Conditional Pricing Practices
DOJ-

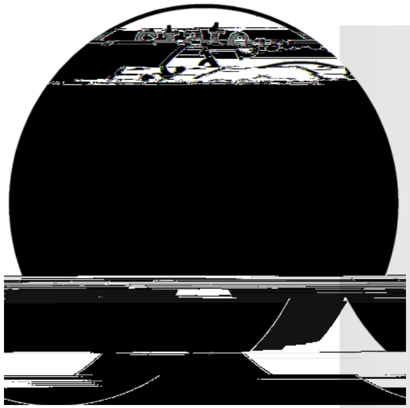
Background Principles

The antitrust laws promote price cutting. *See, e.g.*, *Matsushita v. Zenith.*, 475 U.S. 574, 594 (1986) ("[C]utting prices in order to increase business often is the very essence of competition."); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 896 (9th Cir. 2008) ("[P]rice cutting is a practice the antitrust laws aim to promote.").

Rules that punish discounting are "especially costly because they chill the very conduct the antitrust laws are designed to protect." *Brooke Grp. v. Brown & Williamson Tobacco*, 509 U.S. 209, 226 (1993)

Bundles, discounts, and loyalty rebates are common in many markets. *Jefferson Parish v. Hyde*, 466 U.S. 2, 12 (1984) ("Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively-conduct that is entirely consistent with the Sherman Act.")

Loyalty Discounts: Courts Converging on Price-Cost Test



"Accordingly, ***we join our sister circuits*** in holding that ***the price–cost test applies to market–share or volume rebates*** offered by

ZF Meritor, LLC v. Eaton Corp.,
696 F.3d 254, 274-275 n.11 (3d Cir. 2012)

ZF Meritor, LLC v. Eaton Corp.

> "[W]hen price is the ***clearly predominant*** mechanism of exclusion, the price-cost test tells us that, so long as the price is above-cost, ***the procompetitive justifications for, and the benefits of, lowering prices far outweigh any potential anticompetitive effects***."

Eisai contracted with Pfizer for the U.S. rights to market Fragmin, an anticoagulant

Eisai sued for billions of dollars in damages, alleging that Sanofi US's market share and volume discounts on its anticoagulant, Lovenox, limited Eisai's sales

Eisai argued that there were 6 mechanisms of exclusion that were non-price in nature, thus the price cost test should not apply

The court granted Sanofi US's motion for summary judgment.

- All "6 mechanisms" came back to price (e.g. "imposed disloyalty penalties")
- No threat of non-su0 cs 0 Tp1(l)2(uy1( )3(bn)1(d)1( ))1(o)e31u6guty pn m20 0 19.9

Critics of Price-Cost Test for Loyalty Discounts Often Focus on "Incontestable Demand"

What does "incontestable" mean?

Is the demand "incontestable" if…

- **Rival can win by discounting an extra 50%** and still be above all measures of cost?
  - What about **discounting by 10% or 1%?**
  - Does the rival have a **right to price at an equal level** as the dominant firm in a differentiated product market?
- **Rival can win through other measures**, e.g., advertising and promotion, training, product quality improvement?
- **Other (non-plaintiff) rivals can and do win these sales?**

Critics of Price-Cost Test Often Focus on "Incontestable Demand"

Why is demand "incontestable" in the first place?

- **Product differentiation**. Customers don't like the entrant's product as well
- **Brand/reputation**. Less investment in advertising or promotion
- **Capacity**. Entrant cannot fulfill all orders
- **Other**.

Effect of a rule turning on "incontestable" demand

- Effect on rivals' incentives to invest in quality, innovation, advertising, capacity
- Effect of offering greater protection to entrants with less attractive products
- Effect on counseling for incumbent suppliers

"If

John Temple Lang, *Article 82 EC – The Problems and the Solution* 16 (Fondazione Eni Enrico Mattei, Working Paper No. 326, 2009).