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## NOTE

# **Eighth Circuit Bungles Bundled Discounts: The Court Avoids Resolving Bundled Discounts**

*Southeast Missouri Hospital v. C.R. Bard, Inc.*, 642 F.3d 608 (8<sup>th</sup> Cir. 2011)

MELISSA A. CULLMANN\*

### I. INTRODUCTION

From fast-food value meals to buy one get one free deals at the grocery store, bundled discounts are in virtually every market.<sup>1</sup> Bundled discounts encompass several different discounts,<sup>2</sup> but the most common understanding of bundled discounts occurs when multiple products are sold together for less than the total price of the products sold individually.<sup>3</sup> Bundled discounts can provide a variety of efficiencies for sellers and can broaden the relationship between the buyer and seller.<sup>4</sup> Buyers also receive benefits by reducing transaction costs and increasing their purchasing power.<sup>5</sup> For example, if a retail store offers shampoo and conditioner for a discount, it induces the buyer to purchase both products and take advantage of the discount. The buyer gets the benefit of the discount and the seller sells two products rather than just one.

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1. Blake I. Markus, Note, *Bundled Discounts: The Ninth Circuit and the Third Circuit Are on Separate LePage's*, 73 MO. L. REV. 907, 907 (2008).

2. Mark S. Popofsky, *Section 2, Safe Harbors, and the Rule of Reason*, 15 GEO. MASON L. REV. 1265, 1287 (2008).

3. Thomas A. Lambert, *Appropriate Liability Rules for Tying and Bundled Discounting*, 72 OHIO ST. L.J. 909, 911 (2011); Richard M. Steuer, *Bundles of Joy*, ANTITRUST, Spring 2008, at 25; John H. Kilper, Note, *A Bundle of Trouble: An Analysis of How the Lower Courts Have Handled Bundled Discounts Since LePage's Inc. v. 3M*, 72 MO. L. REV. 1363, 1364 (2007).

4. Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling by Firms? A Survey of the Economic Literature*, 1 J. COMPETITION L. & ECON. 707, 708 (2005).

5. Steuer, *supra* note 3, at 26.

The question pending before many courts is the legality of these discounts. Most scholars agree that many bundled discounts are beneficial and procompetitive, but some are not.<sup>6</sup> The issue before many courts and hotly debated among antitrust scholars is choosing the proper test to separate the good bundled discounts from the bad.

In *Southeast Missouri Hospital v. C.R. Bard, Inc.*, the Eighth Circuit passed on an opportunity to choose a bundled discount test and instead focused on the proper market for the products at issue.<sup>7</sup> This Note first explores the bundled discounts and contracts at issue in the instant decision. It then provides a detailed explanation of bundled discounts and the various tests proposed for them, as well as an explanation of the Eighth Circuit's precedent concerning bundled discounts. The Note concludes by analyzing the instant decision and discussing why the court should have addressed bundled discounts in its opinion and the consequences of its failure to do so.

## II. FACTS AND HOLDING

Saint Francis Medical Center (St. Francis) brought a class action suit against C.R. Bard (Bard) and other defendants for violating "sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act, and Missouri antitrust laws."<sup>8</sup> Saint Francis claimed that certain conduct by Bard constituted an unreasonable restraint of trade, an unlawful monopoly, and illegal exclusive dealing.<sup>9</sup> St. Francis sought relief under sections four and sixteen of the Clayton Act and under Missouri law.<sup>10</sup>

St. Francis is a hospital in Cape Girardeau, Missouri.<sup>11</sup> The hospital is a member of two Group Purchasing Organizations.<sup>12</sup> A Group Purchasing Or-

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6. See Lambert, *supra* note 3, at 973.

7. 642 F.3d 608, 613 (8th Cir. 2011).

8. *Id.* at 610. The other defendants in the case were Tyco International, US, Inc., Tyco Health Care Group, and John Does 1-10. *Id.* at 608. Section 1 of the Sherman Act prohibits agreements between competitors that unreasonably restrain trade. 15 U.S.C. § 1 (2006). Under section 2 of the Sherman Act, monopolizing or attempting to monopolize is illegal. *Id.* § 2. Section 3 of the Clayton Act addresses exclusive dealing and tying. *Id.* § 14.

9. *St. Francis Med. Ctr. v. C.R. Bard, Inc.*, 657 F. Supp. 2d 1069, 1078 (E.D. Mo. 2009), *aff'd sub nom. Se. Mo. Hosp. v. C.R. Bard, Inc.*, 616 F.3d 888 (8th Cir. 2010), *aff'd sub nom. Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608 (8th Cir. 2011).

10. *Se. Mo. Hosp.*, 642 F.3d at 610. Section 4 of the Clayton Act provides damages for violations of previous sections of the act. 15 U.S.C. § 15. A party seeks relief for violations of the Sherman Act under section 4 of the Clayton Act. *Id.*

11. *Se. Mo. Hosp.*, 642 F.3d at 610. St. Francis is a medium-sized hospital with 258 beds. *St. Francis Med. Ctr.*, 657 F. Supp. 2d at 1077.

12. *St. Francis Med. Ctr.*, 657 F. Supp. 2d at 1077. The two GPOs that Saint Francis joined were MedAssets for its pharmaceuticals and Novation for its medical supplies. *Id.* It is estimated that ninety-six to ninety-eight percent of hospitals belong to GPOs. *Id.* at 1079.

ganization (GPO) negotiates contracts with suppliers for hospitals.<sup>13</sup> Membership in the GPO is voluntary and members may belong to more than one GPO or switch among various GPOs.<sup>14</sup> A GPO negotiates contracts with suppliers, but does not actually buy the supplies – the hospital buys directly from the supplier.<sup>15</sup> Hospitals that are members of GPOs are not mandated to purchase supplies through GPO contracts; they may purchase “off-contract.”<sup>16</sup>

Bard sells catheters and other medical supplies.<sup>17</sup> It is the leading United States manufacturer of Foley catheters and has a large share of the market for intermittent catheters.<sup>18</sup> “Saint Francis purchase[d] Bard catheters through a GPO.”<sup>19</sup> Bard’s contract through St. Francis’ GPO was a sole-source contract; Bard was the only supplier on the GPO’s price list and the only seller that was negotiated by the GPO.<sup>20</sup> Bard’s contracts with the GPOs usually involved tiered pricing, where a hospital gets a share-based discount when it purchases “higher percentages of supplies from Bard.”<sup>21</sup> Hospitals can also get a bundled discount when it buys other Bard supplies along with catheters.<sup>22</sup> St. Francis alleged that Bard used its considerable market power to inflate prices and restrain competition through “sole-source [contracts], share-based discounts, and bundled discounts.”<sup>23</sup>

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13. *Se. Mo. Hosp.*, 642 F.3d at 610. Hospitals belong to GPOs to obtain better prices and services, lower transaction costs, obtain assistance with product failures and learn knowledge and assessments of products. *St. Francis Med. Ctr.*, 657 F. Supp. 2d at 1078. GPOs also offer training programs on new products. *Id.*

14. *Se. Mo. Hosp.*, 642 F.3d at 610.

15. *Id.* Contracts through GPOs usually last three to eight years and can be ended by either side with notice. *Id.*

16. *Id.* Hospitals that use GPOs usually save between ten and fifteen percent on their medical supplies. *Id.* at 610-11. GPOs are particularly helpful for smaller hospitals in getting lower prices. *St. Francis Med. Ctr.*, 657 F. Supp. 2d at 1079.

17. *Se. Mo. Hosp.*, 642 F.3d at 611.

18. *Id.* Foley catheters are tubes attached to a balloon that drain a bladder over extended periods of time whereas intermittent catheters are used to drain a bladder once and then are discarded. *Id.* Bard’s market share for intermittent catheters is disputed with Bard claiming it has thirty-four percent while St. Francis claims it is sixty percent under GPO contracts. *Id.* at 611 n.2.

19. *Id.* at 611.

20. *Id.* “Bard prefers sole-source contracts with GPOs.” *Id.* According to the district court, “there is ‘fierce competition’ for sole-source contracts.” *Id.* (quoting *St. Francis Med. Ctr.*, 657 F. Supp. 2d at 1084). Suppliers do not decide if there will be a sole-source contract, GPOs make that decision. *St. Francis Med. Ctr.*, 657 F. Supp. 2d at 1079.

21. *Se. Mo. Hosp.*, 642 F.3d at 611. The highest discount a hospital can get is when it buys at least eighty-five percent of its supplies from Bard. *Id.* There is no larger discount for buying Bard catheters exclusively. *Id.*

22. *See id.*

23. *Id.*

St. Francis claimed that Bard's contracts with GPOs were unreasonable restraints of trade under section 1 of the Sherman Act.<sup>24</sup> St. Francis argued the contracts were unreasonable restraints of trade because they required hospitals to purchase a specified percentage of supplies from Bard to receive discounts.<sup>25</sup> St. Francis also claimed the contracts were unreasonable restraints of trade because they included loyalty discounts and rebates for purchasing Bard products or penalties for purchasing products from other vendors.<sup>26</sup> The complaint alleged that Bard had and maintained monopoly power because of this conduct.<sup>27</sup> St. Francis asserted that Bard raised barriers to entry and proposed pricing structures that excluded competition, including technologically superior products made by competitors.<sup>28</sup> St. Francis also alleged that Bard, to maintain its monopoly, violated section 3 of the Clayton Act by making exclusive agreements with hospitals prohibiting them from purchasing supplies from Bard's competitors.<sup>29</sup> St. Francis believed that although Bard's contracts were not technically exclusionary, the effect of the terms of the contract made them exclusionary.<sup>30</sup> St. Francis argued that the discounted prices were too attractive; a hospital could not afford to go to a competitor with a smaller discount.<sup>31</sup>

In response, Bard first argued that it did not possess the required monopoly power, a prerequisite to liability.<sup>32</sup> In addition, it claimed that St. Francis did not define the proper antitrust market.<sup>33</sup> Bard further contended that St. Francis failed to establish market foreclosure and an antitrust injury, and insisted that its contracts and discount programs were not anticompetitive.<sup>34</sup>

The Eastern District of Missouri granted summary judgment to Bard.<sup>35</sup> For St. Francis' claim that Bard violated section 1 of the Sherman Act, the hospital needed to satisfy the rule of reason standard that asks "whether the contract unreasonably restrains trade in a relevant product or geographic mar-

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24. *St. Francis Med. Ctr.*, 657 F. Supp. 2d at 1093.

25. *Id.*

26. *Id.*

27. *Id.* at 1099.

28. *Id.*

29. *See id.* at 1104.

30. *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 612 (8th Cir. 2011).

31. *Id.*

32. Brief of Defendant-Appellee C. R. Bard Inc. at 40, *Se. Mo. Hosp.*, 642 F.3d 608 (No. 09-3325), 2010 WL 685836, at \*39-40.

33. *Id.* at \*29-30.

34. *Id.* at \*42, 50, 55.

35. *St. Francis Med. Ctr. v. C.R. Bard, Inc.*, 657 F. Supp. 2d 1069, 1107 (E.D. Mo. 2009), *aff'd sub nom. Se. Mo. Hosp. v. C.R. Bard, Inc.*, 616 F.3d 888 (8th Cir. 2010), *aff'd sub nom. Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608 (8th Cir. 2011).

ket” and also establish anticompetitive effects from the restraint.<sup>36</sup> The court found that St. Francis failed to define the relevant product market because it wrongly tried to include in the definitions of the product markets GPOs, which were the devices by which Bard allegedly used to restrain trade.<sup>37</sup> The market definitions also incorrectly differentiated between Foley and intermittent catheters when evidence showed that the products were reasonably interchangeable and the market depended more on whether the catheter is latex or silicone.<sup>38</sup> According to the court, St. Francis also failed to prove the restraint was anticompetitive.<sup>39</sup> St. Francis did not present evidence of actual adverse effects on the competition, nor did it prove that Bard had market power.<sup>40</sup> Bard’s actions all had a “legitimate business purpose.”<sup>41</sup> The court concluded that St. Francis failed to establish an antitrust injury from Bard’s discounts or tiered-pricing programs.<sup>42</sup>

St. Francis’ second claim, arising under section 2 of the Sherman Act for attempted monopoly, was also rejected by the district court.<sup>43</sup> St. Francis did not establish that Bard had specific intent to destroy competition or that Bard’s practices were anticompetitive.<sup>44</sup> St. Francis cited various barriers to entry imposed by Bard, but the district court determined that it was the GPOs, not Bard, that were creating barriers to entry.<sup>45</sup> As for St. Francis’ claims that Bard engaged in predatory pricing, the district judge determined that Bard’s prices were not below average variable cost; thus, they could not be predatory.<sup>46</sup> In addition, the court found that St. Francis failed to present evidence

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36. *Id.* at 1094 (quoting *Minn. Ass’n of Nurse Anesthetists v. Unity Hosp.*, 208 F.3d 655, 659 (8th Cir. 2000)).

37. *Id.* at 1095.

38. *Id.*

39. *Id.* at 1096, 1098.

40. *Id.* at 1097. Market power is when the defendant has the ability to raise prices without losing sales so as to be unprofitable. *Id.*

41. *Id.* at 1098.

42. *See id.*

43. *Id.* at 1103-04.

44. *Id.* at 1100-03.

45. *Id.* at 1101.

46. *Id.* at 1101-02. Predatory pricing is when a firm reduces the price of its product to below the cost of the product to gain market share. *Id.* at 1011. Other competitors will be forced to leave the market because they cannot afford to offer the product at the same price. *Id.* Once other competitors have left the market, the firm will be able to set prices well above market value and make higher profits. *Id.* To determine if a firm is engaging in predatory pricing, the Eighth Circuit looks to average variable cost. *Id.* at 1102. Average variable cost is “the sum of all variable costs . . . divided by [the] output.” *Id.* (quoting *Morgan v. Ponder*, 892 F.2d 1355, 1360 n.11 (8th Cir. 1989)). If the price is above the average variable cost, there is a “strong presumption of legality.” *Id.* (quoting *Morgan*, 892 F.2d at 1360). If the price is below the average variable cost, the burden shifts to the defendant to prove that it is not predatory. *Id.*

that customers were unwilling to purchase products from various categories to receive the discounts.<sup>47</sup> Further, there was evidence that customers could purchase catheters without having to purchase other products.<sup>48</sup> Because of these two factors, the court concluded that customers were not injured by Bard's discounts.<sup>49</sup> St. Francis' third claim under section 3 of the Clayton Act was denied for the same reasons.<sup>50</sup> Because of St. Francis' failure to establish a relevant product market or anticompetitive practices by Bard, the district court granted Bard summary judgment.<sup>51</sup>

The Eighth Circuit Court of Appeals initially issued an opinion in August 2010, but in October 2010, it was vacated.<sup>52</sup> In the first opinion, the court affirmed the district court's granting of summary judgment to Bard.<sup>53</sup> The opinion focused on unfair pricing claims, including predatory pricing and bundled discounts.<sup>54</sup> The court did not explicitly adopt the discount attribution test for bundled discounts, but it analyzed and rejected St. Francis' claim that Bard's discounts were predatory using the test.<sup>55</sup> Other factors were also considered in determining that Bard's actions were legal including that hospitals were not required to purchase 100 percent of their supplies from Bard, that participation in the GPO programs was voluntary, and that the primary reason hospitals purchased from Bard was because the physicians preferred Bard products.<sup>56</sup> The court concluded that St. Francis did not suffer any injury because of the contracts.<sup>57</sup> In the instant decision, the Eighth Circuit again affirmed the trial court's grant of summary judgment to Bard but for a different reasoning.<sup>58</sup> The court applied the *Concord Boat Corporation v. Brunswick* decision and found that St. Francis failed to define a relevant market and submarket and therefore failed to establish an antitrust claim.<sup>59</sup>

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47. *Id.* at 1102-03.

48. *Id.* at 1103.

49. *Id.*

50. *Id.* at 1104.

51. *Id.* at 1107.

52. *Se. Mo. Hosp. v. C.R. Bard*, 616 F.3d 888, 895 (8th Cir. 2010), *vacated*, 642 F.3d 608 (8th Cir. 2011).

53. *Id.* at 895.

54. *See generally id.*

55. *Id.* at 893. The discount attribution test applies the full discount to the competitive product in the bundle. If after the discount is applied, the price of the competitive product is below the seller's costs, then the bundled discount may be exclusionary – it may be anticompetitive and illegal. Lambert, *supra* 3, at 912, 962; Popofsky, *supra* note 2, at 1289.

56. *Se. Mo. Hosp.*, 616 F.3d at 894.

57. *Id.* at 895.

58. *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, (8th Cir. 2011).

59. *Id.* at 618.

### III. LEGAL BACKGROUND

This section will explain bundled discounts and then discuss various tests proposed to analyze bundled discounts. These tests include the discount attribution test, the anticompetitive foreclosure test, and the equally efficient competitor test as well as tests applied in Europe. This section then concludes by discussing the Eighth Circuit's history with bundled discounts.

#### A. *Bundled Discounts*

Bundled discounts include a variety of discounting practices,<sup>60</sup> but the most common definition is when a firm offers a package of products for a price less than the total price of the products sold individually.<sup>61</sup> Pure bundling is when a firm only offers the package and not the products individually.<sup>62</sup> Mixed bundling is when a firm offers both the discounted package and the individual, undiscounted products.<sup>63</sup> Bundled discounts have similar elements to predatory pricing, exclusive dealing, and tying, but with a few key differences.<sup>64</sup> A buyer is not required to purchase a second product in a bundled discount, but the buyer is incentivized to do so because of the discount.<sup>65</sup> The key to distinguishing bundled discounts from other practices is that they span across multiple products and are purchase target discounts requiring a buyer to purchase a certain amount before receiving the discount.<sup>66</sup> Bundled

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60. Timothy J. Muris & Vernon L. Smith, *Antitrust and Bundled Discounts: An Experimental Analysis*, 75 ANTITRUST L. J. 399, 399 (2008); Popofsky, *supra* note 2, at 1287.

61. Lambert, *supra* note 3, at 911; Popofsky, *supra* note 2, at 1287-88; Steuer, *supra* note 3, at 25; Kilper, *supra* note 3, at 1364.

62. Kobayashi, *supra* note 4, at 710.

63. Nicholas Economides & Ioannis Lianos, *The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft Cases*, 76 ANTITRUST L. J. 483, 487 (2009); Kobayashi, *supra* note 4, at 711.

64. Herbert Hovenkamp, *Discounts and Exclusion*, 2006 UTAH L. REV. 841, 850 (2006); Steuer, *supra* note 3, at 25. Exclusive dealing is when a firm requires a buyer to purchase a certain percentage of their products for a discount. Hovenkamp, *supra*, at 846. For example, an office agrees to purchase all of their paper needs from the seller if the seller agrees to a twenty percent discount. *Id.* Tying is when a firm requires a buyer to purchase two products; one product cannot be purchased without purchasing the other. *Id.* at 849. For example, a buyer could be required to purchase a lamp and a lampshade for one single price rather than being able to purchase the lamp and lampshade separately. Bundled discounts and tying seem very similar but tying does not necessarily include a discount and bundled discounts do not prevent a buyer from purchasing the products separately without the discount. *Id.* at 849-50.

65. Hovenkamp, *supra* note 64, at 851.

66. *Id.* at 850; *see* Steuer, *supra* note 3, at 26.



discounts can be challenged under sections 1 or 2 of the Sherman Act or section 3 of the Clayton Act.<sup>67</sup>

The issue with bundled discounts is deciding whether they are procompetitive or anticompetitive. Most commentators agree that the majority of bundled discounts are procompetitive.<sup>68</sup> Bundled discounts can be beneficial to both the seller and the buyer and often buyers request bundled discounts from sellers.<sup>69</sup> For the seller, offering a bundled discount can create a “broader relationship” with each customer; it can be used to establish or reinforce long-term relationships by creating loyalty between the seller and buyer.<sup>70</sup> They can also allow a seller to capture economies of scope in production and other efficiencies, including reduced transaction and information costs and more efficient advertising.<sup>71</sup> A seller can increase the sales of “multiple products with one sales call, one shipment, and one bill.”<sup>72</sup> Bundled discounts are also a device that sellers use to enter new markets.<sup>73</sup>

The benefits for buyers are numerous as well. Buyers benefit from reduced transaction costs by not having to negotiate with multiple sellers; this spares a buyer the time and expense of researching vendors.<sup>74</sup> Buyers can also use their purchasing power to receive lower prices from sellers that can then be passed on to consumers.<sup>75</sup> For these reasons, most commentators believe that bundled discounts are generally procompetitive.<sup>76</sup> Experimental analysis has shown that bundled discounts actually increase consumer welfare even in situations where the purpose is to create welfare decreasing bundles.<sup>77</sup> Even when exclusion does occur, long term consumer surplus does not decrease.<sup>78</sup> However, even though there are many benefits, there are instances where bundled discounts can be anticompetitive and exclusionary.

The primary concern of bundled discounts is that they may exclude equally efficient rivals from the market, allowing the remaining firm to

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67. Steuer, *supra* note 3, at 26.

68. Hovenkamp, *supra* note 64, at 843; Lambert, *supra* note 3, at 973; Muris & Smith, *supra* note 60, at 399.

69. Steuer, *supra* note 3, at 26.

70. Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. REV. 1611, 1651 (2010); Steuer, *supra* note 3, at 26; Jeane A. Thomas & Ryan C. Tisch, *Carrots and Sticks: In Defense of a Differentiated Approach to Bundled Discounts and Tying*, 11 SEDONA CONF. J. 161, 161 (2010).

71. Kobayashi, *supra* note 4, at 708.

72. Steuer, *supra* note 3, at 26.

73. Kobayashi, *supra* note 4, at 708.

74. Steuer, *supra* note 3, at 26.

75. Richard M. Steuer, *Bundling Beyond Borders*, ANTITRUST, Summer 2010, at 41 [hereinafter Steuer, *Bundling Beyond Borders*].

76. See Lambert, *supra* note 3, at 973-74.

77. Muris & Smith, *supra* note 60, at 403.

78. *Id.*

charge higher prices.<sup>79</sup> An equally efficient rival could be foreclosed if they do not offer as wide of a product line as the firm offering the bundled discount.<sup>80</sup> To compete with a firm offering a bundled discount, the competitor selling only one of the products in the bundle would have to attribute the entire amount of the discount to its one product rather than across several products as the discounting firm may do.<sup>81</sup> This may result in the competitor having to sell its product below cost.<sup>82</sup>

In addition, some commentators argue that bundled discounts are not true discounts at all; instead sellers are charging higher prices to buyers who purchase individual products.<sup>83</sup> Essentially, they claim that bundled discounts impose a penalty or tax on buyers who opt out of the bundle.<sup>84</sup> According to these scholars, this can create the same effects as tying.<sup>85</sup> As seen, bundled discounts have many procompetitive benefits, but they can also exclude rivals from the market in violation of antitrust laws. The question in antitrust law today is how to differentiate between bundled discounts that are procompetitive and should be legal, and those that are harmful and should be prohibited.<sup>86</sup>

### B. Tests for Analyzing Bundled Discounts

#### 1. Discount Attribution Test

A number of tests have been proposed for analyzing bundled discounts. One of the leading tests is the discount attribution test adopted by the Ninth Circuit in *Cascade Health Solutions v. PeaceHealth*.<sup>87</sup> The attribution test applies the full discount to the competitive product in the bundle.<sup>88</sup> If after the discount is applied, the price of the competitive product is below the seller's costs, then the bundled discount may be exclusionary – it may be anticompetitive and illegal.<sup>89</sup> A “safe harbor” is created for above-cost bundled discounts, which most commentators think is necessary because they do not create the same risk of harm to competition.<sup>90</sup> The measure of cost used

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79. Lambert, *supra* note 3, at 964.

80. See Lambert, *supra* note 3, at 964; Steuer, *supra* note 3, at 26.

81. Lambert, *supra* note 3, at 963-64.

82. *Id.*

83. Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 450 (2009); Popofsky, *supra* note 2, at 1288.

84. Popofsky, *supra* note 2, at 1288; see Elhauge, *supra* note 83, at 450.

85. Elhauge, *supra* note 84, at 450.

86. See Hovenkamp, , at 841.

87. 515 F.3d 883 (9th Cir. 2007).

88. *Id.* at 906.

89. *Id.*

90. Lambert, *supra* 3, at 912, 962; Popofsky, *supra* note 2, at 1289.

is the average variable cost of each product.<sup>91</sup> This test “makes the . . . bundled discounts legal unless” it could “exclude a hypothetical equally efficient [rival] of the competitive product.”<sup>92</sup> The Antitrust Modernization Commission has adopted a similar standard except they have added an additional step that requires the discounting firm be likely to recoup any short-term losses from the discount if it is below-cost.<sup>93</sup> It appears likely that some variation of the attribution test will be adopted by courts.<sup>94</sup>

Most commentators agree that the attribution test is under deterrent, that it will not capture all of the bundled discounts that are anticompetitive, but they prefer this test because they believe most bundled discounts are not anticompetitive and this test is unlikely to chill the use of them.<sup>95</sup> This reasoning is similar to the Supreme Court of the United States’ reasoning in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*, where the Court created the test for predatory pricing claims.<sup>96</sup> The discount attribution test builds off the predatory pricing test. A benefit to the attribution standard is that it provides a clear guideline for businesses to follow that also protects competitive rivals from exclusion.<sup>97</sup> This test only excludes rivals that are less efficient or that refuse to charge competitive prices for their products.<sup>98</sup> However, not all commentators agree that the discount attribution test is the best option.

Some antitrust scholars believe that the attribution test should not be applied because it does not cover bundled discounts that charge a penalty to buyers who opt out of the bundle.<sup>99</sup> The discount attribution test only finds below-cost discounts exclusionary and these “penalty discounts” are above-cost.<sup>100</sup> For other scholars who believe bundled discounts create the same harms as tying, this test would still allow these harms to occur and it is inconsistent with tying precedent.<sup>101</sup> Another criticism of the test is that it is over-deterrent when the products in the bundle “are subject to joint costs or sold in variable proportions,” or when the bundle includes more than just two prod-

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91. Steuer, *supra* note 3, at 27.

92. *Id.* (quoting *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895, 916 (9th Cir. 2007), *superseded by* 515 F.3d 883); *see also* Lambert, *supra* note 3, at 963, 964-65.

93. *PeaceHealth*, 515 F.3d at 900; Popofsky, *supra* note 2, at 1289.

94. Steuer, *supra* note 3, at 27.

95. *See* Lambert, *supra* note 3, at 963, 979; Popofsky, *supra* note 2, at 1289-90; Thomas & Tisch, *supra* note 70, at 176-77.

96. 509 U.S. 209, 222-24 (1993).

97. Lambert, *supra* note 3, at 979; Popofsky, *supra* note 2, at 1293-94; Thomas & Tisch, *supra* note 70, at 177.

98. Lambert, *supra* note 3, at 975.

99. *See* Elhauge, *supra* note 83, at 463.

100. *Id.*

101. *Id.* at 464.

ucts.<sup>102</sup> Because of these concerns, some scholars believe that the attribution test is just a starting point, and that a larger safe harbor is needed such as one that requires substantial market foreclosure in the competitive market or a likelihood of recoupment by a defendant.<sup>103</sup>

## 2. Anticompetitive Foreclosure Test

A second test that has been proposed and adopted by the Third Circuit in *LePage's Inc. v. 3M* is the anticompetitive foreclosure test.<sup>104</sup> The test analyzes whether the bundled discount “impermissibly excludes” competition in the competitive market.<sup>105</sup> The court will then decide if the procompetitive business justifications for the bundled discount outweigh the anticompetitive effects.<sup>106</sup> This test has been widely criticized.<sup>107</sup> The main criticism with *LePage's* decision and the test is that the court focused solely on the defendant’s conduct rather than considering whether the plaintiff was a less efficient competitor.<sup>108</sup> The court was also criticized for focusing on the defendant’s conduct in relation to the plaintiff, rather than to competition in general.<sup>109</sup> Finally, scholars thought the test was likely to chill bundled discounts<sup>110</sup> because it was unclear exactly what conduct was illegal;<sup>111</sup> the court gave little guidance on how to weigh procompetitive benefits with anticompetitive harms leaving businesses unsure on how juries will decide whether the discount is illegal.<sup>112</sup> The Third Circuit concluded that bundled discounts offered by monopolists are anticompetitive if their competitors do not offer as diverse of a product line regardless of the effects of the bundled discount on competition.<sup>113</sup>

## 3. Equally Efficient Competitor Test

A third test was adopted in *Ortho Diagnostic Systems, Inc., v. Abbott Laboratories, Inc.* – the equally efficient competitor test (EEC).<sup>114</sup> The

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102. Hovenkamp, *supra* note 64, at 1658.

103. *Id.*; Lambert, *supra* note 3, at 979.

104. 324 F.3d 141, 162 (3d Cir. 2003).

105. Thomas & Tisch, *supra* note 70, at 168.

106. *Id.*

107. *Id.* at 169.

108. *Id.*; see also Popofsky, *supra* note 2, at 1288.

109. Thomas & Tisch, *supra* note 70, at 169.

110. Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688, 1723 (2005) [hereinafter Lambert, *Evaluating Bundled Discounts*]; Thomas & Tisch, *supra* note 70, at 169.

111. Popofsky, *supra* note 2, at 1288; Kilper, *supra* note 3, at 1381-82.

112. Lambert, *Evaluating Bundled Discounts*, *supra* note 110, at 1724-25.

113. Thomas & Tisch, *supra* note 70, at 170.

114. 920 F. Supp. 455 (S.D.N.Y. 1996).

Southern District of New York held that a plaintiff must either allege that the bundled discount results in below-cost pricing or that it excludes an equally efficient competitor by making it unprofitable for the plaintiff to compete.<sup>115</sup> This test has also been criticized by many antitrust scholars because it could prohibit procompetitive bundled discounts and it protects individual competitors rather than competition amongst competitors in the marketplace.<sup>116</sup> In addition, courts will have a difficult time administering the test because ascertaining the costs of the defendant is extremely difficult and it may require multiple lawsuits if the particular plaintiff is not the equally efficient competitor.<sup>117</sup> The EEC focuses on the “competitive virtue of the rival” rather than on the effect the bundled discount has on “consumer welfare and efficiency.”<sup>118</sup>

#### 4. Additional Tests

A multitude of other tests have also been suggested by various scholars including using the same tests applied to tying and exclusive dealing or using the predatory pricing test established in *Brooke Group*.<sup>119</sup> One test suggested focuses on determining whether a bundle discount offers a true discount or if it is merely a penalty for not buying the bundle.<sup>120</sup> Another test, the evaluative approach, looks at whether there are barriers to entry in the market or if there is some other way the plaintiff can compete with the bundle, such as through coordination with other producers or by becoming a supplier to the defendant.<sup>121</sup> In Europe, courts focus on bundled discounts offered by dominant firms; they are less concerned with firms gaining a dominant position than they are with their behavior once they are dominant.<sup>122</sup> The European

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115. *Id.* at 469.

116. Muris & Smith, *supra* note 60, at 427.

117. Lambert, *Evaluating Bundled Discounts*, *supra* note 110, at 1729-30.

118. Elhauge, *supra* note 83, at 464.

119. *See* Popofsky, *supra* note 2, at 1288-89.

120. Elhauge, *supra* note 83, at 474. Elhauge’s test has received a lot of attention by antitrust scholars. *See, e.g.*, Lambert, *supra* note 3 (providing a “comprehensive response to Elhauge’s arguments”). Elhauge’s article focuses on debunking the single monopoly profit theory that is applied to tying. Elhauge, *supra* note 83. Elhauge argues that there are certain assumptions in tying that must be made for the single monopoly profit theory to be true. *Id.* at 400. If we relax those assumptions then certain effects occur, all of which harm consumer welfare and total welfare. *Id.* at 400-01. Elhauge then argues that bundled discounts have the same effects as ties in certain situations and sometimes are not true discounts but rather “penalties” for buyers who opt out of the bundle. *Id.* at 402-03. Therefore, bundled discounts should be treated like ties and should be illegal based on market power with but-for price exception. *Id.* at 403.

121. Lambert, *Evaluating Bundled Discounts*, *supra* note 110, at 1742.

122. Thomas & Tisch, *supra* note 70, at 171; *see* Economides & Lianos, *supra* note 63, at 497-98.

courts apply the same tests used for tying arrangements as United States courts, while the European Commission suggests a standard closer to the attribution test with a safe harbor for above-cost bundles.<sup>123</sup> Because of the various benefits and criticisms of each proposed test, the law has been in a state of flux for the past decade;<sup>124</sup> however, one thing is agreed on by : bundled discounts should not be treated as unlawful per se.<sup>125</sup>

### C. The Eighth Circuit and Bundled Discounts

The controlling case in the Eighth Circuit with respect to bundled discounts is *Concord Boat Corporation v. Brunswick*.<sup>126</sup> Brunswick Corporation offered market share discounts on its stern drive engines.<sup>127</sup> Purchasers who agreed to buy a certain percentage of engines from Brunswick were given a discount off the list price.<sup>128</sup> None of the discounts offered by Brunswick required boat builders to buy a certain amount of engines, nor did it prevent purchasers from buying from different suppliers.<sup>129</sup> Boat builders filed suit alleging that Brunswick and other manufacturers who had implemented similar discounts violated sections 1 and 2 of the Sherman Act.<sup>130</sup>

The court held that Brunswick did not violate sections 1 or 2 of the Sherman Act.<sup>131</sup> The discount was not exclusive because the builders were allowed to walk away at any time, they were not required to commit to any specific amount, and there were no significant barriers to entry into the engine market.<sup>132</sup> The court mentioned that price cutting was the “very essence of competition” and that attempting to control prices created a dangerous risk of chilling price cuts that are beneficial to consumers.<sup>133</sup> The court held that as long as the price is still above the firm’s average variable costs, the plaintiff must overcome a “strong presumption of legality.”<sup>134</sup> According to the Eighth Circuit, above-cost discounts are generally not anticompetitive.<sup>135</sup>

The *Concord Boat* court expressly distinguished these discounts from bundled discounts;<sup>136</sup> however, in the instant decision, the Eighth Circuit

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123. See Economides & Lianos, *supra* note 63, at 500, 504-05.

124. Thomas & Tisch, *supra* note 70, at 176.

125. See Hovenkamp, *supra* note 64, at 844.

126. 207 F.3d 1039 (8th Cir. 2000). Even though this case does not address bundled discounts directly, it does discuss above-cost discounts specifically. See *id.*

127. *Id.* at 1044.

128. *Id.*

129. *Id.* at 1045.

130. *Id.* at 1045-46.

131. *Id.* at 1063.

132. *Id.* at 1059.

133. *Id.* at 1061.

134. *Id.*

135. See *id.*

136. *Id.* at 1062.

applied *Concord Boat* because it was the only case somewhat applicable to bundled discounts.<sup>137</sup> In *Concord Boat*, the district court had examined cases involving bundling or tying in its initial analysis.<sup>138</sup> However, on appeal, the Eighth Circuit pointed out that bundling and tying cases required two separate product markets to be linked, whereas in *Concord Boat* there was only one product at issue.<sup>139</sup> Thus, the cases relied on by the district court were not persuasive.<sup>140</sup> Even though the court distinguished bundled discounts in its holding, *Concord Boat* is the most applicable Eighth Circuit case available for bundled discounts.

#### IV. INSTANT DECISION

##### 1. Majority Opinion

In the instant decision, the Eighth Circuit affirmed the district court's decision to grant summary judgment to Bard.<sup>141</sup> The court first denied St. Francis' claims relating to share-based discounts by applying standards set out in *Concord Boat*.<sup>142</sup> In *Concord Boat*, the court held that because the agreements were voluntary and because the buyers were willing to purchase engines elsewhere for better discounts, the discounts offered by the defendant were not "*de facto* exclusionary dealing."<sup>143</sup> Similarly, in the instant decision, hospitals were not required to purchase 100 percent of their supplies from Bard to receive the discount and the suppliers could purchase from competitors.<sup>144</sup> Because the share-based discounts were the "heart of the sole-source contracts, and the centerpiece of the bundled discounts" at issue in the instant decision, the court decided that *Concord Boat* was applicable.<sup>145</sup>

The court then analyzed the relevant market that St. Francis identified, which was a threshold requirement for an antitrust claim according to *Concord Boat*.<sup>146</sup> The issue in the case was the relevant product market because both parties agreed the geographic market was the United States.<sup>147</sup> The court looked to the cross-elasticity of demand between the product and any substitutes to establish the product market.<sup>148</sup> The court noted that if the mar-

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137. See *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 611-18 (8th Cir. 2011).

138. *Concord Boat*, 207 F.3d at 1062.

139. *Id.*

140. *Id.*

141. *Se. Mo. Hosp.*, 642 F.3d at 610.

142. *Id.* at 612; see also *Concord Boat*, 207 F.3d 1039.

143. *Se. Mo. Hosp.*, 642 F.3d at 612 (citing *Concord Boat*, 207 F.3d at 1060).

144. *Id.*

145. *Id.* at 613.

146. *Id.*

147. *Id.*

148. *Id.*

ket was broad, a sub-market may be needed for the antitrust analysis.<sup>149</sup> The court looked to *Brown Shoe Company v. United States* for factors to determine whether a submarket existed.<sup>150</sup> St. Francis alleged two submarkets: one for Foley catheters sold under GPO contracts and another for intermittent catheters sold under GPO contracts.<sup>151</sup> Because the GPO contracts were not specialized, the court rejected these submarkets.<sup>152</sup>

The court found that GPOs did not provide additional distribution efficiencies or advantages that were needed to define a submarket.<sup>153</sup> In addition, hospitals were able to purchase their supplies outside of the GPOs and did not rely on GPOs for expertise in purchasing certain catheters over others.<sup>154</sup> St. Francis argued that the “significant cost savings” distinguished catheters sold through GPOs from catheters sold independently.<sup>155</sup> However, the Supreme Court of the United States has stated that a price differential does not create a separate market and it has warned courts to use caution when dealing with unfair pricing claims.<sup>156</sup> Therefore, the court decided that St. Francis could not use this as reasoning for two distinct markets.<sup>157</sup> The Eighth Circuit noted that even if a price differential was able to establish a market, in the instant case, there was no evidence of “significant cost savings.”<sup>158</sup> In fact, some non-GPO catheters were cheaper than Bard’s GPO catheter.<sup>159</sup> The record showed that St. Francis chose Bard catheters because the physicians preferred them over other brands, not because of the discount.<sup>160</sup>

St. Francis also argued that “a small but significant non-transitory increase in price (SSNIP) in the GPO market did not cause customers to switch” to other options and that the catheter market was foreclosed.<sup>161</sup> However, the court rejected both of these arguments for defining a submarket.<sup>162</sup> Although establishing a SSNIP could create a disputed issue of material fact, the court did not find that there were any facts supporting St. Fran-

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149. *Id.* at 614.

150. *Id.* (citing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)). Factors to consider include “industry or public recognition of [a] separate economic character, special uses or characteristics or production facilities, distinct customers or prices, price sensitivity, and specialized vendors.” *Id.* (citing *Brown Shoe Co.*, 370 U.S. at 325).

151. *Id.*

152. *Id.* at 614-15.

153. *Id.* at 615.

154. *See Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 615-16.

160. *Id.* at 616.

161. *Id.*

162. *Id.*



cis' theory.<sup>163</sup> As for the market foreclosure, the court found that St. Francis performed an incorrect analysis.<sup>164</sup> St. Francis looked to what products the hospital ultimately bought, but the question to be asked was what products were reasonably available to the hospitals.<sup>165</sup> Because of the aforementioned reasons, the court held that St. Francis did not establish a relevant product submarket under the *Brown Shoe* factors.<sup>166</sup>

The court also rejected St. Francis' claim that the "claw-back" provisions under the GPO contract prevented hospitals from switching to another supplier.<sup>167</sup> Because hospitals could purchase catheters off-contract and because the agreements were voluntary and "terminable at will and on short-notice," hospitals could purchase catheters from other brands.<sup>168</sup> Nothing in the record indicated that any penalties that occurred from switching brands deterred hospitals from switching to take advantage of better offers.<sup>169</sup> The contractual restraints of a particular plaintiff do not determine if a product is interchangeable when establishing a product market. The use of the product by the general consumer is what is important.<sup>170</sup> According to the court, St. Francis failed to establish that Foley and intermittent catheters were separate product submarkets different than those sold through non-GPO contracts.<sup>171</sup>

Finally, St. Francis attempted to argue that the relevant product market for Foley catheters sold in both GPO contracts and non-GPO contracts was the entire United States.<sup>172</sup> However, the court determined that St. Francis waived this argument because it failed to raise it with the district court.<sup>173</sup> Because St. Francis did not establish a relevant product market and because *Concord Boat* precluded St. Francis' challenge, the court affirmed summary judgment for Bard.<sup>174</sup>

## 2. Dissenting Opinion

Judge Clarence Beam wrote a dissenting opinion in favor of reversing and remanding the district court's grant of summary judgment because he believed there were disputed questions of material fact that should not have been resolved with summary judgment.<sup>175</sup> First, the dissent did not agree that

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163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 617.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 618.

174. *Id.*

175. *Id.* at 620 (Beam, J., dissenting).

St. Francis waived the issue of establishing the market to include all Foley and intermittent catheters, whether sold under GPOs or not.<sup>176</sup> Judge Beam argued that St. Francis did not waive the argument because the record contained facts supporting and discussing the market – the issue was raised in the complaint and in the summary judgment papers – and the district court discussed the specific product market.<sup>177</sup> As for establishing a relevant submarket, Judge Beam believed that the district court “improperly weigh[ed] the evidence against St. Francis.”<sup>178</sup> One such piece of evidence that should have been presented to a jury was whether physician brand preferences for catheters influenced if catheters were interchangeable between brands.<sup>179</sup> Because this evidence went towards establishing a relevant product market, which is a factual issue, Judge Beam thought the evidence should have been presented to the jury.<sup>180</sup> Judge Beam thought that St. Francis introduced other evidence, as well, for determining a submarket that required the claims to survive summary judgment.<sup>181</sup>

Judge Beam also believed that St. Francis presented a question of material fact on whether Bard violated sections 1 and 2 of the Sherman Act.<sup>182</sup> Because St. Francis presented evidence of entry barriers into the catheter market along with evidence of high market shares in the various relevant markets proposed, there was a genuine issue of material fact as to whether Bard had market power as required for a section 2 violation.<sup>183</sup> In addition, Judge Beam thought there were questions as to whether Bard’s conduct was anticompetitive.<sup>184</sup> He agreed that *Concord Boat* should guide the issue and in that case the court found that bundled discounts that link monopolistic products with competitive products may be anticompetitive.<sup>185</sup> In Judge Beam’s opinion, St. Francis presented evidence that Bard’s bundled discounts may be exclusive, creating a question of fact as to whether they were anticompetitive.<sup>186</sup> Although it was not clear whether the court would have adopted the attribution test, St. Francis created a question of fact as to whether under the test Bard’s conduct was anticompetitive.<sup>187</sup> Finally, Judge Beam believed that St. Francis also created a question as to whether they suffered an antitrust injury by presenting evidence that they paid a higher

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176. *Id.* at 621.

177. *Id.*

178. *Id.*

179. *See id.* at 620-21.

180. *Id.* at 621.

181. *Id.*

182. *Id.* at 622.

183. *Id.* at 623.

184. *Id.*

185. *Id.*

186. *Id.* at 624.

187. *Id.*

price for Bard catheters.<sup>188</sup> Because of the evidence presented by St. Francis as to the relevant product market and as to Bard's bundled discounts, Judge Beam thought there were questions of material fact that should have been presented to a jury, not decided by summary judgment.<sup>189</sup>

## V. COMMENT

This section begins with an analysis of the impact of the instant decision on future bundled discounts. Next, this section discusses what the court should have done, concluding that the Eighth Circuit should have taken this opportunity to choose a test to apply to bundled discounts.

### *A. Impact of the Decision*

In the instant decision, the court focused on the definition of the market and did not address the issue of bundled discounts.<sup>190</sup> The court gave no indication as to the future of bundled discounts. Unlike the first opinion vacated by the Eighth Circuit that applied the discount attribution test to the bundled discounts at issue,<sup>191</sup> the instant decision did not address which test, if any, should be applied. By not addressing bundled discounts, the central issue of the case, the court kept the law in flux; there is no direction on how bundled discounts will be addressed in the future. This greatly affects businesses using bundled discounts. Because a business does not know which test will be applied or how the court will analyze bundled discounts, they cannot assess their risk or shape their policies to ensure that they are complying with the law. If a business cannot plan for the future, then it may stop using bundled discounts altogether.

After the *LePage's*<sup>192</sup> and *PeaceHealth*<sup>193</sup> decisions, it made sense for courts to pause and wait to make a decision on the proper test to apply. At the time, there was little research on possible tests and their implications or on whether bundled discounts were procompetitive or anticompetitive. In fact, after the *LePage's* decision, the United States Attorney General recommended that the Supreme Court of the United States not take up the issue of bundled discounts until more research could be done and more case law could be developed because it was uncertain whether the practice was exclusion-

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188. *Id.* at 625.

189. *Id.*

190. *See id.* at 613. (majority opinion).

191. *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 616 F.3d 888 (8th Cir. 2010), *vacated*, 642 F.3d 608 (8th Cir. 2011).

192. *See supra* note 104-13 and accompanying text.

193. *See supra* notes 87-94 and accompanying text.

ary.<sup>194</sup> However, it has now been more than nine years since *LePage's*,<sup>195</sup> and numerous articles have been written and experimental analysis has been done on bundled discounts. Thus, there is ample information and research to make a decision on a test for bundled discounts.

Courts need to start making decisions on what tests they will apply so businesses can start planning and analyzing their bundled discounts to make them legal. One of the many criticisms of the *LePage's* decision is that it gives little guidance to businesses on how to approach these discounts.<sup>196</sup> By not making a decision on a test or even starting the dialogue on an appropriate test, courts are refusing to give direction. A fear of many scholars in choosing a test is that the test will be too restrictive and will chill bundled discounts.<sup>197</sup> This same effect may occur if courts avoid the issue altogether. Businesses may stop using bundled discounts because they will have no idea how courts are going to analyze them and decide their legality. This will ultimately harm consumers because bundled discounts are generally thought of as beneficial to consumers.<sup>198</sup> The courts' indecision is negatively affecting businesses and consumers.

### B. What the Court Should Have Done

One major analysis the instant decision avoided was a discussion of the discount attribution test.<sup>199</sup> At the very least, the court should have addressed this test or another test that was proposed by one of the parties. A mere discussion of the numerous proposed tests would have given at least some indication of the court's opinions where it may be heading in the future. The facts of this case, similar to those in *PeaceHealth*,<sup>200</sup> were set up perfectly for a decision on bundled discounts and further development of the various tests, but the court missed this opportunity. This opinion was a great chance for bundled discounts to reach the Supreme Court of the United States, but because the court focused on the wrong issue, the relevant market definition, the opportunity was foreclosed.

The court took a much different approach with the instant decision than it did with the vacated opinion.<sup>201</sup> The opinions focus on two completely

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194. See Brief for the United States as Amicus Curiae, *3M Co. v. LePage's, Inc.*, 542 U.S. 953 (2004) (No. 02-1865), 2004 WL 1205191, at \*14-17.

195. See *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003).

196. *Thomas & Tisch*, *supra* note 70, at 175.

197. *Lambert*, *supra* note 3, at 977, 980; *Popofsky*, *supra* note 2, at 1289; *Thomas & Tisch*, *supra* note 70, at 176, 178.

198. *Muris & Smith*, *supra* note 60, at 403; *Steuer*, *supra* note 3, at 26; *Steuer, Bundling Beyond Borders*, *supra* note 75, at 41.

199. This test was discussed in the vacated opinion. See *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 616 F.3d 888, 893 (8th Cir. 2010), *vacated*, 642 F.3d 608 (8th Cir. 2011).

200. See *supra* notes 87-94 and accompanying text.

201. See *supra* note 199 and accompanying text.

different things with little explanation of why the court chose to abandon its initial logic. The instant decision is disjunctive and makes it seem as if the court is grasping for straws to avoid bundled discounts and decide the case on a smaller, less complex issue. In contrast, the vacated opinion gets to the heart of the issue and focuses on bundled discounts.<sup>202</sup> In the instant decision, as reasoning for ignoring the bundled discounts, the court stated that the case was not distinguishable from *Concord Boat* because the share-based discounts were the “heart of the sole-source contracts, and the centerpiece of the bundled discounts.”<sup>203</sup> This explanation makes little sense especially when comparing it to the vacated opinion that thought the bundled discounts were central to the decision.<sup>204</sup> The court’s complete reversal in its approach to this opinion is difficult to understand especially in light of the need for development in case law on bundled discounts. Also, it is confusing that the court would rely heavily on *Concord Boat* to decide this case when it did not involve multi-product discounting. One thing the instant decision makes clear is that challenges to bundled discounts will be difficult to bring before the Eighth Circuit and will need distinguishing characteristics such as long-term contracts to be viable.

Bundled discounts are a difficult area of antitrust. Opinions differ widely on their benefits as evidenced by the numerous approaches taken in the United States as well as the approach taken in Europe.<sup>205</sup> But many scholars have come to the conclusion that a less restrictive test is best to prevent chilling bundled discounts.<sup>206</sup> Some direction, any direction at this point, after so many years since *LePage’s* and *PeaceHealth*, is necessary for businesses. Enough scholarship has been done for courts to make meaningful decisions on the best course of action. The Supreme Court also needs to take up the issue to create national uniformity, but it cannot do so without a lower court first addressing the issue. The application of the discount attribution test in the vacated opinion gave businesses guidance. By vacating the opinion, the Eighth Circuit created even more confusion on what will be done in the future. The court leaves us with too many unanswered questions.

## V. CONCLUSION

As can be seen, bundled discounts create controversy and it is unclear where courts will go from here. There are many tests, all with positives and negatives. Scholars disagree on which test should be applied and what the goals of the chosen test should be. However, more and more scholars do

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202. *See Se. Mo. Hosp.*, 616 F.3d at 893.

203. *Se. Mo. Hosp.*, 642 F.3d at 613.

204. *See Se. Mo. Hosp.*, 616 F.3d at 892-93.

205. *See Economides & Lianos, supra* note 63, at 497; Thomas & Tisch, *supra* note 70, at 171.

206. *See supra* note 197 and accompanying text.

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agree that bundled discounts are generally procompetitive and that we should worry about chilling these discounts with too strict of a test. In the instant decision, the Eighth Circuit had the opportunity to delve into bundled discounts and do a careful analysis of the various tests proposed. However, they passed on the opportunity and have chosen instead to keep the law undecided and unclear. Businesses have little guidance on the legality of different discounts which may cause them to be used less and less. After the instant decision, the law on bundled discounts continues to remain in flux.