When Does Buyer Power Become Monopsony Pricing?

BY JOHN D. SHIVELY

THE STRUCTURE OF AGRICULTURAL industries breeds monopsony claims, and consequently, those industries are a major arena for conflicting schools of thought on monopsony pricing. The 2010 USDA-DOJ Agriculture Industry Workshops raised issues of buyer power and monopsony pricing by concentrated agribusiness to new prominence and encouraged the DOJ's Antitrust Division to take more aggressive enforcement positions. As a result, the ABA Antitrust Section's Agriculture and Food Committee sponsored two recent panel discussions on monopsonies, one at the 2012 Antitrust Section Spring Meeting and the second in a May 2012 webinar. Both programs discussed an analytical issue that may be the economic key to antitrust treatment of buyer power in agricultural industries: "What role should consumer welfare play in analyzing the anticompetitive impact of mergers that present buyer power/monopsony pricing concerns?"

The Consumer Welfare Question

To explore this issue, I present the following brief hypothetical based on common facts seen in agriculture industries:

> Newly-merged agribusiness X+Y Company buys inputs, such as farm animals or crops, from farmers in a narrow, local geographic market, and then processes the inputs and sells processed, packaged food items to consumers through retail grocery stores nationwide.
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> Because the farm products it buys are perishable and have high transportation costs, X+Y Company's upstream, buy-side market consists of a few competing buyers (processors with plants in a rural area), and a large number of sellers (farmers within a short distance of these plants). The farmers have few options; X+Y Company has a large percentage of purchases in the market; and X+Y Company has sufficient buyer power to drive hard bargains and pay "low" prices to the farmers.
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> X+Y Company's downstream, sell-side market is national, includes many competitors, and includes products beyond those made by X+Y Company. Competition is strong, and X+Y Company has a low market share and no ability to increase consumer prices or decrease quality.
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> Any harm from the price X+Y Company pays for inputs is felt directly by the farmers whose profits are depressed, but there is no increase in price, or decrease in quality, to consumers who ultimately buy X+Y Company's product.

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The key issue is how to determine whether X+Y Company's power to pay "low" prices to farmers is (1) buyer power that exists in all competitive markets[1] or (2) anticompetitive monopsony power.[2] Several schools of thought invoke the concept of "consumer welfare" to answer this question. If "consumer welfare" is enhanced, X+Y Company's pricing is legal; if "consumer welfare" is diminished, it is to be condemned. But what precisely is "consumer welfare?"

Note that the situation often presented in agricultural markets involves only one allegedly anticompetitive act: X+Y Company's "underpricing" as a buyer in input markets. The merger is not alleged to have empowered any anticompetitive conduct in downstream or consumer markets.[3] The question is: What proof of harm to consumer welfare in downstream markets (created as a ripple effect from pricing actions in the upstream market) is necessary to establish that those actions are anticompetitive?

The Origins of the Consumer Welfare Debate

The roots of this debate are found in Robert Bork's 1978 work, *The Antitrust Paradox*, which argued that "consumer welfare" is the exclusive goal of antitrust law. Bork argued that (1) "consumer welfare" was found in the aggregate welfare of all market participants, achieved through the allocative efficiencies created by competitive markets, and (2) maximizing aggregate welfare best served consumers as a whole.

Not all agree with Bork. The result has been a debate over what facts antitrust law should require, and what economic assumptions it should make, to prove harm, or lack of harm, to aggregate welfare. Should private plaintiffs or government agencies have to prove the precise mechanisms by which allocative efficiency is disrupted, and aggregate welfare is diminished, to establish monopsony?[4] Should they have to prove only some brighter-line economic facts that serve as a reasonable proxy for harm to allocative efficiency, such as decreased production volume by the defendant?[5] Or can they reasonably make the assumption that because "farmer/producers . . . are forced to accept lower profits and to make inefficient substitutions to other products," there will be a "deadweight" loss [to aggregate welfare] equal to that produced by the orthodox seller's cartel, except that those experiencing the loss are growers rather than consumers?"[6]

This debate heated up in 2006 as the U.S. Supreme Court considered a version of the X+Y Company hypothetical in the context of a manufacturer's challenge to a competing manufacturer's input pricing scheme in *Weyerhaeuser*.[7] The Court had the opportunity to resolve debates over the economic importance of consumer welfare issues in that case, and commentators eagerly awaited its decision.

During the period anticipating the Supreme Court's pronouncement on these issues, another school of thought emerged, arguing that "consumer welfare" should mean "end-user welfare"—the welfare of the subset of consumers who are the ultimate purchasers of X+Y Company's product (and not all consumers generally impacted by allocative inefficiency, as Bork argued). This argument would (1) require plaintiffs to show an increase in the price paid, or decrease in quality of the product purchased, by the consumers who bought X+Y Company's product, to establish that X+Y Company was a monopsonist, and (2) permit a defendant to avoid such a finding by showing it had no market power in downstream markets.[8]

Weyerhaeuser

In *Weyerhaeuser*, a sawmill sued a competing sawmill for "predatory buying" in violation of Section 2 of the Sherman Act. Specifically, the defendant was accused of bidding up the price for sawlogs. The plaintiff alleged that this business practice was an attempt to monopolize the upstream input market for sawlogs in order to force competitors out of the downstream market for finished hardwood lumber.

In its decision, the Supreme Court sidestepped any discussion of what type of "consumer welfare" was most appropriate for antitrust analysis. Emphasizing (1) the analytical similarity between monopsony and monopoly; (2) the danger of wrongly condemning any lowering of prices ("the essence of competition"); (3) potential procompetitive reasons for paying high input prices; and (4) the fact that failed monopsonistic schemes (without a recoupment phase) would be procompetitive and benefit consumers, the Court imposed a buy-side version of the monopoly predatory pricing test set out in *Brooke Group*.[9] This test required (1) that X+Y Company's total cost of producing lumber (including the cost of buying overpriced logs) exceed the price at which it sold lumber during Phase 1 of the scheme, and (2) that there be a dangerous probability that X+Y Company would recoup Phase 1 losses by underpricing the logs it purchased during Phase 2.

In discussing (or, more accurately, not discussing) what consumer welfare might be harmed during the second, recoupment phase—the only time when input suppliers would be injured by low prices—the Court simply quoted *Brooke Group* to the effect that "making a showing on the recoupment pricing will require 'a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market.'"[10] This result created a relatively clear, and stringent, standard for proof in a Section 2 monopsony case when injury was alleged by a rival manufacturer, but left critical questions regarding harm to "consumer welfare" entirely unresolved.

It should be noted that the recurring X+Y Company situation in agriculture markets does not involve the situation the Supreme Court addressed in *Weyerhaeuser*—a competitor's claim that its rival was monopolizing, or attempting to monopolize, by paying anticompetitively high prices to suppliers. While both excessive buyer power injuring suppliers and the *Weyerhaeuser* fact situation are discussed under the rubric of "monopsony," they are different.[11] Indeed, Weyerhaeuser's suppliers benefited in the first phase of its alleged scheme (high input prices raising its rival's cost), and would have been harmed only in the second phase (low input prices to recoup), when customers in downstream markets would also have been injured by reduced lumber production. *Weyerhaeuser* simply did not address the requirement for proof of harm to competition, allocative efficiency, or consumer welfare. As a result, all schools of thought can pluck dicta from *Weyerhaeuser* to support their arguments on this issue.

2010, the Agriculture Workshops, and the Revised Merger Guidelines

During 2010, two significant events focused monopsony analysis on agriculture. The first was the series of USDA-DOJ Agriculture Industry Workshops held around the country.[12] At these meetings, Antitrust Division lawyers heard vehement complaints from livestock producers and poultry growers that increasingly concentrated packers and processors were forcing the prices paid for animals down to the point where farmers are now receiving a smaller percentage of the food dollar than in previous periods. Only the last workshop in Washington, D.C., which was focused on margins at the various levels of the agricultural production chain, discussed impact on consumers. There, the consensus was that consumers were not paying higher prices for food; packers and processors were also receiving a lower share of the food dollar; and concentrated retail grocers were taking a larger share.

Also in 2010, the FTC and DOJ issued their revised Horizontal Merger Guidelines.[13] These guidelines contain a short, one-page discussion on mergers of competing buyers that is not entirely clear as to what role harm to allocative efficiency or consumers will play in the agencies' thinking.[14]

2011 and *George's Foods*

The DOJ invoked the revised Horizontal Merger Guidelines when it sued George's Foods in 2011[15] to void its acquisition of a competing Tyson chicken processing plant in Virginia's Shenandoah Valley on grounds that the acquisition created monopsony power in the processors' purchase of "broiler grower services" from local chicken farmers. The facts in *George's Foods* parallel the X+Y Company hypothetical.[16]

The allegations in the government's complaint focused entirely on George's Foods upstream, input markets. The complaint alleged that: (1) the merger reduced the number of purchasers in the plants' local input market from three to two, giving the merged firm a 43 percent share of purchases; (2) this would "allow George's unilaterally to decrease prices or degrade contract terms to farmers"; and (3) the remaining competitor had insufficient capacity to thwart, and entry barriers prevented any new competitor from thwarting, this exercise of buyer power. There were no allegations relating to downstream markets or any allegations of harm to consumer welfare, end-user welfare, or allocative efficiency. The complaint merely assumed some form of injury to consumer welfare. However, the complaint and the terms of the settlement clearly did indicate that the merger would have decreased production volume of processors in the geographic market.[17]

2012 and the Spring Meeting Monopsony Panel Discussion

The ABA Section of Antitrust Law Spring Meeting panel discussion of buyer power and monopsony pricing in mergers addressed four principal approaches regarding the proof of injury to consumer welfare necessary to establish that a merger is likely to be anticompetitive. In decreasing order of difficulty of proof, they are:

1. *Proof of harm to end-user welfare.* The merger will likely result in increased price, or decreased quality, to end-user consumers buying X+Y Company's product.

2. *Proof of harm to allocative efficiency.* The merger will likely create allocative inefficiencies in upstream and/or downstream markets that will have a negative impact on consumers generally, including a showing of how producer surpluses that X+Y Company have extracted from farmers are (or are not) likely to be passed on into downstream markets or are (or are not) likely to be reinvested by X+Y Company.

3. *Proof of bright-line test as proxy for harm to allocative efficiency.* The merger will likely result in decreased volume of production in the market in which X+Y Company sells. Decreased production volume is used as a proxy for (1) increase in price to end users of X+Y Company's product and/or (2) allocative inefficiencies in upstream and/or downstream markets that will have negative impact on consumers generally. Conversely, increased production volume is used as a proxy for a procompetitive result.

4. *Proof of market power over input prices.* The merger reduces the number of buyers in the input market sufficiently to create or increase buyer power, without any proof of anticompetitive effects—only proof of negative impact on the "process of competition" in the input market. This approach analogizes monopsony pricing to per se illegal horizontal price fixing to assume (a) anticompetitive effects in the input market and/or (b) allocative inefficiencies in upstream and/or downstream markets that will have negative impact on consumers generally.

Non-government panelists tended to advocate the need to prove some form of harm to consumers—approaches 1, 2, or 3 above. Former Antitrust Division attorney Joseph Miller focused on the economic danger from overenforcement and advocated the need to prove some harm to consumers in downstream markets—approaches 1 and 2 above.[18] He suggested that the DOJ shared this view because its monopsony cases in health care industries pled decreases in the quality of services provided to insureds/patients/consumers in downstream markets.[19] Economist Mark Israel advocated a test based on the increase or decrease in production volume—approach 3 above—as the most accurate, yet easy-to-determine, bright-line economic indicator of impact on allocative efficiency and consumer welfare.[20]

Enforcement agency panelists, speaking solely in their individual capacities, did not agree. Catharine Moscatelli, the Assistant Director, Bureau of Competition at the FTC,[21] suggested a comprehensive, totality-of-the-circumstances approach. Arguably, this approach would allow the agencies to oppose any given merger without having to establish any harm to consumer welfare (thereby forcing the merging parties to raise and argue any sort of procompetitive increases in consumer welfare). This approach is consistent with the DOJ's prosecution of the *George's Foods* case, which alleged harm to farmers without any allegation or proof of harm in downstream markets or to consumers.

In essence, the enforcement lawyers maintained that their agencies can oppose mergers on monopsony grounds under the least vigorous approach—approach 4 above. Economist Mark Israel called the enforcers' refusal to accept any economics-based test for harm to consumer welfare a "cop-out."[22]

The Recent Express Scripts/Medco Merger

The week after the Spring Meeting, the FTC analyzed both monopsony issues in an upstream buy-side market and monopoly issues in a downstream sell-side market in deciding not to challenge Express Scripts' acquisition of Medco.[23] Express Scripts and Medco were two of the nation's three biggest pharmacy benefit managers (PBMs). They and their competitors (1) bought prescription drugs from retail pharmacies, and (2) sold PBM services to health care benefit plans, employers, and unions. The approach and sequence of the FTC's analysis is instructive.

The FTC looked first to the downstream market in which Express Scripts and Medco sold—looked in the direction of consumers—and found that the merger was unlikely to result in anticompetitive efforts. Only then did it look at monopsony issues in the upstream market. Analysis of monopsony issues (after a finding that no harm to competition had taken place in the downstream market) created a situation similar to the X+Y Company hypothetical.

The FTC found that the merger was unlikely to lead to

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exercise of monopsony power in the purchase of prescription drugs because (1) the merged firm had a smaller share of the retail pharmacies' sales (29%) than is ordinarily considered necessary for the exercise of monopsony power; (2) even if the merged firm did have monopsony power, there was no evidence that there was likely to be a reduction in output; and (3) there was evidence that competition in downstream markets would force the merged firm to pass any cost savings it could negotiate from the pharmacies on to consumers.

This analysis demonstrates that the FTC did not apply a per se rule to condemn the merger as a monopsony harming pharmacies without additional analysis showing some harm to consumers. Rather, the FTC analyzed the harm to consumers as if it were the test for monopsony power exercised against suppliers. Although this result might be rationalized as an application of the totality-of-the-circumstances approach espoused by the enforcement agency representatives at the Spring Meeting panel, the logic the FTC actually used clearly incorporates elements of the more rigorous approaches discussed at Spring Meeting panel—approaches 1, 2, and 3 above.

Recent Statements by DOJ Lawyers

Recent statements by Antitrust Division lawyers, speaking solely in their individual capacities, evidence a more aggressive approach than the FTC took in the *Express Scripts* merger. Sharis Pozen, then acting head of the DOJ's Antitrust Division, reiterated the position taken in *George's Foods* and advocated by enforcers at the Spring Meeting panel. In an article on agricultural antitrust in this magazine, she restated the law as follows:

> Specifically, the antitrust laws proscribe mergers that reduce buy-side competition, agreements among buyers that unreasonably restrain competition, and exclusionary conduct enabling the acquisition or maintenance of monopsony power (*without being limited by a requirement of showing downstream effects*).[24]

Bill Stallings, head of the Antitrust Division's Section on Transportation, Energy and Agriculture, repeated and elaborated on this position at the Antitrust Section Agriculture and Food Committee's monopsony webinar on May 22, 2012. He portrayed past merger enforcement by the Division as demonstrating a long-term, consistent position of opposing mergers where buyer power reduced prices paid to farmers, without regard to harm to allocative efficiency or consumers in downstream markets. He described this focus on upstream harm as the basis for the Division's major actions impacting agriculture, including its challenges to the Cargill-Continental Growers merger in 1999[25] and the JBS-National Beef merger in 2008,[26] the record it developed on agricultural markets at the 2010 Industry Workshops, the 2010 Merger Guidelines, its decision not to challenge the Perdue-Coleman merger,[27] and its challenge of George's Foods acquisition of a Tyson plant in 2011.[28]

In the spring of 2012, the DOJ issued an official report summarizing what the Antitrust Division learned about agriculture markets from the 2010 Industry Workshops, including selected citations and quotes from the transcripts of the workshops.[29] The report's emphasis on producers' complaints, its definition of major antitrust concerns (anticompetitive mergers, high market concentration, monopsony power, and price levels), and its failure to make any mention of consumer welfare suggest that the report is intended as a record to be cited in support of a per se assumption of harm to competition in agricultural industries when concentrated buyers pay lower prices for inputs.

What Is the Law?

Both the Antitrust Division's current views of what it will consider in analyzing a merger raising monopsony issues and the antitrust law defining what it must prove under Section 7 are unclear. If merging parties were to test the DOJ's position in court, it is not at all certain that an antitrust violation or anticompetitive merger would be found "without being limited by a requirement of showing downstream effects" involving some harm to consumers. The two schools of thought—one represented by the DOJ (which would rely on an assumption that downstream allocative efficiency is harmed by disruption of the "process of competition" in buy-side input markets) and the other by its opponents (who would require more rigorous proof of harm to allocative efficiency or consumers)—can find support for both of their positions in a murky body of case law.

Support for the DOJ. Based on its recent cases and policy statements, the DOJ will presumably argue that (1) price-fixing agreements by sellers and by purchasers are "mirror images," (2) both are deemed per se illegal under Section 1 of the Sherman Act, and (3) as a per se violation, buy-side monopsony misconduct can be condemned without proof of anticompetitive impacts or exploration of procompetitive benefits in downstream markets.

The legal foundation for this argument is *Mandeville Island Farms*, where the Supreme Court confronted a version of the X+Y Company hypothetical in 1948.[30] There, the Court condemned an agreement to limit prices paid to suppliers under Section 1 on the grounds that "[i]t is clear that the agreement is the sort of combination condemned by the

Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers."[31] Prior cases establishing the per se rule for sell-side price fixing agreements were cited to support this conclusion. Two dissenting Justices actually drove the enforcers' position home by pointing out that the majority was applying the per se rule when the farmers' complaint did not allege any anticompetitive impact on consumers.

Fifty years later, *Mandeville Island Farms* is alive and well, at least in the Tenth Circuit. There, a pair of more recent cases, *Law*[32] and *Telecor*,[33] condemned buy-side price-fixing agreements for inputs, despite the absence of any evidence of harm to consumers. Those cases cited *Mandeville Island Farms* for the proposition that a "naked horizontal price fixing agreement among competitive purchasers to fix prices [is] usually found to be illegal per se,"[34] "even when the anti-competitive activity does not harm end-users."[35] In *Telecor*, the court explained the economic reasons for this result:

> [A]ccording to the economists, there is a dead-weight loss associated with imposition of monopsony pricing restraints. Some producers will either produce less or cease production altogether, resulting in less-than-optimal output of the product or service, and over the long run higher consumer prices, reduced product quality, or substitution of less efficient alternative products. . . . So, even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers.[36]

Two more recent cases have addressed monopsony issues in the context of Sherman Act Section 1 claims. In *Knevelbaard Dairies*,[37] a two-judge majority of a Ninth Circuit panel held that cheesemakers' price-fixing conspiracy to depress the prices they paid to dairies supplying them with milk was a buy-side price-fixing scheme that was per se illegal.[38]

In 2010, the Third Circuit relied upon *Knevelbaard Dairies* in discussing harm to competition in *West Penn Allegheny Health System*.[39] There, an agreement between the dominant hospital and the dominant health insurer with monopsony power required the insurer to reduce reimbursement rates it paid to a smaller competing hospital. This conspiracy to exercise the insurer's monopsony power to exclude the dominant hospital's competitor was held to create antitrust injury without any evidence of anticompetitive impact.

The DOJ can also read *Weyerhaeuser*'s reasoning as consistent with its approach. *Weyerhaeuser* emphasized the "mirror image" identity of monopoly and monopsony claims, which is the heart of the argument that both should be treated as per se violations: "Predatory-pricing and predatory-bidding claims are analytically similar. This similarity results from the close theoretical connection between monopoly and monopsony."[40]

The result in *Weyerhaeuser* also supports the DOJ's argument. The facts indicate little possibility that Weyerhaeuser had market power in the downstream market for sale of lumber. In fact, the trial jury had found no liability under Section 2 for sale of lumber in that market. Thus, *Weyerhaeuser* can be interpreted as holding that a monopsonist *could* be liable under Section 2 when there was no harm to downstream buyers/consumers—albeit only after a competitor had proven the strict cost-related predatory-buying-plus-recoupment test established in that case. Moreover, arguably, the Court in *Weyerhaeuser* excluded suppliers from the strict test it applied to competitors when it recognized that "this case does not present a situation of suppliers suing a monopsonist buyer under § 2 of the Sherman Act. . . ."[41]

[T]he DOJ can point to the buyer power section of the 2010 revisions to the Horizontal Merger Guidelines to support their position.

Finally, the DOJ can point to the buyer power section of the 2010 revisions to the Horizontal Merger Guidelines to support their position. It can argue that the Merger Guidelines (1) acknowledge that a merger can be unlawful based solely on buyer-side effects, even if there are no immediate effects on consumers; (2) recognize the fact that output may remain unchanged without necessarily compelling the conclusion that there is no adverse effect on competition; and (3) accept that efficiency gains do not include transfers of producer surplus to power buyers.[42]

Support for the DOJ's Opponents. Those who would impose a more rigorous requirement for proof of harm to consumer welfare can counter that the DOJ's current narrative of a consistent, long-term policy of opposing mergers on the basis of buyer power, without downstream market effects, is a selective, revisionist history. In fact, the Division's contemporaneous reasoning for its actions in *Cargill*, *JBS*, and *George's Foods* all involved downstream market effects—reduction of production volumes sold in downstream markets and resulting allocative inefficiencies—as grounds for the Division's merger challenges. For example, the DOJ's explanation for its settlement of *George's Foods* was that it would result in procompetitive effects by increasing the production capacity of buyers.[43]

The DOJ's opponents can argue that *Mandeville Island Farms* and its progeny are not on point and, in any event, are ancient history and do not reflect current antitrust thinking or law. They can point out that buyer power sits precisely in the category of conduct that has been reassessed and reformed since the 1940s.

> While the history of antitrust enforcement . . . . [h]as evinced much suspicion of specific contractual relationships or organizational forms between upstream firms and downstream retailers, such as vertical integration, input price-discrimination, "foreclosure," "retail price maintenance," "margin

> squeeze," "raising rivals' costs," and so on, it is now recognized in modern economics (and increasingly—though not yet entirely—in competition law) that most such practices, considered in themselves, are generally benign from the point of view of end-customer welfare, and only potentially anticompetitive (from the point of view of actual or possible exclusion) under a narrow set of conditions.[44]

Some opponents also argue that another fundamental precept of modern antitrust analysis—the focus on consumer welfare—undermines the DOJ's position. This group argues that protection of consumer welfare, and not allocative efficiency, is the only legitimate goal of antitrust, and, therefore, that only harm to consumers equates with harm to competition. If this is true, the DOJ's assumption that buyer power harms allocative efficiency—even if true—is simply not sufficient, as a matter of law, to demonstrate harm to competition.[45]

Advocates of the need to prove, rather than assume, harm to competition can also challenge the DOJ's reliance on such Section 1 conspiracy cases as *Mandeville Island Farms*, *Law*, *Knevelbaard Dairies*, and *West Penn Allegheny Health Services*. These cases hold that a buy-side price-fixing conspiracy should be a per se violation of Section 1 because a sell-side price-fixing conspiracy is a per se violation. This conclusion leads to the anomaly that a monopsony pricing agreement between oligopsonists is illegal under Section 1, while the same conduct is legal if it is independent but parallel, or if it is imposed unilaterally by a monopsonist.[46]

The X+Y Company hypothetical began as a merger case, and Section 7 controls the DOJ's analysis. Cases permitting per se liability under Section 1 should not control the DOJ's merger analysis under Section 7, because Section 7, by its own terms, requires a showing that the "effect" of the combination "may be substantially to lessen competition or to tend to create a monopoly." Thus, the controlling statute dictates proof of harm to competition that the DOJ seeks to assume away.

The DOJ's opponents can also advance several arguments against the DOJ's use of the case law. First, when read fully, the cases on which the DOJ relies do not actually hold what the DOJ purports them to hold. For example, *Mandeville Island Farms* was an interstate commerce case. It held that a buy-side conspiracy in an intrastate California-only market could be attacked under Section 2 because all the purchasers processed the sugar beets they purchased and sold the sugar in a national, interstate market. There is no language that expressly states that buy-side input price-fixing without harm to consumer welfare is a per se violation.

Similarly, *Law* did not treat a buy-side price-fixing agreement as a knee-jerk per se violation. Rather, it recognized post-1940s restrictions on the per se rule, holding that "[b]ecause some horizontal restraints serve the procompetitive purpose of making college sports available, the Supreme Court subjected even the price and output restrictions at issue in *[NCAA v.] Board of Regents* to a rule of reason analysis."[47] Instead, the court in *Law* applied a rule of reason test. It balanced the anticompetitive impacts on the buy-side market against the procompetitive impacts on the sell-side market and found a violation because the NCAA did not introduce evidence of any procompetitive effect that benefited consumers in the downstream market. If the NCAA had proved consumer benefit greater than the negative impact of its upstream price fixing, the conduct at issue might well have been considered legal. Other than allocating the burden of proof to the defendant, this is very close to the standard the DOJ's opponents advocate.

The Tenth Circuit's decision in *Telecor* is also not on point. It addressed a competitor's Section 2 allegations of a complex scheme on the part of a monopolist selling pay phone services. Plaintiff characterized Southwestern Bell as a monopoly seller. Southwestern Bell tried to characterize itself as a monopsonist buyer. The jury found, and the court of appeals upheld, a violation based on the monopoly seller theory—necessarily involving a factual determination of harm in downstream and consumer markets. This finding, as a practical matter, mooted any ruling regarding Southwestern Bell's monopsony buyer theory.

The DOJ's opponents can argue further that the DOJ ignores other cases that expressly endorse the need to prove harm to consumers to show an antitrust violation. In particular, *Rebel Oil*[48] expressly recognized the requirement to prove antitrust injury, as established in *Brunswick*[49] and *Atlantic Richfield*,[50] and applied it to Rebel Oil's predatory pricing claim against a rival:

> [R]eduction of competition does not invoke the Sherman Act until it harms consumer welfare. . . . Consumer welfare is maximized when economic resources are allocated to their best use . . . and when consumers are assured competitive price and quality. Accordingly, an act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality.[51]

Rebel Oil's Sherman Act claims were thrown out because no harm to consumer welfare under this test was proven. *Rebel Oil*'s requirement that harm to allocative efficiency and consumers be demonstrated, in order to establish violation of either Section 1 or Section 2 of the Sherman Act, has been cited and relied upon as recently as 2003,[52] and *Rebel Oil* has not been explicitly overruled.

Those who would require proof of harm to competition can also read *Weyerhaeuser* to support their position. The modern focus on consumer welfare and on law restricting application of the per se rule and law requiring proof of antitrust injury all dictate a requirement that suppliers show harm to consumer welfare. *Weyerhaeuser* emphasized and endorsed these concerns, particularly the reluctance to condemn the lowering of prices and the danger of condemning conduct that is usually procompetitive. These concerns and the statement in *Weyerhaeuser* that "predatory bidding presents less of a direct threat of consumer harm than predatory pricing,"[53] together indicate that the Supreme Court would likely require an allegedly injured supplier to make a showing of harm to consumer welfare.

Finally, proponents of a more rigorous test can argue that the 2010 Horizontal Merger Guidelines support their position by pointing out that the Guidelines' ambiguous, one-page statement on buyer power is not unequivocally supportive of the DOJ position. The language (1) states that effects in downstream markets remain a factor (albeit not the "only" or "primary" factor) and (2) recognizes the importance of whether output is reduced or not, reflecting the importance of impact on competition in sell-side markets.[54]

Moreover, the DOJ's reading of the Guidelines' statement on buyer power contradicts the Division's own general statements as to how it will approach buyer power situations. Section 11 of the Guidelines discusses monopsony and buyer power and states that the agency will "assess monopsony concerns" by "employ[ing] essentially the framework described above for evaluating whether a merger is likely to enhance market power in the selling side of the market." That framework clearly includes analysis of harm to competition. In addition, Section 3.31(a) of the FTC-DOJ Antitrust Guidelines for Collaborations Among Competitors states that "many buying collaboration agreements do not raise antitrust concerns and indeed may be procompetitive"—an approach completely at odds with the DOJ position on how it will evaluate monopsony issues in the merger context.

Current Status

Since both schools of thought can make colorable legal arguments in support of, and against, the need to prove harm to allocative efficiency or to consumers, one gets no impression that consensus is near. What is clear, though, is that the DOJ—the agency with primary authority over transactions in agricultural production markets—will assert that a merger enhancing buyer power can violate Section 7 even if there is no demonstrable harm to allocative efficiency or consumers. But whether the DOJ can carve monopsony out as an exception to the general trend limiting antitrust concern to actions that harm consumer welfare is questionable. Until a monopsony claim without demonstrable harm to consumers or allocative efficiency is litigated by merging parties (or by private plaintiffs bringing Section 1 or Section 2 claims under the Sherman Act or Section 202(a) & (b) claims under the Packers and Stockyards Act), the debate will continue. ■

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1 "Buyer power" is the ability of a buyer to bargain for lower prices and to capture a larger share of total surplus in negotiating the price of inputs with sellers. Exercise of this sort of bargaining power by buyers and sellers is the essence of every competitive market in which prices are negotiated. It is neither anticompetitive nor illegal. Any buyer that is not a pure price-taker has some buyer power.

2 "Monopsony power" is generally, and imprecisely, used as a synonym for buyer power or to describe buyer power that is illegal. As a matter of economics, a "monopsony" is a market in which there is only one buyer. This is a specific subset of buyer power that is anticompetitive. A monopsonist is able to lower input prices by reducing the quantity of the inputs it purchases. This, in turn, causes the monopsonist to lower its output and raises the price of the products in downstream markets. In an "oligopsony," a market dominated by a few large buyers, buyers can achieve some level of monopsony power through parallel and coordinated depression of input prices.

3 The X+Y Company agriculture hypothetical is, thus, different than combined monopoly and monopsony claims where the newly-merged firm competes against the same rivals in both buy- and sell-side markets and the merger is alleged to have direct anticompetitive effects in *both* markets. Simply put: If the same decrease in volume is alleged to cause lower upstream prices and higher downstream prices, harm to consumers *has* been alleged. An example of this situation is the DOJ's challenge to JBS's acquisition of National Beef. Complaint at 3, United States. v. JBS S.A., 08-CV-5992 (N.D. Ill. Oct. 20, 2008) (merger alleged to have anticompetitive effects in both downstream market for sale of "boxed beef" and input market for purchase of "fed cattle"), *available at* http://www.justice.gov/atr/cases/f238300/238388.pdf.

4 For various versions of what proof might be required, see ROBERT BORK, THE ANTITRUST PARADOX (1978) (discussing "consumer welfare" as encompassing both (a) allocative efficiency and aggregate surplus and (b) harm to consumers); Michael Jacobs, *An Essay on the Normative Foundation of Antitrust Economics*, 74 N.C. L. REV. 219 (1995) (arguing that proof of harm to allocative efficiency is necessary); Steven Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2005) (arguing that proof of harm to consumers is necessary).

5 *See* Dennis W. Carlton & Mark Israel, *Proper Treatment of Buyer Power in Merger Review*, 39 REV. INDUS. ORG. 127–36 (2011).

6 *See* 12 HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 2011b1, at 128–29 (2d ed. 2005).

7 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007). Competing sawmills (1) bought red alder sawlogs in a limited regional Pacific Northwest market and (2) sold hardwood lumber in a broader national market. *See id.* at 315–16.

8 *See, e.g.*, J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Monopsony and the Meaning of "Consumer Welfare": A Closer Look at *Weyerhaeuser* (Dec. 7, 2006), *available at* http://www.ftc.gov/speeches/rosch/061207miltonhandlerremarks.

9 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

10 *Weyerhaeuser*, 549 U.S. at 325 –26 (quoting *Brooke Group*, 509 U.S. at 226).

11 The Supreme Court expressly stated in its decision that it was not addressing a situation of suppliers suing a monopsonist buyer under Section 2. *Id.* at 321.

12 Transcripts of all five day-long programs plus links to more than 18,000 public comments are available on the Department of Justice's webpage. U.S. Dep't of Justice, *Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy*, http://www.justice.gov/atr/public/workshops/ag2010/.

13 See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), *available at* http://ftc.gov/os/2010/08/100819hmg.pdf.

14 The concluding paragraph of the Horizontal Merger Guidelines' section on competing buyers and Example 24, which follows it, state:

> The Agencies do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power. Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.
>
> *Example 24:* Merging Firms A and B are the only two buyers in the relevant

> geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.

Id. at 33.

15 Complaint, United States v. George's Foods, LLC, No. 5:11-CV-00043-gec (W.D. Va. May 10, 2011), *available at* http://www.justice.gov/atr/cases/f270900/270983.pdf.

16 George's Foods and its rival processors (1) bought "broiler grower services" from farmers in a limited Shenandoah Valley market and (2) sold "a variety of fresh, frozen, further processed, and ready to eat" chicken products to consumers through "retail, institutional, big-box and food-service outlets" in a broader market. *Id.* at 3, 5.

17 The Final Judgment agreed to between the DOJ and George's Foods allowed George's Foods to keep the plant it acquired but required George's Foods to make significant investments in its two plants. *See* Final Judgment at 3, *George's Foods*, No. 5:11-CV-00043-gec (W.D. Va. Nov. 4, 2011), *available at* http://www.justice.gov/atr/cases/f278500/278560.pdf.

The DOJ asserts that this settlement is procompetitive because it will (1) increase the combined capacity of George's Foods two plants and the number of chickens George's Foods must buy from farms, which, in turn, will (2) increase the demand for grower services to the benefit of the farmers. *See* Competitive Impact Statement at 9–10, *George's Foods*, No. 5:11-CV-00043-gec (W.D. Va. June 23, 201 1), *available at* http://www.justice.gov/atr/cases/f272500/272501.pdf. Again, it is clear that an increase in production volume could have a beneficial effect on consumers downstream, but the DOJ did not rely on this fact, and consumers are not mentioned in the Competitive Impact Statement.

18 *See generally* Joseph Miller, Antitrust Enforcement Against Health Plan Mergers: The Role of Buyer Power (2012) (unpublished presentation paper) (on file with author).

19 *See id.* at 5–6.

20 *See generally* Mark Israel, Notes on Proper Economic Evaluation of Buyer Power (2012) (unpublished presentation notes) (on file with author). For further discussion on this approach, see Carlton & Israel, *supra* note 5.

21 *See* Catharine Moscatelli, The Role of Buyer Power in Merger Analysis (2012) (unpublished Powerpoint slides) (on file with author).

22 *Cf.* Israel, *supra* note 20.

23 Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc., FTC File No. 111-0210 (Apr. 2, 2012), *available at* http://www.ftc.gov/speeches/rosch/120402expressmedcostatement.pdf.

24 Sharis A. Pozen, *Agriculture and Antitrust: Dispatches and Learning from the Workshops in Competition in Agriculture*," ANTITRUST, Spring 2012, at 8, 9 (emphasis added).

25 *See* Complaint, United States v. Cargill, Inc., No. 99 1875 (D.D.C. July 8, 1999), *available at* http://www.justice.gov/atr/cases/f2500/2552.htm.

26 *See* Complaint, *supra* note 3.

27 *See* Press Release, U.S. Dep't of Justice, Statement of the Department of Justice's Antitrust Decision on Its Decision to Close Its Investigation of Perdue's Acquisition of Coleman Natural Foods (May 2, 2011), *available at* http://www.justice.gov/opa/pr/2011/May/11-at-555.html.

28 *See* Am. Bar Ass'n Section of Antitrust Law committee program, Poultry Merger Reviews: When Can Birds of a Feather Flock Together? (May 22, 2012), http://www.americanbar.org/groups/antitrust_law/resources/committee_program_audio/committee_program_audio_2012_05.html.

29 U.S. DEP'T OF JUSTICE, COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD (May 2012), *available at* http://www.justice.gov/atr/public/reports/283291.pdf.

30 Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948). Three competing sugar beet refineries agreed to fix the prices at which they bought "bulky and semi-perishable" sugar beets in a limited Northern California market. The beets were then processed into sugar that the defendants sold to consumers in a national market that included sugar refined from both beets and cane by a larger number of companies. *Id.* at 223–24.

31 *Id.* at 235 (citations omitted).

32 Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998).

33 Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124 (10th Cir. 2002).

34 *Law*, 134 F.3d at 1017.

35 *Telecor*, 305 F.3d at 1134.

36 *Id.* at 1136 (citations omitted) (quoting Brown v. Pro Football, Inc., 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting)).

37 Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979 (9th Cir. 2000).

38 *But see id.* at 994, 998–1003 (Paez, J., dissenting) (well-reasoned dissenting opinion).

39 W. Penn Allegheny Health Sys. , Inc. v. UPMC , 627 F.3d 85 (3d Cir. 2010).

40 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321 (2007) (internal quotations and citations omitted); *see, e.g.*, Vogel v. Am. Soc'y of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) ("[M] onopoly and monopsony are symmetrical distortions of competition from an economic standpoint."); John Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L.J. 625, 653 (2005) (describing monopsony as the "mirror image" of monopoly).

41 *Weyerhaeuser*, 549 U.S. at 321.

42 *See* Peter C. Carstensen, *Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue*, 14 U. PA. J. BUS. L. 775 (2012).

43 *See* Competitive Impact Statement, *supra* note 17, at 9.

44 Richard Schillings & Joshua D. Wright, *"Sui Generis"?: An Antitrust Analysis of Buyer Power in the United States and European Union*, 39 AKRON L. REV. 207, 212–13 (2006). Joshua Wright has recently been nominated to succeed Commissioner J. Thomas Rosch on the Federal Trade Commission.

45 *See* Salop, *supra* note 4; Rosch, *supra* note 8.

46 *See, e.g.*, W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 103 (3d Cir. 2010). ("Admittedly, had Highmark been acting alone, West Penn would have little basis for challenging the reimbursement rates. A firm that has substantial power on the buy side of the market (i.e., monopsony power) is generally free to bargain aggressively when negotiating the prices it will pay for goods and services. . . . This reflects the general hesitance of courts to condemn unilateral behavior, lest vigorous competition be chilled." (citations omitted)).

47 Law v. NCAA, 134 F.3d 1010, 1018 (10th Cir. 1998) (citing NCAA v. Bd. of Regents, 468 U.S. 85, 103 (1984)).

48 Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421 (9th Cir. 1993).

49 *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

50 *See* Atl. Richfield Co. v. USA Petroleum, Inc., 495 U.S. 328, 334 (1990).

51 *Rebel Oil*, 51 F.3d at 1433. Numerous lengthy cites and quotations are omitted. However, they include Bork's *The Antitrust Paradox* and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

52 *See* MetroNet Serv. Corp. v. US WEST Commc'ns, 329 F.3d 986, 1006 (9th Cir. 2003).

53 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 324 (2007).

54 See, for example, Horizontal Merger Guidelines, *supra* note 13, at 33, looking specifically to Example 24, where the concern is that "enhance[d] buyer power and depress[ion of] the price paid to farmers" will cause "transfer of wealth from farmers to the merged firm *and inefficiently reduc[e] supply*" (emphasis added).