Monopsony 2013: **Still Not Truly Symmetric**

Jonathan M. Jacobson

W̲e have been assured for years that "monopoly and monopsony are symmetrical distortions of competition,"[1] and that statement is precisely true. But the conclusion some commentators have told us to draw, that symmetric legal and economic treatment is necessarily required,[2] is sometimes quite wrong. Despite the superficial appeal of symmetric outcomes, economic analysis frequently yields a different result. And, indeed, the case law over many decades has been consistent in authorizing conduct by buyers that symmetric treatment would prevent. To that end, the courts routinely uphold practices like purchasing cooperatives whose counterparts are invariably condemned as unlawful per se on the selling side.[3] And to this day, no reported case has found a firm guilty of unilateral monopsonization, notwithstanding the numerous occasions in which single-firm conduct has been held to constitute unlawful monopolization under Section 2 of the Sherman Act.[4]

The purposes of this article are, first, to explain the important real-world economic differences between monopoly and monopsony and, second, to analyze why the outcomes in the relevant case law are generally consistent with sound economic analysis. As I explain, the economic reasons why symmetric outcomes are often unwarranted are complex and the courts have never specifically discussed them. Instead, the courts—while maintaining their ability to distinguish purely naked restraints from conduct that may in fact benefit consumers—appear guided by the simple intuition that buyer power tends to reduce prices, and that lower prices are good. That intuition does not always hold true. But it is correct often enough, and it has led to case law results that, in the main, promote antitrust's goal of preserving competition for the benefit of consumers.

Economics of Monopsony

The important way in which monopsony and monopoly are similar is that both impair welfare by reducing market output below competitive levels. The monopolist uses its market power as a seller to restrict its production so that its customers have to bid a higher price per unit. The monopsonist, similarly, uses its market power as a buyer to reduce the quantity it purchases so that sellers must reduce their prices in order to make a sale. In both instances, there is a misallocation of resources resulting from the below-competitive levels of output, a wealth transfer (to the monop-

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[1] Vogel v. Am. Soc'y of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) (*quoted in* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 322 (2007)).

[2] *See generally* ROGER BLAIR & JEFFREY HARRISON, MONOPSONY IN LAW AND ECONOMICS (2010); Warren Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L.J. 563 (2005); Roger Blair & Jeffrey Harrison, *Antitrust Policy & Monopsony*, 76 CORNELL L. REV. 297 (1991).

[3] *E.g.*, Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 295 (1985).

[4] *See generally* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 240–318 (7th ed. 2012).

olist from its customers or to the monopsonist from its suppliers), and associated consumer harm.[5]

A competitive equilibrium in an input market is shown in Figure 1. The supply curve, S, represents the supply of the product being purchased, effectively the sum of the cost curves for the sellers of the product. The demand curve, D, is derived from the demand for the final product sold in the downstream market, as the product being purchased is typically an input into that final product. Price and quantity in equilibrium are at the competitive level, where supply and demand intersect.[6]

Figure 1

The monopsonist . . .

uses its market power

as a buyer to reduce the

quantity it purchases so

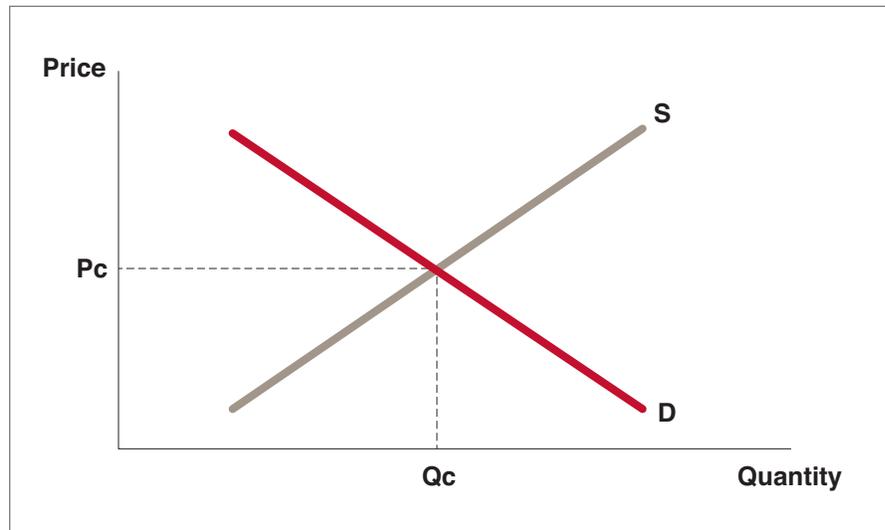*that sellers must reduce*

their prices in order to

make a sale.

The textbook monopsony outcome is shown in Figure 2. Here, the monopsonist buyer recognizes that, because of its market power, its buying decisions can influence the average price per unit for its total purchase. Thus, the monopsonist maximizes its profits at the expense of its suppliers by reducing purchases to the point where its marginal input cost (i.e., the change in the monopsonist's average cost per unit, after purchasing an *additional* unit at the margin, given the total number of units in its entire purchase), as represented by the line MIC, intersects with the market demand curve. The result is that the quantity purchased by the monopsonist is reduced from Qc to Qm, and price is lowered from Pc to Pm. Resources are misallocated by the output reduction and wealth is transferred from the suppliers to the monopsonist buyer. This result holds irrespective of whether the monopsonist has market power or not in the downstream market into which its products are sold.[7]

An important point to note, however, is that, if the monopsonist has no market power as a seller in the downstream market for the final product, and if there are ready substitutes for the input product sold by the monopsonist in this downstream market, price and quantity for the final product in the downstream market will not be impaired. Other sellers, using their own inputs, will

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[5] Jonathan M. Jacobson & Gary J. Dorman, *Monopsony Revisited: A Comment on Blair & Harrison*, 37 ANTITRUST BULL. 151, 152–53 (1992) [hereinafter Jacobson & Dorman, *Monopsony Revisited*].

[6] Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony, and Antitrust,* 36 ANTITRUST BULL. 1, 6 (1991) [hereinafter Jacobson & Dorman, *Joint Purchasing*].

[7] *See* Jacobson & Dorman, *Joint Purchasing*, *supra* note 6, at 6–8.

replace any quantities lost from the monopsonist. Consequently, any harm in that context will be felt only in the upstream market in which the monopsonist buys.[8]
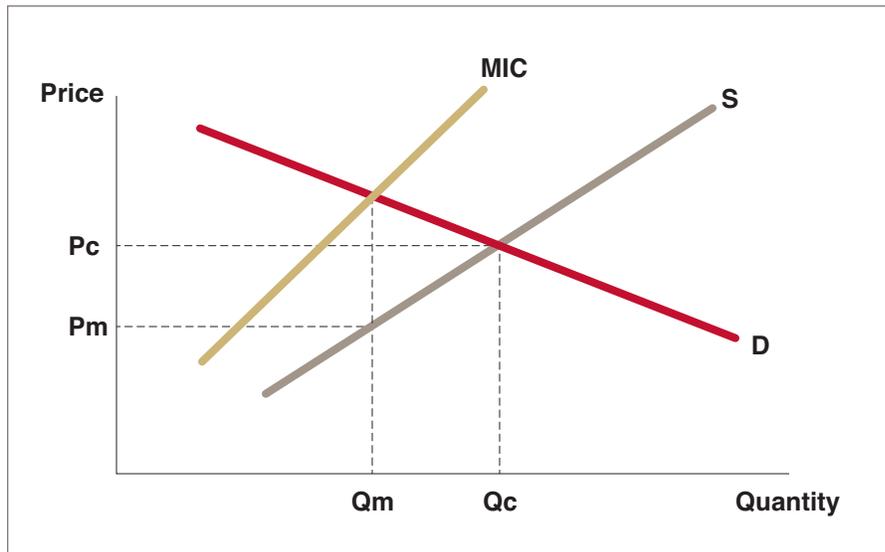

Figure 2

What if the monopsonist also has market power or monopoly power as a seller in the downstream market? Those consequences are depicted in Figure 3. Here, the monopsonist reduces its purchases to the point where the marginal revenue received for its sales of the input product in the downstream market (MRP or marginal revenue product) intersects with its marginal cost for the input (MIC) in the upstream market. Again price (Pm) and quantity (Qm) are below competitive levels Pc and Qc in the upstream market. And, indeed, output in the upstream market may be restricted even further than in the case where the downstream market is competitive.
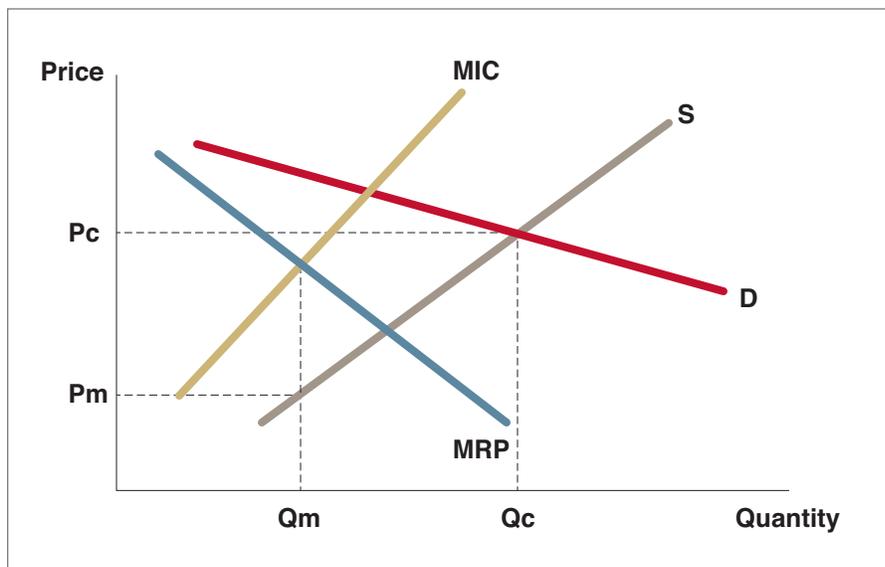

Figure 3

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[8] *See* Jacobson & Dorman, *Monopsony Revisited*, *supra* note 5, at 153.

All this is common ground and not controversial. But note the common thread throughout Figures 1 through 3. It is that the outcome in each diagram depends on having supply and marginal input cost curves that are upward-sloping. That is a condition that, although critical to monopsony analysis, does not always hold in the real world.

Key Differences Between Monopoly and Monopsony

The traditional reasons for visualizing market supply curves as upward-sloping are straightforward. An industry supply curve is the sum of the cost curves of the various producers in the market. Goods are scarce. Buyers will seek to obtain the lowest cost goods first, leaving the higher cost goods for later. At the margin, other things being equal, a buyer must therefore pay more per unit to obtain additional units. That scarcity value, other things being equal, translates into a supply curve with an upward slope. But other things are not always equal. If economies of scale are present, or if the marginal costs of supplying or producing the input are otherwise flat or decreasing, incremental units of a good may be produced at constant (or even decreasing) per-unit costs despite resource scarcity, causing the supply curve to flatten out (or even decline).

There are a large number of empirical studies of cost and supply conditions in manufacturing industries. These studies provide evidence that, at prevailing levels of production, industrial market supply curves are typically flat. That is the conclusion reached years ago by Professors Scherer and Ross following a careful review of dozens of firm and industry studies,[9] and is echoed by the Carlton and Perloff textbook today.[10] Professors Stigler[11] and others[12] have reached the same conclusion in their separate analyses. And flat or downward-sloping supply curves are by no means limited to traditional manufacturing. Very important sectors of our new economy also exhibit high initial fixed costs accompanied by zero to trivial incremental costs. Software, semiconductors, and pharmaceuticals are prime examples.

Of course, not every market is associated with flat or downward-sloping cost curves, and there are many other types of markets where supply curves do tend to slope upwards. Perhaps the best example is labor markets, where the resource scarcity that causes costs to increase is readily apparent.[13] Indeed, economics texts often use labor markets to illustrate monopsony issues.[14] Another type of industry historically believed to exhibit upward-sloping supply curves is agriculture, although modern farming techniques (with their attendant economies of scale) make this a varying and empirical question today.[15] Not surprisingly, a large proportion of the reported cases

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[9] F.M. Scherer & David R. Ross, Industrial Market Structure and Economic Performance 106–07 (3d ed. 1990); *see id.* at 97–107 (collecting sources).

[10] Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 40 (4th ed. 2005).

[11] George Stigler, The Theory of Price 182 (3d ed. 1966).

[12] *See* William R. Baumol, *On the Proper Tests for Natural Monopoly in a Multiproduct Industry*, 67 Am. Econ. Rev. 809, 814, 818–19 (1977); John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. Rev. 1485, 1496 (2012); John McGee, *Efficiency and Economies of Size, in* Industrial Concentration: The New Learning 58, 67, 72, 81 (H. Goldschmidt, H.M. Mann & J.F. Weston eds. 1974).

[13] *See* Jacobson & Dorman, *Joint Purchasing*, *supra* note 6, at 13.

[14] *E.g.*, Edward Mansfield, Microeconomics 412–14 (5th ed. 1985); William M. Boal & Michael R. Ransom, *Monopsony in the Labor Market*, 35 J. Econ. Lit. 86 (1997).

[15] *See, e.g.*, C. Richard Shumway et al., *Multiproduct Supply and Input Demand in U.S. Agriculture*, 70 Am. J. Agric. Econ. 330, 337 (1988).

finding joint buyer conduct unlawful under the antitrust laws involve labor markets[16] or agricultural markets.[17]

   If the supply curve is not upward-sloping, the consequences for monopsony analysis are significant. As Figure 4 illustrates, an effort to reduce the market price paid by restricting the monopsonist's purchases will fail. The monopsonist cannot lower its purchasing costs by reducing the quantity of its purchases: with a flat input supply curve the monopsonist pays the same price per unit of input regardless of how much it buys.[18] However dominant the purchaser may be, it cannot unilaterally cause the market price for the input to decline. Trying to force lower prices would require sellers of the input to price below cost, a situation unsustainable over time. If the supply curve is downward-sloping due to economies of scale past a certain quantity threshold of production, a monopsonist's reduction in purchases theoretically could even lead prices to increase as economies of scale disappear.
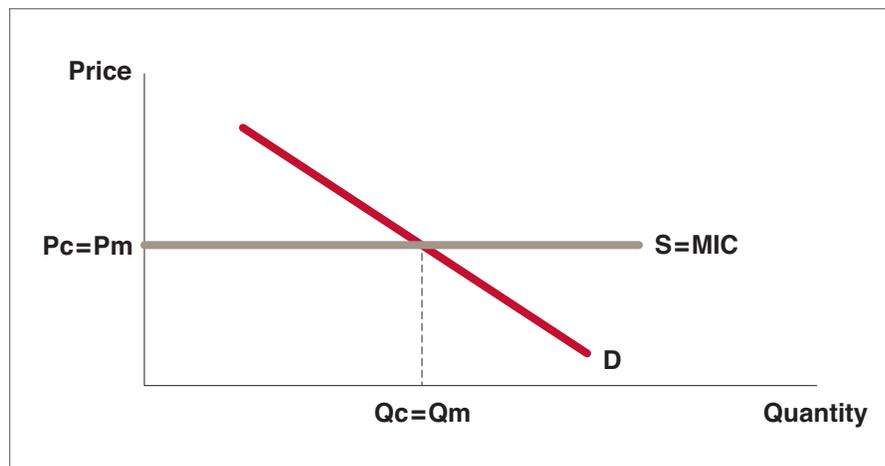

Figure 4

   This is where the symmetry between monopoly and monopsony breaks down. In contrast to monopsony, where the relevant (supply) curve's slope may vary, the relevant curve for monopoly (or seller) analysis is the demand curve. Demand curves invariably slope downwards, and so a conclusion that an output reduction means a price increase—and, in fact, is the means to achieve

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[16] *See, e.g.*, Anderson v. Shipowners' Ass'n of Pac. Coast, 272 U.S. 359 (1926); Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Union Circulation Co. v. FTC, 241 F.2d 652, 658 (2d Cir. 1957); Barr v. Dramatists Guild, Inc., 573 F. Supp. 555, 558–59 (S.D.N.Y. 1983); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975); H.B. Marienelli, Ltd. v. United Booking Offices, 227 F. 165, 170–71 (S.D.N.Y. 1914).

[17] *See, e.g.*, Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948); Been v. O.K. Indus., 495 F.3d 1217 (10th Cir. 2007); Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir. 1983); *In re* Beef Industry Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979); United States v. Champion Int'l Corp., 557 F.2d 1270 (9th Cir. 1977); Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976); Nat'l Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965); Live Poultry Dealers' Protective Ass'n v. United States, 4 F.2d 840, 841–43 (2d Cir. 1924); United States v. Rice Growers Ass'n, 1986-2 Trade Cas. (CCH) ¶ 67,287 (E.D. Cal. 1986); Bray v. Safeway Stores, Inc., 392 F. Supp. 851 (N.D. Cal.), *vacated following settlement*, 1975-2 Trade Cas. (CCH) ¶ 60,533 (9th Cir. 1975); United States v. Olympia Provision & Baking Co., 282 F. Supp. 819 (S.D.N.Y. 1968), *aff'd mem.*, 393 U.S. 480 (1969).

[18] *See, e.g.*, ROBERT PINDYCK & DANIEL RUBINFELD, MICROECONOMICS 377–78 (7th ed. 2009).

it—necessarily follows.[19] The distinction has important real-world consequences. Key sectors of the economy, including manufacturing, software, semiconductors, and pharmaceuticals, are often the subject of important competition concerns from the selling side perspective. Yet monopsony or other buy-side problems in these areas are likely to be quite rare because the supply curves are not necessarily upward-sloping.

The often differing nature of supply and demand curves carries these important practical implications and is the principal reason the idea of "symmetric" treatment of monopoly and monopsony does not work. It is, however, not the only difference. In addition, buying-side markets are typically less concentrated than selling-side markets. To be sure, there is the occasional monopsony buyer. But, as a general matter, there are typically many more buyers than sellers in a given market. As a consequence, buyer combinations are less likely in general than seller combinations to create or exercise market power.[20]

The upshot is that there are at least two obstacles to symmetric treatment of buying- and selling-side conduct. First, in the many industries facing flat or declining costs at prevailing levels of production, and hence similarly shaped supply curves, a monopsonist's effort to reduce prices by restricting purchases will not work; prices will stay the same and the monopsonist buyer(s) in question will just get less of the input at issue without any necessary deadweight loss or associated reduction in consumer welfare. Second, buyer combinations are, in general, less likely to create or exercise market power because buyers typically tend to outnumber sellers significantly in a given market. As a result, adverse welfare effects are inherently less likely in buy-side contexts than in sell-side cases.

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Monopsony in the Courts

One can search the case law at length for any articulation of the distinctions just discussed, but nothing will be found. There is nothing about the slope of the supply curve, nothing about comparative levels of concentration. Still, the cases are quite consistent in their outcomes with these distinctions. Buyer-side conduct is regularly treated more leniently than equivalent conduct on the selling side. Antitrust is concerned with both collusion (i.e., joint conduct) and exclusion (unilateral conduct). A discussion of both will be useful.

Joint Buyer Conduct. Arrangements among competing sellers to use a common sales agent or otherwise to purchase at an agreed-upon price have long been condemned as illegal per se in the absence of a very significant integration of resources.[21] The law as to buyers is entirely dif-

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[19] Cases where a price increase is associated with an output increase—such as an increase in the price of perfume to signal quality—are generally not viewed as exceptions. The higher perceived quality is viewed as having shifted the demand curve to the right. Following the shift, the demand curve retains its downward slope. To visualize the point, think of a perfume sold at $5 a bottle, garnering little if any sales. Price is increased to $150 a bottle with an accompanying marketing campaign, causing dramatically increased sales. The demand curve has shifted outwards to the right. Assume that, later, retailers are allowed to give customers a "bargain" at $145 and that sales pick up again. That is the (new) downward-sloping demand curve at work.

[20] The unusual situation where the selling-side is monopolized while the buying-side is monopsonized is referred to as "bilateral monopoly." In that context, the outcome is indeterminate, with price depending on the respective bargaining abilities of the buyer and the seller. This indeterminate outcome is typically better for consumers than either pure monopoly or pure monopsony. *See* PINDYCK & RUBINFELD, MICROECONOMICS, *supra* note 18, at 380; Jacobson & Dorman, *Joint Purchasing*, *supra* note 6, at 19.

[21] *See, e.g.*, Va. Excelsior Mills, Inc. v. FTC, 256 F.2d 538, 540 (4th Cir. 1958); ANTITRUST LAW DEVELOPMENTS, *supra* note 4, at 89 (cases "have summarily condemned agreements among competitors to use a common sales agent to fix prices"); *cf.* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 19–23 (1979) (blanket license for music licensing subject to rule of reason treatment as a single price was necessary to market the product).

ferent as joint purchasing is routinely upheld and almost never subject to per se analysis. For example, the Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care,[22] issued in 1996, place many joint purchasing arrangements in a broad safety zone, without even examining particular efficiencies:

> The Agencies will not challenge, absent extraordinary circumstances, any joint purchasing arrangement among health care providers where two conditions are present: (1) the purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and (2) the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement.[23]

Judicial outcomes generally have been pro-buyer as well. The Supreme Court addressed a joint purchasing cooperative in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*[24] The Court upheld the arrangement by pointing to "economies of scale in both the purchase and warehousing of wholesale supplies."[25] Notably, while scale economies in warehousing are traditionally cognizable efficiencies from any perspective, "economies of scale in purchase" sounds much more like a simple aggregation of buying power—power that, on the selling side, would count against, not in favor, of the arrangement. Several lower court cases uphold joint buying arrangements on similar reasoning.[26] At least in the absence of a large share of the market in issue, the cases are consistent in this respect.

This is not to say that all buyer combinations are benign. Notwithstanding *Northwest Wholesale* and the breadth of the agencies' Health Care Statements, it is clear that some collective buyer agreements are subject to per se condemnation. Thus, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*,[27] the Supreme Court condemned, per se, an agreement to fix buy-side prices among three sugar refiners that comprised roughly the entire market collectively. Similarly, in *National Macaroni Manufacturers Association v. FTC*,[28] an agreement among the largest sellers of macaroni to limit the amount of higher-quality (and higher-priced) durum wheat they purchased—allowing them to substitute lower-quality wheat in the finished macaroni—was also held

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[22] U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care (1996), *available at* http://www.justice.gov/atr/public/guidelines/0000.htm.

[23] *Id*. Statement 7, *available at* http://www.ftc.gov/bc/healthcare/industryguide/policy/statement7.pdf?. Note, however, that the agencies' 2000 Competitor Collaboration Guidelines have no such provision. They provide, instead, a "safety zone" for competitor collaborations that are (1) not purely naked restraints of trade, and (2) formed by firms with a market share of 20 percent or less. These Guidelines do *not* distinguish in this respect buyer arrangements from seller arrangements. U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors §§ 3.31(a), 4.2 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf. The Health Care Statements have never been withdrawn and remain effective as agency policy. Curiously, the agencies have never explained the reasoning behind the differences on this issue.

[24] 472 U.S. 284 (1985).

[25] *Id*. at 286–87.

[26] *See, e.g.*, Webster County Mem'l Hosp. v. United Mine Workers of Am. Welfare & Retirement Fund of 1950, 536 F.2d 419, 420 (D.C. Cir. 1976); N. Jackson Pharmacy, Inc. v. Caremark RX, Inc., 385 F. Supp. 2d 740, 747 (N.D. Ill. 2005); Instant Delivery Corp. v. City Stores Co., 284 F. Supp. 941 (E.D. Pa. 1968).

[27] 334 U.S. 219 (1948); *see also* Vogel, 744 F.2d at 601 ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se.") (citing *Mandeville Island Farms*, 344 U.S. at 223–24).

[28] 345 F.2d 421, 426 (7th Cir. 1965); *see also* Cackling Acres, Inc., 541 F.2d at 244–46; Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000); Bellevue Drug Co. v. Advance PCS, 2004 WL 724490, at *6 (E.D. Pa. Mar. 2, 2004).

illegal per se. And agreements by auction participants to set agreed-upon bid prices have been prosecuted criminally.[29]

Much of the analysis of joint buyer arrangements has come in the context of business review letters or advisory opinions from the federal antitrust agencies.[30] A recent review was in response to a request from the STARS Alliance LLC,[31] a group of seven electric utilities operating nuclear facilities. Together, STARS operates 13 of 69 pressurized water nuclear plants in the country—roughly 19 percent. They proposed to procure jointly a variety of specialized services, including turbine maintenance, reactor coolant pump maintenance, and radiation protective services. Participation was voluntary, but any participation would be associated with minimum purchase requirements. The Justice Department approved the request, relying on the participants' aggregate market share of less than 20 percent and on the fact that the participants were not competitors on their selling sides (although they did compete on the buy side).[32] Had the firms been selling-side rivals, it is difficult to believe that the Justice Department would have so readily approved a similar agreement to set selling prices—at least not without some significant resource integration.

Although no court has articulated the distinction precisely this way, the cases and agency determinations can all be reconciled if one concludes that buyer arrangements require a lesser showing of efficiencies to avoid per se condemnation than a comparable arrangement on the selling side. Truly naked arrangements with no efficiency justifications whatsoever, such as those in *Mandeville Island Farms* or the auction-rigging cases, will be condemned without regard to the defendants' collective market shares (or market power).[33] But even minor efficiencies, such as "economies of scale in purchasing" will be enough to avoid per se treatment and require, at a minimum, a showing that the defendants' collective market shares are substantial. Joint selling arrangements, in contrast, are not treated so leniently.[34]

Single-firm Conduct. Numerous types of conduct can be alleged to constitute exclusionary conduct under Section 2 of the Sherman Act. Predatory pricing, certain types of refusals to deal with customers or suppliers, exclusive dealing, bundling, loyalty discounts, tying, most-favored-nations clauses, and denials of access are the most prevalent.[35] Of all of these, however, the only cases involving allegations of genuine buy-side monopsony abuse—a strategy designed to lower

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[29] *See, e.g.*, United States v. Seville Indus. Mach. Corp., 696 F. Supp. 986, 989–90 (D.N.J. 1988).

[30] *See, e.g.*, DOJ Business Review Letter to Textile Energy Ass'n, *available at* http://www.justice.gov/atr/public/busreview/1928.htm (approving proposal by textile manufacturing firms to purchase energy needs through joint purchasing agent where individual firms could also purchase independently); DOJ Business Review Letter to Nickel Users Purchasing Ass'n, *available at* http://www.justice.gov/atr/public/busreview/211614.htm (no intention to challenge association to purchase nickel where membership was open to all U.S. purchasers); DOJ Business Review Letter to FRA Shipper's Ass'n, 1988 DOJBRL LEXIS 6 (1988) (trade association of 25 footwear retailers open to any qualified footwear retailer to negotiate transportation services).

[31] DOJ Business Review Letter to Stars Alliance LLC, Dec. 20, 2012, *available at* http://www.justice.gov/atr/public/busreview/290492.htm.

[32] *Id.*

[33] *See Mandeville Island Farms*, 334 U.S. at 225–26 (buying agreement among three refiners allegedly eliminated their competition as to performance, ability, and efficiency, and was devoid of any of the "efficiency that consolidation into one corporation might bring"); *Seville Industrial Machinery Corp.*, 696 F. Supp. at 989–91.

[34] A key form of joint buyer conduct, specifically mergers of rival buyers, is addressed comprehensively in Kirkwood, *supra* note 12; *see generally* United States v. Rice Growers Ass'n, 1986-2 Trade Cas. (CCH) ¶ 67,287 (E.D. Cal. 1986); Marius Schwartz, Economics Dir. of Enforcement, Antitrust Div., U.S. Dep't of Justice, Buyer Power Concerns and the Aetna-Prudential Merger (Oct. 20, 1999), *available at* http://www.justice.gov/atr/public/speeches/3924.pdf.

[35] Antitrust Law Developments, *supra* note 4, at 240–89. For a discussion of buyer conduct designed to exclude selling-side rivals, see Steven Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669, 670, 679–82 (2005).

prices and reduce output—are those involving predatory below-cost pricing. And in no instance has any court ever found a violation.[36]

The case that got furthest—a jury verdict for the plaintiff sustained by the court of appeals— was *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*[37] Weyerhaeuser was the dominant purchaser of alder logs in the Pacific Northwest. It converted the logs into lumber products, which were then sold in a broader geographic market (in which Weyerhaeuser was not alleged to have market power). Its smaller rival, Ross-Simmons, alleged that Weyerhaeuser drove it out of business by overbidding for logs. The jury agreed that Weyerhaeuser "purchased more logs than it needed, or paid a higher price for logs than necessary," and the trial court and Ninth Circuit upheld the plaintiff's verdict on that basis.

The Supreme Court reversed 9–0. The Court said that "more than needed" was an unacceptable standard, and that predatory buying should be evaluated under a standard analogous to the selling-side standard articulated in *Brooke Group v. Brown & Williamson Tobacco Corp.*[38] Specifically, the Court said that a buyer may be held liable only if (1) "the predator's bidding on the buy side [has] caused the cost of the relevant output [in the downstream market] to rise above the revenues generated in the sale of those outputs,"[39] and (2) "that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."[40]

The Court's rejection of the "higher than needed" standard, and its insistence on a variant of the *Brooke Group* below-cost pricing standard, were expected and not controversial. Nor were many eyebrows raised by the Court's statements about "the economic similarity between monopoly and monopsony,"[41] or its citations to commentator suggestions for symmetric treatment.[42] What has been little remarked, however, is that the Court's standard actually raises higher hurdles for the plaintiff than does the *Brooke Group* rule on the selling-side.[43]

To see this point, consider first the sell-side predator. If it sells below cost, it necessarily incurs losses on those sales. But the buy-side predator does not. If the monopsonist firm has market power as a seller in the downstream market, predatory overbidding will not lead it to incur losses, because it can, at the same time, raise prices to its customers in the downstream market. There is no "below cost" buying under the standard the Court has set out. And under *Weyerhaeuser*, those sell-side profits do not count as "recoupment" to satisfy the second prong of the test. The decision requires instead recoupment "through the exercise of monopsony power," meaning the ability to recoup prong 1 selling-side losses through the exclusion of buy-side rivals and resulting lower prices on the buy-side. Importantly, the *Weyerhaeuser* Court's heightened

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[36] Most-favored-nations clauses can be viewed as involving buyer-side abuse, but the harm in these cases is traditional sell-side harm, the exclusion of rivals to raise selling prices. *See generally id.*; Jonathan M. Jacobson & Daniel P. Weick, *Contracts that Reference Rivals as an Antitrust Category*, ANTITRUST SOURCE, Apr. 2012, at 4–8, http://www.wsgr.com/publications/PDFSearch/jacobson-0412.pdf.

[37] 549 U.S. 312 (2007).

[38] *Id.* at 318–22 (citing Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)).

[39] 549 U.S. at 325.

[40] *Id.*

[41] *Id.* at 322.

[42] *Id.*

[43] This point is addressed in Jeffrey L. Harrison, Complications in the Antitrust Response to Monopsony 10–11, *available at* http://ssrn.com/abstract=1722687 (Dec. 9, 2010).

standard appears to favor the monopsonist about which we should be most concerned—the one with market power as a seller in the downstream market.

Although some have questioned whether the Court truly meant to impose a heightened standard on plaintiffs in predatory buying cases,[44] the language of the opinion shows that the Court did indeed mean to do just that:

> [P]redatory bidding presents less of a direct threat of consumer harm than predatory pricing. A predatory-pricing scheme ultimately achieves success by charging higher prices to consumers. By contrast, a predatory-bidding scheme could succeed with little or no effect on consumer prices because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses.[45]

The determination to protect the predatory buyer seems quite intentional from this text.

Case Law Is Consistent with, but Does Not Fully Account for, the Distinction Between Monopoly and Monopsony

Despite the often-stated expression that monopsony and monopoly are two sides of the same coin, the cases do not treat them that way.

Despite the often-stated expression that monopsony and monopoly are two sides of the same coin, the cases do not treat them that way. *Weyerhaeuser* appears to be explicit in that respect, and it is also the clear implication of the cases involving joint purchasing arrangements. So what is motivating these outcomes? Clearly, it is not some great empirical analysis of seller versus buyer concentration or some deep investigation of the slope of industry supply curves. It is, quite simply, the fact that buyer conduct tends to *lower* prices (at least as a first order effect), consistent with the courts' long-held belief that "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."[46]

Buyer power without true monopsony power—the power to reduce prices by restricting quantity—may indeed benefit consumers through the lower prices the buyer is able to achieve. If sellers singly or collectively are pricing above competitive levels, buyer power can push prices down without restricting output, and where these are the facts, consumers are better off. This may often be the case in the many important markets with flat or downward-sloping supply curves. Sellers in those industries may be able to price in excess of marginal cost and, if so, an exercise of buyer power will generally benefit consumers. These real-world experiences appear, perhaps not consciously, to motivate the intuition underlying the courts' treatment of buyer conduct as generally benign.

Monopsony can, however, be a real-world problem in a number of other industries. In some cases, the monopsonist's downstream selling market may be competitive. If so, downstream effects depend on the availability of substitutes for the monopsonized product. On the facts of *Weyerhaeuser*, for example, Weyerhaeuser was alleged to have monopsonized a regional market for the sale and purchase of trees. The downstream market for lumber products, however, was much broader geographically, and Weyerhaeuser's downstream share was too small to affect price or quantity downstream. If Weyerhaeuser succeeded in restricting output of logs in the regional input market, rival sellers in the broader output market could make up the volume with logs purchased elsewhere. (Similarly, in *Mandeville Island Farms*, the monopsony buyers could have restricted output of the beet sugar they were buying, but the defendants would still have to

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[44] Harrison, *supra* note 43, at 11.

[45] 549 U.S. at 324 (citing Salop, *supra* note 35, at 676).

[46] Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990).

compete against cane sugar in their output markets.) If price and quantity downstream are not affected, then downstream consumers will not be harmed.[47]

Lack of harm to downstream consumers is not the whole story, however. Even if price and output downstream are not affected, an exercise of monopsony power can still harm consumers. Consumers are harmed, for example, by an output reduction and associated misallocation of resources if the production of logs in the Pacific Northwest is reduced or if reduced quantities of beet sugar are available.[48] In these instances, moreover, wealth is improperly transferred from the sellers to the buyers. The effects in broader downstream selling markets may be too dispersed to be felt, but cognizable harm remains nonetheless.

If the monopsonist has power downstream and the input market supply curve slopes upwards, consumers are necessarily harmed by an exercise of monopsony power. Output is reduced in both the input and downstream markets, and prices downstream will rise. If one thought that predatory buying was prevalent, then this would be the one context in which the rule laid down in *Weyerhaeuser* might be thought to go too far. Still, the fact that there have been so few predatory buying cases in the Sherman Act's 123-year history, coupled with the fact that predatory buying can harm consumers only in those markets where input supply curves slope upwards, provides some measure of comfort that the underinclusiveness of the *Weyerhaeuser* rule will not cause too much harm.[49]

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In the end, there is ample reason to believe that joint purchasing and unilateral efforts to exercise buyer power will, in fact, yield lower consumer prices quite frequently. The outcomes in the case law are consistent with that view—even if the associated analysis is not as sharp as one might hope. ●

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[47] *See* Addamax Corp. v. Open Software Found., 888 F. Supp. 274, 280 (D. Mass 1995) ("Only with control of a downstream market can the monopsonist decrease output and raise prices.").

[48] *See* HAL VARIAN, INTERMEDIATE MICROECONOMICS 461 (5th ed. 1999).

[49] *Cf. Been*, 495 F.3d at 1230–32 (sustaining monopsony claim of "unfair practices" under the Packers and Stockyards Act).