Antitrust Issues Raised by Product Bundling in Communications Markets

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Communications firms with large residual market shares, such as incumbent local telephone exchange carriers (ILECs) and incumbent cable companies (both often referred to as "incumbent monopolists"), face growing competition in their core communications markets. To stem the hemorrhaging of their residential and small business customers, they have begun to adopt a strategy of bundling the core product with other telecommunications services.[1]

This article identifies and examines some of the antitrust risks posed by this bundling strategy in light of recent case law developments in the area of distribution restraints and the ongoing technological developments in the telecommunications arena. It also identifies factors—some of which are within a company's control—that may influence the antitrust risk.

Bundling by Incumbents

The Telecommunications Act of 1996 sought to open all communications markets, and particularly local telephone and cable television markets, to competition. As competition has developed, Congress's intent has, to at least a limited extent, been fulfilled—ILECs and cable companies have begun to lose market share in their core markets.

Given the decline in their core markets, it is no surprise that incumbents have begun adopting a strategy of bundling telecommunications and non-telecommunications services, including long distance services, broadband Internet access (cable modem or digital subscriber line (DSL) service), mobile phone service, voice over Internet protocol (VOIP), video on demand (VOD), multi-player online gaming, and personal video recording technology (PVRs). The rationales for these bundles are both defensive and offensive. The offensive goal of bundling is to increase the per-customer revenues, and possibly to raise rivals' costs. A key defensive purpose is to slow erosion of market share in the core market by making it more difficult, expensive, and time-consuming for the end user to switch services to one or more other providers. Attaining customer "stickiness" is another way to describe this goal. There are various other possible motivations, including responding to consumer demand, reducing churn, and price discrimination.

Incumbents have created a variety of bundled packages. The four remaining regional Bell operating companies (RBOCs)—Verizon, SBC, BellSouth, and Qwest—have introduced various combinations of local, long distance, wireless, and/or Internet Service Provider (ISP) service (both dial-up and broadband).[2] Most of the major incumbent cable operators, including Cox, Comcast,

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[1] I use the term "bundling" in its common (and most generic) form to mean sales of two or more products made together and made more attractive because the purchaser receives an additional feature (e.g., a single monthly bill for multiple services) or a discount or rebate on one or more of the bundled products or services.

Charter, and Cablevision, offer bundles that combine cable television service with other services, including cable modem, local and long distance voice and, in limited areas, circuit-switched resale and wireless.[3] The major differences between incumbent telephone companies and incumbent cable companies today are the lack of a competitive video product in the RBOC bundles (although recently announced deals with direct broadcast satellite firms may serve as an interim solution) and the lack of a viable wireless component (and in some cases, any telephone component at all) in the cable offerings.[4]

Opposition to Bundling

The cable companies' bundled offerings have already generated opposition. In March 2003, the Consumer Federation of America and Consumers' Union filed a letter with the Antitrust Division and the FTC asking for an investigation of whether the bundled offerings of cable companies, particularly Comcast, constituted either predatory pricing or illegal tying arrangements.[5] Neither agency has publicly responded to the letter or indicated that it has initiated any investigation.

The incumbent telcos' bundling practices are also beginning to come under attack. For example, a group of customers has brought an antitrust action in New York challenging as anticompetitive Verizon's practice of tying DSL and local phone service.[6] In addition, at least four state public utilities commissions have ruled that incumbents must unbundle their voice and DSL services and so cannot refuse to sell DSL services to customers unless those customers also buy voice service. In an attempt to preempt this state trend, BellSouth filed an emergency petition at the FCC in December 2003 seeking a ruling that its refusal to sell unbundled DSL is legal, and preempting state public utility commissions from ordering unbundling.[7] The proceeding is still pending.

Antitrust Bundling

The will to attack these new bundling practices is obviously present, at least in private parties and the states, and antitrust provides a fearsome, if not wholly reliable, weapon. At present, the antitrust law on distributional restraints is fluid and chaotic. There is no consensus among the circuits as to either permissible or impermissible behavior by firms found to be dominant or to have significant market power in a properly defined antitrust market.[8] The situation is complicated by the fact that most distributional restraints can be challenged under at least two and up to five separate statutory provisions,[9] each with disparate elements of proof and precedent. In addition, there is no consensus on terminology in the realm of product co-marketing and cross-product dis-

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[2] *See, e.g.*, Washington Telecom & Media Insider, *SBC, BellSouth Launch Bundle Offers* (Apr. 4, 2003); Washington Telecom & Media Insider, *The World According to Chairman Notebaert: Qwest Focused on Broadband and Bundling* (May 16, 2003); Legg Mason Equity Research, *Battle of the Bundles, Appendix: Breakdown of Current Bundling Efforts* 15–17 (June 2003), *available at* http://www.theinternetanalyst.com/download.asp? docid=27277324.

[3] *See* Legg Mason Equity Research, *supra* note 2, at 17–20; Precursor Group, *Cox Lengthens Bundle Lead over Rivals* (June 23, 2003).

[4] Cable companies are moving quickly to adopt VOIP technology for voice services to fill this gap.

[5] *See, e.g.*, Washington Telecom & Media Insider, *Groups Seek Antitrust Scrutiny of Cable Company Bundling Practices* 4–5 (Mar. 23, 2003).

[6] Greco v. Verizon Communications, Inc., 03 Civ. 0718 (KMW) (S.D.N.Y.). A motion to dismiss is pending in the case.

[7] *In re* BellSouth Telecommunications, Inc., WC Docket No. 03-251.

[8] Showing that a defendant has market power is a threshold requirement for any plaintiff claiming harm to competition through distributional restraints, such as tying, bundling, and various loyalty discount programs. Market share is usually a first-stage proxy for market power. To rebut the inference that a significant market share equates to significant market power requires a complex, costly, and time-consuming economic analysis of the relevant market. Such analysis has not been done in most telecommunications product or geographic markets.

counts. Many practices are now labeled under the rubric of "bundling," a term relatively new to the law, having migrated there from business jargon and recent economic theory. The outcome of a lawsuit can turn on whether bundling is characterized as "tying," "predatory pricing," or an "exclusionary practice." Tying and predatory pricing analyses are notoriously defendant-friendly. Exclusionary practice analysis is just as notoriously plaintiff-friendly.

Since 1995, seven circuits have been called upon to address the issue of bundling. Four of the outcomes have favored plaintiffs; defendants have clearly prevailed only twice.[10] The unlucky defendant in a recent pro-plaintiff case, *LePage's Inc. v. 3M*,[11] petitioned for certiorari. Many in the antitrust community were hoping that the Supreme Court would grant the petition and provide some guidance. On June 30, 2004, however, the Court, following the suggestion of a strongly worded brief from the U.S. Solicitor General, denied certiorari, leaving the case law and academic analysis to develop further.

In this atmosphere of "Let a Thousand Flowers Bloom," potential plaintiffs will see a gold mine of theories and fact patterns from which they can pick and choose the precedent that is most helpful to their case. Potential defendants will see a minefield where an attractive business model can explode in their faces. Whether a firm is crafting a defensive or an offensive strategy, the following distillation of case law serves as a useful starting point. In particular, it identifies specific factors that may affect the application of antitrust law to bundling by communications incumbents.

Bundling Paradigms

A close reading of these seven circuit court decisions leads to the conclusion that firms whose bundling activities may be most vulnerable to antitrust challenge are those that:

1. have significant market share, especially if built upon an installed base;
2. are in a market characterized by high entry barriers and/or high switching costs;
3. have a larger portfolio of products than most or all of their competitors;
4. bundle a new product with an established product;
5. start bundling in a market where the practice is not common; and
6. market the bundled products via steep discounts, generous volume or market share rebates, or exclusive dealing provisions.

In addition, a plus factor that resonates through some of the cases is the sense that the challenged bundling is a strategic move necessary for the incumbent to defend the continued existence of its core market. Where regulatory, business, or technological developments are causing a dramatic change to the market—a paradigm shift—an incumbent may feel that if it does not make a fundamental change in its distribution model, it risks not just a loss in market share, but

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[9] Those provisions are: Sherman Act Section 1 (agreements in restraint of trade); Sherman Act Section 2 (single firm conduct that creates or maintains a monopoly); Clayton Act Section 3 (tying arrangements); and the Federal Trade Commission Act (unfair acts and practices; note that this statute is not available to private plaintiffs). In addition, most states have a "Little FTC Act" which allows the state attorney general to sue on behalf of the state's citizenry.

[10] In chronological order, the plaintiff-friendly circuit court decisions are Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc., 63 F.3d 1540 (10th Cir. 1995); Conwood Co. v. United States Tobacco Co., 290 F.3d 768 (6th Cir. 2002); LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003), *cert. denied* (June 30, 2004); and Metronet Servs. Corp. v. USWest Communs., 325 F.3d 1095 (9th Cir. 2003), *reh. den.*, 329 F.3d 986 (9th Cir. 2003). The defendant-friendly circuit court decisions are Concord Boat Corp. v. Brunswick Corp., 207 F. 3d 1039 (8th Cir. 2000); and Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256 (2d Cir. 2001). The seventh case, U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), might best be characterized as a draw, since the appellate court's directions for treatment of bundling, which could have been harmful to defendant if followed on remand, were mooted by settlement of the case.

[11] 324 F.3d 141 (3d Cir. 2003), *cert. denied* (June 30, 2004).

total obsolescence. That perception, especially if memorialized in documents or admitted in testimony,[12] tends to persuade courts and juries that innovative bundling practices employed by the incumbent are fundamentally unfair because they are not intended merely to compete in an existing market, but to prevent the development of a competing market, or at least to impede its growth until the incumbent can shift its resources to become dominant in that market also. In short, the incumbent is perceived as unfairly tilting the new competitive playing field in its favor. This suggests that judges and juries may be intuitively applying a different set of rules when firms are engaged in competition *for the market*, as opposed to the traditional antitrust analysis applied to competition *in an existing market.*

Only one of the seven decisions arose in the traditional communications industry. However, most if not all of the paradigm conditions for bundling vulnerability exist for incumbents in the cable television and local phone markets. The incumbents' still-high market shares in their local service areas would likely satisfy a plaintiff's initial burden of demonstrating significant, perhaps even dominant or monopolistic, market power.[13] In addition, most of these local markets are characterized by high barriers to entry in the form of facilities and branding costs.[14] The switching costs are low in the local wireline and the wireless markets because of mandated number portability, but they are not low in many local cable TV service areas (and in fact switching may not be possible since in most markets there is only one local cable provider).

Bundling in its current incarnation is new to the communications industry. Until very recently, cable television was a stand-alone product and cable systems were not designed to provide even simple two-way communications services. Bundling of local, long distance, and equipment was long the norm in the AT&T-dominated wireline telephone market, but it came under attack from government agencies and competitors beginning in the 1960s.[15] For the last thirty years, bundling has been on the decline in the wireline market (except in the medium to large corporate market, which was dominated by firms, such as MCI and AT&T, that did not have bottleneck local facilities), and bundling has never, until very recently, been a common practice in other communications markets. However, the incumbents are now bundling their established core products with a variety of new products, and they can offer more attractive bundles than most competitors because they that have a larger portfolio of products. On some of these bundles, the discounts are in the order of 5–10 percent or more, well above the levels that led the Third Circuit to find liability in a case that provided the precedent for its analysis and outcome in *LePage's*.[16]

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[12] *See, e.g., Microsoft*, 253 F.3d at 96–97; *Conwood*, 290 F.3d at 787; Smithkline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089, 1151–52 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir. 1978).

[13] To rebut the inference would require complex, costly, and time-consuming economic analysis of each relevant market. Such analysis has not been done in most communications product or geographic markets.

[14] *See, e.g.*, Metronet Servs. Corp. v. USWest Comm., 325 F.3d at 1102–04 (discussing plaintiff's expert's identification of structural barriers to entry into the market for small business local telephone service in the Seattle/Tacoma area).

[15] FCC decisions running back through the *Computer Inquiries* to the *Carterfone* order required or encouraged unbundling. The MFJ, of course, represented an extreme form of unbundling, because AT&T's long distance and local operations were split and the RBOCs were prevented from providing long distance and many enhanced (information) services. Modification of Final Judgment, *reprinted in* U.S. v. AT&T, 552 F. Supp. 131 (D.D.C. 1982). In recent years, there has been a trend towards permissive bundling by incumbents. Judge Greene lifted the MFJ prohibition on RBOC provision of information services in the early 1990s, and the Telecommunications Act of 1996 provided a mechanism—Section 271—under which RBOCs could gain the ability to enter the long distance market, with no restrictions on the bundling of local and long distance services. The FCC has also become more tolerant of bundling. For example, in 2000, in its order approving the Section 271 application of SBC for long distance authority in Texas, it for the first time permitted RBOC bundling of local telephone and DSL services. *See* In the Matter of SBC Communications Inc., FCC 00-238, released June 30, 2000.

In light of the structure of the market, it seems inevitable that some plaintiffs will bring communications bundling cases that survive summary judgment and reach the trial stage. Moreover, the "plus" factor discussed above—the struggle for survival in a rapidly evolving market—would seem to apply in spades. Technological change and deregulatory initiatives at the state and federal levels are reinforcing each other and causing fundamental structural changes in communications markets. Incumbents are facing drastic and accelerating loss of market share in their core markets, and those markets are either stagnant or declining in size. The danger for incumbents is that at trial the finder of fact, whether judge or jury, will focus on the imbalance of power, and find it likely that bundling could be used anticompetitively regardless of actual pricing levels.[17]

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Surviving Antitrust Scrutiny

The justification for the bundling program will no doubt be crucial at the fact-finding stage of a case.[18] The justification will have to be visible in the initial documentation for the development of the bundling program. Valid justifications might include improved products or any other benefits to the consumer, response to customer demand, distributional efficiencies,[19] and possibly responding to competition.[20] If one of the incumbent's major multi-product competitors initiates a bundling program, then the incumbent may be able to justify its own bundling as a simple competitive response, just so long as its bundled price is not predatory.[21] The goals of preserving mar-

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[16] SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir. 1978). The term "bundled rebates" was not used in the opinion: the court spoke of "linked" sales and "volume rebates." However, when the Third Circuit revisited this precedent in *LePage's*, it stated that SmithKline had addressed the practice of bundled rebates. Defendant Eli Lilly had, through lawful patents, created the market for cephalosporins, a type of antibiotic. By the time competition appeared, Lilly was marketing five cephalosporins, two of which were still on patent and therefore reaping (lawful) monopoly profits. SmithKline's competitive product was the generic equivalent of Lilly's third (unpatented) product. Moreover, SmithKline's product could also compete against Lilly's premium (patented) product, as the therapeutic features were identical, but the generic had a more comfortable and less expensive delivery mode. To fend off this competition, Lilly offered a 3% "bonus rebate" to hospital pharmacies that purchased any three of Lilly's five cephalosporins. The court found that the "practical effect" of this offer was to force SmithKline, a single product competitor, to compete "three-on-one." *Id.* at 1061–62. It found the marketing plan to be monopoly maintenance in violation of Section 2 of the Sherman Act, and issued a permanent injunction against the illegal marketing practices.

[17] *Multistate Legal Studies*, 63 F.3d 1540. Defendant started bundling multistate bar review workshops with its Colorado state bar review courses when faced with competition from a new entrant into the Colorado market, which was offering only multistate programs. Despite the fact that the new entrant was a relatively strong competitor to defendant, both being national providers of both local and multistate bar review, the court focused on the imbalance of power in the state locality.

[18] Any justification created by lawyers after the bundling is challenged will carry almost no weight. *See* United States v. Dentsply Int'l, Inc. 2003 U.S. Dist. LEXIS 14139,*191 (D.C. Del. Aug. 8, 2003).

[19] Such efficiencies can include lower distribution and consumer transaction costs. PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1703g2 at 51–52 (1991); *Microsoft Corp.*, 253 F.3d at 87–88; *see generally* Virgin Atlantic Airways, Ltd. v. British Airways PLC, 257 F.3d at 256; Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000).

[20] The fact that Brunswick's market share discounts were a common distribution practice among boat engine manufacturers helped convince the court that Brunswick was acting within the confines of fair competition, despite its 75% market share (a dominant position by most standards). *Concord Boat*, 207 F.3d at 1044, 1063–64. The tone of documents referring to the competition can be important. Merely copying a rival's successful marketing approach is benign; but documents suggesting that the bundle was designed to target a specific, weaker competitor could be dangerous. Less obvious as to anticompetitive intent, but still helpful to plaintiffs, are documents which boast of the incumbent's "market power." These documents can be used to suggest that the bundling program is a device to leverage installed base market power into other, still developing communications markets.

[21] *See* AREEDA, *supra* note 19, ¶ 1744c4 at 200; *Microsoft*, 253 F.3d at 87–88; *Concord Boat*, 207 F.3d 1039; *Virgin Atlantic Airways*, 257 F.3d at 261, 266–69. Query whether, if the initiating competitor was the other incumbent, a plaintiff could bring a dual monopoly maintenance action against both incumbents, perhaps on some novel coordinated interaction theory.

ket power or leveraging power in one market into another market would be viewed as decidedly anticompetitive.[22]

A bundle that provides product integration, new services, or other benefits to consumers is more likely to survive antitrust scrutiny than a bundle that involves the mere "electronic stapling" of multiple bills into one bill or a price discount on one or more services.[23] Customer demand and customer reaction will also likely be key determinants at trial of the legitimacy of any incumbent's bundle. To the extent that a firm can demonstrate customer demand predating its bundled offerings, it will be in a more defensible position.[24]

A court may, of course, look at the incumbent's pricing. The Supreme Court has endorsed an average variable cost test for predatory pricing, but other tests for measuring the price/cost variable may be used.[25] If internal documents suggest or demonstrate that the bundled price is a money-losing proposition for any significant period of time, red flags may be raised. For example, a special introductory offer which lasts only up to three months would probably be safe, but an open-ended commitment to maintain a low price for DSL or cable modem service, regardless of cost or profitability might be read as evidence of predatory intent.

Another consideration is likely to be whether the components of the bundle are available separately at competitive prices.[26] For incumbents electing to sell pieces of the bundle, such as DSL or cable modem service, as stand alone products with attractive discounts, *Concord Boat* is a helpful template.[27] Moreover, the availability of certain pieces of the telephone network as unbundled network elements under the FCC's regulations and the Telecommunications Act of 1996 may also reduce the antitrust risk for ILECs, although not for cable incumbents. Even without true predatory pricing, a package may be so economically coercive that consumers will feel compelled to buy it, rather than mix and match the components from various producers. Consumer options may also be constrained by any technological ties between the large installed base of basic cable TV service or local telephone service and the bundled products.[28]

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[22] "Desire to maintain a monopoly market share or thwart the entry of competitors" does not constitute the type of business justification that is an acceptable defense to monopolization. *LePage's Inc.*, 324 F.3d at 163 (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994)).

[23] *See* J. Gregory Sidak, *An Antitrust Rule for Software Integration*, 18 YALE J. ON REG. 1, 29–31, 33 (2001). Examples of the former type of bundle might be a "follow-me" platform that automatically transferred wireline calls to a subscriber's wireless phone after a set number of rings, or an interactive TV application that allowed a customer to participate in audience polling or shop online using her associated wireless service.

[24] *See* discussion in *Microsoft Corp.*, 253 F.3d at 88–89, 96–97 (2001). Evidence that consumers did not want the bundled product (calling it "horrible," "a waste of time," and "a joke") helped the court conclude that defendant's alleged business rationale for bundling was specious in *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1552 (10th Cir. 1995).

[25] Brooke Group Ltd., v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); United States v. AMR Corp., 353 F.3d 1109 (10th Cir. 2003); *aff'g* 140 F. Supp. 2d 1141 (D. Kan. 2001).

[26] *Microsoft Corp.*, 253 F.3d at 97.

[27] Brunswick's reprieve rested upon several factors. First, although the industry was highly concentrated at times, there were no significant entry barriers; in fact, during the relevant time period several firms entered or exited the boat engine market. Brunswick's market share fluctuated around 75% during the time it offered volume discounts, but the gains were due to market events unrelated to the discount program. Second, customers were not coerced into buying Brunswick's engines. The engines were not tied to any other product, the discounts were reasonable, and the agreements were not exclusive (i.e., Brunswick did not require that a customer buy 100% of its engines from Brunswick). Third, the discounted prices were above Brunswick's costs. Fourth, when Brunswick started its "market share discount" program, several of its competitors already had similar programs in place. *See* 207 F. 3d at 1042 *et seq.*

[28] *Microsoft Corp.*, 253 F.3d at 64–67.

In a rule of reason case, however, the nature of the relationship between the incumbent's price and cost may not be the governing factor. Rather, the result may turn on the judge's or jury's categorization of the defendant's entire course of conduct. If a plaintiff can get the case out of the predatory pricing box and into a non-price predation box (e.g., strategic behavior aimed at defending, maintaining, or extending a monopoly), then it has a much better chance of prevailing.[29] The Second Circuit (*Virgin Atlantic*) seems to have as clear a preference for the pricing box as the Third Circuit (*LePage's*) has for the conduct box.[30] Other circuits can be placed somewhere between the two extremes. The key issue in communications bundling cases will be this categorization battle, especially since the Supreme Court declined to cut the Gordian knot by addressing the issue in *LePage's*.

Conclusion

In late May, the Solicitor General filed an amicus brief advising the Supreme Court not to accept the *LePage's* case on certiorari because there was a dearth of practical experience with and academic analysis of the competitive effects of the practice of bundling products and rebates.[31] The government recognized that bundling of rebates was widespread and in many cases likely to be procompetitive, but that under certain circumstances it could in theory (and perhaps in practice) be anticompetitive. The brief concluded:

> While bundled rebates may be a common business practice, it is not clear that monopolists commonly bundle rebates for products over which they have monopolies with products over which they do not. The United States submits that, at this juncture, it would be preferable to allow the case law and economic analysis to develop further and to await a case with a record better adapted to development of an appropriate standard.[32]

The communications industry may well be unique because it clearly is an area where incumbents now commonly bundle rebates for products over which they have monopolies with products over which they do not. Given the Supreme Court's denial of certiorari in *LePage's*, the bundling of products in communications markets will be a key area of antitrust activity in the next few years. In fact, the communications industry will likely be the laboratory for the development of theoretical and analytical models of the economic desirability of bundling practices. Both incumbents and plaintiffs will be better prepared for the conflict if they keep the complex chain of antitrust precedent in mind. ●

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[29] *See* Andrew I. Gavil, *Dominant Firm Distribution: Striking a Better Balance*, 72 ANTITRUST L.J. (forthcoming 2004); *see also* Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. ECON. 159 (2004).

[30] The European Commission has adopted variations of the conduct box in its decisions in the *GE/Honeywell* and *Microsoft* cases. *See* General Electric/Honeywell, Case No. COMP/M.2220 (July 3, 2001); *Microsoft*, Case No. COMP/C-3/37.792 (Mar. 24, 2004). At press time, there are reports that the EU is also forcing The Coca-Cola Company to cease its practice of offering discounts across bundles of soda products, and to base discounts on the retailer's sales of the specific product on which the discount is offered. *Coke European Accord Seen*, N.Y. TIMES, July 16, 2004, *available at* http://www.nytimes.com/2004/07/16/business/worldbusiness/16coke.html.

[31] Brief for the United States as Amicus Curiae, 3M Company v. LePage's Inc., No. 02-1865 at 12–14 and 18, *available at* http://www.usdoj.gov/osg/briefs/2003/2pet/6invit/2002-1865.pet.ami.inv.html.

[32] *Id.* at 19.