



Loyalty Discounts Under US Law

IBRAC and IBA
May 13, 2010 • São Paulo

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This Presentation's Focus

- Loyalty discount = price reduction in return for volume or full or partial exclusivity
- Bundled discount = price reduction in return for volume across multiproduct line
- Related concepts
 - Often commingled in cases
- US standards commonly misperceived, especially outside US

Quick Summary of US Law

- US standards do not bar loyalty programs
 - *LePage's* simply allows inquiry into effects when market power is substantial
- Exclusivity generally lawful
- Discounts generally lawful
- But they can be unlawful in particular cases
- Policy debate relates to standards for determining when presumptive legality verges into illegality

Exclusivity Arrangements

- Presumptively lawful in the US for at least six decades
 - *Standard Stations* (1949)
 - *Tampa Electric* (1961)
- Have always been viewed leniently, given efficiency benefits
 - Align incentives
 - Facilitate predictability and long-term planning
 - Reduce capital expenses and financial exposure
 - Reduce selling and inventory expenses

Discounting

- Also presumptively lawful in US
- Limited exception for predation
 - *Brooke Group* (1993)
- Limited exception for certain discrimination
 - “Availability” generally a defense
- Discount programs rewarding full or partial exclusivity
 - Commonplace and generally lawful
 - Generally safer than simple “volume discounts”

But Not *Conclusively* Lawful

- Exclusivity and discounting can be competitively problematic in some circumstances
- Presumption of illegality can be overcome
- Issues in recent cases
 - When is loyalty discount unreasonable?
 - When is loyalty discount an exclusionary act in furtherance of monopolization?

LePage's

- Did not hold bundled discount programs to be unlawful
- Affirmed a jury verdict for monopolization
 - Market power conceded by defendant
 - “Ample evidence” on facts to allow jury consideration of adverse effect of conduct
- Little guidance as to standards for –
 - Instructing jury or
 - Determining when discount programs are exclusionary, rather than procompetitive

AMC Test

- Antitrust Modernization Commission joined widespread criticisms of *LePage's*
- Proposed three-part test
 - Priced competitive product below cost, after allocating all discounts to competitive product
 - Recoupment likely
 - Adverse effect on competition

PeaceHealth

- 2008 appellate decision
- Rejected *LePage's*
- Mirrored first prong of AMC test
 - Allocate all discounts on bundle to competitive product
 - If resulting price is below cost, may find discount to be exclusionary
 - Implication: discounts legal unless have potential to exclude equally efficient producer

Summary

- In general, loyalty discounts and similar programs are viewed as procompetitive and presumptively lawful
- Standards for deviating from the general rule are still evolving
 - Not yet tested before US Supreme Court
- Issue is limited to exceptional cases
 - Substantial market power
 - Conduct beyond competition on the merits
 - Adverse competitive effect



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