BUNDLING, TYING, AND EXCLUSIVE DEALING: TRENDS SIGNAL NEED FOR CAUTION

BY KENNETH RACOWSKI, ANNA P. HAYES & ALEXANDER DUDLEY[1]



1 Kenneth Rackowski and Anna P. Hayes are partners and Alexander Dudley is an associate at Holland & Knight LLP. The views expressed are entirely their own. Their views do not represent the view of the firm or any client of the firm

CPI ANTITRUST CHRONICLE
May 2026

Visit www.competitionpolicyinternational.com for access to these articles and more!

BUNDLING, TYING, AND EXCLUSIVE DEALING: TRENDS SIGNAL NEED FOR CAUTION

By Kenneth Racowski, Anna P. Hayes & Alexander Dudley

This article explores the resurgence of bundling, tying, and exclusive dealing theories in healthcare enforcement and litigation. Drawing on recent jury verdicts, appellate decisions, and enforcement trends, the authors demonstrate how practices that are often procompetitive in principle can give rise to significant liability when they foreclose competition in practice. Their discussion of "de facto" exclusive dealing—where contractual arrangements functionally replicate exclusivity without formal terms—is particularly instructive, reflecting a broader shift toward effects-based analysis grounded in market realities rather than formalistic distinctions. For healthcare companies navigating complex product ecosystems, the message is clear: familiar commercial strategies are attracting renewed scrutiny and carry substantial litigation risk.

On March 20, 2026, Andrew Ferguson, Chairman of the Federal Trade Commission ("FTC") launched a Healthcare Task Force directed to, among other things, "conduct ongoing horizon-scanning exercises to identify emerging issues and new priority areas for enforcement and advocacy" in the healthcare industry.[2] Given the emphasis on healthcare-related enforcement in recent years, it comes as no surprise that this remains an industry on which the FTC (and other enforcers, both federal and state) are keenly focused. But the creation of this new task force begs the question: can we expect an uptick in challenges or increased focus on a particular area of antitrust healthcare issues?

One such area may be cases or investigations involving claims stemming from bundling or tying arrangements (or, as discussed herein, *de facto* exclusive dealing). These theories of liability share a common thread: each targets commercial practices that, while not necessarily anticompetitive on their face (and in fact often viewed as pro-consumer), can have the practical effect of foreclosing competition. Mounting jury verdicts and court decisions related to these practices warrant close attention, particularly for those in the healthcare spotlight. This article examines the historical legal framework underlying bundling, tying, and *de facto* exclusive dealing claims; surveys landmark decisions and recent developments; and offers practical guidance for healthcare companies seeking to navigate this evolving terrain.

I. HISTORY OF EXCLUSIVE DEALING, TYING, BUNDLING, AND DE FACTO EXCLUSIVE DEALING

A. Basics of Exclusive Bundling, Tying, and Exclusive Dealing

Bundling generally refers to the practice of offering multiple products or services together as a package. Suppliers typically offer discounts or rebates for a "bundle" to reach a lower total price than the price of the products or services sold separately. When bundling simply lowers prices to consumers, such arrangements are generally procompetitive and legal. However, bundling may violate Section 2 of the Sherman Act when a dominant firm employs bundling discounts that equate to below-cost pricing (predatory pricing) and therefore amount to exclusionary conduct.[3]

Tying arrangements are those where a party agrees to sell one product or service, but only on the condition that the buyer also purchases a different product or service, or at least agrees that the buyer will not purchase that tied product or service from any other supplier.[4] A tying arrangement violates Section 1 of the Sherman Act "if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market."[5] The seller must coerce the buyer, using its control of the desired product or service, into purchasing the tied product or service that the buyer does not otherwise wish to purchase from the seller. Tying arrangements for goods also violate Section 3 of the Clayton Act and can also serve as support for Sherman Act Section 2 monopolization claims[6] and claims under Section 5 of the FTC Act.[7]

Exclusive dealing is an agreement between a supplier and a purchaser whereby the purchaser agrees to purchase all, or nearly all, of a particular product or service from the supplier (or, vice versa, where a seller agrees to sell only to the buyer). Exclusive dealing arrangements are common and generally legal. However, if an exclusive dealing agreement forecloses or substantially forecloses competition in a market, and the harm to the market is not outweighed by procompetitive benefits of the exclusive dealing agreement, exclusive dealing may be actionable under Section 1 of the Sherman Act.[8] Similarly, if such an agreement covers goods and may "substantially lessen competition or tend to create a monopoly," it may violate Section 3 of the Clayton Act.[9] If a monopolist or near-monopolist enters an exclusive dealing agreement, it may also constitute illegal acquisition or maintenance of monopoly power, violating Section 2 of the Sherman Act.[10]

---

2 Memorandum from Chairman Andrew N. Ferguson, Directive Regarding Healthcare Task Force (Mar. 20, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/Memorandum-Ferguson-re-Healthcare-Task-Force.pdf.

3 E.g. *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 906 (9th Cir. 2008).

4 See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461 (1992).

5 *Ibid.* (internal quotations and citations omitted).

6 *Ibid.* at 480–85.

7 See *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 34 (2006).

8 15 U.S.C. § 1.

9 15 U.S.C. § 14.

10 15 U.S.C. § 2.

B. Bundling and De Facto Exclusive Dealing

In some cases, courts have construed bundling arrangements as *de facto* exclusive dealing agreements that can violate Section 1 of the Sherman Act. In *LePage's Inc. v. 3M*,[11] after a jury verdict finding that bundled rebates supported a Sherman Act Section 2 monopolization claim, the Third Circuit ultimately found the rebates "could reasonably have been viewed as effectuating exclusive dealing arrangements because of the way in which they were structured."[12] Specifically, 3M structured the rebates as conditioned on purchasing six different product lines and linked the size of the rebate to the number of product lines in which targets were met, which ultimately resulted in substantial rebates to various customers totaling nearly half of LePage's sales to those customers.[13] The Third Circuit held that the jury reasonably could have found this use of bundled rebates as an exercise of anticompetitive monopoly power.[14] Similarly, the Third Circuit found 3M's rebates amounted to "all-or-nothing" discounts, leading customers to maximize discounts by dealing exclusively with 3M.[15] Accordingly, the court affirmed the district court's entry of judgment based on the jury's verdict finding that 3M violated Section 2 of the Sherman Act because these bundled discounts could effectively drive LePage's, 3M's only competitor, out of business.[16] Thus, *LePage's* shifted the focus from the direct terms and effects of an arrangement alleged to be anticompetitive to the coercive effect of such an arrangement.

Following *LePage's*, the Third Circuit expanded application of the *de facto* exclusive dealing theory in *ZF Meritor, LLC v. Eaton Corp*.[17] After the jury returned a verdict in the plaintiffs' favor on their Section 1 and 2 claims, Eaton appealed, arguing, among other things, that Eaton's agreements with manufacturers were not true exclusive dealing arrangements because the agreements did not contain express exclusivity requirements and did not cover 100% of the manufacturers' purchases.[18] In rejecting this argument, the Third Circuit explained that "*de facto* partial exclusive dealing arrangements may, under certain circumstances, be actionable under the antitrust laws."[19] The legality of such a contract, the court reasoned, turns on "whether the agreement foreclosed a substantial share of the relevant market such that competition was harmed."[20] Consequently, although no agreement was completely exclusive, the agreements had the effect of unlawfully foreclosing competition through market-penetration targets of approximately 90%.[21] Thus, like in *LePage's*, the court looked to the practical effect of an agreement, rather than restricting its antitrust analysis to only the contractual language.

II. RECENT DECISIONS ON BUNDLING AND TYING RESULT IN SIGNIFICANT DEFENDANT PAY-OUTS AND APPELLATE REVIEW

Cases brought by private parties in litigation (both class actions and business-to-business lawsuits) continue to mount. As discussed below, several of these cases have survived to jury trial and through appellate review and have resulted in significant damages verdicts and settlements. Additionally, the Third Circuit is currently considering an appeal related to antitrust claims arising from alleged rebates and exclusive dealing arrangements.

A. Bundling and Exclusionary Contracts Jury Verdict

In February 2026, a California jury in federal district court awarded $381.7 million in damages to the plaintiff, Applied Medical, in *Applied Med. Res. Corp. v. Medtronic, Inc.* ("*Medtronic*"),[22] in its suit against Medtronic for violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clay-

11 324 F.3d 141 (3d Cir. 2003) (en banc).

12 *Ibid.* at 154.

13 *Ibid.* at 154-57.

14 *Ibid.* at 157.

15 *Ibid.* at 159.

16 *Ibid.*

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

18 *Ibid.* at 282.

19 *Ibid.*

20 *Ibid.* at 283.

21 *Ibid.* at 283-84.

22 No. 8:23-CV-00268-WLH-DFM, 2023 WL 5503107 (C.D. Cal. 2023).

ton Act. Applied Medical alleged that Medtronic entered into exclusionary contracts and below-cost pricing from bundled discounts for blood-vessel sealing surgical devices with other products, and, in doing so, foreclosed competition by preventing hospitals and group purchasing organizations from purchasing the devices from any manufacturer except Medtronic because of the threat of losing discounts on bundled products.[23] According to Applied Medical, these tactics allowed Medtronic to maintain a dominant 78% market share.[24] At trial, although Medtronic argued that its contracts were not exclusive and industry-standard, and that its market share was the result of its superior advanced bipolar device preferred by hospitals and surgeons, the jury nevertheless found Medtronic's tactics anticompetitive in rendering its verdict in favor of Applied Medical.[25] Of particular note, the FTC had filed an amicus brief in the case where it took issue with Medtronic's framing in motion to dismiss briefing of legal issues. The FTC's brief urged the court to focus on "actual market realities" rather than "formalistic distinctions."[26] Of particular note, and among other arguments, the FTC voiced its views that exclusive contracts are not legal just because they are short term; that a contract can constitute exclusive dealing even if not formally binding; that plaintiffs need not allege a lack of alternative distribution channels; that plaintiffs challenging bundling need not demonstrate exact prices or costs; and that bundling may not necessarily result in consumers getting lower prices.[27]

B. Tying Payouts Following Appellate Court Reversals

In 2024, the Ninth Circuit overturned a jury's finding of no liability for a health system (Sutter Health) on claims that it had engaged in unlawful tying and unreasonable course of conduct in violation of California's Cartwright Act.[28] In *Sidibe v. Sutter Health*, plaintiffs argued that Sutter Health was able to impose supracompetitive prices on health plans by conditioning in-network participation of Sutter Health's providers in markets where there were few or no non-Sutter providers on the health plans' willingness to purchase either in-network participation of or pay supracompetitive out-of-network rates for Sutter Health's providers in the more competitive "tied" markets where Sutter lacked market power because of the operation of many non-Sutter providers.[29] As argued, this arrangement forced health plans to accept anticompetitive contract terms by negotiating on a systemwide basis rather than individually.[30] On appeal, the Ninth Circuit agreed with the plaintiffs that the district court improperly excluded evidence relevant to both plaintiffs' anticompetitive tying and unreasonable course of conduct claims, including evidence of intent to link tying and tied products and to exercise market power in the tying market (even evidence of intent that predated the class period).[31] Consequently, the Ninth Circuit reversed entry of final judgment and remanded for a new trial.[32] Following remand and shortly before the new trial was set to begin in April 2025, Sutter Health agreed to enter a $228.5 million class action settlement to resolve all claims, and the district court granted final approval of that settlement in November 2025.[33]

In 2025, a federal jury awarded $147.4 million in damages (which the court trebled to $442 million, as required by law) to Innovative Health, a manufacturer of specialized catheters, based on tying claims against its competitor Biosense, a manufacturer of cardiac mapping systems and specialized catheters for its systems. Biosense provided clinical support services only to those hospitals that directly purchased a catheter from it.[34] As a result, hospitals that purchased reprocessed catheters from Innovative Health could not receive free clinical support services.[35] After the district court had originally granted summary judgment in favor of Biosense on the Section 1 and 2 Sherman Act claims based

23 *Ibid.* at *1.

24 *Ibid.*

25 See e.g. Craig Clough, *Medtronic Hit with $382M Antitrust Verdict Over Bundling*, Law 360, available at https://www.law360.com/articles/2438718/medtronic-hit-with-382m-antitrust-verdict-over-bundling (last visited Mar. 25. 2026).

26 Amicus Brief on Behalf of the Federal Trade Commission at 4, Applied Med. Res. Corp. v. Medtronic, Inc., No. 8:23-cv-00268-WLH-DFM (C.D. Cal. 2023) (quoting *Eastman Kodak*, 504 U.S. at 466-67 (1992)).

27 *Ibid.* at 3-4.

28 Sidibe v. Sutter Health, 103 F.4th 675 (9th Cir. 2024).

29 *Ibid.* at 689–90.

30 *Ibid.* at 698.

31 *Ibid.* at 693–98.

32 *Ibid.* at 706.

33 *Sidibe v. Sutter Health*, No. 3:12-cv-04854-LB, ECF No. 1764 (N.D. Cal. Apr. 25, 2025).

34 *Innovative Health, LLC v. Biosense Webster, Inc.*, No. 22-55413, 2024 WL 62948, at *1 (9th Cir. Jan. 5, 2024).

35 *Ibid.*

on the conclusion that Innovative Health failed to show that the clinical support services were a separate product from the catheters, Innovative Health appealed to the Ninth Circuit.[36] The Ninth Circuit reversed, finding there was "sufficient evidence both that clinical support services and catheters have been sold separately in the past and that they still are sold separately."[37] Further, the Ninth Circuit rejected Biosense's alternative argument that its tying policy had procompetitive effects that outweighed any anticompetitive effects.[38] The Ninth Circuit found that genuine issues of material fact existed as to whether the tying arrangement was justified because it prevented competitors from "free riding," whether the tie was necessary to ensure quality and safety of the catheters used for the cardiac mapping system.[39] As a result of the Ninth Circuit's reversal, the case proceeded to trial and ultimately concluded with the significant damages award for Innovative Health.

C. Ongoing Appellate Review Related to Rebates and Exclusive Dealing

Apart from these payouts, the Third Circuit is currently considering an appeal in *Reading Hosp. v. Hill-Rom Holdings, Inc.* In that case, the district court dismissed claims under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act arising from alleged rebates and exclusive dealing agreements.[40] The district court in 2025 found that plaintiff hospitals failed to adequately allege that defendants, suppliers of hospital beds, had substantially foreclosed the relevant markets or pleaded adequate details of the allegedly anticompetitive agreements (including quoting or attaching the contractual language at issue).[41] Plaintiffs appealed the decision and argued, *inter alia*, that they did not need to meet a minimum percentage test for substantial foreclosure or allege specific terms of an agreement to support their claims.[42]

III. TAKEAWAYS FOR HEALTHCARE INDUSTRY

In the healthcare industry in particular, bundled discounts and tying arrangements are particularly common and consequential. Medical device manufacturers, pharmaceutical companies, and healthcare systems frequently offer products and services that are complementary, creating natural commercial incentives to bundle or tie offerings together. Such arrangements can serve legitimate business purposes, such as ensuring product quality, safety, or interoperability, and can result in lower costs for purchasers and ultimate consumers. However, these dealings can support allegations of anticompetitive conduct if used to leverage dominance in one market or foreclose competition in some way. Recent decisions, such as those discussed above, demonstrate the strong possibility that such claims survive to jury trial, and the damages exposure for companies is substantial.

A. U.S. Supreme Court Declines to Weigh in Regarding De Facto Exclusive Dealing

Outside of the healthcare context, the Supreme Court recently denied a petition for a writ of certiorari related to *de facto* exclusive dealing. In *CoStar Grp., Inc. v. Com. Real Est. Exch., Inc.* ("CREXi"),[43] the Ninth Circuit held that counterclaimant CREXi sufficiently alleged claims for violations of Sections 1 and 2 of the Sherman Act based on a *de facto* exclusive dealing theory. CREXi alleged that CoStar's agreements with brokers for use and access of CoStar's database for real-estate listings, information, and auction services had the preclusive effect of prohibiting brokers from using any other service besides CoStar.[44] Although CoStar's right to use broker-provided data was expressly "non-exclusive" in its agreements, CREXi argued that these clauses were "illusory and contradicted by other contractual provisions and by CoStar's conduct" and resulted in brokers refusing to work with CREXi.[45] In reversing the district court's dismissal of the antitrust counterclaims, the Ninth Circuit for the first time

36 *Ibid.*

37 *Ibid.* at *2.

38 *Ibid.* at *3-4.

39 *Ibid.*

40 *Reading Hosp. v. Hill-Rom Holdings, Inc.*, No. 25-2969 (3d Cir. 2025).

41 *Reading Hosp. v. Hill-Rom Holdings, Inc.*, No. 5:24-cv-02715-JMG, 2025 WL 2637233, at *8-9 (E.D. Pa. Sept. 9, 2025).

42 Opening Brief for Appellant at 4-5, *Reading Hosp.*, No. 25-2969 (3d Cir. 2026).

43 *CoStar Grp., Inc. v. Com. Real Est. Exch., Inc.,* 150 F.4th 1056 (9th Cir. 2025), *cert. denied sub nom.*, *CoStar Grp., Inc. v. Com. Real Est. Exch., Inc.*, No. 25-667, 2026 WL 795193 (U.S. Mar. 23, 2026).

44 *Ibid.* at 1073-74.

45 *Ibid.*

"recognize[d] a *de facto* exclusive dealing theory" and found that CREXi "plausibly allege[d] that the contracts operate as a *de facto* exclusive agreements for purposes of § 1, and that they are anticompetitive under § 2."[46]

On December 5, 2025, CoStar filed its petition for writ of certiorari with the Supreme Court arguing that the Ninth Circuit's decision allows *de facto* exclusive dealing claims "without any guardrails" and based on expressly non-exclusive agreements that "a small handful of customers unilaterally misunderstood."[47] CoStar argued that the Ninth Circuit's decision's "guardrail-free" approach illustrates confusion among the courts about *de facto* exclusive dealing.[48] CoStar cited decisions from the Second and Eighth Circuits rejecting claims of *de facto* exclusive dealing when contracts "were expressly nonexclusive" or where contracts offered discounts to customers purchasing certain amounts of products.[49] On the other hand, CoStar pointed to Third, Tenth, and Eleventh Circuit decisions limiting *de facto* exclusive dealing to agreements that function as exclusive because of economic incentives or where there is a program or policy "functionally equivalent" to an exclusive contract.[50] However, on March 23, 2026, the Supreme Court denied the petition, leaving the Ninth Circuit's decision intact.[51]

B. Guidance for Avoiding Conduct Challenges

The foregoing decisions, particularly those resulting in huge damages or settlements, and the U.S. Supreme Court's decision not to weigh in on these issues emphasize the need for caution when healthcare companies make decisions regarding sales "groupings" of products or services together (whether in the form of bundled discounts or conditioning the sale of certain products or services on others, or even the sale of complementary products and related services) and when entering agreements that may have the practical effect of causing exclusive relationships in sales channels or supply chains. Typically, antitrust laws exist to improve the competitive environment – including by lowering prices. But, when prices are lowered only under certain conditions, and especially when lowered prices are not passed on to consumers or when they result in fewer competitors and higher market concentration, more analysis is needed to ensure that there is no risk of claims regarding illegal anticompetitive agreements or monopolization. This analysis is not always easy, particularly when the competitive outcome (i.e., effect on competitors or potential competitors) only becomes clear in hindsight.

Though this may be a difficult undertaking in the moment, as healthcare companies are making marketing or commercial decisions, the foregoing decisions provide some helpful guidance – both on actions to avoid and where to exercise additional caution:

- The *CoStar* case demonstrates that where a dominant firm is active in litigation seeking to protect itself, particularly with regard to data or intellectual property issues, it should take additional measures to ensure that any potential references to, or even possible misunderstandings regarding, exclusive rights or exclusive purchasing/supply relationships, are minimized.
- The *Medtronic* verdict demonstrates that firms with significant market power must analyze whether, when offering discounts, those discounts are such that competitors could be effectively barred from offering similar products or services.
- *Innovative Health* is especially instructive with regard to medical devices – when sold along with services related to those devices, device-makers should reconsider the necessity of placing requirements related to the purchase of the device to "qualify" to receive services (even if directly related to that device).
- *Sutter Health* demonstrates the importance of continuous compliance efforts and understanding that internal strategy documents and communications may be used as evidence of anticompetitive intent, even if the alleged anticompetitive acts do not occur until many years later. The FTC's current express intention to engage in "horizon-scanning" exercises to identify antitrust issues in healthcare, along with the recent successes by private plaintiffs in litigation, warrants careful thought and thorough re-examination of these types of commercial relationships.

---

46 *Ibid.*

47 *CoStar Grp., Inc. v. Com. Real Est. Exch., Inc.*, 2025 WL 3542343, at *2 (Dec. 4, 2025).

48 *Ibid.* at *9.

49 *Ibid.* at *9-11 (citing *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 742 (2d Cir. 1989); *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 612-13, 617 (8th Cir. 2011); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir.), *cert. denied*, 531 U.S. 979 (2000)).

50 *Id.* at *11-13 (citing *ZF Meritor*, 696 F.3d at 698; *LePage's*, 324 F.3d at 158-59; *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 193 (3d Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006); *McWane, Inc. v. FTC*, 783 F.3d 814, 820-21, 830, 833-34 (11th Cir. 2015), *cert. denied*, 577 U.S. 1216 (2016); *Chase Mfg., Inc. v. Johns Manville Corp.*, 84 F.4th 1157, 1163-64, 1169, 1171, 1173-77 (10th Cir. 2023)).

51 *CoStar*, No. 25-667, 2026 WL 795193 (U.S. Mar. 23, 2026).

CPI COMPETITION POLICY® INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.