

# The Verdict on Monopsony

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## I. Introduction

In the wake of the Supreme Court's decision last year in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,<sup>1</sup> monopsony has become an increasingly popular topic in antitrust law. Nevertheless, courts and antitrust enforcers have been encountering anticompetitive conduct occurring on the buy side of the market for many years.<sup>2</sup> Because courts and enforcers generally agree that protecting consumers is a major purpose of the antitrust laws, one might expect buyer conduct to be treated less strictly than seller conduct by the courts and agencies.<sup>3</sup> After all, consumers arguably

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<sup>1</sup> See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

<sup>2</sup> Buy-side conduct refers to actions made by purchasers in the input market. See Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 669 (2005).

<sup>3</sup> See J. Thomas Rosch, Comm'r, Fed. Trade. Comm'n, *Monopsony and the Meaning of "Consumer Welfare:" A Closer Look at Weyerhaeuser*, Address before the 2006 Milton Handler Annual Antitrust Review at 1 (Dec. 7, 2006), ("Courts and federal law enforcement officials routinely invoke 'consumer welfare' as the guiding principle behind their application of the antitrust laws."), available at <http://www.ftc.gov/speeches/rosch/061207miltonhandlerremarks.pdf> (last visited Apr. 24, 2008); Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address before the Antitrust Modernization Commission at 6 (Mar. 21, 2006) (referring to the protection of consumer welfare as a recognized goal of the antitrust laws and referring to the United States as "an example of an antitrust regime with consumer welfare as its centerpiece"), available at <http://www.ftc.gov/speeches/majoras/060321antitrustmodernization.pdf> (last visited Apr. 24, 2008); Thomas O. Barnett, Assistant Attorney Gen. for the Antitrust Div., U.S. Dep't of Justice, Address before the Antitrust Modernization Commission at 19 (Mar. 21, 2006) (stating that "the [Antitrust Modernization] Commission should reaffirm that consumer welfare

are less directly affected by the conduct of buyers in the input market than they are by the conduct of sellers in the output market.

The Supreme Court's recent decision in *Weyerhaeuser*, however, suggests otherwise. In *Weyerhaeuser*, the Court's opinion implies that similar legal standards should apply to buy-side conduct and sell-side conduct.<sup>4</sup> This article suggests that this idea brought forth in *Weyerhaeuser* is nothing new in federal antitrust enforcement and jurisprudence. An examination of a sample of federal court decisions and government enforcement actions dating back to the 1940s, involving a wide range of buy-side conduct (from price fixing to potential mergers),<sup>5</sup> reveals that courts and antitrust enforcers do not appear to treat potentially anticompetitive buy-side conduct more leniently than they treat anticompetitive sell-side conduct. This holds true despite the nature of the conduct involved.

## II. Monopsony

Monopsony involves an exercise of market power on the buy side of the market.<sup>6</sup> A monopsonist exercises its market power by

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is the correct touchstone for competition law and enforcement.”), *available at* [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/060321\\_FTC\\_DoJ\\_transcript\\_reform.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/060321_FTC_DoJ_transcript_reform.pdf) (last visited Apr. 24, 2008). *See also* Timothy J. Muris, Chairman, Fed. Trade Comm'n, Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity, Prepared Remarks at the American Bar Association Antitrust Section Annual Meeting in Chicago, Illinois (Aug. 7, 2001) (stating that “[a]lthough there are disagreements about specific cases, there is widespread agreement that the purpose of antitrust is to protect consumers, that economic analysis should guide case selection, and that horizontal cases, both mergers and agreements among competitors, are the mainstays of antitrust.”) *available at* <http://www.ftc.gov/speeches/muris/murisaba.shtm> (last visited Apr. 24, 2008); U. S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND THE CONSUMER 1 (n. d.) (stating that “[a]ntitrust laws protect competition. Free and open competition benefits consumers by ensuring lower prices and new and better products.”), *available at* [http://www.usdoj.gov/atr/public/div\\_stats/211491.htm](http://www.usdoj.gov/atr/public/div_stats/211491.htm).

<sup>4</sup> Specifically the Court referred to the “close theoretical connection between monopoly and monopsony.” *Weyerhaeuser*, 127 S. Ct. at 1076.

<sup>5</sup> In this paper, I examine cases that involve the following categories of buy-side conduct: 1) price fixing or cartel cases; 2) cases involving exacting non-price concessions from trading partners; 3) potential mergers; and 4) miscellaneous or other cases that do not fall neatly into one of the first three categories.

<sup>6</sup> *See* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 297-98 (1991). *See also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 1.2b-14 (1994) (defining a monopsonist as “a monopoly buyer rather than seller.”)

reducing its purchases of an input, thereby decreasing its input price below competitive levels.<sup>7</sup> While monopsony power may not necessarily result in any direct consumer harm,<sup>8</sup> economists and antitrust experts generally agree that monopsony results in a reduction of allocative or economic efficiencies.<sup>9</sup> Because the monopsonist has an incentive to reduce its input purchases below the competitive level, too few resources will be employed in the production of the good.<sup>10</sup>

### III. The Weyerhaeuser Decision

In its *Weyerhaeuser* decision last year, the Supreme Court discussed the issue of monopsony. It ultimately held that the high standard of liability the Court applied to predatory-pricing claims in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* also applies to predatory-bidding claims.<sup>11</sup> In *Brooke Group*, the Court held that a plaintiff must prove the following two requirements in order to recover on a predatory-pricing claim: 1) that the prices complained of are below an appropriate measure of its rival's costs, and 2) that the alleged predator has a dangerous probability of recouping its investment in below-cost prices.<sup>12</sup> In *Weyerhaeuser*, the Court adapted the *Brooke Group* test to the predatory-bidding context by requiring a plaintiff seeking to recover on a claim of predatory bidding to prove that 1) the "alleged predatory bidding led to below-cost pricing of the predator's outputs," and that 2) the "defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."<sup>13</sup>

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<sup>7</sup> See Salop, *supra* note 2, at 672; HOVENKAMP, *supra* note 6, at § 1.2b-14. See also FTC & DEP'T OF JUSTICE, IMPROVING HEALTHCARE: A DOSE OF COMPETITION ch. 6, at 13 (2004), available at <http://www.ftc.gov/reports/healthcare/040723healthcare rept.pdf> (last visited March 24, 2008).

<sup>8</sup> See Salop, *supra* note 2, at 673.

<sup>9</sup> See, e.g., Blair & Harrison, *supra* note 6, at 303; Rosch, *supra* note 3, at 6; Salop, *supra* note 2, at 673.

<sup>10</sup> Blair & Harrison, *supra* note 6, at 303.

<sup>11</sup> *Weyerhaeuser*, 127 S. Ct. at 1078.

<sup>12</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993).

<sup>13</sup> *Weyerhaeuser*, 127 S. Ct. at 1078.

The Court's reasoning in *Weyerhaeuser* suggests that conduct on the buy side of the market should be reviewed as stringently as conduct on the sell side of the market. For example, the Court stated that "[p]redatory-pricing and predatory-bidding claims are analytically similar," and that "[t]his similarity results from the close theoretical connection between monopoly and monopsony."<sup>14</sup> The Court further stated that "[t]he kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization."<sup>15</sup> Could the Court be suggesting here that the harm resulting from a monopsony may be just as serious as the harm resulting from a monopoly, even though a monopsony does not necessarily result in any direct consumer harm?<sup>16</sup>

#### IV. Mandeville Island Farms and Buy-side Cartels

The Supreme Court and various federal courts have repeatedly affirmed that buyer cartels like seller cartels are *per se* illegal. In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, a well-known monopsony case, the Supreme Court held that an agreement between members of a group of California sugar farmers to pay a uniform price for sugar beets violated Sections 1 and 2 of the Sherman Act, and "is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not

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<sup>14</sup> *Id.* at 1076.

<sup>15</sup> *Id.*

<sup>16</sup> In *Weyerhaeuser*, the Court, in fact, states that predatory bidding presents less of a direct threat of consumer harm than predatory pricing since "a predatory bidding scheme could succeed with little or no effect on consumer prices because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses." *Id.* at 1078. The fact that the case presented no possibility of *Weyerhaeuser* being able to achieve monopoly power and raise prices in the output market to consumers underscores this point. *Id.* at 1076. The Supreme Court in a footnote distinguished the facts in this case from a scenario where the predatory firm's competitors in the input and output market are the same, enabling the predatory firm to achieve monopoly power in the output market. *Id.* at 1076, n.2. Because the jury found that there was no relevant product market for finished alder lumber, there was no finding that *Weyerhaeuser* had market power in the output market. Brief of Petitioner at 5, *Weyerhaeuser*, 127 S. Ct. 1069 (2007) (No. 05-381). In fact, *Weyerhaeuser's* market share of the downstream North American hardwood lumber market was only 3%. *Id.*

customers or consumers.”<sup>17</sup> In an earlier case, *American Tobacco Co. v. United States*, the Court also condemned buy side cartels when it held that a conspiracy among tobacco companies to increase prices of cheaper tobacco and thereby drive out manufacturers of lower-priced cigarettes violated Section 2 of the Sherman Act.<sup>18</sup>

The Seventh Circuit also affirmed the illegality of buyer cartels in *National Macaroni Mfrs. Ass’n v. FTC*. In *National Macaroni*, the court held that a buying cartel of macaroni manufacturers’ attempt to control the price it paid for durum wheat by reducing the quantity it purchased, was a *per se* violation of Section 5 of the Federal Trade Commission Act.<sup>19</sup> Similarly, in *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, the Ninth Circuit held that a group of log purchasers who conspired to pay artificially low prices for logs to drive out competitors, violated Section 1 of the Sherman Act.<sup>20</sup>

One outlier case where a court refused to strike down a buy-side cartel is *Balmoral Cinema v. Allied Artists Pictures*.<sup>21</sup> In *Balmoral*, the Sixth Circuit upheld a cartel involving a group of movie exhibitors that agreed not to engage in competitive bidding for films offered by distributors.<sup>22</sup> The court reasoned that the collusive conduct at issue may have had the result of lowering the prices paid by exhibitors, thereby lowering prices to consumers who purchased movie tickets.<sup>23</sup> However, Roger D. Blair and Jeffrey L. Harrison have criticized the court’s opinion in *Balmoral*, warning that “. . . it

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<sup>17</sup> *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). Note that this case was cited by the United States in its amicus curiae brief in the *Weyerhaeuser* case for the proposition that the Sherman Act is not confined to protecting consumers, but rather protects all who are made victims of practices forbidden by the antitrust laws. Brief for the United States as Amicus Curiae at 12, *Weyerhaeuser*, 127 S. Ct. 1069 (2007) (No. 05-381) (citing *Mandeville Island Farms*, 334 U.S. at 236).

<sup>18</sup> *Am. Tobacco Co. v. United States*, 328 U.S. 781, 813-815 (1946). See also *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1036 (9th Cir. 2005) (citing *American Tobacco Co.*, 328 U.S. at 801-04).

<sup>19</sup> *Nat’l Macaroni Mfrs. Ass’n v. FTC*, 345 F.2d 421, 427 (7th Cir. 1965).

<sup>20</sup> *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1295, 1298 n. 5 (9th Cir. 1983).

<sup>21</sup> *Balmoral Cinema Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 315, 317 (6th Cir. 1989).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 316-17.

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comes dangerously close to equating lower prices with overall economic benefit.”<sup>24</sup>

## V. Cases Involving Non-Price Concessions

Another category of antitrust cases where courts have been willing to strike down anticompetitive buy-side conduct involves buyers or purchasers employing their market power to exact certain non-price concessions from trading partners. For example, in *United States v. Crescent Amusement Co.* and *United States v. Griffith*, the Supreme Court held that movie theaters that engaged in certain practices to eliminate or disadvantage their competitors—such as making their purchases of films or exhibition rights from distributors contingent on the distributors agreeing to provide the theaters with monopoly rights in certain markets where the theaters faced competition—violated the Sherman Act.<sup>25</sup> In fact, in *Crescent Amusement Co.*, the court upheld a decree requiring divestiture, and revised the decree to prohibit acquisitions among the defendant theaters.<sup>26</sup>

In another case with similar facts, *FTC v. Motion Picture Advertising Service Co.*, the defendant was a producer and distributor of advertising motion pictures shown at movie theaters.<sup>27</sup> The Court held that the defendant’s practice of making its purchases of time from theaters contingent on the theaters’ agreement not to sell time to competing producers of advertising films, violated Section 5 of the FTC Act.<sup>28</sup>

In two other cases, *Klor’s, Inc. v. Broadway Hale Stores, Inc.* and *Toys “R” Us, Inc. v. FTC*, courts struck down similar actions by buyers using their market power to demand non-price concessions from trading partners.<sup>29</sup> In these cases, the courts held that the defendant retailers violated the antitrust laws when they demanded

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<sup>24</sup> Blair & Harrison, *supra* note 6, at 300.

<sup>25</sup> See *United States v. Crescent Amusement Co.*, 323 U.S. 173, 183-84 (1944); *United States v. Griffith*, 334 U.S. 100, 109 (1948).

<sup>26</sup> *Crescent Amusement Co.*, 323 U.S. at 189-190.

<sup>27</sup> *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 395 (1953).

<sup>28</sup> *Id.* at 395.

<sup>29</sup> *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959); *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 940 (7th Cir. 2000).

that manufacturers from whom they purchased goods limit business with their competitors.<sup>30</sup>

## VI. Mergers

The courts have also been willing to condemn horizontal mergers potentially resulting in an increase of market power on the buy side of the market.<sup>31</sup> In *FTC v. Consolidated Foods Corp.*, the Supreme Court upheld the Federal Trade Commission's conclusion that an acquisition of a food products corporation by a wholesale and resale grocery network likely would result in a substantial lessening of competition, thereby violating the Clayton Act.<sup>32</sup> The acquisition, the Court stated, would enable the food products corporation to increase its share of onion sales (even though its onions were inferior to those of the principal competitor) due to the grocery network's reciprocal buying power.<sup>33</sup> In another merger affecting the buy side of the market, *United States v. Rice Growers Ass'n of California*, the District Court for the Eastern District of California held that a merger of firms that purchased, milled, and resold rice, violated Section 7 of the Clayton Act because it may have "substantially. . .lessen[ed] competition in the market for the purchase or acquisition for milling of paddy rice grown in California."<sup>34</sup>

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<sup>30</sup> See *Klor's*, 359 U.S. at 212-13; *Toys "R" Us*, 221 F.3d at 940. In *Klor's*, the Supreme Court held that a department store chain owner's practice of requiring several of its appliance manufacturer customers not to deal with its competitor, violated Section 1 of the Sherman Act, treating the practice as a group boycott that was *per se* illegal. *Klor's*, 359 U.S. at 212-13. In *Toys "R" Us*, the Seventh Circuit held that Toys "R" Us' practice of exacting promises from toy manufacturers to limit distribution of their products to low-priced warehouse club stores, violated Section 5 of the FTC Act. *Toys "R" Us*, 221 F.3d at 930. However, the Court's basis for its decision was that Toys "R" Us engaged in a horizontal agreement with its competitors, and the Court did not specifically point out that the conduct was occurring in the input market rather than the output market. *Id.*

<sup>31</sup> See Blair & Harrison, *supra* note 6, at 322.

<sup>32</sup> *FTC v. Consol. Foods Corp.*, 380 U.S. 592, 601 (1965).

<sup>33</sup> *Id.* at 599-601. In its reciprocal buying arrangements, Consolidated, the grocery network, would purchase products of food processors who, in return, would purchase dehydrated onion and garlic from the acquired food products corporation. *Consol. Foods Corp.*, 380 U.S. at 595.

<sup>34</sup> *United States v. Rice Growers Ass'n of Cal.*, S-84-1066 E.J.G., 1986 WL 12562, at \*12 (E.D. Cal. Jan. 31, 1986).

Along the same lines, the Department of Justice has filed complaints that include monopsony allegations to block proposed mergers, which have resulted in consent decrees that include provisions about restoring competition in the input market. For example, in the Antitrust Division's complaint in *United States v. Cargill, Inc.*, the Division alleged that post merger, Cargill, a grain trader, would depress purchase prices to grain sellers in numerous localities.<sup>35</sup> The Division also made monopsony allegations in its complaints in *United States v. Aetna, Inc.* and *United States v. UnitedHealth Group, Inc.*, alleging in both cases that the proposed transactions would create market power in the purchase of physician services.<sup>36</sup>

The government was not successful in blocking potentially anticompetitive buy-side conduct in *United States v. Syufy Enters.*<sup>37</sup> In *Syufy*, the U.S. District Court for the Northern District of California dismissed the argument the government made in a post-trial brief that an acquisition by a movie theater chain of various movie theaters would result in a monopsony harming film

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<sup>35</sup> Complaint at 8, *United States v. Cargill, Inc.*, No. 99cv01875 (D.D.C. 1999) available at [www.usdoj.gov/atr/cases/f2500/2552.pdf](http://www.usdoj.gov/atr/cases/f2500/2552.pdf) (last visited March 24, 2008).

<sup>36</sup> The Division also alleged in both cases that the proposed transactions would enable the acquiring companies to exert market power in the sale of various commercial health plans. See Complaint at 8, 11, *United States v. Aetna, Inc.*, No. 3-99 CV 1398-8 (N.D. Tex. Jun. 21, 1999) (alleging that the proposed 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), available at <http://www.usdoj.gov/atr/cases/f2500/2501.pdf> (last visited March 24, 2008); Complaint at 8, 12, *United States v. UnitedHealth Group, Inc.*, No. 1:05CV02436 (D.D.C. Dec. 20, 2005) (alleging that the transaction would enable United to lower the reimbursement rates of physicians in Tucson and Boulder and exert market power in the sale of commercial health plans to small-group employers), available at [www.usdoj.gov/atr/cases/f213800/213815.htm](http://www.usdoj.gov/atr/cases/f213800/213815.htm) (last visited March 24, 2008).

The Department of Justice also made similar allegations in a complaint it filed last year in a non-merger case involving the purchase of nursing services, asserting that the Arizona Hospital and Healthcare Association (AzHHA) and its participating member hospitals set uniform bill rates paid to nurse staffing agencies below competitive levels. See Complaint at 2, *United States v. Ariz. Hosp.*, No. CV07-1030-PHX (D. Ariz. May 22, 2007) available at [www.usdoj.gov/atr/cases/f223400/223477.pdf](http://www.usdoj.gov/atr/cases/f223400/223477.pdf) (last visited March 24, 2008).

<sup>37</sup> *United States v. Syufy Enters.*, 712 F. Supp. 1386, 1404 (N.D. Cal. 1989).

distributors.<sup>38</sup> However, one of the court's major reasons for this decision was that the government had failed to raise this argument during trial, and changed its theory at the last minute when the market definition began to favor the defendants.<sup>39</sup>

## VII. Recent Miscellaneous Cases

In some recent cases that do not fall neatly into any of the three categories of conduct discussed above, courts have expanded upon the Supreme Court's proposition in *Mandeville Island Farms* that the Sherman Act's protections are not confined to consumers.<sup>40</sup> For example, in *Telcor Communications, Inc. v. Southwestern Bell Telephone Co.*, the Tenth Circuit held that Southwestern Bell monopolized pay-phone services, and that the relevant customer base was defined properly at the location-owner level rather than at the end-user level.<sup>41</sup> In doing so, the court rejected the defendant's argument that market power must be defined from the consumer's perspective and that a monopsony "is not actionable unless it 'injure[s] consumers by forcing up the price of the end product.'"<sup>42</sup> The court further stated that the Supreme Court's treatment of monopsony cases strongly suggests that suppliers are protected by the antitrust laws even when anticompetitive activity does not harm end users.

In another case, *Law v. NCAA*, the 10th Circuit held that a NCAA rule limiting colleges to four basketball coaches and limiting the earnings of a particular category of coaches, violated Section 1 of the Sherman Act.<sup>43</sup> The court further stated that the schools' argument that the rule would reduce the schools' costs was not valid because if cost-cutting were a legitimate procompetitive justification,

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1398 (stating that "[n]ow, after having had time to realize that the uncontroverted evidence introduced by Syufy at trial proved that consumers view the ancillary markets as substitutes to first-run exhibition, the government, in a post-trial brief, tries to argue that it is only concerned with the effect of Syufy's acquisitions on the distributors and not its effect on the consumers.").

<sup>40</sup> See *Mandeville Island Farms*, 334 U.S. at 236.

<sup>41</sup> *Telcor Communications, Inc., v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1133-34 (10th Cir. 2002).

<sup>42</sup> *Id.* at 1133. (citing *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995)).

<sup>43</sup> *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998).

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“any group of competing buyers could agree on maximum prices.”<sup>44</sup> The court also said that “[l]ower prices cannot justify a cartel’s control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises” and that “setting maximum prices reduces the incentive among suppliers to improve their products.”<sup>45</sup>

Another monopsony case, *Kartell v. Blue Shield of Massachusetts, Inc.*, took the opposite approach, holding that Blue Shield’s ban on a “balance billing” practice, which prohibited doctors from charging Blue Shield subscribers more than the Blue Shield payment-schedule amounts, did not violate Section 2 of the Sherman Act because Blue Shield would pass on the lower prices it was paying on insurance premiums to its customers.<sup>46</sup> However, Judge Breyer’s opinion in this case has been criticized by a number of antitrust scholars.<sup>47</sup> For example, Economist Steven Salop suggested that the effect of the decision permitted Blue Cross to act as an agent for a buyer-side cartel of final consumers, and further stated that “a cartel of final consumers is inefficient because it reduces output below the competitive level.”<sup>48</sup>

## VIII. Conclusion and Implications for the Consumer Welfare/Total Welfare Debate

This review of antitrust decisions involving a wide range of conduct by purchasers in the input market reveals a long history of courts and antitrust enforcers condemning anticompetitive behavior occurring on the buy side of the market. The Supreme Court’s statement in *Weyerhaeuser* that similar legal standards should be applied to monopoly and monopsony is consistent with this approach.

This conclusion has implications on the debate about whether the antitrust laws should be applied using a “consumer welfare” or

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<sup>44</sup> *Id.*, at 1022.

<sup>45</sup> *Id.*

<sup>46</sup> *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 930-931 (1st Cir. 1984).

<sup>47</sup> See Peter J. Hammer & William M. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L.J. 949, 967 (2004) (stating that “Breyer’s opinion has been fairly criticized for inferring positive welfare effects simply from the fact that Blue Shield reduced its input prices for physician services.”).

<sup>48</sup> Salop, *supra* note 2, at 689.

“total welfare” standard.<sup>49</sup> Those espousing the “consumer welfare” standard believe that antitrust analysis should focus on the interests of consumers who purchase a final end product or output in the chain of distribution.<sup>50</sup> In contrast, proponents of the “total welfare” standard argue that the antitrust laws should seek to maximize society’s wealth as a whole rather than focusing on any one type of market participant.<sup>51</sup>

The fact that many courts and enforcers have not been reluctant to condemn anticompetitive buy-side conduct, which potentially poses little or no direct threat to consumer welfare, suggests a willingness on their part to take into account the interests of all market participants. Perhaps this indicates some recognition by courts and enforcers that in the long run, monopsony can ultimately be just as harmful to consumers as anticompetitive conduct occurring in the output market.<sup>52</sup> While the *Weyerhaeuser* decision may not completely resolve the debate about the consumer welfare and total welfare standards, perhaps it helps to solidify to some degree what courts and enforcers have been suggesting all along—that conduct on the buy side of the market should be treated just as strictly as conduct on the sell side of the market.

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<sup>49</sup> See Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL’Y INT’L, 29, 30 (2006).; Rosch, *supra* note 3, at 1-2.

<sup>50</sup> See Rosch, *supra* note 3, at 2.

<sup>51</sup> See *id.*; Heyer, *supra* note 49, at 30.

<sup>52</sup> See Blair & Harrison, *supra* note 7, at 339 (stating that “[l]ower input prices in the short run may mean decreases in both future supply and in ultimate consumer well-being.”); Roger G. Noll, “Buyer Power” and Economic Policy, 72 ANTITRUST L.J. 589, 613 (2005) (stating that “[i]n most cases, monopsony harms consumers because the distortions it creates in an input market reduce efficiency in final goods markets.”)