

NOTE

USE CASE PRODUCT MARKETS AND THE SPIRIT OF REASONABLE INTERCHANGEABILITY

*Denis Hurley**

This Note posits that a single product with multiple, non-reasonably interchangeable use cases can function like multiple products, exchanged in multiple product markets, for purposes of assessing antitrust liability.

In antitrust law, individual product markets are defined by the principle of reasonable interchangeability (or substitutability). Where a single product has multiple uses that are not reasonably interchangeable, the use cases should define the product market. The lay concept of what constitutes a single product is not applicable to antitrust law when a single product has multiple, non-reasonably interchangeable use cases. As a result, antitrust liability should attach where a seller leverages market power in a unique use case of one product to foreclose competition in another use case of the same product.

*I use the recent Third Circuit case *Eisai v. Sanofi-Aventis*, in which plaintiff *Eisai* alleged that defendant *Sanofi* improperly leveraged market power in a unique FDA-approved indication (use case) of an anticoagulant drug to coerce more sales in competitive indications, to illustrate my argument.*

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* B.A., Government & Economics, College of Arts & Sciences, Cornell University, 2014; J.D. Candidate, Cornell Law School, 2018. I would like to thank my parents (both attorneys themselves) for their feedback and everyone on JLPP who helped prepare this Note for publication.

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INTRODUCTION

In May 2016, the Third Circuit affirmed a district court grant of summary judgment for the defendant in antitrust dispute *Eisai v. Sanofi-Aventis (Eisai)*.¹ The Third Circuit rejected a novel theory of antitrust monopolization liability under Section 2 of the Sherman Act that the plaintiff characterized as bundling contestable and incontestable demand.² *Eisai* claimed that Sanofi's volume-based discount policies for anticoagulant drug Lovenox improperly leveraged Lovenox's FDA approval for multiple "indications"—or use cases—in medical settings.³ The FDA had not approved *Eisai*'s competing anti-coagulant drug for the

¹ *Eisai v. Sanofi-Aventis*, 821 F.3d 394 (3d Cir. 2016).

² *Id.* at 401.

³ *Id.* at 406 (citing, in large part, *Eisai*'s expert testimony). Note: When I refer to the *Eisai* case I use the term "indication," but when discussing use-case based product markets

same indications.⁴ Eisai argued that Sanofi's discounting practices effectively bundled together two different types of demand for Lovenox in a manner that improperly maintained Sanofi's market power in the anti-coagulant drug market.⁵ The Third Circuit rejected the claim on the facts, but may have left the door open to the underlying theory.⁶

In the case, the district and circuit courts both treated the drug Lovenox as a single product. *Eisai's* complaint had originally asserted a stronger conception of the relevant product markets based on the drug's FDA-approved indications embodied in its complaint. But by the time the litigation had progressed to plaintiff's submission of a brief in opposition to defendant's motion for summary judgment, *Eisai* had abandoned this definition of the relevant market in favor of one based on Lovenox as a single product occupying a single product market.

This Note argues that Eisai's theory of liability (assuming it could be proven) is fundamentally sound under current antitrust law. For purposes of antitrust liability, Lovenox's multiple approved indications could have allowed the single drug to function as multiple products exchanged in multiple product markets. Sanofi could have improperly leveraged one or more of the drug's unique indications—assuming market power in these indications—through volume discounting on all Lovenox indications. Such a discounting scheme could coerce more sales of Lovenox for its non-unique use cases in which it lacked market power. Plaintiff's initial argument, dependent on a drug indication-based definition of the relevant product markets, is consistent with antitrust law and the underlying purposes of the law.

At base, this Note argues that a single product that has multiple uses is not necessarily exchanged in a single product market. A single product's uses can define the product markets in which it is exchanged if the single product is not reasonably interchangeable among its multiple uses. For purposes of antitrust liability, a single product in the lay sense is not necessarily a single product in the antitrust sense.

This Note proceeds as follows. First, I introduce the foundations of current U.S. antitrust law, courts' methods of defining product markets for antitrust analysis, and predatory pricing, tie-in, and bundling claims—all of which lay a foundation for my argument. Second, I review *Eisai* and the plaintiff's theory of the case. Third, I explore why the *Eisai* theory of liability is consistent with the law and its rationale. Fi-

generally, I refer to "use cases." From a theoretical perspective, they embody the same concept.

⁴ *Id.*

⁵ *Id.*

⁶ See *id.* at 409. ("But our conclusion may be different under different factual circumstances.").

nally, I address the implications and limitations of defining and applying use case product markets.

I. BACKGROUND ANTITRUST LAW

A single goal undergirds American antitrust law: protecting competition.⁷ American antitrust law is grounded in the Sherman Antitrust Act (Sherman Act or Act). Section 1 of the Act makes “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce” illegal.⁸ Section 1 targets multi-party, agreement-based anticompetitive conduct, such as price-fixing cartels.⁹ The law seeks to prohibit only unreasonable restraints on trade.¹⁰

Section 2 of the Act makes monopolization and attempted monopolization illegal.¹¹ Section 2 targets single-firm anticompetitive conduct.¹² To prove a Section 2 monopolization claim, a plaintiff must show two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”¹³ To prove a Section 2 attempted monopolization claim, a plaintiff must show “(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a

⁷ *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 689 (1975) (“[T]he sole aim of antitrust law is to protect competition”); *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) (“The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”); Edward K. Esping, et al., *Corpus Juris Secundum: Monopolies*, 58 C.J.S. Monopolies § 7: Purpose of antitrust regulation, Dec. 2016 Update.

⁸ 15 U.S.C. § 1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”); *United States v. ALCOA*, 148 F.2d 416, 427 (1945) (“[Congress] did not condone “good trusts” and condemn “bad” ones; it forbade all.”).

⁹ 15 U.S.C. § 1; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954) (noting that “[t]he crucial question” for Section 1 claims is whether the challenged anticompetitive conduct “stem[s] from independent decision or from an agreement”).

¹⁰ See *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

¹¹ 15 U.S.C. § 2. (“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, and, on conviction thereof.”).

¹² See *American Needle Inc. v. Nat’l Football League*, 560 U.S. 183, 189–191 (2010); John J. Miles, 1 *Healthcare and Antitrust Law*, Section 1:2: Purpose and Definition of the Antitrust Laws, Dec. 2016 (“[T]he test for lawfulness under the antitrust laws is not an activity’s effect on the firm harmed by the challenged conduct, but rather the activity’s effect on competition in the market as a whole.”).

¹³ *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570–571 (1966).

specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.”¹⁴

The touchstone of a Section 2 claim is the anticompetitive result of monopolization or attempted monopolization.¹⁵ In making a Section 2 claim, a plaintiff can present evidence of any conduct that it alleges to be anticompetitive.¹⁶ Through an accumulation of Section 2 case law, courts and scholars have classified certain types of anticompetitive conduct that repeatedly underpin Section 2 claims. Predatory pricing, ties, and bundling are three types of conduct that can support Section 2 claims. In this Part, I first address the crucial concept of market definition. I then introduce predatory pricing, tying, and bundling. Together these parts lay a foundation for the Note’s overall argument.

A. Market Definition

Market definition is an essential concept in antitrust law. In the context of a Section 2 claim, the relevant market defines the arena of legal analysis. Defining the market focuses attention on the economic area in which an alleged monopolist exerts improper influence.¹⁷ A broader market reduces the potency of alleged anticompetitive conduct. A narrower market increases it. Antitrust defendants necessarily fight for the former, and plaintiffs for the latter.

Market definition involves two distinct dimensions: geographic market and product market.¹⁸ The relevant geographic market consists of the area of effective competition.¹⁹ “The purpose of the search for the relevant geographical market is to find the area or areas to which a po-

¹⁴ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Section 2 can also support a claim of conspiracy to monopolize, which, like Section 1 claims, requires an agreement between two parties. Plaintiffs tend not to assert conspiracy to monopolize claims because Section 1 claims are easier to prove. Section 2 claims require a showing of market power; Section 1 claims do not. *Broad. Music, Inc. v. Hearst/ABC Viacom Ent. Serv.’s*, 746 F. Supp. 320, 326 (1990).

¹⁵ See Hans B. Thorelli, *The Federal Antitrust Policy in TRADE REGULATION: CASES & MATERIALS*, at 35, eds. Pitofsky et al. (“What matter[s] is whether trade was restrained (or monopolized) or not.”) (emphasis in original).

¹⁶ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). The Sherman Act does not delineate what conduct is “exclusionary” or “anticompetitive.” A plaintiff must only show that the conduct that brought about monopoly power or attempted monopolization is not “a consequence of a superior product, business acumen, or historic accident.” *Id.*

¹⁷ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (“Without a definition of that market there is no way to measure [the defendant’s] ability to lessen or destroy competition.”); see also William Holmes & Melissa Mangiaracina, *Antitrust Law Handbook, Sherman Act Section 2, Section 3.4: Actual Monopolization—Defining the relevant market and monopoly power*, Nov. 2016.

¹⁸ See William Holmes & Melissa Mangiaracina, *Antitrust Law Handbook, Sherman Act Section 2, Section 3.4: Actual Monopolization—Defining the relevant market and monopoly power*, Nov. 2016.

¹⁹ *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395–96 (1956).

tential buyer may rationally look for the goods or services that he seeks.”²⁰ The relevant product market—broadly—is “composed of products that have reasonable interchangeability for the purpose for which they are produced—price, use and qualities considered.”²¹

Courts do not employ a single straightforward test for market definition in any given context or across contexts. But courts consistently delineate markets with a focus on a product’s functional characteristics, not on literal or lay conceptions of what constitutes a single product or a single product market.²²

I explore the following types of tests as employed in past seminal cases in turn: (1) whether the products are reasonably interchangeable from a consumer’s perspective²³; (2) whether two products are given to separate efficient provision²⁴; and (3) the hypothetical monopolist test.²⁵ I identify and describe these tests separately, but in practice, all three intersect and attempt to answer the same question: What goods “have reasonable interchangeability for the purpose for which they are produced” such that they fall within the bounds of the relevant product market?

In determining whether to include two or more products in the same product market, courts look to whether the products are reasonably interchangeable to consumers.²⁶ “In determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control.”²⁷ Specifically, the “market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.”²⁸ The inquiry focuses on the functional aspects of given products.

Another form of the inquiry asks whether two allegedly separate products can be efficiently provided to consumers. “For service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service sepa-

²⁰ *U.S. v. Grinnell Corp.*, 384 U.S. 563, 588 (1966).

²¹ *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. at 395–96 (1956).

²² *See e.g., id.*

²³ *See e.g., U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. at 395–96 (1956); *Eastman Kodak v. Image Technical Serv.’s, Inc.*, 504 U.S. 451, 462 (1992).

²⁴ *See e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21–22;

²⁵ *See e.g., F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (2008).

²⁶ *See e.g., Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 111 (1984) (“The District Court employed the correct test for determining whether college football broadcasts constitute a separate market—whether there are other products that are reasonably substitutable.”).

²⁷ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395–96 (1956).

²⁸ *Id.* at 404. *See also, Eastman Kodak v. Image Technical Serv.’s, Inc.*, 504 U.S. 451, 481–482 (1992) (“The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners.”).

rately from parts.”²⁹ Despite an apparent focus on possible or hypothetical efficient provision, supporting evidence tends to consist of proof that the two products are, or have been, provided separately, either by the particular antitrust defendant or by one of the defendant’s competitors.³⁰ This form of the inquiry provides a relatively lax criterion compared to reasonable substitutability and is treated as a minimum test to separate markets.³¹

Courts and scholars also employ the Hypothetical Monopolist Test (HMT) as a means of defining a relevant market, especially in merger cases. The HMT asks whether, if there was only a single seller of a given product, could that seller profitably impose a “small but significant and non-transitory increase in price,” (SSNIP) defined as an increase of 5% or more.³² If a single seller could profitably take such action, then the market is properly defined.³³ If a single seller could not profitably impose an SSNIP, then the market is likely too narrow to be cognizable for antitrust inquiry and needs to be expanded to include other reasonably interchangeable goods or services.³⁴ The SSNIP provides proof that the hypothetically monopolized product market is not vulnerable to substitutes outside that market. Because the product or products in that market cannot be readily substituted for others not included in the market, products outside the market are not reasonably interchangeable.

All three tests form part of the same generalized inquiry and are useful guideposts for performing the necessary analysis. A defined mar-

²⁹ *Eastman Kodak v. Image Technical Serv.’s, Inc.*, 504 U.S. 451, 462 (1992). Note that the tests here are not ultimate authorities, but, the D.C. Circuit observed, proxies: “*Jefferson Parish* does not endorse a direct inquiry into the efficiencies of a bundle. Rather, it proposes easy-to-administer proxies for net efficiency [T]he separate-products test is not a one-sided inquiry into the cost savings from a bundle [T]he Court conspicuously did not adopt that approach in its disposition of tying arrangement before it. Instead it chose proxies that balance costs savings against reduction in consumer choice.” *United States v. Microsoft Corp.*, 253 F.3d 34, 88 (D.C. Cir. 2001).

³⁰ See e.g., *id.* at 462–63, 480; *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. at 21–22 (1992).

³¹ See *Eastman Kodak v. Image Technical Serv.’s, Inc.*, 504 U.S. 451, 494 n.2 (1992) (citing *Jefferson Parish Hospital, Dist. No. 2 v. Hyde*, 466 U.S. 2, 39 (1984) (“For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product.*”) (emphasis in original)).

³² Department of Justice & the Federal Trade Commission, *Horizontal Merger Guidelines*, Issued Aug. 19, 2010 [hereinafter “2010 Merger Guidelines”]; *F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (2008) (“If a small price increase would drive consumers to an alternative product, then that product must be reasonably substitutable for those in the proposed market and must therefore be part of the market, properly defined.”); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 198 (1st Cir. 1996) (“The touchstone of market definition is whether a hypothetical monopolist could raise prices.”).

³³ *F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (2008).

³⁴ See *id.*

ket sets the parameters for analyzing alleged anticompetitive conduct underlying plaintiffs' antitrust claims.

B. *Predatory Pricing*

Predatory pricing targets sellers who price their products below their cost of production to force competitors to either charge uncompetitive high prices or sell at a loss until they exit the market.³⁵ Courts and scholars are very skeptical of predatory pricing claims because prevailing wisdom (and common sense) counsel that lower prices are good for competition and for consumers.³⁶ The costs of erroneously finding liability are extremely high—"[T]he mechanism by which a firm engages in predatory pricing—lowering 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."

As a result, the Supreme Court promulgated a strict and difficult to prove test for predatory pricing claims. In *Brooke Group v. Brown and Williamson Tobacco*, the Supreme Court ruled that to succeed on a predatory pricing claim, a plaintiff must show that (1) the defendant's prices are below an appropriate measure of the defendant's costs and (2) that the defendant had a "dangerous probability" of recouping the losses incurred from the alleged scheme by charging supracompetitive prices in some later period, presumably after driving competitors from the market.³⁷ This is commonly referred to as the "price-cost test."³⁸

The price-cost test appears appropriate wherever the alleged anticompetitive conduct is primarily based on pricing. But whether price is the primary mechanism of the defendant's anticompetitive conduct is not always clear. *Brooke Group* did not offer clear guidance on what "below cost" entails.³⁹ One option is pricing below marginal cost, but this can be difficult to prove even after discovery, let alone to survive a motion to

³⁵ *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220–23 (1993).

³⁶ *Id.* at 226–27 (1993) (citations excluded) ("It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.")

³⁷ *Id.* at 222–25 (1993). The Supreme Court's subsequent opinion in *Weyerhaeuser* affirmed this new rule for predatory bidding claims as well. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 315 (2007). Assembling proof of the second element of the test has created substantial problems for courts and plaintiffs, but these issues are beyond the scope of this Note.

³⁸ See *Eisai, Inc. v. Sanofi-Aventis*, 821 F.3d 394, 408 (3rd Cir. 2016); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 268–69 (3rd Cir. 2012); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 946 (6th Cir. 2005); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 905–06 (9th Cir. 2008).

³⁹ *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) ("[A plaintiff] must prove that the prices complained of are below an appropriate measure of its rival's costs."); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 905–06 (9th Cir. 2008).

dismiss. Another option is to use average variable cost as a proxy for marginal cost, as in the gas station hypothetical below. This option has gained the most traction among courts and scholars as the best realistic option.⁴⁰

Consider, gas station A and gas station B are the only gas stations in Hay City, such that consumers in Hay City have no reasonable substitute suppliers of gasoline. If station A sells each gallon of gasoline below its average variable cost to undercut station B and drive it out of business, station B clearly has a predatory pricing claim. But if A sells gasoline at increasing discounts for increasing volumes, does station B accrue a claim only if *all* gallons of gas are sold below variable cost? Or does station B accrue a claim based on gas sold by A *through the discount program* if the price of the *discounted* gas is below average variable cost? Or alternatively, does station B only accrue a claim on those gallons of gas sold below A's *marginal cost* of producing those gallons?⁴¹

Some scholars suggest that single-product loyalty discounts can be better analogized to exclusive dealing arrangements than predatory pricing schemes.⁴² This would effectively bolster a plaintiff's claims against single-product loyalty discounts by allowing a plaintiff to avoid the stringent *Brooke Group* price-cost test. In contrast, the Third Circuit decided in *ZF Meritor v. Eaton Corp.* that the price-cost test applied to single-product loyalty discounts only where pricing is "the clearly predominant mechanism of exclusion."⁴³

Courts confront further complications about whether the price-cost test applies when producers award volume-based discounts on purchases of two or more product lines. Modifying the previous example—when does station B accrue an antitrust claim if station A is selling gas above cost but includes a free car wash for every gas purchase, necessarily selling the car wash below average variable cost? I address these and similar issues in Part I.D, *infra* "Bundling."

⁴⁰ *Id.* at 907 (citations omitted).

⁴¹ An inquiry into selling below marginal cost necessarily focuses on sales at the margin. An inquiry into average variable costs focuses on overall sales. Under the latter, a seller could discount below marginal cost and still be pricing above average variable cost for some portion of its sales, giving sellers more leeway to discount and potentially sacrifice profits on some units to increase market share. The reverse—pricing below average variable cost and above marginal cost—would not occur unless a seller is operating at inefficiently low levels of production.

⁴² Benjamin Klein & Andres V. Lerner, *Price-Cost Tests In Antitrust Analysis Of Single Product Loyalty Contracts*, 80 *Antitrust L.J.* 631, 631 *et seq.* (2016).

⁴³ *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012).

C. *Tie-Ins*

Tie-ins are sales arrangements that require a buyer to purchase a second good (the tied product) in order to purchase the first good (the tying product). “There are four elements to a per se tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.”⁴⁴

Tying arrangements are anticompetitive because a seller of tied products can leverage market power in the tying product market to foreclose competition in the tied product market. A seller of tied products must have market power in the tying product market to have an anticompetitive effect and create an antitrust claim. If ski manufacturer A refuses to sell pairs of skis to consumers unless consumers also each purchase a ski jacket as well, the tying arrangement is only anticompetitive if the ski manufacturer has power in the market for skis. If the ski manufacturer does not have market power, then consumers can weigh whether to purchase the skis-ski jacket combination from A, or purchase the pair of skis from manufacturer B and a ski jacket from manufacturer C. But if ski manufacturer A is the only producer of skis, then a consumer cannot purchase skis without also buying the ski jacket from A. This forecloses the market for ski jackets—the tied product. Thus, not all tying arrangements can cause substantial foreclosure of competition in the tied market, only those arrangements in which a seller has market power in the tying product market.

With respect to the first element, the Supreme Court reasoned in *Jefferson Parish* that whether two separate products are amenable to a tying arrangement “depends on whether the arrangement may have the type of competitive consequences addressed by the rule” prohibiting tie-ins.⁴⁵ Furthermore, “no tying arrangement can exist unless there is sufficient demand for the purchase” of one good or service separately from the other good or service.⁴⁶ One must be able “to identify a distinct product market in which it is efficient to offer” the allegedly tied product and tying product separately.⁴⁷

With respect to the second element of market power in the tying product, market power is the seller’s power “to force a purchaser to do

⁴⁴ *United States v. Microsoft Corp.*, 253 F.3d 34, 85 (D.C. Cir. 2001) (citing *Eastman Kodak v. Image Technical Serv.’s, Inc.*, 504 U.S. 451, 461–462 (1992)).

⁴⁵ *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 21 (1984).

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* 21–22.

something that he would not do in a competitive market.”⁴⁸ It is the ability to raise price and restrict output.⁴⁹ A plaintiff can show that a defendant has market power through direct evidence.⁵⁰ But more often plaintiffs use market share as a proxy for inferring market power.⁵¹ Without market power in the tying product, a seller cannot foreclose competition in the tied market because competitors in the tying and tied markets can compete effectively in both individual markets as well as in the market for the bundle of the tying and tied product.

For many years, courts presumed that a patented product possessed market power by virtue of its government-granted monopoly through the patent. But in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, the Supreme Court ended that presumption of market power in antitrust cases citing Congress’s 1988 amendments to the Patent Act, which had ended the presumption of market power in patent misuse cases.⁵² Thus, government-granted monopoly on production, sales, and use of a product or service does not necessarily imply market power.⁵³

With respect to the third element, coerced purchase of the tied product is the essence of a tie-in claim. “[T]he 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.”⁵⁴ Such coercion causes direct foreclosure of the market for the tied product that otherwise would not occur.

The final element of a tie-in is foreclosure of a “substantial”⁵⁵ or a “not insubstantial” amount of commerce.⁵⁶ The element appears to be a nominal, highly fact-dependent hurdle to pursuing a tying claim, either under Section 1 or as a part of a Section 2 claim.⁵⁷ I do not address this nebulous element further in this Note.

⁴⁸ *Eastman Kodak Co. v. Image Technical Serv.’s, Inc.*, 504 U.S. 451, 464 (1992) (quoting *Jefferson Parish*, 466 U.S. at 14).

⁴⁹ *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

⁵⁰ See *Eastman Kodak Co. v. Image Technical Serv.’s, Inc.*, 504 U.S. 451, 477 (1992); *United States v. Am. Express Co.*, 838 F.3d 179, 200 (2nd Cir. 2016) (citations excluded).

⁵¹ See *Eastman Kodak Co.*, 504 U.S. at 464.

⁵² *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006).

⁵³ See *id.*

⁵⁴ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984).

⁵⁵ *United States v. Microsoft Corp.*, 253 F.3d 34, 85 (D.C. Cir. 2001) (citing *Eastman Kodak v. Image Technical Serv.’s, Inc.*, 504 U.S. 451, 461–462 (1992)).

⁵⁶ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 2 (1984). Cases vary on whether the final element is a “substantial amount of commerce” or a “not insubstantial amount of commerce.” See *id.*; *United States v. Microsoft Corp.*, 253 F.3d 34, 85 (D.C. Cir. 2001). The standard is the same.

⁵⁷ See e.g., *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969) (noting the foreclosed sales of \$2,300,000 cannot be considered insubstantial); *North-*

Courts also allow sellers to present one or multiple business justifications as a defense to tying allegations used to support Section 2 claims.⁵⁸ A valid business reason can rebut a plaintiff's showing of willful acquisition and maintenance of market power.⁵⁹ Such valid business justifications could include quality control, costs savings, or innovation. With respect to innovation, at least one court has shown deference to a seller where finding liability for a tie-in may "chill innovation to the detriment of consumers by preventing firms from integrating into their products new functionality previously provided by standalone products—and hence, by definition, subject to separate consumer demand."⁶⁰

D. Bundling

Courts, practitioners, and scholars use the term "bundling" inconsistently to refer to various types of liable conduct—e.g. the term "bundled tie" refers to a classic "tying claim."⁶¹ "Price bundling" or "discount bundling" is the relevant conduct here. I use the term "discount bundling" from here on. "Discount bundling" applies to situations where a manufacturer combines more than one product together in a discounted "package," or where two or more products are marketed together and market power in one product is used to enhance the appeal of a second product.⁶²

ern Pacific Railway v. United States, 356 U.S. 1, 3, 7 (1958) (noting tying more than 6 million acres of mineral rights to rail freight purchases cannot be considered insubstantial).

⁵⁸ *Eastman Kodak v. Image Technical Serv.'s, Inc.*, 504 U.S. 451, 461–462 (1992). The same business justification defense may apply to Section 1 claims as well, depending on the circumstances. See *United States v. Microsoft Corp.*, 253 F.3d 34, 89–95 (D.C. Cir. 2001) (finding the per se rule inappropriate in the context of Microsoft's tying its operating system to its internet browser).

⁵⁹ *Eastman Kodak v. Image Technical Serv.'s, Inc.*, 504 U.S. 451, 483 (1992).

⁶⁰ *United States v. Microsoft Corp.*, 253 F.3d 34, 88–89 (D.C. Cir. 2001) ("[F]irms without market power will bundle two goods only when the cost savings from joint sale outweigh the value consumers place on separate choice. . . . If integration has efficiency benefits, these may be ignored by the *Jefferson Parish* proxies . . . [b]ecause one cannot be sure beneficial integration will be protected by the other elements.").

⁶¹ The imprecise use of antitrust terminology can muddle understandings of what liable conduct are at issue in particular applications and in the abstract. For more background on Section 2 bundling, tying, and related claims, see generally, Dep't of Justice, COMPETITION & MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT, September 2008.

⁶² See Sec 4:16: Bundling and Loyalty Programs, Corporate Counsel's Antitrust Deskbook; See also *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) ("Bundling is the practice of offering, for a single price, two or more goods or services that could be sold separately."); *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 270 (2d Cir 2001) ("[A] bundling arrangement offers discounted prices or rebates for the purchase of multiple products, although the buyer is under no obligation to purchase more than one item."); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 ("[B]undling or tying . . . 'cannot exist unless two separate product markets have been linked.'" (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21 (1984))).

In particular cases, discount bundling functions like single-product price-cutting when competitors can compete effectively bundle-to-bundle.⁶³ In such cases, the price-cost test is arguably appropriate.⁶⁴ Where one firm cannot effectively compete bundle-to-bundle, discount bundling functions more like product tying.⁶⁵ Because the Supreme Court has not yet grappled with a discount bundling case, discount bundling, unlike many other more fleshed out categories of anticompetitive conduct, remains a hazy and unstructured realm of antitrust law.⁶⁶

The antitrust concern with discount bundling is that “it is possible, at least in theory, for a firm to use a bundled discount to exclude an equally or more efficient competitor and thereby reduce consumer welfare in the long run.”⁶⁷ A plaintiff who sells only a single product in a bundle of products sold by a defendant may not be able to match the post-discount prices of the defendant’s entire bundle.⁶⁸ Thus, even an equally efficient producer of the single product may not be able to profitably compete with a competitor who sells a bundle including that single product above the average cost of the entire bundle.⁶⁹

Because price is an integral element of discount bundling claims, circuit courts have extrapolated the Supreme Court’s holding in *Brooke Group* as a signal that discount bundling claims must involve some form of below-cost pricing for antitrust liability to attach.⁷⁰ But because *Brooke Group* left open the question of what measurement of “cost” is relevant and what “below cost” must entail, the circuit courts have split on when and how to apply *Brooke Group* to discount bundling.

In this context, plaintiffs have mounted two types of bundled discount challenges: “(1) charges that one or more of the items in the package, as a result of the discount, are sold at ‘predatory prices’ . . . [and] (2) that the exclusionary effect of the package discount is much the same as a conventional tie-in.”⁷¹ Where courts characterize a challenge to discount bundling as price-based behavior, they apply some version of the

⁶³ DOJ, COMPETITION & MONOPOLY, at 5–6.

⁶⁴ See *supra* Part I.A.

⁶⁵ See *supra* Part I.B.

⁶⁶ See *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 911, 914 (9th Cir. 2008). The Ninth Circuit attempted to clear the air with its bundling “discount attribution” rule in *PeaceHealth*, but as of 2010 at least, the approach had not attracted much case law support. See Robert Pitofsky, et al, TRADE REGULATION: CASES AND MATERIALS 914 (6th ed. 2010).

⁶⁷ *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 896 (9th Cir. 2008) (citing Richard A. Posner, Antitrust Law 236 (2d ed.2001); Barry Nalebuff, Exclusionary Bundling, 50 Antitrust Bull. 321, 321 (2005)).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See e.g., *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 903–05 (9th Cir. 2008).

⁷¹ Robert Pitofsky, et al, TRADE REGULATION: CASES AND MATERIALS 914 (6th ed. 2010).

price-cost test.⁷² Where courts characterize a challenge to discount bundling as akin to a tie-in or de facto exclusive dealing, they refuse to apply the price-cost test.⁷³ Every circuit court that has addressed discount bundling claims, except the Third Circuit, recognizes some form of cost-based safe harbor involving an analysis of whether a discount bundling practice improperly results in below-cost pricing.

In *Cascade Health Solutions v. PeaceHealth*, the Ninth Circuit confronted a challenge to bundling different types of hospital services. Plaintiff healthcare services provider claimed that defendant, a competing provider, offered health insurers increasing discounts prices for purchasing primary, secondary, and tertiary hospital services from it alone.⁷⁴ Plaintiff competed in the market for primary and secondary hospital services, but did not provide tertiary services.⁷⁵ Plaintiff asserted various claims for relief including monopolization, exclusive dealing, and tying under Sections 1 and 2.⁷⁶ Plaintiff appealed summary judgment for defendant on the tying claim, and defendant cross-appealed a jury verdict for plaintiff on the monopolization claim.⁷⁷ The Ninth Circuit adopted a “discount attribution” standard for the discount bundling claims.⁷⁸ Under this standard, the full amount of a discount on a bundle of goods is allocated to the competitive product or products.⁷⁹ If the post-discount-allocation price of the competitive good is below the defendant’s cost of production, a fact-finder “may find that the bundled discount is exclusionary” for purpose of Section 2 of the Sherman Act.⁸⁰

The discount attribution rule provides a clear standard to guide sellers in offering bundled discounts to consumers without violating antitrust law. On the other hand, the standard does not settle the debate about the appropriate measure of cost for calculating below-cost sales under *Brooke Group*. The standard also does not capture potentially exclusionary sales arrangements that do not meet the standard. The Ninth Circuit solution is a useful shortcut that conforms to *Brooke Group* and provides clear guidance, but does not necessarily capture all anticompetitive discount bundling arrangements.

Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc. provides another alternative standard.⁸¹ The case involved defendant’s dis-

⁷² See e.g., *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

⁷³ See e.g., *LePage’s Inc. v. 3M*, 324 F.3d 141, 151 (3d Cir. 2003).

⁷⁴ *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 891 (9th Cir. 2008).

⁷⁵ *Id.* at 906.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Ortho Diagnostic Sys.’s, Inc. v. Abbott Lab.’s, Inc.*, 920 F. Supp. 455 (S.D.N.Y. 1996). Because, it is a district court case, *Ortho* is not precedential, but it is a widely cited treatment

counting across a bundle of products used to screen blood samples for viruses.⁸² Under *Ortho*, to support a Section 2 claim with a discount bundling arrangement, a plaintiff “must allege and prove either that (a) the monopolist has priced below its average variable cost or (b) [that] 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.”⁸³ Roughly speaking, a competitor is equally or more efficient when it matches the same per-unit cost structure, or achieves a lower per-unit cost structure, respectively, for the same product.⁸⁴ Under this test, below-cost pricing is only one possible indicator of exclusionary conduct; the bundled pricing scheme can still be exclusionary even if the goods are sold above cost.⁸⁵ Thus, the standard does a better job capturing anticompetitive conduct that does not strictly conform to the spirit of *Brooke Group*. However, the standard does not provide much guidance to sellers offering bundled discounts on how to avoid potential antitrust violations.

Prevailing law in the Third Circuit suffers from a similar deficiency in providing guidance to sellers. The seminal case is *LePage’s Inc. v. 3M*.⁸⁶ LePage’s produced private label transparent tape.⁸⁷ 3M produced its own brand name transparent tape, and entered the market for private label tape several years after LePage’s.⁸⁸ 3M also sold a variety of other related and unrelated products, such as stationary and pens, as well as healthcare and automotive products.⁸⁹ 3M offered retailers progressively higher discounts for increased purchases across 3M product lines.⁹⁰ LePage’s could not match the discounts because it did not provide as diverse an array of products.⁹¹ A jury found for LePage’s on its Section 2 monopolization claim on the basis of 3M’s bundled discounts.⁹²

On appeal, the Third Circuit refused to apply the *Brooke Group*’s price-cost test to the entire bundle—which would have absolved 3M of liability because it never priced its entire bundle of goods below cost.⁹³

of discount bundling claims. The opinion also provides a good example of how discount bundling can be exclusionary. *Id.* at 467. In *Cascade Health Solutions*, the Ninth Circuit uses this example in elucidating the discount attribution standard as well. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d at 896 *et seq.*

⁸² *Ortho Diagnostic Sys.’s, Inc. v. Abbott Lab.’s, Inc.*, 920 F. Supp. at 455.

⁸³ *Id.* at 469.

⁸⁴ *See id.* at 467.

⁸⁵ *Id.* at 467.

⁸⁶ *LePage’s Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003).

⁸⁷ *Id.* at 144.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 154–156.

⁹¹ *LePage’s Inc. v. 3M*, 324 F.3d at 161.

⁹² *Id.* at 145.

⁹³ *Id.* at 147.

The court reasoned that unlike *Brown and Williamson* in *Brooke Group*, 3M was a monopoly in the transparent tape market “with its unconstrained market power.”⁹⁴ “[A] monopolist is not free to take certain actions that a company in a competitive (or even [an] oligopolistic) market may take, because there is no market constraint on a monopolist’s behavior.”⁹⁵ The Third Circuit effectively limited its application of *Brooke Group* to straightforward predatory pricing claims because “[n]othing in any of the Supreme Court’s opinions in the decade since the *Brooke Group* decision suggested that the opinion overturned decades of Supreme Court precedent that evaluated a monopolist’s liability under § 2 by examining its exclusionary, i.e., predatory, conduct.”⁹⁶ 3M’s bundling practices amounted to exclusionary conduct subject to Section 2, and the *Brooke Group* price-cost test did not apply to it.⁹⁷ The Third Circuit upheld the jury verdict in favor of LePage’s on the Section 2 monopolization claim.⁹⁸

The Third Circuit stopped short of extending the *LePage’s* rationale to single product volume discounts in *ZF Meritor, LLC v. Eaton Corp.*⁹⁹ In *ZF Meritor*, plaintiff ZF Meritor, a competitor in the heavy-duty truck transmissions market, brought Section 1 and Section 2 claims against defendant Eaton Corp., the dominant competitor in that market.¹⁰⁰ Eaton was a monopolist in the market until ZF Meritor entered in 1989.¹⁰¹ In the early 2000s, Eaton revised its long-term sales contracts (LTAs, in industry parlance) with original equipment manufacturers (OEMs), extending the length of their terms, adding aggressive volume and market share rebates, requiring preferential pricing on Eaton’s products (which apparently was not passed on to consumers), and, in some cases, requiring the OEM to remove competing products from their sales materials.¹⁰²

Eaton contended that the ZF Meritor had only identified “Eaton’s pricing practices, that incentivized the OEMs to enter into the LTAs, and because price was the incentive, [the court] must apply the price-cost test.”¹⁰³ The Third Circuit acknowledged “that even if a plaintiff frames its claim as one of exclusive dealing, the price-cost test may be dispositive . . . as a specific application of the ‘rule of reason’ when the plaintiff

⁹⁴ *Id.*

⁹⁵ *Id.* at 151–52.

⁹⁶ *Id.* at 152.

⁹⁷ *See id.*

⁹⁸ *Id.* at 169.

⁹⁹ *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012).

¹⁰⁰ *Id.* at 263.

¹⁰¹ *Id.* at 264.

¹⁰² *Id.* at 264–266. OEMs list transmissions in “data books,” which customers use to make their selections. *Id.* at 264. Note that the savings from Eaton’s rebate scheme apparently were not passed on to consumers. *Id.* at 266.

¹⁰³ *Id.* at 273.

alleges that price is the vehicle of exclusion.”¹⁰⁴ But the court refused to apply the price-cost test because the LTAs went much further than offering simple volume or market share discounts to customers.¹⁰⁵ The court characterized Eaton’s LTAs as broader exclusive dealing arrangements because Eaton used not only pricing and discounting arrangements, but also (i) coerced OEMs into signing long-term buying contracts by leveraging its position as a dominant supplier of parts and (ii) worked in concert with OEMs to block customer access to plaintiff’s products by coercing OEMs into removing or burying competing sales listings.¹⁰⁶

A final standard worthy of mention is the strict application of *Brooke Group* to an entire bundle of goods—what the defendant in *Cascade Health Solutions* called an “aggregate discount rule.”¹⁰⁷ If the price of an entire bundle exceeds the total cost of producing all the goods in the bundle, the bundle passes the first prong of the price-cost test, and a seller cannot be liable under Section 2. Under this standard, a seller can assemble a broad bundle of products that an equally efficient competitor cannot match without incurring antitrust liability. 3M would have prevailed against LePage’s because the price of the entire 3M goods bundle was above 3M’s cost of production.

This brings us to the question that the Third Circuit skirted in *Eisai* and that presents an ultimate threshold question here: When does a discounting scheme involve multiple products such that an equally efficient competitor may not be able to compete fairly?

II. EISAI V. SANOFI-AVENTIS

A. Background

The dispute in *Eisai* centered on a Sanofi anticoagulant drug called Lovenox, which is used to treat and prevent deep vein thrombosis (DVT)—blood clotting in the veins.¹⁰⁸ Lovenox is a type injectable anticoagulant known as low molecular weight heparin (LMWH).¹⁰⁹ Eisai sold a competing injectable LMWH drug called Fragmin. At the time of the litigation, the FDA had approved Fragmin for five indications, or medical use cases.¹¹⁰ Of its four direct competitors, Lovenox had the

¹⁰⁴ *Id.* at 273 (citing *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1060–1063 (8th Cir. 2000)).

¹⁰⁵ *Id.* at 269.

¹⁰⁶ *Id.* at 277.

¹⁰⁷ *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 914 (9th Cir. 2008)

¹⁰⁸ *Eisai v. Sanofi Aventis*, 821 F.3d 394, 399 (3d Cir 2016).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; see also U.S. Nat’l Library of Med., PubMed Health, last updated 20 Aug. 2015, <https://www.ncbi.nlm.nih.gov/pubmedhealth/approved-drug-uses/> (“The FDA approves each drug for one or more indications. An indication is a particular use for the drug, such as treating asthma. A group of people can also be specified, for example, adults.”).

most indications with seven.¹¹¹ “[F]rom September 27, 2005 (when Eisai began selling Fragmin) through July 25, 2010 (when Sanofi ended certain marketing practices after a generic entered the market), Lovenox had the most indications of the four [competing] drugs [in the broad overall market for injectable LMWH drugs] . . . and maintained a market share of 81.5% to 92.3% while Fragmin had the second largest market share at 4.3% to 8.2%.”¹¹²

Injectable LMWH drug customers consist either of individual hospitals or, in larger part, group purchasing organizations (GPOs).¹¹³ Under its “Lovenox Acute Contract Value Program,” Sanofi granted discounts to customers who purchased a certain proportion of Lovenox relative to their total LMWH drug needs.¹¹⁴ If Lovenox constituted less than 75% of a customer’s LMWH purchases, the customer received a 1% discount.¹¹⁵ Above the 75% threshold, a customer received steadily increasing discounts based on volume and purchasing share.¹¹⁶

Eisai filed suit alleging, among other claims, unlawful monopolization and attempted monopolization in violation of Section 2 of the Sherman Act based on the contract discount program, together with a formulary access clause and a marketing campaign allegedly targeted at discrediting Eisai and Fragmin, constituted anticompetitive conduct.¹¹⁷ There is a strong analogy—heavily leveraged by Eisai, and rejected by the court—between the facts in *Eisai* and those of *LePage’s*. In both cases, the plaintiffs alleged that the defendant’s discounting arrangement was exclusionary conduct that, in conjunction with other alleged non-discount-related conduct, supported monopolization and attempted monopolization claims.

Eisai’s expert asserted that “the Lovenox program restricted rival sales by bundling each customer’s contestable demand for Lovenox . . . with the customer’s incontestable demand.”¹¹⁸ Lovenox’s incontestable demand was based in part on its unique cardiology indication.¹¹⁹ As a result, the discount program created a “dead zone” where any customer choosing to increase its Fragmin purchase share from 10% to any amount

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* “A group purchasing organization (GPO) is an entity that is created to aggregate the purchasing volume of a group of businesses to obtain discounts from vendors based on the collective buying volume of the GPO members.” Essensa, What is Group Purchasing?, <http://essensa.org/aboutus/WhatIsGroupPurchasing.aspx>.

¹¹⁴ *Id.* at 400.

¹¹⁵ *Eisai v. Sanofi-Aventis*, 821 F.3d 394, 400 (3d Cir 2016).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 401.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

less than 62% would spend more on LMWH drugs despite Fragmin's lower price.¹²⁰

B. Plaintiff's Theory

In its complaint, plaintiff alleged that the broadest possible market was for the Lovenox category of LMWH anticoagulant drug.¹²¹ But plaintiff also alleged that the relevant FDA indications for the LMWH drugs constituted their own separate "Relevant Use Markets."¹²²

Eisai claimed that Sanofi's conduct operated to substantially foreclose the market for Lovenox-type anticoagulants in two ways.¹²³ First, plaintiff claimed that Lovenox's "monopoly-share" condition for price discounts "operates as a de facto one-way exclusive dealing arrangement."¹²⁴ Second, through its monopoly position in various cardiology and orthopedic uses "Sanofi-Aventis has coerced the use of Lovenox(R) for other Relevant Use Markets . . . which has eliminated or effectively eliminated competition between Sanofi-Aventis and Eisai regarding that market."¹²⁵ Thus, plaintiff originally alleged a sound theory of functional markets for individual use cases.¹²⁶

But in its brief in opposition to defendant's motion for summary judgment, plaintiff appeared to abandon the allegations in the complaint that FDA indications defined the relevant submarkets for analyzing anticompetitive effect.¹²⁷ The brief references only the "LTC market" throughout.¹²⁸ Plaintiff appeared to fall back on its expert's testimony on bundling "contestable" and "incontestable" demand for a single product within in the LTC/LMWH anticoagulant market overall.

C. District Court Decision

In ruling on defendant's motion for summary judgment, the district court "assume[d], arguendo, that the relevant market is the [LMWH]

¹²⁰ *Id.*

¹²¹ Complaint & Demand for Jury Trial at ¶ 56, *Eisai v. Sanofi-Aventis, U.S., LLC*, No. 08CV04168 (D.N.J. Aug. 18, 2008) [hereinafter "Compl."].

¹²² *Id.*

¹²³ *Id.* ¶ 63.

¹²⁴ *Id.*

¹²⁵ *Id.* ¶ 68.

¹²⁶ Note that the plaintiff alleged but did not prove this theory.

¹²⁷ Plaintiff Eisai Inc.'s Opposition to Sanofi-Aventis's Motion to Dismiss, *Eisai v. Sanofi-Aventis, U.S., LLC*, No. 08CV04168, 1-3 (D.N.J. Aug. 18, 2008).

¹²⁸ *E.g. id.* at 1 n.1. ("As detailed in the Complaint (¶¶ 52-56), and undisputed by [Sanofi] in its motion to dismiss, the broadest relevant market in this case is the market for injectable anticoagulants defined in [Sanofi's] Lovenox® contracts as the "Lovenox® Therapeutic Class." Thus, the relevant products are described herein as "LTC" products and the relevant market as the "LTC Market."). The "LTC market" is equivalent to the "injectable LMWH market." Compare Eisai District Court Decision and *Eisai v. Sanofi-Aventis*, 821 F.3d at 399 (3d Cir 2016).

market—Lovenox®, Fragmin®, Innohep®, and Arixtra®.”¹²⁹ “[T]he Court, for summary judgment purposes, adopts the more limited market definition provided by Eisai.”¹³⁰ In a fairly comprehensive opinion surveying the relevant case law, the district court granted Sanofi’s motion for summary judgment on all claims. The court determined that price operated as Sanofi’s primary means of exclusion and any antitrust claims failed because Sanofi’s prices were above cost.¹³¹ It further held that the evidence did not support an exclusive dealing claim and that Eisai could not establish that its lower market share was due to Sanofi’s anticompetitive conduct.¹³² The district court did not address the complaint’s allegation that the FDA-approved indications, rather than the drug type (injectable LMWH), defined the relevant markets.

D. Third Circuit Rationale

On appeal, the Third Circuit also noted that “. . . a bundling arrangement generally involves discounted rebates or prices for the purchase of *multiple products*.”¹³³ Eisai did not claim that Sanofi conditioned discounts on purchases across various product lines, but on different types of demand for the same product.¹³⁴ Eisai did not argue that the existence of different types of demand for Lovenox resulted in different market demand structures for Lovenox defined by the relevant indications at issue.¹³⁵ The Third Circuit did not elaborate on the possibility that multiple use cases for Lovenox could have given the LWMH market the flavor of multiple products exchanged in multiple product markets.

The Court made several points critical of Eisai’s theory. The Court noted that “[e]ven if bundling of different types of demand for the same product could . . . foreclose competition, nothing in the record indicates that an equally efficient competitor was unable to compete with Sanofi.”¹³⁶ The court then stated that the evidence did not suggest that the fixed costs of obtaining FDA approval for a cardiology indication were so high as to create barriers to entering the market. Furthermore, Eisai did not articulate how much “incontestable demand” flowed from the unique cardiology indication as opposed to other factors.¹³⁷

¹²⁹ *Eisai v. Sanofi-Aventis U.S., LLC*, 2014 WL 1343254, at 24 (D. N.J. Mar. 28, 2014) (citing Compl. at ¶ 52) [hereinafter “Eisai District Court Decision”].

¹³⁰ *Id.* at 25.

¹³¹ *Id.* at 402.

¹³² *Id.*

¹³³ *Eisai v. Sanofi-Aventis*, 821 F.3d at 406 (emphasis added).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

These additional factors may have been fatal to Eisai's demand bundling theory even if the court had accepted it. But Eisai's articulation of its theory and the court ignore strong legal and economic arguments for treating different indications of the same drug as two different products for bundling analysis.

III. USE CASE PRODUCT MARKETS AND TIE-INS

From this foundation of antitrust doctrine, I argue that a demand type tie-in (or a multiple use case tie-in) can be anticompetitive and can serve as evidence to support a Section 2 claim if: (1) two different use cases for a single product function as separate products and define separate product markets; (2) a seller has market power in one of the use case markets (the tying use case); (3) the arrangement gives consumers in the tying use case market no reasonable alternative but to purchase the product for the tied use case from the same seller (a coerced purchase); and (4) the arrangement causes foreclosure in the market for the tied use case. The anticompetitive effect of this arrangement is foreclosure in the use case market in which the seller does not have market power. The crux of the argument is that a single product in the lay sense can function as multiple products in an economic and antitrust sense. This Part examines how my argument fits into the law governing tie-in arrangements.

To determine if Sanofi effectively tied Lovenox's monopolized cardiovascular indication with other competitive indications in an anticompetitive manner, first, we have to define the relevant product market. Second, we need to determine whether Sanofi exercised market power in the relevant use case product market. Third, we need to determine whether Sanofi imposed a tie-in arrangement on Lovenox customers. Finally, we need to determine whether Sanofi's conduct foreclosed a substantial portion of the relevant market.

A. *Defining the Product Market: The Spirit of Reasonable Interchangeability*

Courts define product markets based on what products "have reasonable interchangeability for the purpose for which they are produced—price, use and qualities considered."¹³⁸ Courts' definitions of relevant product markets are consistent with the idea that the literal, lay concept of a single product can function as multiple products, each with a distinct product market. The crux is interchangeability. If one use of a product is not interchangeable with another use of the same product, this is not consistent with the definition of a single market. Given barriers to using the product for a given use case, one use case is not interchangeable with

¹³⁸ *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

another. Thus, a single product with multiple use cases could clear the test for functional interchangeability characteristic of multiple products.

Eisai's Fragmin does not share Sanofi Lovenox's cardiovascular indication. The FDA did not approve substituting Fragmin for Lovenox for this cardiovascular indication. Thus, the products are not reasonably interchangeable for that indication, or for any other non-overlapping indication between the two drugs.

The separate efficient provision test does not necessarily preclude the idea that a single product could function as two separate products in two separate product markets. If a product has two use cases and the government has only approved Company A's sale of the product for one use and Company B's sale of the product for the second use, that product satisfies the separate efficient provision test. A single product with multiple use-cases easily clears this test, where, for example, the government approves A's selling the product for use cases 1 and 2, but only approves B's selling the same product for use case 1.

Eisai and Sanofi provide Fragmin and Lovenox, respectively, for different indications. They have marketed and sold these drugs for their respective purposes for sufficient time that the two indications can be provided separately efficiently.

The theory also holds if the market is defined under the HMT. In applying the HMT, we start with the narrowest possible market. If a hypothetical monopolist can profitably impose an SSNIP on the market, the market is properly defined. If the narrow market fails the HMT, then we expand the definition of the market until it is consistent with the HMT.

The narrowest possible market in *Eisai* is that for Lovenox's cardiovascular indication alone because the FDA has approved only Lovenox for that indication. Sanofi could profitably impose an SSNIP on Lovenox without losing market share because it is a monopolist in the cardiovascular indication.¹³⁹ But Sanofi could lose market share in the other indications, because its SSNIP would apply to Lovenox for all approved indications. If Sanofi could execute price discrimination between Lovenox's cardiovascular indication and its other approved indications, it could impose an SSNIP without losing market share in the other indications. Sanofi can leverage inelastic demand for Lovenox's cardiovascular indication by charging much more for the product market share expected to go to the unique cardiovascular indication and heavily discounting sales over the volume purchased for the unique indication. This arrangement could foreclose competition by giving customers no economically competitive choice but Lovenox for all indications. The an-

¹³⁹ I merely use the cardiovascular indication as an example. Sanofi could profitably impose an SSNIP for all monopolized/noncompetitive indications.

ticompetitive effect mirrors that of a two-product tie-in or a multi-product discount bundling arrangement.

B. Market Power in the Tying Product

Given the Supreme Court's ruling in *Illinois Tool*, government-granted monopoly over a product does not create a presumption of market power.¹⁴⁰ Assuming that a similar burden applies wherever government regulation provides incidental barriers to entry, a plaintiff in Eisai's situation would have to prove market power in the alleged tying product as well. A plaintiff can prove market power through either direct evidence or through indirect evidence by using market share as a proxy for market power and by showing that there are barriers to market entry. To demonstrate market power in the latter case, a plaintiff needs to show: (1) substantial market share in the tying product and (2) that government regulation incidentally creates substantial barriers to entry that prevent potential competitors from competing for the same use case.¹⁴¹

Thus, Eisai would have to show market power in the individual use case product markets defined by the FDA indications. Because Lovenox is the only FDA-approved drug for certain indications, then, if Eisai could demonstrate substantial barriers to entry in that use case (indication) product market, Eisai could demonstrate that Sanofi possesses market power in the market for that indication—monopoly power in fact, based on government regulation's incidental monopoly protection. Eisai alleged barriers to entry for competitors seeking approval to use an LWMH/LTC drug for a new indication, but these may not have been sufficiently particular and substantial to support a finding of market power.¹⁴² If Eisai could have made such a showing, this should have been sufficient for alleging a tying claim.

C. Coerced Purchase

Assuming that Sanofi has market power in the cardiovascular indication for Lovenox, it can leverage that indication to coerce other purchases. The case did not exhibit a direct tie-in and coerced purchase. Rather, if the plaintiff's allegations are correct, customers effectively have no reasonable economic alternative but to purchase additional quantities of Lovenox for other, non-unique indications as well. Therefore, Sanofi's discounting arrangement resembles a de facto exclusive dealing arrangement.

¹⁴⁰ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 31 (2006).

¹⁴¹ In theory, natural market conditions could also create the necessary barriers to entry.

¹⁴² Compl. at ¶¶ 55–57. The complaint simply does not provide much detail regarding barriers to earning FDA approval for additional indications.

D. Conclusion

A use case product tie-in causes market foreclosure in the same manner as a classic tie-in. The seller can leverage market power in one use case to foreclose competition in another use case, either through a classic forced tie-in or through a discount bundling scheme.

In Eisai's case, Sanofi's Lovenox market power in two indications provided the tying product (the "incontestable demand" in Professor Elhauge's parlance). Heavy discounting on volume purchases for competitive indications over and above consumer need for the indications in which Sanofi had market power provided the tying mechanism. The competitive indications in which Fragmin and Lovenox compete provided the tied product. Thus, if the other elements of a tie-in claim were present, Sanofi's discounting practices could cause foreclosure in the tied indication product market.

For the foregoing reasons, use case product market tie-ins can function as anticompetitive conduct supporting a Section 2 claim where a single product has multiple use cases, and a plaintiff can show the other classic elements of a tying claim. In the Eisai case, then, assuming a sufficient showing of market power in noncompetitive indications (and barring a business justification defense), Sanofi's conduct could have been anticompetitive within the meaning of Section 2.

IV. USE CASE PRODUCT MARKETS AND DISCOUNT BUNDLING

This Part examines how my argument fits into the law on discount bundling. Analyzing Eisai's claim under a discount bundling paradigm yields a similar result: where use cases define the relevant product markets, a seller can leverage unique use cases in a single product to foreclose competition in other use cases. As in the tie-in analysis, the argument is that a single product in the lay sense can function as multiple products in an economic and antitrust sense. The arrangement resembles a bundle because Sanofi is effectively discounting across multiple products—its indications—to exclude other producers of this particular LMWH/LTC drug that do not produce an equally diverse product line (set of indications). Under each of the three leading case rationales on discount bundling, the anticompetitive effect can be the same for use case product discount bundling as for traditional product discount bundling.

A. *Cascade Health Solutions: Discount Attribution Standard*

Under the *Cascade Health Solutions* discount attribution standard, if, when a seller's full discount on a bundle is applied to a competitive use case, that use case is sold below cost, then the discount bundling

arrangement may be exclusionary. If Sanofi's discounts on volumes greater than the volume purchased for a monopoly indication result in sales of that (or those, if there are multiple) indication below cost, the arrangement may be exclusionary.

The downside of the discount attribution standard holds true for use case product bundling as well: the seller may be able to heavily discount a competitive use case without selling that use case below average variable cost and still achieve an exclusionary effect. Sanofi could sell LovenoX volumes over the volume needed for its unique indication above average variable cost and still hobble competitors and potential competitors. Another downside is that it would be difficult to prove that Sanofi is discounting competitive indications because the end user, rather than the seller, decides how to use a given volume of LovenoX.

B. The Equally Efficient Competitor

Under the second prong of the *Ortho* test, a plaintiff would need to prove that it is an equally efficient competitor in the market for a given use case. Such a plaintiff must show that it has the same or a lower per-unit cost structure than the defendant and yet, the defendant's bundling mechanism still excludes plaintiff's product from the market. Where discount bundles involve use case product markets, the analysis could be slightly easier because the single product's cost structure (average variable cost) is likely to be equivalent or very similar across all use cases.¹⁴³ Eisai would have to prove that it is at least as efficient as Sanofi in producing and marketing Fragmin as Sanofi is at producing and marketing LovenoX for the overlapping indications.

C. LePage's: No Cost-Based Standard

Under the *LePage's* standard, a plaintiff would have to show that the defendant is a monopolist and that its discounting practices are exclusionary. But a monopolist in what exactly? In *LePage's*, the Third Circuit never precisely specified what market 3M was a monopolist in. In the eyes of the court, 3M appeared to be a monopolist in branded transparent tape, and 3M seemed to have used that power to become a monopolist in the private label tape market by excluding *LePage's* from the market. But the bundling scheme in that case leveraged discounts across a wide array of 3M products, not just branded and private label tape, and the court does not make a judgment on whether 3M is a monopolist in

¹⁴³ This is a simplifying assumption based on average variable costs that may not reflect reality using average total cost if, for example, gaining government approval for different use cases requires different upfront investments.

the markets for some or all the goods constituting a given discounted bundle.

Assuming the court meant that 3M's position as a monopolist in branded transparent tape met the first prong of the test, then a plaintiff in a similar use case product market case would have to show that a defendant is a monopolist in one of those use cases included in the bundled discount. Then the plaintiff would have to show that this practice is exclusionary.

In a use case product market example, this analysis essentially collapses into the tie-in analysis for disputes like *Eisai*. *Eisai* could prove the first prong of the test by pointing to Sanofi's monopoly on its unique, FDA-approved cardiology indication. Then *Eisai* could prove that the discounting practice is exclusionary because customers have no true economic choice but to purchase additional volume for competitive, non-monopoly indications from Sanofi.

D. *Aggregate Discount Rule: Price-Cost Across the Entire Bundle*

Strict application of the price-cost test to an entire bundle of use case products yields the same result as strict application of price-cost to traditional bundling claims. As long as the price of the entire bundle is above the cost of production of the entire bundle, a seller does not violate *Brooke Group*, and its actions are not anticompetitive. This standard would allow a monopolist in one use case to increase the price of the monopoly indication to fund ever-greater discounts on the competitive indication. Applied to *Eisai*, this standard is essentially what the district court and the Third Circuit applied by grouping all LMWH/LTC indications into a single market.

E. *Conclusion*

Under a bundling paradigm of exclusionary conduct, the result is the same as in the tying analysis—a seller can leverage market power in one use case product market to exclude competitors in another use case. As is the case for traditional product bundles, the application form of *Brooke Group*'s price-cost test impacts whether or not an antitrust defendant has acted anticompetitively, and the current prevailing standards all suffer from similar faults when applied to use case product markets. Further, the discount attribution standard suffers an additional handicap of being extremely difficult to prove.

V. IMPLICATIONS AND QUALIFICATIONS

The argument here is inherently narrow in theory and probably narrow in practice. The argument that a single product can functionally be two products, in two separate product markets, for purposes of antitrust

liability is most applicable where the government has granted a monopoly on one of a product's use cases. Patents are the most obvious source of such a monopoly, but there are other potential sources as well. The FDA indication in *Eisai* is a case in point. Because of *Illinois Tool*, a government-granted monopoly does not necessarily attach market power to a given use case; a plaintiff would still have to prove it. This application of antitrust law would provide a weapon for attacking volume discounts that improperly leverage government sanction of commercial use for anticompetitive purposes.

A. *Analogy with Price Discrimination*

There is an analogy between my argument and government's argument in merger cases *FTC v. Whole Foods Market* and *U.S. v. Vail Resorts*. In those cases, the government argued that a challenged merger would negatively impact certain strata of consumers.¹⁴⁴ Those strata had more inelastic demand for the products sold by the merging parties, and hence would bear the brunt of any anticompetitive effect of the merger.¹⁴⁵ In those cases, certain consumers could not reasonably substitute another product for that sold by the merging parties.¹⁴⁶ In *Eisai*, the consumers of the indication of Lovenox in which Sanofi has market power have no reasonable substitutes for that indication—like the strata of consumers in *Whole Foods* and *Vail*.

B. *Source of Use Case Product Market Power*

The question that remains is whether a seller can enjoy market power in a use case for a single good based on something other than government sanction. The answer is likely “no” for two reasons. First, market power in one of multiple use cases for a single product in which the seller does not have monopoly power suggests that potential competitors could quickly and easily enter the market for the other use case—simply sell the product for the other use case. Second, if exogenous natural (as opposed to government-enforced) barriers to entry hinder competitors from entering the market for the other use case, potential competitors can compete to surmount those barriers—like the argument the defense made in *Eisai* with respect to competing to attain certain FDA indications. Barriers to entry include any downside of buying from

¹⁴⁴ *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038–39 (D.C. Cir. 2008); Competitive Impact Statement, *U.S. v. Vail Resorts, Inc.*, No. 97-B-10, at 5–6 (D. Colo. Jan 22, 1997) (noting that the challenged merger likely would not negatively impact destination skiers but that the merger would result in higher prices for local skiers as a result of reduced competition).

¹⁴⁵ *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038–39 (D.C. Cir. 2008); Competitive Impact Statement, *U.S. v. Vail Resorts, Inc.*, No. 97-B-10, at 5–6 (D. Colo. Jan 22, 1997)

¹⁴⁶ *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038–39 (D.C. Cir. 2008).

another seller of the same drug that is approved for only certain indications. For use case products, switching costs may be higher as a general matter than for traditional products because of a consumer's natural tendency, in the interest of convenience, to purchase volume for all uses from the same source.

This begs a more difficult question that the Third Circuit broached indirectly. When are barriers to entry low enough that a court should eschew a finding of liability and instead find that the potential competitor in one use case market should enter and compete in the market for the other use case? In *Eisai*, the Third Circuit noted that Eisai could compete to attain the FDA indications in which Sanofi possessed market power.¹⁴⁷ A general rule obliging a competitor to compete in all use case markets for which a single product is potentially suited would be an easy shortcut around use case product antitrust liability (and negate the argument here), but such a rule would be a blunt instrument for a nuanced problem and it would allow sellers to foreclose competition in the various manners described here.¹⁴⁸

C. *Competing for Indications and the Equally Efficient Competitor*

In *Eisai* the Third Circuit Court noted that “[e]ven if bundling of different types of demand for the same product could . . . foreclose competition, nothing in the record indicates that an equally efficient competitor was unable to compete with Sanofi.”¹⁴⁹ In other words, the evidence did not suggest that the fixed costs of obtaining FDA approval for a cardiology indication were so high as to create barriers to entering the market.¹⁵⁰

One problem with this statement is its focus on fixed costs to entry when the inquiry into an equally efficient competitor seems to be focused on marginal cost and average variable cost. The Third Circuit also failed to explain why Eisai's entering the market for Sanofi's unique indication would be presumptively easy such that an equally efficient competitor could compete. On the other hand, a narrow interpretation of the court's statement that, assuming Eisai is an equally efficient competitor, Eisai simply failed to prove that barriers to attaining a new indication prevented it from doing so, is consistent with my argument. As the costs of entry into a new use case market approach zero, a plaintiff's Section 2 case based on bundling or tying arrangements (involving traditional or use case products) should become increasingly less viable. In contrast,

¹⁴⁷ *Eisai v. Sanofi-Aventis*, 821 F.3d at 406.

¹⁴⁸ There would also be no defensible theoretical reason for restricting such a rule to use case product markets.

¹⁴⁹ *Id.*

¹⁵⁰ See *Eisai v. Sanofi-Aventis*, 821 F.3d at 405.

where a plaintiff can prove that the monetary, temporal, and related costs associated with entering the market for a new use case are significant, it should also have the opportunity to prove that it is an equally efficient competitor. Disputes involving use case product markets should minimize problems of proof because the average variable cost of production for one use should be at least roughly equivalent to that for another use case.

D. Additional Exclusionary Effect: Eliminating Potential Competitors

Bundling and tying involve two methods of market foreclosure: squeezing out current competitors and dissuading potential competitors from entry. With respect to use case product markets, the first means is as potent as when the arrangement involves traditional product markets, but the second means of foreclosure could be even more so. Where one competitor has a monopoly in one use case, it can leverage that market power to eliminate competition in all the other use cases, assuming that every use cases' customer base is roughly the same (e.g. Eisai and Sanofi's medical customer base). Leveraging power in one use case to eliminate competitors in other use cases extinguishes competition in once competitive use cases *and* eliminates the closest potential competitors for the monopoly use case.

E. Completely Separate Customer Bases

Throughout this Note, I assume that the multiple use case products implicated in bundling and tying arrangements are marketed to the same or at least partially overlapping customer bases—as in the *Eisai* dispute. If the customer base for the use cases are completely different such that, theoretically, the markets exhibit zero demand and supply effect interactions on each other, an anticompetitive effect from bundling goes away. A customer of the monopoly use case only would not be induced to purchase the other use case at any price because the customer has no use for it. In theory, a tying arrangement could still coerce such a customer to purchase competitive use cases, which the customer would never use or potentially resell.

F. Contestable and Incontestable Demand Bundling

Eisai's backup argument that Sanofi's practices bundle "contestable" and "incontestable" demand failed for several reasons. For one, Eisai failed to articulate how much "incontestable demand" flowed from the unique cardiology indication as opposed to other factors.¹⁵¹ At base, this portion of Eisai's argument is similar to mine. In a single market

¹⁵¹ *Id.*

that exhibits one highly inelastic demand structure and one elastic demand structure, depending on the type of customer (a customer of a unique use case versus a customer of a competitive use case), a seller in the inelastic portion of the market has power in that portion.¹⁵²

This articulation of the theory muddies the explanation for why Sanofi's and similar sales schemes are anticompetitive. First, it asks a court to recognize a new type of anticompetitive conduct underlying Section 2 claims rather than following more tried and true routes etched in precedent to allege and prove antitrust liability. Second, it's not as if the market has an elastic portion of the demand curve and an inelastic portion of the demand curve and consumers in the market are situated somewhere along that curve. Instead, consumers in the market for different use cases overlap, so a single consumer can be situated both on the elastic and the inelastic portions of the demand curve simultaneously. This is where the demand bundling argument collapses. A group of customers each with two different sets of demand preferences depending on how they can use the single product demanded form different demand curves based on the two different uses. There are two different supply curves as well. The seller of the monopoly use case sets the supply curve for that indication. In the competitive use case, multiple sellers in the market interact with each other and customers demand preferences to set prices at given quantities along a different curve. The customers and sellers are participating in two separate markets.¹⁵³

G. *The Bundling Guidance Problem Remains*

Finally, my argument does nothing to solve the guidance problem inherent in the discount bundling standards utilized in *LePage's* and *Ortho*. Rather, my argument only aims to argue that a single product for lay purposes may not function as a single product for antitrust purposes in the context of seller discounting and tie-in arrangements. Perhaps there is a necessary trade-off between capturing anticompetitive effects from bundling and providing meaningful guidance to sellers; if so, then the answer seems to be a policy choice. This Note does not cover the issue further.

¹⁵² For a full discussion of the plaintiff's demand bundling theory, see *Eisai v. Sanofi-Aventis*, 821 F.3d at 401–02.

¹⁵³ Note that a prohibition on using the one product for both uses provides the impetus for the separation of the markets by use case. If customers could use the same product for both use cases, then each can trade off one use for the other after purchasing the product until their demand preferences in the two markets converge to a single point on the demand curve. Once every customer in both markets does this, every customer's single set of demand preferences form just one demand curve in a single market.

CONCLUSION

This Note put forth a simple premise—that a single product with multiple use cases can act like multiple products exchanged in multiple product markets defined by its use cases. The single product's uses can define the product markets in which it is exchanged if the single product is not reasonably interchangeable among its multiple uses.

The dispute in *Eisai v. Sanofi-Aventis* provides a sample scenario for how this situation could exist. And although both the district court and the Third Circuit rejected plaintiff Eisai's theory of antitrust liability, the latter court properly left the door open to such theories on a different set of facts.

Hopefully this theory (1) will contribute to limiting or eliminating on otherwise baffling exception to current, product-function based methods of defining product markets and (2) will have some impact in those areas of the economy where government regulation deflects concerns about monopoly and oligopoly and provides an incidental shelter for sellers to engage in anticompetitive conduct.

