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Summary

Recent litigation brought by a smaller competitor challenging pricing practices of an allegedly dominant firm display a marked failure by the lower courts to apply the clear teachings of the Supreme Court which require a meaningful analysis of price/cost relationships before pricing can be condemned as exclusionary. This situation has been exacerbated by the failure of the United States to urge that certiorari *be granted in* LePage's*. The result in error costs and injury to our nation's competition policy is evident in the three cases examined in this paper. The problem, however, is not one which lends itself to legislative remediation. Rather, it calls for strong amicus intervention by the enforcement agencies in private litigation with the mission of redirecting courts from an open-ended rule of reason analysis toward a proper application of cost-based administrable rules.*

Introduction

It is a daunting task to fashion workable rules from the language of the Sherman Act which, as the Supreme Court has observed, "cannot mean what it says," *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687 (1978). That fact notwithstanding, my endeavor here as a litigation practitioner is to offer some thoughts based on cases in which I have participated as appellate counsel with the hope that it may inform the growing debate on what constitutes exclusionary conduct under Section 2.

I.
The Rise and (Partial) Fall of *Per Se* Rules under Section I

The quest for certainty or at least predictability in applying the Sherman Act is not new. Both business counseling and dispute resolution demand that it be undertaken. The experience under Section 1 is instructive although not itself the subject of these hearings. Throughout its history, Section 1 has been particularly hostile to horizontal agreements between competitors. In that context *per se* rules were born condemning, without more, agreements respecting price, output, customers, territories and the like. The instinct which prompted this infusion of Latin norms into antitrust law was sound enough: information relevant to market effects is often difficult to assess at least at the margin, litigation costs are high, and mistakes (false positives in today's parlance), if made, were thought to pose only modest risks to consumer welfare particularly when balanced against the seemingly obvious harms such agreements cause.

However sound the instinct for clear rules, the decades since *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977), have prompted scholars and courts alike to carefully consider the economics of practices previously thought to be so pernicious that a detailed and factual assessment of their competitive effects likely would waste judicial resources. Along the way, practices formerly deemed illegal *per se* – those which involve a form of integration, whether vertical or horizontal – such as tying (more or less), boycotts, and vertical maximum (though not minimum) price fixing have been held subject to a full-blown rule of reason assessment in which the efficiency benefits and harms are weighed against one another.

But that evolution threatened to produce a jurisprudence as shapeless as a flapper's dress, at least in part. As Professor (as he then was) Frank H. Easterbrook wrote in his seminal article, *The Limits of Antitrust*, 63 Tex. L. Rev 1, 11-12 (1984), it is "fantastic" to suppose that judges and juries can make the required "balancing" evaluation since "[T]he welfare implications of most forms of business conduct are beyond our ken. … When everything is relevant, nothing is dispositive."

Such criticisms were telling. After all, a workable regime governing dispute resolution, even though derived from the opaque language of the Sherman Act, is a practical necessity if our nation's competition policy and its concern for consumer welfare is to be served by something more than haphazard decisions. A "second best" set of rules shaped by concerns about certainty, false positives, and litigation costs was necessary, at least when "naked" restraints were not at issue. It evolved in the form of rebuttable presumptions.

The idea of burden shifting as an alternative to *per se* rules is not new: Richard Posner, then Assistant Solicitor General, argued in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), that vertical territorial restraints should be held presumptively illegal, but the presumption ought to be rebuttable by the defendant if it could demonstrate that the competitive harms were more than outweighed by the benefits to consumers. While the Supreme Court adopted a *per se* rule instead – one which was to last only a decade before being expressly overruled – burden shifting found life in subsequent "quick look" holdings (terminology which the Supreme Court recently employed in *California Dental Ass'n v. FTC,* 526 U.S. 756 (1999) ("*Cal Dental")*, which try to capture the benefits of the *per se* rule while leaving a justification window open to defendants. *See, e.g., FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Nat'l Collegiate Athletic Ass'n. v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)

To be sure, burden shifting may provide some of the benefits of a *per se* regime; yellow lights provide some guidance to drivers of the risks ahead. But the significance of those benefits is perhaps doubtful in the wake of *Cal Dental,* which viewed *per se* rules, quick look and rule of reason as little more than way stations on the road to a meaningful economic analysis. As Justice Souter put it for the majority:

> As the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions.

Cal Dental, 526 U.S. at 780 - 781.

But while consideration of direct and error costs has substantially weakened the viability of some "hard boiled" rules in Section 1 jurisprudence, the reverse is true in Section 2 when alleged predatory pricing is at issue. But that is not as anomalous as it may appear. Section 1, at its most general level, is concerned with the failure of entities which have not integrated operations – either wholly or partially, vertically or horizontally – to stop competing (or at least not hard enough). *See, e.g., United States v. Citizens and Southern National Bank*, 422 U.S. 86, 116 (1975) ("a business entity must find new customers and higher profits through internal expansion – that is, by competing successfully rather than by arranging treaties with its competitors."). In those circumstances, traditional *per se* notions remain operative. It is only when confronted with various forms of integration that the Supreme Court has adopted the more cautious jurisprudence of presumptions or quick looks. On the other hand, Section 2 is largely directed at curbing entities which are thought to be competing too hard. There, the Supreme Court has clearly decreed that concerns over error costs and the need for certainty require "hard and fast" rules, even if the cost is that some forms of single firm conduct that exclude rivals and in the short term may reduce consumer welfare are exonerated. Under Section 2, these rules are shaped by price/cost relationships. Yet lower courts – including the circuits – have largely ignored them. It is a development which fairly commends itself to this Commission's consideration.

II
Single Firm Exclusionary Conduct

Evaluation of exclusionary pricing practices under Section 2 poses a particularly vexing problem for antitrust adjudication. *See generally* Mark Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 72 Anti. L.J. (forthcoming 2005). The conundrum was superbly articulated by Judge Easterbook in his article *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?,* 2003 Colum. Bus. L. Rev. 345, 346 (2003):

> I want to talk today about the puzzle of exclusionary conduct. Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike. The dominant firm is an aggressor and expands its market share at the expense of its smaller rival. The rival yelps and sues – or complains to the Antitrust Division and state attorney general and asks *them* to sue in its stead.

The problem is not easily resolved by asking general questions about the goals of antitrust (for Judge Easterbook it is "preventing the allocative loss that comes about when firms raise price over long run marginal cost") and then trying to predict in some kind of balancing exercise whether such goals are furthered or harmed by a challenged practice. In this context, the cost of false positives is very high in terms of confusing real competition with exclusion, thereby imposing inordinate costs on firms doing precisely what the law encourages, *i.e.,* competing vigorously by lowering prices. That, in turn, plainly harms consumer welfare.

It was precisely these concerns which underlay the opinion of then Judge Stephen Breyer in *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) ("*Barry Wright*"), in which, writing for the Court, he endorsed a rigorous bright-line cost-based standard for predatory pricing even though he recognized that predation might consequently occur through the technique of "limit" pricing. Explaining why any other rule (including that then operative in the Ninth Circuit under *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014 (9th Cir. 1981)), was unacceptable, Judge Breyer wrote:

> [U]nlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.... [W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.

Barry Wright, 724 F.2d at 234.

This view ultimately carried the day with the Supreme Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("*Matsushita*"), and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) ("*Brooke Group*"), in which the court relied on the reasoning in *Barry Wright* as support for declaring that anything other than a bright-line cost-based standard would be "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting" *Brooke Group*, 509 U.S. at 223; *see also Matsushita*, 475 U.S. at 594-5. Lest there be any doubt about how the Supreme Court views the importance of error and related costs in evaluating exclusionary conduct, it was laid to rest in *Verizon Communications Inc. v Law Offices of Curtis v. Trinko LLP*, 540 U.S. 398 (2004), where the Court expressly invoked *Brooke Group*'s concern over the dangers of uncertain legal standards and "false positives" as a central principle of Section 2 jurisprudence. See *Trinko*, 540 U.S. at 414-15.

My experience suggests the lower courts simply have not "gotten the message." That may be because of a judicial distaste for any rule which countenances heavy-handed conduct which lawfully excludes rivals, however rare, as *Brooke Group* plainly does. It may also reflect a failure to appreciate that a rule of reason balancing test may be appropriate in Section 1 cases involving various kinds of integration but may be entirely misplaced in single firm pricing cases where the economic considerations are very different even though Section 2 is subject to the rule of reason as well. Or perhaps it is explained by nothing more than unthinking adherence to form book jury instructions derived from *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985) ("*Aspen Skiing*"). Whatever its inspiration, I submit it is a matter for concern.

To illustrate the point, I discuss three cases in which my firm was retained as post-trial counsel following jury verdicts for the plaintiffs in Section 2 "price" cases.

- *LePage's Inc. v. 3M*, Nos. 00-1368, 001473, 2002 WL 46961 (3rd Cir. Jan. 14, 2002.) ("*LePage's*"), is doubtless familiar to all and is insightfully analyzed by Professor Muris, *Comments on Antitrust Law, Economics, and Bundled Discounts; Response to the Antitrust Modernization Commission's Request for Public Comments,* (July 15, 2005);

- *Weyerhaeuser* has just resulted in a Ninth Circuit opinion which will be challenged by Petition to the Supreme Court later this year (*Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.,* 411 F.3d 1030 (9th Cir. 2005)) ("*Weyerhaeuser*"); and

- *McKenzie-Willamette Hospital v. PeaceHealth*, No. Civ. 02-6032-HA, 2004 WL 3168282 (D. Or. Oct. 13, 2004) (denial of renewed motion for directed verdict), appeal filed May 27, 2005) ("*PeaceHealth*"), is now being briefed on appeal to the Ninth Circuit.

A. LePage's

LePage's brought suit, *inter alia*, under Section 2 based on 3M's entry into the private label transparent tape business in which LePage's was the dominant manufacturer (88% of the segment). 3M had what was admitted, for appellate purposes, to be monopoly power in transparent tape through its Scotch brand. In seeking to expand its success in the private label arena, 3M engaged in various marketing practices described by the Third Circuit as consisting principally of various "exclusive dealing arrangements," both formal and implicit, which were secured by cash incentives, as well as "bundled rebate programs" through which customers obtained lower prices by increasing product purchases across a number of 3M's different product lines.

At its crux, LePage's claimed that it would have to reduce its private label tape prices by an amount sufficient to compensate purchasers for the loss of 3M's rebates. This it declined to do and lost market share as a consequence.

The district court instructed the jury that exclusionary or predatory conduct "either does not further competition on the merits or does so in an unnecessarily restrictive way." If 3M has been attempting to exclude rivals on some basis other than efficiency, you may characterize that behavior as predatory. *Le Page's*, 2002 WL 46961, at *29. That and related instructions were largely based on those upheld in *Aspen Skiing,* irrespective of the fact that *Aspen Skiing* involved a refusal to deal rather than bundled pricing.

3M argued – and initially a divided panel of the court agreed – that the jury's verdict for *LePage's* could not be sustained inasmuch as *LePage's* failed to offer any price/cost calculations demonstrating that it "could not compete," assuming it were as efficient as 3M. In fact it admitted it was not, whatever the cause. Indeed, LePage's actually conceded that 3M did not sell below its costs however those costs were calculated – which is to say that even if all of 3M's discounts were attributed to 3M's private label tape sales where LePage's offered direct product competition, 3M was still pricing above cost. In the panel's view (which became the core of the subsequent *en banc* dissent), absent proof of below cost sales of some dimension, "competitors unwilling to accept lower profits could use the law to insulate themselves from competition." *Le Page's*, 2002 WL 46961, at *10. So far as one could tell from the record, *LePage's* simply declined to lower its profit margins, electing instead to sue for its lost sales.

The full circuit court sitting *en banc* saw it differently. Dismissing *Brooke Group* on the patently erroneous grounds that the Supreme Court's reasoning there did not apply to a monopolist and was, in any event, irrelevant because *LePage's* did not expressly plead a predatory pricing claim, the court concluded that 3M's bundled rebates constituted illegal exclusionary conduct, even though it was not proven that 3M's rebates would have driven LePage's prices below its own costs if it were to offer comparable discounts. And it did so without any apparent sensitivity to the fact that bundled discounts are ubiquitous in our society for reasons which generally pose no risks to consumer welfare. *See Muris, passim*.

The rationale for the majority opinion is simply impossible to fathom. The opinion does no more than invoke classic Section 2 bromides. The Brief for the United States, which unfortunately urged that *certiorari* be denied, nonetheless noted that the majority opinion "provided few useful landmarks on how Section 2 should apply as a general matter in future cases involving bundled rebates." U.S. Brief at 16. Further, it said, "the court of appeals failed to explain precisely why the evidence supported a jury verdict of liability, including what precisely rendered 3M's conduct unlawful." U.S. Br. at 16. Finally, the Government observed, "(t)he court of appeals' failure to identify the specific factors that made 3M's bundled discount anticompetitive may lead to challenges to procompetitive programs and prospectively chill the adoption of such programs." U.S. Br. at 18. Thus, while the Solicitor General urged the court to deny review because of alleged record deficiencies and the need to let bundled pricing issues be developed more fully by academics and courts alike, there was no actual support for the Third Circuit's reasoning. Indeed, on any fair reading, the Government viewed the majority opinion as indefensible.

That view is also reflected in the near-unanimous judgment of antitrust scholars that it is impossible to divine from *LePage's* a rule that relates meaningfully to the price/cost relationships necessary for assessing exclusionary behavior. *See, e.g.*, Daniel L. Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. Chi L. Rev. 243, 264 (Winter 2005) (the *LePage's* decision "lacks a clear, coherent economic rationale and leaves unclear when package pricing … will or should be condemned under the antitrust laws"); Daniel A. Crane, *Multiproduct Discounting: A Myth of Nonprice Predation*, 72 U. Chi L. Rev. 27, 43 (Winter 2005) ("The *LePage's* decision regrettably condemns as anticompetitive above cost discounting without offering any clear guidance on when mixed bundling will be deemed illegal"); Thomas A Lambert, *Evaluating Bundled Discounts*, 89 Minn. L. Rev. 1688 (2005). Even Judge Posner, who has expressed concern about bundling because of its allegedly discriminatory potential, finds little basis for defending the reasoning of the *LePage's* decision. *See* Richard A Posner, *Vertical Restraints and Antitrust Policy*, 72 U. Chi. L. Rev 229 (Winter 2005). These comments suggest that the supposed need for further reflection is wrong.

In any event, *LePage's* simply ignores the Supreme Court's clearly stated concerns about false positives and related costs, as well as the need to provide clear objective guidance on the standards applicable to bundled rebates which take such concerns into account. 3M suggested that the court might adopt a modified *Brooke Group* rule similar to that urged by Professor Areeda, whose classic text viewed above cost pricing of a package as procompetitive inasmuch as the lower package price reflects either cost savings (*i.e.,* efficiencies) associated with the package or that the unbundled prices were supracompetitive. 10 Phillip E. Areeda, et al., *Antitrust Law* ¶ 1758f (2d ed. 2004); 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 749 (2d ed. 2002). More recently, Professor Crane has argued that "*LePage's* has it backward. If anything, we should be more indulgent of package discounts than of single product discounts." 72 U. Chi. L Rev. at 42. Moreover, in *LePage's*, 3M acknowledged that while there may be circumstances in which above cost bundles can harm the competitive process by disadvantaging equally efficient competitors with more limited product offerings (*i.e.,* if the aggregate discounts were fully attributed to the competitive product), they were rare indeed. *See Ortho Diagnostic Sys., Inc. v. Abbott Lab., Inc.*, 920 F. Supp. 455 (S.D.N.Y. 1996). But to determine whether that risk is real in any given case, of course, it is necessary to engage in discrete price/cost analysis – the very thing the *LePage's* court declined to do.

For the present, I submit that the modified *Brooke Group* rule is preferable to that sketched in *Ortho*. In that regard, I concur with the view of Professor Muris cited above. His argument rests on the following seemingly incontestable maxims:

- "Bundled discounts are not inherently anticompetitive" and, in fact, are "a ubiquitous and facially procompetitive practice," Muris, *supra*, at 22;
- "The current academic economic literature falls far short of showing the circumstances under which bundled discounts should be condemned under the antitrust laws," *id*. at 21-22;
- "The *Brooke Group* rule readily can be understood and easily applied by courts and lawyers alike," *id*. at 26;
- "Using treble damages liability to regulate multiproduct bundling poses a clear, sizeable, and unjustifiable risk of deterring procompetitive conduct" which is "of especial concern in the area of price cutting." *id*. at 25; and
- Any imperfections in the *Brooke Group* test will mean only that the test "may not eliminate all risk of anticompetitive [conduct]," *id*. at 27.

Moreover, as previously noted, the possibility that competitors might be harmed by lawful above cost "limit pricing" was recognized in *Barry Wright* and obviously countenanced by the Supreme Court in *Brooke Group*. Those cases emphatically teach that such possibilities must be tolerated when balanced against the need for certainty, lower litigation costs, and the avoidance of false positives. In other words, in the context of single-firm predation law, these latter concerns are so compelling that they fairly demand a bright line test rather than a regime of presumptions *a la* Section 1, let alone rule of reason balancing.

One final note: given the conceptual possibility that a modified *Brooke Group* rule leaves some room for competitive harm, more elaborate tests or models have been suggested which are intended to avoid that theoretical possibility. *See Lambert, supra*. I respectfully submit that this endeavor is misguided. Simplicity in rule-making is as much a virtue as certainty. We must not forget the advice of Voltaire from three centuries ago: "The enemy of the good is the perfect." *Dictionnaire Philosphique* (1764).

B. Weyerhaeuser

Perhaps even more striking than *LePage's* is the rejection of the holding of *Brooke Group* in a "buy-side" single product monopolization case soon to be the subject of a petition for *certiorari*: *Weyerhaeuser,* 411 F.3d 1030.

This case involved the alleged "overpayment" for or "overbuying" of alder saw logs processed into lumber for sale in what the jury found to be a competitive downstream market. Weyerhaeuser was by far the largest purchaser of the hardwood saw logs which it used to supply its six mills in the Pacific Northwest. Plaintiff Ross-Simmons was a single mill competitor who claimed it was driven out of business when Weyerhaeuser utilized its monopsony power to bid up log prices "too high" for it to compete successfully.

However, Ross Simmons did not adduce evidence that the prices paid by Weyerhaeuser were "too high" to enable it successfully to sell its processed lumber at a profit in the downstream market, *i.e.,* to sell its output above its marginal cost (logs represent some 80% of finished goods costs). Consequently, Weyerhaeuser argued that, by parity of reasoning, *Brooke Group's* bright line test necessarily required that the claim be rejected.

At trial, the district court declined to instruct the jury that proof of predation required analysis of price/cost relationships analogous to those applicable on the "sell side." Instead, it instructed the jury that anticompetitive predatory overbidding could be committed by a buyer if the would-be or actual monopolist pays a "higher price ... than necessary, in order to prevent (competitors) from obtaining the (products) they need() at a fair price" (*see Weyerhaeuser,* 411 F.3d at 1036 n.8).

This remarkable instruction was expressly upheld on appeal. While ostensibly accepting the proposition that consumer welfare is not independent of allocative efficiency but, rather, follows from it (*Weyerhaeuser,* 411 F.3d at 1036), the panel rejected the argument that the standard of liability should be "as high" in "buy-side" cases as "sell-side" because "consumer benefits" are not "necessarily the same." Its reasoning was simplistic at best: the benefits to consumers in "sell side" cases – lower prices – are not present when "too high" a price is paid for inputs, particularly when the upstream market is "relatively inelastic." In so doing, the court simply ignored the obvious: the beneficiaries (at least in the first instance) of "buy side" competition are input sellers who have a legitimate competitive interest in obtaining as high a price for their output as possible. And of course buyers have no presumptive interest in paying more than is necessary in order to obtain raw materials sufficient for their needs. Ultimately, of course, consumers may indeed benefit from even a dominant firm bidding high to obtain inputs because it enables those firms (who are sellers) to secure adequate inventories for their downstream needs while enabling input sellers – facing static demand or otherwise – to use the increased funds for product innovation, output maximization, or simply income accumulation.

But whatever the conceptual flaws in the Ninth Circuit's premise, it is its complete failure to address – let alone assess – the significance of those considerations which shaped the *Brooke Group* standard that is most striking. After all, concerns about administrability and avoidance of false positives are every bit as much operative in "buy side" cases as they are on the "sell side."

In this respect, *Weyerhaeuser* may be read as a studied refusal to accept the *Brooke Group* teaching, particularly given the tenuous, unconvincing distinction it draws respecting supply side elasticities. In truth, the opinion can only be fairly read as remitting predatory pricing cases under Section 2 to the realm of the "fantastic."

That, I would submit, is made evident by the jury instruction which the Ninth Circuit approved. What makes a price not "necessary"? Measured for whom – buyer or seller? For a firm selling into a competitive downstream market, as here, how can it not be "necessary" for it to purchase as much raw material as it can process and resell profitably. And what in the world does "fair" mean? To the competitor? Can it be the law that, in making pricing decisions, the buyer must decide what prices its competitors can pay, let alone doing so without regard to their comparative efficiency. And to get down and dirty – the real world of counseling and trials – "how is a judge or jury to determine a 'fair price'?" *Town of Concord, Mass. v. Boston Edison Co.*, 915 F. 2d 17, 25 (1st Cir. 1990) (Breyer J). Even pre-*Brooke Group*, when competition theories related to price/cost were at play (*compare Inglis* 668 F.2d at 1035 *with Barry Wright*, 724 F. 2d at 234-6), all courts recognized the need to provide businesses with at least *some* guidance. "Fairness" or "necessity" were not offered as options, and for obvious reasons. In this respect, nothing has changed with the passage of time.

C. PeaceHealth

Decisions such as *LePage's* and *Weyerhaeuser* put trial courts – not to mention counsel and their clients – in a quandary. One can only guess at the rule likely to be applied. Supreme Court guidance such as that in *Brooke Group* and *Trinko* may be considered instructive, but scarcely controlling, at least analytically. But as every trial lawyer knows, juries in particular see antitrust cases involving complex economic concepts as little more than morality plays pitting a little David against Goliath. The result can only be damaging to our economy inasmuch as it will chill competitive conduct which the antitrust laws are intended to nurture.

Illustrative of this phenomenon is the remarkable judgment in *PeaceHealth.* There, the smaller of two hospitals (McKenzie) in Lane County, Oregon, offered only acute primary and secondary care (114 beds), while its larger competitor (432 beds) offered tertiary care as well (PeaceHealth). At issue were preferred provider contracts that offered all hospital services, including tertiary care. These originated with two of the 45 Lane County insurers who endeavored to devise products that they could offer in the highly competitive downstream consumer market. The two plans at issue covered no more than 15% of insured lives in the relevant market. When existing plans came up for renewal in 2001, the insurers sought two bids: one exclusive of McKenzie; one not. PeaceHealth responded with two bids with a price differential representing what it considered the value of the steering associated with the "exclusivity." One insurer, Regence Blue Cross Blue Shield of Oregon, accepted the exclusive bid; the other, Providence Preferred, included McKenzie in their post-2001 plan, albeit paying somewhat higher rates in so doing.

McKenzie, of course, claimed that its limited service offers compared with those of its larger rival put it at a competitive disadvantage which PeaceHealth capitalized upon by bundled pricing during contract negotiations. Nonetheless, PeaceHealth prevailed before the jury on Section 1 claims alleging unlawful exclusive dealing, as well as monopolization and conspiracy to monopolize claims under Section 2. However, the jury found against PeaceHealth on claims of attempted monopolization under Section 2 as well as state court claims not relevant for these purposes.

While exclusive dealing was the principal anticompetitive act originally asserted (others were of little consequence), bundled pricing appeared as a theory of liability following the Third Circuit's *en banc* opinion in *LePage's*. Permitting the theory to go to the jury, the court instructed that "bundled pricing occurs when price discounts are offered for purchasing an entire line of services exclusively from one supplier. Bundled price discounts may be anticompetitive if they are offered by a monopolist and substantially foreclose portions of the market to a competitor who does not provide an equally diverse group of services and who *therefore* cannot make a comparable offer" (emphasis added) (Tr. 33:18-34:3). While not free from ambiguity, there was little doubt about what this instruction was meant to convey, taken as it was, *verbatim,* from the Third Circuit's description of bundled discounting in *LePage's*, 324 F.3d at 155. When the bundling theory was first asserted, discovery was closed and there was no evidence – expert or otherwise – regarding the price/cost considerations related to the bundle. McKenzie's counsel argued that the absence of such evidence was of no moment, since "the rule on bundling does not require an expert's opinion because I believe it to be under *LePage's* a rule of law that need not be supported by facts other than the facts that indeed they were providing across the board discounts" (RT 10:12-16). The trial court apparently agreed. As a result, the jury was permitted to find the lower pricing for the bundled plan to be an anticompetitive act when it successfully resulted in exclusivity for the "big guy" and, presumably, substantial market foreclosure.

The standard adopted by the district court in PeaceHealth suffers from the same infirmities which infect *LePage's* from whence it comes. It allows a jury to draw the line between protected and unprotected discount programs without consideration of price/cost relationships or competitive efficiencies. It draws from the structure of the market – a simplistic comparison of the range of products on offer – the conclusion ("therefore") that the smaller competitor cannot compete but offers no meaningful guidance for giving the "therefore" economic content beyond a general reference to foreclosure (which itself poses significant issues on appeal). Indeed, the instruction permits a jury to condemn price cutting resulting presumably in some meaningful degree of market foreclosure, (1) whether or not the bundles offered produce savings for consumers; (2) whether or not an equally efficient firm could match the discounts if it chose to do so by prices which override the transaction cost advantages of the packaging; and (3) whether or not the practice results in enhanced sales for the defendant with no sacrifice of profits that is irrational apart from its attempt to increase sales perhaps even to monopoly levels. This, I submit, is the apotheosis of the false positive.

One fears that this trial court's reading of *LePage's* and its form of jury instructions leaving out any price/cost analysis akin to *Brooke Group* or even *Ortho* will be replicated elsewhere. For the present, that fear is tempered by the fact that one district court in the Sixth Circuit has declined to follow *LePage's*. *See J.B.D.L. Corp. v. Wyeth-Ayesrst Labs., Inc.,* No. 1:01-CV-704, 1:03-CV-781, 2005 WL 1396940 at *16 (S.D. Ohio, June 13, 2005) (granting summary judgment for the defendant).

III.
A Final Comment

Given our common law tradition, I, for one, hope that the issue of price predation will be sorted out in our traditional adjudicatory process. Indeed, it was the Government's view in *LePage's* that assessment of pricing practices should "percolate" through the courts before the Supreme Court addresses the subject. There is, however, a cost to that process – one which we are now experiencing in the wake of *LePage's*. In my view, it is incumbent on the DOJ and/or FTC to step into the process as soon as possible in order to provide the necessary guidance. Their pedagogical function through *amicus* briefs can and should be employed. In truth, the Government erred in urging the Supreme Court to deny *certiorari* in *LePage's*. It should correct that error in every way at its disposal. A strong call by this Commission would aid in producing that result.

It is, of course, possible to conceive a jurisprudential transition from firm, bright-line rules to presumptions similar to those applicable in some circumstances under Section 1. That would enable issues to go to the jury under appropriate instructions, assuming they could be satisfactorily devised with more specificity and content than those in the cases discussed here. But rules based on presumptions were attempted by the Ninth Circuit, only to be soundly rejected in *Brooke Group*. Here, under Section 2, perhaps even more than under Section 1, the "big is bad" concern makes litigation by presumption problematic. For one thing, jury nullification would be a heightened risk. For another, the need is for clear and unequivocal judicially-shaped rules – not simply refined methods for shipping cases to the jury – seems compelling.

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