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## Bundle of Trouble: An Analysis of How the Lower Courts Have Handled Bundled Discounts Since *LePage's Inc. v. 3M, A*

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## NOTES

# A Bundle of Trouble: An Analysis of How the Lower Courts Have Handled Bundled Discounts Since *LePage's Inc. v. 3M*

### I. INTRODUCTION

A bundled discount, also known as a “loyalty discount” or “bundled rebate,” is created when a seller offers a buyer a reduction in price that is contingent upon the buyer purchasing a minimum percentage of the buyer’s needs from the seller.<sup>1</sup> Since the Third Circuit’s decision in *LePage’s Inc. v. 3M* in 2003,<sup>2</sup> a decision that directly dealt with bundled discounts, district courts facing antitrust lawsuits involving bundled discounts have been left with little guidance as to how they should approach the procompetitive and anticompetitive aspects of such a discounting scheme. Consequently, the decisions made and the analysis used by these district courts since *LePage’s* has varied greatly. Some courts have chosen to reject *LePage’s* reasoning outright,<sup>3</sup> while others have followed *LePage’s* initially, only to then subsequently reject the reasoning in later decisions.<sup>4</sup>

This Summary will analyze the reasoning utilized in the various district court decisions since *LePage’s* and will seek to illustrate how those courts have dealt with a lack of clear foundation as to how to handle bundling claims under the antitrust laws. Furthermore, this summary will attempt to determine specific reasons why the *LePage’s* decision has failed to provide a proper approach to determining the legality of bundled discounts. Finally, the Summary will conclude that the Supreme Court should grant certiorari in order to provide both the district and circuit courts with guidance as to how

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1. See Warren S. Grimes, *The Future of Distribution Restraints Law: Will the New Learning Take Hold?*, 2006 UTAH L. REV. 829, 841 (2006).

2. 324 F.3d 141 (2003) (en banc), cert. denied, 542 U.S. 953 (2004).

3. See, e.g., *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, No. 1:01-CV-704, No. 1:03-CV-781, 2005 WL 1396940, at \*13-\*14 (S.D. Ohio June 13, 2005).

4. See, e.g., *Applied Med. Res. Corp. v. Ethicon Inc.*, No. SACV031329JVSMGLGX, 2006 WL 1381697 (C.D. Cal. Feb. 3, 2006) (adopting *LePage’s* reasoning in denying a grant of summary judgment for defendant); but see *Masimo Corp. v. Tyco Health Care Group, L.P.*, No. CV 02-4770 MRP, 2006 WL 1236666, at \*13 (C.D. Cal. Mar. 22, 2006) (holding that the court no longer agreed with the *LePage’s* decision).

they should balance between both the procompetitive and anticompetitive effects of bundled discounts.

## II. LEGAL BACKGROUND

### A. What is a Bundled Discount?

A bundled discount, also known as a “loyalty discount” or “bundled rebate,” is created when a seller offers a buyer a reduction in price that is contingent upon the buyer purchasing a minimum percentage of the buyer’s needs from the seller.<sup>5</sup> One of the most basic forms of a bundled discount is the package discount, which occurs when “a seller charges a lower price for a group of disparate goods sold together than for the same collection of goods purchased separately.”<sup>6</sup> However, bundled discounts can be more complex, such as when a seller offers to pay a rebate on all of a buyer’s purchases from the seller so long as the buyer meets certain purchasing targets pertaining to each of the seller’s product lines.<sup>7</sup> Thus, one of the distinguishing characteristics of a bundled discount is that they are “multi-product, purchase target discounts – they are conditioned upon purchasing some quantum of goods from multiple product markets” from a single seller.<sup>8</sup>

### B. Monopolization under the Sherman Act

Section 2 of the Sherman Act provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony,” and subject to significant fines and imprisonment.<sup>9</sup> Additionally, a private party who successfully sues for an antitrust violation may recover threefold the damages and counsel fees if successful.<sup>10</sup>

In *U.S. v. Grinnell Corp.*, the Supreme Court held that in order to show monopolization under section 2 of the Sherman Act, a plaintiff must prove, *inter alia*, that the defendant has demonstrated a “willful acquisition or maintenance of that power as distinguished from growth or development as a con-

5. See Grimes, *supra* note 1, at 841.

6. See Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688, 1693 (2005). Note that this was the type of package disputed in *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. 455, 467 (S.D.N.Y. 1996).

7. See Lambert, *supra* note 6, at 1693. See also *LePage’s Inc. v. 3M*, 324 F.3d 141, 144-45 (3d Cir. 2003) (en banc).

9. 15 U.S.C. § 2 (2006).

10. *Id.* 5.

sequence of a superior product, business acumen, or historic accident.”<sup>11</sup> Although there are no bright line rules available to determine exactly what types of conduct fall under this element,<sup>12</sup> actions such as unlawful acquisitions,<sup>13</sup> predatory pricing,<sup>14</sup> refusals to deal,<sup>15</sup> and leveraging<sup>16</sup> have been found illegal under section 2. Traditionally, courts have analyzed claims involving bundled discounts under either an exclusionary conduct or predatory pricing claim.<sup>17</sup> As a result, it is necessary to provide a more in-depth background of exclusionary conduct and predatory pricing.

### 1. Exclusionary Conduct

Exclusionary conduct has been defined as “[c]onduct that intentionally, significantly, and without business justification excludes a potential competitor from outlets . . . , where access to those outlets is a necessary . . . condition to waging a challenge to a monopolist and fear of the challenge prompts the conduct.”<sup>18</sup> More specifically, exclusionary conduct occurs when a firm’s actions are designed “to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary . . . conduct.”<sup>19</sup> When this behavior is used by a firm, it injures not only that specific competitor, but competition in general.<sup>20</sup>

In determining whether a certain type of conduct should be classified as exclusionary, the Supreme Court noted in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* that “it is relevant to consider [the conduct’s] impact on

11. 384 U.S. 563, 570-71 (1966). In addition to this element, the Supreme Court has also determined that a plaintiff must prove that the defendant had “possession of monopoly power in the relevant market.” *Id.* However, this Summary does not address issues associated with this elemental requirement.

12. See Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 253 (2003) (“Monopolization doctrine currently uses vacuous standards and conclusory labels that provide no meaningful guidance about which conduct will be condemned as exclusionary.”).

13. See, e.g., *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 73-75 (1911).

14. See, e.g., *Utah Pie Co. v. Cont’l Baking Co.*, 386 U.S. 685, 688 (1967).

15. See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 586 (1985); *Lorain Journal Co. v. U.S.*, 342 U.S. 143, 152-53 (1951).

16. See, e.g., *U.S. v. Griffith*, 334 U.S. 100, 105 (1948); *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451, 452 (1992).

17. See K. Craig Wildfang & Christopher W. Madel, *Predatory Conduct Under Section Two of the Sherman Act: Dead or Alive?*, 2 SEDONA CONF. J. 73, 78, 82-83 (2001).

18. Eleanor M. Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 390 (2002). This definition was also accepted by the Third Circuit in the *LePage’s* decision. *LePage’s Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003) (en banc).

19. See *LePage’s Inc.*, 324 F.3d at 159.

20. See *id.*

consumers and whether [that conduct] has impaired competition in an unnecessarily restrictive way.”<sup>21</sup> The Court went on to conclude that whenever a firm acts in such a way that excludes its competitors on some basis other than efficiency, it is fair to characterize that behavior as predatory.<sup>22</sup> Although a plaintiff wishing to bring an exclusionary conduct claim must still meet the test described in *Grinnell*,<sup>23</sup> federal courts have been inconsistent in determining what will or will not constitute exclusionary conduct.<sup>24</sup> However, courts have found illegal exclusionary conduct in cases involving behavior such as monopoly leveraging,<sup>25</sup> tying arrangements,<sup>26</sup> and predatory pricing.<sup>27</sup>

## 2. Predatory Pricing

Predatory pricing occurs when a firm “drives out, excludes, or disciplines rivals by selling at non-remunerative prices.”<sup>28</sup> Specifically, predatory pricing takes place when a firm sets its prices at such a level that the prices will cause an immediate loss of profits in the hopes of driving the firm’s rivals out of the market.<sup>29</sup> Once the competition is driven out of the market, a “recoupment” period follows in which the predatory firm “enjoys monopoly prices and profits.”<sup>30</sup>

The most recent Supreme Court decision analyzing predatory pricing was *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*<sup>31</sup> In that case, the plaintiff, a manufacturer of generic cigarettes, alleged that the defendant injured competition “by furthering a predatory pricing scheme de-

21. 472 U.S. 585, 605 (1985).

22. *Id.*

23. *See supra* note 11 and accompanying text.

24. *See, e.g.,* *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1065 (3d Cir. 1978) (noting that conduct is exclusionary where the price, supply, and demand are affected so as to prevent competition); *Concord Boat Corp. v. Brunswick Corp.*, 21 F. Supp. 2d 923, 933 (E.D. Ark. 1998), *rev’d*, 207 F.3d 1039 (8th Cir. 2000) (finding that a monopolist’s conduct that creates an obvious exclusion of any significant competition in the relevant market violates Section 2); *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 467-71 (S.D.N.Y. 1996). *See also* Joanna Warren, Comment, *LePage’s v. 3M: An Antitrust Analysis of Loyalty Rebates*, 79 N.Y.U. L. Rev. 1605, 1611 (2004).

25. *See, e.g.,* *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 499 (1992); *U.S. v. Griffith*, 334 U.S. 100, 107 (1948).

26. *See Eastman Kodak*, 504 U.S. at 462.

27. *See, e.g.,* *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993).

28. 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 723(a), at 272 (2d ed. 2006).

29. *Id.*

30. *Id.*

31. 509 U.S. 209 (1993).

signed to purge competition from the economy segment of the cigarette market.”<sup>32</sup> The plaintiff argued that the volume discounts given by Brown & Williamson (Brown) to its wholesale customers reduced Brown’s net prices below its average variable cost, and that those discounts were intended to drive out competition.<sup>33</sup>

The Supreme Court found that in order for a plaintiff to succeed on a predatory pricing claim, it must prove that (1) the prices being challenged “are below an appropriate measure of its rival’s costs,”<sup>34</sup> and (2) that there is a “dangerous probability of recouping its investment in below-cost prices.”<sup>35</sup> In formulating the predatory pricing test, the Court noted that it had previously rejected the idea that “above-cost prices that are below general market levels or the costs of a firm’s competitors inflict injury to competition.”<sup>36</sup> As a result, the Court recognized a general rule 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.”<sup>37</sup>

### C. History of Bundled Discount Cases Before LePage’s

#### 1. *SmithKline Corp. v. Eli Lilly & Co.*<sup>38</sup>

One of the earliest cases dealing with bundled discounts prior to *LePage’s* was *SmithKline Corp. v. Eli Lilly & Co.*, which was also a Third Circuit decision.<sup>39</sup> In that case, SmithKline Corp. (SmithKline) brought a section 2 claim arguing that a rebate program created by Eli Lilly (Lilly) was an attempt to monopolize the cephalosporin market.<sup>40</sup> More specifically, SmithKline alleged that Lilly’s rebate program worked to discourage its customers from purchasing SmithKline’s cephalosporin product, Ancef, by re-

32. *Id.* at 220.

33. *Id.* at 217.

34. *Id.* at 222.

35. *Id.* at 224 (alteration to original).

36. *Id.* at 223. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) (determining that “[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition”).

37. *Brooke Group Ltd.*, 509 U.S. at 223.

38. 575 F.2d 1056 (3d Cir. 1978).

39. *Id.*

40. See *id.* at 1060-62. The term “cephalosporin” refers to a type of antibiotic that was first introduced to the U.S. market by Lilly in 1964. *Id.* at 1059.

quiring those customers to purchase specified quantities of at least three of Lilly's cephalosporin products.<sup>41</sup>

The Third Circuit found that in order for a competitor to meet the bonus discounts Lilly offered, it would be forced not only to meet the competition on a single product, but also to "match the bonus rebate awarded to the hospital purchaser based on [the] total purchases of three [different] cephalosporins."<sup>42</sup> Ultimately, the Third Circuit concluded, *inter alia*, that "[w]ere it not for [Lilly's rebate plan], the price, supply, and demand of [drugs that were also produced by SmithKline] would have been determined by the economic laws of a competitive market."<sup>43</sup>

## 2. *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*<sup>44</sup>

Nearly eighteen years passed after the *SmithKline* decision before another federal court was given an opportunity to hear a case involving bundled discounting. In 1996, the U.S. District Court for the Southern District of New York was given such an opportunity in *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*<sup>45</sup> In that case, Ortho Diagnostic Systems, Inc. (Ortho) brought a section 2 claim against Abbott Laboratories, Inc. (Abbott) alleging that Abbott violated the antitrust laws "by entering into a contract with the Council of Community Blood Centers (CCBC) pursuant to which CCBC members were entitled to advantageous pricing if they purchased a package of four or five tests from Abbott."<sup>46</sup>

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41. *See id.* at 1060-62. Following the launch of its first type of cephalosporins, called Keflin, Lilly proceeded to introduce four additional forms of the drug: Keflex, Loridine, Kafocin, and Kefzol. *Id.* at 1059. At the time of this case, Lilly maintained valid U.S. patents on all of the drugs except for the Kefzol line. *Id.* Between 1964 and 1973, Lilly held a complete and legal monopoly over the cephalosporin market as a result of its patents. *Id.* However, beginning in 1973, SmithKline entered the market with its product, Ancef. *Id.*

42. *Id.* at 1062. Furthermore, the court noted that in this case, SmithKline would have had to offer the purchasers of its product rebates of "some 16% to hospitals of average size, and 35% to larger volume hospitals." *Id.*

43. *Id.*

44. 920 F. Supp. 455 (S.D.N.Y. 1996).

45. *Id.*

46. *Id.* at 458. The Council of Community Blood Centers is an organization that "engages in joint purchasing activities on behalf of participating members" which typically include a number of blood donor centers, or BDCs. *Id.* Members of the CCBC, when combined with the American Red Cross, collect 85-90 percent of the total blood gathered by BDCs. *Id.* The facts indicated that during the period of time in question, the defendant Abbott accounted for approximately seventy to ninety percent of the sales of all the blood screening tests except for the HCV test, which was designed to test for hepatitis C. *Id.* at 459.

In the fall of 1992, after a period of negotiation, CCBC and Abbott executed a three year contract for the supply of blood tests and equipment.<sup>47</sup> As part of the contract, Abbott created a pricing schedule in which the price on the individual tests and data equipment were lowered for those purchasers willing to buy most, if not all of the supplies from Abbott.<sup>48</sup>

In its decision, the District Court focused its attention on whether Abbott engaged in predatory behavior, specifically focusing on the pricing schedule.<sup>49</sup> The court framed the issue as “whether a firm that enjoys a monopoly on one or more of a group of complementary products, but which faces competition on others, can price all of its products above average variable cost and yet still drive an equally efficient competitor out of the market.”<sup>50</sup> The court found that the answer seemed to be that a firm could drive an equally efficient competitor from the market even if its prices are above its variable cost.<sup>51</sup> As a result, the court determined that Abbott could not prevail simply by proving that its bundled prices were above its average variable cost.<sup>52</sup>

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47. *Id.*

48. *See id.* at 460 (chart showing the product prices based on whether a purchaser bought (1) all five tests and the data software; (2) four tests and the data software; (3) four tests without the software; and (4) three or fewer tests).

49. *Id.* at 464.

50. *Id.* at 467.

51. *Id.* The court’s finding came from the use of a hypothetical, which proposed:

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.

*Id.*

52. *Id.*



However, the court did not end its analysis there but, instead, went on to address Abbott's contention that "there can be no liability [in this case] because Ortho's blood [test] business – indeed, its blood [test] business with CCBC members – remains profitable."<sup>53</sup> The District Court noted that the antitrust laws "were not intended, and may not be used, to require businesses to price their products at unreasonably high prices . . . so that less efficient competitors can stay in business."<sup>54</sup> As a result, the court held that

a Section 2 plaintiff in . . . a case 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 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.<sup>55</sup>

The court based its holding on the fact that Ortho failed to show Abbott had priced below average variable cost or that Ortho was as efficient a producer as Abbott, but was unable to compete because of the discounting strategy.<sup>56</sup>

### 3. *Concord Boat Corp. v. Brunswick Corp.*<sup>57</sup>

Both the *SmithKline* and *Ortho Diagnostics* decisions dealt directly with situations that involved a bundled discount program involving multi-product purchase targets.<sup>58</sup> However, in *Concord Boat Corp. v. Brunswick Corp.*, the Eighth Circuit was asked to determine whether Brunswick, a stern drive engine manufacturer, violated section 2 when it offered to provide its purchasers a single product purchase target discount by offering a percentage discount based on the number of engines purchased.<sup>59</sup> Concord Boat and the other

53. *Id.* at 469.

54. *Id.* at 470 (quoting *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 58 (2d Cir. 1979)).

55. *Id.* at 469.

56. *Id.* at 469-70.

57. 207 F.3d 1039 (8th Cir. 2000).

58. *See supra* text accompanying notes 38-41 and 44-48.

59. 207 F.3d at 1044. During the early 1980s, Brunswick began offering a discount to boat builders and dealers in which the builders and dealers "could agree to purchase a certain percentage of their engine requirements from Brunswick for a fixed period of time in exchange for a discount off the list price of the engine." *Id.* Brunswick offered a three percent discount to those who purchased eighty percent of their engines from the company, a two percent discount for seventy percent of all purchase,

boat builders involved in the suit argued that “the discount programs . . . were part of a deliberate plan to exclude competitors from the stern drive engine market, and that this exclusion enabled Brunswick to charge supracompetitive high prices for its engines.”<sup>60</sup>

In its decision, the Eighth Circuit began its analysis by noting that, absent predatory pricing, “any losses caused by pricing ‘cannot be said to stem from an *anticompetitive* aspect of the defendant’s conduct,’” and that “[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.”<sup>61</sup> Furthermore, the court recognized that if a firm sets its prices at a level that is above that firm’s average variable cost, the burden falls on the plaintiff to overcome a strong presumption of legality.<sup>62</sup>

As a result, the Eighth Circuit concluded that the boat builders had failed to show that Brunswick had achieved its superior market share<sup>63</sup> “by means other than the competition on the merits.”<sup>64</sup> Continuing, the court found that price cuts implemented by Brunswick were a “normal competitive tool within the stern drive manufacturing industry.” That fact, coupled with the fact that the discount programs did not involve exclusive dealing contracts, led the court to conclude Brunswick had not violated section 2.<sup>65</sup>

#### D. LePage’s Inc. v. 3M

In *LePage’s Inc. v. 3M*, an en banc panel of the Third Circuit vacated a judgment made by the three-judge panel and affirmed a district court decision that found the defendant 3M liable for a section 2 violation as a result of its implementation of a loyalty rebate pricing program.<sup>66</sup> In doing so, the Third Circuit rejected 3M’s argument that its price structure was *per se* legal since it never priced its products below its average variable cost, and instead held

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and a one percent discount for those who purchased sixty percent of their engines from Brunswick. *Id.* However, the discount program did not restrict a boat builder or dealer from purchasing its engines from other manufacturers. *Id.* at 1045. *See also* Lambert, *supra* note 6, at 1694 n.20 (providing a discussion of *Brunswick* decision).

60. *Concord Boat Corp.*, 207 F.3d at 1060.

61. *Id.* at 1061 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340-41 (1990)).

62. *Id.* The court then went on to distinguish the facts of the case with those found in *SmithKline* and *Ortho Diagnostics*, finding that “[b]ecause only one product, stern drive engines, is at issue here and there are no allegations of . . . bundling with another product,” those cases were not persuasive. *Id.* at 1062.

63. In 1983, Brunswick controlled approximately seventy-five percent of the market for stern drive engines. *Id.* at 1044. The percentage changed over the next seven years, but never dropped below fifty percent. *Id.* at 1045.

64. *Id.* at 1062.

65. *Id.* at 1062-63.

66. 324 F.3d 141, 169 (3d Cir. 2003) (en banc).

that 3M's conduct could be held to constitute monopolization in violation of section 2.<sup>67</sup>

As the manufacturer of Scotch-brand tape, 3M held a monopoly in the domestic tape market until the early 1990s.<sup>68</sup> However, with the rapid growth of office superstores, such as Office Depot, and mass merchandisers like Wal-Mart, demand for "second brand and private label tape"<sup>69</sup> began to rise "as many of the large retailers wanted to use their 'brand names' to sell stationary products, including transparent tape."<sup>70</sup> In response to the increase in demand, 3M initiated a bundled rebate structure, which granted higher rebates when customers purchased products in a number of 3M's different product lines.<sup>71</sup>

In response, LePage's, another manufacturer of office products who by 1992 controlled approximately eighty-eight percent of all private label tape sales in the U.S., brought suit against 3M.<sup>72</sup> LePage's alleged that 3M used its bundling scheme and its monopoly over the Scotch-tape brand to gain a competitive advantage in the private label tape market.<sup>73</sup> In addition, LePage's alleged that 3M offered some of LePage's customers "large lump-sum cash payments, promotional allowances and other cash incentives to encourage them to enter into exclusive dealing arrangements with 3M."<sup>74</sup>

In its decision, the Third Circuit first noted that the sole issue was "whether 3M took steps to maintain that power in a manner that violated [sec-

67. *Id.*

68. *Id.* at 144. 3M conceded that it had a monopoly in the primary tape market at trial. *Id.*

69. Private label tape sold at a lower price to both retailers and customer than the branded Scotch tape. *Id.*

70. *Id.*

71. *Id.* at 145. More specifically, 3M's rebate program evolved through three different types of rebates: Executive Growth Fund, Partnership Growth Fund, and Brand Mix Rebates. *Id.* at 170 (Greenberg, J., dissenting). Under the Executive Growth Fund, "3M negotiated volume and growth targets for each customer's purchases from the six 3M consumer product divisions involved." *Id.* A customer meeting these targets was given a volume rebate between .2-1.25% of total sales. *Id.* Following the Executive Growth Fund, 3M initiated the Partnership Growth Fund, which "established uniform growth targets applicable to all participants." *Id.* at 171. Customers who increased their total purchase by 12% over the previous year received a rebate between .5-2%. *Id.* Following the Partnership Growth Fund, 3M offered the Brand Mix Rebates to only two customers, Office Depot and Staples. *Id.* Under this rebate plan, 3M "imposed a minimum purchase level for tape set at the level of Office Depot's and Staples's purchases the previous year with 'growth' factored in." *Id.* In order to receive a higher rebate, the two customers were required to increase the total volume of purchases from 3M. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 145 (majority opinion).

tion] 2 of the Sherman Act.”<sup>75</sup> The Third Circuit concluded that even assuming the *Brook Group* decision held that a company’s pricing is legal if its prices are not below its costs, nothing in the discussion of that issue is applicable to a “monopolist with . . . unconstrained market power.”<sup>76</sup> The court then concluded that “nothing that the Supreme Court has written since *Brooke Group* dilutes the Court’s consistent holdings that a monopolist will be found to violate [section 2] . . . if it engages in exclusionary or predatory conduct without a valid business justification.”<sup>77</sup>

The court then focused its analysis on determining whether the bundled discounts 3M offered constituted exclusionary conduct.<sup>78</sup> The court found that the bundled rebates offered by 3M could foreclose portions of the market to a competitor “who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.”<sup>79</sup> The court compared the facts of the case to those found in the *SmithKline* decision<sup>80</sup> and concluded that 3M’s rebate structure was more harmful than that found in *SmithKline*, because 3M’s rebates required purchases bridging 3M’s extensive product lines.<sup>81</sup>

After making the comparison to the facts of *SmithKline*, the Third Circuit then examined the anticompetitive effect of 3M’s rebate scheme.<sup>82</sup> The court pointed to facts indicating that LePage’s sales had been rapidly rising prior to the introduction of 3M’s bundled rebates, and concluded that as a result of the rebates, LePage’s manufacturing process became less efficient and its profits declined.<sup>83</sup> Furthermore, because there were substantial barriers to entry and documentation indicating 3M’s interest in raising prices,<sup>84</sup> the court found that “there was sufficient evidence for the jury to conclude the long-term effects of 3M’s conduct were anticompetitive.”<sup>85</sup>

In its defense, 3M claimed that the use of bundled discounts was justified because they helped to meet its customers’ desire to have single invoices and shipments.<sup>86</sup> However, the court rejected this claim, finding that there was no evidence to support such an argument.<sup>87</sup> The Third Circuit concluded

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75. *Id.* at 146-47.

76. *LePage’s*, 324 F.3d at 151.

77. *Id.* at 152.

78. *Id.* at 154.

79. *Id.* at 155.

80. *See supra* text accompanying notes 38-43.

81. *LePage’s Inc.*, 324 F.3d at 157.

82. *Id.* at 159-60.

83. *Id.* at 163.

84. *See id.* at 163 (accepting the district court’s findings that there were substantial barriers to keep competitors from entering the tape market and that internal memoranda introduced into evidence indicated 3M’s intent to raise the price of tape).

85. *Id.*

86. *Id.* at 164.

87. *Id.*

that 3M “used its market power over transparent tape, backed by its considerable catalog of products, to entrench its monopoly to the detriment of LePage’s, its only serious competitor.”<sup>88</sup> As a result, the Third Circuit held that 3M violated section 2 of the Sherman Act.<sup>89</sup>

### III. RECENT DEVELOPMENTS

Since the Third Circuit’s decision in *LePage’s*, the district courts that have heard bundled discounting claims differed in how they incorporate the analysis of the *LePage’s* decision.

#### A. United States District Court for the District of Puerto Rico

One of the first cases following *LePage’s* was heard by the U.S. District Court for the District of Puerto Rico in *Ramallo Brothers Printing, Inc. v. El Dia, Inc.*<sup>90</sup> In that case, the primary defendant,<sup>91</sup> El Dia, Inc. (El Dia), was a Puerto Rican corporation that owned and operated *El Nuevo Dia*, the largest newspaper in Puerto Rico.<sup>92</sup> In 1997, the defendant formed a new corporation called AGP, which operated as a commercial printing company, and became a direct competitor with the plaintiff Ramallo.<sup>93</sup> Shortly after establishing AGP, the defendant began offering “[g]roup contracts and other package discount arrangements.”<sup>94</sup> As part of these contracts, El Dia offered “incentives for the advertiser to print with Defendant AGP, such as a lower price for insertion [in the newspaper] . . . if the advertiser provid[ed] a minimum volume of printing business to Defendant AGP.”<sup>95</sup> As a result of this package discount program, the plaintiff Ramallo filed suit alleging that El Dia violated the antitrust laws by “unlawfully ‘bundling’ printing services with . . . advertising and insertion in Defendant’s newspaper[], and predatorily pricing Defendant’s printing and insertion services.”<sup>96</sup>

In its decision, the court discussed the package discounts offered by the defendant. The court first found that in order for a bundling program to be an

88. *Id.* at 169.

89. *Id.*

90. 392 F. Supp. 2d 118 (D. P.R. 2005).

91. In addition to El Dia, the plaintiff also named Editorial Primera Hora, the owner and publisher of *Primera Hora* newspaper, which El Dia printed, as well as AGP, a commercial printing company founded by El Dia. *Id.* at 123-24.

92. *Id.* at 123-24. Like many newspapers, *El Nuevo Dia* relied primarily on advertising to generate its revenues. *Id.* at 124. Unlike display advertising, shoppers were frequently printed on glossy paper, which required the services of a commercial printer. *Id.* at 125.

93. *Id.* at 124-125.

94. *Id.* at 127.

95. *Id.*

96. *Id.* at 129.

antitrust violation, “[t]he challenged prices must have the effect of excluding a single-product competitor.”<sup>97</sup> The court found that the plaintiff had provided no evidence indicating the amount of sales it had lost as a result of the defendant’s bundling or how those discounts or benefits offered by the defendant actually caused the plaintiff’s loss of sale.<sup>98</sup> Additionally, the court distinguished the facts found in *LePage’s*<sup>99</sup> by describing how in that case the single-product competitor was unable to compete with the multi-product discounts; however, in *Ramallo*, the plaintiff who was claiming antitrust injury was “the dominant incumbent, whose market share prior to AGP’s entry was in excess of 80 percent.”<sup>100</sup> As a result, the court concluded that the plaintiff had failed to demonstrate that the defendant’s bundling practices had any discernable exclusionary effect on the plaintiff.<sup>101</sup>

### B. United States District Court for the Southern District of Ohio

Within a few days after the *Ramallo* decision, the U.S. District Court for the Southern District of Ohio released its decision in a case concerning a bundled discount program.<sup>102</sup> In *J.B.D.L. Corp. v. Wyeth-Ayerst Laboratories, Inc.*, the plaintiff J.B.D.L. Corp. (JBDL) alleged that defendants Wyeth and Wyeth Pharmaceuticals (Wyeth) violated section 2 of the Sherman Act by “forc[ing] [the plaintiffs] to pay a supracompetitive price for Wyeth’s drug Premarin because Wyeth engaged in anti-competitive and exclusionary conduct towards one of its rivals, Duramed.”<sup>103</sup> Specifically, JBDL contended that the rebate contracts defendants held with many “pharmacy benefit man-

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97. *Id.* at 138.

98. *Id.* In fact, despite receiving direct competition from AGP, the plaintiff’s revenues continued to increase between 1999 and 2003. *Id.* at 130. Furthermore, the court noted that the plaintiff’s insertions into the *El Nuevo Dia* newspaper increased by sixty-three percent between 1999 and 2003. *Id.*

99. See *LePage’s, Inc. v. 3M*, 324 F.3d 141 (3rd Cir. 2003) (en banc). See also *supra* Part II.D.

100. *Ramallo*, 392 F. Supp. 2d at 138 n.6.

101. *Id.* at 138.

102. *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, No. 1:01-CV-704, No. 1:03-CV-781, 2005 WL 1396940 (S.D. Ohio June 13, 2005).

103. *Id.* at \*1.

agers" (PBMs)<sup>104</sup> allowed Wyeth to illegally maintain its monopoly in the estrogen replacement therapy market.<sup>105</sup>

The district court's decision turned on its choice not to follow the Third Circuit precedent in *LePage's*. The court began by noting that in *LePage's*, "[t]he jury punished 3M rather severely for engaging in above-cost, discount pricing coupled with some exclusive retail contracts, an arrangement that clearly permitted 3M to increase its market share . . . yet did not clearly harm competition or consumers."<sup>106</sup> Furthermore, the court found that the Third Circuit decision provided no clear and consistent guidance for what is considered permissible price competition.<sup>107</sup> Instead, the court focused on the Eighth Circuit's reasoning in *Concord Boat*<sup>108</sup> and noted how that decision recognized the "strong line of authority that above cost discounting is not anticompetitive conduct as a matter of law and sound policy."<sup>109</sup> Finding this line of reasoning to be more persuasive, the district court held that Wyeth's bundled pricing behavior did not violate section 2 of the Sherman Act and granted summary judgment in its favor.<sup>110</sup>

### C. United States District Court for the Central District of California

Similarly, the U.S. District Court for the Central District of California has also had an opportunity to hear cases involving bundled discounting. One of the first cases that the district court heard concerning bundled discounting was *Applied Medical Resources Corp. v. Ethicon, Inc.*<sup>111</sup> In that case, the plaintiff, Applied Medical Resources Corp. (Applied Medical), alleged that

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104. See *id.* at \*2 (describing that "rebate . . . contracts between pharmaceutical manufacturers and third party payors are a widespread industry practice," and that the "third party payors" include not only traditional HMOs, but also "pharmacy benefit managers"). See also Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 328 n.221 (2007) (providing a description of how a PBM functions).

105. *J.B.D.L. Corp.*, 2005 WL 1396940, at \*2. Wyeth manufactured Premarin, which is a "conjugated estrogen product approved for several therapeutic purposes," such as "treatment of vasomotor symptoms associated with menopause." *Id.* at \*1. Premarin is classified as an "estrogen replacement drug" or ERT. *Id.* In March 1999, Duramed obtained FDA approval to start marketing Cenestin, which is also considered a conjugated estrogen product. *Id.* Shortly thereafter, Wyeth began including "sole conjugated estrogen" clauses in most of its contracts with PBMs. *Id.* at \*4. Plaintiff alleged that these clauses "'force[d]' various PBMs to refuse a place for Cenestin on their formularies." *Id.*

106. *Id.* at \*13.

107. *Id.* at \*14.

108. See *supra* Part II.C.3.

109. *J.B.D.L. Corp.*, 2005 WL 1396940, at \*14.

110. *Id.* at \*17.

111. No. SACV031329JVSM LGX, 2006 WL 1381697 (C.D. Cal. Feb. 3, 2006).

defendants Ethicon, Inc. and Johnson and Johnson Health Care Systems, Inc. (J & J), violated section 2 of the Sherman Act when it sold its products in “multi-product offerings, or ‘bundles.’”<sup>112</sup>

Beginning in the 1990s, the defendant began offering “bundled discounts for the combined purchase of endo products and sutures.”<sup>113</sup> Under this discount program, “the discount levels were linked to the percentage of requirements purchased from J & J, with a higher percentage of purchases yielding a higher discount.”<sup>114</sup> Understanding that this type of bundling could potentially exclude a single-product manufacturer, J & J began to take steps in the fall of 2003 to mitigate the effects of its bundling on these single-product manufacturers.<sup>115</sup> Applied Medical argued that these contractual carve outs allowed J & J to threaten a hospital with penalties if that hospital chose to purchase products from Applied.<sup>116</sup>

The district court first noted that there was ample evidence to support J & J’s argument “that bundled competition in the medical supplies field has produced cost savings.”<sup>117</sup> However, the court rejected the argument that J & J’s bundling program was per se lawful.<sup>118</sup> Specifically, the court found that there was a question of material fact as to whether the bundling was used by J & J to address the demand of purchasers or whether it was simply used for its own protective purposes.<sup>119</sup>

The court then focused its attention on Applied’s monopolization claim.<sup>120</sup> The court noted that it “disagree[d] that a claim under Section 2 [could] only be established by [only] specific predatory or exclusionary acts.”<sup>121</sup> Citing *LePage’s*, the court recognized that “anticompetitive conduct [could] come in many forms, generally driven by the facts of a particular case.”<sup>122</sup> As a result, the court concluded that Applied created a genuine issue of material fact as to whether J & J had maintained its monopoly through unduly restrictive means.<sup>123</sup>

112. *Id.* at \*1.

113. *Id.* at \*2. Endo devices are primarily used in minimally invasive surgeries. *Id.* at \*1.

114. *Id.* at \*2. Some of these discount contracts evolved into “sole source” contracts, which were given an even larger discount off the various product lines. *Id.*

115. *Id.* Specifically, “in determining [the] threshold percentage discount requirements, J & J carved out purchases from competitors who did not offer a full line of products.” *Id.* As a result, a purchaser could purchase the plaintiff’s product without losing its ability to qualify for discounts from J & J. *Id.*

116. *Id.* at \*4.

117. *Id.* at \*2.

118. *Id.*

119. *Id.* at \*3.

120. *Id.* at \*4.

121. *Id.* at \*5.

122. *Id.*

123. *Id.*



Shortly after its decision in *Applied Medical*, the District Court for the Central District of California heard arguments concerning a motion for a new trial resulting from an action between the Masimo Corporation (Masimo) and Tyco Health Care Group, L.P. (Tyco).<sup>124</sup> The proceeding four week trial held during February and March 2005<sup>125</sup> was a result of a denial of summary judgment to Tyco in June 2004.<sup>126</sup> In the decision regarding Tyco's summary judgment, the court found that the question of whether the bundled rebates used by Tyco acted to foreclose the relevant market was one of fact, not law.<sup>127</sup> The court arrived at this decision by noting the similarities between the facts found in *LePage's* and those found in the case at hand and concluded that "given the similarity of the facts in this case to those in *LePage's*, this Court finds the Third Circuit's holding that bundled rebates may qualify as anticompetitive conduct within the meaning of Section 2 of the Sherman Act to be instructive."<sup>128</sup>

Following a jury finding that Tyco's product bundling program was illegal,<sup>129</sup> Tyco filed both a "Renewed Motion for Judgment as a Matter of Law," and alternatively, a motion for a new trial.<sup>130</sup> In its decision, the district court determined that the plaintiffs had provided insufficient evidence for a jury "to reach any reasonable conclusion about the anticompetitive effect of Tyco's bundling practices."<sup>131</sup> Specifically, the court found "that a jury could not reasonably conclude how much, if any, of the bundled oximetry sales were sold in connection with anticompetitive bundling practices as compared to legitimate bundling practices."<sup>132</sup>

In addition, the court "reconsider[ed] Masimo's bundling claims and the practice of bundling in general within the context of Section 2," and the *LePage's* decision.<sup>133</sup> The court again addressed the *LePage's* decision's findings and concluded that "it is only when products that do not face competition are included in a bundle that the bundle can conceivably be anticompetitive."<sup>134</sup> The court reasoned that in order for Masimo to be successful

124. *Masimo Corp. v. Tyco Health Care Group, L.P.*, No. CV 02-4770 MRP, 2006 WL 1236666 (C.D. Cal. Mar. 22, 2006).

125. *Id.* at \*1.

126. *See Masimo Corp. v. Tyco Health Care Group, L.P.*, No. CV-02-4770 MRP, 2004 U.S. Dist. LEXIS 26916 (C.D. Cal. June 10, 2004).

127. *Id.* at \*30. The bundling program involved Tyco bundling its oximetry products, over which it held a monopoly, with its non-oximetry products. *Id.* at \*26.

128. *Id.* at \*29-\*30. The court also noted that "[w]hile none of the law cited by Masimo is binding on this Court, neither Tyco nor this Court's independent research has revealed any controlling authority in this Circuit." *Id.* at \*29.

129. *Masimo*, 2006 WL 1236666, at \*2.

130. *Id.* at \*1.

131. *Id.* at \*12.

132. *Id.*

133. *Id.*

134. *Id.*

regarding its bundling claims against Tyco, it would have had to show that “Tyco had monopoly or near monopoly power in at least one non-oximetry product included within its bundles” and that “Tyco used that monopoly power as leverage in maintaining its monopoly in the relevant market.”<sup>135</sup> The court concluded that insufficient evidence was provided to conclude that either of these requirements were met.<sup>136</sup> Furthermore, the court held that it no longer agreed with the reasoning of *LePage’s*, but instead, held that without evidence of predatory pricing or tying, offering a discount on two or more bundled products is not anticompetitive under section 2.<sup>137</sup>

#### IV. DISCUSSION

Although bundling can have a negative effect on competition<sup>138</sup> that federal courts should seek to prevent, a bundling strategy can also lead to significantly reduced price structures that are procompetitive, or beneficial for competition.<sup>139</sup> Unfortunately, the Third Circuit’s decision in *LePage’s* failed to properly take into account the procompetitive benefits provided by bundled discounts in its opinion.<sup>140</sup> As a result, the *LePage’s* decision has left the district courts with little guidance as to how they should weigh the procompetitive benefits of bundling with its potentially anticompetitive effects.<sup>141</sup> The following discussion will first provide a critique of the *LePage’s* decision by focusing on how the decision failed to provide a useful test to apply to future bundling cases. Then the discussion will focus on analyzing a number of proposed methods intended to provide courts with a

135. *Id.* at \*13.

136. *Id.*

137. *Id.* In making this conclusion, the court noted that there may be some “factual circumstances that warrant consideration of the antitrust implications of bundling practices;” however, the court concluded that those circumstances were not present in this case, or in the factual record presented in *LePage’s. Id.*

138. See *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 467 (S.D.N.Y. 1996) (providing a hypothetical example demonstrating how bundling could cause anticompetitive harm).

139. See Herbert Hovenkamp, *Discounts and Exclusion*, 2006 UTAH L. REV. 841, 853 (describing how discounts are a good thing and as a result “we must have a way of distinguishing the small subset of discounts that harm competition”); John Thorne, *Discounted Bundling by Dominant Firms*, 13 GEO. MASON L. REV. 339, 342-43 (2005) (describing how bundled discounts “function most directly as a form of quantity discount that, by inducing increased sales, can enable a firm to reduce its costs by taking advantage of scale economies, multi-product production and distribution synergies, and economies of scope”).

140. See Gregory G. Wrobel, *New Clothes for the Emperor? Tailoring Section 2 Standards for Predatory and Exclusionary Conduct*, 18 ANTITRUST 26, 28 (2003) (describing the *LePage’s* decision as being “unreasoned” and “lacking ‘a clear standard of what would constitute illegal conduct’”).

141. *Id.*

proper method of addressing bundling claims and determine if any such methods have been applied by the lower courts.

### A. Failing to Provide a Clear Test

One of the main concerns raised by *LePage's* stems from the fact that the Third Circuit explicitly rejected the U.S. Supreme Court's reasoning in *Brooke Group*, which noted that generally only below-cost prices should give rise to an antitrust violation.<sup>142</sup> Instead, the court concluded that a firm could engage in illegal exclusionary conduct by using bundled discounts, despite the fact that all the prices involved remained above that firm's costs.<sup>143</sup>

However, in coming to this conclusion, the Third Circuit incorporated essentially no analysis of pricing issues. The court made no mention of the possible cost efficiencies that result from discount packaging.<sup>144</sup> Typically, cost efficiencies that result from bundling include economies of scope and transactions costs savings.<sup>145</sup> Additionally, bundling can allow a firm to lower its costs simply because selling multiple products jointly to the consumer costs less than selling those same products individually.<sup>146</sup> Likewise, lower production and transactional costs for the producers lead to lower prices for the consumer.<sup>147</sup> Despite these procompetitive benefits that are a result of bundling, the Third Circuit chose to exclude this topic in their opinion.

In addition to omitting any discussion regarding the pricing issues involved with bundled rebates, a second way in which *LePage's* fails to provide an adequate test stems from the fact that the Third Circuit did not require the plaintiff to prove that it could not meet 3M's discount without pricing below its own cost.<sup>148</sup> Likewise, the court did not require *LePage's* to show that it was an equally efficient competitor with 3M.<sup>149</sup> Instead, the court only re-

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142. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993).

143. See *LePage's Inc. v. 3M*, 324 F.3d 141, 163 (3d Cir. 2003) (en banc).

144. See Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 EMORY L.J. 423, 430 (2006) (noting that "there have been few, if any, systematic efforts to catalogue the reasons why mixed bundling occurs").

145. *Id.* at 430-31.

146. *Id.* at 430. See also, Joseph P. Gultinan, *The Price Bundling of Services: A Normative Framework*, J. MARKETING, Apr. 1987, at 74-75; Robert Scott & Jannett Highfill, *Mixed Bundling with Profit and Sales Objectives*, 7 INT'L ADVANCES IN ECON. RES. 243, 243 (2001).

147. Crane, *supra* note 144, at 430-31.

148. See Lambert, *supra* note 6, at 1720.

149. *Id.* at 1720-21.

quired LePage's to show that bundles offered by 3M included products that LePage's could not produce.<sup>150</sup>

Limiting LePage's requirement to only having to show that it did not produce one of the products being offered in 3M's bundles seems to go against the court's earlier reasoning found in *SmithKline*, which was recognized by Judge Greenberg's dissent.<sup>151</sup> Judge Greenberg noted that in *SmithKline*, the plaintiff provided evidence that "showed that it could not compete by explaining how much it would have had to lower prices for both small and big customers to do so."<sup>152</sup> Judge Greenberg also noted that "[i]n contrast, LePage's did not even attempt to show that it could not compete by calculating the discount that it would have had to provide in order to match the discount offered by 3M through its bundled rebates."<sup>153</sup>

Another way in which the *LePage's* decision is problematic is that it remains unclear exactly which part of 3M's rebate scheme the Third Circuit found to be illegal exclusionary conduct.<sup>154</sup> In the beginning of the opinion, the court asserted the problem as being that "3M used its monopoly over its Scotch tape brand to gain a competitive advantage in the private label tape portion of the transparent tape market in the United States through the use of 3M's multi-tiered 'bundled rebate' structure."<sup>155</sup> However, when discussing the bundled rebates later in the opinion, the court did not focus on 3M's monopoly in the Scotch-brand market, but instead focused on the fact that the bundled rebate included products that LePage's was unable to sell.<sup>156</sup> In following this reasoning, section 2 is violated whenever a seller offers bundled discounts on a group of products that includes any product not also sold by its competitor.<sup>157</sup> As a result, it is unclear whether a firm needs to even possess monopoly power over one of the products being offered in a bundle in order for section 2 to be violated, or whether it is enough simply to offer a bundled discount that includes at least one product that is not sold by a competitor.

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150. *LePage's Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003) (en banc). See also Lambert, *supra* note 6, at 1721.

151. *LePage's Inc.*, 324 F.3d at 175 (Greenberg, J., dissenting).

152. *Id.*

153. *Id.*

154. See Warren, *supra* note 24, at 1619; W. Dennis Cross, *What's Up With Section 2?*, 18 ANTITRUST 8, 11-13 (Fall 2003).

155. *LePage's Inc.*, 324 F.3d at 145 (majority opinion).

156. *Id.* at 155 ("The principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.")

157. See Cross, *supra* note 154, at 11.

### B. *The Inconsistent Results*

As a consequence of the lack of clarity provided by the *LePage's* decision, district courts hearing cases involving bundled discounts have been unable to apply a uniform economic and legal analysis in their decisions. For instance, there have been cases, such as *Applied Medical*, in which the U.S. District Court for the Central District of California largely agreed with *LePage's* when it found that anticompetitive conduct can come in many forms.<sup>158</sup> Yet, in the *Masimo* decision, the very same district court concluded that an antitrust violation for bundling only occurs when “products that do not face competition are included in a bundle.”<sup>159</sup> However, as was already pointed out above, the *LePage's* decision is unclear as to whether monopoly power over one of the bundled products is a necessary element in proving an antitrust violation.<sup>160</sup> As a result of trying to apply *LePage's*, the Central District Court of California managed to change its application of the *LePage's* analysis in less than two months.<sup>161</sup>

In contrast to the U.S. District Court for the Central District of California, other district courts, such as the Southern District of Ohio, have decided to reject the *LePage's* decision altogether.<sup>162</sup> Unlike *LePage's*, in the *J.B.D.L.* decision, the district court chose to focus heavily on whether the bundling program being used by the defendant involved above or below-cost pricing.<sup>163</sup> Noting that the *LePage's* decision failed to produce “consistent guidance for what is permissible price competition in the retail market,” the court instead chose to follow the reasoning adopted by the Eighth Circuit in *Concord Boat*,<sup>164</sup> and found that the defendant’s bundling program which involved above-cost pricing did not violate section 2 of the Sherman Act.<sup>165</sup> As a result, unlike the Central District for California, which seems unclear as to how it should apply *LePage's* reasoning, the Southern District for Ohio has simply chosen to ignore *LePage's* completely.

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158. *Applied Med. Res. Corp. v. Ethicon, Inc.*, No. SACV031329JVSMLGX, 2006 WL 1381697, at \*5 (C.D. Cal. Feb. 3, 2006).

159. *Masimo Corp. v. Tyco Health Care Group, L.P.*, No. CV 02-4770MRP 2006 WL 1236666, at \*12 (C.D. Cal. Mar. 22, 2006).

160. *See supra* text accompanying notes 154-57.

161. *Compare Applied Med. Res. Corp.*, 2006 WL 1381697 (decision released on Feb. 3, 2006) with *Masimo*, 2006 WL 1236666 (decision released on Mar. 22, 2006).

162. *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, No. 1:01-CV-704, 1:03-CV-781, 2005 WL 1396940, at \*12, \*14 (S.D. Ohio June 13, 2005).

163. *See id.* at \*13.

164. *See supra* text accompanying notes 61-65.

165. *J.B.D.L.*, 2005 WL 1396940 at \*17.

### C. Outlook

Although the *LePage's* decision remains valid Third Circuit law, the deficiencies in the decision's analysis have not gone unnoticed. After the decision, 3M petitioned the Supreme Court for a writ of certiorari,<sup>166</sup> which was accompanied by amicus briefs filed by over twenty various businesses and trade groups all requesting that the Third Circuit's decision be reversed.<sup>167</sup> In addition, the U.S. Supreme Court also appeared to be uncomfortable with the *LePage's* decision. Prior to denying certiorari to 3M, the Court requested that the solicitor general also file a brief expressing the views of the United States on whether the Court should grant certiorari.<sup>168</sup> In the brief, the solicitor general concluded that although the business community and consumers would benefit from clear guidance surrounding section 2's application to bundled discounts, the Court should not grant certiorari.<sup>169</sup> Instead, the solicitor general recommended that the Court should "allow the case law and economic analysis to develop further," concerning bundled discounting.<sup>170</sup>

The solicitor general's comments have been taken seriously. Since the *LePage's* decision, a number of approaches for how to deal with bundled discounts within antitrust law have been offered.<sup>171</sup> One such approach would be to deem all bundled discounts per se legal as long as the discounted

166. Petition for a Writ of Certiorari, *3M Co. v. LePage's Inc.*, 542 U.S. 953 (2004) (No. 02-1865), 2003 WL 22428375.

167. See, e.g., Brief for Amici Curiae Bellsouth Corp. et al. in Support of Petitioner, *3M*, 542 U.S. 953 (No. 02-1865), 2003 WL 22428381; Brief for Amicus Curiae the Business Roundtable in Support of Petitioner, *3M*, 542 U.S. 953 (No. 02-1865), 2003 WL 22428382; Brief of Washington Legal Foundation and National Ass'n of Manufacturers as Amici Curiae in Support of Petitioner, *3M*, 542 U.S. 953 (No. 02-1865), 2003 WL 22428379; Brief for the Boeing Co. et al. as Amici Curiae in Support of Petitioner, *3M*, 542 U.S. 953 (No. 02-1865), 2003 WL 22428377; Brief for Amici Curiae Morgan Stanley et al. in Support of Petition for Certiorari, *3M*, 542 U.S. 953 (No. 02-1865), 2003 WL 22428378.

168. *3M v. LePage's Inc.*, 540 U.S. 807 (2003).

169. Brief for the United States as Amicus Curiae at \*19-\*20, *3M v. LePage's, Inc.*, 542 U.S. 953 (2004) (No. 02-1865), 2004 WL 1205191.

170. *Id.* Specifically, the Solicitor General noted that "[t]he practice of bundled rebates has received far less judicial and scholarly scrutiny than predatory pricing," and that, as a result, "[t]here is insufficient experience with bundled discounts to this point to make a firm judgment about the relative prevalence of exclusionary versus procompetitive bundled discounts." *Id.* at \*12, \*14.

171. See, e.g., Elhauge, *supra* note 12, at 315; Willard K. Tom, David A. Balto & Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L.J. 615, 636-38 (2000); Lambert, *supra* note 6, at 1699-1756 (providing an analysis of a number of different approaches to handling bundled discounts).

price exceeds the cost of the constituent products.<sup>172</sup> Advocates of this approach point to both the *Brooke Group* decision, in which the Court suggested that discounts are legal unless they result in below-cost pricing,<sup>173</sup> and the *Concord Boat* decision, which adopted the *Brooke Group* reasoning in hearing a case concerning single product bundling.<sup>174</sup> This per se approach was applied by the Southern District of Ohio in its *J.B.D.L.* decision.<sup>175</sup>

Another method of addressing bundled discounts, a method adopted by the *LePage's* majority, focuses on whether a discounter creates a bundle that includes products not sold by its competitor.<sup>176</sup> Under this approach, a seller will be found to have engaged in exclusionary conduct when it offers bundled discounts that include products not sold by its competitor without an adequate business justification.<sup>177</sup> The Central District of California used this approach when it made its decision to deny Tyco's motion for summary judgment,<sup>178</sup> but the court subsequently abandoned the analysis in its decision regarding the motion for a new trial.<sup>179</sup>

172. Lambert, *supra* note 6, at 1700. This was the approach taken by the amici that filed briefs in support of 3M's petition for writ of certiorari. See, e.g., Brief for Amici Curiae Morgan Stanley et al. in Support of Petition for Certiorari at \*5, 3M, 542 U.S. 953 (No. 02-1865), 2003 WL 22428378 ("This Court has repeatedly recognized that '[l]ow prices benefit consumers regardless of how those prices are set' and that above-cost prices 'do not threaten competition regardless of the type of antitrust claim involved.'") (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993)); Brief for Amicus Curiae the Business Roundtable in Support of Petitioner at \*6, 3M, 542 U.S. 953 (No. 02-1865), 2003 WL 22428382 ("This Court, in an unbroken line of cases, has made clear that businesses are entitled – indeed, encouraged – to engage in above-cost price-cutting without fear that those pro-competitive actions will subject them to antitrust liability.").

173. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-23 (1993).

174. See *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000).

175. *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, No. 1:01-CV-704, 1:03-CV-781, 2005 WL 1396940, at \*17 (S.D. Ohio June 13, 2005) ("[T]his Court believes that the approach adopted by the Eighth Circuit in *Concord Boat* is correct.").

176. Lambert, *supra* note 6, at 1718.

177. *Id.*

178. *Masimo Corp. v. Tyco Health Care Group, L.P.*, No. CV-02-4770 MRP, 2004 U.S. Dist. LEXIS 26916, at \*29 (C.D. Cal. June 10, 2004).

179. *Masimo Corp. v. Tyco Health Care Group, L.P.*, No. CV 02-4770 MRP, 2006 WL 1236666, at \*13 (C.D. Cal. Mar. 22, 2006)

These approaches, along with a number of other proposed methods,<sup>180</sup> have worked to greatly increase the academic and economic analysis surrounding bundled discounts. However, they have also made it difficult for district courts to determine which is the right approach. Without further guidance from the Supreme Court on how to handle these issues, it is likely that the district court decisions will continue to be inconsistent and at times contradictory to an earlier decision.

## V. CONCLUSION

Since the Third Circuit's decision in *LePage's* and the Supreme Court's decision to deny certiorari, the district court decisions that have addressed bundling claims have varied in the way in which they approach the legality of bundled discounts under antitrust law. This variety stems from the Third Circuit's failure to provide a reasonable, economically sound approach to addressing the antitrust concerns of bundled discounts. As a result, some district courts, such as the U.S. District Court for the Southern District of Ohio, have decided to simply reject *LePage's* reasoning outright. Other courts, such as the U.S. District Court for the Central District of California, started to follow *LePage's* reasoning, only to then abandon that reasoning a short time later. Until the Supreme Court has spoken on the matter, these inconsistencies are likely to continue among district courts, and will likely cause discrepancies between the circuit courts upon hearing an appeal concerning bundled discounts.

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180. See Elhauge, *supra* note 12, at 315 (advocating an approach that focuses on whether the discounts unjustifiably increase the costs of the discounter's rivals); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶749, at 182 (Supp. 2004) (adopting an approach in which the court deciding whether an above-cost bundled discount is exclusionary would ask whether the discount would exclude a hypothetical equally efficient rival); Lambert, *supra* note 6, at 1742 (proposing a method that would assume the above-cost bundle is legal unless "(1) there are barriers to entry (a) in the product market(s) in which the plaintiff does not participate and (b) in the market for the competitive product; (2) the plaintiff cannot practicably coordinate with other producers to create a competing bundle; and (3) the plaintiff made a good faith offer to become a supplier to the discounter but was rebuffed").



