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Can Bundled Discounting Increase Consumer Prices Without Excluding Rivals?

A Comment on *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit* by Einer Elhauge

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Can Bundled Discounting Increase Consumer Prices Without Excluding Rivals?

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I. Introduction

Since we abhor suspense, we will quickly answer the question our title poses: No. As a general matter, bundled discounting schemes lower prices to consumers unless they are predatory—that is to say, unless they exclude rivals and thereby permit the bundled discounter to price free of competitive restraint. The corollary of this observation is that bundled discounting is generally pro-competitive and pro-consumer and should only be condemned when it is capable of excluding rivals.[1]

We pose and answer this question because it is at the heart of Section VI of Professor Elhauge's provocative draft article which is the subject of this symposium.[2] In Section VI, Professor Elhauge argues that bundled discounting can have "power effects" identical to conventional tying arrangements irrespective of any exclusionary effect on rivals as well as that cost/revenue tests for bundled discounting perversely immunize the worst bundled discounting schemes—those that represent the highest non-exclusionary price increases to consumers.

We disagree with Professor Elhauge on these propositions, as we do on many of the earlier arguments in his draft. At a later date, we will offer a fuller response to his arguments and a qualified defense of a "neo-Chicago" perspective on monopoly leverage, price discrimination, and bundled discounting. Qualified, because we do not believe that monopoly leverage is impossible, that price discrimination is always efficiency-enhancing, or that bundled discounts can never exclude competitors or harm consumers. Rather, we believe that if Chicago overstated its case on each of these points, post-Chicago has far overstated its case on

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each of these points. Indeed, the best available empirical evidence suggests the frequency of instances of bundled discounts and tying arrangements resulting in harm to consumers as compared to those arrangements improving consumer welfare is very low.[3] Particularly, we believe that:

1. The conditions necessary for monopoly leveraging through tying are narrow and rarely exhibited in real markets and, thus, we should continue to be presumptively skeptical about leverage claims. Further, the theoretical analyses of anticompetitive bundling, tying, and bundled discounts contain highly stylized and restrictive assumptions, assume away efficiency benefits of these practices, and have not generated testable hypotheses supported by empirical tests.

2. The conditions necessary for price discrimination through tie-ins to be output-reducing are rarely exhibited in real markets. Price discrimination should be thought of as competitively neutral in static efficiency terms and frequently, but not always, competitively beneficial in dynamic efficiency terms. More precisely, and contrary to Professor Elhauge's analysis, price discrimination's effects on both static total- and static consumer-welfare are generally ambiguous depending on market conditions. When one takes into account the incentives for price discrimination to intensify price competition and dynamic efficiencies such as the incentive to innovate and offer new products, it becomes clear that sound antitrust policy should view price discrimination as a legitimate and normal part of the competitive process.[4]

3. Bundled discounts only rarely partake of the qualities of tie-ins and they should generally enjoy legal protection unless they are predatory.

INDEED, THE BEST AVAILABLE EMPIRICAL EVIDENCE SUGGESTS THE FREQUENCY OF INSTANCES OF BUNDLED DISCOUNTS AND TYING ARRANGEMENTS RESULTING IN HARM TO CONSUMERS AS COMPARED TO THOSE ARRANGEMENTS IMPROVING CONSUMER WELFARE IS VERY LOW.

For the purposes of this symposium, we tackle only the last of these propositions. In brief, we argue that Elhauge's "power effects" thesis as to bundled discounts rests on a faulty premise—that the monopolist is free to threaten an unlimited price on the monopoly item in the bundle and, consequently, can charge a higher price for the bundle than it could for sales of the goods individually. To the contrary, since a rational monopolist will already have charged the profit-maximizing monopoly price on the monopoly item, its threat to charge a higher price unless the customer accedes to a bundled discount demand is hollow. Execution of such a threat would harm the monopolist, and harm it considerably more than the opposite predatory strategy of cutting prices.

While there may be a few examples of such strategies in the real world, we are skeptical that such strategies occur frequently enough to organize legal rules around them. The economics literature and available evidence supports our skepticism. Bundled discounting law should focus on the paradigmatic threat—that a bundled discounting package will exclude rivals and thereby increase the defendant's monopoly power.

II. Bundled Discounts as Tie-Ins

A practice ostensibly related to tying that has received much attention in the last decade is bundled discounting—where the dominant firm offers customers a discount if they choose to purchase a package of goods or services.[5] There is presently a circuit split over how antitrust law should evaluate such discounts. The U.S. Court of Appeals for the Third Circuit treats them as akin to tying or exclusive dealing arrangements.[6] The U.S. Court of Appeals for the Ninth Circuit treats them as akin to predatory pricing, subject to a discount attribution rule.[7]

Bundled discounts differ nominally from tie-ins insofar as they offer the buyer a choice of either buying the competitive or monopoly products. The Supreme Court has suggested that the offering of the option to buy the two goods unbundled defeats a tying claim, even if the two goods are offered jointly at a lower price.[8] Still, courts have sensibly recognized that the seller's offer to sell the goods unbundled could be a sham concealing a de facto tying arrangement if the unbundled price was set so high that it would not be economically rational for any customer to accept it.[9]

However, when a significant number of buyers choose to disregard the discount offer and instead purchase the goods individually, it is unlikely that the discount offer is coercive.

However, when a significant number of buyers choose to disregard the discount offer and instead purchase the goods individually, it is unlikely that the discount offer is coercive. The volume of the Areeda-Turner treatise on which Elhauge was a co-editor suggests, as a rule of thumb, that only "separate sales [falling] below ten percent presumptively indicate a de facto tie."[10] The treatise further suggests that when separate sales are above ten percent, the package discount should not be treated as tying at all and that the defendant should not be required to justify the discount as cost-justified.[11]

In his current draft, Elhauge rejects the Treatise's position and proposes a new test that would treat non-exclusionary bundled discounts as unlawful tie-ins under specified circumstances. Elhauge would condemn as an unlawful tie those bundled discount offers where the defendant has market power over the "linking product," the "unbundled price for the linking product exceeds the but-for level," and the defendant cannot offer an offsetting efficiency justification.[12]

As an initial matter, we are very skeptical that identifying the "but-for" price of the linking, *i.e.*, monopoly, product will be feasible in most cases. Elhauge admits the "determining the but-for price can be difficult," but asserts—without citing any examples—that internal business documents or regression analyses will often provide evidence of the but-for price.[13] There are many problems with Elhauge's suggestion.

For one, Elhauge assumes a clean before-and-after story where the defendant used to engage in only single-product pricing and then moved to a bundled discount scheme. In our experience, bundled discounts stories are usually far more dynamic than that simplistic two-stage analysis, with constantly shifting pricing and discounting structures, product innovation, cost changes, and industry dynamics making it impossible to determine clean before-and-after figures.

Further, the search for the but-for price is bound to run into the difficulty that, as both Elhauge and Chicago School scholars believe, bundled discounts often produce price discriminatory effects. A seller with a monopoly over the linking product will often have engaged in some price discrimination even prior to initiating a bundled discount program and will probably do so afterwards. The aggrieved plaintiff may very well be the loser in the shift from a less-efficient to more-efficient price discrimination scheme. From the plaintiff's perspective, the shift may appear to raise prices in the linking product even though average prices fall. It would be anomalous to allow the individual plaintiff's idiosyncratic experience to determine the legality of the discount, but proving the effect on average prices across all buyers may be impossible.

FURTHER, THE SEARCH FOR THE BUT-FOR PRICE IS BOUND TO RUN INTO THE DIFFICULTY THAT, AS BOTH ELHAUGE AND CHICAGO SCHOOL SCHOLARS BELIEVE, BUNDLED DISCOUNTS OFTEN PRODUCE PRICE DISCRIMINATORY EFFECTS.

In any event, Elhauge's assumption that dominant firms will be able to increase the linked product price over the but-for price rests on a faulty premise. He asserts that "[b]ecause the defendant is free to set the noncompliant prices at whatever level it wishes, it can set them above the levels that would have prevailed 'but for' the bundling."[14] Thus, Elhauge argues, a package price that nominally offers discounts does not reflect true price reductions at all, but only a concession off a threatened price that is higher than the prices that would have prevailed absent the monopolist's demand for bundling. This assumption frames much of Elhauge's "power effects" arguments about bundled discounts.

The central problem with Elhauge's argument is that the monopolist cannot obtain much leverage by demanding a price above its profit-maximizing monopoly price. Unless the monopolist has been engaging in some form of limit pricing,[15] it has already priced the monopoly product at the level that makes any further price increase unprofitable. Consequently, any threatened price increase on the monopoly product to punish the buyer for failing to purchase the package would inflict costs on the seller as well as the buyer. The threat to raise the "tying" product's price thus lacks credibility.

Suppose, for example, that the dominant firm enjoys a monopoly over Product A but faces competition for Product B. The profit-maximizing monopoly price for Product A is $10 and the marginal cost of Product B—which is also the price prevailing in the competitive market—is $5. The dominant firm would ordinarily sell the AB combination for $15. Suppose it seeks to leverage its market power from Product A to Product B. Under Elhauge's approach, the dominant firm could obtain a price above $15 by threatening to increase the price of Product A to, say, $12 if buyers refused to pay, say, and $16 for an AB package. But since $10 was the profit-maximizing monopoly price of A, it would be unprofitable for the dominant firm to raise the price to $12. At $12, the dominant firm would face elastic demand and unprofitably lose sales. Hence, the threat to raise price to $12 would be a hollow one, since it would be as unprofitable for the seller as for the buyer.

One might respond that raising the monopoly price above the profit-maximizing level is simply another form of profit sacrifice that monopolists might utilize to discipline the market. Like below-cost pricing, such unprofitably high pricing might allow the monopolist to exclude rivals or engage in wealth-transferring price discrimination strategies which would, in turn, permit the monopolist to recoup the costs of its unprofitable pricing campaign.[16]

But, if below-cost pricing strategies are risky propositions for the monopolist, above-profit maximizing pricing strategies are even more so. When a predator lowers its price below its cost, it expands output, enlarges its market share, steals customers from its rivals, and often brings new customers into the market. One of the reasons that it is difficult to distinguish predatory pricing from pro-competitive promotional pricing is that, even in a competitive market, temporary aggressive price-cutting may have long-run benefits for the price-cutter if it is able to build customer loyalty in its expanded share of the market. Also, expanding the dominant firm's market share may boost its status and prestige in the market. Even if the price-cutting is truly predatory in the sense that the dominant firm would not have undertaken such a strategy unless it expected to be able to recoup its lost profits in a less-competitive market, the enhanced market share and its loyalty-building and status-building effects may be silver linings in the event the predatory campaign fails.

But, if below-cost pricing strategies are risky propositions for the monopolist, above-profit maximizing pricing strategies are even more so.

Pricing above the profit-maximizing price is just the opposite. The dominant firm must now cede sales to rivals. Those rivals obtain short-run benefits as their own market share expands and may also enjoy the long-run customer loyalty and prestige enhancements that a predator experiences. Although the supra-monopoly price need only continue long enough to coerce customers to accept the bundle, that may be long enough to shift the market dynamics in favor of rivals. It is unlikely that many firms would frequently run such a risk. If there is one thing that makes sales executives nervous, it is the prospect of their customers experimenting with a rival's product.

We anticipate three objections to this line of argument. First, some may object that the monopolist over Product A does not have to fear diversion of sales to rivals since, by definition, there are no rivals for Product A. But this argument misconceives the nature of competition in two ways. First, a monopoly does not have to mean a 100 percent market share. The dominant firm may very well face some limited competition within the relevant market and those competitors may be positioned to expand production in the event of further price increases by the dominant firm.

There is an even more fundamental economic point. A monopolist's profit-maximizing price occurs in the elastic portion of the demand curve. The reason that any further price increase would be unprofitable is that the marginal customers would begin switching to other products if the defendant increased its price. Hence, by increasing its price above the profit-maximizing level, the defendant would be inviting its customers to divert purchases to adjacent products that were not previously in direct competition with the monopolist's product. In effect, the monopolist's price increase would be encouraging its customers to consider substitutes for the monopolist's product. Most sales managers would not want to run the risk of their customers experimenting with new products and deciding they prefer them to the monopolist's product.

A second line of objection would follow the game theoretic literature on predatory pricing that suggests that dominant firms do not have to incur the costs of actual predatory pricing if they can obtain a reputation as predators and, hence, deter entry by threatening predation.[17] Perhaps the monopolist could occasionally discipline a customer who rejects its bundled offer by raising the stand-alone monopoly price and thereby obtain a reputation as a punitive seller. As Frank Easterbrook demonstrated several decades ago, there are reasons to be skeptical about reputational theories in single-product predation.[18] There are even more reasons to be skeptical of such a theory when the threat is directed at customers rather than rivals. It is one thing to develop a reputation as a punisher of rivals and quite another to develop a reputation as a punisher of customers. Monopolists do not depend on the good will of their rivals, but they do depend on the good will of their customers.

IF THERE IS ONE THING THAT MAKES SALES EXECUTIVES NERVOUS, IT IS THE PROSPECT OF THEIR CUSTOMERS EXPERIMENTING WITH A RIVAL'S PRODUCT.

Finally, one might object that dominant firms can threaten a supra-monopoly price because the customers will not know that it will harm the monopolist. However, informational asymmetries between the buyer and seller are unlikely to allow the seller to bluff the buyer into believing the threat. The buyer has as much information as the seller about its demand elasticity. The buyer knows that at the threatened higher price point it will simply begin substituting other products and that the seller will therefore experience pain as well if it follows through on its threat. The buyer thus has a strong counter-threat to the seller's threat.

POST-CHICAGO HAS NOT YET MADE THE CASE THAT SUPRA-MONOPOLY PRICING THREATS ARE A REALISTIC OR FREQUENT OCCURRENCE.

We do not claim that a monopolist could never coerce customers to accept a bundle by threatening a supra-monopoly price on the tying product. We are simply skeptical that this would happen often enough to craft legal rules designed to prevent it. In the push-and-pull between Chicago and post-Chicago theories, the issue again comes down to evidence.[19] Post-Chicago has not yet made the case that supra-monopoly pricing threats are a realistic or frequent occurrence.

III. Bundled Discounts as True Discounts

In order to be considered a tying arrangement, bundled discounts would have to coerce buyers to forego their preferred buying patterns.[20] If such disguised tying occurs, it is surely in a small percentage of all bundled discounting cases. Bundled discounting is pervasive across competitive markets where market power is not conceivably present and where the practice therefore cannot be coercive. Further, bundled discounts that represent the transmission of savings from economies of scale or scope—which is often the case—are not coercive even in imperfectly competitive markets. Elhauge would permit a cost-justification defense akin to that allowed for commodity price discrimination under the Robinson-Patman Act.[21]

While such justifications should clearly be allowed if bundled discounts are held to be potentially anticompetitive, the post-Chicago School's focus on the buyer's motivations and justifications for bundled discounting schemes often misses the mark. For, in many cases, the buyer rather than the seller initiates the bundled discount scheme, or the buyer and the seller are equally in favor of the contract's bundled pricing structure.

Why would a buyer enter into a contract that made its favorable pricing options contingent upon minimum purchase volumes across multiple product lines? The answer is that the buyer may leverage its buying power across multiple product lines in order to obtain more favorable pricing. Hence, contrary to post-Chicago assertions that bundled discounting is not a true price reduction, buyer-initiated bundled discounting is often an essential feature in a buyer's strategy to lower procurement costs.

The formal analysis of buyer-initiated bundled discounting follows Klein & Murphy's analysis of retailer-initiated exclusive shelf-space contracts.[22] In Klein & Murphy's model, firms compete for preferred distribution from retailers relative to rival products. The preferred method of distribution often involves retailer exclusivity- or partial exclusivity-commitments in exchange for compensation from manufacturers, such as wholesale price discounts, slotting fees, or even cash payments.[23]

There are two fundamental economic questions raised by this form of competition. The first is whether there is a pro-competitive explanation for the purchase of preferred distribution or exclusivity.[24] The second is whether payment in the form of a discount, in this case a bundled discount, is efficient.[25] We focus on the first question here.[26] The retailers are able to obtain lower prices (or the equivalent) from manufacturers because, by committing that all of their customers will purchase a single brand within the relevant product category (spices, for example), the retailer elasticizes the demand facing the manufacturer.[27] The retailer essentially acts as its customers' bargaining agent, committing the customers to buy in a block instead of picking based on brand preference at the point of sale.[28] Customers lose variety but obtain lower prices.[29]

A similar analysis applies to buyer offers to purchase minimum volumes of a product from a diversified seller across the seller's various product lines. In a cost-free world, the buyer would prefer to pick and choose its brands on a product-by-product basis. However, the buyer might also prefer a price reduction to the option to maintain brand variety. By combining multiple products into a single package purchase, the buyer can credibly signal to the seller that it is foregoing its product variety preferences in exchange for a lower price. By jettisoning its individual variety preferences (or, to disaggregate the buyer, the variety preferences of the purchasing of separate product purchasers within a large organization), the buyer effectively elasticizes the demand facing the seller and can thereby drive the price lower.

> UNLIKE ELHAUGE'S MODEL OF THREATENED SUPRA-MONOPOLY PRICES, THERE ARE ABUNDANT REAL-WORLD EXAMPLES OF BUYERS PURSUING BUNDLED DISCOUNTING SCHEMES.

Unlike Elhauge's model of threatened supra-monopoly prices, there are abundant real-world examples of buyers pursuing bundled discounting schemes. Consider, for example, the federal government's procurement guidelines on bundling. The guidelines contemplate that federal government buyers may consider making solicitations for bundled contracts in order to lower the price of the acquired goods or services.[30] The guidelines recognize that bundling may have adverse effects on small businesses and therefore requires a finding that the bundling would have "measurably substantial benefits."[31] These include "cost savings or price reductions," "quality improvements that will save time or improve or enhance performance or efficiency," "reduction in acquisition cycle times," "better terms and conditions," and "any other benefits."[32] These "measurably substantial benefits" must generally equal 10 percent of the estimated contract value for contracts worth $75 million or less and at least 5 percent or $7.5 million (whichever is greater) for contracts worth more than $75 million.[33] In sum, the federal government's procurement guidelines call for federal buyers to solicit substantial discounts for entering into bundled contracts.

Similarly, medical supply Group Purchasing Organizations ("GPOs") and Pharmacy Benefit Managers ("PBMs") employ bundled discount strategies to drive prices lower on behalf of their constituencies (usually hospitals and insurance companies).[34] Elhauge's argument that "[b]uyers face a collective action problem that requires a collective action solution through antitrust law"[35] misses the point that GPOs, PBMs, and other buyer cooperatives that strategically employ bundled discounts are organized precisely in order to solve a collective action problem. By collectively committing to trade variety for lower prices, the purchasing organization prevents the seller from exploiting the individual members' variety preferences to obtain higher prices.

While the previous examples have generally focused on power buyers, a significant implication of Klein & Murphy's model is that the buyer's ability to elasticize the demand facing the seller and hence obtain lower prices does not depend on the buyer having monopsonistic power.[36] Hence, even relatively powerless buyers facing relatively powerful sellers may have the ability to bargain for lower prices by committing to purchasing multiple products. Far from being a seller-side power tool, bundled discounting may be a buyer-side power tool.

We do not claim that customer-initiated bundled discount schemes are uniformly beneficial to end consumers. Customer-initiated exclusive dealing may be of greater concern when the customer resells the product downstream and is thus capable of passing on any overcharge imposed by the seller.[37] Some intermediate buyers may tolerate bundled discounts that increase their own profitability even if the long-run effects of such discounts are to exclude competitors and thereby increase prices to end consumers. But that only means that the proper focus on bundled discount law should remain exclusion of rivals. While bundled discounts are not often exclusionary,[38] the possibility that they are disguised predatory discounts—not that they are disguised price increases—should be the focus of the antitrust inquiry.

IV. Conclusion

Professor Elhauge has written a thoughtful and important article that challenges the consensus that seemed to be emerging around a discount attribution test for bundled discounts. Nonetheless, his creative arguments rest on flawed assumptions. Bundled discounts generally benefit consumers and only harm them in the narrow set of circumstances where they exclude rivals. "Power effects" should not be a concern of bundled discounting law. In future work, we will address other aspects of his paper.

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1 Whether those rivals should be "equally efficient" to the defendant is a topic that we do not address in this symposium essay because it is not necessary to the narrower topic on which we focus.

2 Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, Discussion Paper No. 629, forthcoming 123 Harv. L. Rev. (Dec. 2009), *available at* http://www.law.harvard.edu/programs/olin_center/.

3 *See generally* Bruce H. Kobayashi, *Does Economics Provide A Reliable Guide to Regulating Commodity Bundling By Firms? A Survey of the Economic Literature*, 1(4) J. Competition L. Econ. 707 (2005); David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 Yale J. Reg. (2005).

4 *See* Joshua D. Wright, *Missed Opportunities in Independent Ink*, 5 Cato Sup. Ct. Rev. 333, 348-356 (2006) (discussing relationship between price discrimination and welfare measures). We leave for later analysis our objection to Professor Elhauge's claim that antitrust law has committed to a course that would require it to micromanage markets to identify and sanction instances of tying, bundling, and bundled discounts that reduce static consumer welfare. We believe such a policy would be counter-productive for consumers, unadministrable, and run afoul of antitrust law's tolerance of simple monopoly pricing (which obviously reduces static welfare), and would be inconsistent with the Supreme Court's antitrust jurisprudence.

5 The literature includes Philip Areeda & Herbert Hovenkamp, IIIA Antitrust Law ¶ 749 (2008); Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 Emory L. J. 423 (2006); Herbert Hovenkamp, *Discounts and Exclusion*, 200 Utah L. Rev. 841; Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 Minn. L Rev. 1688 (2005); Kobayashi, *supra* note 3.

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

7 Cascade Health Solutions v. Peachealth, 515 F.3d 883 (2008).

8 Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, (1958) ("Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.").

9 Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455, 471 (S.D.N.Y. 1996).

10 Phillip E. Areeda, Herbert Hovenkamp, & Einer Elhauge, Antitrust Law: An Analysis of Antitrust Principles and their Application, ¶ 1758b, at 181 (1996).

11 *Id*. at 348.

12 Elhauge, *supra* note 2 at 59, 79.

13 *Id*. at 79.

14 Elhauge, *supra* note 2 at 57.

15 *See generally* Paul Milgrom & John Roberts, *Limit Pricing and Entry Under Incomplete Information: An Equilibrium Analysis*, 50 Econometrica 443 (1982).

16 *See*, *e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (requiring predatory pricing plaintiff to prove that defendant's predation created a dangerous probability that defendant would be able to recoup the costs of predation at a later time).

17 *See generally* Patrick Bolton, Joseph F. Brodley, & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L. J. 2239, 2301-03 (2000).

18 Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 264,282-88 (1981).

19 *See* Daniel A. Crane, *Chicago, Post-Chicago and Neo-Chicago*, 75 U. Chi. L. Rev. ___ (2009) (forthcoming); Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, 5(1) Competition Pol'y Int'l (2009).

20 *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984) ("Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.")

21 Elhauge, *supra* note 2 at 79-80.

22 Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 25 Antitrust L. J. 433 (2008).

23 *Id*. at 433-34. *See also* Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J. L. & Econ. 421 (2005).

24 Klein & Wright, *Id*.

25 Benjamin Klein, *Bundled Discounts as Competition for Distribution*, Global Competition Pol'y (June 2008). *See also* Joshua D. Wright, *Antitrust Law and Competition for Distribution*, 23 Yale J. Reg. 169 (2006) (analyzing bundled discounts as a form of competition for distribution).

26 One reason it may be efficient to purchase exclusive or preferred distribution in the form of a discount on the "monopoly" product is that the seller earns a higher margin on that product than the competitive product. Thus, preferred distribution for the competitive product can be purchased more efficiently by discounting the monopoly product, increasing the manufacturer's profit, and improving consumer welfare. *See* Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. Econ. 159 (2004).

27 *Id*. at 444.

28 *Id.*

29 *Id.*

30 General Services Administration Acquisition Manual Appendix 519(f) (2004), *available at* http://www.acqnet.gov/GSAM/current/pdf/GSAM.pdf. ("Bundling means consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate contracts into a solicitation of offers for a single contract . . .").

31 *Id.*

32 *Id*.

33 *Id*.

34 *See*, *e.g.*, Herbert Hovenkamp, *Discounts and Exclusion*, 2006 UTAH L. REV. 841, 859-60..

35 Elhauge, *supra* note 2 at 66.

36 Klein & Murphy, *supra* note 22 at 449.

37 *See* Richard M. Steuer, *Customer-Instigated Exclusive Dealing*, 68 ANTITRUST L. J. 239, 242 (1997). *See also* Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 268, 275 (1979) (noting that "in a multiple-level chain of distribution, passing on monopoly overcharges is not the exception: it is the rule").

38 *See* Easterbrook *supra* note 18 at 273 (observing that "as long as victims and customers have rational expectations about the future conduct of the predators, and the predators themselves behave rationally, the intended victim should always be able to offer some package that is more attractive to customers than the monopolist's offer of low prices followed by monopoly prices.").