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Maurice E. Stucke

University of Tennessee, mstucke@utk.edu

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LOOKING AT THE MONOPSONY IN THE MIRROR

*Maurice E. Stucke**

INTRODUCTION

Although still a distant second to monopoly, buyer power and monopsony are hot topics in the antitrust community.¹ The Organisation for Economic Co-operation and Development (OECD),² International Competition Network (ICN),³ and American Antitrust Institute (AAI)⁴ have studied recently monopsony and buyer power. The U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) pay more attention to buyer power in their 2010 Horizontal Merger Guidelines.⁵ With growing buyer concentration in commodities like coffee, tea, and cocoa, and among retailers, buyer power is a human rights issue.⁶

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¹ OECD, Policy Roundtables, Monopsony and Buyer Power, DAF/COMP(2008)38, at 255 (2008), *available at* www.oecd.org/dataoecd/38/63/44445750.pdf (European Commission's submission) ("Buying power is an increasingly hot topic within the competition community.").

² *Id.* at 208 (Netherlands).

³ ICN Special Program for Kyoto Annual Conference, Report on Abuse of Superior Bargaining Position Prepared by Task Force for Abuse of Superior Bargaining Position (2008).

⁴ AAI *Invitational Symposium on Buyer Power*, 53 ANTITRUST BULL. 233 (2008); Albert A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 ANTITRUST L.J. 505 (2005).

⁵ Compare U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 0.1 (issued Apr. 2, 1992, revised Apr. 8, 1997) (noting in one short paragraph that "to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines) *with* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §§ 8 & 12 (2010), *available at* www.justice.gov/atr/public/guidelines/hmg-2010.pdf (extended discussion of buyer power).

⁶ Olivier de Schutter, United Nations Special Rapporteur on the Right to Food, *Addressing Concentration in Food Supply Chains: The Role of Competition Law in*

Recently the DOJ and U.S. Department of Agriculture (USDA) investigated buyer power in the agriculture industry's seed, hog, livestock, poultry, and dairy sectors.⁷ Professor Peter Carstensen, among others, expressed relief: "For years many of us who follow agricultural competition issues have lamented the failure of both antitrust enforcement and market facilitating regulation to deal with continuing problems that farmers and ranchers confront in both the acquisition of inputs and the marketing of their production."⁸ Over 4,000 people attended the public workshops in Iowa, Alabama, Wisconsin, Colorado, and Washington, D.C. The DOJ received over 18,000 public comments.⁹ Participants complained about the lack of antitrust enforcement, "a severely concentrated marketplace in which power and profit are limited to a few at the expense of countless, hard working family farmers," and how mergers, left unchallenged, led to "high input prices, low commodity prices, or other hardships, having invested particular suppliers or buyers with greater market power."¹⁰ The U.S. livestock industry, observed several states, is more concentrated currently than in 1921, when Congress enacted the Packers and Stockyards Act to respond to a market the "Big Five" packers

Tackling the Abuse of Buyer Power, Briefing Note 03 (Dec. 2010), <http://www.srfood.org/index.php/en/documents-issued/briefing-notes>; Aravind R. Ganesh, *The Right to Food and Buyer Power*, 11 GERMAN L.J. 1190 (2010); South Centre & Traidcraft, *Rebalancing the Supply Chain: Buyer Power, Commodities & Competition Policy* (Apr. 2008); Duncan Green, Oxfam, *Conspiracy of Silence: Old & New Directions on Commodities* 39-40 (2005).

⁷ U.S. Dep't of Justice, Antitrust Div., Division Update, Spring 2011, <http://www.justice.gov/atr/public/division-update/2011/ag-workshops.html>.

⁸ Peter C. Carstensen, Comments for the United States Departments of Agriculture and Justice Workshops on Competition Issues in Agriculture, Univ. of Wisconsin Legal Studies Research Paper No. 1103 (Jan. 15, 2010), available at <http://ssrn.com/abstract=1537191> or <http://dx.doi.org/10.2139/ssrn.1537191>.

⁹ Division Update, *supra* note 7.

¹⁰ U.S. Dep't of Justice, Antitrust Div., *Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward* 5 (May 2012), available at www.justice.gov/atr/public/reports/283291.pdf.

controlled and to ensure fair competition and fair trade practices in the marketing of livestock, meat, and poultry.¹¹

Despite the increasing interest in monopsony and buyer power, the larger jurisdictions have challenged few mergers or conduct cases that target buyer power.¹² The DOJ and USDA workshops ended with a whimper.¹³ And one recent DOJ monopsony case yielded an unusually weak behavioral remedy.¹⁴ The DOJ, however, in 2012 promised “vigorous antitrust

¹¹ Comments Regarding Competition in the Agriculture Industry by Attorneys General from Montana, Iowa, Maine Maryland, Mississippi, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Vermont, and West Virginia 6 (Mar. 11, 2010), <http://www.justice.gov/atr/public/workshops/ag2010/016/AGW-15683.html>; International Federation of Agricultural Producers, Sixth Draft Report on “Industrial Concentration in the Agri-Food Sector” 4 (May 2002) (noting that four firms control over 80 percent of the U.S. cattle slaughter business, nearly 60 percent of the pork packing industry, and 50 percent of production and processing of broiler chickens, and process 74 percent of all U.S. corn, 62 percent of U.S. wheat, and 80 percent of U.S. soybeans).

¹² Peter C. Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers*, 53 ANTITRUST BULL. 271, 272 (2008) (observing how “the merger enforcement decisions by the courts and agencies have failed to appreciate the buyer power issues presented in some merger cases”).

¹³ David Andrews, *Antitrust Efforts Have Gone in Dustbin of History*, NAT’L CATH. REP., Mar. 6, 2012, available at <http://ncronline.org/news/politics/antitrust-efforts-have-gone-dustbin-history>.

¹⁴ In challenging an acquisition, the United States originally asked the court to divest assets sufficient to restore competition in the affected chicken processing market and to enjoin the defendant from further ownership and operation of the assets acquired as part of the transaction. Compl., United States v. George’s Food, LLC, Civ. Action No. 5:11-cv-00043-gec (W.D. Va. filed May 10, 2011). But the DOJ later settled for a behavioral remedy, namely requiring defendant to make several capital improvements to its Harrisonburg chicken processing plant. Defendant had to (i) install an individually frozen freezer, (ii) install “a whole leg or thigh deboning line with the capacity to debone a minimum of fifty legs per minute or new automated lines with similar capacities,” and (iii) repair the processing plant’s roof. Competitive Impact Statement, United States v. George’s Foods, LLC, Civ. Act. No. 5:11-cv-00043-GEC, at 7 (W.D. Va. filed June 23, 2011). The settlement, the DOJ asserted, was in the public interest as it significantly increased the number of chickens that George’s would process, thereby increasing the demand for grower services and averting the likely adverse competitive effects arising from the acquisition. Carstensen and a former FTC official objected to both the remedy’s scope and duration. They argued that among other things the consent decree should require the DOJ to reassess the transaction’s competitive effects in three to five years and, if necessary, revise the remedy. The DOJ rejected their concerns, “confident that the effectiveness of the proposed Final Judgment obviates the need for requiring undefined ‘additional remedies.’” Response of Plaintiff United States to Public Comment on the Proposed Final Judgment, United States v. George’s Foods, LLC, Civ. Act. No. 5:11-cv-00043-GEC

enforcement” after “redoubl[ing] its already active enforcement activities.”¹⁵

One challenge, given the relatively few antitrust cases that target monopsony power, is that the legal standards for monopsony claims are less developed than for monopoly claims. In recent years, courts, competition agencies, and scholars in addressing monopsony begin with a simple premise: Monopsony is the mirror image of monopoly.¹⁶ In the leading monopsony case, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, the Supreme Court’s initial premise was that monopoly and

(W.D. Va. filed Oct. 25, 2011).

¹⁵ DOJ, Competition and Agriculture, *supra* note 10, at 23.

¹⁶ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 321-22 (2007) (quoting John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 653 (2005); *Khan v. State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (“[M]onopsony pricing ... is analytically the same as monopoly or cartel pricing and [is] so treated by the law”), *vacated and remanded on other grounds*, 522 U.S. 3 (1997); *Vogel v. American Soc. of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (“[M]onopoly and monopsony are symmetrical distortions of competition from an economic standpoint”)); *GMA Cover Corp. v. Saab Barracuda LLC*, 4:10-CV-12060, 2012 WL 642739 (E.D. Mich. Feb. 8, 2012), report and recommendation adopted sub nom. *GMA Cover Corp. v. Saab Barracuda, LLC*, 10-CV-12060, 2012 WL 639528 (E.D. Mich. Feb. 28, 2012); *Sprint Nextel Corp. v. AT&T Inc.*, 821 F. Supp. 2d 308, 324 (D.D.C. 2011) (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001) (Sotomayor, J.) (Because “the equation for measuring market power in monopsony is a mirror image of the relationships that create market power in a seller[,] ... [a] greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question.” (citation and internal quotation marks omitted))); *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 724 (E.D. Tenn. 2011); *Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274, 280 n.9 (D. Mass. 1995); Federal Trade Comm’n & U.S. Dep’t of Justice, *Improving Health Care: A Dose Of Competition* 13 (July 2004), 2004 WL 1685795 (F.T.C.), at 122 [hereinafter *Health Report*]; Marius Schwartz, U.S. Dep’t of Justice, Antitrust Div., Economics Director of Enforcement, *Buyer Power Concerns and the Aetna-Prudential Merger*, Presented at 5th Annual Health Care Antitrust Forum, Northwestern University School of Law (Nov. 30, 1999), 1999 WL 34804330 (D.O.J.), at * 2 (“The textbook case of monopsony is the mirror image of monopoly.”); OECD, *Monopsony*, *supra* note 1, at 245 (United States); *see also id.* at 256 (European Commission); Roger G. Noll, “*Buyer Power*” and *Economic Policy*, 72 ANTITRUST L.J. 589, 589 (2005); Dennis W. Carlton & Mark Israel, *Proper Treatment of Buyer Power in Merger Review*, 39 REV. IND. ORGAN. 127, 128 (2011); *but see* Carstensen, *Buyer Power*, *supra* note 12, at 5 (mantra that buyer power is the mirror image of seller power obscures the need for differentiating market power in buyer and seller situations).

monopsony power were economically similar and shared a close theoretical connection.¹⁷ Given the “kinship” between monopoly and monopsony power, the Court suggested “that similar legal standards should apply” to monopolization and monopsonization claims.¹⁸

But as this Article contends, courts and agencies should be careful when importing monopolization standards for monopsony cases. What works for monopolization claims may not necessarily work for monopsony claims. This Article first defines monopsony and buyer power and discusses their economic, social, and moral harm. Part II then discusses a key issue: How much market share must defendant possess to be a monopsony? An antitrust plaintiff challenging a monopsony (or monopoly) under section 2 of the Sherman Act¹⁹ must first show that the defendant possesses monopsony (or monopoly) power. If courts and agencies assume that monopsony is the mirror image of monopoly, should the agencies and courts use the same market share thresholds for monopsonization claims as in monopolization claims? If a 50 percent market share is insufficient for monopolization claims, should they similarly conclude that a 50 percent market share is insufficient for monopsonization claims? As Part II examines, requiring high market share thresholds for monopsony claims increases the risk of false negatives.

Part III considers another key issue: should agencies and courts use

¹⁷ 549 U.S. 312, 321-22 (2007).

¹⁸ *Weyerhaeuser*, 549 U.S. at 322 (“[A]symmetric treatment of monopoly and monopsony has no basis in economic analysis”) (quoting Noll, *supra* note 16, at 591). The Court noted the “strikingly similar allegations” involving predatory-pricing and predatory-bidding. 549 U.S. at 322. Given the “general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding,” the Court applied its two-pronged predatory pricing test to predatory-bidding claims. *Id.* at 325. Nonetheless, the Court erred. ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* 77-78 (2010) (describing how predatory buyer can purchase other significant inputs at a competitive price so that its output price is above total cost).

¹⁹ 15 U.S.C. § 2.

consumer harm as a threshold screen for monopsony claims? Among the principles the D.C. Circuit observed from “a century of case law on monopolization under § 2,” is that a monopolist’s act must “harm the competitive process and thereby harm consumers.”²⁰ Another risk in assuming monopsony as the mirror image of monopoly is when the competition agencies and courts use consumer harm to screen monopsony claims. As Part III discusses, a consumer welfare screen, contrary to its aim, increases, rather than decreases, the risks and costs of false positives and negatives. It promotes greater subjectivity and reduces predictability and transparency. The deficiencies of a consumer welfare screen are compounded when one shifts from the neoclassical economic theory’s assumption of economic self-interest to the more realistic behavioral economic findings of consumers’ other-regarding behavior and concerns over fairness.

I. MONOPSONY & BUYER POWER

A. *Monopsony*

Monopsony often is characterized as the mirror image of monopoly.²¹ Under its textbook economic definition, the monopsonist purchases fewer widgets than buyers otherwise would purchase in a competitive market; as a result, the monopsonist forces down the price of the sellers’ widgets.²² The sellers have little, if any, market power.²³ They decide how many widgets

²⁰ *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

²¹ *See supra* note 16.

²² OECD, *Monopsony*, *supra* note 1, at 256 (European Commission); Zhiqi Chen, *Defining Buyer Power*, 53 ANTITRUST BULL. 241, 243 (2008) (“defining characteristic of monopsony power . . . is the depression of quantity purchased by a buyer.”); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 672 (2005). The monopolist, in contrast, normally reduces its output below competitive levels to raise its product’s price above competitive level. European Commission, Directorate-General for Competition, *Glossary of Terms Used in EU Competition Policy, Antitrust and Control of Concentrations* 32 (July 2002) (monopoly), available at ec.europa.eu/competition/publications/glossary_en.pdf.

²³ OECD, *Monopsony*, *supra* note 1, at 256 (European Commission); Chen, *supra* note 22, at 242. The price can be competitive but provide economic rent on the supply side of

to sell at the per unit price.²⁴ The widget industry's aggregate supply curve is upward sloping, in that sellers will produce more widgets if offered a higher price to cover the increase in their marginal cost.²⁵ The monopsonist profits more by buying fewer widgets at the lower price per unit and selling less of its final product than in buying more widgets, albeit at a higher price, and selling more output.

B. Buyer Power

Buyer power has different definitions.²⁶ One definition is the “[a]bility of one or more buyers, based on their economic importance on the market in question, to obtain favourable purchasing terms from their suppliers.”²⁷ Buyer power is about superior bargaining position and terms relative to rivals and/or the competitive norm.²⁸ This can occur when a purchaser obtains a lower net price or better terms compared to its rivals.

The terms *buyer power*—along with *countervailing power*—are used favorably, such as when “powerful buyers may discipline the pricing policy of powerful sellers, thus creating a ‘balance of powers’ on the market concerned.”²⁹ Alternatively, powerful buyers “can credibly threaten to

the market. As Noll points out, the company has little incentive to become a monopolist if there was no consumer surplus to capture. Noll, *supra* note 16, at 592. “Likewise, rent is present in a market if, in the aggregate, suppliers of the product receive more revenues than are necessary to induce them to provide the quantity of goods that is sold.” *Id.* That is certainly true. The monopsonist (like the monopolist) appropriates wealth from the seller (customer) to itself. The more surplus to be had, the greater the monopolist's/monopsonist's potential profits.

²⁴ *Id.* at 594. The monopsonist pays a single price per unit; it pays the same price for the first and last widget it purchases that year. Carlton & Israel, *supra* note 16, at 129.

²⁵ OECD, Monopsony, *supra* note 1, at 256 (European Commission); Chen, *supra* note 22, at 243.

²⁶ Chen, *supra* note 22, at 241; Noll, *supra* note 16, at 589 (noting that term is “rarely precisely defined”).

²⁷ EC Glossary, *supra* note 22, at 7.

²⁸ OECD, Monopsony, *supra* note 1, at 201 (Korea), at 246 (United States) (“the ability of a buyer to negotiate a favourable price that is nevertheless *above* the competitive level”), at 256 (European Commission) (“where a purchasing agreement accounts for a sufficiently large proportion of total volume of a purchasing market so that prices can be driven down *below* the competitive level.”) (emphasis added).

²⁹ EC Glossary, *supra* note 22, at 7; European Commission, Guidelines on the

integrate backward and produce the industry's product themselves if vendors are too profitable," observed Professor Michael Porter.³⁰

This Article focuses on the dark side of *buyer power*: "Where a strong buyer faces weak sellers, for example, the outcome can be worse than where the buyer is not powerful."³¹ The buyers depress below the competitive level the prices they pay, as in the case of "the cattle, hog, or poultry farmer who faces the buying power of the relatively few processors of agricultural commodities."³²

C. Traditional Economic Concerns of Monopsony and Buyer Power

Under the textbook economic definition, the monopsonist, in depressing the price of widgets, transfers wealth from the widget suppliers to itself. The monopsonist will not pass along the lower input price to its downstream consumers.³³ Moreover since fewer widgets are produced and sold, society suffers a deadweight welfare loss.³⁴

Problems arise once one deviates from the textbook definition. The

Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, 2004/C 31/03 §§ 11.c, 64-67 (2004); ICN, Unilateral Conduct Working Group, Unilateral Conduct Workbook Chapter 3: Assessment of Dominance, presented at the 10th Annual ICN Conference (May 2011). Mergers among buyers can yield efficiencies and lower input prices without increasing buyer power. See 2010 Merger Guidelines, *supra* note 5, at § 12 (mergers between buyers may not "enhance market power on the buying side of the market [but] can nevertheless lead to a reduction in prices paid by the merged firm, for example, by reducing transactions costs or allowing the merged firm to take advantage of volume-based discounts").

³⁰ Michael E. Porter, *The Five Competitive Forces That Shape Strategy*, HARV. BUS. REV., Jan. 2008, at 84; 2010 Merger Guidelines, *supra* note 5, at § 8 (merging parties' ability to exercise market power constrained "if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry, or if the conduct or presence of large buyers undermines coordinated effects").

³¹ EC Glossary, *supra* note 22, at 7.

³² Carstensen, *Buyer Power*, *supra* note 12, at 277.

³³ BLAIR & HARRISON, *supra* note 18, at 47 (2010); de Schutter, *supra* note 6, at 2; John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, B.U. L. REV. (forthcoming 2012), draft available at <http://ssrn.com/abstract=1809985> [hereinafter Merger].

³⁴ BLAIR & HARRISON, *supra* note 18, at 43-45; DOJ & FTC Health Report, *supra* note 16, at 13-14 (when the monopsonist reduces input prices, "society foregoes the production of output whose value to consumers exceeds the resource costs of associated inputs, thereby creating a welfare loss to society").

European Commission states that if “increased buyer power lowers input costs without restricting downstream competition or total output, then a proportion of these cost reductions are likely to be passed onto consumers in the form of lower prices.”³⁵ This is not always true. As the U.S. competition agencies recognize, significant buyer power, even to point of monopsony, does not always lead to less output of the sellers’ or monopsonist’s goods.³⁶ This can be important when evaluating competitive effects.

First, the supply curve of the sellers’ widgets may be inelastic. Here buyer power depresses the sellers’ price of widgets but not the total amount of widgets produced. So, unlike the textbook monopsony, society does not bear a welfare deadweight loss. There is, however, a wealth transfer from widget suppliers to the powerful buyers, and consumers do not necessarily benefit from the exercise of buyer power.³⁷

Second, a monopsonist, like a monopolist, can price discriminate to get a non-cost-justified price decrease--namely paying each widget seller only the minimum amount needed for that seller to produce the widget. As economist Roger Noll discusses, the monopsonist can target (i) more efficient widget suppliers and extract from them their incremental profits (Ricardian rents),³⁸ (ii) widget suppliers with lower short-run costs and extract from them their quasi-rents,³⁹ and (iii) any *supra*-competitive profits earned by the widget suppliers.⁴⁰ Under these scenarios, the more efficient

³⁵ EC Horizontal Merger Guidelines, *supra* note 29, at § 62.

³⁶ 2010 Merger Guidelines, *supra* note 5, at § 12 (“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.”).

³⁷ BLAIR & HARRISON, *supra* note 18, at 50; OECD, Monopsony, *supra* note 1, at 141 (Canada).

³⁸ Noll, *supra* note 16, at 593.

³⁹ *Id.* (describing quasi-rents as “the difference between a supplier’s total revenues and short-run total costs”).

⁴⁰ *Id.* at 593-94, 603.

suppliers are punished. A fluid milk processing monopsony, for example, can demand a lower price from the more efficient dairy farmers who obtained through their investments more milk, at a lower cost, from better cows. The farmer is not rewarded from her efficiency. The monopsonist milk processor simply appropriates the efficient farmer's extra profits for itself. Similarly the monopsonist milk processor can squeeze the dairy farmers so that they do not earn in the short-term a competitive return on their milking equipment. Eventually, when the equipment breaks down, the farms close. The monopsonist can price discriminate by using all-or-nothing contracts, whereby the farmer must commit to selling a specific volume at a specified price (that captures the above-described rents), otherwise the monopsonist refuses to purchase anything.⁴¹ Buyers can also price discriminate by shifting costs and risk to suppliers. For example, powerful retailers can require suppliers to stock the retailers' shelves and take returns.⁴²

A third economic concern is the "commodity problem," whereby buyer power depresses price by increasing, rather than decreasing, total output. Farmers--faced with buyer power and lower prices--increase the supply of agricultural commodities. This is unusual. Neoclassical economic theory predicts that monopsony power leads to less output. What appears to drive this behavioral anomaly is that each farmer seeks a target income; by producing more, the farmers collectively depress price further. One

⁴¹ OECD, Monopsony, *supra* note 1, at 246 (United States); Ganesh, *supra* note 6, at 1216-19.

⁴² U.K. Competition Commission, The Supply of Groceries in the UK Market Investigation 12 (Apr. 30, 2008), *available at* www.competition-commission.org.uk/rep_pub/reports/.../538.pdf (finding that "the principal manner in which excessive risks or unexpected costs could be transferred from grocery retailers to suppliers was through retailers making retrospective adjustments to the terms of supply" and expressing concern that as a result of the transfer of risk "the retailer has less incentive to minimize that risk"); Consumers International, *The Relationship Between Supermarkets and Suppliers: What are the Implications for Consumers?* 6 (July 2012), *available at* http://www.consumersinternational.org/news-and-media/news/2012/07/supermarkets_uk.

example is coffee.⁴³ Coffee growers have little alternatives. Coffee is best cultivated on hilly land in high altitudes,⁴⁴ which limits other alternative crops. Many coffee growers face “limited access to markets for other commodities, the perennial nature of coffee plants (and the investment they represent), strong cultural attachment to coffee, [and] ‘adding-up’ problems (if different countries diversify into the same products).”⁴⁵ Coffee growers also face obstacles in vertically integrating downstream to process their coffee.⁴⁶ In the coffee value chain, economic power has shifted from coffee growers to the trading houses (five of which account for 40 percent of green coffee imports), roasters (ten of which account for 60 to 65 percent of processed coffee sales), and retailers.⁴⁷ So while coffee importers, roasters, and retailers may compete for a share of the rents, they “combine to ensure that few of these [rents] accrue to producer countries.”⁴⁸ When coffee growers faced declining prices from concentrated buyers, they produced “even more coffee in an attempt to earn short-term income to meet daily expenses, and thereby cause[d] oversupply and further depression of coffee prices, even below the average cost of production.”⁴⁹ In 2002, coffee prices collapsed to a 100-year low,⁵⁰ and eight percent more coffee was produced

⁴³ de Schutter, *supra* note 6, at 2; Nicolas Petit, *Ethiopia’s Coffee Sector: A Bitter or Better Future?*, 7 J. AGRARIAN CHANGE 225 (2007).

⁴⁴ <http://www.coffeeresearch.org/agriculture/environment.htm>;
<http://www.ncausa.org/i4a/pages/index.cfm?pageid=75>.

⁴⁵ Petit, *supra* note 43, at 252; Green, *supra* note 6, at 21.

⁴⁶ Green, *supra* note 6, at 21.

⁴⁷ *Id.* at 40 (noting how in the early 1990s, coffee exporting countries earned about ten to twelve billion U.S. dollars, whereas retail coffee sales, mostly in large industrialized countries, were about thirty billion U.S. dollars; by 2002, retail sales exceeded \$70 billion, whereas coffee producing countries received only \$5.5 billion); Petit, *supra* note 43, at 230-31.

⁴⁸ Green, *supra* note 6, at 40.

⁴⁹ de Schutter, *supra* note 6, at 3; South Centre & Traidcraft, *supra* note 6, at 10; Ganesh, *supra* note 6, at 1196.

⁵⁰ Petit, *supra* note 43, at 225.

than consumed.⁵¹

Some argue that the exercise of monopsony power “usually results” in higher retail prices downstream.⁵² This is clearly so when the monopsonist also monopolizes the output market. The economic harm, for example, of the monopsonist milk processor that is also a monopolist is twofold. The monopsonist extracts wealth from the dairy farmers. It also extracts wealth from consumers by charging them higher prices for the fewer gallons of milk it sells.⁵³ This concern of a monopsony/monopoly recently arose when the health insurer Blue Cross Blue Shield of Michigan sought to acquire its primary competitor, Physicians Health Plan of Mid-Michigan, thereby controlling nearly 90 percent of the commercial health insurance market in the Lansing, Michigan area.⁵⁴ The acquisition, the DOJ said, would have harmed both consumers (“higher prices, fewer choices, and a reduction in the quality of commercial health insurance plans purchased by Lansing area residents and their employers”) and sellers (acquisition would give “Blue Cross-Michigan the ability to control physician reimbursement rates”).⁵⁵ The parties abandoned the transaction, after the DOJ threatened prosecution.

A related concern is that buyer power can lead to downstream market power and ultimately a monopsony/monopoly.⁵⁶ A firm may exercise its buyer power to (i) reduce prices downstream, eliminating smaller

⁵¹ Oxfam, *Summary Report Mugged: Poverty in Your Coffee Cup 2* (Sept. 2002), available at <http://www.oxfamamerica.org/publications/mugged-poverty-in-your-coffee-cup>.

⁵² OECD, Monopsony, *supra* note 1, at 9 (Executive Summary by the Secretariat).

⁵³ *Id.* at 246 (United States); Noll, *supra* note 16, at 596.

⁵⁴ U.S. Dep’t of Justice, Antitrust Div., Press Release, Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans--Decision to Abandon Deal Follows Justice Department’s Decision to Challenge the Acquisition (Mar. 8, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/256259.htm.

⁵⁵ *Id.*

⁵⁶ Kirkwood, Exclusionary Conduct, *supra* note 16, at 648-49.

competitors,⁵⁷ (ii) encourage sellers to raise their price charged to other, less powerful buyers (raising rivals' costs),⁵⁸ (iii) extract price cuts such that sellers charge higher prices to other, less powerful buyers (the waterbed effect),⁵⁹ or (iv) otherwise foreclose its rivals.⁶⁰

Alternatively consumers can pay higher prices even when the monopsonist lacks market power downstream. Suppose, for example, four monopsony milk processors supply the same broader geographic market, the greater New York region. Suppose each monopsonist produces less milk, as it buys less milk from the dairy farmers in its local market. With each monopsony following this strategy, barring entry by another milk processor, less milk will be delivered to supermarkets, cafeterias, and other buyers in the greater New York region, causing milk prices to rise.

The harder case is when buyer power directly harms the sellers but not the ultimate consumers. Suppose local farmers sell their veal calves to the local monopsony meat packer. After slaughtering the calves, and processing and packaging the finished cuts of veal, the meat packer sells the veal cutlets nationwide. The local farmer has few options of where to sell its calves. The calves “have a very short time frame of a few weeks when they are market ready, so their optimum value quickly drops if they are not sold in a timely manner.”⁶¹ Suppose then the relevant geographic market

⁵⁷ *Id.*; Kirkwood, Merger, *supra* note 33, at 78-79.

⁵⁸ Kirkwood, Merger, *supra* note 33, at 65-73.

⁵⁹ Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 WIS. L. REV. 331, 333 (describing the “waterbed effect” as “better supply terms for powerful buyers can lead to a worsening of the terms of supply for smaller or otherwise-less-powerful buyers, which might then have an adverse consequence for consumers if downstream competition is lessened”).

⁶⁰ EC Horizontal Merger Guidelines, *supra* note 29, at § 61 (“Competition in the downstream markets could also be adversely affected if, in particular, the merged entity were likely to use its buyer power vis-à-vis its suppliers to foreclose its rivals”).

⁶¹ Comment by Patrick Kilsdonk, dated Dec. 29, 2009 submitted in the DOJ and USDA Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy Workshops, *available at* www.justice.gov/atr/public/workshops/ag2010/comments/255233.pdf; *see also* BLAIR &

where the farmer can sell its calves is several hundred kilometers.⁶² On the other hand, the meat packer selling the selected cuts of veal and the retailers and institutions that buy the veal can turn to a broader geographic area (perhaps thousands of kilometers).⁶³ The meat packer enjoys a monopsony in buying calves from local farmers, but lacks market power in selling its packaged veal, since it competes with other meat packers across the United States. The monopsonist supplies fewer selected cuts of veal. But suppose that other meat packers sell more veal cutlets so that market output remains the same. This is a big assumption.⁶⁴ But if the same amount of veal is sold, are consumers who buy the veal cutlets harmed?

Perhaps. One potential inefficiency is if other veal calf farmers outside the monopsonized market replace the lost production at a higher cost.⁶⁵ Other meat packers are increasing output with incremental input that is less efficiently procured. Suppose, for example, farmers in other states with a less hospitable climate--higher temperatures and humidity--start raising more calves, albeit at a higher cost.⁶⁶ If their demand is relatively inelastic, consumers are harmed when the higher costs from raising the calves are passed to them as higher retail prices. A second inefficiency is the

HARRISON, *supra* note 18, at 81 (discussing inelasticity of supply for perishable goods); DOJ & FTC Health Report, *supra* note 16, at 16 (“Seller switching costs for physicians can be significant because: (1) a physician’s time is perishable and (2) it can be difficult for a physician to quickly replace lost patients.”).

⁶² Carstensen, Buyer Power, *supra* note 12, at 278.

⁶³ OECD, Monopsony, *supra* note 1, at 246 (United States).

⁶⁴ As Jack Kirkwood reminded me,

That assumes the other packers are as efficient as the monopsonist and have the excess capacity to make up the lost output at a marginal cost below the market price. That could happen, but it would not be common. It assumes that supply is perfectly elastic in this market – that any increase in price will immediately provoke a compensating increase in supply.

⁶⁵ Carlton & Israel, *supra* note 16, at 129 n. 5; Noll, *supra* note 16, at 595-96.

⁶⁶ OECD, Monopsony, *supra* note 1, at 144 (Canada) (observing that an “output decrease in response to monopsony power in one relevant upstream market that results in output increases in other relevant upstream markets is typically the result of inefficient substitution towards less efficient producers”).

opportunity cost of suppliers who now devote resources in competitive markets to produce more of the output (veal calves) when they could have profitably devoted their inputs (such as land) to other uses (such as raising chicken).⁶⁷ A third inefficiency is when the sellers (the veal calf farmers) in the monopsonized market are squeezed of their Ricardian rents and quasi-rents. The farmers now have less money to purchase goods and services. In a competitive market, some veal calf farmers would have the profits to purchase a new novel, see a movie, and dine at a restaurant. In the monopsonized market, they forego these purchases, since their income barely covers basic expenses. The wealthier monopsonist will not take up the slack by purchasing more copies of the same book. To the extent that consumers also produce these goods and services, they will be harmed.

But the downstream harm to consumers is less clear when the monopsonist employs “a different technology, using different inputs than its output-market rivals.”⁶⁸ Or the end product competes closely with other products.

D. Other Economic, Social and Moral Concerns about Monopsony

The downward pressure on the seller’s price can lead to other undesirable effects. One is an increase in negative externalities. To reduce their costs, more farmers, for example, dispense waste without the necessary precautions.⁶⁹ Sustainability and environmental concerns of increased soil erosion, reduced biodiversity, deforestation, and water, soil, and air pollution arise.⁷⁰

Workers facing financial distress and poverty can impose risk and costs

⁶⁷ Noll, *supra* note 16, at 595.

⁶⁸ OECD, *Monopsony*, *supra* note 1, at 246 (United States).

⁶⁹ de Schutter, *supra* note 6, at 2.

⁷⁰ Green, *supra* note 6, at 11, 24-26, Table 2; Petit, *supra* note 43, at 253 (describing environmental degradation in Ethiopia).

on others.⁷¹ Facing less income and increased uncertainty over future earnings, suppliers will have less incentive to innovate or invest in their equipment.⁷²

Quality and consumer choice can also deteriorate, especially when the buyer enjoys market power downstream.⁷³ With the concessions it obtains, a powerful buyer may seek the quiet life, with less incentive to innovate or become more efficient.⁷⁴

Also of concern are the sellers' loss of economic liberty and basic human rights, such as the right to food, work, and development.⁷⁵ Buyer power can encourage a race to the bottom for wages, health benefits, working conditions, use of child labor, and schooling.⁷⁶ One account of the coffee crisis concluded:

Families dependent on the money generated by coffee are pulling

⁷¹ Stephan J. Goetz & Hema Swaminathan, Wal-Mart and County-Wide Poverty, AERS Staff Paper No. 371 (Oct. 18, 2004), *available at* <http://aers.psu.edu/research/centers/cecd/research/wal-mart-and-county-wide-poverty/full-study/view> (results of study suggest that Wal-Mart chain creates costs to taxpayers in the form of greater local poverty than would occur absent Wal-Mart).

⁷² Consumers International, *supra* note 42, at 13-14; South Centre & Traidcraft, *supra* note 6, at 12; UK Competition Commission, *supra* note 42, at 12 (finding that “the transfer of excessive risks or unexpected costs by grocery retailers to their suppliers is likely to lessen suppliers’ incentives to invest in new capacity, products and production processes” and “if unchecked, these practices would ultimately have a detrimental effect on consumers”); Kirkwood, Merger, *supra* note 33, at 85-87.

⁷³ W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 104 (3d Cir. 2010) (“The very nature of monopsony or oligopsony power is that it tends to suppress output and reduce quality or choice.”) (quoting Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians*, 69 ANTITRUST L.J. 195, 210 (2001)); DOJ Blue Cross Press Release, *supra* note 54 (alleging that acquisition gave “Blue Cross-Michigan the ability to control physician reimbursement rates in a manner that could harm the quality of health care delivered to consumers”); Ganesh, *supra* note 6, at 1212; Kirkwood, Merger, *supra* note 33, at 79-82, 87-89; Porter, *supra* note 30, at 84 (“Intermediate customers gain significant bargaining power when they can influence the purchasing decisions of customers downstream. Consumer electronics retailers, jewelry retailers, and agricultural-equipment distributors are examples of distribution channels that exert a strong influence on end customers.”).

⁷⁴ Kirkwood, Merger, *supra* note 33, at 82-84.

⁷⁵ de Schutter, *supra* note 6, at 4.

⁷⁶ *Id.* at 2 (noting how small-hold cocoa farmers in Cote d’Ivoire resorted to child labor); Green, *supra* note 6, at 10.

their children, especially girls, out of school. They can no longer afford basic medicines, and are cutting back on food. Beyond farming families, coffee traders are going out of business. National economies are suffering, and some banks are collapsing. Government funds are being squeezed dry, putting pressure on health and education and forcing governments further into debt.⁷⁷

So to the extent a jurisdiction treats human dignity as inviolable, its competition law cannot ignore the sellers' welfare. Its law must promote a competitive process that promotes (or at least does not hinder) many market participants' access to food, work, and a livable wage.⁷⁸

II. LEGAL IMPLICATIONS OF MONOPSONY POWER

The economic, social, and moral concerns of monopsony and buyer power, which Part I discusses, can be attacked on different fronts. The country, for example, can (i) assign buyer power problems in specific industries to a regulatory agency,⁷⁹ and (ii) design laws, as in Japan and Korea, that specifically address common complaints of powerful buyers in particular sectors.⁸⁰ On the antitrust front, the competition authorities can enjoin mergers that tend to create a monopsony or significantly increase the

⁷⁷ Oxfam, *supra* note 51, at 2

⁷⁸ Ganesh, *supra* note 6, at 1229-30.

⁷⁹ OECD, Monopsony, *supra* note 1, at 10 (Executive Summary). The UK Competition Commission, for example, has twice investigated the grocery market. Its first inquiry, completed in 2000, resulted in a Code of Practice to regulate the relationship between the largest supermarkets and their suppliers. "However, the OFT received many complaints that the Code was not preventing supermarkets exploiting some of their suppliers, and putting many small shops out of business." Antony Seely, Business & Transport Section, Library, House of Commons, *Supermarkets: Competition Inquiries into the Groceries Market*, Standard Note: SN03653 (last updated Aug. 2, 2012), www.parliament.uk/briefing-papers/SN03653.pdf. In 2008, "the Commission completed its inquiry, concluding that in many respects UK grocery retailers were 'delivering a good deal for consumers' but that action was 'needed to improve competition in local markets and to address relationships between retailers and their suppliers,' including a strengthened and revised Code of Practice, to be enforced by an independent ombudsman." *Id.*

⁸⁰ *Id.* at 192-96 (Japan) & 203-04 (Korea) (discussing its Fair Subcontract Transaction Act). The JFTC Chair emphasized the importance of fairness and protecting besides consumers the rights of the players on a level playing field. *Id.* at 191 (Japan). The country's laws specifically prohibit powerful retailers from common complaints, such as the "unjust return of goods," unjust price reductions (after purchasing the product), and unjust assignment of work to employees of suppliers. *Id.* at 194-95 (Japan).

anticompetitive risks from buyer power.⁸¹ They can prosecute group boycotts and collusion among buyers.⁸² This Part focuses on illegally maintaining or attaining a monopsony under section 2 of the Sherman Act. Section 2 prohibits any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce.”⁸³ Since section 2 addresses the evils of concentrated economic power,⁸⁴ it is a good starting point for evaluating monopsony claims.

⁸¹ Kirkwood, Merger, *supra* note 33.

⁸² Sony Electronics, Inc. v. Soundview Technologies, Inc., 157 F. Supp. 2d 180, 187 (D. Conn. 2001) (citing Jones Knitting Corp. v. Morgan, 244 F. Supp. 235, 237 (E.D. Pa. 1965) (“[c]oncerted refusals to buy are no less a violation of the antitrust law than concerted refusals to sell”), *aff’d*, 361 F.2d 451 (3d Cir.1966); Gould v. Control Laser Corp., 462 F. Supp. 685, 692 (M.D. Fla. 1978) (declining to dismiss complaint alleging concerted refusal to buy; agreement not to take a license except under terms agreed by the group “unquestionably restrained the freedom of each group member to act as an individual producer in the laser market, free to contract or not contract with whom it chooses” and concluding that “competitive consequences of such collaborative decision making cannot be determined on the basis of the pleadings”).

⁸³ 15 U.S.C. § 2.

⁸⁴ United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) (“[W]hatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by maintenance of competition.”); *see also* United States v. Von’s Grocery Co., 384 U.S. 270, 274 (1966) (“From this country’s beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few.”); United States v. Line Material Co., 333 U.S. 287, 309 (1948) (“Monopoly is a protean threat to fair prices.”); United States v. Se. Underwriters Ass’n, 322 U.S. 533, 553–54 (1944) (“‘Trusts’ and ‘monopolies’ were the terror of the period. Their power to fix prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but some of numerous evils ascribed to them.”); United States v. Am. Linseed Oil Co., 262 U.S. 371, 388 (1923) (“The Sherman Act was intended to secure equality of opportunity, and to protect the public against evils commonly incident to monopolies, and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.”); Charles A. Ramsay Co. v. Associated Bill Posters of U.S. & Can., 260 U.S. 501, 512 (1923) (“The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.”).

A. Proving Monopsony Power

To prevail under section 2, the antitrust plaintiff must prove first that defendant possesses monopsony power, and second, “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”⁸⁵

Having buyer power does not satisfy the first element. Plaintiff must prove that defendant possesses monopsony power. All monopsonists (like monopolists) have buyer (market) power, but not all firms with buyer (market) power are monopsonists (monopolists).⁸⁶ Firms with buyer power enjoy more power than a price taker in a perfectly competitive market but less power than a monopsonist. For example, the Coca-Cola Company increases its market power by acquiring a smaller competitor, Dr. Pepper. While the merger enables Coca-Cola to exercise market power (e.g., raise price, or diminish quality, service, innovation or another important facet of competition), Coca-Cola, given the competition from PepsiCo among others, is not a monopolist. The difficult question then is how much buyer power is necessary to be a monopsonist.⁸⁷

Plaintiffs can prove monopsony power with direct evidence that the buyer depressed prices below the competitive level by withholding

⁸⁵ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966); *see also* *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 724 (E.D. Tenn. 2011) (setting out same elements for monopsony claim under § 2 of the Sherman Act).

⁸⁶ EC Horizontal Merger Guidelines, *supra* note 29, at § 8 (noting that both suppliers and buyers can have market power, but, for clarity, using *market power* to refer to a supplier's market power, and *buyer power* to refer to a buyer's market power).

⁸⁷ *Remarks on Single Firm Conduct*, 15 GEO. MASON L. REV. 1205, 1210 (2008) (Dennis Carlton) (noting the difficulty in making this distinction: “I mean, you can say that monopoly power is a lot of market power, but then what do you mean by a lot? And it's not a very precise distinction and that can cloud issues.”); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992) (“Monopoly power under § 2 [of the Sherman Act] requires, of course, something greater than market power under § 1.”).

purchases of goods and services.⁸⁸ The problem is that direct evidence of monopsony (or monopoly) power is rare.⁸⁹ As the German competition authorities observe, “the simple monopsony model often does not adequately reflect the reality of procurement markets.”⁹⁰

Plaintiffs typically prove market power circumstantially, with evidence of a high market share in a properly defined market protected by entry barriers.⁹¹ In monopolization claims, the threshold market share is typically high.⁹² If courts and agencies assume that monopsony is the mirror image

⁸⁸ *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) (“The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output.”); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir.2001) (en banc).

⁸⁹ *Microsoft*, 253 F.3d at 51 (observing that because direct proof of monopoly power is “rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power”). The D.C. Circuit also declined to adopt a rule requiring direct evidence to show monopoly power in any market. *Id.* at 57. One reason is that rarely is there a line that clearly demarcates what a defendant would or would not do if it possessed (or lacked) monopoly or monopsony power. *Id.*

⁹⁰ OECD, *Monopsony*, *supra* note 1, at 176 (Germany).

⁹¹ *See, e.g., Microsoft*, 253 F.3d at 51; I ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 229 (6th ed. 2007).

⁹² *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 91, at 231-32 (“courts virtually never find monopoly power when market share is less than about 50 percent”); *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 725 (E.D. Tenn. 2011) (citing *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 850 (6th Cir. 1979) (finding that 75–80 percent or greater is a “starting point” in assessing monopoly power); *Smith Wholesale Co.*, 219 Fed. Appx. at 409 (56% market share insufficient); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 201 (3d Cir. 1992) (55 percent share insufficient); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1443 (6th Cir. 1990) (19–29 percent market shares insufficient and “there is substantial merit in a presumption that market shares below 50 or 60% do not constitute market power” (quoting AREEDA & HOVENKAMP, ANTITRUST LAW, Section 578.3 (1988 Supp.))); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (“it is doubtful whether sixty or sixty-four per cent” is sufficient “and certainly thirty-three percent is not”); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683, 694 n. 18 (10th Cir. 1989) (“While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70 percent and 80 percent.”) (citing 2 E. KINTNER, FEDERAL ANTITRUST LAW § 12.6 (1980)); *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362 (M.D.N.C. 2002), *aff’d sub nom.* 67 F. App’x 810 (4th Cir. 2003) (“Seventy to seventy-five per cent is generally considered the minimum market share necessary to support a finding of monopoly power.”); *but see Broadway Delivery Corp. v. United Parcel Serv.*, 651 F.2d 122, 130 (2d Cir. 1981); *Reazin v. Blue Cross & Blue Shield of Kan.*, 899 F.2d 951, 968 (10th Cir. 1990); *Kolon Indus.*,

of monopoly, and that a 50 percent market share is insufficient for monopolization claims, should they similarly conclude that a 50 percent market share is insufficient for monopsonization claims?

Some agencies and courts fall in this trap. One U.S. district court recently dismissed a section 2 claim because the market share of around 40 percent did not meet “the threshold of what it takes to establish monopoly or monopsony power.”⁹³ The European Commission’s Vertical Guidelines also treat buyers’ and sellers’ market power similarly. The Guidelines state that the sellers’ and buyers’ market shares are “decisive” in determining if the block exemption applies.⁹⁴ So if the seller’s or buyer’s share in the market where it sells or purchases goods or services is 30 percent or less, its conduct, except for certain hardcore restrictions of competition, is presumptively legal.⁹⁵

One important distinction between monopoly and monopsony is the market share needed to infer significant power.⁹⁶ Retailers with a 20 percent market share can enjoy significant buyer power over sellers.⁹⁷ In *Toys-“R”-Us, Inc. v. Federal Trade Commission*, the market shares fell below the ordinary thresholds for monopolization claims: the retailer Toys-“R”-Us accounted for 20 percent of the national wholesale market and up to 49 percent of some local wholesale markets.⁹⁸ The affected toy

Inc. v. E.I. du Pont De Nemours & Co., 3:11CV622, 2012 WL 1155218 (E.D. Va. Apr. 5, 2012) (court considers besides market share defendant’s “ability to maintain power over pricing and competition for a significant period without erosion by new entry or expansion”).

⁹³ *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 727 (E.D. Tenn. 2011).

⁹⁴ European Commission, Guidelines on Vertical Restraints, 2010/C 130/01, ¶ 87 (2010), *available at* http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

⁹⁵ *Id.* at ¶ 23.

⁹⁶ Carstensen, Buyer Power, *supra* note 12, at 295-96; Kirkwood, Merger, *supra* note 33, at 35-38.

⁹⁷ Carstensen, Buyer Power, *supra* note 12, at 295-96.

⁹⁸ 221 F.3d 928, 937 (7th Cir. 2000).

manufacturers collectively accounted for about 40 percent of the traditional toy market.⁹⁹ Nonetheless, the FTC found, and the circuit court affirmed, that the group boycott, which the retailer orchestrated, was having its intended anticompetitive effect. Toys-“R”-Us “was remarkably successful in causing the 10 major toy manufacturers to reduce output of toys to the warehouse clubs, and that reduction in output protected [Toys-“R”-Us] from having to lower its prices to meet the clubs’ price levels.”¹⁰⁰ One could distinguish *Toys-“R”-Us* as a group boycott, rather than a monopsony case. Moreover, Toys-“R”-Us was not a textbook monopsonist, whereby it purchased fewer toys to depress the market price. But that ignores the fact that Toys-“R”-Us, despite its relatively low market share, had sufficient buyer power to accomplish its intended anticompetitive effects. The retailer--without a dominant market share--was wielding its buyer power to induce the toy manufacturers to raise the costs of its new rivals, the warehouse clubs.

If firms can enjoy monopsony power with a market share below 50 percent, then agencies and courts cannot reflexively import the market share thresholds from monopolization cases to monopsonization cases. Doing so significantly increases the risk of immunizing monopsonies from antitrust liability. The U.S. competition authorities recognize the difficulty, “in the abstract, to state market share thresholds for such monopsony concerns.”¹⁰¹ Rather than rely on market share thresholds alone to find monopsony power, they encourage the courts to consider several interrelated factors:

- (1) a large market share on the part of the purchaser;
- (2) an upward sloping or somewhat inelastic supply curve in the input market;
- and (3) an inability or unwillingness for new purchasers to enter the market or current purchasers to expand the amount of their

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ DOJ & FTC Health Report, *supra* note 16, at 17.

purchases in the market.¹⁰²

This is the correct approach. In explaining why reliance on market share alone can be misleading,¹⁰³ Professors Blair and Harrison apply the following formula to measure the degree of buyer power (i.e., the percentage deviation from the competitive result):

$$\frac{s\varepsilon + \eta(1-s)}{\varepsilon}$$

where s is the buyer's market share, η is the elasticity of demand of the fringe buyers, and ε is the overall elasticity of supply.¹⁰⁴ From this formula, one can see that market share is one of several interrelated factors that determine buyer power. Indeed in defining the relevant monopsony product and geographic markets, one should account both η and ε .¹⁰⁵

In assessing whether the defendant possesses monopsony power, the competition authority and court should consider first its market share, s , namely the percentage share in either dollars or units of defendant's purchases of that input.

Next is the elasticity of fringe demand, η , which is the capacity of alternative buyers to purchase the goods or services "without undue delay, risk, or cost."¹⁰⁶ The greater the widget sellers' difficulty in turning to other

¹⁰² *Id.*

¹⁰³ BLAIR & HARRISON, *supra* note 18, at 60; Ganesh, *supra* note 6, at 1223; *see also* Cory S. Capps, *Buyer Power in Health Plan Mergers*, 6 J. COMPETITION L. & ECON. 375, 380, 383 (2009) (discussing how assessing buyer power in health insurance cases on the basis of shares of patients may understate the risk of harm, given the difference in reimbursement levels from commercially insured patients and Medicare and Medicaid patients).

¹⁰⁴ BLAIR & HARRISON, *supra* note 18, at 58.

¹⁰⁵ DOJ & FTC Health Report, *supra* note 16, at 15 ("whether the buyers of the input in the putative market successfully would be able to lower the price they pay for the input or whether, instead, the sellers have sufficient realistic alternatives to allow them to circumvent the price decrease").

¹⁰⁶ BLAIR & HARRISON, *supra* note 18, at 58-59; Carstensen, *Buyer Power*, *supra* note 12, at 278; 2010 Merger Guidelines, *supra* note 5, at § 12 ("In defining relevant markets, the Agencies focus on the alternatives available to sellers in the face of a decrease in the price paid by a hypothetical monopsonist.").

buyers to purchase their widgets, the greater the defendant's buyer power.¹⁰⁷ One factor is the difficulty of entry of other buyers. If the defendant attempted to exercise monopsony power by offering too low a price, would that likely attract sufficient entry of other buyers to timely defeat the exercise of monopsony power?

Third is the elasticity of supply, ε , namely the sellers' ability and incentive to switch to providing other goods or services. Buyer power depends in part on the captivity of the sellers in producing and selling that product.¹⁰⁸ An apple orchard owner, facing a powerful buyer, may have fewer options than a carrot farmer, who may more readily switch to another crop (such as beets or turnips) the following year.

To illustrate, suppose two firms in two different industries: Firm A has a 60 percent market share; Firm B has a 40 percent market share. If η and ε are the same in both industries, then we can conclude that Firm A enjoys more buyer power in its industry than Firm B in its industry. But if we change the values of η and ε , then Firm B, despite its lower market share, can enjoy greater buyer power.

Suppose in Firm A's industry,

- $\eta = 2$, in that the elasticity of demand of the fringe buyers is greater as they are willing to buy more of the sellers' products should Firm A lower its purchase price, and
- $\varepsilon = 2$, in that sellers, if Firm A lower its price, can more readily switch from producing widgets to other things.

¹⁰⁷ If "the equation for measuring market power in monopsony is a mirror image of the relationships that create market power in a seller[]," then a "greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question." *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001) (Sotomayor, J.) (citation and internal quotation marks omitted); *Sprint Nextel Corp. v. AT&T Inc.*, CIV.A. 11-1600 ESH, 2011 WL 5188081 (D.D.C. Nov. 2, 2011).

¹⁰⁸ 2010 Merger Guidelines, *supra* note 5, at § 12 ("Market power on the buying side of the market is not a significant concern if suppliers have numerous attractive outlets for their goods or services.").

Firm B, despite its lower market share, now enjoys greater buyer power than Firm A if the elasticity of demand of the fringe buyers and the elasticity of supply are lower (say if both η and ε equal 1).

These three interrelated factors were evident in a recent DOJ action. In 2011, George's Foods acquired Tyson Foods' Harrisonburg, Virginia chicken processing plant.¹⁰⁹ George's and Tyson were two of the region's three chicken processors that competed in producing, processing, and distributing chickens raised for meat products ("broilers"). Post-acquisition, George's would control "approximately 43% of chicken processing capacity in the Shenandoah Valley, with only one other remaining competitor, Pilgrim's Pride Corporation."¹¹⁰ The DOJ alleged that the acquisition would lead to monopsony power.¹¹¹ George's could reduce below competitive levels the prices it paid to Shenandoah Valley area farmers who raised chickens for processors such as Tyson Foods and George's.

The antitrust plaintiff to prevail under section 7 of the Clayton Act must prove that the effect of the merger "may be substantially to lessen competition *or* to tend to create a monopoly."¹¹² In proving the former, the DOJ need not prove a merger to monopsony. Here the DOJ alleged a merger to monopsony, and did so without relying on market share alone. If the antitrust agency and court simply assume that monopsonies are the mirror image of monopolies, they would conclude that George's, with a 43 percent market share, is not a monopsony.

But the DOJ properly considered the other interrelated factors. It first considered the industry's inelastic supply:

¹⁰⁹ Compl., *George's*, *supra* note 14.

¹¹⁰ *Id.* at ¶ 4.

¹¹¹ Competitive Impact Statement, *George's*, *supra* note 14, at 6 ("in short, the Transaction would lead George's to exercise monopsony power").

¹¹² 15 U.S.C. § 18 (emphasis added).

In order to enter the chicken growing business, growers make significant investments that are highly specific to broiler production. They must build chicken houses that may cost from \$100,000 to \$300,000, and have a 30-year economic life. Many growers take out substantial loans in order to make these investments. Chicken houses have no practical alternative use. If a grower were to stop raising chickens, his or her best option would likely be to raze the chicken-raising facilities because converting a chicken house to a house suitable for another use involves substantial expense. For instance, converting a chicken house to one suitable for turkey growing can cost more than \$100,000. Most chicken farmers would not abandon their investments in chicken houses in response to small decreases in the prices and other contract terms they receive for their services.¹¹³

Next the DOJ considered the inelasticity of demand of fringe buyers. Post-acquisition the market's remaining processor lacked "sufficient capacity to take on significant numbers of growers if George's were to depress payments to growers."¹¹⁴

Finally the DOJ considered the difficulty in entering the broiler chicken processing industry:

New entry into the production and sale of broiler chickens is costly and time consuming. Construction of a large-scale chicken processing facility would require investment of at least \$35 million and take two or more years to obtain necessary permits, plan, design, and build. In addition, there are significant costs and inefficiencies associated with the start-up period of a new chicken processing facility. Repositioning by firms or facilities that slaughter primarily turkeys would require additional capital investment. Moreover, a turkey processor seeking to add chicken products to its offering would first need to find customers for its output prior to contracting with growers.¹¹⁵

Entry therefore would be neither likely, timely nor sufficient to defeat a small but significant, non-transitory decrease in the price of broiler grower

¹¹³ Compl., *George's*, *supra* note 14, at ¶ 21.

¹¹⁴ *Id.* at ¶¶ 6, 28.

¹¹⁵ *Id.* at ¶ 30.

services.

Consequently, courts and agencies can lessen the risk of false negatives by looking beyond market share thresholds. Depending on the elasticity of demand of the fringe buyers (η) and overall supply (ε), firms with relatively low market shares can enjoy as much, if not greater, buyer power than firms with higher market shares. Although George's market share may not suggest monopsony power (if one simply applied the thresholds used in monopolization cases¹¹⁶), George's nonetheless could "decrease prices or degrade contract terms to farmers for grower services in that region."¹¹⁷

The issue of false positives, however, remains. Monopsonists can have low market shares, but many buyers with low market shares are not monopsonists. Likewise all monopsonists possess buyer power, but not all firms with buyer power are monopsonists. "Indeed," observed the U.S. competition authorities, "because one of the purposes of managed care is to lower prices closer to a competitive level, it can be difficult to determine when a managed care purchaser is exercising monopsony power."¹¹⁸ Reduction in sellers' output is not the telltale mark of monopsony, as buyers, for example, can price discriminate. Quantifying η and ε can be elusive, difficult, and contentious.¹¹⁹

¹¹⁶ One could argue that market share thresholds are arbitrary for both monopsony and monopoly claims. Indeed the same factors to show George's monopsony power, despite its relatively low market share, could show that a firm had monopoly power. In other words, when the elasticity of supply by fringe sellers and the elasticity of consumer demand are both low, a firm with a 43 percent market share could also exercise monopoly power. Plaintiffs, however, rarely challenge the market share thresholds per se. Instead the litigants debate whether the market should be defined more broadly or narrowly. Nonetheless even in properly defined markets, buyers with low market shares at times can exert tremendous power. Maybe buyers, in their ability in deciding when, whether, from whom, and how much to buy, generally have relatively more power than sellers; thus buyers can more effectively discipline sellers from exercising market power, than sellers can discipline buyers.

¹¹⁷ Compl., *supra* note 14, at ¶¶ 6, 28.

¹¹⁸ DOJ & FTC Health Report, *supra* note 16, at 18.

¹¹⁹ BLAIR & HARRISON, *supra* note 18, at 66.

Therefore in assessing monopsony claims, agencies and courts should use a sliding scale: the lower the alleged monopsonist's market share, the greater the plaintiff's burden in showing the (i) fringe buyers' inability to acquire more of the sellers' output and (ii) sellers' lack of alternatives to selling in the affected market (being unable to easily and cheaply produce and sell other products).¹²⁰ Granted this is, at times, a matter of degree. The defendant can be a "hard-nosed actor in the market,"¹²¹ but not a monopsonist. So a rule of thumb is the buyer's coercion. Coercion implicitly incorporates both η and ε : as the sellers' price is depressed, there remain few alternative buyers or alternative selling opportunities to rescue the sellers from exploitation and their captivity to the buyer. The more the evidence shows that the defendant is forcing the seller "to do something that he would not do in a competitive market," the more likely the defendant is a monopsonist, even when the defendant's market share is relatively low.¹²² The stronger the evidence of the buyer's coercion, the stronger the inference of monopsony.

B. Proving Exclusionary or Predatory Conduct

Monopsony, by itself, does not violate section 2 of the Sherman Act.¹²³ A monopsonist, like a monopolist, "may be the survivor out of a group of active competitors, merely by virtue of [its] superior skill, foresight and industry."¹²⁴ A monopsonist, like a monopolist, in America can underpay its suppliers, overcharge its customers, provide inferior service and poor quality goods, be inefficient, and not innovate.¹²⁵

¹²⁰ *Id.*

¹²¹ *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 727 (E.D. Tenn. 2011)

¹²² *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 817 (6th Cir. 1997).

¹²³ *White Mule Co. v. ATC Leasing Co. LLC*, 540 F. Supp. 2d 869, 888 (N.D. Ohio 2008) ("Possession of monopsony power, like possession of monopoly power, is not an antitrust violation in and of itself," citing *BLAIR & HARRISON*, *supra* note 18, at 307); *Salop*, *supra* note 22, at 675.

¹²⁴ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

¹²⁵ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S.

Because the Sherman Act does not prohibit monopsony power by itself, the next challenge is determining whether the defendant sought to attain or maintain its monopsony by exclusionary and predatory conduct. If the monopsonist, for example, is attempting to exclude rival purchasers on some basis other than efficiency, then courts likely will characterize the behavior as predatory or exclusionary.¹²⁶

Because few monopsony cases have been brought, what constitutes exclusionary and predatory monopsony behavior remains largely unexplored. One interesting development will be the extent to which courts use the legal standards developed for monopolization claims (e.g., evaluating a monopolist's tying, exclusive dealing, and refusal to deal) for monopsonization claims. But as this Article discusses, monopsony is not the mirror image of monopoly. So one can expect unique monopsonization theories, such as "naked overbuying," where the defendant raises its rivals' costs by purchasing (or manipulating the purchase price of) an input that its rivals, but not defendant, use in their production process.¹²⁷

In devising any legal standard for evaluating monopsony claims, the critical threshold issue is what harm counts. As the German Bundeskartellamt observed, one must discuss abuses of buyer power in terms of the basic objectives of competition law.¹²⁸ Part III addresses whether courts and agencies should reconcile abuse of monopsony power claims with a consumer welfare objective. Must antitrust plaintiffs prove harm to downstream consumers?

III. USING CONSUMER WELFARE TO SCREEN MONOPSONY CLAIMS

The OECD proposes that agencies and courts use consumer harm as a

398, 407 (2004).

¹²⁶ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

¹²⁷ Salop, *supra* note 22, at 683-84 (raising and discussing naked overbuying).

¹²⁸ OECD, Monopsony, *supra* note 1, at 175 (Germany).

threshold screen for buyer power claims.¹²⁹ As it explained, “[r]eductions in input prices in the case of bargaining power are typically beneficial, so requiring an explanation of how increases in bargaining power would harm downstream consumers will help to avoid inadvertently deterring pro-competitive behavior.”¹³⁰ The European Commission likewise observed that “the ultimate end user of any product—the consumer—should be the centre of competition law.”¹³¹ The OECD and EC believe that predicting whether an increase in buyer power will have positive or negative effects is difficult. To avoid chilling a monopsonist’s pro-competitive behavior, agencies and courts should use consumer harm as a screen, namely that the upstream buyer’s conduct adversely affects the end consumer.

Consumer welfare is indeed a popular antitrust objective.¹³² Thirty of thirty-three countries in a 2007 ICN survey identified promoting consumer welfare as an objective for their monopolization statutes.¹³³ The EC noted how, “over the past two decades, the Commission’s antitrust and merger policy more effectively placed the emphasis on consumer welfare, notably through an increasingly refined economic analysis.”¹³⁴

But there are many problems with consumer welfare as the primary or sole antitrust goal. Monopsony only highlights the infirmities.

¹²⁹ *Id.* at 10 (Executive Summary).

¹³⁰ *Id.* at 9 (Executive Summary).

¹³¹ *Id.* at 255 (European Commission).

¹³² Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 570-71 (2012); J. Thomas Rosch, *Monopsony and the Meaning of “Consumer Welfare”*: A Closer Look at Weyerhaeuser, 2007 COLUM. BUS. L. REV. 353, 353-54 (2007).

¹³³ Int’l Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 9 (2007), *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>. Consumer welfare was the second most popular antitrust goal, trailing the goal of ensuring an effective competitive process, and ahead of the goals, maximising efficiency and ensuring economic freedom.

¹³⁴ European Commission, *Report on Competition Policy 2010*, COM(2011)328 final, at 5 (2011), *available at* ec.europa.eu/competition/publications/annual_report/index.html.

A. *Why Doesn't the Key Proponent of the Consumer Welfare Objective Use a Consumer Welfare Screen?*

Some United States courts¹³⁵ and scholars¹³⁶ in the past thirty years have been cheering globally for consumer welfare as antitrust's primary objective. But the quest in the United States over the past 30 years for a single economic objective was, as I discuss elsewhere, a failure.¹³⁷ One need only look at monopsony power to see why.

The U.S. courts, shortly after the Sherman Act's enactment, recognized harm to sellers, independent of any harm to downstream consumers. One early antitrust prosecution was against stockyard owners that bought and slaughtered livestock into fresh meats for human consumption.¹³⁸ The defendants directed their purchasing agents at the stockyards "to refrain from bidding against each other when making purchases of such livestock, and by these means inducing and compelling the owners of such livestock to sell the same at less prices than they would receive if such bidding were

¹³⁵ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993) (noting "antitrust laws' traditional concern for consumer welfare and price competition"); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979))); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983) (observing that antitrust laws "assure customers the benefits of price competition"); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007) ("primary goal of antitrust law is to maximize consumer welfare by promoting competition among firms"); *L.A.P.D., Inc. v. Gen. Elec. Corp.*, 132 F.3d 402, 404 (7th Cir. 1997) ("Antitrust law is designed to protect consumers from the higher prices—and society from the reduction in allocative efficiency—that occurs when firms with market power curtail output."); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1444–45 & n.15 (9th Cir. 1995) (characterizing allocative efficiency as synonymous with consumer welfare and as "the central goal of the Sherman Act"); *J. Allen Ramey, M.D., Inc. v. Pac. Found. For Med. Care*, 999 F. Supp. 1355, 1364 (S.D. Cal. 1998); *Ginzburg v. Mem'l Healthcare Sys., Inc.*, 993 F. Supp. 998, 1015 (S.D. Tex. 1997) ("purpose of antitrust law is the promotion of consumer welfare") (quoting *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 960 (10th Cir. 1990)).

¹³⁶ *See, e.g.*, ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 91 (1978).

¹³⁷ Stucke, *Goals*, *supra* note 132, at 563-95.

¹³⁸ *United States v. Swift & Co.*, 122 F. 529 (C.C.N.D. Ill. 1903) *modified*, 196 U.S. 375 (1905).

competitive.”¹³⁹ But the fact that consumer surplus increased did not excuse the bid-rigging:

Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases, even as against the consumer, be restraint of trade; and combination that leads directly to higher prices, may, as against the producer be restraint of trade. The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition. Whatever combination has the direct and necessary effect of restricting competition, is, within the meaning of the Sherman Act as now interpreted, restraint of trade.¹⁴⁰

Likewise, the Supreme Court in 1948 held that the Sherman Act applies to buyer cartels that injure only sellers, and not customers or consumers.¹⁴¹ The Sherman Act “does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these.”¹⁴² The Act “is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”¹⁴³

Even outside of cartel cases, courts are reluctant to apply a consumer welfare screen. As one lower court said,

This contention—questionable even in the monopoly context [citation omitted]—certainly cannot apply to monopsony claims. *See Phillip E. Areeda & Herbert Hovenkamp, et. al., Antitrust Law* ¶ 350b (2007) (“Notwithstanding numerous statements to the effect that the primary or even exclusive concern of antitrust is ‘consumer’ welfare, upstream, or monopsony, injury to suppliers is treated in largely the same way as injury to consumers.”). In contrast to a monopoly, in a monopsony the buyer uses its market power to damage competition among upstream market participants. In such a situation, the direct victims are competitors and suppliers

¹³⁹ *Swift & Co.*, 122 F. at 530.

¹⁴⁰ *Id.* at 534.

¹⁴¹ *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948).

¹⁴² *Id.* at 236.

¹⁴³ *Id.*

rather than competitors and customers.¹⁴⁴

Similarly, the U.S. antitrust agencies do not use consumer harm to screen mergers.¹⁴⁵ To dispel any uncertainty, the 2010 Merger Guidelines provide an example of an illegal merger that does not directly harm consumers:

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.¹⁴⁶

The U.S. agencies prosecute mergers to monopsony that affect solely suppliers, and not consumers:

In *Cargill*,¹⁴⁷ the Division challenged a merger that would have created a monopsony purchaser of grain in some local markets. The merging companies, however, sold grain in world markets, in which they faced competition from many other grain sellers. Thus, even if the merged firms imposed a loss on farmers by cutting back the quantity of grain they bought from them, consumers of the merging companies would not be harmed because they had numerous other sources of supply. The harm in the upstream

¹⁴⁴ *White Mule Co. v. ATC Leasing Co. LLC*, 540 F. Supp. 2d 869, 888 (N.D. Ohio 2008).

¹⁴⁵ See, e.g., 2010 Merger Guidelines, *supra* note 5, at § 12 (“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.”). The Guidelines do state that efficiencies must be “sufficient to reverse the merger’s potential to harm customers in the relevant market.” *Id.* at § 10. But assuming that this applies to mergers between buyers, a consumer-oriented efficiencies defense does not mean that the Clayton Act prohibits only mergers that harm consumers. The latter does not follow from the former, and there is no need for symmetry between the two. The efficiencies defense simply elevates the harm to consumers over potential efficiency benefits to producers in mergers; the efficiencies defense is not intended to discount the harm (or possibility of harm) to other producers arising in mergers.

¹⁴⁶ *Id.* at § 12.

¹⁴⁷ Compl., *United States v. Cargill Inc. & Continental Grain Co.*, Civ. Act. No. 1:99CV01875 (GK) (D.D.C. filed July 8, 1999), available at <http://www.justice.gov/atr/cases/f2500/2552.htm>.

market, however, was sufficient to prompt the Division to challenge the merger.¹⁴⁸

So why doesn't the United States--a leading cheerleader of the consumer welfare objective--advocate a consumer welfare screen for buyer power claims? Several explanations exist.

First, the Sherman Act, like some other jurisdictions' antitrust statutes, does not expressly identify consumer welfare as the primary objective or require the agencies to use consumer welfare as a screen.¹⁴⁹

Second, the legislators in enacting the Sherman Act were concerned about buyer power's adverse impact on sellers, apart from any injury to consumers.¹⁵⁰

Third, a consumer welfare screen produces anomalous results. If the U.S. courts required the antitrust plaintiff to prove consumer harm in cases involving buyer power, otherwise per se illegal, and criminally prosecuted, behavior would become per se legal. A bid-rigging cartel composed of

¹⁴⁸ DOJ & FTC Health Report, *supra* note 16, at 19-20 (footnotes omitted).

¹⁴⁹ INT'L COMPETITION NETWORK, COMPETITION ENFORCEMENT AND CONSUMER WELFARE—SETTING THE AGENDA 15 (2011), *available at* <http://www.icn-thehague.org/page.php?id=78> [hereinafter 2011 ICN Survey] (24% of the 54 agencies surveyed reported that legislation does not mention consumer welfare; 28% responded that legislation indirectly refers to consumer welfare).

¹⁵⁰ Senator Sherman said,

These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the costs of the necessities of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion which makes the people poor. Then, making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of speculation under the law, until they are fast producing that condition in our people in which the great mass of them are the servitors of those, who have this aggregated wealth at their command.

21 CONG. REC. 2461 (1890); *see also* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in A New Light*, 74 ANTITRUST L.J. 707, 714 (2007) ("The legislative history leaves no doubt that Congress intended to protect sellers victimized by trusts and other conduct within the scope of the Sherman Act's prohibitions.").

ultimate buyers, for example, would be per se legal, while their counterpart sellers, if they colluded, would be incarcerated and fined. Not surprisingly the United States does not distinguish between buyer and seller cartels, and actively prosecutes buyer cartels without considering their impact on consumers.¹⁵¹

Although U.S. courts mention consumer welfare as an antitrust objective, in reality, the courts are more concerned about preserving competition.¹⁵² This raises other issues, including what is competition, as

¹⁵¹ OECD, Monopsony, *supra* note 1, at 247 (United States) (noting how DOJ brought 70 criminal cases against buyer cartels between 1997-2006); *see also* Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) (“buyer 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”); Int’l Outsourcing Services, LLC v. Blistex, Inc., 420 F. Supp. 2d 860, 865 (N.D. Ill. 2006) (complaint “sets forth a horizontal price fixing scheme among buyers to fix the prices of an input-shipping costs for coupons-below its competitive cost” and “sufficiently alleges conduct prohibited per se by the Sherman Act”).

¹⁵² *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000):

The fallacy of this argument [that collusive bid rigging legal because lower consumer prices ensued] becomes clear when we recall that the central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition-not the collusive fixing of prices at levels either low or high-that these statutes recognize as vital to the public interest. The Supreme Court's references to the goals of achieving “the lowest prices, the highest quality and the greatest material progress,” [*N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)], and of “assur[ing] customers the benefits of price competition,” [*Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983)], do not mean that conspiracies among buyers to depress acquisition prices are tolerated. Every precedent in the field makes clear that the interaction of competitive forces, not price-rigging, is what will benefit consumers. “[O]ur prior cases,” the Court noted in *Associated General*, “have emphasized the central interest in protecting the economic freedom of participants in the relevant market.” 459 U.S. at 538, 103 S.Ct. 897. In California, similarly, “The public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand.” *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 44, 172 P.2d 867 (1946).

See also *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 105 (3d Cir. 2010) (“Highmark’s improperly motivated exercise of monopsony power, like the collusive exercise of oligopsony power by the cheese makers in *Knevelbaard*, was anticompetitive and cannot be defended on the sole ground that it enabled Highmark to set lower premiums on its insurance plans.”).

the term is not self-defining, and what are the goals of competition law.¹⁵³ Recent buyer power cases, to the extent they state a specific goal, describe it as protecting suppliers from artificially low prices.¹⁵⁴

B. Disagreement over Consumer Welfare

A skeptic can reply that the fact that the United States does not apply a consumer welfare screen does not mean the screen is undesirable. The United States simply is misguided.

As I elaborate elsewhere, consumer welfare remains one of antitrust's most abused terms.¹⁵⁵ No consensus exists in the United States or globally on what *consumer welfare* actually means, who the consumers are, how to measure consumer welfare (if it is indeed measurable), or how to design legal standards to further this goal.¹⁵⁶ Although one recent ICN survey of its member countries found "some agreement" on a consumer welfare objective,¹⁵⁷ the ICN surveys also found that most countries did "not specifically define consumer welfare and appear[ed] to have different economic understandings of the term."¹⁵⁸ The ICN surveys suggest that the

¹⁵³ Maurice E. Stucke, *Reconsidering Competition*, 81 MISS. L.J. 107 (2011).

¹⁵⁴ For example, the Ninth Circuit recently quoted earlier case law of how "Congress designed the Sherman Act as a consumer welfare prescription." *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1132 (9th Cir. 2011) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343-931 (1979)). But the court recognized that harm transcends the consumer: "Congress sought to ensure that competitors not cut deals aimed at stifling competition and at permitting higher prices to be charged to consumers than would be expected in a competitive environment, or permitting lower prices to be paid to those from whom competitors bought materials than a fair market rate." *Id.* Judge Reinhardt, in a separate opinion, dissenting in part and concurring in part, bluntly rejected the defendants' justification that driving down their workers' compensation was somehow a "procompetitive" benefit: "The Supreme Court has made clear, however, that because antitrust law operates to correct all distortions of competition, it condemns market actors who distort competition, whether on the buyer side or seller side." *Id.* at 1161; *see also West Penn*, 627 F.3d at 105 (concluding that "paying [the plaintiff] artificially depressed reimbursement rates was an anticompetitive aspect of the alleged conspiracy").

¹⁵⁵ Stucke, *Goals*, *supra* note 132, at 570-77.

¹⁵⁶ *Id.*

¹⁵⁷ 2011 ICN Survey, *supra* note 149, at 14.

¹⁵⁸ INT'L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND

phrase “promoting consumer welfare,” provides little guidance as an antitrust goal.¹⁵⁹ A former FTC Chair concluded the same:

[T]he concept of “consumer welfare” and the principle of protecting “competition, not competitors” are so open-ended that their true meaning in practice depends on how they are applied. It is a relatively barren exercise for EU and US officials to invoke these phrases without taking the further difficult step of achieving agreement on what these phrases mean.¹⁶⁰

Consequently, it is illogical to advocate a consumer welfare screen given the current disagreement over what *consumer welfare* means, whether the agencies “examine effects on *either* or both of the direct customers and the final consumers,”¹⁶¹ and how consumer welfare is promoted.¹⁶²

C. Risk of False Negatives under a Consumer Welfare Screen

Even if competition authorities could overcome these obstacles, could agree on a definition of consumer welfare, say maximizing consumer surplus, and could identify the consumer whose surplus must be maximized, applying the consumer welfare screen remains problematic. Proving harm to consumers is often difficult on the selling side—especially for intermediary goods.¹⁶³ Proving buyer power’s adverse impact on the ultimate consumer is even more problematic and difficult.¹⁶⁴

A consumer welfare screen, when actually applied, provides an

STATE-CREATED MONOPOLIES 9 (2007) [hereinafter 2007 ICN Report], *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>; *see also* 2011 ICN Survey, *supra* note 149, at 4.

¹⁵⁹ 2011 ICN Survey, *supra* note 149, at 3 (noting “connection between consumer welfare and the practical enforcement of competition law is not always straightforward” and that “there may be a considerable gap between policy statements and practice”).

¹⁶⁰ William E. Kovacic, Chairman, US Federal Trade Comm’n, Competition Policy in the European Union and the United States: Convergence or Divergence?, Bates White Fifth Annual Antitrust Conference 9 (June 2, 2008), *available at* www.ftc.gov/speeches/kovacic/080602bateswhitepdf.

¹⁶¹ 2010 Merger Guidelines, *supra* note 5, at § 1.

¹⁶² OECD, Monopsony, *supra* note 1, at 182 (Germany) (noting “intensive discussion about what this concept really means”).

¹⁶³ Stucke, Goals, *supra* note 132, at 573-77.

¹⁶⁴ OECD, Monopsony, *supra* note 1, at 187 (Hungary).

incomplete and distorted assessment of consumer harm. Antitrust enforcers typically consider the challenged behavior's impact on short-term pricing effects.¹⁶⁵ If retail prices are unchanged (or declining), then the competition authority, under a consumer harm screen, would likely conclude that the challenged practice is competitively neutral or pro-competitive. They would unlikely investigate further the complaints over buyer power, and would likely dismiss any non-price concerns as too tenuous or speculative.¹⁶⁶

This brings us to the fundamental difficulty in measuring consumer welfare. As Subparts I.C and D discuss, buyer power can harm consumers, albeit indirectly, such as farmers who have less money to purchase goods that consumers produce and the increase in negative externalities when farmers with tighter margins cut corners by polluting more, engaging in less sustainable farming, allowing a more dangerous workplace, and hiring underage or illegal aliens. Competition authorities generally do not consider these other harder-to-quantify harms, which may exceed the short-term benefits from lower prices.¹⁶⁷ The authorities are not willfully ignorant. Rather they lack the tools to assess the short- and long-term harms arising from buyer power (e.g., higher prices, less variety, less innovation).¹⁶⁸ Thus if a Wal-Mart depresses wages in a local community, which in turn increases the taxpayers' costs, would that be factored in the agency's consumer welfare screen? Unlikely.

Accordingly, given the difficulty in proving and quantifying consumer harm, the agency would use a simple, but incomplete, measure. The agency assumes that monopsony power "usually results in higher prices

¹⁶⁵ 2011 ICN Survey, *supra* note 149, at 4.

¹⁶⁶ de Schutter, *supra* note 6, at 5 (expressing concern over consumer welfare standard); South Centre & Traidcraft, *supra* note 6, at 20.

¹⁶⁷ 2011 ICN Survey, *supra* note 149, at 23-24.

¹⁶⁸ *Id.* at 40-42; Stucke, Goals, *supra* note 132, at 32-34.

downstream.”¹⁶⁹ Absent evidence of *supra*-competitive retail prices, the agency concludes that the challenged behavior is pro-competitive or competitively neutral. This heuristic—assessing the restraint’s short-term impact on retail prices--increases the risk of false negatives. It also leaves many consumers, who are also sellers, unprotected: “If competition policy is consistently focused on the welfare of the end consumer, those suppliers disadvantaged by buyer power could now and then find themselves in a rather defenceless position.”¹⁷⁰

D. Risk of False Positives under a Consumer Welfare Screen

As Subpart III.C shows, a consumer welfare screen, if narrowly applied, increases the risk of false negatives. The screen excuses monopsony behavior that reduces, albeit indirectly, consumer welfare.

One risk is that courts and agencies, confronted with a monopsonist’s unfair and abusive conduct, will construe consumer welfare so loosely that it serves more as a general principle than a standard to guide the instant analysis.¹⁷¹

One economist stated that in most cases, “monopsony harms consumers because the distortions it creates in an input market reduce efficiency in final goods markets.”¹⁷² The OECD agrees.¹⁷³ If true, then a consumer welfare screen is superfluous. If the court finds that the defendant is a monopsony, and if monopsony power and its willful maintenance usually harm downstream consumers, then the key issue is whether the defendant is a monopsony. The absence of direct evidence of consumer harm is not

¹⁶⁹ OECD, Monopsony, *supra* note 1, at 9 (Executive Summary).

¹⁷⁰ *Id.* at 175 (Germany).

¹⁷¹ *Id.* at 182 (Germany).

¹⁷² Noll, *supra* note 16, at 613; *see also* Brown v. Pro Football, Inc., 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting) (“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.”), *aff’d*, 518 U.S. 231 (1996).

¹⁷³ OECD, Monopsony, *supra* note 1, at 9 (Executive Summary).

determinative if one assumes that monopsony power and its willful maintenance ultimately harm consumers. Consumers are (or will be) harmed, but the harm is not readily observable or measurable. So in finding that the defendant has enough buyer power to be a monopsonist, the court or agency can conclude that consumers are somehow harmed. The screen serves no real function.

But monopsony, while harming sellers, does not always harm consumers. Even here, courts, concerned about the monopsonist's behavior, can hypothesize a string of future events leading to consumer harm: The exercise of buyer power enables the defendant to lower its wholesale price, which significantly disadvantages defendant's competitors, prompts their exit from the market, lessens competition over the long-term, and harms consumers.¹⁷⁴ Alternatively, the court can rely on the waterbed effect as its theory of consumer harm: Buyer power nets lower prices or better terms for some firms but results in higher wholesale prices (or worse terms) for less powerful buyers, which in turn causes prices to increase downstream to the detriment of consumers.¹⁷⁵

One problem is predicting the subsequent anticompetitive consequences. A defendant may use its buyer power to raise its rivals' costs and increase its price accordingly; alternatively, the defendant lowers its retail price to squeeze out its competitors and take greater profits later. So under the waterbed effect, retail prices to consumers in the short-term may decrease, increase, or remain unchanged.¹⁷⁶

Courts and agencies plausibly can find consumer harm from the exercise of buyer power in the form of less innovation, lower quality goods,

¹⁷⁴ *Id.* at 11 (Executive Summary) & 176 (Germany) (“spiral effect”).

¹⁷⁵ *Id.* at 11 (Executive Summary), at 177 (Germany); Carstensen, Buyer Power, *supra* note 12, at 284.

¹⁷⁶ OECD, Monopsony, *supra* note 1, at 11 (Executive Summary).

and less variety.¹⁷⁷ With smaller margins, sellers have less incentive or ability to invest.¹⁷⁸ If the powerful buyer captures Ricardian rents from the more efficient sellers, these sellers likely will testify of their disincentive to innovate, thereby harming downstream consumers. Agencies and courts can reasonably find that lower “input prices may slow the rate of innovation and the adoption of socially desirable product improvements.”¹⁷⁹ With all-or-nothing contracts, “the inability to capture gains from innovative contributions to efficiency in production creates a disincentive to enter, expand, or innovate within the production sector.”¹⁸⁰

Other courts and agencies could plausibly conclude the opposite. By squeezing its suppliers and retarding innovation upstream, a monopsonist can increase the risk of being displaced by a superior innovation.¹⁸¹ Also attempts to squeeze sellers of their Ricardian rents increases the sellers’ incentives to differentiate their products and increase consumer demand for their branded product.¹⁸² The prospect of smaller margins would encourage sellers to invest in innovations that make them less dependent on the monopsony. Moreover, powerful buyers, if rational, would want sellers to invest in innovations that likely increase buyer’s profits.¹⁸³ Or to the extent the powerful buyers face rival technologies or competitors, they would not want to squeeze sellers’ margins below competitive levels. Ford, for example, would not want to squeeze the margins of its automobile

¹⁷⁷ See, e.g., *Sony Electronics, Inc. v. Soundview Technologies, Inc.*, 157 F. Supp. 2d 180, 185 (D. Conn. 2001) (“The all-or-nothing price set by these colluding purchasers can depress the price below the optimal price that would obtain if usual market forces of supply and demand were at work. The price to consumers does not decrease, but there may be social welfare consequences in the long run, because suppliers will leave the industry (or, as Soundview has it, will cease to innovate and invent).”).

¹⁷⁸ OECD, *Monopsony*, *supra* note 1, at 177 (Germany).

¹⁷⁹ *Id.* at 260 (European Commission).

¹⁸⁰ Carstensen, *Buyer Power*, *supra* note 12, at 299.

¹⁸¹ *Id.* at 260 (European Commission).

¹⁸² *Id.* at 177 (Germany).

¹⁸³ *Id.* at 177 (Germany).

component suppliers, if doing so disadvantages Ford competitively against General Motors and Toyota.

Consequently, jurisdictions should not use consumer welfare to screen monopsony claims. Contrary to its aim, a consumer welfare screen, when applied, increases, rather than decreases, the risks and costs of false positives and negatives. Rather than bring the monopsony legal standards closer to the rule of law, the screen promotes greater subjectivity and less predictability and transparency. It increases the difficulty for a generalist court to predict with confidence the eventual effects on consumer welfare.¹⁸⁴

E. Behavioral Economics and Monopsony

The OECD's consumer harm screen implicitly assumes that market participants are interested primarily in maximizing their wealth. Despite this simplifying assumption, subparts III.C and D show the practical difficulties in using consumer welfare as a threshold screen for monopsony cases. The screen's deficiencies are compounded as courts and agencies shift from the archaic assumption of self-interest to the more realistic premise, namely consumers' other-regarding behavior and their concerns over fairness.

The consumer harm screen implicitly assumes that consumers are solely concerned about promoting their self-interest; this consumers are harmed, when they pay a higher price, get poorer quality goods, etc. So when powerful meat packers earn *supra*-competitive profits by paying local farmers prices below the competitive level, absent evidence of higher retail prices, selfish consumers do not care. Nor would selfish consumers care whether an Indonesian coffee grower receives a fair price for her harvest, has safe working conditions, enjoys a living wage, and has the right to

¹⁸⁴ *Id.* at 12 (Executive Summary).

organize. Selfish consumers do not care whether the farmers' families can "eat better, keep their kids in school, improve [their] health and housing, and invest in the future."¹⁸⁵ Selfish consumers would not differentiate between Fair Trade coffee and regular (exploited farmer) coffee. Given the pervasive greed, companies would not devote time and resources to ensure that the upstream coffee farmers earned higher than the minimum wage, received paid sick leave, had their school age children attending school, had not converted any natural forest habitat to coffee production areas, used organic matter or cover crops to improve or maintain soil fertility, or processed waste so as to not contaminate the local environment.¹⁸⁶ Responding to self-interested consumers, companies would seek to obtain the minimum acceptable quality inputs at the lowest possible cost. A coffee house, for example, would not pursue a goal of having all of their coffee to be third-party verified or certified (through Coffee and Farmer Equity (C.A.F.E.) Practices, Fairtrade, or another externally audited systems),¹⁸⁷ when selfish consumers simply want a cheaper latte.

Consumers, as the behavioral economics literature shows, are not solely concerned about promoting their economic self-interest. Today fairness and other-regarding behavior are hot topics among economists¹⁸⁸ and lawyers.¹⁸⁹ The psychological and experimental economic evidence shows

¹⁸⁵ <http://fairtradeusa.org/about-fair-trade-usa/mission>.

¹⁸⁶ <http://www.starbucks.com/responsibility/sourcing/coffee>.

¹⁸⁷ Starbucks Ethical Sourcing Factsheet, <http://www.starbucks.com/responsibility/global-report/ethical-sourcing/coffee-purchasing>.

¹⁸⁸ 255 economics articles were published in the past two years with fairness in the title or abstract compared to 126 with self-interest. Search of EconLit database July 2010-July 2012 (Aug. 5, 2012).

¹⁸⁹ See, e.g., LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD LAWS* 238-40 (2011) (discussing how societal norms of fairness and prosocial behavior are both common in, and necessary for, a market economy); Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. 615, 653-654 (2012) (citing research on how "fairness evolved as a stable strategy for maintaining social harmony" in our economic relationships and how "neurobiological studies have found that

that people care about treating others, and being treated, fairly.¹⁹⁰ This “strong reciprocity” in human behavior entails “a predisposition to cooperate with others and to punish those who violate the norms of cooperation, at personal cost, even when it is implausible to expect that these costs will be repaid either by others or at a later date.”¹⁹¹ Employers, for example, may not reduce wages during times of deflation as workers perceive this wage reduction as unfair, and retaliate by working less hard.¹⁹² So rather than self-interest, employers appeal to fairness concerns.¹⁹³

Likewise, in the behavioral experiments, people care about resources being equitably distributed, not solely about resources going to those with the greater use.¹⁹⁴ The experiments in bargaining settings, economist Samuel Bowles summarizes, systematically show “that substantial fractions of most populations adhere to moral rules, willingly give to others, and punish those who offend standards of appropriate behavior, even at a cost to

the sense of fairness fundamental to distributive justice is rooted in humans’ emotional processing”).

¹⁹⁰ MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE (Herbert Gintis et al. eds. 2005); Yochai Benkler, *The Unselfish Gene*, HARV. BUS. REV., July-Aug. 2011, at 79 (“In no society examined under controlled conditions have the majority of people consistently behaved selfishly.”); Ming Hsu et al., *The Right and the Good: Distributive Justice and Neural Encoding of Equity and Efficiency*, SCIENCE, May 23, 2008, at 1092.

¹⁹¹ Herbert Gintis et al., *Explaining Altruistic Behavior in Humans*, 24 EVOLUTION & HUM. BEHAV. 153, 154 (2003). These authors argue that “the evolutionary success of our species and the moral sentiments that have led people to value freedom, equality, and representative government are predicated upon strong reciprocity and related motivations that go beyond inclusive fitness and reciprocal altruism.” *Id.*

¹⁹² Herbert Gintis et al., *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, in MORAL SENTIMENTS, *supra* note 190, at 3, 32; GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM 107-115 (2009).

¹⁹³ Akerlof & Shiller, *supra* note 192, at 19-25; Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729 (1986) (“A central concept in analyzing the fairness of actions in which a firm sets the terms of future exchanges is the *reference transaction*, a relevant precedent that is characterized by a reference price or wage, and by a positive reference profit to the firm.”).

¹⁹⁴ Matthew Rabin, *A Perspective on Psychology and Economics*, 46 EUR. ECON. REV. 657, 665 (2002).

themselves and with no expectation of material reward.”¹⁹⁵

Consumers are angrier and more willing to punish corporate behavior perceived as intentional, unfair, and motivated by greed.¹⁹⁶ Even if one assumes that firms seek primarily to maximize wealth, consumers nonetheless consider whether the firm intentionally exploits others.¹⁹⁷ Suppose a retailer violated a pricing norm by charging higher prices to purchasers willing to pay more. Such price discrimination, one study found, led to “specifically lower perceived fairness of the pricing, lower benevolence trust towards the firm, lower intention to purchase from this retailer, [and] higher likelihood of additional search” on competing retailer websites.¹⁹⁸ Even when one study’s participants personally received a better price than other customers who were exploited, the participants still perceived the retailer as behaving unfairly, were less inclined to purchase from that retailer again, and less willing to recommend the retailer to a friend.¹⁹⁹

So the behavioral economics literature can better explain why firms

¹⁹⁵ Samuel Bowles, *Policies Designed for Self-Interested Citizens May Undermine “The Moral Sentiments”*: Evidence from Economic Experiments, SCIENCE, June 20, 2008, at 1606.

¹⁹⁶ Thomas M. Tripp & Yany Grégoire, *When Unhappy Customers Strike Back on the Internet*, MIT SLOAN MGMT. REV., Jan. 26, 2011, available at <http://sloanreview.mit.edu/the-magazine/2011-spring/52303/when-unhappy-customers-strike-back-on-the-internet/> (experiment and survey results “showed that inference of motive was the *key* belief that drove anger and any consequent desires for revenge or reconciliation”); Ellen Garbarino & Sarah Maxwell, *Consumer Response to Norm-Breaking Pricing Events in E-Commerce*, 63 J. BUS. RES. 1066, 1067 (2010); Lan Xia & Kent B. Monroe, *Is a Good Deal Always Fair? Examining the Concepts of Transaction Value and Price Fairness*, 31 J. ECON. PSYCHOL. 884, 891 (2010); Horton, *supra* note 189, at 655-56 (collecting additional studies).

¹⁹⁷ Stephan M. Wagner et al., *Effects of Suppliers’ Reputation on the Future of Buyer-Supplier Relationships: The Mediating Roles of Outcome Fairness and Trust*, J. SUPPLY CHAIN MGMT., Apr. 2011, at 32; Garbarino & Maxwell, *supra* note 196, at 1067 (pricing norm violation will likely reduce consumers’ trust in the firm’s intention to behave in the customer’s best interest); Lisa E. Bolton et al., *How Do Price Fairness Perceptions Differ Across Culture?*, J. MARKETING RES., June 2010, at 564.

¹⁹⁸ Garbarino & Maxwell, *supra* note 196, at 1069.

¹⁹⁹ Xia & Monroe, *supra* note 196, at 891.

avoid behavior or statements that suggest intentional exploitation. If consumers believe the company is exploiting its workers or suppliers, they can punish the corporate behavior—simply at times by taking their business elsewhere. Indeed Senator Sherman assumed that competition checked the selfishness of firms and their disregard of consumers’ interests.²⁰⁰ In competitive markets, firms would be sensitive to social norms of fairness, and promote employee behavior that abided by these values.²⁰¹ A positive reputation can provide a competitive advantage.²⁰²

If firms are exploiting their workers or suppliers, then many consumers either (i) are unaware of the exploitation, (ii) do not care, or (iii) do care, but they, like the sellers, lack sufficient competitive alternatives. Consumer ambivalence (option ii) is hard to reconcile with the behavioral experiments and today’s marketplace. Although consumers can economically benefit from the exploitation of sellers, they nonetheless object to such exploitation.²⁰³ We see this with Nike, Apple, and the growth of Fair Trade products:

In 2011, Fair Trade USA and our industry partners delivered record impact to producers. Imports of Fair Trade Certified products grew to an all time high, satisfying the continued growth in consumer demand for the more than 11,000 products carrying our label in supermarkets, cafés, universities and workplaces. This growth was driven by longstanding business partners that

²⁰⁰ 21 CONG. REC. 2457 (1890).

²⁰¹ Wagner et al., *supra* note 197, at 43 (to secure competitive advantage, companies, among other things, should “ensure that fairness and trust are part of the training expectations among company representatives that work face-to-face with customers”).

²⁰² *Id.* at 29, 30, 42.

²⁰³ During the financial crisis in 2009, a majority of consumers surveyed in five (Belgium, Denmark, France, Spain and Poland) of six European countries felt that “supermarkets should pay a price that enabled suppliers to pay their workers a fair wage, even if it resulted in consumers having to pay more.” Consumers International, *Checked Out: Are European Supermarkets Living Up to their Responsibilities for Labour Conditions in the Developing World?* 10 (Mar. 2010), available at www.consumersinternational.org/media/394236/checkedout-english-02.pdf. Greek consumers were the exception: 70 percent agreed that retailers should “[e]nsure lowest prices by paying minimum to suppliers.” *Id.* at 18.

expanded their Fair Trade offerings as well as by new businesses joining us for the first time. In addition, consumer demand continued to grow, enabled by our consumer education campaigns which bring together brands, retailers, non-profits and community organizations. For example, during our annual Fair Trade Month promotion in October, Fair Trade USA and our partners actively engaged nearly 30 million consumers through various campaign activities, reinforcing the message that everyday purchases have the power to improve lives and protect the environment.²⁰⁴

Consequently, to the extent consumers include in their welfare calculus the fair treatment of others, including upstream suppliers, then a consumer welfare screen, if realistic, must incorporate consumers' other-regarding behavior and their concern over the exploitation of others.

F. Shared Value

Subpart III.E assumes fairness as demand driven: Self-interested firms respond to consumer pressure to treat upstream suppliers fairly. If unchecked by consumers or competition, the firms naturally would exploit their suppliers. But business professor Michael Porter and consultant Mark Kramer recently discussed fairness as a supply driven response to yield greater profits.²⁰⁵ In the past, the concepts of sustainability, fairness, and profitability generally were seen as conflicting. Under the neoclassical approach, companies “commoditize and exert maximum bargaining power on suppliers to drive down prices—even when purchasing from small businesses or subsistence-level farmers.”²⁰⁶ So the monopsonist, given the opportunity, would extract Ricardian rents from its more efficient suppliers and quasi-rents from its suppliers with lower short-run costs.

One conundrum is that this exploitation makes little sense in the long

²⁰⁴ http://fairtradeusa.org/fairtrade_for_all.

²⁰⁵ Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.–Feb. 2011, at 62, 77.

²⁰⁶ *Id.* at 70.

run.²⁰⁷ In extracting these rents, the monopsonist can retard innovation and investment and jeopardize its long-term competitiveness. This exploitation, Porter and Kramer explain, destroys shared value. Rather than zero-sum competition, whereby the monopsonist gains when its suppliers' profits dwindle, they argue that greater profits can be achieved in "creating economic value . . . for society by addressing its needs and challenges" and "enhanc[ing] the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates."²⁰⁸ Under their concept of shared value, powerful buyers recognize why exploitation is inconsistent with their long-term viability and profitability. In promoting shared value, buyers recognize

that marginalized suppliers cannot remain productive or sustain, much less improve, their quality. By increasing access to inputs, sharing technology, and providing financing, companies can improve supplier quality and productivity while ensuring access to growing volume. Improving productivity will often trump lower prices. As suppliers get stronger, their environmental impact often falls dramatically, which further improves their efficiency.

In the context of buyer power, Porter and Kramer turn to the coffee sector and its challenges of a reliable supply:

Most coffees are grown by small farmers in impoverished rural areas of Africa and Latin America, who are trapped in a cycle of low productivity, poor quality, and environmental degradation that limits production volume. To address these issues, Nestlé redesigned procurement. It worked intensively with its growers, providing advice on farming practices, guaranteeing bank loans, and helping secure inputs such as plant stock, pesticides, and fertilizers. Nestlé established local facilities to measure the quality of the coffee at the point of purchase, which allowed it to pay a

²⁰⁷ See, e.g., *Sony Electronics, Inc. v. Soundview Technologies, Inc.*, 157 F. Supp. 2d 180, 186 (D. Conn. 2001) (observing that although the "monopsonist purchaser's interests are not served by reducing the numbers of suppliers, business conduct is not always rational, and economic actors do not always have access to perfect information, the utopian ideal of economics").

²⁰⁸ Porter & Kramer, *supra* note 205, at 64, 66.

premium for better beans directly to the growers and thus improve their incentives. Greater yield per hectare and higher production quality increased growers' incomes, and the environmental impact of farms shrank. Meanwhile, Nestlé's reliable supply of good coffee grew significantly. Shared value was created.

Embedded in the Nestlé example is a far broader insight, which is the advantage of buying from capable local suppliers. Outsourcing to other locations and countries creates transaction costs and inefficiencies that can offset lower wage and input costs. Capable local suppliers help firms avoid these costs and can reduce cycle time, increase flexibility, foster faster learning, and enable innovation. Buying local includes not only local companies but also local units of national or international companies. When firms buy locally, their suppliers can get stronger, increase their profits, hire more people, and pay better wages—all of which will benefit other businesses in the community. Shared value is created.²⁰⁹

Consequently, shared value, like bounded self-interest, can promote capitalism. Rather than fearing regulatory dictates to prevent them from exploiting suppliers (and lobbying governments on measures to promote such exploitation),²¹⁰ enlightened firms will see how profits can be attained, not through exploitation (e.g., creating demand for harmful or useless products), but through collaboration and trust, and in better helping suppliers and consumers solve their problems. Sustainability, rather than a cost, represents an opportunity for companies to improve productivity and societal welfare.

CONCLUSION

Developing the legal standards for monopsonization claims will be more complex than simply mirroring the monopolization standards. Courts and agencies cannot rely on market share thresholds alone as monopsonists can have relatively lower market shares. Nor can they rely on a consumer

²⁰⁹ *Id.* at 70.

²¹⁰ DARON ACEMOGLU & JAMES ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY* (2012).

welfare screen premised on economic self-interest. Accordingly, as one participant recognized about monopsony and buyer power, “the central economic issues facing the food system have little to do with economic efficiency, but a lot to do with fairness and economic freedom for farmers and ranchers.”²¹¹ The U.S. Attorney General Eric Holder agreed:

the overriding concern we have in the Justice Department is maintaining fairness. Doesn't mean we're going to put our thumb on the scale. We want everybody to have a fair shot. . . . As [the Assistant Attorney General for the Antitrust Division] indicated, you know, big is not necessarily bad, but big can be bad if the power that comes from being big is misused, and that is simply not something that this Department of Justice is going to stand for. We will use every tool that we have to ensure fairness in the marketplace.²¹²

The challenge for the competition agencies is to develop these tools, in a way that promotes consumers’ concerns of fairness and the rule of law.

²¹¹ C. Robert Taylor, *The Many Faces of Power in the Food System*, Comments presented at the DOJ/FTC Workshop on Merger Enforcement (Feb. 17, 2004), *available at* <http://www.justice.gov/atr/public/workshops/docs/202608.doc>.

²¹² U.S. Dep’t of Justice & U.S. Dep’t of Agriculture, *Public Workshops Exploring Competition Issues in Agriculture: A Dialogue on Competition Issues Facing Farmers in Today’s Agricultural Marketplace* 56 (Mar. 12, 2010), *available at* <http://www.justice.gov/atr/public/workshops/ag2010/iowa-agworkshop-transcript.txt>.