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Section 2 Symposium: Dan Crane on Buyer-Instigated Bundled Discounts

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[Dan Crane](#)

Daniel Crane is a Professor of Law at Cardozo Law School (soon to be at University of Michigan Law School).

Bundled discounts have been one of the hottest monopolization topics of the last decade. Much of the trouble began with the Third Circuit's en banc decision in *LePage's v. 3M*, which reversed an earlier 2-1 panel decision which in turn had overturned a plaintiff's jury verdict largely based on 3M's bundled discounts. After the Solicitor General's amicus curiae brief asked the Supreme Court to deny cert on the grounds that there wasn't sufficient scholarship on bundled discounts, there was a flurry of legal and economic scholarship, the overwhelming majority of which was highly critical of LePage's.

Over the past five years or so, it seemed that a consensus was emerging that some sort of discount reallocation or attribution test should be used as a screen in bundled discounting cases. There are various formulations of the test, but in general it requires the plaintiff to show that defendant priced the competitive product below cost after the discounts on the non-competitive product are reallocated to the competitive market. Versions of that test have been adopted by a variety of commentators, agencies, and courts, including the DOJ in its [Section 2 report](#), the Antitrust Modernization Commission, the Areeda-Hovenkamp treatise, and the Ninth Circuit's PeaceHealth decision. I have been—and continue to be—a staunch defender of some formulation of that test.

Just when I thought we were close to reaching a strong majority position on bundled discounts, along comes a [significant new article by Einer Elhauge](#) (to be published this coming December in the Harvard Law Review) challenging the entire basis of the theory. Einer argues that bundled discounts manifest anticompetitive “power effects” if the unbundled price for the linking product exceeds the but-for price level (i.e., the price the defendant would charge in the absence of the bundle) and that such bundles should be treated as tie-ins.

Einer's article is sure to attract lots of attention and give courts and perhaps the agencies pause in adopting the until-now consensus position on bundled discounts. Although I profoundly disagree with much of Einer's analysis, it is a provocative and important article. Josh Wright and I are planning a full response at a later date. For the moment, let me just preview one responsive angle. Assuming we get beyond the one monopoly profit theory (which Einer attacks earlier in his paper) and believe that bundled discounts could be vehicles for monopoly leverage, our attitude toward the legal treatment of bundled

discounts depends in part on where we think they originate. Critics of bundled discounts seem to assume that they are like coercive tie-ins pushed by dominant firms on weak consumers. In fact, the evidence is that many bundled discount schemes originate with strong buyers who want to leverage their multi-product buying power to achieve price concessions.

If that's the case, then we should be suspicious of claims that bundled discounts are frequently used as monopoly leveraging devices. Power buyers do not have an incentive to facilitate a seller's monopoly. Sure, there are circumstances where collective action problems force buyers to accept contractual terms that harm them in the long run (even buyers aware that a price is predatory usually do not insist on a higher price) but with power buyers like group purchasing organizations, pharmacy benefit managers, and various governmental buying organizations we shouldn't generally worry about collective action problems. These organizations often come into existence to aggregate disparate buying power—i.e., as a solution to a collective action problem. And it's these kinds of organizations that often make requests for proposals ("RFPs") or publish contracting guidelines that call for bundled discounts or other sorts of loyalty discounts. I don't mean to suggest that bundled discounts are exclusively pushed by power buyers. Often, the story is more mixed. A discount for purchasing across multiple product lines may be one negotiation element that both sides push and pull in combination with other contractual elements.

Buyers expect to get better prices when they show greater loyalty to sellers and sellers are willing to give greater discounts in exchange for greater loyalty. To be sure, there are occasions when monopolistic sellers push bundled discounts to exclude rivals, but these are by far the exception to the rule.

In medicine, there's an aphorism that when you hear hoofbeats, you should think horse, not zebra. I think this applies neatly to bundled discounts.

Most of the time bundled discounts are competitively benign and our instinct should be to assume that they reflect ordinary business practices, not exclusion devices. Rules crafted for the exceptional cases must take care not to paint stripes on too many horses.

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