

Alito and Antitrust (Part II)

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A few weeks back, Josh had a nice [post](#) (on Ideoblog) regarding Judge Alito's antitrust record. He was pretty optimistic, dismissing Judge Alito's antitrust [critics](#) and concluding that "what little Judge Alito has written on antitrust issues is properly described as fastidious analysis complemented by strict application of doctrine."

Some of Judge Alito's comments in last week's hearings cause me to be similarly optimistic. I was particularly pleased with the following exchange between Senator Dewine and Judge Alito regarding [LePage's v. 3M](#), a terrible en banc decision involving "bundled discounts" (i.e., discounts granted in exchange for purchasing products from multiple product lines):

SENATOR DEWINE: Judge, you had a case that dealt with bundling like this. It was, of course, the *3M v. LePage's* case. In that case, 3M, which sells Scotch tape, was selling it as part of a bundle with other products. The result was that LePage's, which was offering a cheaper, competing tape, was having a hard time getting stores to sell its tape because if the stores did, they would have to give up the chance to save money on all the other 3M products that they carry.

The majority ruled against 3M, but you dissented. I wonder if you could please explain your reasoning behind that dissent, and explain what type of bundle discounts you think would violate the antitrust laws.

JUDGE ALITO: ...3M was selling the product, as I recall — it was selling these products — it was not selling them below its cost. It was selling them above its cost. But 3M, because of its scale or because it was more efficient, was able to produce its product more cheaply.

...[M]y understanding of the state of the scholarship on this issue right now and on the way economists view the issue is that I believe that there are many of them who believe that a situation like this does not involve monopolization, that this is not a way in which a company like that can engage in a predatory practice over a period of time.

But there's uncertainty, really, about how the monopolization standard applies to issues of bundling. So I think it's quite up in the air and should it come up again, I think it merits reexamination.

For why Judge Alito was right in saying that *LePage's* "merits reexamination," read on....

The facts of *LePage's* were as follows: 3M, which makes Scotch Tape and sells goods across a number of product lines (e.g., automotive products, "Post-It" notes), cut deals with retailers like Wal-Mart, saying it would give them a discount on all their 3M purchases if they would meet certain purchase targets in multiple product lines. 3M's discounted prices were never below its costs and therefore could be met by any equally efficient rival that sold a similarly diversified product line or was willing and able to team up with other sellers to create a competing bundle. *LePage's*, however, claimed to have been excluded by the discounts. It argued that it could not compete with 3M's multi-product discounts unless it provided a discount the size of 3M's on its narrower product line, which consisted only of private label transparent tape competing with 3M's Scotch brand. To give a similarly-sized total discount, it would have to price below its costs. Thus, *LePage's* argued, it was being excluded from the market by 3M's above-cost bundled discounts.

The en banc Third Circuit agreed with *LePage's* that 3M's consumer-friendly discounts could be anticompetitive. Even though *LePage's* acknowledged that 3M's discounted prices were not predatory (i.e., below cost), produced no evidence that it had tried to compete with 3M by crafting a similar bundled discount with other sellers, and (here's the kicker) *admitted that it was a less efficient tape producer than 3M*, the en banc court determined 3M's discounts to be anticompetitive. The court concluded, in other words, that competition may require a company to forego price cuts in order to prevent the "exclusion" of a less efficient competitor that cannot meet those price cuts. Would you call a race where the fastest runner wins "anticompetitive"? Only in the [Bizarro World](#).

Judge Alito's comments, which hone in on the fact that 3M's discounted prices were not below cost, suggest that he might adopt a rule of per se legality for above-cost bundled discounts. Dan Crane has argued for that very respectable position (see [here](#)). While I've argued for a more nuanced approach to evaluating bundled discounts (see [here](#)), the position Judge Alito alludes to would certainly represent an improvement from the *LePage's* court's reasoning.



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