul of the law.

The AMC's test, fundamentally, is the consumer welfare effects test with a safe harbor. It resists the extremes of the aggregate price-cost test and the open-ended *LePage's* approach by focusing directly on consumer welfare with a specific guideline that businesses can use to be assured that they are complying with the law.

Some commentators have raised concerns with the AMC's approach. Some say that the safe harbor is too permissive and that anticompetitive discounts will be encouraged—that because the attributed cost safe harbor allows the exclusion of rivals whose costs are higher than the defendant's, consumer welfare may be harmed because even less-efficient rivals may constrain a monopolist's pricing (forcing prices down to at least some measure below the pure monopoly price).[36] The point is technically accurate, and it is foreseeable that application of the AMC test may result in some false negatives as a result. Nevertheless, it is appropriate to err on the side of encouraging price competition customers desire—especially in the context here, where there is no reason to believe that the attribution cost safe harbor will result in an excessive amount of false negatives and where the ones that do result are unlikely to cause serious consumer harm. The only real alternative is no safe harbor at all, and that outcome would surely deter many beneficial pricing strategies. Any kind of sensible cost-benefit analysis would strongly favor keeping the attribution safe harbor in place.

Conversely, others have expressed concern that the attribution safe harbor is not safe enough.[37] Arguments are made that, absent a stronger safe harbor, multi-product firms may not take full advantage of their investments in multiple products, and that this may create an incentive to keep aggregate price levels higher than they otherwise might be. It is certainly accurate in this regard to say that many beneficial package pricing programs will escape the AMC safe harbor and be subjected to further scrutiny. But that outcome is entirely appropriate. Pricing programs that escape the initial screen will be subject to condemnation if, but only if, there is proof that they will increase prices or otherwise harm consumers in a relevant market as a whole. The attribution safe harbor errs on the side of allowing some false *negatives*. Screening out even more arrangements would necessarily generate even more false negatives. That seems quite inappropriate—and unnecessary, since the competitive effects test, properly applied, will rule out all the false positives.

The AMC test balances the need for business clarity against the equal need to protect consumers from anticompetitive harm. No other standard proposed to date does so.

PeaceHealth Case

As this is written, these bundled product pricing issues are all under consideration by the Ninth Circuit in the *PeaceHealth* case. The case is an appeal from a jury verdict in favor of a plaintiff who prevailed at trial following a jury instruction tracking the Third Circuit's approach in *LePage's*.

In March 2007, the Ninth Circuit, *sua sponte*, issued an order permitting any interested party to file a brief as amicus curiae. The results of the court's request were impressive. Eight briefs amici curiae were filed. A brief by the American Antitrust Institute and Consumer Federation of America supported affirmance. Briefs filed by Pacific Bell (and others) and by Verizon (and others) supported the aggregate cost standard. And briefs filed by Genentech (and others) and by various law professors support-

ed the test adopted by the AMC. With many of the leading viewpoints represented, the decision should be of great interest. And a trip to the Supreme Court could be next. ■

[1] 324 F.3d 141 (3d Cir. 2003).

[2] *Compare, e.g.*, Masimo Corp. v. Tyco Health Care Group, No. 02-4770, 2004 U.S. Dist. LEXIS 26916 (C.D. Cal. June 10, 2004) (endorsing *LePage's*), Applied Med. Res. Corp. v. Ethicon, Inc., No. SAC031329JVSMLGX, 2006 WL 1381697 (C.D. Cal. Feb. 3 2006) (same), *and* McKenzie-Williamette Hosp. v. PeaceHealth, No. Civ.02-6032-HA, 2004 WL 3168282, at *4 (D. Or. Oct. 22, 2004) (same) *with*, *e.g.*, J.D.B.L. Corp. v. Wyeth-Ayerst Labs., No. 1:01-CV-704, 2005 WL 1396940, at *12 (S.D. Ohio June 13, 2005) (declining to follow *LePage's*); *see also* Ortho Diagnostic Sys. v. Abbott Labs., 920 F. Supp. 455, 467–69 (S.D.N.Y. 1996) (attributed price-cost test); Virgin Atl. Airways v. British Airways, 59 F. Supp. 2d 571, 580 & n.8 (S.D.N.Y. 1999) (same), *aff'd on other grounds*, 257 F.3d 256 (2d Cir. 2001); Information Res., Inc. v. Dun & Bradstreet Corp., 359 F. Supp. 2d 307, 307–08 (S.D.N.Y. 2004) (same).

[3] *Compare, e.g.*, PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 749b2 (2006 Supp.) (advocating attributed price-cost screen), Barry Nalebuff, *Loyalty Rebates* (2006), *available at* http://www.doj.gov/atr/public/hearings/single_firm/docs/220029.pdf (similar), *and* Willard K. Tom et al., *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L.J. 615, 637–38 (2000) (similar), *with*, *e.g.*, Timothy J. Muris, *Exclusionary Behavior & Bundled Discounts*, Submitted on Behalf of the United States Telecom Ass'n (Nov. 29, 2006), *available at* http://www.law.gmu.edu/faculty/story.php?id=618 (advocating *Brooke Group* test applied to revenues and costs for the total package). *See also* RICHARD A. POSNER, ANTITRUST LAW 234–36 (2d ed. 2001) (advocating equally efficient competitor standard); Kenneth Glazer & Brian Henry, *Coercive v. Incentivizing Conduct: A Way Out of the Section 2 Impasse*, ANTITRUST, Summer 2003, at 49 (focusing on customer incentives).

[4] Letter from Senators DeWine and Kohl to Antitrust Modernization Commission, Oct. 1, 2004, at 2–3, *available at* http://www.amc.gov/comments/senatesubcomm.pdf.

[5] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 83 (2007) [hereinafter AMC REPORT].

[6] *Id.*

[7] *Id.*

[8] *See, e.g.*, Nalebuff, *supra* note 3; Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. ECON. 159 (2004); EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW & ECONOMICS 626–33 (2007); Janusz Ordover & Greg Shaffer, *Economics of Loyalty Rebates: Where Are We Now?* (Nov. 29, 2006), *available at* http://www.usdoj.gov/atr/public/hearings/single_firm/docs/220032.pdf; AREEDA & HOVENKAMP, *supra* note 3, ¶ 749b2; *see also* Patrick Greenlee et al., *An Antitrust Analysis of Bundled Loyalty Discounts* (Oct. 30, 2006), *available at* http://www.usdoj.gov/atr/public/hearings/single_firm/docs/220345.pdf. Note that Professor Nalebuff's analysis focuses on the defendant's absorption of consumer surplus through price discrimination (as well as on enhancement of market power) as the source of consumer harm. The total welfare effects of this type of price discrimination, however, are ambiguous. *See infra* note 11 and accompanying text.

[9] *See* ELHAUGE & GERADIN, *supra* note 8, 626–28; Nalebuff, *supra* note 3. Consumer welfare is also reduced where the effect is to create or enhance market power, with or without an immediate price effect.

[10] *See, e.g.*, Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311, 357–60 (2002).

[11] *See* AMC REPORT, *supra* note 5, at 398–99 (separate statement of Commissioner Carlton) ("By offering product A separately from the bundle consisting of (A, B), a monopolist can separate consumers into different groups and charge different prices."); *see generally* ELHAUGE & GERADIN, *supra* note 8, at 398, 633 ("[I]mperfect price discrimination has ambiguous effects on output, efficiency, and total welfare. All are more likely to increase the more fine-tuned such imperfect discrimination is. Compared to uniform pricing, imperfect price discrimination also has ambiguous effects on net consumer welfare; however, it will predictably redistribute welfare away from the low-elasticity (price sensitive) consumers toward the high-elasticity (price insensitive) consumers.") (footnotes omitted); DENNIS CARLTON & JEFFREY PERLOFF, MODERN INDUSTRIAL ORGANIZATION 284–90 (3d ed. 1999).

[12] 324 F.3d at 161–62.

[13] AMC REPORT, *supra* note 5, at 97; *see* Daniel L. Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. CHI. L. REV. 243 (2005). The *LePage's* opinion did point out that the jury might have concluded that the effect of 3M's bundled pricing strategy could have been the elimination of lower-priced private label tape, which "would channel consumer selection to the higher price Scotch brand and lead to higher profits for 3M." *LePage's*, 324 F.3d at 162. Yet nothing in the opinion suggested that any such consumer harm was essential to liability.

[14] AMC REPORT, *supra* note 5, at 97.

[15] *See* Muris, *supra* note 3. The aggregate price-cost test was advocated in Brief of Pacific Tel. Co. & Visa USA as Amici Curiae Supporting Appellant, Cascade Health Solutions v. PeaceHealth, No. 05-36153 (9th Cir. filed Apr. 19, 2007).

[16] Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–23 (1993).

[17] Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co., 127 S. Ct. 1069, 1071 (2007).

[18] *See* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006); Jonathan M. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 ANTITRUST L.J. 779 (2006).

[19] *See infra* text accompanying notes 31–33; Jacobson & Sher, *supra* note 18 (exclusive dealing); Jonathan M. Jacobson, Tying: Antitrust Law & Policy, Paper for Conference Board (Mar. 2007), *available at* http://www.wsgr.com/publications/PDFSearch/jacobson0307.pdf (tying).

[20] AMC REPORT, *supra* note 5, at 83.

[21] For commentators supporting the attribution cost test in some form, see, as examples, AREEDA & HOVENKAMP, *supra* note 3, ¶ 749b2; Nalebuff, *supra* note 3; Tom et al., *supra* note 3; Carl Shapiro, *Exclusionary Conduct* 17–18 (Sept. 29, 2005) (AMC testimony), *available at* http://www.amc.gov/commission_hearings/ pdf/Shapiro_Statement.pdf; R. Hewitt Pate, *Exclusionary Conduct*, at 13–18 (Sept. 29, 2005) (AMC testimony), available at www.amc.gov/commission_hearings/pdf/Pate_statement.pdf. For court endorsements of the test, see Ortho Diagnostic Sys. v. Abbott Labs., 920 F. Supp. 455, 467–69 (S.D.N.Y. 1996); Virgin Atl. Airways v. British Airways, 59 F. Supp. 2d 571, 580 & n.8 (S.D.N.Y. 1999), *aff'd on other grounds*, 257 F.3d 256 (2d Cir. 2001); Information Res., Inc. v. Dun & Bradstreet Corp., 359 F. Supp. 2d 307, 307–08 (S.D.N.Y. 2004). There are reports that the test was developed by Janusz Ordover at a break in his deposition in the *Ortho* case.

[22] AMC REPORT, *supra* note 5, at 98–100.

[23] *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 272–82 (6th ed. 2007).

[24] *See id.* at 274–75. A focus on a limited number of customers, however, may be appropriate in unusual circumstances where those sales alone are likely to drive competitors from the market. *Id.*

[25] Although price-cost analyses are a good deal more administrable than many other tests, there are many complexities inherent in any cost-based analysis. *See, e.g.*, United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003). The AMC recognized this point but took the cost-based safe harbor approach anyway because the difficulties in applying a price-cost screen were considered minor, in the commissioners' collective experience, as compared to the available alternatives. Most importantly, the availability of a cost-based screen allows businesses to engage in planning; their cost analyses may be second-guessed in litigation, but that typically will be a difficult challenge for a claimant to mount.

[26] Some have pointed out that, under the alternative approach, it may be easier for a defendant to obtain summary judgment; they reason that summary judgment on probable recoupment is more likely than on harm to competi-

tion. While elevating a plaintiff's burden will definitionally enhance a defendant's prospects for summary judgment, the differences here should be trivial. The same bases that will lead to summary judgment on recoupment should equally justify summary judgment on harm to competition.

[27] An example illustrates the point. D sells four products, P1, P2, P3, and P4. P1 is the monopoly product, P4 the competitive product. The unbundled price for each product is $20, and the cost is $18. D adopts a bundled pricing strategy in which the price for all four products is $76. The price is below attributed cost on P4 (the attributed revenues are $16, and the cost $18), but the strategy is profitable in that the revenues of $76 exceed the cost of $72. Consumers will be harmed by the bundled pricing in this example if rival costs had been at the equally efficient level of $18, but the volume lost to the bundled pricing arrangement results in lost scale economies, driving their costs up over $18, or leading some or all to exit the market.

[28] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 30–32 (1984); United States v. Visa USA, Inc., 344 F.3d 229, 241 (2d Cir. 2003).

[29] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (exclusion of competition in browsers raised barriers to entry into monopolized operating systems market).

[30] *Id.* at 45–50; *see* Jacobson & Sher, *supra* note 18, at 799–801; Antitrust Law Developments, *supra* note 23, at 58.

[31] NCAA v. Board of Regents, 468 U.S. 85, 109–10 (1984) (quoting Phillip Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981)).

[32] *See, e.g.*, PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 104, 111 (2d Cir. 2002) (summarily disposing of monopolization and rule of reason claims, stating "[i]n the context of antitrust cases, however, summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces.") (the author represented the defendant in this case).

[33] AMC Report, *supra* note 5, at 114 n.157. It has long been recognized that price discounts can be used to effectuate exclusive dealing arrangements. Early exclusive dealing cases, in fact, were predominantly ones in which exclusive dealing was induced through heavy discounting. *See*, *e.g.*, Whitehall v. Continental Tobacco Co., 125 F. 454 (8th Cir. 1903). Section 3 of the Clayton Act was designed to prohibit those arrangements, provided there was proof that exclusive dealing would lessen competition substantially. *See*, *e.g.*, H.R. Rep. No. 627, PT. 1, 63 Cong., 2d Sess. 13 (1914); 51 Cong. Rec. 9161–62 (1914) (Rep. Floyd). The statutory language of Section 3, in fact, applies expressly to arrangements achieved by the "fix[ing of a] . . . discount." 15 U.S.C. § 12. Similarly, under certain circumstances, package discounts can be used to effectuate a tying arrangement. And, again, the specific language of Section 3 of the Clayton Act, which applies to tying as well as exclusive dealing, contemplates tying arrangements achieved by means of discounting, including package discounts. *Id.*; *see* 10 Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1758, at 326 (2d ed. 2004).

[34] *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000); Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483 (8th Cir. 1992).

[35] *See, e.g.*, 10 Areeda & Hovenkamp, *supra* note 33, ¶ 1758, at 327–28; 9 Areeda & Hovenkamp, *supra* note 33, ¶ 1729.

[36] *See, e.g.*, Elhauge & Geradin, *supra* note 8, at 630.

[37] *E.g.*, AMC Report, *supra* note 5, at 99 n.* ("Commissioners Carlton and Garza join [the AMC's] recommendation, but are concerned that the first screen in the three-part test would still require many pricing schemes where exclusion is not at issue to receive further scrutiny under the second and third parts of the test.").

COMMENTARY

AMC Legislative Recommendations

BY LARRY FULLERTON

AS HAS BEEN WIDELY NOTED, one of the central themes of the Antitrust Modernization Commission's Report and Recommendations (April 2007) is that the current state of U.S. antitrust law is generally sound.

The Commission concluded that the statutory basis for public and private antitrust enforcement is generally adequate and that it is flexible enough to allow for its continued "modernization" through the common law process. The Commission expressly recommended, for example, that no statutory changes are needed to the Sherman Act or Section 7 of the Clayton Act, and that no statutory changes are needed to improve the application of antitrust to "new economy" industries. The Commission did not recommend any end to the shared law enforcement responsibilities of the Antitrust Division, the FTC, and the states. Generally, where the Commission concluded that changes are needed, it saw the courts or the enforcement agencies themselves as best positioned to implement needed reforms, rather than the Congress.

Nevertheless, in several instances, the Commission's formal recommendations do include recommendations for legislative action by the Congress. The more potentially significant of those recommendations are summarized below, along with a brief discussion of their near-term prospects for enactment. Note that recommendations with the support of at least seven of the twelve Commissioners were reported as recommendations of the Commission as a whole. The precise "votes" on each recommendation were not formally reported; indeed to do so would have been difficult, given that many recommendations were subject to separate concurring and dissenting statements by individual Commissioners.

Summary of Legislative Recommendations

Robinson-Patman Repeal. Perhaps the most notable of the Commission's legislative recommendations is that "Congress should repeal the Robinson-Patman Act in its entirety." Recommendation 55. This recommendation was based on the Commission's finding that the Robinson-Patman Act prohibition

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