

EXTENDING PREDATION ANALYSIS TO MONOPOLIST'S BUNDLED DISCOUNTS UNDER SECTION 2: AN ECONOMIC, LEGAL, AND COMPARATIVE PERSPECTIVE

INTRODUCTION

In *LePage's v. 3M*,¹ the Third Circuit decided the first case at the federal appellate court level that dealt with the subject of bundled discounts by a monopolist under Section 2 of the Sherman Act² in the period following the U.S. Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*.³ Prior to the decision in *Brooke Group*, the Third Circuit⁴ had only once before addressed this topic in *Smithkline Corp. v. Eli Lilly and Company*.⁵ *Smithkline* is only significant because it nearly suggested that any bundled discount, regardless of whether above or below cost, was anti-competitive. At the time of *Smithkline* in 1978, the Third Circuit had therefore not even considered monopolist bundled discounts with regard to products in the same relevant market as constituting a very serious legal issue.⁶ Following *Brooke Group*, however, practitioners believed that this state of affairs had changed. It is only well in the aftermath of *Brooke Group*, following the *LePage's Inc. v. 3M* decision, that this issue has become the subject of vigorous debate.⁷

¹ *LePage's Inc. v. 3M*, 324 F.3d 141 (3rd Cir. 2002), *vacating* *LePage's Inc. v. 3M*, 277 F.3d 365 (3rd Cir. 2002), *cert. denied* *3M v. LePage's Inc.*, 542 U.S. 953 (2004).

² Section 2 of the Sherman Act provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

Sherman Act § 2, 15 U.S.C. S. § 2 (2004)

³ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*, 509 U.S. 209 (1993) (defining the predatory pricing standard for Section 2 of the Sherman Act and the Robinson-Pateman Act).

⁴ The Third Circuit is the only federal court of appeals to have ever addressed this issue.

⁵ *Smithkline Corp. v. Eli Lilly and Co.*, 575 F.2d 1056 (3rd Cir. 1978).

⁶ *Id.* at 1057 ("The major question for decision is whether the district court . . . erred in defining the relevant product market. . . .").

⁷ See, e.g., Kenneth L. Glazer and Brian R. Henry, *Coercive v. Incentivizing Conduct: A Way Out of the Section 2 Impasse?*, ANTITRUST, Summer 2003, at 49 (contending that *Brooke Group* required the Court in *LePage's* to reach a different result than it would have without *Brooke Group*); James A. Keyte, *LePage's v. 3M – More Questions than Answers for the Lawful "Monopolist,"* ANTITRUST, Summer 2003, at 27

In Section 1, this Article explores how the Third Circuit should have decided in *LePage's* and provides an answer to what should be the proper U.S. jurisprudence with regard to this issue in light of *Brooke Group* and U.S. economic theory. In Section 2, this Article proceeds to question this ideal U.S. jurisprudence by providing an EC comparative perspective. In doing so, this Article tries not to laud one standard over the other, but to precisely understand the philosophies, advantages, and disadvantages that underlie each system beyond the veil of law and economics.

1. ABOVE-COST DISCOUNTING IN THE U.S.

1.1. *Smithkline: Bundled Discount Law Prior to Brooke Group*

Smithkline and Eli Lilly were both pharmaceuticals manufacturers in the relevant market of the “nonprofit hospital market for a class of antibiotic drugs known as cephalosporins” in the United States.⁸ Eli Lilly first produced, patented, and monopolized a drug branded by the name of Keflin and known generically as cephalothin in 1964.⁹ Subsequently, it manufactured four other cephalosporins, branded and known generically by the names of Keflex (cephalexin), Loridine (cephaloridine), Kafocin (cephalexin), and Kefzol (cefazolin). Kefzol, or cefazolin in the generic, was the only one of Eli Lilly’s cephalosporins that was not patented.¹⁰ Eli Lilly continued to enjoy total dominance¹¹ in the market from 1964 until 1973, at which point other manufacturers, namely Smithkline, produced cephalosporin drugs.¹²

(highlighting the analytic schism between the majority and the dissent in *LePage's* over the application of *Brooke Group*).

⁸ *Id.*

⁹ *Id.* at 1059.

¹⁰ *Id.*

¹¹ *See id.* at 1065 n. 15 (showing that the Smithkline Court estimated that Eli Lilly controlled between 89.8% and 100% of the cephalosporin market between 1964 and 1973).

¹² *Id.* at 1059.

Beginning in 1973, Smithkline began to produce a drug branded by the name of Ancef and known generically as cefazolin.¹³ Cefazolin was identical to Eli Lilly's Kefzol.¹⁴ After Smithkline began marketing Ancef, Eli Lilly responded by augmenting its pre-existing quantity-based discount program,¹⁵ known as the Cephalosporin Savings Plan ("CSP"), to include a percentage rebate that applied only when hospitals bought minimum quantities among any three of Eli Lilly's cephalosporin products.¹⁶ All of the bundled discounts thus related to a relevant market in which Eli Lilly was a monopolist.

Before reaching its final conclusion, the *Smithkline* Court noted a policy-like concern that Smithkline's Ancef and Eli Lilly's Kefzol, both cefazolin products, were superior in quality to Eli Lilly's other monopolized products in the cephalosporin relevant market.¹⁷ It then held that Eli Lilly had monopolized under Section 2 on the basis of its obvious power to exclude and its "willful acquisition and maintenance of monopoly power," which was satisfied because the bundled discount linked a product that faced competition, Kefzol, with products that did not face competition.¹⁸ As a result, a "competitive" market for Ancef and Kefzol was replaced by a "non-competitive" market, since Smithkline would be unable to equal Eli Lilly's 3% rebate without offering a 16% rebate.¹⁹

¹³ *Id.*

¹⁴ See *id.* (noting that Kefzol and Ancef were both licensed by a Japanese developer).

¹⁵ Compare *Western Parcel Express v. UPS*, 190 F.3d 974, 976 (9th Cir. 1999) (stating that volume discounts are categorically legal because they do not "preclude competition in violation of the Sherman Antitrust Act") with Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, ¶768b2, at 148 (2d ed. 2002) (suggesting that continuously increasing volume discounts or conditioning them on a one-year period could be anticompetitive under the Sherman Act, since they would preclude equally efficient competitors of the discounting firm from matching prices).

¹⁶ *Smithkline Corp. v. Eli Lilly and Co.*, 575 F.2d 1056, 1059-60 (3rd Cir. 1978).

¹⁷ *Id.* at 1061.

¹⁸ *Id.* at 1065.

¹⁹ *Id.*

Although Smithkline potentially suggested that any bundled discount was anti-competitive, one must identify facts that might limit the scope of this monopolization conclusion. First, the bundled discount took place entirely within one relevant market, cephalosporins. Second, under the bundled discount, sales within a competitive submarket were linked to a monopolized submarket, thereby maintaining not only a monopoly, but a dangerously inferior one in light of the Court's policy calculation.

1.2. Brooke Group: The Emergence of Above-Cost Discounting Jurisprudence

Brooke Group Ltd. and Brown & Williamson were both oligopolist tobacco manufacturers.²⁰ Since Brooke Group's market share in the general cigarette market had severely declined, it innovated the marketing of generic cigarettes in order to bolster its market share.²¹ By 1984, Brooke Group had achieved 97% market share in the generic segment.

Brown & Williamson, who until 1984 had only manufactured branded cigarettes, was particularly affected by Brooke Group's generic cigarettes innovation.²² In response to its eroding market share, Brown & Williamson produced its own generic cigarettes lines and provided wholesalers with volume discounts²³ on them that made its wholesale

²⁰ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 212 (1993).

²¹ *Id.* at 212, 214.

²² *Id.* at 214 (noting that 20% of converts to Brooke Group's generics came from Brown & Williamson, which had only had 11.4% of the market for branded cigarettes).

²³ Volume discounts are considered anti-competitive when the product so discounted is fungible, as was the case with respect to the two company's generic cigarettes in *Brooke Group*. See Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶768b2, at 149 (2d ed. 2002). Nevertheless, despite the fact that such a discount threatened to eliminate a competitor, the Court relying on *Brown Shoe*, held that there was no harm to competition, since there was no evidence of recoupment. This suggests that, by analogy, in Section 2, the definitive inquiry goes more to the issue of recoupment than to exclusionary conduct.

prices cheaper than Brooke Group’s generic cigarettes.²⁴ Retail prices remained the same.²⁵

Brooke Group, in turn, responded with deeper discounts in the area of wholesale rebates.²⁶ This led to a price war between the two firms where Brown & Williamson likely sold below cost.²⁷ Brooke Group then brought a lawsuit against Brown & Williamson, alleging price discrimination under the Robinson-Patman Act. Brooke Group alleged that discounting below cost would force it to raise the list price of its generic cigarettes so as to effectively narrow the gap between prices in the branded and generic markets.²⁸

In analyzing this claim, the Court first noted that Brooke Group had alleged a predatory pricing scheme to harm a competitor, which it analogized to a Section 2 claim under the Sherman Act.²⁹ In order to prevail on this claim, Brooke Group had to show “‘a reasonable possibility’ of substantial injury to competition. . . .”³⁰ This meant showing both pricing below cost as well as a reasonable probability of recouping profits.³¹

In announcing the below cost prong of predatory pricing, the Court stated very broad principles that suggested that low prices never threatened competition unless they

²⁴ *Brooke Group*, 509 U.S. at 215.

²⁵ This suggests that the Court’s holding in *Brooke Group* in favor of the discounting firm does not rest on assumptions about end user consumer gains. *See id.*

²⁶ *Id.* at 216.

²⁷ *See id.* at 216, 231 (noting that a reasonable jury could conclude that Brown & Williamson priced below cost).

²⁸ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 217 (1993).

²⁹ *Id.* at 220.

³⁰ *Id.* at 222. The Court also stated that the Robinson-Patman Act demanded a broader reading of competitive injury than Section 2 of the Sherman Act. *See id.* at 229 (noting that competitive injury under the Robinson-Patman Act extends beyond the monopoly context). The Court noted that in the Section 2 context, the standard was “‘a dangerous probability of actual monopolization.’” *Id.* This suggests per se liability for a monopolist who predatorily priced.

³¹ *Id.* at 223-24. In the context of the Sherman Act, the Court noted that one would have to show a “‘dangerous probability [] of recouping its investment in below-cost prices.’” *Id.* at 224.

were below predatory levels, regardless of the type of antitrust injury alleged.³² Although the Court did assert the possibility of anti-competitive discounting above the predatory level, it suggested that such discounting was “beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.”³³ These points are both critical because they threaten to overrule the *Matsushita* framework for discounting, which focused entirely on the certainty and degree to which the discounter could recoup.³⁴

Given the *Brooke Group* Court’s definition of predatory pricing, one might deduce that low prices only threatened competition in a cognizable sense when a) prices were below cost,³⁵ b) there was a reasonable or dangerous probability of recoupment; and c) discounting and probability of recoupment, or predatory pricing as a whole, threatened competition, or in the Section 2 context, monopolization.³⁶

On the other hand, in the next paragraph, the Court very obliquely implied that these broad principles might be tied to a particular context and a particular logic,

³² For example, the Court cited *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). *Atlantic Richfield* held: “Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition We have adhered to this principle regardless of the type of antitrust claimed involved.” *Id.* at 340.

³³ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993).

³⁴ See *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1985). Under a rationale that is entirely focused on recoupment, a monopolist that discounts will be per se liable under Section 2, assuming that there are no competitors to enter the market upon elimination of the monopolist’s competitors. See Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981) (asserting that a would-be monopolist must maintain its monopoly power a sufficiently long time in order to recoup). This, however, is not true under a standard that requires below cost pricing. See R. Bork, *The Antitrust Paradox* 145 (1978) (suggesting that the future flow of profits would exceed the discount only for a would-be monopolist who was able to maintain position). The below cost discounting prong in *Brooke Group* also casts doubt on the remand instructions in *Matsushita* that would allow a competitor to show that a discounting plan was “economically senseless.” *Matsushita*, 475 U.S. at 597-98. Such evidence would only go to the question of recoupment.

³⁵ There is considerable disagreement among lower courts over the appropriate measure of cost. The *Brooke Group* Court did not answer this issue, since the parties agreed on average variable cost. See *Brooke Group*, 509 U.S. at 223.

³⁶ This deduction applies the elements of the Court’s predatory pricing definition combined with its rule that predatory pricing must injure competition or lead to monopolization. See *id.* at 222-25.

potentially suggesting that its principles could extend no farther than the oligopoly context:

Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price: The antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition.³⁷

The Court then noted that in the oligopoly context the consumer should not be denied the benefit of the lower price in the short run even if the ultimate effect is to “induce” supracompetitive pricing, the reasoning of which potentially might apply to monopolies.³⁸ However, one must realize that this statement presupposed a situation where oligopoly pricing could potentially break down. Thus, based on the principles of *Brooke Group*, competitive pricing should be, as a matter of law and policy, non-cognizable only when both discounting may break down monopoly pricing and when consumers³⁹ may experience gains.

In addition, the above analysis regarding the applicability of predatory pricing claims in the oligopoly context to any discounting in the monopoly context bears another caveat.⁴⁰ The *Brooke Group* Court asserted that the pre-requisites to recovery were so difficult, in part, because lowering prices was not only the mechanism of predatory

³⁷ *Id.* at 223.

³⁸ *Id.* at 223-24.

³⁹ Consumers should not be understood to mean only end users. In *Brooke Group*, despite the price war for wholesale business, the list price itself never changed. *See infra* text accompanying note 25.

⁴⁰ One might argue, as the *LePage's* Court, that there is also a serious issue regarding the applicability of predatory pricing to claims relating to discounting scenarios when predatory pricing is not asserted. *See LePage's Inc. v. 3M*, 324 F.3d 141, 151 (3rd Cir. 2003) (en banc). Regardless of whether there is one market or multiple markets, the economic rationale of *Brooke Group* would apply well in the oligopolistic context. In this context, a decrease in price could always tend to at least immediately increase competition. Furthermore, nothing in the *Brooke Group* opinion suggests that this case is conceptually limited apart from its general economic rationale and its discussion of the oligopolistic context.

pricing, but of stimulating competition.⁴¹ The cost of wrong judgments regarding predatory pricing was therefore high. In the context of a monopoly, however, the cost of a wrong judgment is arguably lower. A decrease in price cannot tend to increase competition to the same extent where little to none exists.

1.3. Ortho Diagnostic Systems: Above-Cost Bundled Discount Analysis #1 – Toward a Showing that Monopolist Price was Below Competitor Cost

Abbott Laboratories manufactured certain blood assays. These were: 1) HBsAg; 2) HBc or Anti-Core; 3) HCV; 4) HTLV; and 5) HIV – 1/2.⁴² Abbott alone manufactured all five of these commonly used assays and it possessed monopoly market shares in all of these five relevant markets, with the exception of HCV.⁴³ Abbott’s overall market share in assays was approximately “70 to 90 percent.”⁴⁴ Ortho Diagnostic Systems was a competitor to Abbott. It only widely offered three of the above tests, HBsAg, Anti-Core, and HCV.⁴⁵

In the fall of 1992, Abbott concluded a contract with the Council of Community Blood Centers (“CCBC”), a group of blood donor centers that constituted a large percentage of potential assay customers.⁴⁶ The relevant features of the CCBC were as

⁴¹ *Id.* at 226 (“The mechanism by which a firm engages in predatory pricing – lower prices – is the same mechanism by which a firm stimulates competition; because cutting prices in order to increase business often is the very essence of competition. . . .”).

⁴² *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. 455, 458 (S.D.N.Y. 1996).

⁴³ *Id.* at 458, 459 n. 3 (showing Abbott’s market share percentages in the five assays).

⁴⁴ *Id.* at 459.

⁴⁵ *Id.*

⁴⁶ *See id.* at 458 (noting that the Red Cross and CCBC members together accounted for 85-90% of the blood gathered by blood donor centers).

follows. First, the contract was for three years.⁴⁷ Second, discounts were given to customers that agreed to purchase either four or five assay products.⁴⁸

This lawsuit arose when Ortho alleged, inter alia, under Section 2 of the Sherman Act, that Abbott had used its monopoly power to effectively force CCBC members to buy Abbott assays.⁴⁹ Specifically, Ortho asserted that since it did not widely manufacture HTLV and HIV – 1/2, CCBC members would have to buy these products from Abbott and in turn would be coerced⁵⁰ into purchasing the other three types of assays from Abbott.⁵¹ This is because the CCBC could not have afforded to forego the discount on the other three products once they were already roped into purchasing Abbott products.

The Court proceeded to analyze this as follows. First, it cited *Griffith*⁵² and *Berkey*⁵³ for the broad proposition that while a monopolist could not “employ the power derived from a dominant position in the market,” it could “utilize the advantages of size.”⁵⁴ In the context of discounting or pricing, the Court suggested that a firm used its dominant power as opposed to its size when it drove “its competitors out of business with the intention thereafter of using its market power to restrict output, raise prices, and recoup the losses sustained in the competitive battle and then to enjoy the fruits of monopoly profits in the future.”⁵⁵

⁴⁷ *Id.*

⁴⁸ Greater discounts were given to those who purchased five assay products than four assay products. No discounts were given to those who purchased less than three assay products. *See id.* at 460.

⁴⁹ *Id.* at 463 (“The first [claim] asserts that Abbott had monopoly power in one or more of the alleged markets for HBsAg, Anti-core, HTLV and HIV – 1/2 sold to BDCs and that the package pricing features of the CCBC contract unlawfully maintained that power.”).

⁵⁰ *But cf.* Glazer & Henry, *supra* note 7, at 45 (making an argument that bundled discounts that give genuine discounts are not coercive, but incentivizing, and thereby give consumers better prices and choice).

⁵¹ Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 920 F. Supp. 455, 461 (S.D.N.Y. 1996).

⁵² United States v. Griffith, 334 U.S. 100, 107 (1948).

⁵³ Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979).

⁵⁴ Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 920 F. Supp. at 465.

⁵⁵ *Id.* at 466.

Economically, this meant that below cost pricing definitely ran afoul of Section 2 of the Sherman Act. “The reason is plain: below-cost pricing, unlike pricing at or above that level, carries with it the threat that the party so engaged will drive equally efficient competitors out of business, thus setting the stage for recoupment at the expense of consumers.”⁵⁶ Thus, the *Ortho* Court viewed the below cost prong of *Brooke Group* as representing something akin to a qualification of judicial economy and nothing more.⁵⁷

For this reason, it found *Brooke Group* inapplicable in the bundled discount context, where it was possible for a competitor who bundled discounts to eliminate a more efficient competitor. This could be accomplished, for example, in a two-product situation when the discount on a second purchased product exceeded the extra efficiency of the second competitor.⁵⁸ Under this line of analysis, “the fact that the components of Abbott’s package all are priced at or above variable cost [was] not alone fatal to Ortho’s Section 2 claims.”⁵⁹ However, since Abbott’s assays were priced above Ortho’s costs, there was no threat to eliminating an efficient competitor and thus no threat to competition in this particular case.⁶⁰

1.4. Concord Boat: Non-Bundled Fidelity Discounts

Brunswick Corporation was a manufacturer of stern drive engines, which it sold to boat manufacturers.⁶¹ Unlike Brooke Group, Brunswick was a monopolist. It possessed 75% market share in 1983.⁶²

⁵⁶ *Id.*

⁵⁷ This view is not entirely consistent with *Brooke Group*, the rationale of which was rather the fact that cutting prices was broadly the engine of competition and narrowly the means by which consumers could enjoy the interim competitive fruits of an oligopoly world. *See infra* Section 2.2.

⁵⁸ For a more elaborate hypothetical, *see Ortho*, 920 F. Supp. at 467.

⁵⁹ *Id.* at 468.

⁶⁰ *Id.* at 469. For a discussion of how this concept should be incorporated as an element of Section 2 discounting analysis in the above cost pricing context, *see infra* Section 2.5.

⁶¹ *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1043-44 (8th Cir. 2000).

In 1984, Brunswick began offering a discounting program to boat manufacturers for stern engines. This program consisted of three types of discounts, discounts for multi-year contracts, volume discounts, and market share percentage⁶³ discounts.⁶⁴ Neither of these programs contained exclusive dealing requirements, since “none of the programs restricted the ability of builders and dealers to purchase engines from other engine manufacturers.”⁶⁵

The boat builders who bought the stern engines from Brunswick subsequently brought a lawsuit, contending, inter alia, that the discount programs were an attempt to exclude competitors and that it enabled Brunswick to charge supracompetitive prices in violation of Section 2 of the Sherman Act.⁶⁶ Specifically, they argued that the discount killed competition at the stern engine level, since Brunswick had effectively placed “golden handcuffs” on the boat manufacturers that effectively kept them from dealing with other engine manufacturers.⁶⁷ The Court accordingly framed the usual Section 2 inquiry as whether Brunswick had possessed monopoly power in the relevant market and whether that monopoly power was willfully maintained through anticompetitive conduct.⁶⁸

The Court, like the *Brooke Group* Court, first proceeded very broadly. It cited the already mentioned principle of *Atlantic Richfield*, cited by the *Brooke Group* Court, that

⁶² *Id.*

⁶³ Market share percentage discounts happen where a seller discounts by a certain percentage in exchange for the customer accepting to buy a certain percentage of its market share. See Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶768b2, at 148 (2d ed. 2002) (noting that market share discounts are less likely than quantity discounts to price discriminate against customers).

⁶⁴ *Concord Boat*, 920 F. Supp. at 1044.

⁶⁵ *Id.* at 1045.

⁶⁶ *Id.* at 1060.

⁶⁷ *Id.*

⁶⁸ *Id.*

“low prices benefit consumers regardless of how those prices are set. . . .”⁶⁹ It further noted, again citing *Atlantic Richfield* that in the absence of predatory prices, losses stemming from pricing “cannot be said to stem from an *anticompetitive* aspect of the defendant’s conduct.”⁷⁰ Finally, it discussed the aforementioned concern in *Brooke Group* that Courts could not efficiently distinguish legitimate conduct from hocus pocus price cutting claims.⁷¹ Largely based on these principles, the Court arrived at “the general rule that above cost discounting is not anticompetitive.”⁷² The Court thus had no difficulty concluding that cutting prices was a sufficient business justification under Section 2, particularly since there were no exclusive dealing contracts.⁷³

This case is significant in discounting jurisprudence because it is the first court of appeals case to find that even a monopolist could engage in heavy discounting that encompassed a wide array of discounting schemes, including a market share scheme, provided that there were no exclusive dealing contracts and that pricing was above cost. However, this case, like *Ortho*, is arguably inconsistent with *Brooke Group*. At a minimum, it pushes the limit of *Brooke Group*, since existing monopolists who discount do not increase competition to the same extent.⁷⁴ On the other hand, *Brooke Group* equally asserted the *Atlantic Richfield* proposition that the below cost pricing prong

⁶⁹ *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990); *See supra* text accompanying note 33.

⁷⁰ *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000) (citing *Atlantic Richfield*, 495 U.S. 328 at 340-41). In the light of *Brooke Group*, it is extremely difficult to maintain that above cost pricing is predation, since below cost pricing is now an element of predatory pricing. *See supra* text accompanying note 35.

⁷¹ *Id.* at 1062.

⁷² *Concord Boat*, 207 F.3d at 1061. The Court claimed to arrive at this rule based on *Matsushita* as well as *Brooke Group*. Although *Brooke Group* may reasonably suggest this rule, *Matsushita* does not allow such an inference. *See supra* note 35.

⁷³ *Concord Boat*, 207 F.3d at 1062-63 (defining exclusive dealing contracts very strictly).

⁷⁴ *See supra* text accompanying note 41.

applies to *all* antitrust violations.⁷⁵ One might thus conclude that the Eighth Circuit in *Concord Boat* was the first court of appeals to resolve a fundamental tension in *Brooke Group* in favor of extending application of its predation standard to monopolies.

1.5. *LePage's*

3M manufactured Scotch tape as well as its own brand of private label tape called “Highland.”⁷⁶ Until the early 1990s, it had a market share above 90% in transparent tape, which was the relevant market encompassing both private label and branded tape.⁷⁷ *LePage's* manufactured its own brand of private label and possessed an 88% market share in private label tape in 1992. Its overall market share in transparent tape was a comparatively low 14.4%.⁷⁸

In 1993, 3M began a program called the “Partnership Growth Fund”⁷⁹ with which it offered bundled discounts to *LePage's* customers.⁸⁰ The bundled discount program not only provided considerable rebates, but spanned six lines of products, set target growth rates for each product, and required that all requirements be met upon penalty of losing the whole discount.⁸¹ The six lines of products that it spanned were: health care products, home care products, home improvement products, stationery products (including transparent tape), retail audio products, and leisure time products.⁸²

⁷⁵ See *supra* text accompanying note 33.

⁷⁶ *LePage's Inc. v. 3M*, 324 F.3d 141, 144 (3rd Cir. 2003) (en banc).

⁷⁷ *Id.* Private label tape refers to “tape sold under the retailer’s name rather than under the name of the manufacturer.” *Id.*

⁷⁸ *Id.* at 161.

⁷⁹ The program was originally called the “Executive Growth Fund.” *Id.* at 154.

⁸⁰ *Id.* at 154, 165. The *LePage* Court further asserted that the discounts “induced [customers] to eliminate or reduce their purchases of tape from *LePage's*.” *Id.* at 154.

⁸¹ *Id.*

⁸² *Id.*

By 1997, LePage’s market share in transparent tape had dropped to 9.35%, a decline of 35%.⁸³ LePage’s then brought a lawsuit, alleging, inter alia, that 3M’s bundled discount program violated Section 2 of the Sherman Act, since “3M maintained its monopoly by stifling growth of private label tape and by coordinating efforts aimed at large distributors to keep retail prices for Scotch tape high.”⁸⁴

The Court began its analysis by highlighting certain broad legal principles that have been established throughout the history of Section 2 of the Sherman Act that related to the meaning of “willfully acquired or maintained” power by monopolists, since 3M was clearly a monopolist.⁸⁵ First, *Alcoa*⁸⁶ suggested that a monopolist could not keep growing if entering competitors could not succeed. Second, *American Tobacco* noted that competition was essential and that neither exclusion nor intent was necessary for Section 2 liability.⁸⁷ Third, *Lorain Journal* held that although it was generally lawful to refuse to deal, this is not so when a monopolist does with the intent to eliminate a competitor.⁸⁸ More broadly, it suggested that monopolists who have an evil intent might be liable under Section 2 for otherwise benign conduct, particularly where the malignant effects on competition were readily foreseeable. Fourth, *Grinnell* had held that mergers, non-competition covenants and pricing practices (which subsidized non-monopolized geographical areas with profits from monopolized geographical areas) could not be lawfully employed to achieve monopoly status.⁸⁹ Fifth, *Aspen* implied that a monopolist could not even refuse to cooperate with competitors where there was a deliberate intent to

⁸³ *Id.* at 165.

⁸⁴ *Id.* at 144-45.

⁸⁵ *Id.* at 146 (citing *United States v. Grinnell Corp.*, 384 U.S. 563 (1966)).

⁸⁶ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

⁸⁷ *American Tobacco Co. v. U.S.*, 328 U.S. 781 (1946).

⁸⁸ *Lorain Journal Co. v. U.S.*, 342 U.S. 143 (1951).

⁸⁹ *U.S. v. Grinnell Corp.*, 384 U.S. 563 (1966).

discourage rivals, absent a clear efficiency justification.⁹⁰ Finally, *Kodak* held that a monopolist could not engage in exclusionary action to leverage an existing monopoly into another market.⁹¹

Overall, the Court's purpose in synthesizing these principles was to communicate that Section 2 jurisprudence in discounting cases cannot be simplistically reduced to a *Brooke Group* predation analysis, "a decision that was primarily concerned with the Robinson-Patman Act, not §2."⁹² This was because 3M's principal and only serious defense was the *Brooke Group* notion that "[a]bove-cost pricing cannot give rise to an antitrust offense as a matter of law, since it is the very conduct that the antitrust laws wish to promote in the interest of making consumers better off."⁹³ Against this argument, the Court was attempting to explain that one non-monopolist case that did not even take place in the confines of Section 2 could not suggest a principle that conflicted with nearly one hundred years of Sherman Act jurisprudence.

The applicability of such broad principles is unclear, since none of them specifically relate to the discounting context. One could therefore on this basis alone conclude that such principles are not definitive, since there are cases such as *Matsushita* and *Brooke Group* that are more analogous, monopoly context or not. As noted above, *Brooke Group* suggested that above cost discounting, which gives customers better prices in the short run, should categorically be allowed in the monopoly context if it generally presented a possibility of stimulating competition or if courts would be unable to generally distinguish between pro-competitive and anti-competitive above cost

⁹⁰ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁹¹ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

⁹² *LePage's Inc. v. 3M*, 324 F.3d 141, 151 (3rd Cir. 2003) (en banc).

⁹³ *Id.* at 147 (citing appellant's brief at 30).

discounting.⁹⁴ The question, then, is whether and when discounting in the monopoly context would ever have the potential to break down the monopoly structure, or at least to arguably break it down that the judiciary should end its inquiry as a matter of economy.

Areeda & Hovenkamp assert that in the monopoly context “anticompetitive effects [from discounting] are only likely when the large firm can offer a larger variety of products or services than the smaller firm does.”⁹⁵ This is clearly the situation at hand in *LePage’s*. The economic fear is that equally efficient smaller competitors that could match the discount on one product alone will be foreclosed from the market.

However, Areeda & Hovenkamp never maintain that anticompetitive effects *necessarily* result from a monopolist’s bundled discounts. Thus, one might argue under *Brooke Group* that bundled discounts *may* have the potential to break down the monopolist’s structure. Notwithstanding this possibility, the rationale of *Brooke Group* does not appear to hold very well when anticompetitive effects are likely. This is especially true if the judiciary is capable of distinguishing procompetitive from anticompetitive effects in the monopoly context. However, since bundled discounting is the only context where anticompetitive effects are likely, in other discounting contexts, the rationale of *Brooke Group* should hold even in the monopoly context.⁹⁶

One additional question that arises is a more focused issue, whether all types of bundled discounts are likely to foreclose competition.⁹⁷ This issue ties into *Ortho*, which

⁹⁴ See *supra* Section 2.2.

⁹⁵ Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶768b2, at 150 (2d ed. 2002); *But cf. id.* at 149-50 (“For single-item discounts, no matter how measured or aggregated, injury to an equally efficient rival seems implausible.”).

⁹⁶ This explains the result in *Concord Boat* that upheld a monopolist’s discount when bundled discounts did not exist.

⁹⁷ See *LePage’s*, 324 F.3d at 175 (noting that the *Smithkline* linkage approach required a similar inquiry); James A. Keyte, *LePage’s v. 3M – More Questions than Answers for the Lawful “Monopolist,”* ANTITRUST, Summer 2003, at 27 (highlighting the dissent’s schism with the majority and with the

held that discounting above the monopolist's competitor's cost was not anticompetitive, since there was no possibility of eliminating an equally efficient competitor.⁹⁸

From the point of view of economic theory, the *Ortho* Court's legal analysis of bundled discounts in the monopoly context makes sense for the following reasons. A competitor who is not and will not be foreclosed can always match the monopolist's prices, since its pricing must logically be above marginal cost. Such a situation eliminates the possibility of the only anticompetitive effect that can result from discounting.⁹⁹ This will have the effect of at least temporarily lowering prices and increasing competition, despite the monopolist's malignant purpose.¹⁰⁰ Thus, one might argue that the broad principles of *Atlantic Richfield* and *Brooke Group* apply to above cost discounting that is also above the competitor's cost: "Low prices benefit consumers . . . and . . . do not threaten competition. . . ."¹⁰¹ Moreover, *Brooke Group* would assert that the cost of wrong judgments is too high in this scenario, since competition is not being decreased.¹⁰²

How *Brooke Group* might apply to monopolist above cost discounting ultimately depends on if one reads it as applying to any discounting context where injury to competition is unlikely. *Brooke Group*, after all, never said that it would evaluate every possible permutation of oligopoly sub-contexts in order to determine whether injury to competition was likely. On the other hand, there is no literature to suggest that the

Smithkline competition inquiry); *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. 455, 469 (S.D.N.Y. 1996).

⁹⁸ *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. at 465.

⁹⁹ See *supra* text accompanying note 96.

¹⁰⁰ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws. . . .").

¹⁰¹ *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990).

¹⁰² See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (noting that discounting was the *mechanism* of competition).

oligopoly context required such a multi-tiered analysis. The monopoly context is different because discounting dangers fade out and reappear at various points.

For example, at the broadest metaphysical level, anticompetitive effects are surprisingly unlikely in the monopoly context as a whole.¹⁰³ At a more particular level, that of bundled discounts within monopolies, competitive injury is likely.¹⁰⁴ Finally, at an even more particular level, that of bundled discounts that are priced above competitor cost, competitive injury is again unlikely.¹⁰⁵ This is visually illustrated in Figure 1.¹⁰⁶

The current U.S. court jurisprudence is unclear. No Court has analyzed monopolist discounting by looking at the monopoly context as a whole, though *Brooke Group* might suggest this approach, since discounting in the monopoly context as a whole will generally lead to competitive results. The *LePage's* Court, however, looked at the likelihood of competitive injury in the bundled discount context. Finally, the *Ortho* Court and the *LePage's* dissent analyzed the likelihood of competitive injury in the above cost bundled discount context.¹⁰⁷

Depending on the level of abstraction at which this analysis is applied, i.e., whether it is applied in the monopoly context by itself or in the above competitor cost monopoly context, above-cost prices could potentially be either a defense in certain cases or a total defense in monopoly discounting under *Brooke Group*. Applying likelihood analysis on more and more particular levels will lead to increasingly murky

¹⁰³ See *Concod Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (2000); Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶768b2, at 149-50 (2d ed. 2002) (noting that anticompetitive effects are only likely in the bundled discount context).

¹⁰⁴ See Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶768b2, at 149-50 (2d ed. 2002).

¹⁰⁵ See *Ortho Diagnostic Systems*, 920 F. Supp. at 465.

¹⁰⁶ See *infra* Figure 1, at 20.

¹⁰⁷ *LePage's*, 324 F.3d 141, at 175 (Greenberg, J., dissenting) (requiring a showing of how much *LePage's* would have had to cut its prices).

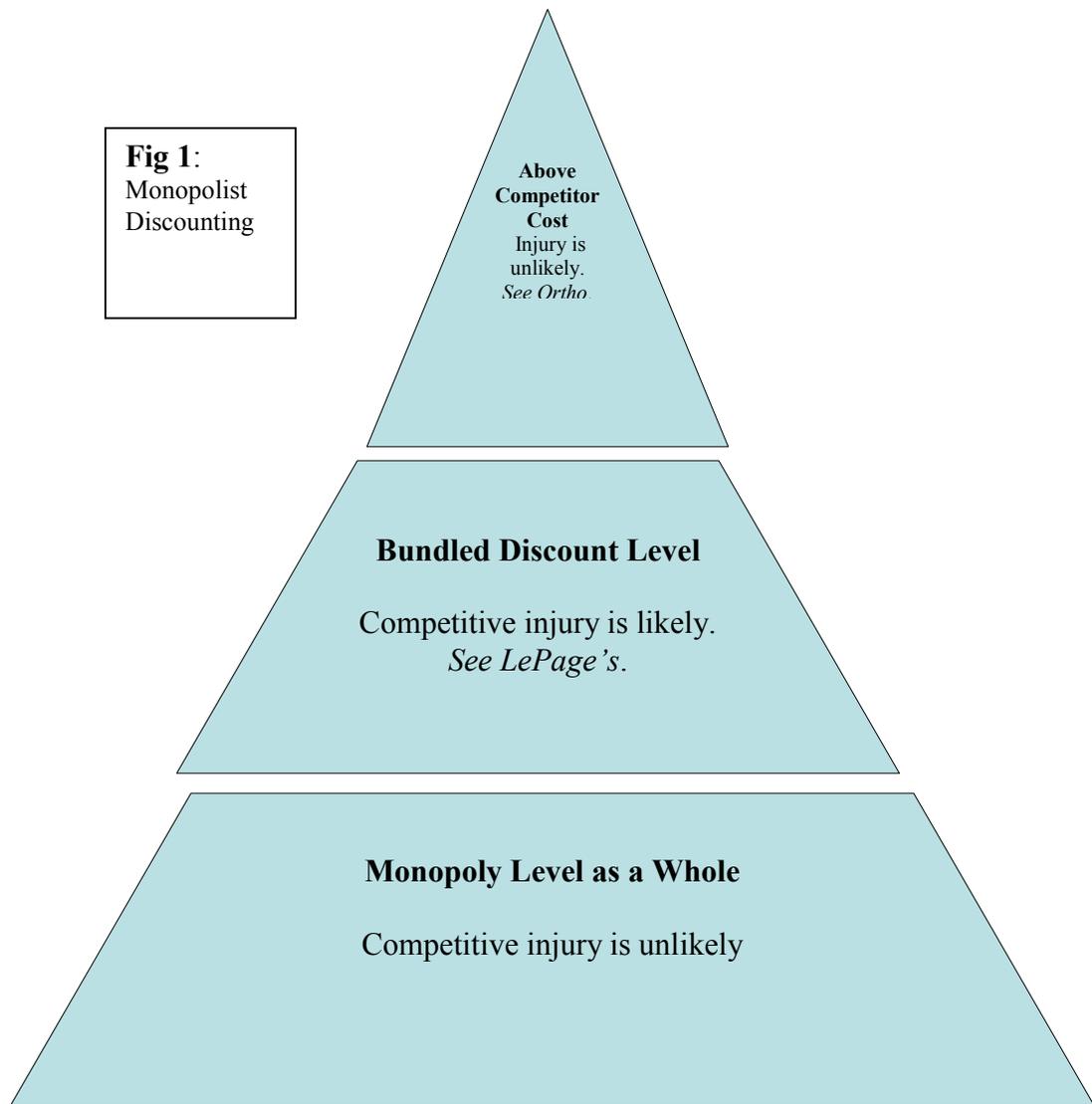
predictability. However, if *Brooke Group* applies beyond the oligopoly context, the Supreme Court should decide at which levels this analysis applies and not extend it too far to make it unwieldy.

This would be a daunting task, since the facts arguably change the probability of the analysis. For example, in *LePage's*, the Court likely analogized bundled discounts to tying in part due to the additional element of target growth rates. Applying *Brooke Group* thus has the danger of precluding judicial flexibility. The counter-argument is that if no other type of discounting is potentially anti-competitive, then the law should reflect that any discount that is above competitor cost is competitive.¹⁰⁸ This, in turn, means that the Supreme Court should at least provide the monopolist defendant with an affirmative defense that his pricing was above competitor cost. In fact, given the potential consumer benefit of discounting above competitor cost, the Supreme Court should probably require plaintiff to prove that the monopolist's pricing was below her cost and that she was efficient enough to compete on a product-by-product basis.¹⁰⁹

¹⁰⁸ See Aaron S. Edlin, *Stopping Above Cost Predatory Pricing*, 111 YALE L.J. 941 (2002) (arguing that discounting above monopolist cost but below competitor cost will eliminate competitors); B.S. Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J.L. & ECON. 129 (1972); Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory – and the Implications for Defining Costs and Market Power*, 112 YALE L.J. 681, 697 n. 52 (2003) (suggesting that above-cost fidelity discounts can raise competitor's costs and function as exclusive dealings). However, in the monopoly context, it is quite likely that a monopolist will have cost advantages. See John Temple Lange & Robert O'Donoghue, *Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC*, 26 FORDHAM INT'L L.J. 83 (2002). It should also be noted that exclusive agreements could still render such discounting anti-competitive, but exclusive agreements can be dealt with under traditional Section 2 analysis.

¹⁰⁹ *Ortho* suggests the efficiency prong of this approach. See *Ortho Diagnostic Systems*, 920 F. Supp. at 469 (“[A] monopolist . . . must allege and prove either that (a) the monopolist has priced below its average variable cost or (b) the plaintiff is at least as efficient a producer of the competitive product as the defendant, but that the defendant's pricing makes it unprofitable for the plaintiff to continue to produce.”).

Fig 1:
Monopolist
Discounting



After relating and applying broad Section 2 principles, the *LePage's* Court tried to find additional reasons why *Brooke Group* should not apply. First, it noted that recoupment was possible in this case, unlike in *Brooke Group*.¹¹⁰ Second, it tried to limit

¹¹⁰ *LePage's*, 324 F.3d at 151.

Brooke Group to the oligopoly context.¹¹¹ Third, it noted that LePage's had never asserted a predatory pricing claim.¹¹²

The possibility of recoupment is by itself irrelevant, since extending *Brooke Group* would require below cost pricing as well as recoupment. Only if the below cost pricing prong is not needed in a given monopoly context does this distinguishing matter. In addition, one cannot distinguish this case from *Brooke Group* merely on the basis of the inherent differences between the oligopoly and the monopoly context. First, the *Concord Boat* Court, without even flinching, applied *Brooke Group* to the monopoly fidelity rebate context, outside of the bundled discount sub-context.¹¹³ Second, the *Ortho* Court applied a *Brooke Group*-like analysis even within the bundled discount sub-context, when the monopolist did not price above her competitor's cost. These approaches are consistent with the broad language of *Brooke Group* and *Atlantic Richfield*.¹¹⁴ The *Concord Boat* Court additionally noted that its approach is correct because *Matsushita* and *Brooke Group* placed an emphasis on the "actual facts or realities of the marketplace."¹¹⁵ Outside of the bundled discount context, there is simply no danger under U.S. efficiency notions to competition from discounting, monopoly context or not. Moreover, even within the bundled discount context, as noted above, the danger is not absolute and should therefore be ascertained with regard to the "actual facts."

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (2000) (noting that Courts had never refused to apply *Brooke Group* to the monopoly context apart from the sub-context of bundled discounts, or linkage).

¹¹⁴ See *supra* Section 2.2.

¹¹⁵ *Concord Boat*, 207 F.3d. at 1062.

The fact that LePage's never asserted a predatory pricing claim should also have no bearing on the monopolization analysis. The *Ortho* Court previously addressed this question in a footnote and explained that what is relevant in Section 2 cases is whether conduct transgresses the monopolization, attempted monopolization or leveraging standard.¹¹⁶ This view seems correct as the alleged violation is Section 2, not a specific predatory pricing statute. Predation is the sole mode of analysis, rather than broad Section 2 principles, by which certain monopolization conduct¹¹⁷ should be narrowly evaluated when there is discounting that is either not likely to be anticompetitive, or raises issues that are as a practical matter of economy too difficult for the judiciary.¹¹⁸

In the next increment of its opinion, the *LePage's* Court consulted an array of primarily court of appeals' decisions in order to determine what type of conduct could be said to be "exclusionary or anticompetitive" under Section 2.¹¹⁹ In sum, the basic point that the *LePage's* Court noted was that any action by a monopolist to drive competitors from the market violated Section 2. This is illustrated by how "[e]ven unfair tortious conduct unrelated to a monopolist's pricing policies [had] been held to violate § 2."¹²⁰ In particular, it cited the Sixth Circuit *Conwood* case that found a Section 2 violation where a monopolist essentially physically wreaked havoc on its competitor's products in stores by removing their product racks.¹²¹ *Conwood* is an interesting Section 2 case. However,

¹¹⁶ *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. 455, 468 n. 16 (S.D.N.Y. 1996) ("As indicated above, Ortho must adduce evidence sufficient to ground a conclusion that the pricing should be condemned, whatever adjective may be applied. In the Court's view, the standard discussed in the text – pricing that could drive a more efficient competitor from the marketplace – is that which separates legitimate from illegitimate competition. Whether such behavior is characterized as 'predatory' is quite beside the point.").

¹¹⁷ For an inquiry regarding which monopoly conduct should be analyzed in this way, see *supra* Figure 1.

¹¹⁸ See *supra* Section 2.2.

¹¹⁹ *LePage's Inc. v. 3M*, 324 F.3d 141, 152 (3d Cir. 2003).

¹²⁰ *Id.* at 153.

¹²¹ *Id.* (citing *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002)).

as the *LePage's* Court itself noted, it did not take place in the pricing context. In the non-pricing context, exclusionary conduct by itself is sufficient to impose antitrust liability, whether or not actual foreclosure is likely to occur, since there is no countervailing consumer benefit. In a discounting context, however, as has been shown above, a different analysis is required.

After considering the exclusionary conduct case law, the *LePage's* Court turned its attention to the economic theory of bundled discounts and to its own Third Circuit precedent in *Smithkline*.¹²² It analogized the bundled discounts to tying and suggested that customers would buy from 3M only to receive a greater discount on a product that LePage's did not produce, not due to the quality or price of 3M's products.¹²³ The Court, however, neglected to consider, as mentioned above, that discounting above competitor cost cannot have anticompetitive effects.¹²⁴ If the victim competitor can likely still compete, then nothing limits *Brooke Group's* presumption that lower prices drives free competition.¹²⁵

The *LePage's* Court's reliance on *Smithkline* is also misplaced. First, as already noted, the plaintiff in *Smithkline*, as in *Ortho*, proved that it was unable to match prices.¹²⁶ In the pricing context, due to the confluence of case law and economic theory regarding consumer benefit from discounting, this is absolutely essential. Any other rule protects competitors at the expense of competition.

¹²² See *id.* at 154-57.

¹²³ See *id.* at 155 (citing Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 794, at 83 (Supp. 2002)) ("In the anticompetitive case, which we presume is in the minority, the defendant rewards the customer for buying its product B rather than the plaintiff's B, not because defendant's B is better or even cheaper. Rather, the customer buys the defendant's B in order to receive a greater discount on A, which the plaintiff does not produce.").

¹²⁴ See *supra* text accompanying note 109.

¹²⁵ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993).

¹²⁶ See *supra* note 97.

Even aside from contemporary Supreme Court precedent and economic theory, the *LePage's* decision is arguably at odds with *Smithkline*. The *LePage's* Court summarily concluded that “3M bundled its rebates for Scotch-brand tape with other products it sold in much the same way that Lilly bundled its rebates for Kefzol with Keflin and Keflex.”¹²⁷ This is not entirely accurate. Lilly used its monopoly in Keflin and Keflex to force customers to buy Kefzol instead of its competitor’s Ancef. If 3M used its monopoly power, it was to force customers of non-transparent tape product lines to buy 3M products instead of those of its competitors. It is not clear therefore how 3M could have linked its competitive product with *LePage's* within the meaning of *Smithkline*. Certainly, if linking existed, it is dubious whether it was the type of linkage that “*directly affected* the price, supply, and demand” of *LePage's* product.¹²⁸

Rather, it seems any such effect would have been indirect, since purchasing private label tape was not directly tied into the purchase of branded tape. To the extent that 3M’s discounted bundling scheme required purchasing *LePage's* substitutes, it was only by virtue of non-monopolized products in other lines. This was arguably merely linking a competitive product with a non-competitive product, a question that *Smithkline* did not necessarily address.

After considering whether the bundled discounts were anticompetitive, the Court proceeded to consider whether there were exclusive dealing contracts.¹²⁹ 3M argued that it had not engaged in exclusive dealing because only two of its contracts were expressly exclusive and because its agreements were not found to rise to the level of exclusivity

¹²⁷ *Id.* at 156.

¹²⁸ *Smithkline Corp. v. Eli Lilly and Co.*, 575 F.2d 1056, 1065 (3rd Cir. 1978).

¹²⁹ *LePage's Inc. v. 3M*, 324 F.3d 141, 157 (3d Cir. 2003) (en banc).

required under Section 1 of the Sherman Act.¹³⁰ The Court, however, asserted that exclusivity could also be an element of a Section 2 monopolization claim and that contracts could be exclusive even when not expressly exclusive.¹³¹

The relationship between bundled discounts and exclusive contracts is an extremely difficult one. On the one hand, one could argue that exclusive contracts that relate to price should be analyzed under the same *Brooke Group* framework, since they are part of the pricing context. However, it seems correct to assert that exclusive contracts should be analyzed under more general Section 2 principles, since they do not pertain to discounting as such.¹³² In other words, inevitable conflicts between the pricing context and *Aspen* should be resolved by ascertaining whether the nexus between the exclusive contract and the discounting is not sufficiently strong.¹³³ Relationships between a supplier and a customer where the customer is not literally coerced should generally be analyzed as having a nexus to discounting as such. If the nexus is not sufficient, however, then any exclusive conduct should be analyzed under a Section 2 rule of reason approach and subject to a justification defense.¹³⁴

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Specifically, they should be analyzed under the *Aspen* framework that inquires as to whether conduct is exclusionary or is justified by exclusionary conduct. See Mark R. Patterson, *The Sacrifice of Profits in Non-Price Predation*, ANTITRUST, Summer 2003, at 37 (noting that the monopolization standard is clear in the non-price context).

¹³³ This is concededly a murky concept, but some line must admittedly be drawn between genuine discounts that provide customers with incentives versus discounts that coerce customers. See *Brunswick Corp.*, 207 F.3d at 1062-63 (rejecting a plaintiff's exclusive agreement claim where it was possible for customers to deal with competitors); See Kenneth L. Glazer and Brian R. Henry, *Coercive v. Incentivizing Conduct: A Way Out of the Section 2 Impasse?*, ANTITRUST, Summer 2003, at 49 (arguing that genuinely incentivizing conduct that gives the customer a choice and lowers his cost should not be penalized under the antitrust laws).

¹³⁴ See Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶1802c, at 62 (2d ed. 2002) (noting that the preconditions for competitive harm in exclusive dealings are that the dealings cover a "significant portion of the downstream market," that there are "entry barriers or equivalent impediments" restricting the entry of potential competitors in the upstream market, and that there is "resulting prolongation of the dominant firm's ability to earn monopoly profits in the downstream market."); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,

If there is not a sufficient nexus between exclusionary contracts and discounting, one must ask what constitutes an exclusionary contract. The *LePage's* Court cited *Tampa Electric* for the proposition that exclusionary contracts were those that “effectively foreclosed the business of competitors.”¹³⁵ *Tampa Electric*, however, involved a twenty year contract with no termination provision, which would preclude a customer from seeking better prices if the contract covered her supply requirements.¹³⁶ In *LePage's*, however, there was no evidence that 3M customers could not generally forego the rebates and purchase from LePage's.¹³⁷ If the monopolist's customer is not locked into the monopolist's supply on a prolonged basis, then there is less reason to find an exclusive contract in any fidelity discount context.¹³⁸

The *LePage's* Court finally proceeded to consider whether the 3M's exclusionary conduct was anticompetitive and suggested that a monopolist's conduct was anticompetitive if the monopolist excluded a “competitor . . . from the essential facilities that would permit it to achieve the efficiencies of scale necessary to threaten the monopoly.”¹³⁹ On the discounting aspect by itself, *Microsoft* should not apply if it flies in the face of *Brooke Group*. The exclusionary conduct aspect beyond mere discounting

472 U.S. 585, 595, 605 (1985) (discussing the “valid business reasons” justification defense and the analysis for exclusionary conduct).

¹³⁵ *Id.* (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).

¹³⁶ *See Tampa Elec.*, 365 U.S. at 320.

¹³⁷ Other than the two express exclusive contracts, the evidence is very sparse. K-Mart's statement that it could not deal with LePage's for three years did not necessarily indicate exclusive dealing, since K-Mart might have merely thought that LePage's would refuse to match 3M's rebates. If 3M's price was above LePage's cost, then the antitrust laws should not protect LePage's refusal to match 3M's price merely because it was too painful. In this situation, to protect LePage's would be to protect a competitor over competition.

¹³⁸ This approach conforms to that of the 8th and 9th Circuits. *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062-63 (8th Cir. 2000) (not finding exclusive dealing where customers could purchase up to 40% from the monopolist's competitors); *Western Parcel Express v. United Parcel Serv. Of Am., Inc.*, 190 F.3d 974, 976 (9th Cir. 1999) (not finding exclusive dealing where a volume discount contract was terminable at will and did not prevent customers from dealings with competitors).

¹³⁹ *LePage's*, 324 F.3d at 159 (citing *U.S. v. Microsoft*, 253 F.3d 34, 70-71 (D.C. Cir. 2001)).

presents a more difficult issue, but *Microsoft* ultimately should not apply in the discounting context in the absence of exclusionary contracts. If there are no exclusionary contracts, i.e., if the nexus between the discount and the conduct is sufficiently strong, then the discount should be analyzed under the proposed *Brooke Group* framework.¹⁴⁰ However, if there actually were exclusive contracts in *LePage's*, then nothing bars application of *Microsoft*.

2. ABOVE COST MONOPOLIST DISCOUNTING IN THE EUROPEAN COMMUNITY

2.1. Introduction to EC Competition Law

Unlike in the United States, the issue of monopolist discount schemes is starkly simple in the EC. The Head of Unit at the Directorate General for Competition of the European Commission recently summarized the state of the law as follows: “One usually refers to ‘fidelity’ or ‘loyalty’ rebates to denote the discounting practices which may raise antitrust concerns under Art. 82 E.C. Treaty or Section 2 of the Sherman Act and to ‘quantity’ rebates to describe the lawful discounting practices.”¹⁴¹

Nonetheless, on a more detailed plane, all monopolist discounting issues are dealt with under Article 82 of the EC Treaty. Article 82 contains a list of “abuses” that is non-exhaustive.¹⁴² It reads:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular consist in:

¹⁴⁰ See *supra* Figure 1, at 20.

¹⁴¹ Luc Gyselen, *Rebates: Competition on the Merits or Exclusionary Practice?*, in European Competition Law Annual: What is Abuse of a Dominant Position (Winter 2003/2004), available at http://europa.eu.int/comm/competition/speeches/text/sp2003_017_en.pdf.

¹⁴² See John Temple Lang, *Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82 EC*, 26 Fordham Int'l L.J. 83, 125 (2002) (noting that the EC Commission has stated that the list is illustrative).

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.¹⁴³

However, since the list is non-exhaustive, the EC has the power to find abuses in discounting decisions on broader criteria beyond Article 82's enumerations. The Court of First Instance¹⁴⁴ stated in *Tetra Pak*: "Article 86 [now Article 82] covers all conduct of an undertaking in a dominant position which is such as to hinder the maintenance or growth of the degree of competition still existing in a market where, as a result of the very presence of that undertaking, competition is weakened."¹⁴⁵ A dominant position was defined in *LaRoche*, a previous case, as a position of economic strength that allows a firm to behave to an appreciable extent independently of competitors.¹⁴⁶

The broad inquiry is therefore similar to Section 2 analysis in that neither dominant position analysis nor monopoly analysis prohibits such a position, absent evidence that the position was used to diminish competition. Nevertheless, the application of abuse of dominant position analysis in the EC has yielded results in the discounting context that are often at odds with U.S. monopolization analysis. In the next three sections, this Paper considers how the EC has applied Article 82 in both the below-cost and above-cost discounting context in non-fidelity, fidelity, and bundled rebates.

¹⁴³ TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, art. 43, O.J. (C 325/65) (2002).

¹⁴⁴ Antitrust cases in the EC are initially argued before the EC Commission. The Court of First Instance is the first level appellate Court.

¹⁴⁵ Case T-83/91, *Tetra Pak International SA v. Commission of the European Communities*, 1994 E.C.R. II-827, para. 114 (citing *Hoffman-La Roche*, 1979 E.C.R. 461).

¹⁴⁶ Case 85/76, *Hoffman-LaRoche & Co. v. Comm.*, at para. 38

2.2. *Hoffman-LaRoche*

LaRoche was the first EC case to deal with the same question as was presented in *LePage's*, the question of bundled discounts. On appeal, the Court of Justice, the highest Court in the EC, found that LaRoche had a dominant position in all of the bundled markets. These were vitamins A, B2, B3, B6, C, E, and H.¹⁴⁷ It furthermore proceeded to find that LaRoche had abused its dominant position on two bases, exclusive contracts and fidelity rebates that gave customers the incentive to deal exclusively with LaRoche.¹⁴⁸

The Court of Justice¹⁴⁹ then gave its reasons for its condemnation of bundled discounts. First, it focused on the intent to prevent customers from obtaining supplies from competing producers. It implied that this was problematic because it was “different from [methods of competition] which condition normal competition in products or services on the basis of the transactions of commercial operators” and thus had the effect of hindering competition.¹⁵⁰ Second, the Court of Justice also noted that the effect of the bundled discounts would be to apply dissimilar conditions to equivalent transactions, disadvantaging customers that did not participate.¹⁵¹ This in itself ran afoul of Article 82(c) of the EC Treaty.

LaRoche thus had the effect of firmly prohibiting bundled discounts in the EC as early as 1978. However, in the following years, Areeda & Turner’s economic analysis of above-cost discounting spread to the EC. These changes suggested a potential change in how the EC would view bundled discounts.

¹⁴⁷ *See id.* at para. 1.

¹⁴⁸ *Id.* at para. 80.

¹⁴⁹ The Court of Justice is the highest level appellate court in the EC.

¹⁵⁰ Case 85/76, *Hoffman-LaRoche & Co. v. Comm.*, at paras. 90-91.

¹⁵¹ *Id.* at para. 90.

2.3. AKZO

The case that laid the groundwork for a distinction between below-cost discounting and above-cost discounting is *AKZO/ECS*,¹⁵² which was handed down by the EC Commission. AKZO was a monopolist in the organic peroxides, while ECS was an up and coming competitor in the flour additive segment of organic peroxides.¹⁵³ AKZO threatened ECS to force it from the market and subsequently engaged in below cost pricing in the flour additive segment.¹⁵⁴ The Commission, based primarily on the strategic objective of price cutting alone, ruled for ECS.¹⁵⁵

The Court of Justice, however, heavily influenced by *Areeda & Turner*, decided there should be a separate analysis for below-cost and above-cost discounting.¹⁵⁶ Thus, it held that discounting below cost was presumptively predatory, while discounting above cost was predatory if there was a plan by a dominant firm to eliminate a competitor.¹⁵⁷

AKZO had similar economic concerns to the *Brooke Group* Court in the United States. *Brooke Group*, however, unlike *AKZO*, patently suggested that above-cost discounting would not violate antitrust law at least under certain conditions.¹⁵⁸ The *Concord Boat* Court thus essentially extended *Brooke Group* to monopolists outside of the bundled discount context. And although *LePage's* so far limits a further extension, it is entirely conceivable that the Supreme Court, if it grants certiorari, might apply *Brooke*

¹⁵² Commission Decision No. 85/609/EEC, O.J. L 374/1 (1985).

¹⁵³ See John Temple Lang, *Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82 EC*, 26 *Fordham Int'l L.J.* 83, 125 (2002).

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* at 126.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ *Brooke Group*, unlike the EC Court of Justice, also requires a showing of recoupment when there is below-cost pricing. Compare *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) with *Tetra Pak*, 1991 E.C.R. II-1483 at para. 100 (holding that recoupment was not required under Article 82).

Group in the bundled discount context when a monopolist's product is priced above competitor cost.¹⁵⁹ Subsequent European Courts, as shown below, nevertheless heavily limited *AKZO* and found reasons why the above-cost framework should not apply.

2.4. Above-Cost Discounting After *AKZO*

In *Hilti*, the Commission asserted that a case of monopolist above-cost discounting did “not hinge on whether the prices were below costs. . . .”¹⁶⁰ Hilti was a nail gun and nail manufacturer that engaged in selective discounts aimed at stopping competitors' customers from purchasing competitor nails.¹⁶¹ Its means namely included tying, bundled discounts, inducing dealers not to fulfill orders, and selective pricing.¹⁶² The Court primarily found these practices to be an abuse because of Hilti's “attempts to prevent or limit the entry of independent producers of Hilti-compatible consumables into these markets.”¹⁶³

Subsequently, in *Irish Sugar*, the Court made it plainly clear that even single line above-cost market share and target rebates would not be tolerated in the non-bundled context. Both rebates were essentially rejected because they were not “normal quantity discount[s]” and had the “effect of tying a customer to the dominant supplier.”¹⁶⁴

Clearly, the European Courts, as shown in *Irish Sugar*, have a different understanding of tying a customer to a dominant supplier than the U.S. courts. In *Concord Boat*, the theory of “golden handcuffs” was rejected as long as an agreement did

¹⁵⁹ See *supra* Section 2.5.

¹⁶⁰ See Commission Decision No. 88/138/EEC, O.J. L65 (1987) [*Hilti*].

¹⁶¹ See John Temple Lang, *Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82 EC*, 26 *Fordham Int'l L.J.* 83, 127 (2002).

¹⁶² *Id.* at 128.

¹⁶³ See Commission Decision No. 88/138/EEC, O.J. L65, at para. 74 (1987) [*Hilti*].

¹⁶⁴ See Case T-228/97, *Irish Sugar plc v. Comm.*, 1999 E.C.R. II-2969 (1999), at para. 194, 203.

not by its terms prevent a customer from dealing with a competitor.¹⁶⁵ Nonetheless, it is now settled European law that non-quantitative based discounting will run afoul of Article 82 simply because it provides an incentive to deal exclusively with the monopolist, regardless of whether it is above-cost.¹⁶⁶

3. CONCLUSION: A COMPARATIVE PERSPECTIVE

The U.S. and the EC are not so different in their rationales. As has already been shown, both the U.S. and the EC deal with above-cost monopolist discounting by broadly prohibiting conduct that will result in a diminution of competition. The broad economic rationale in both the U.S. and the EC is also similar. In attempting to clarify outstanding ambiguities regarding EC discounting law, the Commission recently stated that the enforcer's intervention in discounting is tricky "because it is inspired by faith in competition as a process of rivalry between competitors *and* in this process' contribution to customer and consumer welfare in the longer run. This 'faith' should not be of the religion kind but have sound economic underpinnings. If not, the enforcer might end up protecting one or more *competitors* in rivalry rather than the structural *process* of rivalry between all of them."¹⁶⁷ This obviously echoes what the U.S. Supreme Court has itself often stated.¹⁶⁸

Furthermore, the Commission has stated that in its view "dominant companies will be living dangerously under Art. 82 when they offer prices which equally efficient

¹⁶⁵ See *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062-63 (2000) (discrediting a golden handcuff theory when customers are merely incentivized and can walk away at any time).

¹⁶⁶ See Einer Elhauge, *Defining Better Monopolization Standards*, 56 *Stan. L. Rev.* 252, 256-57 (2003) ("[U]sing above-cost prices cuts to drive out rivals [] has been labeled 'competition on the merits' in the United States but not 'normal competition' in Europe.").

¹⁶⁷ Gyselen paper p. 5

¹⁶⁸ See *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962) (noting that antitrust laws were passed for "the protection of competition, not competitors").

rival competitors cannot match.”¹⁶⁹ These words appear similar to the logic that has driven the U.S. position that single line discounts are always acceptable, absent an exclusive contract.¹⁷⁰ This economic rationale is that: “For single-item discounts, no matter how measured or aggregated, injury to an equally efficient rival seems implausible.”¹⁷¹ Nevertheless, the EC and the U.S. results curiously diverge, particularly in the area of above-cost single line non-bundled fidelity rebates.¹⁷² This divergence is visually illustrated below.

United States		EC
Allowed.	Quantitative Discount	Allowed.
Allowed. <i>See Concord Boat.</i>	Non-Bundled Fidelity Discount	Not Allowed. <i>See Irish Sugar.</i>
Not Allowed, but Supreme Court could in the future conceivably allow in certain cases under <i>Brooke Group</i> .	Bundled Discount	Not Allowed. <i>See LaRoche.</i>

If the rationale is to avoid eliminating equally efficient competitors in both the U.S. and the EC, the only explanation for the divergence is that the U.S. and the EC have different ideas about what it means to eliminate an equally efficient competitor. In the EC, case law suggests that only quantitative based discounting does not eliminate equally efficient competitors. It also suggests, after *Irish Sugar*, that quantitative based discounting is discounting that does not incentivize a customer to deal exclusively with a monopolist. The implication in efficiency terms is that a competitor of a monopolist is not less efficient than the monopolist because he cannot similarly incentivize his customers. Under U.S law, however, it would be assumed in a single line context that

¹⁶⁹ *Id.*

¹⁷⁰ *See Concoard Boat*, 207 F.3d 1039.

¹⁷¹ Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, ¶768b2, at 149-50 (2d ed. 2002).

¹⁷² *Compare Concord Boat*, 207 F.3d 1039, with *Case T-228/97, Irish Sugar plc v. Comm.*, 1999 E.C.R. II-2969 (1999).

such a competitor was not equally efficient. In other words, U.S. law assumes that competitors should be able to compete with the monopolist in a single context, notwithstanding any qualities inhering in monopoly itself. Any such inherent qualities, under U.S. law, are implicitly viewed as efficiencies.¹⁷³

The EC view, however, cannot help but imply that there is some evil inhering in the monopoly itself that ultimately makes it less efficient, since an inability to compete in single line non-bundled fidelity discounts can only stem from a tangible efficiency. This view is perhaps rooted in the fact that few monopolies were historically acquired through skill or ingenuity, but were “created by regulations, government subsidies, or permitted combinations. . . .”¹⁷⁴ Regardless of the origin of the view, it implies that somehow or other, despite immediate operational efficiencies, monopolist discounting that incentivizes loyalty will end up crushing competitors to the detriment of competition.

Efficiency in the EC thus obtains a profoundly historical sense. The efficiency of size, if it exists, does not exceed the efficiency of time. Although different from the U.S.

¹⁷³ For broader evidence of this phenomenon, consider the debate between the EC and the U.S. over the GE/Honeywell Merger. Assistant Attorney General Charles A. James remarked:

We concluded that the merger firm would have offered improved products at more attractive prices than either firm could have offered on its own, and that the merged firm’s competitors would then have had a great incentive to improve their own product offerings. This, to us, is the very essence of competition, and no principal is more central to U.S. law than that antitrust protects competition, not competitors.

In stark contrast, the EC focused on how the merger would affect European and US competitors, essentially concluding that the very efficiencies and lower prices the transaction would produce would be anticompetitive because they might ultimately drive some of these competitors from the market or reduce their market shares to a point where they could not longer compete effectively. In other words, the EC determined that the fact that customers would be ‘induced’ to purchase more attractive and lower-priced GE/Honeywell products, rather than those of its competitors, was a bad thing of a sort that its antitrust law ought to prohibit.

Charles A. James, Assistant Attorney General, Antitrust Division, US DoJ, International Antitrust in the 21st Century: Cooperation and Convergence, Address Before the OECD Global Forum on Competition, Paris, France, 17 Oct. 2001, *available at* http://www.howrey.com/docs/AT_RevAmericas2004_private.pdf.

¹⁷⁴ Einer Elhaunge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 252, 307 (2003) (noting that the EC generally imposes more duties on monopolists than the U.S. does).

view, the EC view seems to be based in solid economic theory. The ultimate resolution between the two views is more metaphysical than economic, since it is ultimately impossible to know which efficiency is greater. On the one hand, EC law might foreclose synthesized progressive efforts that are intimately tied to size. On the other hand, U.S. law might foreclose the struggle that is also essential to progress.

As for the uncertainty in the U.S. regarding bundled discounts, the comparison between EC and U.S. law over non-bundled above-cost discounts helps to remind us that the efficiency rationale used by U.S. economists and implicit in *Brooke Group* and *Concord Boat* is functionally normative. At the same time, it lends support for the argument previously advanced in this Paper that U.S. law should incorporate an element into the bundled discount context that requires a plaintiff to show that he was equally efficient and that the total discount did not fall below the competitor cost, if the Supreme Court essentially upholds the reasoning in *LePage's* that implies that monopolist competitors should not be expected to compete at the bundled discount level. This efficiency showing should be required because U.S. law does categorically expect the efficient non-monopolist to be able to compete on its own in single line contexts. The above competitor cost showing should be required because U.S. law does expect companies to be able to compete when it is possible. In sum, it is fundamentally inconceivable under U.S. conceptions of efficiency and the logic of size¹⁷⁵ that a company could not compete with a countervailing incentive plan when the monopolist prices above the competitor cost, absent a genuine exclusive agreement.

¹⁷⁵ See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979) (suggesting that a monopolist could “utilize the advantages of size”).