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VIEWPOINT:

Cascade Health Solutions v. PeaceHealth: Ninth Circuit Adopts a New Position on Bundled Discounts

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***Cascade Health Solutions v. PeaceHealth*:**
Ninth Circuit Adopts a New Position on Bundled Discounts

by

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On September 4, 2007, the Ninth Circuit issued its widely-anticipated decision in *Cascade Health Solutions v. PeaceHealth*, which concerns the treatment of bundled discounts under Section 2 of the Sherman Act. The *PeaceHealth* decision squarely rejects the approach to bundled discounts taken in the Third Circuit's *en banc* decision in *LePage's, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) and endorses the following approach:

> To prove that a bundled discount was exclusionary or predatory for the purposes of a monopolization or attempted monopolization claim under Section 2 of the Sherman Act, the plaintiff must establish that, after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them.

As I reported in an earlier eCCP commentary, "Bundled Discounts and *Cascade Health Solutions v. PeaceHealth*," (May 2007), the Ninth Circuit took the highly unusual step in *Cascade* of calling for amicus curiae briefing on antitrust treatment of bundled discounts. The position adopted by the court is the one that I and a group of other law professors, including Thom Lambert, Tom Morgan, Danny Sokol, and Richard Squire, had advocated. It is also consistent with the position taken after *LePage's* by the Congressionally appointed Antitrust Modernization Commission, the influential Areeda-Hovenkamp treatise, ANTITRUST LAW, and other scholarship (including my own).

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The Ninth Circuit's explicit rejection of *LePage's* creates a strong possibility that the Supreme Court will grant certiorari in order to resolve the circuit split. Whereas the Department of Justice and FTC recommended against granting certiorari in *LePage's*, it is more likely that they would recommend that certiorari be granted in *Cascade*, assuming that the case does not settle. In light of the Supreme Court's last decision on unilateral pricing offenses, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007), and the overwhelming criticism of *LePage's* in legal commentary and the antitrust community, it would not be surprising to see the Supreme Court grant certiorari and adopt a standard more favorable to bundled discounts than that set forth in *LePage's*. In any event, given the large number of cases alleging exclusionary bundled discounting pending around the country, some clarification of the law by the Supreme Court is desirable.