Buyer Power: Is Monopsony the New Monopoly?

BY DEBBIE FEINSTEIN AND ALBERT TENG

FOR A NUMBER OF YEARS, commentators have debated whether the United States has a monopoly problem. But as part of the recent conversation over the direction of antitrust law and the continued appropriateness of the consumer welfare standard, the debate has turned to whether the antitrust agencies are paying enough attention to monopsony issues.[1] A concept that appears more in textbooks than in case law has suddenly become mainstream and practitioners should be aware of developments when they counsel clients on issues involving supply-side concerns.

This topic is not going anywhere any time soon. Particularly as it affects employer power and restraints in the labor markets, monopsony has drawn the attention of politicians and the antitrust agencies. Senator and presidential hopeful Cory Booker and members of the newly formed Congressional Antitrust Caucus have written letters to the antitrust agencies expressing concern over the agencies' treatment of labor monopsonies.[2] Likewise, in 2017 and again in 2019, Senator and presidential hopeful Amy Klobuchar introduced the Consolidation Prevention and Competition Promotion Act, which would insert "or a monopsony" after every instance of the term "monopoly" in Section 7 of the Clayton Act. The Federal Trade Commission has held a number of public hearings to discuss the topic, and both the FTC and Department of Justice recently brought enforcement actions against companies and individuals accused of suppressing input prices in labor markets. Despite the recent surge of interest in monopsony, however, the paucity of case law on the topic, as well as the lack of clear direction from courts, means that the antitrust agencies may well have a more difficult time advancing cases premised on buyer power, as compared to seller power.

In this article, we discuss: (1) the debate over whether the antitrust laws should condemn monopsony any time it exists—or only when it can also be shown to harm consumer welfare; (2) historical case law on monopsony; (3) recent cases involving monopsony issues; and (4) counseling considerations for monopsony issues. It remains to be seen whether we will see significantly increased enforcement against buyer-side agreements and mergers that affect buyer power and whether such enforcement will be successful, but what is clear is that the antitrust enforcement agencies will be exploring the depth and reach of these theories and clients must be prepared for investigations and enforcement actions implicating these issues.

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The Debate over Monopsony and Consumer Welfare

While monopoly is a single (or dominant) seller dealing with multiple buyers, a monopsony is a single (or dominant) buyer dealing with multiple sellers. The DOJ and the FTC have observed that in "important respects, monopsony is the mirror image of monopoly."[3]

The recent focus on monopsony issues is closely tied to the revival of the debate over the consumer welfare standard. The evolving debate over how enforcers and courts should define the limits of the consumer welfare standard—and even the continued appropriateness of the standard—has important implications for how far enforcers and the courts will go to address monopsony issues.

Some commentators, for instance, argue that a consumer welfare standard protects only those who purchase goods in a relevant downstream market.[4] Under this view, monopsony is only an issue if it ultimately causes consumers to pay higher prices. If it merely redistributes wealth, for instance, between employers and employees, this is not an issue of concern for antitrust enforcers or courts.

Others contend that consumer welfare refers to the welfare of all consumers in society, who can be protected only when allocative efficiency is maximized.[5] The agencies explain that a monopolist restricts supply and forces market prices up, while a monopsonist restricts its purchases to force market prices down. In either case, there is a misallocation of economic resources. Proponents of this view argue we should stop there and find the activity that creates a monopsony (whether by merger or agreement) unlawful. This latter understanding of the goal of the antitrust laws would put far more focus on monopsony issues than has traditionally been the case.

Yet, as others have pointed out, the story does not end there. While the impact on consumers from higher prices is clear, the impact on consumers if a supplier faces lower prices for its goods is less so. In the first instance, a monopsonist may not be able to reduce downstream prices by restricting purchases—either because of the nature of the industry or because buyers typically tend to outnumber sellers.[6] Second, even in the context of bargaining, the agencies have pointed out that larger buyers are not necessarily in a stronger bargaining position.[7]

But suppose the monopsonist is able to receive lower prices, thereby lowering its costs. In that situation, consumers could benefit. Because low prices can benefit consumers—at least in the short run—some argue that unless it can be shown that there will be some long-term detrimental effect on consumers in the form of lower output, we should not worry about monopsony conduct. That same basic intuition underlies why predatory pricing is found to be unlawful only if the initial low prices can be shown to be followed by a period of higher prices.

While this conception of the consumer welfare standard may seem appealing (after all, prices for consumers are lower), some posit that the consumer welfare standard, or at least an interpretation of the standard concerned primarily with downstream prices, has contributed to the creation and maintenance of buying power in labor and other markets. The growth in employer market power in labor markets is hypothesized to have led to depressed wages, reduced hiring and output, and increased economic inequality.[8]

Indeed, President Barack Obama's Council of Economic Advisers released an issue brief examining labor monopsony issues, which cited evidence suggesting that labor monopsonies in a broad range of settings are restricting employee pay increases. In its brief, the Council also discussed the possibility that increased consolidation in the economy could be enhancing employers' labor monopsony power.[9] Some of the factors commentators have cited as leading to increased buying power in labor markets include the proliferation of noncompete agreements, rising employer concentration, implicit and explicit collusion among employers, high transaction costs for switching jobs, and the decline of labor unions.[10] Several of these activities could conceivably result in lower prices for consumers by reducing producers' input costs—putting the activities outside the reach of a consumer welfare standard focused on downstream prices—but would result in lower wages for employees.

In the recent debate, some commentators have advocated for antitrust enforcers and private plaintiffs to play a greater role in curbing anticompetitive practices they believe are leading to depressed wages.[11] But others have cautioned against jumping to the conclusion that rising employer concentration or anticompetitive mergers have led to depressed wages, noting that the study of labor monopsonies is not finished and definitive causal links between depressed wages and antitrust policy and enforcement have not yet been established.[12] Whoever carries the debate will have considerable say in the direction of enforcement against monopsonies.

History of Monopsony Cases

Perhaps because of the debate on the effects of monopsony power on consumers, enforcement and judicial actions concerning buy-side competition are rare. This is in part because if a case involves both sell-side and buy-side issues, plaintiffs and enforcers typically focus on the former, given the straightforward story they can tell about the impact on consumers. Further, the case law appears less restrictive of buy-side agreements. Yet the relatively less frequent cases that do involve buy-side concerns offer important insights into the agencies' and courts' treatment of monopsony issues and serve as the initial legal framework for future enforcement actions and cases.

Conduct Cases. Traditionally, allegations involving buy-side concerns arise most often in conduct matters, rather than merger cases.

Many of the earliest buy-side conduct cases involve joint buying arrangements or buyer cartels. For instance, *Swift & Co. v. United States*,[13] a 1905 case upholding the constitutionality of the Sherman Antitrust Act, involved an allegation that the "Big Six" meatpackers formed a buyer cartel to reduce the prices they paid for cattle. In the 1948 case *Mandeville Island Farms v. American Crystal Sugar Co.*,[14] the Court held that a buyer cartel of sugar refiners that possessed monopsony power was subject to per se treatment. In *Mandeville*, the Court noted that seller harm by itself is sufficient to sustain a buy-side claim if the behavior is otherwise of the kind condemned by the antitrust laws, stating, "It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers."[15]

The DOJ similarly applies per se treatment to such conduct, making clear that it "makes no distinction between seller cartels and buyer cartels in its cartel enforcement program."[16] It has brought a number of actions against buyer cartels, for instance, for joint bidding and for suppressing the pay of employees, including through agreements not to compete for the services of employees ("no-poach" agreements).[17]

However, as on the sell side, whether an agreement is a naked cartel or something else can be the subject of dispute. In *North Jackson Pharmacy, Inc. v. Caremark RX, Inc.*,[18] for instance, the U.S. District Court for the Northern District of Illinois held that antitrust claims against a purported buyer cartel consisting of a Pharmacy Benefits Manager and third-party payors for prescription drugs was subject to rule of reason analysis, rather than per se condemnation. The court found that the purpose of the arrangement was to "lower the price of prescription drugs . . . . and antitrust plaintiffs have to do more than complain about their failure to make more money."[19] The court made clear that the question is whether the prices are lowered "in a procompetitive, efficiency-enhancing manner that benefits consumers, or whether instead that goal is accomplished through unlawful collusion that drives prices below competitive levels and thereby reduces social welfare."[20] After scrutiny of the arrangement, the court held that the rule of reason should apply because the alleged anticompetitive agreement was ancillary to an arrangement with potential efficiencies.

For collaborations other than naked cartels, the courts and agencies apply the rule of reason, which rarely results in condemnation of the agreement. A notable example is joint purchasing. The Supreme Court has held that the rule of reason applies to joint purchasing cooperatives with accompanying efficiency justifications and where the participants do not possess market power. In particular, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[21] the Court held that a petitioner's claim of a group boycott from a joint purchasing cooperative should be evaluated under the rule of reason. It explained the arrangement "permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice."[22] Indeed, the Health Care Guidelines, which have been applied to other industries, have a safe harbor for joint purchasing that accounts for less than 35 percent of the total sales of the product or service at issue.[23]

Issues of buy-side market power also appear in unilateral conduct cases. Perhaps the seminal case in the field is *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[24] a unilateral conduct case involving a Section 2 Sherman Act claim against an alleged monopsonist for predatory bidding. Plaintiff Ross-Simmons sued defendant Weyerhaeuser, alleging that Weyerhaeuser bid up the price of red alder sawlogs in the Pacific Northwest as part of a plan to drive Ross-Simmons out of business. In discussing the relationship between monopoly and monopsony, the Court noted that the "close theoretical connection between monopoly and monopsony. . . . suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization."[25] Accordingly, the Court held that the standard applicable to predatory pricing—laid out by the Court in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[26]—also applied to predatory bidding claims. To prove a predatory bidding claim, a plaintiff must show: (1) the monopsonist's bidding led to below-cost pricing of the monopsonist's product in the downstream market because the monopsonist had increased its costs by overbidding; and (2) the monopsonist had a "dangerous probability of recouping the losses incurred in bidding up input prices."[27] The Court found that the plaintiff had not met that burden.

Although some critics have suggested *Mandeville* should not be read as treating buyers and sellers the same,[28] the majority of the case law has tracked the view that consumer harm is not necessary to find buyer-side agreements unlawful. For instance, in *Telecor Communications v. Southwestern Bell Telephone Co.*,[29] pay phone servicers sued Southwestern Bell for foreclosing entry into the Oklahoma pay phone market by attempting to lock up pay phone locations through long-term contracts between Southwestern Bell and location owners. After an unfavorable jury verdict, Southwestern appealed to the Tenth Circuit, arguing that a monopsony claim is not actionable where the exercise of monopsony power does not harm end users. Citing *Mandeville* and its own precedent, the Tenth Circuit rejected Southwestern Bell's argument, holding that harm in an input market is by itself sufficient to sustain a claim alleging unlawful monopsonistic conduct.[30] Similarly, in *Weyerhaeuser*, the Court recognized that predatory bidding presents "less of a direct threat of consumer harm than predatory pricing," since such a scheme need not rely on raising prices in an output market to recoup losses, but the Court nonetheless did not require that a plaintiff show downstream harm to establish a claim for predatory bidding.[31] It is less clear that the antitrust agencies hold that position. As former FTC Commissioner J. Thomas Rosch has noted, the only examples of illegal buy-side agreements in the agencies' Guidelines for Collaborations Among Competitors are situations where there is a threatened injury to consumers.[32]

Merger Cases. A relatively small number of mergers have been challenged on the basis of buy-side concerns, and the majority of such challenges have not been fully litigated. Those challenges the government has brought often involve mergers between processors of agricultural products that compete to buy agricultural goods from farmers. In one litigated case, *United States v. Rice Growers Association of California*,[33] the U.S. District Court for the Eastern District of California rejected the government's challenge of a merger between two rice millers with respect to several of the alleged product and geographic markets. It nonetheless enjoined the merger on the basis that the merger may have substantially harmed competition in the input market for "the purchase or acquisition for milling of paddy rice grown in California."[34] Notably, the court made no mention of downstream harm in its discussion of the government's monopsony theory, instead focusing exclusively on the merger's potential effects on the input market.

More recently, the DOJ challenged the proposed merger of Anthem and Cigna. In its 2016 challenge, the DOJ alleged the merger would create monopsony power in the market for buying health care services and depress payments to doctors and other health care providers, as well as reduce the quality of services. In its briefing, the DOJ, citing *Telecor* and *Mandeville*, argued that injuring buy-side competition is unlawful regardless of whether downstream harm exists.[35] Unfortunately for observers interested in the issue, neither the district court nor the D.C. Circuit ruled on the DOJ's monopsony claim. On appeal, and in dissent, then-Judge Brett Kavanaugh explained that he would have remanded the case to the district court to decide the monopsony claim—if the combined firm would obtain provider rates that were below competitive levels because of its exercise of unlawful monopsony power, he reasoned, then the merger would be unlawful.[36] He noted that monopsony power is anticompetitive because it may result in higher prices for customers, while the exercise of bargaining power may be procompetitive because it usually results in lower prices for customers.

Recent Attention to Monopsony

After years of relatively little activity in the area of buyer-side agreements, the topic attracted considerable attention when the DOJ brought actions against a number of high-tech companies whose CEOs had agreed not to poach each other's employees.[37] Private plaintiffs have also focused on agreements among employers. In 2015, a class of nurses settled claims with eight Detroit-area hospitals for over $90 million after accusing the hospitals of fixing their wages and exchanging wage information.[38] On the heels of these cases, the DOJ and the FTC issued guidance for human resources professionals to ensure their companies' hiring practices comply with the antitrust laws and also jointly announced that the DOJ intends to investigate criminally naked no-poach or wage-fixing agreements entered into after October 2016.[39] In April 2018, DOJ settled a matter with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp., alleging that these companies had reached naked no-poach agreements that continued for a number of years.[40] In an exercise of prosecutorial discretion, the DOJ pursued this as a civil action because the agreements were formed and terminated before the HR guidance was issued.

In the most recent agency action against a wage-fixing agreement, the FTC charged a therapist staffing service, its owner, and the former owner of a competing staffing company for unlawfully colluding to limit pay for therapists and inviting other competitors to do the same. The FTC alleged that the two companies shared, through text messages, therapist pay rate information and agreed to lower pay rates for therapists. The respondents entered into a consent order under which they agreed not to collude with competitors on contractor or employee pay, exchange compensation information with competitors, or invite competitors to collude on pay.[41]

Likewise, in a series of recent announcements, the Washington Attorney General entered into agreements with restaurants not to enforce no-poach provisions in franchise agreements, which prohibited franchisees from hiring each other's employees within the same corporate chain.[42] Recently, the Washington Attorney General's Office has also attracted attention for its disagreements with the DOJ over what antitrust standard applies to no-poach agreements between franchisors and franchisees. In a number of private lawsuits arising from the alleged franchise no-poach agreements, the DOJ has submitted statements of interest arguing that because the relationship between a franchisor and franchisee is vertical, the rule of reason should apply to plaintiffs' claims. But the Washington Attorney General has argued the opposite—that the per se rule should apply to such agreements under Washington state antitrust law, citing differences between the Washington Consumer Protection Act and the Sherman Act.

The focus on monopsony power has taken root in the realm of merger enforcement as well. Although the agencies have used this tool sparingly, the Horizontal Merger Guidelines make clear that mergers between buyers can be condemned. The Guidelines state that the agencies will not "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 merger firms sell."[43] The Guidelines use an example of a merger between the only two buyers for an agricultural product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. The Guidelines note that 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."[44]

Following the Guidelines analysis, in August 2018, the FTC announced that it was requiring global health care company Grifols S.A. to divest blood plasma collection centers in three U.S. cities, alleging that Grifols and Biotest US were the only two buyers of human source plasma in those cities. Without the divestitures, the FTC contended, Grifols likely would be able to exercise market power by unilaterally decreasing plasma donor fees. While the FTC mentioned neither monopsony nor buyer power in its *Grifols* complaint and press release, it is clear that buy-side issues motivated the FTC's competitive concerns regarding the merger, at least in part. In its press release announcing the action, the FTC noted that, absent the prescribed divestitures, the proposed transaction would likely lead to worsened service and quality for blood plasma donors, longer wait times for donors, and lower donation fees.[45] Shortly after the FTC's announcement, FTC Commissioner Rohit Chopra tweeted that "[m]any Americans living paycheck to paycheck need to sell their blood plasma to get by. [The FTC] has acted to ensure a merger in this industry will not lead to monopsony power that lowers payments for plasma donors."[46]

In its ongoing public hearings, the FTC held a panel discussing monopsony in merger enforcement, as well as two panels on the role of antitrust in labor markets, including one discussing the economic evidence of labor market monopsony. Panelists discussed whether, given the debate over whether monopsony harm requires downstream harm, the consumer welfare standard is sufficient to prevent monopsony harm. Some argued that it is not, as workers and suppliers are not traditionally protected under the consumer welfare standard.[47] And in October 2018 remarks to the American Bar Association, FTC Bureau of Competition Director Bruce Hoffman noted that the FTC was investigating monopsony issues, including labor monopsony issues, in three major merger investigations.[48] Mr. Hoffman testified to the Senate that he has instructed FTC staff to examine a merger's effects on labor markets in every merger investigation.[49] Likewise, Assistant Attorney General Makan Delrahim, the head of the DOJ's Antitrust Division, stated the impact of a merger on a labor market could "certainly be considered" in evaluating mergers.[50]

Counseling Considerations for Practitioners

With the agencies and public having undoubtedly devoted more recent attention to monopsony than before, we would recommend that companies carefully consider whether actions they are taking on the buy-side could be subject to investigation and enforcement. The case law on monopsony is still muddled, as courts remain somewhat lenient toward many types of buyer conduct and mixed as to whether an effect on consumers is required. Accordingly, the agencies will not have unambiguous case law—often present in cases involving seller power—to rely on in bringing monopsony cases. Thus, companies should not simply apply the same guidelines to buy-side behavior as they do to conduct when they are sellers.

First, companies should establish strong compliance programs to ensure they do not enter into naked buyer agreements, especially with respect to HR issues. The agencies are aggressively investigating and challenging such agreements with threats of criminal penalties.

Second, companies should pay closer attention to conduct and mergers affecting labor markets. Harms to employees are manifested more visibly than harms to other suppliers and the agencies (and private plaintiffs) have indicated an intent to step up enforcement related to conduct and mergers affecting employees.

Third, companies should be aware that the agencies may investigate and challenge activity for which there is ambiguous case law on the question of whether downstream effects must be shown. With respect to the effect of buyer power on employees, it appears fairly certain that the agencies will not require that a downstream effect on consumers be shown. Whether they will require a showing of downstream impact from any monopsony concerns with respect to other products or services is an open question.

Finally, companies should consider whether there are good procompetitive justifications supporting the conduct. For instance, numerous joint purchasing agreements have been found not to violate the antitrust laws, in contrast to joint selling arrangements, because the goal and effect of these agreements was to obtain lower input costs to allow lower prices to consumers. This is particularly so where a supply chain involves multiple levels and the allocative inefficiency occurs at a level far removed from the end consumer. It is likely that most joint purchasing agreements will continue to be allowed to proceed.

Conclusion

It is too early to tell whether we will see significantly increased enforcement against buyer-side agreements and mergers that affect buyer power. But it is clear that this is an issue that will continue to be a topic of academic discussion, political debate, and agency focus. Companies should monitor the evolving debate and nature of agency enforcement actions to ensure they do not find themselves in a prolonged investigation or face an antitrust challenge. ■

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1 For ease of exposition, we refer to monopoly and monopsony as including oligopoly and oligopsony, respectively.

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13 Swift & Co. v. United States, 196 U.S. 375 (1905).

14 Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219 (1948).

15 *Id.* at 235.

16 OECD, Roundtable on Monopsony and Buyer Power, *supra* note 3, at 4.

17 *See, e.g.*, Competitive Impact Statement, United States v. SG Interests I, Ltd., 12-cv-00395 (D. Colo. Feb. 15, 2012), https://www.justice.gov/atr/case-document/file/510601/download; Competitive Impact Statement, United States v. Knorr-Bremse AG, 1:18-cv-00747 (D.D.C. Apr. 3, 2018), https://www.justice.gov/atr/case-document/file/1048891/download.

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19 *Id.* at 748–49.

20 *Id.* at 749.

21 Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985).

22 *Id.* at 295.

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[24] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).

[25] *Id.* at 321–22.

[26] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[27] *Weyerhaeuser*, 549 U.S. at 325.

[28] *See* Rosch, *supra* note 4, at 361–63 (arguing that the defendants in *Mandeville* also had market power on the sell-side such that their buy-side agreement could have effects on the sell-side).

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

[30] *Id.* at 1133–36 (citing *Mandeville*, 334 U.S. at 235–36).

[31] *See Weyerhaeuser*, 549 U.S. at 324–25.

[32] *See* Rosch, *supra* note 4, at 360–61.

[33] United States v. Rice Growers Ass'n of Cal., Civ. No. S-84-1066, 1986 WL 12562 (E.D. Cal. Jan. 31, 1986).

[34] *Id.* at *9–10.

[35] *See* Plaintiffs' Supplemental Memorandum on the Buy-Side Case at 9–10, United States v. Anthem, Inc., No. 1:16-cv-01493 (D.D.C. Dec. 19, 2016).

[36] United States v. Anthem, Inc., 855 F.3d 345, 377–78 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

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