

All of Me, Why Not Take All of Me?

Antitrust Issues Affecting Bundling Contracts in Health Care

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Bundling in Health Care Markets

- **Package deals by pharmaceutical manufacturers**
- **Bundling arrangements by medical supply or device companies through GPOs**
- **Hospital system bundling of hospital and non-hospital services, of tertiary and primary level hospital services, or of multiple hospitals' services**
- **Health plan use of “all product” requirements, though analysis for the latter may be very different**

Concern: Use of power in one arena to affect competition in an adjacent or separate market or product

Background – Monopolization in violation of § 2

- **“(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident “**

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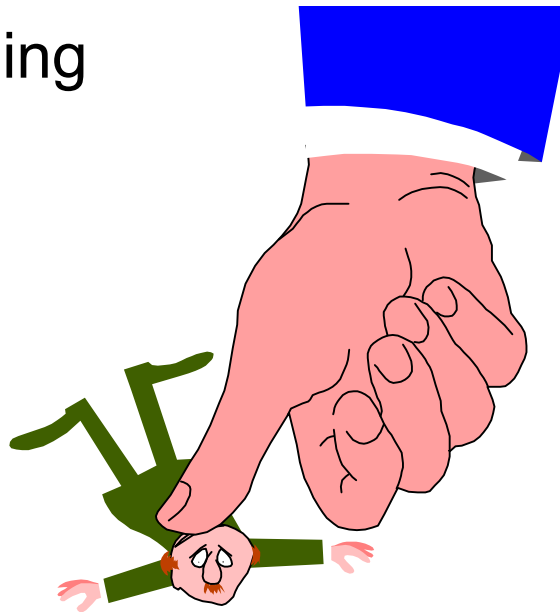
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Background – Tie-ins and Exclusivity Agreements

- **Tie-in = generally unlawful if a seller has market power in Product 1 and conditions the sale of that product on the purchase of Product 2**
- **Exclusive agreement = may be unlawful if a seller secures commitment of buyer not to purchase from competitor and arrangement substantially forecloses competitor from the market.**

What is Bundling?

- “Bundling”
- Different avenues for analysis
 - Predatory pricing
 - Tying
 - Exclusive dealing
 - Other?



Counsel on lookout for next disaster



PeaceHealth

- **Eugene-Springfield**
 - McKenzie Hospital: 114 beds
 - Sacred Heart: 425 beds
- **McKenzie sued Sacred Heart**

PeaceHealth

- **Key Allegation**

- Pricing/bundling in contracts with payors

Include our hospital services exclusively in your network:
Rate = 85% of charges, or

Add smaller hospital in network for primary and
secondary services: Rate = 90% of charges

Payor takes option 1

Smaller hospital without tertiary capacity complains that
impact of differential in bundled package unfair
suppresses competition because it exploits monopoly
status in tertiary care services

PeaceHealth

- **Claims:**
 - Tying
 - Exclusive dealing
 - Monopolization: actual, attempted and conspiracy
 - State law price discrimination
 - State law: tortious interference.

You Call It

- **Hospital with monopoly in tertiary services conditions extra 5% discount on tertiary and other services on health plan's contracting exclusively with hospital for all services**
 - **Has Hospital violated the antitrust laws?**

A. No, discounts are good, and hospital is just competing fairly.

B. Doubtful, but if bundling results in competing lines of business being sold at a loss maybe there is a claim

C. Depends on overall impact of discount on ability to compete of competitors who don't offer all the same lines

PeaceHealth

- **Tying claim dismissed before trial**
 - Services were offered separately
- **Jury found for defendant on exclusive dealing claim**
- **Jury found for plaintiff on attempt to monopolize (bundling)**

PeaceHealth

7. Did plaintiff suffer an antitrust injury arising out of the attempt to monopolize?

Yes

No

If your answer to question 7 is no, then you should skip question 8 and go to question 9.

8. What amount of damages, if any, were suffered by plaintiff?

\$ 5.4 million (^{\$}5,400,000⁰⁰)

Jury Instruction

- **“Bundled pricing occurs when price discounts are offered for purchasing an entire line of services from one supplier. [This] may be anticompetitive if ... offered by a monopolist and substantially foreclose[s] ... a competitor who does not provide an equally diverse group of services ...”**

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- **Similar to result in recent 3rd Circuit case involving tape. (LePages v. 3M)**

Issue on Appeal

- **Can bundling of services be unlawful if the discounted prices offered on the “bundled” services are not priced below the hospital’s cost?**
- **Brooke Group test**
 - Below cost
 - Prospect of recoupment

Ninth Circuit Invites Amicus Briefs

- **Three main lines of argument submitted:**
 - Very defense oriented
 - More to the middle
 - More plaintiff oriented

Position One

- **Bundling only potentially unlawful if pricing for entire package is below threshold for predatory pricing**

Position Two

- **Bundling potentially unlawful if**
 - discounting effect of bundled pricing across whole package is allocated to pricing for the affected competitive product line at issue,
 - there is likelihood predatory pricing can be recouped, and
 - practice will have exclusionary impact on competitors
 - **Note: if practical impact of bundling is to force purchase of bundled package, then conduct may be separately analyzed under tie-in and exclusive contract standards without regard for “predatory pricing” test**
 - **This position tracks the recommendations of the Antitrust Modernization Commission**
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Position Three

- **Conduct should be analyzed taking into account various factors relating to competitive impact, and no specific predatory pricing threshold should have to be satisfied.**

9th Circuit Decides

- **Follow Position 2 in part -- Allocate discounts to product where competition is affected. If net price is below cost, could be suspect as attempted monopolization**
- **Also, give plaintiff a chance to prove that bundling had the effect of coercively tying services**

The Tie-In Approach

- **Monopolization tack challenges below cost character of bundled prices, via impact on competition from less comprehensive competitor**
- **Tie-in analysis focuses on flip-side, use of market power in tying product to force purchase of other products, often at above market prices. 9th Circuit reverses defense summary judgment ruling in PeaceHealth, permitting plaintiff to try to prove tie via pressure of differential pricing from bundling**
- **Stay tuned**