INTRODUCTION TO SYMPOSIUM ON
BUYER POWER AND ANTITRUST

ALBERT A. FOER *

Antitrust has much more typically focused on the market power of sellers rather than buyers. Recent decades, however, have witnessed the rise of very large buyers in previously more fragmented industries, such as retailing, farming, ranching, natural resource extraction, and health care. The purchasing clout demonstrated by these large buyers, in turn, may enhance the advantage they have vis-à-vis their own competitors. Retailers, such as Wal-Mart and Costco, apparently have such clout with suppliers. Is this really something new? From an antitrust perspective, does it matter and should it matter? The articles in this Antitrust Law Journal Symposium on Buyer Power analyze the phenomenon of buyer power in its various forms and suggest alternatives for antitrust policy and enforcement with respect to buyer power.

The Symposium articles present the basic economic framework and the legal precedents in addressing antitrust concerns with buyer power. In his article in the Symposium, Roger Noll provides an economic overview of monopsony, portraying it as a mirror image of monopoly with economic harms that are generally symmetrical and worthy of antitrust pursuit.1 However, most of the buyer power issues of concern are not the extreme case of monopsony, but the intermediate range between a competitive and a monopsony market structure. As John Kirkwood discusses, this raises the question of whether bargaining power can create anticompetitive situations when the buyer-side market power is great enough.2 Much of the newer thinking about antitrust and buyer power

---


505
is really about what limits, if any, should be placed on bargaining power. This is an area where additional research is much needed.

As Warren Grimes points out in his review of the state of the law on buyer power, it is often sunk costs and the perishable nature of assets that make sellers particularly vulnerable to powerful buyers. The farmer is constrained by nature, for example, to sell within a certain time frame. Roger Noll observes that in professional sports, where talents diminish over time, the leagues give teams the power to impose below-market offers on players. An additional critical issue mentioned by Noll and Grimes, as well as by Kirkwood, is that the threshold for market power may be much lower for a buyer than for a seller. Noll, for instance, shows how a retailer’s “take it or leave it”/“all or nothing” offer can put a supplier in a bind because of the importance that the buyer has for the particular seller, even though the buyer’s market share may not be absolutely large. Paul Dobson’s analysis of buyer power in the British retail grocery industry also underscores the importance of large retailers to each supplier.

In the standard economic model of monopsony, the monopsonistic buyer offers a lower price and purchases a reduced quantity, relative to the competitive price and quantity outcome. But the simple monopsony model may overlook important dynamics introduced by large-scale contracts. Whereas the standard monopsony model assumes that prices increase as additional quantities are purchased, the upward-sloping marginal cost curve that generates this result may, in reality, not be applicable in certain industries, for certain buyers, and for certain suppliers. For example, a power buyer may be able to find a supplier that can maintain or increase output by passing costs off onto society (externalities) or by increasing the supplier’s economies of scale or moving down the experience curve through a new relationship that involves producing additional output for a single retailer.

Even with buyer-side market power or monopsony, there may be built-in constraints on a buyer’s power. The chairman of Wal-Mart Stores, S. Robson Walton, describes in his article how Wal-Mart views its relationship with its suppliers, portraying a strategic partnership in which the buyer really is not as powerful as frequently portrayed in the popular

---

4 Noll, supra note 1.
press and, in any event, finds that it is in Wal-Mart’s own best interests to try to help its suppliers to thrive.5

In contrast, Paul Dobson describes a grocery industry where buyer-side market power has received additional attention in recent years due to retail mergers and the growth of super-retailers, such as Wal-Mart and Costco. Focusing primarily on the grocery business in the UK, while also presenting comparative information from other advanced economies, Dobson finds that buying power in retailing is a very real problem that arises from three roles played by the retailer in relationship to suppliers: as their suppliers’ customer (purchasing and then re-selling the suppliers’ goods), as the suppliers’ competitor (when developing own-brand substitutes); and as a supplier to their suppliers (in the provision of shelf and advertising space).6 These roles may give a large retailer great relative power, even if its market share is quite small, compared to traditional measures of market power for sellers.

The concern with potentially anticompetitive behavior and strategies that may arise from buyer-side market power, and attempts to gain buyer-side market power, is the focus of articles by John Kirkwood,8 Steven Salop,9 and Richard Zerbe.10 Unlike predatory pricing, which uses extraordinarily low prices to drive out competitors, predatory bidding (also known as predatory overbuying), and raising rivals’ costs overbuying use the buyer’s ability to pay artificially high prices in order to force rivals from the market. These potentially anticompetitive strategies have been and continue to be an issue in much of the litigation in the timber industry. The three authors discuss and analyze the specifics of possible anticompetitive buyer-side conduct in those timber industry cases.

In a rather different application of buyer power analysis, Robert Skitol11 brings high-tech standard-setting processes into the buyer-side market power picture, arguing that the substantial harm of patent ambush can best be avoided if those who will need to buy license rights from a patent

---

6 Dobson, supra note 5. Although the British grocery retail market is more concentrated than our own, we have had rapid concentration in that segment and are not far behind.
7 Kirkwood, supra note 2.
8 Steven C. Salop, Anticompetitive Overbuying by Power Buyers, infra this issue, 72 Antitrust L.J. 669 (2005).
holder are permitted to negotiate the terms jointly, before the standard is set.

This Antitrust Law Journal Symposium grew out of a set of papers generated for the American Antitrust Institute’s symposium on buyer power and antitrust, held June 24, 2004, in Washington, DC. The Editors of this Journal invited additional authors to comment on and complement the ideas and analyses raised in the original set of papers. As a group, these articles highlight a number of unresolved and challenging issues facing antitrust policymakers, enforcement authorities, and researchers. What is plainly needed is a good deal of additional work that begins with empirical studies of particular industries, much like Dobson’s, where buyer power is important and which test the robustness of the empirical findings by looking at comparisons across national borders.

---

12 Papers by John Kirkwood, Roger Noll, Robert Skitol, and Rob Walton originated as conference presentations at the AAI Symposium held on June 24, 2004. Paul Dobson led a breakout session on retailing and buyer power at that same symposium.

13 Following the AAI Symposium, papers by Warren Grimes, Steven Salop, and Richard Zerbe were prepared to complement the articles based on the AAI presentations.