

Norvir And The Difficulties In Analyzing Bundling

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Companies commonly sell multiple products to the same customers, and in some cases sell inputs of those products to one set of customers who then become their competitors in selling the final product.

The myriad of approaches used to offer products together for sale, whether in an integrated fashion or not, is often described as “bundling” and has presented challenges to the courts and antitrust litigants in terms of providing an underlying economic theory to describe the behavior and in determining the necessary elements when challenged as anticompetitive under Section 2 of the Sherman Act.

Bundling and similar practices commonly used today do not fit neatly into any of the traditional categories, such as predatory pricing or tying, so courts continue to wrestle with how to determine when the unilateral pricing decisions of a company constitute improper use of market power, either in maintaining that power or extending it into another market.

Recent developments in the long-running *Abbott Laboratories Norvir Antitrust Litigation* provide examples of how pricing decisions can be described by more than one theory, and how choice of that theory may impact a litigant’s ability to prove its case.

The *Norvir* cases involve attacks on certain pricing decisions made by Abbott after its patented drug Norvir, a protease inhibitor (“PI”) used to treat HIV patients, turned out to be more useful as a booster taken in lower dosages along with other PI’s.

Abbott responded by combining another of its PI’s with ritonavir (the generic name for Norvir) in a single product (Kaletra) while continuing to sell Norvir for use with other PI’s.

After Abbott’s PI competitors began to take away market share from Kaletra, Abbott raised the price of Norvir from \$1.71 to \$8.57 per 100 mg, but did not increase the price of Kaletra.

The various cases consolidated before the Hon. Claudia Wilken in the Northern District of California have a convoluted history, with direct purchaser, indirect purchaser and competitor plaintiffs asserting various antitrust theories, and with plaintiffs and Abbott repeatedly changing their theories in light of new developments in the law.

One theory in these cases has already been addressed by the Ninth Circuit on interlocutory appeal. In *Doe v. Abbott Laboratories*, 571 F. 3d 930 (9th Cir. 2009), Abbott appealed the denial of its motion to dismiss plaintiffs’ monopoly leveraging claims.

During the pendency of the appeal, the United States Supreme Court decided *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. ___, 129 S. Ct. 1109 (2009).

In *linkLine*, the Supreme Court ruled that to state a claim for price squeezing, one must allege *either* an antitrust refusal to deal in the monopoly market *or* predatory pricing in the second market.

Following *linkLine*, the Ninth Circuit held that allegations of monopoly leveraging through pricing conduct in two markets failed to state a claim under Section 2 of the Sherman Act “absent an antitrust refusal to deal (or some other exclusionary practice) in the monopoly market or below-cost pricing in the second market.” *Doe*, 571 F.3d at 931.

Plaintiffs’ monopoly leveraging theory “[h]owever labeled” was deemed to be “the functional equivalent of the price squeeze the Court found unobjectionable in *linkLine*.” *Id.* at 935.

The claims at issue in Judge Wilken’s most recent January 12, 2010, opinion, *Safeway Inc. v. Abbott Laboratories*, 2010 U.S. Dist. LEXIS 2145, characterize Abbott’s behavior as a refusal to deal in the “boosting market” (Norvir); the direct purchaser plaintiffs also characterize Abbott’s actions as predatory pricing of a bundled product in the “boosted market” (Kaletra).

The court denied Abbott’s motions to dismiss these claims, finding that neither the Ninth Circuit’s previous decision in *Doe*, nor the Supreme Court’s decision in *linkLine* itself, precluded plaintiffs’ refusal to deal or predatory pricing of a bundled product claims.

Judge Wilken did not read *Doe*’s holding that Abbott’s pricing conduct was the functional equivalent of a price squeeze “[h]owever labeled,” 571 F.3d at 935, to preclude a Section 2 claim under the facts of the case.

Instead, she read *Doe* as finding only that *linkLine* required plaintiffs to allege an antitrust violation in either the boosted market or the boosting market.

Because plaintiffs alleged that Abbott had engaged in conduct which constituted predatory pricing in the boosted market and/or a refusal to deal in the boosting market, the court found that plaintiffs had alleged the necessary facts to support a Section 2 violation.

Further, the court refused to read *linkLine* as affecting the elements necessary to establish predatory pricing of a bundled product as set forth by the Ninth Circuit in *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883 (9th Cir. 2008).

The *Cascade* court found defining the appropriate measure of the defendant’s costs in a bundled discounting case to be more complex than in a single product predatory pricing case.

Thus, it modified the below cost pricing test commonly used by adopting a “discount attribution” standard as its cost-based rule, under which “the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products.

If the resulting price of the competitive product or products is below the defendant’s incremental cost [or average variable cost] to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2.” *Id.* at 906.

Cascade also dispensed with the requirement that a plaintiff prove a dangerous probability of the defendant recouping its investment in below-cost prices, finding that such a requirement did not “translate[] to multi-product discounting cases.” *Id.* at 910.

In *Safeway*, Abbott argued that, even if the Ninth Circuit’s decision in *Doe* did not preclude characterizing its actions as predatory pricing of a bundled product, the Supreme Court’s decision in *linkLine* effectively overruled *Cascade* in favor of the traditional test for predatory pricing (*i.e.*, no discount attribution and a requirement for plaintiff to prove a dangerous probability of the defendant recouping its investment in below-cost prices) as set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

Abbott contended that the discount attribution test was similar to the “transfer price test” for identifying an unlawful price squeeze (*i.e.*, “if the upstream monopolist could not have made a profit by selling at its retail rates if it purchased inputs at its own wholesale rates”) rejected in *linkLine*. 129 S. Ct. at 1121-22. Judge Wilken found this discussion in *linkLine* to be dicta and refused to find *Cascade* to be abrogated based on it.

The transfer price test was proposed by certain amici to address the Supreme Court’s concern that any “remedy” for a price squeeze required the court to insert its own judgment on what constituted an acceptable profit for those being “squeezed,” but the Supreme Court rejected it because it found no basis for the test in antitrust jurisprudence absent an underlying legal basis for requiring the monopolist to sell below a particular price or for requiring prices above a certain level at retail.

Thus, *linkLine*’s rejection of the transfer price test appears to be based on issues Judge Wilken did not find present in *Safeway*. Having decided that *Cascade* had not been overruled by *linkLine*, the Court found that plaintiffs needed only to allege below-cost pricing; they were not required to allege a dangerous probability of the defendant recouping its investment in below-cost prices.

Abbott contended that products at issue in *linkLine* were presented as a bundled product, and thus were factually indistinguishable from *Safeway*. 2010 U.S. Dist. LEXIS 2145 at 12 n.3.

While Judge Wilken disagreed with this characterization, she nonetheless found *linkLine* distinguishable on the alternative ground that the *Safeway* plaintiffs had alleged that Abbott had a duty to deal, whereas in *linkLine*, the Supreme Court found no such duty. *Id.*

Relying on *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585 (1985) and *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 US 398, 124 S.Ct 872 (2004), the Court found that “liability under *Section 2* can arise when a defendant voluntarily alters a course of dealing and ‘anticompetitive malice’ motivates the defendants conduct.”

Judge Wilken further found that plaintiffs’ factual allegations were sufficient support of its claim of a duty to deal. 2010 U.S. Dist. LEXIS 2145 at 19.

On February 11, 2010, Abbott moved to certify the issues for an interlocutory appeal of the *Safeway* decision. As of this writing, the Court has yet to rule on this motion.

Even if the Ninth Circuit provides an opinion on this case, however, it is far from clear whether it will provide guidance for the wide range of common businesses practices encompassed by the term bundling. Many economists and other commentators suggest that different types of bundling may require different tests to determine whether they are anticompetitive or promote competition.

Thus, the Ninth Circuit could find that a more conventional *Brooke Group* test for predatory pricing applies to the facts of this case by finding that *Cascade* does not apply to a bundle where the “monopoly” product is an input to the competitive product, but not reach the question of whether *Cascade* has been overruled for other types of bundles.

In fact, overturning the test in *Cascade* at this time would actually make the national divergence in the tests for bundling cases wider.

In *Cascade*, the Ninth Circuit disagreed with the *en banc* decision of the Third Circuit in *LePage’s Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) and held that “bundled discounts may not be considered exclusionary conduct within the meaning of § 2 of the Sherman Act unless the discounts resemble the behavior that the Supreme Court in *Brooke Group* identified as predatory.” 515 F.3d at 903.

In other words, while the Ninth Circuit modified the *Brooke Group* predatory pricing test to address what it perceived were more complex issues surrounding bundling, it rejected the Third Circuit’s approach holding that violations for bundling under Section 2 could occur even if the discounts resulted in prices above an appropriate measure of the defendant’s costs.

Interestingly, Judge Wilken had opined previously in the *Norvir* litigation (*Meijer, Inc. v. Abbott Laboratories*, 544 F. Supp. 2d 995, 999-1005 (N.D. Cal. 2008) that, because of the high fixed costs and low variable costs found in the pharmaceutical industry, even the discount attribution test found in *Cascade* might not apply, and like in *LePage’s*, a discount resulting in price above average variable cost might still constitute a Section 2 violation.

That analysis was described as “perceptive” by Federal Trade Commissioner J. Thomas Rosch in a February 18, 2010 speech he gave at the Fifth Annual In-House Counsel Forum on Pharmaceutical Antitrust. The *Meijer* decision was not reviewed by the Ninth Circuit.

With respect to the duty to deal decision by Judge Wilken, there is certainly a question as to whether the Supreme Court’s decisions in *Trinko* and *linkLine* suggest a movement towards a very limited definition of an antitrust duty to deal, such that *Aspen Skiing* might be limited to its facts. Additional decision by the courts should provide more guidance on this issue.

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