Federal Trade Commission

Monopsony and The Meaning of "Consumer Welfare"
A Closer Look at *Weyerhaeuser*

J. THOMAS ROSCH[1]
COMMISSIONER, FEDERAL TRADE COMMISSION

before the
2006 Milton Handler Annual Antitrust Review
New York City, NY
December 7, 2006

The goals and guiding principles of American antitrust have been debated since the enactment of the Sherman Act over a hundred years ago. Today, there is at least a consensus over basic terminology. Courts and federal law enforcement officials routinely invoke "consumer welfare" as the guiding principle behind their application of the antitrust laws.[2] Yet

---

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am greatly indebted to my attorney advisor, Kyle Andeer, for his significant contributions to this paper.

[2] *See*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 221 (1993) (referring to "the antitrust laws' traditional concern for consumer welfare and price competition."); *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set."); Statement of Deborah Platt Majoras, Chairman Federal Trade Commission, before the Antitrust Modernization Commission (March 21, 2006) (referring to "the recognized goals of modern antitrust law – the protection and enhancement of consumer welfare."); Statement of Thomas Barnett, Assistant Attorney General, before the Antitrust Modernization Commission (March 21 2006) ("this Commission should reaffirm that consumer welfare is the correct touchstone for competition law and enforcement."); Timothy Muris, "Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy", Address Before the Milton Handler Antitrust Annual Review (Dec. 10, 2002) ("The Commission should forestall the greatest threats to consumer welfare. This principle captures the basic direction of FTC practice over the past two decades. . . [T]he proposition that FTC antitrust enforcement should be measured by its capacity to improve consumer welfare commands broad assent today.").

there is continuing debate over what "consumer welfare" means. To some, "consumer welfare" focuses on the effects of the conduct on consumers in the relevant market. In this view, antitrust liability ultimately turns on whether the seller will have market power over consumers purchasing the output of the relevant market.[3] To others, including many from the Chicago School, "consumer welfare" is a much broader concept.[4] They believe the antitrust laws should be applied in a way that maximizes society's wealth as a whole. – or to use their language, that protects "allocative efficiency." Put differently, when they use the term "consumer welfare" they refer not just to the welfare of consumers in the output market but to the welfare of all consumers in society. Finally, there are those that argue that this is largely an academic debate with no real world impact because there is very little difference between the two standards.[5]

This debate over the meaning of consumer welfare has been revived over the last year. Last fall, the Antitrust Modernization Commission solicited testimony on the topic when it

---

[3] *See,* Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony, and Antitrust*, 36 ANTITRUST BULL. 1 (1991); Jonathan M. Jacobson & Gary J. Dorman, *Monopsony Revisited: A comment on Blair & Harrison,* 37 ANTITRUST BULLETIN 151, 153 (Spring 1992); Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard,* presented to the Antitrust Modernization Commission (Nov. 4, 2005); Robert H. Lande, *Wealth Transfers Should Guide Antitrust*, 58 ANTITRUST L.J. 631 (1988); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

[4] *See,* R.Bork, The Antitrust Paradox 66 (1978); Kenneth Heyer, "Welfare Standards and Merger Analysis: Why not the Best?" Vol. 2. COMPETITION POLICY INTERNATIONAL, No.2 (Autumn 2006) (advocating the use of a total welfare standard in merger analysis); Charles (Rick) Rule, "Consumer Welfare, Efficiencies, and Mergers," Statement for the Hearing of the Antitrust Modernization Commission, (Nov. 17, 2005); Charles (Rick) Rule and David Meyer, "An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers" 33 ANTITRUST BULLETIN 677 (1988).

[5] *See,* Thomas O. Barnett, DAAG, Antitrust Div, 2004 Milton Handler Annual Antitrust Review: Substantial Lessening of Competition – the Section 7 Standard, 2005 COLUM. BUS. L. REV. 293, 297 (2005) ("[T]he consumer welfare and total welfare standards can diverge, although I think it is a rare case in practice.")

discussed the role of efficiencies in merger analysis.[6] The Supreme Court has an opportunity to weigh in on the debate when it decides *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.* later this term.[7]

To date, the Court's position has been opaque. It has been almost thirty years since the Supreme Court described the antitrust laws as a "consumer welfare prescription."[8] The Court borrowed the phrase from Judge Bork, a preeminent Chicago School scholar. But it is unclear whether the Court also adopted the philosophy behind Judge Bork's use of the phrase. Judge Bork, like other Chicago School adherents, believed that consumer welfare could only be maximized when total (societal) surplus is maximized.[9] In his view, antitrust policy and rules should guard against all practices and transactions creating allocative inefficiencies; in that way, the antitrust laws could and would facilitate the maximization of consumer wealth in the aggregate without regard for its distribution.

The plaintiffs in *Reiter*, however, were consumers in the output market at issue there. Thus, it is by no means clear that the Court's description of the antitrust laws as a "consumer welfare prescription" went beyond the view of distinguished economists like Salop and Landes that the primary concern of antitrust should be to prevent conduct and transactions that transfer wealth from consumers of the output in the relevant market to those who produce that output.

---

[6] Hearings before the Antitrust Modernization Commission, *Treatment of Efficiencies in Merger Enforcement*, Nov. 17, 2005 materials *available at* http://www.amc.gov/commission_hearings/merger_enforcement.htm

[7] Writ of certiorari granted at *Weyerhaeuser Inc. v. Ross-Simmons Hardwood Lumber Co.*, 126 S. Ct. 2965 (2006).

[8] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

[9] *See* supra note 3. *See also,* Oliver E. Williamson, Economies as an Antitrust Defense: The Welfare Tradeoffs, 58 AM ECON. REV. 18 (1968); Oliver E. Williamson, Economies as an Antitrust Defense Revisited, 125 U. PA. L. REV. 699 (1977).

As I mentioned earlier, in *Weyerhaeuser* the Supreme Court has an opportunity to clarify what it meant in *Reiter*. In *Weyerhaeuser*, Ross-Simmons – a saw mill in the Pacific Northwest – claimed that Weyerhaeuser engaged in a variety of anticompetitive conduct in the late 1990s in an effort to monopolize the relevant lumber market. One allegation was that Weyerhaeuser had purposely overpaid for inputs (alder sawlogs) and bought more than it needed in an effort to increase its rivals' costs and drive them out of business. The jury returned a verdict for the plaintiff despite finding that the plaintiff had failed to prove that alder lumber was a distinct product market from all hardwood lumber. In the hardwood lumber market, Weyerhauser had less than a 10% market share and the jury, in a special verdict, found that Weyerhaeuser lacked market power in that market. Nonetheless the jury awarded damages to the plaintiff because it found, in accordance with the district court's instructions, that Weyerhaeuser had purchased more alder sawlogs than "necessary," paid a higher price than "needed," and prevented plaintiff from obtaining logs at a "fair price."

The Ninth Circuit affirmed the verdict on the grounds that the instructions "provided sufficient guidance regarding how to determine whether conduct was anticompetitive." It rejected Weyerhaeuser's argument that the verdict was unsupportable because the plaintiff had not been required to show that (1) Weyerhaeuser paid so much for logs that its price for finished lumber did not cover its costs and (2) that Weyerhaeuser had a dangerous probability of recouping the losses it incurred during the period of predation.

In both their briefs urging the Supreme Court to grant a writ of certiorari and in their briefs on the merits, Petitioners and the Solicitor General framed the question presented in terms of the appropriate standard for evaluating a claim of "predatory bidding" brought under Section

2 of the Sherman Act.[10] However, lurking beneath that question is the much more fundamental – and cosmic – question as to what "consumer welfare" means.

More specifically, the Petitioners and Solicitor General advocated adoption of the *Brooke Group* standard used in evaluating a claim of predatory selling, when the claim is one of predatory buying. The premise of their position was that the antitrust laws protect sellers and buyers equally. Reasoning from that premise they contended that it was appropriate to use the same standard in a predatory buying case as in a predatory selling case.[11]

That premise, in turn, was rooted in the view that a buyer exercising monopsony power – by initially paying supra-competitive input prices to eliminate competitive buyers and then paying sub-competitive input prices – creates allocative inefficiencies just as does a seller exercising monopoly power by initially charging sub-competitive prices to eliminate competitive sellers. That is Judge Bork's view of "consumer welfare" – namely that the antitrust laws should prevent conduct that creates allocative inefficiencies and thereby inhibits the maximization of the wealth of society as a whole.[12]

---

[10] Brief on the Merits for the United States as Amicus Curiae, No. 05-381 (August 24, 2006); *see also* Brief in support of cert. for the United States as Amicus Curiae in support of cert. No. 05-381 (May, 2006)

[11] *Id.* Brief on the Merits at p.15; Brief in support of cert at 12 ("The Sherman Act "does not confine its protection to consumers or to purchasers, or competitors, or to sellers"; to the contrary, "the Act is comprehensive in its terms and coverage, protecting all who are made victims or *** forbidden practices(,) by whomever they may be perpetrated. *Mandeville Farms, Inc. v. American Sugar Co.*, 334 U.S. 219 (1948).")

[12] Another rationale that is sometimes offered for attacking an exercise of monopsony power under the antitrust laws is that the exercise of that power results in a wealth transfer from the seller to the buyer – in other words, the buyer's profits are increased (since it pays less than it should) and the seller's profits are diminished (since it sells for less than it should). Some argue that the antitrust laws should not distinguish between the welfare of buyers and sellers – if we are concerned about market power that leads to the transfer of surpluses from buyers to sellers then we should be equally concerned about the inverse as well. *See,* supra note 4 Heyer, 2 COMPETITION POLICY INTERNATIONAL at 42; Rule & Meyer, 33 ANTITRUST

The Federal Trade Commission joined the Solicitor General's amicus briefs. I voted against joining those briefs. It was not that I thought the Ninth Circuit was right – as a matter of fact, for reasons I will describe, I thought the appellate court was dead wrong**.** The jury instruction blessed by the Ninth Circuit was amorphous and it creates a substantial risk of false positives. However, I disagreed with the Solicitor General's premise that the antitrust laws protect buyers and sellers equally, with the views of "consumer welfare" underlying that premise, and with the conclusion flowing from that premise that the rules for predatory buying cases ought to be the same as the rules for predatory selling cases.

A. Does the Sherman Act protect sellers and buyers equally?

First, I do not agree that the antitrust laws protect buyers or sellers, as such. In my view the antitrust laws protect *consumers* – and by "consumers" I mean consumers who buy the output in the relevant market. Having practiced antitrust law for more than forty years, I yield to no one in my belief in the value and benefits of the Sherman Act. But I don't think the Act is supposed to cure all societal ills by preventing allocative inefficiencies. Moreover, whatever attraction "total welfare" may have as a theoretical matter, I think it is an impractical theory of antitrust liability in the real world, where liability must be based on findings of fact that are

---

BULLETIN at 684. Indeed, this notion is reflected in some passages of the Solicitor General's briefs. Concern about the welfare of consumers as buyers is, to be sure, based on actual or threatened transfers of wealth from them to sellers. But that does not mean that the antitrust laws should be equally concerned about wealth transfers from sellers to consumers or other buyers. Vigorous antitrust enforcement depends on the support of the public, most whom are consumers. Sellers (including large blocks of sellers such as farmers and employees) are arguably not as critical to the public support that is vital to antitrust law enforcement. Moreover, those who profess to be concerned about wealth transfers from sellers to buyers are among the staunchest critics of the Robinson-Patman Act (which is largely concerned with wealth transfers to power buyers).

frequently made by lay juries.[13] To me, "consumer welfare" means just that – the welfare of those who are confronted by actual or threatened exercises of seller market power in the output market. I think that view of "consumer welfare"generally – and of the way the antitrust laws apply to an exercise of monopsony power specifically – are consistent with the Guidelines adopted by both the DOJ and the FTC.[14]

To be sure, Section 0.1. of the 1992 Horizontal Merger Guidelines provides that the likelihood a merger will result in buy side market power – in other words, monopsony power – may be pernicious in certain circumstances.[15] But the Merger Guidelines do not suggest that those circumstances exist anytime that monopsony power may distort allocative efficiency. To the contrary, the only provisions of the Guidelines bearing on the meaning of "consumer welfare" are the provisions dealing with efficiency claims. Those provisions require that

---

[13] Assuming that an exercise of monopsony power may lead to inefficient allocation of scarce resources, antitrust rules that turn on whether or not those inefficiencies have occurred or are likely to occur, would be very difficult to administer. Indeed, it is arguable that even if the enforcement agencies with their large staffs of economists, could do so in exercising their prosecutorial discretion, it would be impossible to make such determinations in the rough and tumble of courtroom litigation. See Joseph Farrell and Michael L. Katz, "The Economics of Welfare Standards in Antitrust," Vol. 2. COMPETITION POLICY INTERNATIONAL, No.2 (Autumn 2006).

[14] The agencies, and more importantly the courts, focus on the price and quantity effects in the output market of the allegedly anticompetitive conduct. A move away from this consumer welfare standard to a total welfare standard could make a big difference in some cases. For example, under a total welfare standard, one might approve a merger that resulted in higher prices and reductions in input if the merger also results in costs savings to the monopolist (or the cartel) that outweighed those harms. *See,* Oliver E. Williamson, *Economies as an Antitrust Defense: the Welfare Trade-offs*, 58 AM. ECON. REV. 18 (1968); *see also,* supra note 3 Salop, *Question: What is the Real and Proper Antitrust Welfare Standard?* As Professor Salop has observed, that result is hardly consistent with the Supreme Court's oft-repeated declaration that "the antitrust laws are designed to protect competition." *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977).

[15] *See,* U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 0.1 (1992) *reprinted in* 4 Trade Reg Rep. (CCH) ¶ 13,104.

cognizable efficiencies be passed along in whole or in part to consumers purchasing post-transaction output in the relevant market.[16] That suggests that the "consumer" whose welfare the Merger Guidelines are concerned about are consumers in the output market.

The agencies' Guidelines for Collaborations Among Competitors identify three situations where buy-side agreements can have that effect each threatens injury to consumers.[17] The first is where the buyers enjoy monopsony power such that their buying agreement can depress output and thereby produce supra-competitive prices in the long run (to the detriment of consumers of the market's output). The second is where the buy-side agreement can standardize costs of an input that is so important in output prices that they can effectively fix sell-side prices (again to the detriment of consumers of the market's output). The third is where the buy-side agreement will enable participants to monitor important input prices so as to facilitate prediction of competitor production levels and thereby influence output and pricing decisions on the sell-side (to the detriment of consumers of the market's output).

The Health Care Guidelines likewise treat threats to consumer welfare as the defining characteristics of buy-side agreements that should be condemned and challenged.[18] In short, there is nothing in the government Guidelines to suggest that we should be concerned about the welfare of the seller (rather than consumers of the output in the relevant market), much less to support the sweeping assertion made in the *amicus* briefs that the antitrust laws are designed to

---

[16] *Id.* at § 4.0

[17] *See,* United States Department of Justice and Federal Trade Commission, Guidelines for Collaborations Among Competitors § 3.31(a) at p. 14 (April 7, 2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,160.

[18] *See,* United States Department of Justice and Federal Trade Commission, Policy Statements on Health Care Antitrust Enforcement, Statement 7 on Joint Purchasing Arrangements Among Health Care Providers (August 18, 1996), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153.

protect sellers and buyers equally.

Several arguments have been advanced to support the position that the Sherman Act applies equally to sellers and buyers, and they deserve serious attention.

First, the Solicitor General cited the Supreme Court's decision in *Mandeville Island Farms v. American Crystal Sugar Co,* 334 U.S. 219 (1948) as support for the argument that the Sherman Act does not distinguish between buyers and sellers. *Mandeville Farms* does not compel that conclusion. For one thing, *Mandeville Farms* is nearly a half century old, and the language quoted was written long before consumer welfare became the lodestar of antitrust analysis for the courts (including the Supreme Court) and commentators.[19] Moreover, the Supreme Court said in its analysis of the facts that the defendant sugar beet processors enjoyed monopsony power on the buy-side *and* market power on the sell-side so that their buy-side agreement had the potential to impact sell-side prices (and thus injure consumers in the output market).[20]

---

[19] To be fair, the broad language cited by the Solicitor General has been cited and relied on in some recent lower court decisions. *See, Telecor Communications Inc. v. Southwestern Bell Telephone Co.,* 305 F.3d 1124, 1133 (10th Cir. 2002) ("The Supreme Court's treatment of monopsony cases strongly suggest that suppliers . . . are protected by antitrust laws even when the anticompetitive activity does not harm end users."); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 962 (10th Cir. 1990) (rejecting a monopsony defendant's argument that injury to sellers without injury to end users is not cognizable antitrust injury).

[20] *Mandeville Farms* at 240-41. Other civil cases cited by the parties and various amici here contain allegations of both market power on the buy side and the sell side. *See, e.g., Houser v. Fox Mgmt. Corp.*, 845 F.2d 1225 (3d Cir. 1988) (Plaintiffs alleged its competitor in the first run movie theater market had overbooked its two first run theaters in an effort to prevent their entry into that market.); *Betaseed, Inc. v. U&I Inc.*, 681 F.2d 1023, 1221 (9th Cir. 1982) (U&I sold seeds to farmers and bought sugar beets from farmers. It was the sole processor in the area and used that position to its advantage in the sale of seeds.). Petitioners and the Solicitor General also cite several consent decrees that outline concerns in the input market, however, in most instances there were also concerns in the output market. *See, United States v. Aetna, Inc.*, 64 Fed. Reg. 44953 (1999) (DOJ alleged that the transaction would (1) create market power in the *sale* of HMO and HMO-based point-of-service health plans; and (2) create market power in the *purchase* of physician services); *United States v. UnitedHealth Group*, Proposed Final

Additionally, *Mandeville Farms* was a Section 1 case in which *concerted* conduct was alleged. *Weyerhaeuser* is a *single firm* conduct case. Thus, there is no reason for the Solicitor General or the Court to determine what the analysis should be when the alleged buy-side predatory conduct is concerted – and, that being so, the reliance on *Mandeville Farms* is doubly misplaced. The Solicitor General's brief asserted, however, that unless the antitrust laws protect sellers and buyers equally, DOJ would be foreclosed from prosecuting criminally real estate brokers or antique dealers who secretly conspire to fix the prices at which products and services are sold. That is a straw man concern. A *secret* conspiracy of that sort makes it difficult, if not impossible, to detect the buy side conduct, much less to subject it to the kind of inquiry into anticompetitive effects that is appropriate. That conduct can therefore properly be condemned as *per se* illegal. Open and transparent concerted purchasing activity (like group purchasing arrangements) does not pose that threat, and thus can and should be tested using the same analysis that is applicable to unilateral conduct. Indeed, that is the way that transparent group purchasing activity is treated under the Health Care and Collaboration Among Competitors Guidelines.[21] Again, however, there is no reason to address that matter in the *Weyerhaeuser*

Judgment and Competitive Impact Statement, 71 Fed. Reg. 13,991 (2006) (DOJ had concerns over the merged firm's ability to exert market power in the *sale* of HMOs (output market) and the *purchase* of physician services (input market) in Tuscon. It did also require divestitures in Boulder, Colorado because of concerns about market power in the purchase of physician services (input market)). The one exception was *United States v. Cargill*, however Congressional concerns over farmers may have driven that decisions. *See, United States v. Cargill*, *Inc.,* Competitive Impact Statement 64 Fed. Reg. 44,054 (1999), R. Hewitt Pate, Asst. Atty. Gen, Antitrust Division, *Antitrust Enforcement in the Agricultural Marketplace*, Statement before the Committee on the Judiciary United States Senate (Oct. 30, 2003).

[21] Judge (now Justice) Breyer's opinion in *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984) appears to endorse this approach as well. In *Kartell*, doctors complained that Blue Shield – which represented over 70% of the Massachusetts residents relying on private (non-governmental) health care – used its market power to obtain "lower than competitive" prices from doctors. The doctors felt that they had no choice but to accept Blue Shield's terms because of the company represented so many potential customers. The First Circuit rejected the

case.

Second, a number of economists believe that monopsony is merely the mirror image of monopoly and therefore there is little reason to treat the two differently under the law. They support that position on the basis of Judge Bork's view of "consumer welfare,"arguing that market inefficiencies created by anticompetitive restraints on input markets can "distort" those markets and produce a dead weight loss to total welfare.[22] More specifically, these economists contend that some producers of the input product will either produce less or cease production altogether, resulting in less-than-optimal output of the product or service.[23] But other economists disagree, pointing out that in any event, the antitrust laws protect the welfare of consumers in output markets, not total welfare, and the welfare of those consumers is rarely harmed by an exercise of monopsony power in input markets.[24] Indeed in *Brooke Group*, the Supreme Court's concern was explicitly for the welfare of consumers in the output market, not total welfare or the risk of some theoretical "dead weight" loss.[25]

---

doctors' argument. In part the opinion was grounded in the assumption that Blue Shield would pass on its lower input costs to its customers in the form of lower insurance premiums. *Id.* at 928.

[22] *See e.g.,* Roger D. Blair & Jeffrey L. Harrison, MONOPSONY: ANTITRUST LAW AND ECONOMICS, 36-43 (1993); Roger Noll, "'Buyer Power' and Economic Policy," 72 ANTITRUST L.J. 2 (2005); Charles F. (Rick) Rule, *Consumer Welfare, Efficiencies, and Mergers*, Statement before the Antitrust Modernization Commission (Nov. 17, 2005) ("[E]xercises of monoposony power like exercises of monopoly power typically reduce output in the market and cause allocative inefficiency, and even the proponents of a consumer surplus standard recognize that no sensible antitrust policy would ignore agreements that have that effect.")

[23] *See,* Blair & Harrison *at* 42-43, 72.

[24] *See,* supra note 2, Jacobson & Dorman, 37 ANTITRUST BULLETIN at 153.

[25] *Brooke Group,* 509 U.S. at 225-227 ("Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.").

Third, another argument advanced in support of the position staked out by Petitioners and the Solicitor General is that the Sherman Act's drafters were concerned that sellers could be harmed by firms exercising monopsony power. Yet others take issue with this interpretation of the legislative history.[26] Indeed, Judge Frank Easterbrook has noted that "the choice [Congress] saw was between leaving consumers at the mercy of trusts and authorizing the judges to protect consumers. However you slice the legislative history, the dominant theme is the protection of consumers from overcharges."[27]

This is not to say that I believe that monopsony power does not ever distort competition – or that it should never be condemned. However, I disagree with the premise that the antitrust laws protect sellers in input markets equally with consumers in output markets, with the citation of *Mandeville Farms* in support of that proposition, and with the definition of "consumer welfare" which underlies that proposition.

B. What is the appropriate test for evaluating Predatory Purchasing/Over-bidding

As previously discussed, Petitioners – along with a number of their amici including the Solicitor General – argue that *Brooke Group* should apply foursquare to a buyer case alleging predatory buying in an input market as well as to a seller case alleging predatory pricing in an output market.[28] I also disagreed with that conclusion for several reasons.

---

[26] Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST LAW JOURNAL 631 (1989)(citing Senator Sherman's characterization of monopoly overcharges as "extorted wealth.").

[27] Frank Easterbrook, *Workable Antitrust Policy*, 84 MICHIGAN L. REV. 1696, 1702-03 (1986).

[28] Applying *Brooke Group* in other contexts has been tried, and it has failed, for example the Third Circuit Court of Appeals rejected the defendant's argument that it should apply to bundled discounts. *LePage's Inc. v. 3M*, 324 F.3d 141, 147 (3d Cir. 2003). I agree with those who are skeptical that any "one size fits all" rule is appropriate for Section 2 cases. *See,* Statement of Deborah Platt Majoras, Chairman Federal Trade Commission, "The Consumer

First, the risk of false positives is not the same in buy side cases involving input markets as it is in sell side cases involving output markets. In both cases, to be sure, there is a predation period and a harvest period. However, the resemblance ends there. In the sell side case involving an output market, there is a real risk of false positives; during the predation period, the defendant sells at low prices, and if a challenge is unwarranted so that the low pricing is chilled, consumers will be injured by being deprived of the low prices. That is the heart of the Supreme Court's *Brooke Group* opinion and analysis.[29] However, the same thing cannot be said of buy side cases involving an input market at least where the defendant buyer lacks market power in selling in the output market. During the predation period, the defendant (or defendants) buy input at high prices, but they cannot pass those high prices along to consumers because the vigorous competition in the output market will constrain them from doing so; conversely, during the harvest period, the defendant (or defendants) buy at low prices, and the vigorous competition in the output market gives them every incentive to pass those low prices on to consumers. Thus, as the Ninth Circuit said, the issue of over-deterrence in a buy-side predatory pricing case is not nearly as great as it is in a sell-side predatory pricing case.[30]

Second, absent market power in the output market, applying the *Brooke Group* test in a predatory buying case may actually deter conduct that benefits consumers. As the Health Care Guidelines state, efforts by a defendant (or defendants – i.e., a buying group) to reduce buy side

---

Reigns: Using Section 2 to Ensure a 'Competitive Kingdom'" Opening Session, Joint DOJ/FTC Hearings on Section 2 of the Sherman Act (June, 20 2006).

[29] *Brooke Group,* 509 U.S. at 224 ("Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.").

[30] *Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.,* 411 F.3d 1030, 1038 (9th Cir. 2005).

input prices is potentially beneficial to consumers in those circumstances because the buy side savings are apt to be competed away. As stated above, there is a school of thought (e.g., Blair & Harrison) that theorizes that a unilateral or collective exercise of monopsony power "distorts" the operation of the input market to the detriment of sellers in that market and/or others associated with those sellers. But whether and when input prices are "artificially" high or low is speculative at best, and there is a very real risk that a false finding of artificiality will deprive consumers of low prices in the output market. Indeed, if the analysis focuses on whether buy-side prices will distort allocative efficiencies and thereby impair the welfare of all consumers (or society as whole), there must be a determination whether buy-side prices are "artificially" high or low (or on whether they are above or below a "market clearing" price). Those who argue that the antitrust laws should protect "total welfare" can hardly fault the jury instruction in *Weyerhaeuser*, which told the jury to focus on whether the defendant paid too much for the input product.

Third, the application of the *Brooke Group* test in buy side input market cases would be particularly difficult and cumbersome. For example, the *Brooke Group* analysis focuses on whether there is a likelihood of recoupment; that is a determination that cannot be made without first determining whether and by how much the defendant "overpaid" for the input product during its predation period.[31] As discussed above, the jury instruction blessed by the Ninth

---

[31] As Professor Hovenkamp has observed, "On administrative grounds, a price/cost test is more difficult to defend if the input in question constitutes only a small percentage of the cost of the finished product. For example, suppose that hardwood saw blades were in short supply and Weyerhaeuser acquired them by bidding up the price. Suppose that a saw blade is a variable cost item because it wears out and its cost amortizes at less than ½ percent of the total cost of the finished lumber. Even if the defendant paid double the market price for saw blades, the difference is likely to be within its margins. It would be almost impossible to show that overpaying for saw blades drove the defendant's price below its costs. In such case, courts might need to look for other hard evidence of exclusionary behavior. For example, the defendant might have purchased saw blades and stockpiled them for very long periods or even destroyed

Circuit in *Weyerhaeuser* essentially focused on that issue. As the Solicitor General asserts, that instruction is too amorphous and difficult to apply.[32] If the jury gets that wrong, the error costs can be high.

Fourth, and finally, a much easier liability test is available. It is one that would screen out all predatory buying claims where the defendant lacks market power in the output market.[33] This analysis could be conveyed to a lay jury by instructions which are simple (and familiar because juries in Section 1 Rule of Reason and Section 2 cases are currently instructed that market power is an essential element of the claim and then instructed how to determine whether the defendant has market power.). Beyond that, this kind of analysis, based on whether the defendant has used exclusionary conduct to create or maintain market power in the output

---

them, simply to deny access to rival sawmills. However, even here courts must be careful. For example, stockpiling of inventories in times of anticipated shortages is perfectly pro-competitive behavior. A firm that has a reasonable expectation at the time of purchase that it actually will use an input in its own production should never be condemned for behaving predatorily. In any event, the fact findings here were that Weyerhaeuser was reselling the finished lumber in a competitive market. In that case, it could have sold all it wanted at the competitive price. For the same reason, such a firm would have no incentive to overbuy and destroy the excess – in a competitive resale market there would be no excess." Herbert Hovenkamp, *The Law of Exclusionary Pricing*, 2 COMPETITION POLICY INT'L 21, 38 (2006).

[32] *See, Verizon v. Trinko* 540 U.S. 398, 408 (2004) (rejecting an analysis that "requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited.").

[33] I am not alone in endorsing a standard that requires proof of market power in the output market. *See* supra note 2 Jacobson & Dorman, 36 ANTITRUST BULL. 1; Jacobson & Dorman, 37 ANTITRUST BULLETIN 151; *see also Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.,* 908 F.Supp. 1194, 1203 (W.D.N.Y. 1995) (A monopsony is not actionable unless it "injures consumers by forcing up the price of the end product. Where the risk of that happening is slight or nonexistent, however, monopsony power per se does not crate an antitrust concern."); *Addamax Corp. v. Open Software Found., Inc.* 888 F.Supp. 274, 280 (D.Mass. 1995) (noting that "only with control of a downstream market can the monopsonist decrease output and raise prices.").

market, is the Section 2 analysis that was used in *Microsoft.*[34] If, but only if, the trier of fact finds that the defendant enjoys market power in the output market, would it be necessary to determine whether the defendant also enjoyed monopsony (or oligopsony) power vis-a-vis the input market and, if so, whether it exercised that power in a fashion that enabled it to exercise market power in the output market.

This test would dispose of the "predatory bidding" claims in *Weyerhaeuser.* As previously stated, the jury found that Weyerhaeuser did not have market power in the downstream market (or output) – in my view that fact was dispositive. Given my conviction that the antitrust laws are supposed to protect consumers in that market, I do not believe Section 2 liability should attach to predatory bidding allegations if it does not create or maintain monopoly power in the downstream (or output) market – or create a dangerous probability of creating that monopoly power.

---

[34] *United States v. Microsoft,* 253 F.3d 34 (D.D.C. 2001).