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By now, the story of the Justice Department's Section 2 report² is well known. After years of joint hearings by the Federal Trade Commission ("FTC") and Antitrust Division in the Department of Justice ("DOJ"), in September 2008, the DOJ alone issued the report. Three FTC Commissioners issued a shrill dissenting statement, disagreeing with almost everything in the report and warning that the FTC "stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its Report."³ Then, in May of 2009, Christine Varney—President Obama's new Assistant Attorney General in charge of the Antitrust Division—gave a speech proclaiming that the Division was entirely withdrawing the Section 2 report.⁴ After a pitiful eight months of life, the Section 2 report was history.

The death of the Section 2 report is a real shame. Many staff members at both agencies and many outsiders (myself included) put a significant amount of work into the hearings and the report. Contrary to the suggestion in the FTC's dissenting statement, I saw no evidence that the hearings were stacked against more interventionist perspectives on Section 2. That certainly was not the case at the bundled discount hearings at which I testified. To the contrary, my general impression was that the hearings were constructive and made substantial progress toward agreement on some basic principles. Certainly, they lacked the rancor that characterized the release of the report.

One of the important lessons coming out of the Section 2 report debacle is institutional. Despite the current rapprochement between the FTC and Antitrust Division, the skirmishing over the report left a sour taste in many mouths and may have

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² Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

³ FTC Commissioners React to Department of Justice Report, "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act," <http://www.ftc.gov/opa/2008/09/section2.shtm>.

⁴ Christine A. Varney, *Vigorous Antitrust Enforcement in this Challenging Era*, May 11, 2009, <http://www.usdoj.gov/atr/public/speeches/245711.htm>.

been detrimental to the collective influence of the antitrust agencies. To be sure, if we are going to have a two-agency system (which I'm not sure we should—more on this in my upcoming book on the institutional structure of antitrust), including one agency that is supposed to be independent from the executive, legislative, and judicial branches, then we should expect constructive disagreement between the agencies. However, when both agencies jointly expend the resources to hold hearings on a subject, it is a major disappointment that they cannot find any common ground for a report even if it has to be somewhat watered down. And, yes, I would have preferred a watered down joint report that would have had at least some instructional value to courts and legislators than a strong report by one agency that is almost entirely neutralized by a sharp dissent from the other.

How important was it for the agencies to issue a joint Section 2 report? It would have been nice. In recent years, the Supreme Court has decided few unilateral exclusionary conduct cases and the ones it has decided have been largely idiosyncratic. For example, *Brooke Group*⁵ is a weird predatory pricing case involving (a) an alleged predation campaign by an oligopolist rather than a monopolist and (b) disciplining a maverick rival to join an implicit cartel rather than the more traditional claim of an attempt to drive the rival out of the market. *Weyerhaeuser*⁶ is probably a one-shot case involving predatory overbidding claims not likely to be seen again. *Spectrum Sports*⁷ is more of a business ethics case than a real monopolization case. *Trinko*⁸ and *linkLine*⁹ are bona fide monopolization cases, but that's not much to go on in terms of recent decisions.

Overall, the Supreme Court has allowed monopolization law to percolate in the lower courts. It has deflected or lacked the opportunity to review significant lower court decisions including *Rambus*,¹⁰ *Microsoft*,¹¹ *PeaceHealth*,¹² *LePages*,¹³ *Dentsply*,¹⁴ *Spirit/Northwest*,¹⁵ *Conwood*,¹⁶ *Concord Boat*,¹⁷ *American Airlines*,¹⁸ *Beech-Nut/Gerber*,¹⁹ *Broadcom/Qualcomm*,²⁰ *Virgin/BA*,²¹ and *Pepsi/Coke*.²² Significant circuit splits remain over

⁵ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

⁶ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S.Ct. 1069 (2007).

⁷ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

⁸ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398 (2004).

⁹ *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S.Ct. 1109 (2009).

¹⁰ *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

¹¹ *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

¹² *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

¹³ *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003).

¹⁴ *United States v. Dentsply Intern., Inc.*, 399 F.3d 181 (3d Cir.2005).

¹⁵ *Spirit Airlines v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir.2006).

¹⁶ *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir.2002).

¹⁷ *Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494 (8th Cir.2002).

¹⁸ *U.S. v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

¹⁹ *Beech-Nut Nutrition Corp. v. Gerber Prods. Co.*, 69 Fed. Appx. 350 (9th Cir. 2003).

²⁰ *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir.2007).

²¹ *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir.2001).

such issues as the appropriate measure of cost in predatory pricing cases, the treatment of bundled discounts and exclusive dealing contracts that are terminable at will, and the role of antitrust in policing patent hold-up in standard-setting organizations. There is a gap for someone to fill. The Antitrust Modernization Commission provided a couple of nice snippets on bundled discounts and refusals to deal, but did not provide the level of coverage or detail required to address the many open questions.

Ultimately, the inter-agency friction over the report may have little significance for public antitrust enforcement. For one, neither agency has been highly active in Section 2 enforcement and, despite the veiled threats from the three dissenting commissioners, the FTC is unlikely to become a major force in policing unilateral exclusionary conduct. Frankly, there is relatively little need for public Section 2 enforcement, since (unlike in many merger or collusion cases) there is almost always a competitor victim of the violation with a sufficiently concentrated and severe injury to make it worthwhile to sue. Also, neither agency would likely have felt itself bound in future litigation by positions taken in the report. The real shame is that the agencies were not able to speak as one voice on the rules that should govern private monopolization lawsuits, an issue on which the agencies do not have a direct stake and hence could have served as an “honest broker.” And now with the complete withdrawal of the Section 2 report, we are back to square one in terms of agency guidance on unilateral exclusionary conduct offenses.

One area of monopolization law where some legal clarity is sorely needed is the treatment of bundled discounts, which have been one of the hottest monopolization topics of the last decade. Much of the trouble began with the Third Circuit’s en banc decision in *LePage’s*, which reversed an earlier 2-1 panel decision which in turn had overturned a plaintiff’s jury verdict largely based on 3M’s bundled discounts. After the Solicitor General’s amicus curiae brief asked the Supreme Court to deny cert on the grounds that there was not sufficient scholarship on bundled discounts,²³ there was a flurry of legal and economic scholarship, the overwhelming majority of which was highly critical of *LePage’s*.

Over the past five years or so, it seemed that a consensus was emerging that some sort of discount reallocation or attribution test should be used as a screen in bundled discounting cases. There are various formulations of the test, but in general it requires the plaintiff to show that defendant priced the competitive product below cost after the discounts on the non-competitive product are reallocated to the competitive market. Versions of that test have been adopted by a variety of commentators, agencies, and courts, including the DOJ in its Section 2 Report, the Antitrust Modernization

²² *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101 (2d Cir. 2002).

²³ *Brief for the United States as Amicus Curiae, 3M v. LePage’s*, 542 U.S. 953 (May 2004) (No. 02-1865) (<http://www.usdoj.gov/atr/cases/f203900/203900.pdf>).

Commission, the Areeda-Hovenkamp treatise, and the Ninth Circuit's *PeaceHealth* decision. I have been and continue to be a staunch defender of some formulation of that test.

Just when I thought we were close to reaching a strong majority position on bundled discounts, along comes a significant new article by Einer Elhauge (to be published this coming December in the *Harvard Law Review*) challenging the entire basis of the theory.²⁴ Einer argues that bundled discounts manifest anticompetitive "power effects" if the unbundled price for the linking product exceeds the but-for price level (*i.e.*, the price the defendant would charge in the absence of the bundle) and that such bundles should be treated as tie-ins.

Einer's article is sure to attract lots of attention and give courts and perhaps the agencies pause in adopting the until-now consensus position on bundled discounts. Although I profoundly disagree with much of Einer's analysis, it is a provocative and important article. Josh Wright and I are planning a full response at a later date. For the moment, let me just preview one responsive angle. Assuming we get beyond the one monopoly profit theory (which Einer attacks earlier in his paper) and believe that bundled discounts could be vehicles for monopoly leverage, our attitude toward the legal treatment of bundled discounts depends in part on where we think they originate. Critics of bundled discounts seem to assume that they are like coercive tie-ins pushed by dominant firms on weak consumers. In fact, the evidence is that many bundled discount schemes originate with strong buyers who want to leverage their multi-product buying power to achieve price concessions.

If that's the case, then we should be suspicious of claims that bundled discounts are frequently used as monopoly leveraging devices. Power buyers—particularly those that are end users of the purchased product—do not have an incentive to facilitate a seller's monopoly. Sure, there are circumstances where collective action problems force buyers to accept contractual terms that harm them in the long run (even buyers aware that a price is predatory usually do not insist on a higher price) but with power buyers like group purchasing organizations, pharmacy benefit managers, and various governmental buying organizations we should not generally worry about collective action problems. These organizations often come into existence to aggregate disparate buying power—*i.e.*, as a solution to a collective action problem. And it is these kinds of organizations that often make requests for proposals ("RFPs") or publish contracting guidelines that call for bundled discounts or other sorts of loyalty discounts. I do not mean to suggest that bundled discounts are exclusively pushed by power buyers. Often, the story is mixed. A discount for purchasing across multiple product lines may be one

²⁴ Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345239 (working paper, forthcoming HARV. L. REV.).

negotiation element that both sides push and pull in combination with other contractual elements.

Buyers expect to get better prices when they show greater loyalty to sellers and sellers are willing to give greater discounts in exchange for greater loyalty. To be sure, there are occasions when monopolistic sellers push bundled discounts to exclude rivals, but these are by far the exception to the rule.

In medicine, there is an aphorism that when you hear hoof beats, you should think horse, not zebra. I think this applies neatly to bundled discounts. Most of the time bundled discounts are competitively benign and our instinct should be to assume that they reflect ordinary business practices, not exclusion devices. Rules crafted for the exceptional cases must take care not to paint stripes on too many horses.

In any event, bundled discounts are likely to remain a contentious topic for the indefinite future. The Supreme Court will likely intervene to provide guidance at some point. One can only hope that the agencies will be able to agree on a sensible and workable test to propose to the Court should that occur.