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**VIEWPOINT:**

**Bundled Discounts and *Cascade Health Solutions v. PeaceHealth***

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**Bundled Discounts and *Cascade Health Solutions v. PeaceHealth***

by

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On March 20, 2007, a panel of the Ninth Circuit took the unusual step of issuing an open invitation for amicus curiae briefing on the liability rules governing bundled discounts. The Court's order, in *Cascade Health Solutions v. PeaceHealth*, reads:

The court invites supplemental briefs by any amicus curiae addressing the following issue raised in this appeal: Whether a plaintiff who seeks to establish the predatory or anticompetitive conduct element of an attempted monopolization claim under § 2 of the Sherman Act by showing that the defendant offered bundled discounts to the defendant's customers must prove that the defendant's prices were below an appropriate measure of the defendant's costs. If so, what is the appropriate measure of costs and how should the trial court instruct the jury on the matter of costs? If not, what standard should the trial court instruct the jury to use to determine whether the bundled discounts are predatory or anticompetitive?

Eight groups of *amici* filed briefs in response. Seven wrote in favor of some cost-based test for bundled discount claims. One wrote against cost-based tests. I wrote a brief on behalf of a group of law professors supporting reversal. Our brief argued: (1) that the court should adopt a discount reallocation screen that requires the dismissal of any challenge to bundled discounts in which the plaintiff cannot show that the price of the competitive product in the bundle was priced below cost after relocation of discounts from the monopoly product; and (2) that the court should adopt average variable cost as the appropriate measure of cost.

In its simplest form, bundled discount challenges argue that when a firm has a monopoly over product A and faces competition for product B, if the firm offers a

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discount on the joint purchase of A and B, a competitor that makes only B may be excluded from the market because it cannot compete with discounts on a product (A) that it does not sell. The law professors' brief accepts the possibility of such exclusionary bundling, but demands rigor in the plaintiff's showing. Just as in a single-product predatory pricing case, the single-product seller will not be excluded from the market if it can match the bundled discount without pricing below cost. The discount reallocation screen tests whether plaintiff could have profitably matched the discount. If the monopolist's entire package discount is allocated to the competitive product and the resulting price is still above cost, an equally efficient rival will not be excluded from the market.

Bundled discounting challenges have been raised in many cases in recent years. There has been a good deal of scholarship on the subject, the FTC and DoJ held joint hearings on bundled discounts and other fidelity discounts last November, and the Antitrust Modernization Commission has a recommendation on bundled discounts in its recent report. Hopefully, the Ninth Circuit will use the *Cascade* case to clarify the law in this area by offering some specific and concrete (and pro-consumer!) liability rules.