ANTITRUST TREATMENT OF BUNDLED DISCOUNTS IN US: A CASE ANALYSIS

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Discounts and rebates have been a longstanding practice of sellers in order to lure customers to buy their products. The practice goes by various different names, often used interchangeably,[1] as loyalty or fidelity discounts/rebates, quantity or volume discounts/rebates or bundled discounts/rebates. Loyalty discounts or rebates are agreements whereby a seller gives discounts to buyers on fulfilling a condition in purchase which may range from buying some percentage of the relevant product from the seller to buying all of it. Discounts are generally offered on individual transactions, while rebates are normally deductions or cash payments made retrospectively to a customer in accordance with the latter's purchases over a period of time.[2] However these terms are used interchangeably in competition law literature. Scholars opine that the terminology of discount or rebate may be misleading as it suggests that these schemes offer lower price to buyer, which may not be true in all cases.[3] Prof. Elhauge and Prof. Geradin argue that the terminology only suggests that there is a price difference between the buyers who comply with the loyalty programme and those who do not. If the seller has raised the noncompliance price above the but-for price it would have charged without any loyalty programme, or if its prices have generally been inflated by the foreclosure effects generated by the loyalty programme, then the discounted price paid by loyal buyers may well be higher than the but-for price they would have paid without the loyalty programme.[4]

Discounts and rebates are often viewed as a healthy and legitimate competitive practice. Since dominant firms do not face effective competition, it is considered to be healthy if they roll out a share of their profits to buyer consumers. However, on the other side this practice also forecloses market share which otherwise would have been available to rival competitors. Therefore, loyalty discounts or rebates pose two extreme situations. At one end of spectrum they offer price reduction which is the classic form of competition on merits reflecting the dominant firm's efficiency. At the other end, they tend to burden the customers with exclusive purchasing obligation thereby excluding competitors from accessing the residual market. The case laws on discount schemes largely reflect the tension between these two dialectic ways of viewing such schemes. This paper will review treatment of loyalty and bundled discounting practices by the US courts. Part I of the paper briefly explains the various

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[1] However, there are slight differences among all these terms (see *infra*). But for the purposes of antitrust/competition analysis of these practices they pose little difference.

[2] *See*, Jonathan Faul & Ali Nikpay, The EC Law of Competition, (2nd Ed., Oxford,) at 381

[3] *See*, Einer Elhauge & Damien Geradin, Global Competition Law and Economics, (1st ed., Hart) at 570

[4] Id.

types of rebate schemes followed by the firms. Part II discusses the US law condemning such discount schemes with the help of leading case laws on this subject. Finally, in part III general observations have been made based on the decisions of the courts.

Part I: Understanding Rebates

Discount or rebate schemes are sub-set of discriminatory pricing conduct by dominant firms. They may take various forms depending upon the terms of agreement. A first form of rebate relates to "loyalty" or "fidelity" rebate where discounts are offered to the buyer on the commitment that he/she shall place all or majority of its order to the seller granting the rebate. Another form of rebate may be in terms of quantity rebate where discounts are offered on the condition that a specific quantity of product is bought from the seller. Quantity rebates may also take the form of target rebates where the discounts are offered if the purchaser reaches a specified sales target. Quantity discounts may, sometimes, be loyalty inducing and thus are treated similar to loyalty discounts. Yet another form of rebate may be bundled discounts where the seller conditions the discount on purchase of two distinct products.

Overview: Part II: Legal Treatment of Rebates/Discounts in US

The US courts have treated loyalty discounts as a mechanism for exclusive dealing. Agreements aimed at exclusive dealing are generally scrutinized under rule of reason under Section 1 of the Sherman Act. However, they are also litigated under Section 2 of the Sherman Act as such agreements have tendency to enable a firm to move into a position of dominance. Finally Section 3 of the Clayton Act expressly makes it unlawful to offer a "discount . . . or rebate . . . on the condition, agreement, or understanding that the . . . purchaser . . . shall not use or deal in the goods . . . of a competitor where the effect of . . . such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce". Further, the US Supreme Court has held that Section 3 of the Clayton Act condemn not merely exclusive dealing contracts but also contracts that have the practical effect of inducing exclusive dealing. Therefore, quantity discounts which though on the face of it may not be exclusive-dealing in nature, however, if they tend to induce exclusive dealing they would be covered under Section 3 of the Clayton Act.

1. *United States v. Loew's Inc. 371 US 38 (1962)*

This case raised the issue of validity of block booking of copyrighted feature motion pictures for television exhibition under Section 1 of the Sherman Act. The defendants had conditioned the license or sale of one or more feature films upon the acceptance by the station (buyer) of a package or block containing one or more unwanted or inferior films. The Court classified these agreements as tie-in contracts and held that the requisite economic power is presumed when the tying product is patented or copyrighted. The Court further held:

> "Moreover, there can be no question in this case of the adverse effects on free competition resulting from appellants' illegal block booking contracts. Television stations forced by appellants to take unwanted films were denied access to films marketed by other distributors who, in turn, were foreclosed from selling to the stations. Nor can there be any question as to the substantiality of the commerce involved. The 25 contracts found to have been illegally block booked involved payments to appellants ranging from $60,800 in the case of Screen Gems to over $2,500,000 in the case of Associated Artists. A substantial portion of the licensing fees represented the cost of the inferior films which the stations were required to accept. These anticompetitive consequences are an apt illustration of the reasons underlying out recognition that the mere presence of competing substitutes for the tying product, here taking the form of other programming material as well as other feature films, is insufficient to destroy the legal, and indeed the economic, distinctiveness of the copyrighted product. By the same token, the distinctiveness of the copyrighted tied product is not inconsistent with the fact of competition, in the form of other programming material and other films, which is suppressed by the tying arrangements. It is therefore clear that the tying arrangements here, both by their "inherent nature" and by their "effect", injuriously restrained trade."[5]

The court without going into the analysis of injury took a per se approach in declaring the appellant's scheme illegal.[6]

2. *SmithKline Corp v Eli Lilly & Co 575 F 2d 1056 (3rd Cir 1978)*

The case involved the bundling of cephalosporin family of antibiotics. Lilly introduced the first cephalosporin, Keflin, in 1964 and later followed with Keflax. In the early 1970s, the two Lilly products accounted for over 80 percent of the market. In 1973, SmithKline introduced its own cephalosporin called Ancef. Lilly responded by (a) introducing a generic equivalent of Ancef, called Kefzol, and (b) offering customers a three percent rebate if they purchased all three of the Lilly products. Thus, Lilly took advantage of the popularity of Keflin and Keflax to gain an advantage in selling Kefzol against SmithKline's Ancef. In order for SmithKline to sell Ancef to a customer that needed all three drugs-and to do so at a price that left the customer in the same economic position as if it had bought all three drugs from Lilly-SmithKline had to do two things. First, it had to match Lilly's three percent discount on Kefzol, the product directly competitive to Ancef. But it also had to price Ancef sufficiently lower than Kefzol to offset the customer's loss of the three percent discount on its purchases of Keflax and Keflin. The effect of the bundling scheme was, therefore, to force SmithKline to pay rebates on one product, Ancef, equal to rebates paid by Lilly based on volume sales of three products.[7] The lower Court had found SmithKline's prospects for continuing in the cephalosporin market under such conditions to be poor.

The Circuit Court first analyzed the offence of monopoly under Section 2, Sherman Act. For the offence of monopoly, it held, two elements must be proved: (1) the possession of monopoly power in the relevant market and (2) the willful

[5] 371 US 38 at 48,49

acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[8] Relying on the finding of lower courts on the issue of relevant geographic and product market, the Circuit court held that Lilly's bundling scheme aimed at willful acquisition and maintenance of monopoly by linking its product with the products on which it faced no competition.[9] In the opinion of the Court, the goal of the programme was to associate Lilly's legal monopolistic practices with an illegal activity that directly affected the price, supply, and demand of Kefzol and Ancef. Were it not for the Lilly's alleged scheme, the price, supply, and demand of Kefzol and Ancef would have been determined by the economic laws of a competitive market.[10]

The case is important for the reason that unlike the decision in Loew's Inc, the Court did not presume that the bundled discounts are per se anti-competitive. In arriving at its conclusion the Court took into account the costing which SmithKline would have to spend to meet competition against Lilly.[11] However, the Circuit Court could have used a detailed cost test before endorsing the lower court's conclusion that SmithKline's prospects for remaining in the market were poor. **3. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp 509 U.S. 209 (1993)***

The Brooke Group was concerned with the issue of volume discounts. This case involved competition between two cigarette manufacturers. Prior to the mid 1980's, both companies produced branded cigarettes. In the mid-1980s, Liggett, which eventually became part of Brooke Group, pioneered the development of "generic" cigarettes, which were sold at a lower price (approximately 30% lower) than branded cigarettes. Liggett promoted its generic cigarettes at the wholesale level by giving rebates that increased with the volume of cigarettes ordered. In response, Brown & Williamson introduced their own line of generic cigarettes, and also promoted them using volume rebates.

After a price war developed in which successively larger volume rebates were offered to wholesalers, Liggett filed a suit alleging, among other things, that Brown & Williamson's "discriminatory volume rebates to wholesalers violated the Robinson Patman Act by furthering a predatory pricing scheme designed to purge competition from the economy segment of the cigarette market."[12]

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[6] The court noted that ". . . tying arrangements, once found to exist in a context of sufficient economic power, are illegal without elaborate inquiry as to . . . the business excuse for their use." 371 US 51, 52.

[7] Although Eli Lilly's rebate was only three percent, due to the amount of volume sales, SmithKline would have had to offer rebates of sixteen percent to average size hospitals and thirty-five percent to larger hospitals. 575 F 2d 1056, 1062

[8] *Id*. at 1061

The Court concluded that Brown & Williamson was entitled to judgment as a matter of law because it had no reasonable prospect of recouping the losses suffered during the predatory scheme.[13] The Court began by stating that a plaintiff seeking to establish a predatory pricing claim must prove that the prices are below a measure of its rival's costs, but did not specify whether that cost was average total cost (ATC) or AVC.[14] The Court reasoned that low prices that are above cost do not threaten competition and may benefit consumers.[15] Because lowering prices is often the essence of competition, the Court felt that lower standards for predatory pricing would chill competition instead of preserving it.[16]

4. *Ortho Diagnostic Systems v Abbott Laboratories, 920 F Supp 455 (SDNY, 1996)*

In this case, the defendant entered into a contract with Council of Community Blood Centers (CCBC) offering pricing advantages on purchase of four or five tests products used in screening blood supply for the presence of viruses. All the five tests were complementary to each other and none was a substitute for the other. Abbot enjoyed monopoly position in some of the tests of the package. Ortho claimed that this pricing scheme foreclosed competition in the relevant market. It further claimed that it lost a significant volume of sales that it otherwise would have made to CCBC customers. Interestingly, the prices set forth by Abbot in the CCBC contract were above its average variable cost. On this ground Abbot claimed that a claim under Section 2 cannot succeed against it.

Therefore, the question was whether a firm that enjoyed a monopoly on one or more of a group of complementary products, but which faced competition on others, could price all of its products above average variable cost and yet still drove an equally efficient competitor out of the market. The court concluded the answer in affirmative by giving an example.[17] It further held that though the defendant's pricing scheme had not driven Ortho out of the market, it did not mean that the plaintiff might not seek judicial relief as long as it remained in business. The crucial issue was in such cases where the dominant firm has not only priced its bundled products above its average cost but also above the plaintiff's average cost, what should be the standard threshold to find a violation of Section. The Court concluded that a Section 2 plaintiff in such cases—in which a monopolist (1) faces competition on only part of a complementary group of products, (2) offers the products both as a package and individually, and (3) effectively forces its competitors to absorb the differential between the bundled and unbundled prices of the product in which the monopolist has

[9] *Id.* at 1065

[10] *Id.*

[11] See, *supra* fn 7

[12] 15 U.S.C. §13a. This type of injury, which harms direct competitors of the discriminating seller, is known as primary-line injury under the Robinson Patman Act.

[13] 509 U.S. 209, 243. The Court held that the evidence was insufficient to support a finding that Brown & Williamson's alleged predatory pricing scheme "was likely to result in oligopolistic price coordination and sustained supracompetitive pricing in the generic segment of the national cigarette market." *Id.* Because of this, Brown & Williamson could not threaten competition or cause an injury that the antitrust laws proscribe. *Id.*

market power-must allege and prove either that (a) the monopolist has priced below its average variable cost or (b) the plaintiff is at least as efficient a producer of the competitive product as the defendant, but that the defendant's pricing makes it unprofitable for the plaintiff to continue to produce.[18] On the issue of tying the Court held that mere selling of package at a discount price is not alone sufficient to establish the requisite tie-in. The plaintiff must also establish that the defendant's pricing structure makes purchase of the tying ad tied products together the only viable economic option.[19] On evidence, the Court found that the unbundled prices of the products were not so high as to make their purchase as part of the package the only viable alternative.[20] Hence, it concluded that Abbott's contract with CCBC was not that of tying and exclusive dealing. This ruling significantly differed from the judgement in SmithKline case where the court declared the bundled discount illegal as it helped maintain monopoly power by making rebates on a monopoly product contingent on purchasing a non- monopoly product.

5. *Concord Boat v Burnswick Corp 207 F 3d 1039 (8th Cir 2000)*

In this case the defendant was alleged to violate Section 1 and Section 2 of Sherman Act and Section 7 of the Clayton Act because of its quantity discount scheme. The defendant, a stern drive engine manufacturer, acquired 75% market share by 1983. The defendant then offered a 3% discount to boat builders who bought 80% of their engines from the company, a 2% discount for 70% of all purchases, and a 1% discount for those who took 60% of their needs. The Court held that in order to test the reasonableness of any contract under Section 1 three factors had to be considered:

14 *Id*. at 223

15 *Id*. The Supreme Court reasoned that low prices above predatory levels do not threaten competition. Noting that this principle has been adhered to in all types of antitrust claims, the Court stated that the "exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." *Id.* The Court was concerned that any other rule would protect competitors from the loss of profits from legitimate price competition. In view of the goals of the antitrust laws, this result would be perverse. *Id.*

16 *Id*. at 226-27. The Court thought that "[i]t would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high."

17 The Court noted: "A hypothetical example illustrates the point. Assume for the sake of simplicity that the case involved the sale of two hair products, shampoo and conditioner, the latter made only by A and the former by both A and B. Assume as well that both must be used to wash one's hair. Assume further that A's average variable cost for conditioner is $2.50, that its average variable cost for shampoo is $1.50, and that B's average variable cost for shampoo is $1.25. B therefore is the more efficient producer of shampoo. Finally, assume that A prices conditioner and shampoo at $5 and $3, respectively, if bought separately but at $3 and $2.25 if bought as part of a package. Absent the package pricing, A's price for both products is $8. B therefore must price its shampoo at or below $3 in order to compete effectively with A, given that the customer will be paying A $5 for conditioner irrespective of which shampoo supplier it chooses. With the package pricing, the customer can purchase both products from A for $5.25, a price above the sum of A's average variable cost for both products. In order for B to compete, however, it must persuade the customer to buy B's shampoo while purchasing its conditioner from A for $5. In order to do that, B cannot charge more than $0.25 for shampoo, as the customer otherwise will find A's package cheaper than buying conditioner from A and shampoo from B. On these assumptions, A would force B out of the shampoo market, notwithstanding that B is the more efficient producer of shampoo, without pricing either of A's products below average variable cost.", 920 F Supp 455, 467

18 *Id.* at 469

(i) extent to which competition has been foreclosed; (ii) duration of any exclusive arrangement and (iii) the height of entry barriers.[21] The Court found that none of the factors were satisfied to the extent to declare the defendant's contract illegal. It held that no evidence was produced to show that the defendant foreclosed a substantial share of market. Neither was it demonstrated that the discount programme was in any way exclusive. Nor did the plaintiff show that significant barriers to entry existed in the stern drive engine market. On the issue of Section 2 claim, the court cautioned that while dealing with above cost discounting it runs a high risk of chilling legitimate price cutting.[22] If a firm has discounted prices to a level that remains above the firm's average variable cost, "the plaintiff must overcome a strong presumption of legality by showing other factors indicating that the price charged is anticompetitive."[23] In the opinion of the Court, there was nothing on record to show that the defendant's superior market share was achieved or maintained by means other than the competition on the merits.[24]

The importance of the judgement lies in the ruling that above cost discounting practice is presumed to be legal and the burden of overcoming this presumption lies on the plaintiff. This was not the first time that the Court was ruling on the legal presumption in favour of the defendant when the issue involved above cost discounting. However, the manner in which the court analyzed the issue clear shows the difference on the issue of discounting schemes at lower courts level.

6. *LePage's Inc v 3M, 324 F 3d 141 (3rd Cir 2003) (en banc)*

In *LePage's Inc*, the defendant, 3M, had a market share of more than 90% in transparent tape market. The plaintiff started selling second brand and private label transparent tape and accounted for 88% sales of such tape, which represented but a small proportion the total transparent tape market. The defendant also entered the market of private label tapes and it instituted multi-tiered bundled rebate structure, offering higher rebates when customers purchased products in a number of 3M's different product lines. The size of the bundled rebates increased when retailers met volume goals across six product categories, with the largest rebates being given to retailers that met the volume targets in all six categories.[25] In particular, *LePage's* claimed that 3M's bundling of rebates across product lines and entrance into exclusive contracts constituted exclusionary practices.[26] In reply, 3M, relying on the decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[27], argued that its conduct was perfectly legal as it never priced its product below its cost.[28] Therefore the first

[19] *Id.* at 471
[20] *Id.*
[21] 207 F 3d 1039 at 1059
[22] *Id* at 1061

question before the Court was to determine whether after the Brooke Group a conduct by a monopolist who sells its product above cost - no matter how exclusionary the conduct - could constitute monopolization in violation of Section 2 of the Sherman Act. The Circuit Court distinguished it holding that unlike the *Brooke Group*, the plaintiff did not make a predatory price claim. It noted that nothing in the decision overturned decades of Supreme Court precedent that evaluated a monopolist's liability under Section 2 by examining its exclusionary, i.e., predatory, conduct.[29] Instead, the court found that a section 2 Sherman Act violation could occur if a monopolist engaged in exclusionary conduct without a valid business justification.[30] To support the decision, the majority examined different types of conduct which had previously been held exclusionary.[31] Cases cited found violations of section 2 in many forms of conduct: a legal monopoly obtained through patent fraud, predatory pricing, a monopolist's refusal to grant access to essential facilities, and refusals to deal.[32]

Next, the Third Circuit compared 3M's conduct with Eli Lilly's conduct in *SmithKline.*[33] Finding that 3M's conduct was substantially identical to that of Eli Lilly, the court held that 3M's bundled rebates operated to exploit its monopoly power.[34] According to the Third Circuit, the foremost anticompetitive effect of 3M's bundled rebates was the foreclosure of portions of a market to a competitor who did not offer a similar array of products.[35] Asserting that the effects of 3M's rebates, due to its extensive catalog of products, were even larger than those attributed to Eli Lilly's rebates in *SmithKline*, the court found 3M's conduct at least as anticompetitive as Eli Lilly's.[36]

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[23] *Id*.
[24] *Id.* at 1062
[25] The bundled rebates which 3M offered spanned six different product lines: Health Care Products, Home Care Products, Home Improvement Products, Stationery Products (including transparent tapes), Retail Auto Products, and Leisure Time.
[26] 324 F 3d 141, 145
[27] See, *supra* fn 12-16
[28] 324 F 3d 141, 147
[29] *Id*. at 152
[30] *Id.*
[31] *Id.* at 152-154
[32] *Id.* at 152–53; *see also* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965); U.S. Philips Corp. v. Windmere Corp., 861 F.2d 695 (Fed. Cir. 1988); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Byars v. Bluff City News Co., Inc., 609 F.2d 843 (6th Cir. 1979).
[33] *LePage's*, 324 F.3d at 155–56.
[34] *Id* at 156
[35] *Id.* at 155
[36] *Id.* at 157. The dollar amount of 3M's rebate to Sam's Club in 1996 was $666,620. LePage's sales to Sam's Club in 1993 totaled $1,078,484. This amounted to 3M giving rebates to some customers which were as much as half of LePage's total tape sales. Because of these numbers, the court stated that "3M's conduct was at least as anticompetitive as the conduct which this court held violated § 2 in *SmithKline*." *Id.*

In addition to the foreclosure effects of the bundled rebates, the court noted that *LePage's* introduced evidence to showing that the bundled rebates were designed to exclude *LePage's* from the market.[37] *LePage's* argued that the structure of the rebates forced distributors to deal only with 3M in order to maximize the rebate and avoid financial penalties for not meeting a quota in a particular product line.[38]

After considering the effects attributable to the bundled rebates and exclusive dealing arrangements, the Third Circuit recognized that the jury could reasonably infer that 3M sought to eliminate the lower-priced, private-label transparent tape from the market in order to reap profits from higher-priced Scotch tape.[39]

Because of the anticompetitive effects of the bundled rebates, the court had to consider whether there was a valid business justification for the practice.[40] The court held that even though 3M's activities were in line with its economic interests, this was not a valid business reason for purposes of a section 2 claim.[41] The court maintained that 3M did not meet the burden of persuasion merely by claiming that single invoices and bundled shipments increased efficiency.[42] Because 3M did not advance a valid business justification, the court affirmed the lower court's decision that 3M violated section 2 of the Sherman Act.

The decision in LePage's Inc poses various problems. The Third Circuit's decision clearly circumvents the decision of the Supreme Court in the Brooke Group case. The Third Circuit claimed that *Brooke Group* was inapplicable because LePage's did not make a predatory pricing claim.[43] However, in *Brooke Group* the Supreme Court stated that low prices above predatory levels benefit consumers without threatening competition.[44] The Supreme Court also suggested that this principle applies to any antitrust claim, not only predatory pricing claims.[45] Therefore, the rationale of *Brooke Group* should have applied in *LePage's*, even if the court felt

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[37] *Id.* at 158. Evidence showed that a buyer from LePage's largest customer, K-Mart, said to LePage's, "I can't talk to you about tape products for the next three years." *Id.* However, with the exception of express exclusive dealing contracts with Venture and Pamida, the exclusive dealing arrangements complained of by LePage's did not contain an express exclusivity requirement. The issue was that because the rebates were so large, a customer such as K-Mart would buy as much as possible from 3M to maximize its rebate. The result was that the customer would not buy from LePage's. *Id.*

[38] *Id.* at 159. The rebates offered could be maximized by dealing with 3M in as many product lines as possible, often resulting in a distributor exclusively dealing with 3M in those product lines

[39] *Id.* at 162.

[40] *Id.* at 163–64

[41] *Id.* at 163. The court noted that a "business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus pursuit of efficiency and quality control might be legitimate competitive reasons . . . while the desire to maintain a monopoly market share or thwart the entry of competitors would not." *Id.* (citing Data Gen. Corp. v. Gramman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994)).

[42] *Id.* at 164. While 3M alluded to efficiency concerns in an attempt to give a valid business justification for the exclusionary conduct, the court felt it was highly unlikely that savings from single invoices or bundled shipments would reach the millions of dollars returned to customers through the bundled rebates. *Id.*

that LePage's did not state a predatory pricing claim.

A second major ramification is that the Third Circuit's decision opens the door for juries to find that a monopolist violates section 2 of the Sherman Act by offering bundled rebates that result in harm to competitors. Taken to its logical conclusion, the holding of *LePage's* may be seen as a complete prohibition on a monopolist's offering of bundled rebates. This result marks the crucial difference between the *SmithKline* and *LePage's* decisions. In *SmithKline*, evidence was introduced to show how much of a discount SmithKline would have had to offer to compete with Eli Lilly.[46] *LePage's* did not even make an attempt to measure the discount it would have had to offer to meet 3M's rebates.[47] Without requiring a plaintiff to produce specific evidence that the bundled rebates forced the plaintiff to make drastic reductions in price, the Third Circuit deemed bundled rebates illegal when offered by a monopolist.

This result is disturbing as it may have dangerous results. An efficient firm would not be able to indulge in price competition which is the central nervous system of a competitive market would. As a result inefficient or less efficient firms would operate in market passing on higher cost of products on the consumers.

Part III: Conclusions

Given the differing stands taken by circuit courts and the Supreme Court on the issue of bundled discounts, it clearly emerges that US antitrust law is still evolving to meet the myriad questions posed by such discounting schemes. The incoherency in approach may also be attributed to the fact that post *Brooke Group* decision there has been no case on this issue which reached the Supreme Court. In LePage's, denying the certiorari, the Supreme Court chose to wait for a better opportunity to formulate an appropriate standard to deal with bundled discount schemes. However, a review of the cases discussed in this paper suggests the following general observations:

- Lower courts are split on whether loyalty discounts must result in prices that are below cost to give rise to antitrust liability. To be more specific, in single product case, the courts have generally ruled that above-cost volume

[43] *LePage's*, 324 F.3d at 151.
[44] *Brooke Group*, 509 U.S. at 223.
[45] *Id.*
[46] See, *supra* fn 7
[47] *LePage's*, 324 F.3d at 175 (Greenberg, J., dissenting). In his dissent, Judge Greenberg disagreed with the majority's use of *SmithKline* due to this lack of evidence. He noted that although the size of 3M's rebates was substantial, LePage's did not produce any figures to show how much it would have to cut prices to compete with 3M.

discounts, including those that use market share discounts and near exclusive thresholds, are lawful and do not violate the antitrust laws. In cases involving multimarket or bundled rebates, however, courts have not generally followed the *Brooke Group* Court's presumption that above cost bundled discounts are presumptively legal.

- Lower courts are divided on the issue of degree of exclusiveness in a loyalty or bundled discount scheme. Some suggest that the scheme must be at or near 100 per cent, others have held they need not be.
- Lower courts are also split on the issue pro-competitive justification offered by the defendants. In *LePage*'s, the liability was found as there were no pro-competitive justifications even though the foreclosure of market share was never established. In contrast, *Concord Boat* found no liability even though the defendant did not offer any plausible pro-competitive justifications.

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