CAN IDENTICAL PRODUCTS, BUNDLED TOGETHER, CONSTITUTE ILLEGAL TYING?

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Can Identical Products, Bundled Together, Constitute Illegal Tying?

By Melanie Stallings Williams

Can bundling identical items constitute anticompetitive behavior? Unlawful tying occurs when a seller has market control and essentially forces the buyer to purchase another product. Bundling differs from tying because, while products are being sold together, the buyer can purchase the items separately. Bundling does not normally constitute anticompetitive behavior; in fact many products are sold in multiples or with complements. Bundling can reduce consumer welfare, however, if the seller pairs an item over which it has market power (product A) with another item (product B), manipulating prices so as to engage in predatory conduct. But what of two identical products being sold in a bundle? Normally, selling in multiples increases consumer welfare by reducing costs. But what if the markets for the two identical bundled products differ? Can the market for a primary medical emergency device differ from the market for a backup? Or the market for viewing first-run entertainment programs differ from subsequent broadcasts? Or for reading newspapers during the week compared with Saturdays? If so, should we conclude that the otherwise identical products are not substitutes and analyze the two separate markets using tying analysis. Federal district courts in three circuits have reached contradictory conclusions, so that the issue is ripe for analysis.

I. INTRODUCTION

After years of relative quiet in antitrust enforcement, the topic of tying and bundling promises to heat up. A recent Congressional report, with a focus largely on digital industries, identified a cascade of examples of largely unregulated tying and bundling of products and services, all to the detriment of consumers.[2] Some of the report's recommendations were aimed at reducing constraints on private antitrust prosecutions, including what the subcommittee characterized as "judicially imposed standards constraining what constitutes an antitrust injury."[3] Congress responded, proposing "sweeping antitrust legislation."[4]

But while Congress's focus has been on digital markets, its recommendations are more broadly stated, seeking both to strengthen antitrust laws and revive vigorous enforcement.[5] What of "old school" industries where spotty federal enforcement and restricted private efforts have resulted in virtual monopolies? The health care industry, with its heavy reliance on distributing patented products, has long been subject to claims that anticompetitive behavior has stifled competition, raised prices, and reduced consumer choice. Because product selection and payment are often made by intermediaries like medical care providers, insurers, and government agencies, consumer power is even further reduced. *In re EpiPen*,[6] a class action, raises an issue unresolved among the federal circuits: can identical bundled products constitute illegal tying when the products' uses differ? Should we look not at the products themselves, but instead at the consumers' uses when determining whether products or services have been illegally tied? We seem poised for a more sophisticated analysis of what constitutes unlawful tying and bundling.

II. DISCUSSION

A. Factual Background

EpiPens are a type of epinephrine auto-injector ("EAI"). These disposable devices contain pre-measured epinephrine (also known as adrenalin) to be administered when a victim is suffering from anaphylaxis, or a severe allergic reaction to certain foods, insect bites, medications, and other substances. Such allergies are not uncommon, with an estimated one in thirteen children suffering from food allergies alone.[7] Anaphylaxis is a life-threatening emergency and can result in death within thirty minutes. Because of the deadly risk and swift consequences, such patients are advised to keep an EAI handy. While epinephrine is an old drug (with early forms of adrenalin in use for more than a century without FDA approval),[8] the retractable single-dose EpiPen is covered by patents.[9]

Over the years, EpiPens gained dominance in the market. While rival manufacturers of EAIs emerged, some were hampered by inferior products.[10] But a great part of the failure of competing manufacturers was allegedly anticompetitive behavior on the part of Mylan, the sole distributor of EpiPens. The current class action against the distributor and manufacturers of EpiPens alleges, among other things, that the defendants paid illegal kickbacks to pharmacy benefit managers, filed frivolous patent infringement cases, offered exclusionary rebates, obtained additional patents designed not to improve the product but instead to handicap competitors, and engaged in "pay for delay" settlements where competing generic product manufacturers agreed to delay their entry into the market.[11] Mylan lobbied for the successful passage of a federal law that required schools to keep EAIs on site (essentially requiring counties to stockpile the product) and then offered "free" EAIs with agree-

2 Subcomm. on Antitrust, Com. and Admin. Law of the Comm. on the Judiciary, Majority Staff Rep. and Recommendations, 116th Cong., Investigation of Competition in Digital Markets (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

3 *Id.* at 21.

4 Cecilia Kang, *Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust*, N.Y. Times, June 11, 2021, https://www.nytimes.com/2021/06/11/technology/big-tech-antitrust-bills.html.

5 Subcomm. on Antitrust, Com. and Admin. Law of the Comm. on the Judiciary, *supra* note 2, at 20-21.

6 *In re EpiPen Mktg., Sales Practices & Antitrust Litig.*, 336 F. Supp. 3rd 1256 (D. Kan. 2018).

7 *Id.* at 1277.

8 *Par Pharm., Inc. v. Hospira*, Inc. 420 F. Supp. 3d 256, 261 (D. Del. 2019).

9 *In re EpiPen, supra* note 6, at 1277.

10 Caroline Y. Johnson & Catherine Ho, *How Mylan, the EpiPen Company, Maneuvered to Create a Virtual Monopoly*, Wash. Post (Aug. 25, 2016), https://www.washingtonpost.com/business/economy/2016/08/25/7f83728a-6aee-11e6-ba32-5a4bf5aad4fa_story.html.

11 *In re EpiPen*, *supra* note 6, at 1278-81.

ments that limited the schools' right to purchase competing products.[12] EpiPen was so ubiquitous that the resulting School Access to Emergency Epinephrine Act of 2013 was dubbed the "EpiPen Law."[13] These reported efforts were successful: since 2009, Mylan's market share of EAI's exceeded 90 percent, rising to almost 100 percent by 2012 despite significant price increases over that period.[14]

While some consumers bought single EAIs, others bought two devices so as to have a backup. Because consumers were told that the medication expired after twelve to eighteen months, this meant a continuous cycle of purchases. When Mylan acquired the exclusive right to distribute EpiPens in 2007, the product's cost was less than $50 per device. By 2016, the cost had risen to $304[15] although the cost of epinephrine had remained constant during that period at approximately $1 per dose.[16] Beginning in 2011, Mylan began a "hard switch," raising the price of the product and selling them only in packages of two devices. The class plaintiffs complained that this conduct violated antitrust laws because it forced consumers to buy two products when they may have preferred to buy a single device or to buy the branded EpiPen as their primary EAI and a cheaper, generic EAI as a backup. However, this raises a difficult problem for antitrust analysis. Can two identical products, packaged together, constitute unlawful "tying" within the meaning of the Sherman and Clayton Acts?

B. Bundling and Tying

Bundling and tying are often analyzed interchangeably for antitrust purposes, but involve different conduct. Bundling occurs when products are packaged together. Bundling rarely involves anticompetitive conduct and often increases consumer welfare. Consumers may prefer to buy jumbo packages of toilet paper rather than single rolls, for example, when it costs less per item, is more convenient, and results in less packaging waste. There is nothing necessarily anticompetitive about bundling and, in fact, most products are bundled in the sense that they could be broken down to their component parts.[17]

Similarly, bundling may involve two complementary products packaged together. When white board markers are packaged with erasers, the two products have been bundled. Bundling differs from tying because, with bundling, there is no barrier to the buyer purchasing the items separately. That is, there is nothing to stop the consumer from separately buying markers and erasers. Tied products, however, differ from bundled products because they leave the buyer with no choice. If the only way to have bought an iPhone when the product was introduced in 2007 was to use Apple's designated carrier (Cingular), the product and the service had been tied. Tying constitutes an antitrust violation if the seller has control of the market and essentially forces the buyer to purchase a product that the buyer did not want or would have preferred to purchase elsewhere.[18]

While bundling is often advantageous to buyers, it can present some of the same anticompetitive problems as tying. There is a risk that bundling can become predatory if a seller prices products so as to reduce competition.[19] If a seller, for example, controls the market for the A product (for example, by holding a patent) it can bundle product A with another product over which is does not have market control. If the price of product A is inflated, the seller can afford to price product B below its average variable cost, giving the false appearance that product B is a bargain. The seller's control of the market for product A, in other words, allows them to manipulate its price so as to engage in predatory pricing in the market for product B. If the seller prices product B below the cost of production, it can reduce competition by giving the appearance that it is undercutting competitors' prices. Once they have eliminated their competition, the seller has the ability to raise the price of product B to supra-competitive levels, to the harm of consumers. Note, however, that simply holding a patent on a product does not, by itself, show that the

12 *In re EpiPen*, *supra* note 6, at 1285.

13 Johnson & Ho, *supra* note 10. Mylan was additionally the source of controversy during this period when Heather Bresch, its CEO and the daughter of then-Governor Joe Manchin, allegedly falsely claimed to hold an MBA from West Virginia University, a scandal that resulted in the resignation of the university's president, himself a past lobbyist for Mylan. Martha Neil, *Urged By Law Profs to Resign, W. Va. U Prez, Michael Garrison, Will Step Down*, ABA J., June 6, 2008, https://www.abajournal.com/news/article/urged_by_law_profs_to_resign_west_va_u_prez_michael_garrison_step_down.

14 *In re EpiPen, supra* note 6, at 1277.

15 Johnson & Ho, *supra* note 10.

16 *In re EpiPen, supra* note 6, at 1277.

17 Herbert Hovenkamp, Economics and Federal Antitrust Law 216 (1985).

18 *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), abrogated by *Ill. Tool Works Inc. v. Indep. Inc.* 547 U.S. 28, 41-42 (2006).

19 *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 911 (9th Cir. 2007).

seller controlled the market. Instead, the complainant must demonstrate that the seller held market control.[20]

C. Can Selling Identical, Bundled Products Constitute Anticompetitive Behavior?

In *EpiPen*, unlike traditional anticompetitive bundling cases, the products were identical: two EAI devices were sold in a single package. After 2011, consumers could not purchase EpiPens packaged singly. On the face of it, this is no different than other like items being packaged as a group, whether that involves cookies or crew socks. In *EpiPen*, however, the class complainants alleged that while the products were identical, their intended uses were not. Some allergy sufferers wished to buy backup EAI devices; others did not. Those allergy sufferers who wanted a backup device might otherwise have chosen to purchase a lower-priced generic product, especially in light of the fact that the product would probably go unused; they would not need a backup unless they had a second medical emergency without time to fill a new prescription and before the medication expired. Product A, in other words, was the market for emergency EAI devices and product B (itself identical) was the market for backup devices with a low probability of being used.[21]

The question confronting the *EpiPen* court on deciding the defendants' motion to dismiss the class complaint was whether identical products bundled together could constitute a tying claim when the products' uses allegedly differed. Simply packaging two products together does not, of itself, constitute anticompetitive behavior if the product could be purchased, unbundled from competing suppliers.[22] Was that possible in *EpiPen*? An EpiPen itself could not be purchased as a single EAI device after 2011, but there were competitors. However, because of the allegedly anticompetitive conduct of the class defendants (including, as noted *supra*, alleged kickbacks and other exclusionary behavior), EpiPen controlled almost the entire market by 2012.[23] There is an argument, therefore, that by 2011 EAI devices could not realistically be purchased unbundled.

For unlawful tying to exist, a plaintiff must show (1) that the defendant controlled the market, and (2) that the buyer was essentially forced to purchase the tied (or bundled) product.[24] With almost 100 percent of the EAI market controlled by EpiPen, this presumably demonstrates control. But that begs the question of how to define the market: was the market for primary use EAI devices different from the market for backup devices? The devices themselves were identical. The relevant product market in any given case is one "composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered."[25] Surely the two EAI devices would be considered interchangeable by users; it would not matter which of the two bundled devices was used. But if their uses differed, was that sufficient for a finding that there were two markets? A tying claim cannot exist unless the sale links "two distinct markets for products ... distinguishable in the eyes of buyers" but "whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items."[26] In *EpiPen*, the class plaintiffs alleged that the primary market for EAI devices differed from the backup market. Those who wanted no backup device were compelled to buy one. But were consumers who did want a backup but preferred to buy a cheaper, generic EAI foreclosed from doing so? Because few would want three devices (i.e. by buying the bundled EpiPen along with a generic backup device), has the market for backup devices been impermissibly tied?

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20 *Ill. Tool Works Inc. v. Indep. Inc.*, 547 U.S. 28 (2006). This judicial approach is now under attack legislatively. In its report, the Congressional subcommittee urged a return to the standards created in *Jefferson Parish*:

> Although antitrust law has long treated tying by a monopolist as anticompetitive, in recent decades, courts have moved away from this position. Subcommittee staff recommends that Congress consider clarifying that conditioning access to a product or service in which a firm has market power to the purchase or use of a separate product or service is anticompetitive under Section 2, as held by the Supreme Court in *Jefferson Par. Hosp. Dist. V. Hyde*.

Subcomm. on Antitrust, Com. and Admin. Law of the Comm. on the Judiciary, *supra* note 2, at 398.

21 Mylan estimated that 1-20 percent of backup EAIs would be used. In re EpiPen, *supra* note 6, at 1284.

22 Jefferson Par. Hosp, *supra* note 18, at 11.

23 *In re EpiPen, supra* note 6, at 1277.

24 *Ill. Tool Works Inc. v. Indep. Ink*, Inc., 547 U.S. 28, 34-35 (2006).

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

26 *Jefferson Par. Hosp*, *supra* note 18, at 19.

In *EpiPen*, the district court observed that the complaint alleged "sufficient consumer demand" for one to buy a primary EAI separately from a backup device (or to decline to buy a backup) so that it would be efficient for a firm to sell the devices individually.[27] Noting two other cases that held otherwise, the *EpiPen* court concluded that the class complaint plausibly pled a viable tying cause of action sufficient to overcome a motion to dismiss, although the class plaintiffs would need to provide evidence "to support a reasonable finding that two separate product markets exist."[28]

Whether identical products packaged together but with arguably different uses (or values to purchasers) has been raised twice before *EpiPen*, and with different conclusions. In *Metromedia Broad. Corp. v. MGM/UA Entm't Co.*,[29] an entertainment studio combined the sale of broadcast rights for first run television episodes with syndicated reruns of the show. The buyer could not purchase a license to broadcast solely the first-run episodes; any such license was tied with the right to broadcast reruns. The show's episodes (first run or rerun) were, of course identical. But the viewership for the broadcasts would, the plaintiff asserted, differ as would, consequently, the value of advertising rights. In declining to issue an injunction, the district court ruled that because the show's copyright included the bundle of rights of both first and subsequent broadcasts, it was a single market. Requiring the purchase of both sets of rights, the court held, did not constitute unlawful tying.

Similarly, in *Paul v. Pulitzer Pub. Co.*,[30] a district court held that requiring newspaper carriers to sell and deliver papers on Saturdays as well as Mondays through Fridays did not constitute separate markets for purposes of a tying analysis. Different issues of the same newspaper, the court held, were not separate and distinct products. The court did not analyze whether consumer demand differed, i.e. whether the market for Monday – Friday issues differed from that of readers who also wanted Saturday papers.

The *EpiPen* court declined to follow both *Metromedia* and *Paul*, noting that those cases had occurred at more fully developed stages in the litigation and that the *EpiPen* class would still need to demonstrate the elements of market identification and control.[31] Regardless, however, it leaves us with an apparent circuit split: can identical bundled products constitute unlawful tying if their product uses differ? If a patient's use of an EAI differs depending on whether it is a primary device or backup, should antitrust law be interpreted to encompass the planned consumer use when defining the market? Similarly, if consumer demand for first-run program viewing differs from the demand for watching re-runs (or for reading newspapers on Saturdays compared with reading them during the traditional work-week), should we incorporate those differences when analyzing markets? If the prices for such otherwise-identical products differ, is that enough to show that the consumers do not view the products as substitutes? If so, the products are not truly interchangeable and we should view them as separate markets for purposes of antitrust analysis.

III. CONCLUSION

EpiPen, *Metromedia*, and *Paul* were decided by district courts in the Tenth, Ninth, and Eighth Circuits, respectively. While *Paul* was an unpublished decision, it still leaves us with a circuit split. How to reconcile the question of whether identical products bundled together can constitute unlawful tying when the circuits differ on how to evaluate the issue? In light of the congressional subcommittee's recommendation to pursue bundling and tying cases more assertively, the issue seems primed for the enactment of reasoned legislation and further adjudication.

27 *In re EpiPen, supra* note 6, at 1287.

28 *In re EpiPen, supra* note 6, at 1288.

29 611 F. Supp. 415 (C.D. Cal. 1985).

30 No. 7432C(A), 1974 WL 887 (E.D. Mo. May 24, 1974).

31 *In re EpiPen, supra* note 6, at 1288.

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