Are the Courts Moving Toward a Consensus on Bundled Discounts and §2 of the Sherman Act?

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The Eighth Circuit's recent decision in *Southeast Missouri Hospital v. C.R. Bard, Inc.*, ___ F.3d ___, 2010 WL 3220600 (8th Cir. Aug. 17, 2010), aligns this Circuit with the Ninth Circuit's decision in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 906-07 (9th Cir.2008).. Under those decisions the Sherman Act tests for exclusion by means of a bundled discount is the so-called "attribution," test, in which the entire discount is attributed to the "exclusion product," which is the one from which rivals are allegedly excluded. If the fully attributed discount brings the price below the relevant measure of cost (average variable cost in the Cascade case), then the discount is capable of excluding a rival and further analysis will be necessary. If it does not, then the bundled discount does not violate the antitrust laws.

For example, suppose the defendant produces products A and B at costs A=7 and B=6. Its standalone prices for these goods are A=10 and B=7, or 17; but it will sell a bundle at a price of 15, which is still well above its costs for the bundle. A rival produces only B and has the same costs (6) as the defendant. The attribution test attributes the entire discount of 2 to the B product, bringing its unbundled price down to 5. Since this price is less than the defendant's own costs for producing B, the bundle flunks the attribution test. In this case, in order to compete with the

discount the rival would have to match the discount on B plus the foregone discount on A. If the seller must pay 10 for standalone A, it will pay only 5 for the rival's B, which is less than B's costs.

A much simpler and more straightforward version of the attribution test asks whether the incremental price that the defendant charges for including B in the bundle is sufficient to cover B's incremental cost. In this example the price went from 10 for A alone to 15 for the AB bundle, and the increment of 5 is less than the cost of B. See Erik Hovenkamp and Herbert Hovenkamp, Exclusionary Bundled Discounts and the Antitrust Modernization Commission, 53 Antitrust Bull. 517 (2008).

It is also worth noting that the attribution test should be read as no more than a safe harbor. Most bundled discounts that flunk the test are nevertheless competitively beneficial. For example, the automobile dealer who includes a $400 stereo in the deal for an additional price of $150 has flunked the attribution test for the bundle of car+stereo; but the dealer is almost certainly trying to compete for an automobile sale in an oligopolistic market rather than creating a monopoly in the stereo market. And when McDonald's includes a free drink in its meal package it has also flunked the attribution test, although almost certainly without threatening competition in any market.

In *Southeast Missouri* the defendant C.R. Bard provided catheters to the plaintiff and a putative class of hospital purchasers. The catheters were sold under a contract negotiated by Novation, a group purchasing organization (GPO) and offered purchasers a discount for taking specified minimum percentages of a group of catheters and related products. The defendant had several rivals. Some of these made the full line of catheters that was subject to the bundled discount agreement, while others made a smaller subset. In addition to applying the attribution test the court also held that the presence of rival sellers who offered the full line meant that the case should not treated as involving bundled discounts at all, but rather "bundle to bundle" pricing. Such bundles should not be unlawful unless the price of the bundle as a whole fell below the defendant's costs.