

1987

## Monopsony Power in Health Care Markets: Must the Big Buyer Beware Hard Bargaining?

Jack A. Rovner

*Partner, Kirland & Ellis, Chicago, IL*

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>



Part of the [Medical Jurisprudence Commons](#)

---

### Recommended Citation

Jack A. Rovner, *Monopsony Power in Health Care Markets: Must the Big Buyer Beware Hard Bargaining?*, 18 Loy. U. Chi. L. J. 857 (1987).  
Available at: <http://lawcommons.luc.edu/lucj/vol18/iss3/4>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# Monopsony Power in Health Care Markets: Must the Big Buyer Beware Hard Bargaining?\*

Jack A. Rovner\*\*

Increasingly, sellers of health care goods and providers of health care services invoke antitrust law to attack customers who refuse to pay as much or to buy in the same way as they had in the past.<sup>1</sup>

---

\* Copyright © 1987 by Jack A. Rovner. All rights reserved.

\*\* Partner, Kirkland & Ellis, Chicago; B.A., Brandeis University, 1968; J.D., Boston University, 1976. A preliminary draft of this article was presented at the National Health Lawyers Association Seminar, "Antitrust in the Health Care Field," January 28-30, 1987.

1. Among the antitrust cases that have been brought by sellers of health care goods and providers of health care services against their customers are:

(a) Pharmacists' attacks on insurer prepaid drug plans. *See* Feldman v. Health Care Serv. Corp., 562 F. Supp. 941 (N.D. Ill. 1982); Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Conn., Inc., 518 F. Supp. 1100 (D. Conn. 1981), *aff'd per curiam*, 675 F.2d 502 (2d Cir. 1982); Sausalito Pharmacy, Inc. v. Blue Shield, 1980-81 Trade Cas. (CCH) ¶ 63,695 (N.D. Cal. 1980), *and* 544 F. Supp. 230 (N.D. Cal. 1981), *aff'd per curiam*, 677 F.2d 47 (9th Cir.), *cert. denied*, 459 U.S. 1016 (1982); Group Life & Health Ins. Co. v. Royal Drug Co., 415 F. Supp. 343 (W.D. Tex. 1976), *rev'd*, 556 F.2d 1375 (5th Cir. 1977), *aff'd*, 440 U.S. 205 (1979), *on remand*, 737 F.2d 1433 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

(b) Practitioners' attacks on insurer prepaid health service plans. *See* Barry v. Blue Cross, 805 F.2d 866 (9th Cir. 1986); Brillhart v. Mutual Medical Ins., Inc., 768 F.2d 196 (7th Cir. 1985); Ratino v. Medical Serv., 718 F.2d 1260 (4th Cir. 1983); Michigan State Podiatry Ass'n v. Blue Cross & Blue Shield, 1987-2 Trade Cas. (CCH) ¶ 67,687 (E.D. Mich. 1987), *and* 1982-2 Trade Cas. (CCH) ¶ 64,801 (E.D. Mich. 1982); Westchester Radiological Associates, P.C. v. Empire Blue Cross & Blue Shield, Inc., 1987-1 Trade Cas. (CCH) ¶ 67,548 (S.D.N.Y. 1987); Tom v. Hawaii Dental Serv., 606 F. Supp. 584 (D. Hawaii 1985); Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 574 F. Supp. 457 (M.D. Pa. 1983), *aff'd*, 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985), *and* 632 F. Supp. 653 (M.D. Pa. 1986), *rev'd*, 815 F.2d 270 (3d Cir. 1987); Davidowitz v. San Diego County Dental Soc'y, 1983-1 Trade Cas. (CCH) ¶ 65,231 (S.D. Cal. 1983), *on reconsideration*, 1984-1 Trade Cas. (CCH) ¶ 65,988 (S.D. Cal. 1984); Kartell v. Blue Shield of Mass., Inc., 542 F. Supp. 782 (D. Mass. 1982), *and* 582 F. Supp. 734 (D. Mass.), *aff'd in part, rev'd in part*, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985); Blue Cross & Blue Shield v. Michigan Ass'n of Psychotherapy Clinics, 1980-2 Trade Cas. (CCH) ¶ 63,351 (E.D. Mich. 1980); Anderson v. Medical Serv., 1976-1 Trade Cas. (CCH) ¶ 60,884 (E.D. Va. 1976).

(c) Hospitals' attacks on insurer preferred provider organizations or prepaid hospital service plans. *See* St. Bernard Gen. Hosp., Inc. v. Hospital Serv. Ass'n

Initially, these cases typically advanced the claim that prepaid insurance plans, such as Blue Cross or Blue Shield, are fixing prices in violation of section 1 of the Sherman Act.<sup>2</sup> The theory underlying this claim is that prepaid insurance plans are affecting the prices that providers, as the sellers of health care goods and services, are permitted to charge the plans' insureds, which consume the health care goods and services. The courts have rejected this price-fixing theory on the ground that the prepaid insurance plans, as the payors of the health care goods and services consumed, are the buyers.<sup>3</sup> In response, providers have evolved a new theory of

---

of New Orleans, Inc., 712 F.2d 978 (5th Cir. 1983), *cert. denied*, 466 U.S. 970 (1984); Webster County Memorial Hosp., Inc. v. United Mine Workers of Am. Welfare & Retirement Fund of 1950, 536 F.2d 419 (D.C. Cir. 1976) (per curiam); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 603 F. Supp. 1077 (S.D. Ind. 1985), *aff'd*, 784 F.2d 1325 (7th Cir. 1986); Glen Eden Hosp., Inc. v. Blue Cross & Blue Shield of Mich., Inc., 555 F. Supp. 337 (E.D. Mich. 1983), *aff'd in part, rev'd in part*, 740 F.2d 423 (6th Cir. 1984).

(d) Hospital supply vendors' attacks on group purchasing. See Langston Corp. v. Standard Register Co., 553 F. Supp. 632 (N.D. Ga. 1982); White & White, Inc. v. American Hosp. Supply Corp., 540 F. Supp. 951 (W.D. Mich. 1982), *rev'd*, 723 F.2d 495 (6th Cir. 1983).

A probable explanation for this explosion in antitrust suits against health care customers is that the economics of health care delivery are undergoing rapid and wrenching changes that are putting severe pressures on providers and suppliers to cut costs. See Millenson, *Managed Care: Will It Push Providers Against The Wall?* HOSPITALS 66 (Oct. 5, 1986); Petite & Anderson, *Major Systems Will Be Shaped by Payers in the Next Decade*, MODERN HEALTHCARE 53 (Aug. 15, 1986); Traska, *The Financial Exchange: Providers, Insurers, and Employers Stake Claims in New Health Markets*, TRUSTEE 22 (Feb. 1986); MacStravic, "Boutiques" and "Shopping Malls" Threaten Hospitals' Traditional Role, MODERN HEALTHCARE 144 (Sept. 13, 1985); *How Competition Is Reshaping Health Care*, HOSPITALS 116 (July 16, 1984).

2. 15 U.S.C. § 1 (1982). Section 1 prohibits contracts, combinations, or conspiracies in restraint of trade. Any horizontal arrangement, *i.e.*, an arrangement among competitors, that has the purpose or the effect of "raising, depressing, fixing, pegging, or stabilizing" price is illegal per se under section 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

3. See *Barry v. Blue Cross*, 805 F.2d 866 (9th Cir. 1986); *Brillhart v. Mutual Medical Ins., Inc.*, 768 F.2d 196 (7th Cir. 1985); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248 (3d Cir. 1984), *aff'g* 574 F. Supp. 457 (M.D. Pa. 1983), *cert. denied*, 471 U.S. 1016 (1985); *Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Conn., Inc.*, 675 F.2d 502 (2d Cir. 1982) (per curiam), *aff'g* 518 F. Supp. 1100 (D. Conn. 1981); *Michigan State Podiatry Ass'n v. Blue Cross & Blue Shield*, 1987-2 Trade Cas. (CCH) ¶ 67,687 (E.D. Mich. 1987), and 1982-2 Trade Cas. (CCH) ¶ 64,801 (E.D. Mich. 1982); *Davidowitz v. San Diego County Dental Soc'y*, 1983-1 Trade Cas. (CCH) ¶ 65,231 (S.D. Cal. 1983), *on reconsideration*, 1984-1 Trade Cas. (CCH) ¶ 65,988 (S.D. Cal. 1984); *Feldman v. Health Care Serv. Corp.*, 562 F. Supp. 941 (N.D. Ill. 1982); *Sausalito Pharmacy, Inc. v. Blue Shield*, 544 F. Supp. 230 (N.D. Cal. 1981), *aff'd per curiam*, 677 F.2d 47 (9th Cir.), *cert. denied*, 459 U.S. 1016 (1982); *Blue Cross & Blue Shield v. Michigan Ass'n of Psychother-*

attack. Turning to section 2 of the Sherman Act,<sup>4</sup> providers have begun alleging that prepaid insurance plans, as big buyers of health care goods and services, are exercising buyer's monopsony<sup>5</sup> power to depress below competitive levels the price providers can charge.<sup>6</sup>

This article takes the position that these monopsony power claims should not be cognizable under section 2 of the Sherman Act. Instead, the unilateral exercise of monopsony power<sup>7</sup> should be accorded per se legal antitrust treatment, and cases asserting monopsony-based claims should be rejected on their pleadings. In examining this position, the article first reviews basic Sherman Act principles and the economic theory of monopsony. The article then reviews the case law regarding monopsony. First, the buyer

---

apy Clinics, 1980-2 Trade Cas. (CCH) ¶ 63,351 (E.D. Mich. 1980); see also *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 214-15 (1979). For further discussion of price-fixing in the prescription drug context, see generally Note, *Prepaid Prescription Drug Plans Under Antitrust Scrutiny: A Stern Challenge to Health Care Cost Containment*, 75 NW. U.L. REV. 506 (1980).

The only price-fixing claims concerning prepaid insurance plans that have survived are those in which the plan has been found to be under the control of providers that compete with each other, thus rendering the plan a form of horizontal arrangement. See *Glen Eden Hosp., Inc. v. Blue Cross & Blue Shield of Mich., Inc.*, 740 F.2d 423 (6th Cir. 1984); *Ratino v. Medical Serv.*, 718 F.2d 1260, 1270-71 (4th Cir. 1983); *St. Bernard Gen. Hosp., Inc. v. Hospital Serv. Ass'n of New Orleans, Inc.*, 712 F.2d 978 (5th Cir. 1983), cert. denied, 466 U.S. 970 (1984); *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F.2d 476 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981); *Addino v. Genesee Valley Medical Care, Inc.*, 593 F. Supp. 892 (W.D.N.Y. 1984); see also Rovner, *Provider Control and the Third Party Payor Price-Fixing Problem*, NATIONAL HEALTH LAWYERS ASSOCIATION, ANTITRUST IN THE HEALTH CARE FIELD (1985) (price-fixing will generally be found when the mechanism that determines what the prepaid health insurer will pay for services is controlled by the providers of the services). These provider control price-fixing cases follow the teachings of *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982). See generally Weller, "Free Choice" as a Restraint of Trade in American Health Care Delivery and Insurance, 69 IOWA L. REV. 1351 (1984); Youle & Daw, *Preferred Provider Organizations: An Antitrust Prospective*, 1984 ANTITRUST BULL. 301, 328-41.

4. 15 U.S.C. § 2 (1982). Section 2 prohibits monopolization of or attempts, combinations, or conspiracies to monopolize trade. Monopolization is defined as the possession of monopoly power coupled with the willful acquisition or maintenance of that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Monopoly power is the power to control prices or to exclude competition. *United States v. E.I. duPont deNemours & Co.*, 351 U.S. 377, 391 (1956).

5. "Monopsony is the term used to describe a situation in which the relevant market for a factor of production is dominated by a single purchaser." *Permian Basin Area Rate Cases*, 390 U.S. 747, 794 n.64 (1968).

6. See, e.g., *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984), cert. denied, 471 U.S. 1029 (1985).

7. This article is concerned only with unilateral exercise of buyer power. Issues of buyer collusion or cartelization to effect anticompetitive ends are outside the scope of this article.

power cases that suggest that monopsony may be a viable antitrust theory are examined. Next, the case law considering monopsony claims in health care markets is discussed. Finally, the article demonstrates why antitrust policy and the danger of deterring competitive conduct mandate a rule of per se legality for monopsony.

## I. ANTITRUST LAW AND MONOPSONY ECONOMICS

### A. *The Sherman Act*

Congress enacted the Sherman Act (the "Act") in 1890.<sup>8</sup> Called the "Magna Carta of free enterprise,"<sup>9</sup> the Act is intended to enhance consumer welfare by promoting economic efficiency and protecting competition.<sup>10</sup>

Section 1 of the Act is aimed at prohibiting contracts, combinations, or conspiracies involving two or more independent economic actors which have the purpose or the effect of unreasonably restraining trade.<sup>11</sup> The restraints reached by section 1 can be hori-

8. Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-11 (1982)).

9. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

10. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940):

The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . .

*See also* *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 107 (1984) (consumer welfare a "fundamental goal of antitrust law"); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984) (antitrust laws "especially intended to serve" the interests of consumers); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'"); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1985) ("antitrust laws protect efficient production for the benefit of consumers"); *Product Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982) (antitrust laws "designed to protect the consumer interest in competition"); I P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 7 (1978) ("[t]he economic objective of a procompetitive policy is to maximize consumer economic welfare"); R. BORK, *THE ANTITRUST PARADOX* 66 (1978) (the antitrust laws are consistent with an overriding concern for consumer welfare).

11. *See* *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 98 (1984). Section 1 states in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal." 15 U.S.C. § 1 (1982). The Supreme Court recognized early that the literal language of section 1 would outlaw every form of agreement and, accordingly, construed the statute as prohibiting only those restraints of trade that unreasonably restrict competition. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

zontal (among competitors)<sup>12</sup> or vertical (among actors at different levels in the chain of distribution).<sup>13</sup>

The reasonableness of a restraint is tested by whether it “merely regulates and perhaps thereby promotes competition” or whether it “may suppress or even destroy competition.”<sup>14</sup> Application of this “rule of reason” test usually requires intensive analysis of the nature, history, and purpose of the restraint, the reasons for adopting it, and its competitive effects on the particular markets involved.<sup>15</sup>

The rule of reason analysis can be complex and time consuming. Accordingly, the courts have adopted a rule of per se illegality for certain practices that are conclusively presumed to be unreasonable<sup>16</sup> “because of their pernicious effect on competition and lack of any redeeming virtue.”<sup>17</sup> To minimize instances when its inflexibil-

12. See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

13. See, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *White Motor Co. v. United States*, 372 U.S. 253 (1963).

14. *Board of Trade v. United States*, 246 U.S. 231, 238 (1918); see *FTC v. Indiana Fed'n of Dentists*, 106 S. Ct. 2009 (1986); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979).

15. See *Board of Trade v. United States*, 246 U.S. 231, 238 (1918). *Accord* *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

16. The courts have adopted rules of per se illegality for four categories of conduct:

(a) Price-fixing, whether horizontal or vertical. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (horizontal); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (vertical); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (vertical); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (horizontal).

(b) Naked allocations of markets or customers among competitors. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). *But see* *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987); *Polk Bros. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985).

(c) Group boycotts. See *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). *But see* *FTC v. Indiana Fed'n of Dentists*, 106 S. Ct. 2009 (1986); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery Printing Co.*, 472 U.S. 284 (1985).

(d) Tying arrangements. See *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958). *But see* *Jefferson Parish Hosp. Dist. No. 1 v. Hyde*, 466 U.S. 2 (1984).

17. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). The *Northern Pacific* court stated the rule in the following manner:

The utility of such a per se rule is that it not only makes the type of restraints which are prescribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity of an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a

ity may inadvertently penalize competitive conduct, the rule of per se illegality is reserved only for conduct that "facially appears to be [the type] that would always or almost always tend to restrict competition and decrease output."<sup>18</sup>

Because section 1 requires a plurality of actors,<sup>19</sup> it does not reach unilateral conduct. Such conduct is covered instead by section 2 of the Act.<sup>20</sup> Section 2 focuses on abuse of monopoly power—the power to control prices or to exclude competition.<sup>21</sup> Section 2 makes no mention of monopsony.<sup>22</sup> Though there are cases involving abuse of buying power,<sup>23</sup> the legality of monopsony has received scant judicial attention.<sup>24</sup> One possible explanation

---

particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

*Id.*

18. *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 19-20 (1979); see *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 98-104 (1984). For the four categories of conduct deemed per se illegal, see *supra* note 16.

19. See *supra* notes 11-13 and accompanying text.

20. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984). The text of section 2 reads:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1982).

21. See *supra* note 4.

22. See *supra* note 20. Senator Sherman may not have intended the law that bears his name to cover monopsony. During the debates on the proposed Sherman Act, Senator George of Mississippi commented that the cotton farmers had agreed not to purchase jute bagging in order to combat the jute bagging trust. In response to Senator George's fear that the bill would sweep into its reach such "defensive agreements" as the cotton farmers' buyers' cartel, Senator Sherman stated that "[t]here is nothing in the bill to prevent a refusal by anybody to buy something. All that it says is that the people producing or selling a particular article shall not make combinations to advance the price of the necessities of life." 20 CONG. REC. 1458 (1889).

23. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 465 U.S. 1052 (1984); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *McCourt v. California Sports, Inc.*, 460 F. Supp. 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979); *In re National Macaroni Mfrs. Ass'n*, 65 F.T.C. 583 (1964), *enforced*, 345 F.2d 421 (7th Cir. 1965). For an analysis of the cartelization of baseball into a monopsony to control player salaries, see Note, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953).

24. A Lexis search for cases mentioning monopsony, monopsonist, monopsonize and related words located 40 opinions, eight of which do not involve Sherman Act claims. Of the 32 Sherman Act cases, nearly all make only a passing reference to monopsony. Only

for this dearth of monopsony cases is that sellers may be loathe to sue customers. Another is that a seller complaining that its customer refuses to pay as high a price as the seller might like does not make a sympathetic antitrust plaintiff. At any rate, monopsony has been alleged in very few antitrust cases outside health care areas.<sup>25</sup>

### B. *The Economic Theory of Monopsony*

Monopsony is a market structure within which there is only a single buyer,<sup>26</sup> just as monopoly is a market structure within which there is only a single seller.<sup>27</sup> An examination of monopoly assists the understanding of monopsony's theoretical drawbacks.

Economic theory condemns monopoly because it results in a misallocation of resources.<sup>28</sup> This misallocation occurs because the monopolist, in order to maximize its profits,<sup>29</sup> will restrict output to the point at which its marginal revenue—the incremental income from selling one more unit of output—equals its marginal cost—the incremental expense of producing one more unit.<sup>30</sup>

In a competitive market each firm is a price-taker, and its marginal revenue will equal price.<sup>31</sup> In a monopoly, however, the monopolist is a price-maker, and its marginal revenue will be below price.<sup>32</sup> This gives the monopolist both the incentive and the ability to reduce its output and sell at a price that exceeds the cost to

---

one—*Custom Auto Body, Inc. v. Aetna Casualty & Sur. Co.*, 1983-2 Trade Cas. (CCH) ¶ 65,629, at 69,185 (D.R.I. 1983), discussed *infra* at notes 76-91 and accompanying text—attempts to identify a set of elements to be proved to establish an abuse of monopsony power. That case, however, involved only section 1 claims; no section 2 claims were alleged.

25. See R. POSNER & F. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS* 150 (2d ed. 1981).

26. E. MANSFIELD, *PRINCIPLES OF MICROECONOMICS* 314 (3d ed. 1980).

27. *Id.* at 240.

28. See P. SAMUELSON, *ECONOMICS* 371-72 (11th ed. 1980); E. MANSFIELD, *supra* note 26, at 249-50.

29. For a succinct discussion of whether firms really try to maximize profits, see R. POSNER & F. EASTERBROOK, *supra* note 25, at 855-57. See also P. SAMUELSON, *supra* note 28, at 477-78; E. MANSFIELD, *supra* note 26, at 117-18. For expositions of the view that firms seek to maximize other goals, see J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (3d ed. 1976); W. BAUMOL, *BUSINESS BEHAVIOR, VALUE AND GROWTH* (rev. ed. 1967).

30. See E. MANSFIELD, *supra* note 26, at 244-45.

31. See *id.* at 246.

32. See *id.* at 243, 245. The monopolist's marginal revenue will be below price because, presumably, the monopolist would have to lower the price of its entire output in order to have a price that will attract an additional unit of sale.



society of producing additional units.<sup>33</sup> There is a “deadweight loss” to society in the monopolist’s output restriction, and economic inefficiency results.<sup>34</sup>

Essentially the same economic analysis supports the theory that monopsony causes a misallocation of resources.<sup>35</sup> According to theory, the monopsonist, being a price-maker, has the incentive and the ability to restrict its purchase of inputs to the point at which its incremental cost of buying one more unit of input equals the marginal contribution of that additional unit of input to the monopsonist’s own output.<sup>36</sup> The monopsonist’s purchase volume would thus be below the level of purchases expected in a competitive input market, and economic theory predicts that price would be depressed below the competitive market equilibrium.<sup>37</sup> A “deadweight loss” to society would occur in the reduced supply of the input, and economic inefficiency would exist.<sup>38</sup>

The symmetry between the economic theories of monopoly and monopsony provides intellectual consistency; the symmetry, however, does not fit easily into real world contexts.<sup>39</sup> While the incentive to monopolize is clear, the incentive to monopsonize is not. Monopoly provides the attractive business setting of an ability to control market output, charge monopoly prices and reap

33. See P. SAMUELSON, *supra* note 28, at 371-72.

34. *Id.* at 486; E. MANSFIELD, *supra* note 26, at 249-50. Both Samuelson and Mansfield provide graphs in their texts to illustrate the “deadweight loss.”

35. See *Vogel v. American Soc’y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (“monopoly and monopsony are symmetrical distortions of competition from an economic standpoint”); *Williams v. St. Joseph Hosp.*, 629 F.2d 448, 453 n.6 (7th Cir. 1980) (“[i]n economic jargon, monopsony is as evil as monopoly”); see also H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 17-18 (1985) (“monopsony produces a deadweight loss triangle similar to the deadweight loss triangle produced by monopoly”).

36. See R. POSNER & F. EASTERBROOK, *supra* note 25, at 149; E. MANSFIELD, *supra* note 26, at 314-15. The monopsonist’s marginal contribution will be above supply price because, presumably, the monopsonist would have to pay the higher price needed to induce its suppliers to produce one more unit of supply for all of the units of supply it buys.

37. See R. POSNER & F. EASTERBROOK, *supra* note 25, at 149-50; II P. AREEDA & D. TURNER, *supra* note 10, at 311 n.7; IV P. AREEDA & D. TURNER, *supra* note 10, at 202 n.2 (1980); H. HOVENKAMP, *supra* note 35, at 17-18.

38. See H. HOVENKAMP, *supra* note 35, at 17-18. For a graph illustrating the “deadweight loss,” see R. POSNER & F. EASTERBROOK, *supra* note 25, at 149.

39. Economists generally do not seem overly concerned with monopsony. Professor Samuelson’s renowned textbook on economics, for example, makes minimal mention of it, and then only in the context of describing how unions can provide countervailing power for the monopsonistic-employer in a company town. See P. SAMUELSON, *supra* note 28, at 548-49. The book does not examine the effects of monopsony in product markets. Professor Mansfield’s economics textbook also discusses monopsony only in the labor context. See E. MANSFIELD, *supra* note 26, at 314-15. For a discussion of monopsony in the employment context for team sports, see Note, *supra* note 23.

supracompetitive profits without the bother that competitors may bid customers away. If a monopsonist, however, depresses too vigorously its suppliers' prices, it will succeed only in eliminating sources of inputs by driving potential suppliers out of the input market.<sup>40</sup> While a business might relish being the sole seller, few businesses would take comfort in a reduction in their sources for supplies.<sup>41</sup>

Moreover, the capacity to monopsonize an input market depends on the existence of resources having substantially greater value in some uses than in others.<sup>42</sup> Since few inputs are likely to be so specialized as to preclude other uses, the incentive to monopsonize is small because the monopsonist is unlikely to be able to prevent its suppliers from leaving the input market.<sup>43</sup> Thus, efforts to monopsonize inputs seem unlikely.<sup>44</sup>

---

40. See H. HOVENKAMP, *supra* note 35, at 17-18.

41. Cf. *Shapiro v. General Motors Corp.*, 472 F. Supp. 636 (D. Md. 1979), *aff'd mem.*, 636 F.2d 1214 (4th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981). Judges Posner and Easterbrook, when professors, observed that one danger faced by a monopsonist whose pricing drives suppliers from the market is that the remaining suppliers may have an easier task in cartelizing the supplier market to achieve countervailing monopoly power. R. POSNER & F. EASTERBROOK, *supra* note 25, at 720.

One commentator suggests that monopsony in health care markets will benefit consumers by providing countervailing power to the market dominance of health care providers.

A monopsonist . . . by exercising countervailing power [in health care markets], can provide consumers with lower prices provided that the monopsonist is subject to a competitive market below and is forced to pass its savings on to consumers. . . .

The capacity of monopsonies to induce a competitive market response, correct market misallocations, and reduce prices strongly suggests that buyer market power does not have the same anticompetitive effect as seller market power and, therefore, should be treated more favorably under the antitrust laws than seller power.

Note, *supra* note 3, at 522-23 (footnotes omitted).

This theory of countervailing power has appeal in health care markets given their well-recognized competitive imperfections. See *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 686 F.2d 286, 290-91 (5th Cir. 1982), *rev'd*, 466 U.S. 2 (1984); *Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553, 556 (9th Cir. 1980), *rev'd*, 457 U.S. 332 (1982); *In re American Medical Int'l*, 104 F.T.C. 2, 115-19 (1984); Alpert & McCarthy, *Beyond Goldfarb: Applying Traditional Antitrust Analyses to Changing Health Markets*, 1984 ANTITRUST BULL. 165. The position of this article—that monopsonization should be per se legal—does not rest on a theory of countervailing power.

42. As Judges Posner and Easterbrook explained, when professors, "[i]f the machinery used to make widgets can be used just as productively to make gidgets, the sole purchaser of widgets will not be able to force the widget maker to accept a monopsony price." R. POSNER & F. EASTERBROOK, *supra* note 25, at 150.

43. See *id.*

44. See *id.* (incidence of monopsony probably "quite rare"). Cf. IV P. AREEDA & D. TURNER, *supra* note 10, at 204 (1980) ("buyer collusion to reduce prices is a relatively rare phenomenon").

## II. ABUSE OF BUYER POWER: MONOPSONY IN THE COURTS

### A. *The Supreme Court*

The cardinal case examining abuse of buyer power is the Supreme Court's 1948 decision in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*<sup>45</sup> *Mandeville Island Farms* came to the Supreme Court after being dismissed for failure to state a cause of action.<sup>46</sup> The plaintiffs were northern California growers of sugar beets, and the defendant was one of the three sugar beet refiners that were the "only practical market available" to the growers to sell their beets.<sup>47</sup> Although only one of the refiners was named as a defendant, the growers complained that all three had agreed to adopt identical form contracts that they would offer the growers in order to effect uniform purchase pricing.<sup>48</sup> This agreement essentially vested the refiners with monopsony power over the growers.<sup>49</sup>

The issue before the Court was whether the alleged agreement sufficiently affected interstate commerce to fall within the jurisdiction of the Sherman Act.<sup>50</sup> The Court found that it did.<sup>51</sup> The Court also found that the complaint's allegations of an agreement

45. 334 U.S. 219 (1948). Though there were earlier cases involving abuse of buying power—most notably *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944)—none involved claims of depressed prices caused by an exercise of monopsony power.

46. The ground for the dismissal was lack of effect on interstate commerce. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 64 F. Supp. 265, 266 (S.D. Cal. 1946), *aff'd per curiam*, 159 F.2d 71 (9th Cir. 1947), *rev'd*, 334 U.S. 219 (1948). The Sherman Act reaches only conduct that affects "trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1 (1982). See *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976); see also 15 U.S.C. § 2 (1982) (monopolizations of and attempts to monopolize interstate or foreign commerce).

47. *Mandeville Island Farms*, 334 U.S. at 222. In addition to being the growers' only practical customers, the refiners allegedly controlled the supply of sugar beet seed to the growers and, by standard contracts, retained the right "to supervise the planting, cultivation, irrigation and harvesting of the beets." *Id.* at 222-23.

48. *Id.* at 223.

49. The Court stressed that, "[s]ince the refiners controlled . . . the only practical market for beets grown in northern California, when the new contracts were offered to the farmers, they had the choice of either signing or abandoning sugar beet farming." *Id.*

The Court nowhere considered whether the growers had options to contract to plant crops other than sugar beet before the planting season. If such options existed, then the refiners would have faced competition from processors of other agricultural products in contracting with growers and would not have had monopsony power. See *supra* notes 42-44 and accompanying text.

50. *Mandeville Island Farms*, 334 U.S. at 221-22; see *supra* note 46.

51. *Mandeville Island Farms*, 334 U.S. at 234.

to fix purchase prices stated a claim under the Sherman Act.<sup>52</sup>

The Court then proceeded to examine in detail the relationship between the refiners and the growers.<sup>53</sup> Commenting that the refiners “dominate[d] the entire industry,”<sup>54</sup> the Court described the growers as being at the mercy of the refiners: “The farmers’ only alternative to dealing with one of the three refiners is to stop growing beets. They can neither plant nor sell except at the refiners’ pleasure and on their terms.”<sup>55</sup>

The Court’s discussion of the refiners’ monopsony power, though apparently dicta,<sup>56</sup> may reflect its unspoken uneasiness with condemning too broadly combinations of buyers to get lower prices. The Court’s discussion may be a signal, not that monopsonization should be illegal, but that buyer combinations should be legal unless they have monopsony power.<sup>57</sup> That signal is consis-

52. *Id.* at 235. The Court stated, “[i]t is clear that the agreement 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 customers or consumers.” *Id.*

53. *See id.* at 239-41.

54. *Id.* at 240.

55. *Id.*

56. As most subsequent cases have recognized, *Mandeville Island Farms* simply involved an alleged conspiracy to fix prices. *See, e.g.,* Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986); Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 925 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985); Vogel v. American Soc’y of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1159 n.14 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); Custom Auto Body, Inc. v. Aetna Casualty & Sur. Co., 1983-2 Trade Cas. (CCH) ¶ 65,629, at 69,187 (D.R.I. 1983); Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Conn., Inc., 518 F. Supp. 1100, 1108 n.9 (D. Conn. 1981), *aff’d per curiam*, 675 F.2d 502 (2d Cir. 1982); *In re National Macaroni Mfrs. Ass’n*, 65 F.T.C. 583, 611 (1964), *enforced*, 345 F.2d 421 (7th Cir. 1965). In fact, that was the nature of the violation found after trial on the remand of the case. *See American Crystal Sugar Co. v. Mandeville Island Farms, Inc.*, 195 F.2d 622 (9th Cir.), *cert. denied*, 343 U.S. 957 (1952). Such conduct has long been held illegal per se. *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (“[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se”).

57. This signal that buyer combinations lacking monopsony power should be legal is consistent with the current trend of Supreme Court decisions under the Sherman Act that eschew labels like “price-fixing” or “group boycotts” and instead look to the substance of challenged combinations, with particular emphasis on the existence of market power, in order to determine if they promote economic efficiency and output to the benefit of consumers or have the opposite effect. *See, e.g.,* FTC v. Indiana Fed’n of Dentists, 106 S. Ct. 2009 (1986); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985); National Collegiate Athletic Ass’n v. Board of Regents, 468 U.S. 85 (1984); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979). The lower courts follow this trend. *See, e.g.,* Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987); Polk Bros. v. Forest City Enters., 776 F.2d 185 (7th Cir. 1985); General Leaseways, Inc. v. National Truck

tent with the admonition that buyer power is not to be conclusively presumed bad given just five days before the *Mandeville Island Farms* decision in *United States v. Griffith*.<sup>58</sup>

*Griffith* involved a Government Sherman Act challenge to the practice of large movie theater chains using the "buying power of the entire circuit in acquiring [various] exclusive privileges" from the licensors of motion pictures.<sup>59</sup> By negotiating for motion picture exhibition rights for their entire circuits, the defendants were combining movie theaters in towns in which they had competition with those in which they did not have competition.<sup>60</sup> The Court condemned this practice as an illegal exercise of monopoly power aimed at the defendants' competitors in those towns in which the defendants' movie theaters had competition.<sup>61</sup> In doing so, however, the Court cautioned that simply using size to drive a hard bargain is not necessarily illegal.<sup>62</sup> This caution suggests that *Mandeville Island Farms* is not intended to establish that section 2 of the Sherman Act reaches monopsonization.<sup>63</sup>

### B. The Lower Courts

Two lower courts have extensively examined the implications of

---

Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984); *Shop & Save Food Mkts., Inc. v. Pneumo Corp.*, 683 F.2d 27 (2d Cir.), *cert. denied*, 459 U.S. 1038 (1982); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980).

58. 334 U.S. 100 (1948).

59. *Id.* at 104.

60. *Id.* at 102-03.

61. *Id.* at 108. *Griffith* and the similar cases of *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948), and *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), involve monopoly leveraging, not monopsony price depression; and the targets of the leveraging were the defendants' competitors, not the defendants' suppliers.

62. *Griffith*, 334 U.S. at 108.

63. In *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), a movie theater circuit case factually similar to *Griffith*, the Court admonished that the buying power abuses found unlawful in that case should not be analogized "to a case where purchasing power is pooled so that the buyers may obtain more favorable terms." *Id.* at 183.

The authorities appear to favor rule of reason analysis, *see supra* text accompanying notes 14-15, for group purchasing arrangements to obtain lower prices. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495 (6th Cir. 1983); *Langston Corp. v. Standard Register Co.*, 553 F. Supp. 632 (N.D. Ga. 1982); *In re Associated Greeting Card Distribs. of Am.*, 50 F.T.C. 631 (1954); *see also* Rovner, *Hospital Group Purchasing After White & White and Langston*, NATIONAL HEALTH LAWYERS ASSOCIATION, HEALTH LAW UPDATE (1984). *Cf.* *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 427 (7th Cir. 1965) (while enforcing FTC order against a buyers' price-fixing cartel, court stressed that FTC expressly "did not hold 'that . . . all buying agencies or other cooperative buying arrangements . . . are unlawful under the antitrust laws'"). Group purchasing is outside the scope of this Article, which is concerned with unilateral, not collective, buyer conduct.

monopsony claims. *Shapiro v. General Motors Corp.*<sup>64</sup> appears to be the first reported case to involve a true monopsony-type claim. Decided in 1979, *Shapiro* presented sections 1 and 2 claims premised on the theory that auto makers were restraining an alleged market for innovation because they required a royalty-free second source licensee for all of their supplies to guarantee a steady stream of inputs from multiple sources.<sup>65</sup> The plaintiffs had invented and patented an automobile seat belt retractor but, because of the auto makers' royalty-free licensing requirements, were unable to license their invention in return for item-by-item royalties.<sup>66</sup>

The court first examined the plaintiffs' section 1 claims and found no evidence of a conspiracy either among the auto makers or with their suppliers.<sup>67</sup> Turning to the section 2 claims, the court immediately recognized that these claims were novel because the monopsony allegations "complicate[d] not only the legal analysis but the economic and policy aspects of the case as well."<sup>68</sup> Observing that the "plaintiffs [came] very close to admitting that the roy-

---

64. 472 F. Supp. 636 (D. Md. 1979), *aff'd mem.*, 636 F.2d 1214 (4th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981).

65. 472 F. Supp. at 639. At the time *Shapiro* was decided, the massive *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980), alleging a broad conspiracy among supermarket chains to depress the price of beef, had been proceeding on the heels of the successful section 1 case based on a similar conspiracy in *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851 (N.D. Cal.), *vacated and dismissed on settlement*, 403 F. Supp. 412 (N.D. Cal. 1975). About two months after the *Shapiro* decision, the Fifth Circuit reversed dismissal of the *In re Beef* case on grounds that the plaintiffs had sufficiently alleged that the transactions between the middlemen-meat packers (to whom the plaintiff-cattlemen sold) and the defendant-supermarket chains were the functional equivalent of cost-plus contracts and, therefore, within one of the exceptions to the bar of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *In re Beef*, 600 F.2d at 1166-67. *Illinois Brick* held that only direct purchasers from antitrust conspirators may sue for damages for illegal overcharges and that indirect purchasers further down the chain of distribution may not sue even though the illegal overcharges were passed-through to them. *Illinois Brick*, 431 U.S. at 746.

In *In re Beef*, the Fifth Circuit undertook a somewhat extensive analysis of monopsony and oligopsony power, *see* 600 F.2d at 1158-59, to examine the plaintiffs' contention "that *Illinois Brick* is entirely inappropriate to price-fixing suits brought by sellers against indirect purchasers" because "the harm engendered by monopsony or oligopsony pricing of the kind alleged is, as a categorical matter, greater than that engendered by monopoly pricing," *id.* at 1158. The court found that contention thoroughly unpersuasive: "There is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes." *Id.* at 1159. On remand, summary judgment was entered for the defendant-supermarket chains because the plaintiffs could not produce sufficient evidence to sustain the cost-plus exception allegations. *In re Beef Indus. Antitrust Litig.*, 542 F. Supp. 1122, 1140-42 (N.D. Tex. 1982), *aff'd*, 710 F.2d 216 (5th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

66. *Shapiro*, 472 F. Supp. at 639.

67. *Id.* at 641-47.

68. *Id.* at 648.

alty-free licensing policy [meant] lower consumer prices,"<sup>69</sup> the court sharply focused on the tension between the plaintiffs' monopsony claim and the pro-consumer thrust of antitrust law.<sup>70</sup> The court explained that the major car manufacturers, "behaving as rational economic decision makers "were simply" bargaining with their suppliers (plaintiffs' licensees) to secure the seat belt retractors at lower prices,"<sup>71</sup> and noted that the plaintiffs had been "out-bargained."<sup>72</sup> The court recognized that the auto makers' hard-bargaining "benefit[ed] consumers"<sup>73</sup> and warned that "[a]bandoning the royalty-free licensing policy would undoubtedly raise prices for defendants, and, just incidentally, line plaintiffs' pockets."<sup>74</sup>

The court dismissed the complaint. But the dismissal was not premised on a finding that monopsonization fails to state a claim. Rather, it was based on lack of standing to assert any antitrust claim, including the monopsonization claim.<sup>75</sup>

The second decision, *Custom Auto Body, Inc. v. Aetna Casualty & Surety Co.*,<sup>76</sup> involved a Sherman Act challenge to an insurer's "preferred" auto body repair shop program. Under the program, the insurer paid only what it considered the "competitive cost" of repair as an incentive for its insureds to compare auto repair shops for price. If an insured selected a shop that charged more than the "competitive cost" as determined by the insurer, the insured paid the excess.<sup>77</sup> To ease the shopping burden of its insureds, the insurer contracted with selected repair shops that were willing to charge no more than the "competitive cost."<sup>78</sup>

The plaintiff, an auto repair shop without a contract with the insurer, attacked the program as an unreasonable trade restraint in violation of section 1.<sup>79</sup> The plaintiff's allegation that the insurer had sufficient monopsony power to force auto repair shops to con-

---

69. *Id.*

70. *Id.*; see *supra* notes 9-10 and accompanying text.

71. *Shapiro*, 472 F. Supp. at 648.

72. *Id.*

73. *Id.*

74. *Id.*

75. The court found that the plaintiffs' alleged injury was "both indirect and incidental" because "[w]hile they may consider themselves a 'target area,' the impact reaches them only as a result of the loss of royalties which, in turn, follows from the business agreement between the licensees (suppliers) and the car manufacturers." *Id.* at 661.

76. 1983-2 Trade Cas. (CCH) ¶ 65,629 (D.R.I. 1983).

77. *Id.* at 69,179.

78. *Id.* at 69,179-80.

79. *Id.* at 69,178.

tract with it at an "artificially low price" was vital to its claim.<sup>80</sup> Although the plaintiff asserted no section 2 claim, the court was sufficiently intrigued with the plaintiff's monopsony power theory that it denied the defendant's summary judgment motion.<sup>81</sup>

The court considered the plaintiff's monopsony power allegation sufficient to require rule of reason scrutiny of the agreements between the defendant and its preferred repair shops.<sup>82</sup> To test for anticompetitive effect, the court identified three elements of an abuse of monopsony power:

*First*, the buyer must have "significant market power" for its purchases to "have an appreciable effect on total output";<sup>83</sup>

*Second*, the buyer must make its purchases in an industry with "a rising cost curve" (an industry in which the incremental cost to produce one more unit of output increases);<sup>84</sup> and

*Third*, the buyer must have "the power to restrict its purchases to a particular amount."<sup>85</sup>

The court recognized that, only when all three of these conditions are satisfied, is it rational for a large-scale buyer to limit its purchases "to a smaller quantity of goods at a lower price than would be prevalent under conditions of free competition."<sup>86</sup> Only then does an exercise of monopsony power restrict output and create the economic inefficiency of a "deadweight loss."<sup>87</sup>

The court's conclusion that an exercise of monopsony power to depress price can sustain a section 1 rule of reason claim, particularly when no section 2 monopsonization claim is alleged, is unsound. The logical corollary of that approach would be that any sale by a monopolist could be attacked under section 1 as an unreasonable trade restraint even if the monopolist had attained its mar-

80. *Id.* at 69,184.

81. *Id.* at 69,186. The court, however, granted the defendant summary judgment on the plaintiff's per se price-fixing and group boycott claims. *Id.* at 69,183-84, 69,187-91, 69,192.

82. *Id.* at 69,184.

83. *Id.* at 69,185.

84. *Id.*

85. *Id.*; see IV P. AREEDA & D. TURNER, *supra* note 10, at 202 n.2. Although no evidence had been offered on the first or second element, the court declined to dismiss the plaintiff's section 1 claim because "it would be open to the defendant to restrict the level of repair service purchased by arranging for its preferred shops to perform repairs of an inferior quality." *Custom Auto Body*, 1983-2 Trade Cas. (CCH) ¶ 65,629, at 69,186. The First Circuit's subsequent decision in *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985), discussed *infra* at notes 136-46 and accompanying text, rejected this analysis.

86. *Custom Auto Body*, 1983-2 Trade Cas. (CCH) ¶ 65,629, at 69,185.

87. See *supra* notes 35-38 and accompanying text.



ket status legally under section 2.<sup>88</sup> But a monopolist has the right to compete<sup>89</sup> and even to enjoy the benefits of supracompetitive pricing if it has attained and remained a monopoly legally.<sup>90</sup> Thus, the court's view that a unilateral exercise of monopsony power can amount to an unreasonable trade restraint violative of section 1 is wrong.<sup>91</sup>

---

88. Monopoly obtained "as a consequence of a superior product, business acumen, or historic accident" does not violate section 2. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *see United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429-30 (1945) (not illegal to have monopoly "thrust upon" or attained "by virtue of . . . superior skill, foresight and industry"); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953) (section 2 does not condemn one "who merely by superior skill and intelligence . . . got the whole business because nobody else could do it as well"), *aff'd per curiam*, 347 U.S. 521 (1954).

89. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980):

[I]t would be inherently unfair to condemn success when the Sherman Act itself mandates competition. Such a wooden rule . . . might also deprive the leading firm in an industry of the incentive to exert its best efforts. Further success would yield not rewards but legal castigation. The antitrust laws would thus compel the very sloth they were intended to prevent.

*Accord MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1114 (7th Cir.) (it is "in the interest of competition to permit dominant firms to engage in vigorous competition"), *cert. denied*, 464 U.S. 891 (1983); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544-46 (9th Cir. 1983) ("monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits"), *cert. denied*, 465 U.S. 1038 (1984); *California Computer Prods., Inc. v. International Business Machs. Corp.*, 613 F.2d 727 (9th Cir. 1979) (defendant manufacturer's acts constituted reasonable, procompetitive conduct); *ILC Peripherals Leasing Corp. v. International Business Machs. Corp.*, 458 F. Supp. 423, 436-44 (N.D. Cal.) (defendant manufacturer's acts constituted reasonable response to competition), *aff'd* 636 F.2d 1188 (1978); *see United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) ("[t]he successful competitor, having been urged to compete, must not be turned upon when he wins"). *Cf. Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980) (monopolist publisher had no duty to publish schedule of commuter airlines, even when nonpublication put airlines at a significant disadvantage).

90. *See Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986) ("monopolists may raise prices to customers, may charge what the traffic will bear, so long as they came by their market power lawfully"); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985) ("even a monopolist is free to exploit whatever market power it may possess when that exploitation takes the form of charging uncompetitive prices"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979) ("a lawful monopolist ordinarily [is not] precluded from charging as high a price for its product as the market will accept"), *cert. denied*, 444 U.S. 1093 (1980); *id.* at 294 ("no court has required a lawful monopolist to forfeit to a purchaser three times the increment of its price over that which would prevail in a competitive market"); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ("[p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"). *Cf. Youle & Daw, supra* note 3, at 314-17 ("a monopolist's refusal to give one of its suppliers favored treatment does not violate Section 2").

91. *Cf. Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984)

### III. MONOPSONY THEORY APPLIED IN HEALTH CARE MARKETS

#### A. *The Early Cases*

The early antitrust cases involving health care markets tended to focus on section 1 price-fixing issues.<sup>92</sup> Several, however, mention monopsony in a manner which, by implication, suggests that monopsonization is a viable section 2 claim. One of the earliest is *Webster County Memorial Hospital, Inc. v. United Mine Workers of America Welfare & Retirement Fund of 1950*,<sup>93</sup> which is among the first of a long line of cases involving attacks by health care providers upon prepaid service benefit plans that buy their services.<sup>94</sup>

The hospital in *Webster County* had contracts with the United Mine Workers of America Welfare and Retirement Fund of 1950 (the "Fund") under which the hospital provided services to the Fund's beneficiaries and was paid by the Fund in accordance with the pricing terms of the contracts.<sup>95</sup> The Fund had refused the hospital's demands for price increases in what the hospital was permitted to charge the Fund under the contracts.<sup>96</sup> The Fund also had prohibited the hospital from charging the Fund's beneficiaries for the excess that the Fund refused to pay.<sup>97</sup> Frustrated, the hospital filed suit claiming that the Fund violated section 1 of the Sherman Act by fixing prices for the hospital care provided the Fund's beneficiaries and by threatening a boycott.<sup>98</sup>

The hospital theorized that the beneficiaries were the buyers, notwithstanding that the Fund paid for the services.<sup>99</sup> The hospital asserted that the Fund interfered with the pricing structure between the hospital as seller and the beneficiaries as buyers.<sup>100</sup> The district court dismissed the complaint for failure to state a claim, and the D.C. Circuit Court affirmed the dismissal.<sup>101</sup>

The court recognized the similarity of the Fund's status "to that of a group buying agent negotiating a price for medical care on

---

("the conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization").

92. See *supra* note 3 and accompanying text.

93. 536 F.2d 419 (D.C. Cir. 1976) (per curiam).

94. See *supra* note 1.

95. *Webster County Memorial Hosp.*, 536 F.2d at 419-20.

96. *Id.* at 420.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

behalf of its beneficiaries,"<sup>102</sup> and stressed that "negotiations with suppliers of medical care as alleged in this case, without more," do not amount to an unreasonable restraint of trade.<sup>103</sup> The court also remarked that the hospital had not alleged monopoly or monopsony.<sup>104</sup> The court thus implied that, had plaintiff alleged monopsony power by the Fund, the "more" may have been supplied and a cognizable claim stated.

A similar implication for health care plaintiffs appeared in *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*<sup>105</sup> In that case, pharmacies challenged an insurer's prepaid prescription drug plan as price-fixing violative of section 1. Under the plan, insureds who bought the coverage could obtain prescription drugs from any pharmacy participating in the plan at nominal or no cost to them; the participating pharmacy was paid by the insurer at the rate set in the participation contract between the insurer and the pharmacy.<sup>106</sup> If the insured obtained the prescription drug at a nonparticipating pharmacy, the insured had to pay the full amount charged by the pharmacy and would receive reimbursement from the insurer only up to the amount set by the insurer's participation contracts with participating pharmacies; the excess, if any, was borne by the insured.<sup>107</sup>

Finding that the defendant insurer was the purchaser,<sup>108</sup> the district court granted summary judgment dismissing the price-fixing claims.<sup>109</sup> In reaching this result, the district court noted that "plaintiffs' conclusory claim of 'buyer conspiracy' . . . must also fail."<sup>110</sup> This conclusion was correct because the court had already found that there had been no claim that the defendant had conspired with any other payors who offered comparable prescription drug plans.<sup>111</sup> But rather than reiterate this finding as the basis for rejecting the plaintiffs' buyer conspiracy contention, the court resorted to the plaintiffs' failure to allege that the defendant had

---

102. *Id.* For authorities addressing the legality of group purchasing arrangements, see *supra* note 63.

103. *Webster County Memorial Hosp.*, 536 F.2d at 420.

104. *Id.*

105. 518 F. Supp. 1100 (D. Conn. 1981), *aff'd per curiam*, 675 F.2d 502 (2d Cir. 1982).

106. 518 F. Supp. at 1103.

107. *Id.*

108. *Id.* at 1109.

109. *Id.*

110. *Id.* at 1108 n.9.

111. *Id.* at 1106.

“dominant buying power in the market.”<sup>112</sup> Once again, the court implied that, had the plaintiffs pleaded and shown monopsony power, their claims would have survived. The court also stressed, however, apparently to distinguish *Mandeville Island Farms*, that, “to establish a ‘buyer conspiracy,’ plaintiffs must show not only monopsony power, but something more than the mere existence of a group of buyers.”<sup>113</sup> The “something more” is left unspecified.

The Second Circuit affirmed the summary judgment.<sup>114</sup> It also reinforced the implications of the district court’s comments on monopsony power by instructing that the plaintiffs had nowhere claimed that the defendant’s ten percent market share gave it “monopsony power with which it might be capable of obtaining agreements with anticompetitive effect.”<sup>115</sup> Arguably, the message is that, if the market share is big enough, there may be sufficient monopsony power to sustain a seller’s Sherman Act claim that a purchasing agreement obtained without collusion by a powerful buyer could be anticompetitive.

*St. Bernard General Hospital, Inc. v. Hospital Service Association of New Orleans, Inc.*<sup>116</sup> also contains a gratuitous reference to monopsony. The case presented price-fixing claims analogous to those in *Webster County Memorial Hospital*,<sup>117</sup> except that horizontal aspects were found to have been alleged.<sup>118</sup> The Fifth Circuit reversed the district court’s dismissal of the price-fixing claim because it found sufficient evidence of hospital control of the third-party payor defendant to support a finding of a horizontal conspiracy.<sup>119</sup> The Fifth Circuit also found it “notabl[e]” that the plaintiff had not alleged “abuse of monopoly or monopsony power under Section 2.”<sup>120</sup> The Court did not elaborate, however, on why this omission by the plaintiff was notable. The implication is that the plaintiff missed an opportunity to assert a cognizable claim for monopsonization.<sup>121</sup>

---

112. *Id.* at 1108 n.9.

113. *Id.*

114. 675 F.2d 502 (2d Cir. 1982) (per curiam).

115. *Id.* at 507.

116. 712 F.2d 978 (5th Cir. 1983), *cert. denied*, 466 U.S. 970 (1984).

117. *See supra* notes 93-101 and accompanying text.

118. 712 F.2d at 985-87. Regarding the significance of the horizontal aspects. *see supra* note 3.

119. *St. Bernard General Hosp.*, 712 F.2d at 987.

120. *Id.* at 987 n.15.

121. For other cases containing similar negative pregnant concerns concerning monopsonization, see *Fishman v. Estate of Wirtz*, 807 F.2d 520, 532 n.9 (7th Cir. 1986) (in antitrust case over rivalry for purchase of the Chicago Bulls National Basketball Association franchise, court notes, if relevant market alleged had been “national sports franchises.”

### B. *The Recent Cases*

With it becoming apparent from the earlier cases that a price-fixing theory would be unavailing unless a horizontal conspiracy could be shown,<sup>122</sup> providers began to act on the signals that a monopsony theory might work. They started to augment their section 1 claims with section 2 monopsony theories.

The first of these cases was *Pennsylvania Dental Association v. Medical Service Association*.<sup>123</sup> That case presented a hybrid claim in which the plaintiffs asserted monopolization under section 2, though the gravamen of their complaint was that the defendant was exercising monopsony power over them.<sup>124</sup> The plaintiff dentists argued that there were two relevant markets: (a) a market for the sale of dental insurance, consisting of (i) a submarket for the sale of prepaid dental service insurance and (ii) a submarket for the sale of all other forms of dental insurance; and (b) a market for the purchase of dental services, consisting of (i) a submarket for the purchase of dental care by individuals and (ii) a submarket for the purchase of "bulk" dental care by prepaid dental service insurance

---

then "the charge would be monopsony, that is, that [the defendant] had made itself the only *buyer* of basketball franchises in Chicago"); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 655 (7th Cir. 1984) ("[t]he closest antitrust violation to anything alleged in this case would be a conspiracy among buyers to depress the price of a product that they buy by limiting the amount they buy—a conspiracy, in the language of antitrust economics, to 'monopsonize,' " but no such allegation made); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 547-48 (5th Cir. 1980) (finding that the plaintiff lacked standing, court comments that the plaintiff "would arguably be within the 'target area' " on a claim that "monopoly power or a conspiracy in restraint of trade at the refining level might give the defendant oil companies monopsony or oligopsony power to dictate prices at which sellers of crude oil would be able to sell their product").

A contrary message appears in *Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). That case involved Sherman Act § 1 claims brought by auto body repair shops to challenge insurers' preferred repair shop plans similar in operation to that in *Custom Auto Body*, see *supra* text accompanying notes 76-78, and to the prescription drug plan in *Medical Arts Pharmacy*, see *supra* text accompanying notes 105-07. In rejecting the claims, the Seventh Circuit was unpersuaded by pleas that the defendants "as large-scale purchasers of services wield substantial market power through use of these preferred repair shop agreements." *Quality Auto Body*, 660 F.2d at 1204. The court admonished that "[t]he Sherman Act provides no remedy for imbalance of market power as such, absent certain types of abuse," *id.*, and stressed that section 1 "does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business . . . even where, as here, the buyers are big and the sellers are comparatively small," *id.* at 1205. The message in monopsony terms was blunted, however, because no section 2 claims were pressed in *Quality Auto Body*.

122. See *supra* note 3 and accompanying text.

123. 574 F. Supp. 457 (M.D. Pa. 1983), *aff'd*, 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).

124. 574 F. Supp. at 469-70.

plans like the defendant.<sup>125</sup> They asserted that the defendant had “monopsony power as a buyer of prepaid dental services” in the market for the purchase of dental services<sup>126</sup> and claimed that the monopsony power enabled the defendant “to pay ten percent less for dental services provided to its [insureds] than is paid for dental care provided to other persons.”<sup>127</sup> The result of this alleged exercise of monopsony power was to suppress the income of Pennsylvania dentists.<sup>128</sup>

Rather than allege monopsonization of the market for the purchase of dental services, the dentists alleged monopolization of the market for the sale of dental insurance.<sup>129</sup> Their apparent theory was that the defendant was using the price advantage gained by its exercise of monopsony power to undercut and thereby exclude its competitors in the sale of prepaid dental services insurance.<sup>130</sup> As the court recognized, that theory raised serious standing questions because the dentists did not compete in the market allegedly monopolized—the sale of prepaid dental services insurance.<sup>131</sup> But the defendant had not raised a standing defense.<sup>132</sup>

Nevertheless, the court granted summary judgment for the defendant, finding no factual support for the dentists’ contentions.<sup>133</sup> There was no evidence that the defendant had monopoly power in the alleged market for the sale of prepaid dental service insurance.<sup>134</sup> The court did not examine whether the defendant had monopsony power in the purchase of “bulk” prepaid dental services. The court apparently found that examination unnecessary because the plaintiffs had not actually alleged that the claimed use of monopsony power violated the Sherman Act. The Third Circuit, in affirming the summary judgment, appeared to construe the district court’s analysis as though the district court had found no evidence to support a monopsony in the alleged market for the purchase of

---

125. *Id.*

126. *Id.* at 470.

127. *Id.*

128. *Id.*

129. *Id.* at 469.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 470-73.

134. *Id.* at 472. See also *Barry v. Blue Cross*, 805 F.2d 866, 874 (9th Cir. 1986) (no evidence that defendant insurer monopolized market for medical insurance); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1334-40 (7th Cir. 1986) (no evidence that providers of health care financing monopolized market for “preferred provider organization” plans).

dental services in "bulk."<sup>135</sup>

The antitrust significance of monopsony power was finally presented for examination in *Kartell v. Blue Shield of Massachusetts, Inc.*<sup>136</sup> In *Kartell*, the plaintiff physicians attacked their participation agreements with Massachusetts Blue Shield, a prepaid insurance plan, because the agreements forbade them from "balance billing" Blue Shield's insureds.<sup>137</sup> The practice of balance billing involves charging the insureds any amounts by which their physicians' fees exceeded the amounts Blue Shield would pay them under the participation agreements.<sup>138</sup> The district court, after trial, found the ban an unreasonable trade restraint in violation of section 1 because of the defendant's monopsony power over physician services.<sup>139</sup> On appeal, the First Circuit assumed that Blue Shield had monopsony power and had exercised it "to obtain 'lower than competitive' prices" from physicians.<sup>140</sup>

In analyzing the merits of the physicians' monopsony power claim, the First Circuit stressed that a necessary predicate to the claim's validity would be "that the law forbids a buyer with market power to bargain for 'uncompetitive' or 'unreasonable' prices."<sup>141</sup> The court rejected that predicate, stressing that "[a] legitimate buyer is entitled to use its market power to keep prices down."<sup>142</sup> The court also observed that such a theory puts in issue "low prices, not high prices,"<sup>143</sup> and emphasized that Congress intended the Sherman Act "as a way of protecting consumers against prices that were too *high*, not too low."<sup>144</sup> Accordingly, the First Circuit warned that "courts at least should be cautious—reluctant to condemn too speedily—an arrangement that, on its face, appears to bring price benefits to the consumer."<sup>145</sup> Thus, the court rejected the plaintiffs' monopsonization claims, entering judgment for Blue

---

135. *Pennsylvania Dental Ass'n*, 745 F.2d at 262.

136. 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985).

137. *Id.* at 923.

138. *Id.*

139. 582 F. Supp. 734, 755 (D. Mass.), *aff'd in part, rev'd in part*, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985); see *Custom Auto Body*, 1983-2 Trade Cas. (CCH) ¶ 65,629 (D.R.I. 1983).

140. *Kartell*, 749 F.2d at 927.

141. *Id.*

142. *Id.* at 929. This holding plainly conflicts with the contrary proposition that underlies the district court's analysis in *Custom Auto Body*. See *supra* notes 76-91 and accompanying text.

143. *Kartell*, 749 F.2d at 930.

144. *Id.* at 931 (emphasis in original).

145. *Id.* Regarding the consumer welfare focus of antitrust law, see *supra* notes 9-10 and accompanying text.

Shield.<sup>146</sup>

In *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*,<sup>147</sup> monopsonization as a section 2 violation was the very essence of the plaintiffs' case. In *Ball Memorial Hospital*, the plaintiff hospitals complained that the announced implementation of a "preferred provider organization"<sup>148</sup> by Indiana Blue Cross, a prepaid insurance plan, would have anticompetitive effects on both the market for the sale of health care financing plans and the market for the sale of hospital services.<sup>149</sup> The claim failed because the plaintiffs could not establish market power on the part of Blue Cross.<sup>150</sup> On appeal, the Seventh Circuit declined an invitation by Indiana Blue Cross to determine whether the hospitals' monopsonization claim stated a cause of action under section 2.<sup>151</sup> The court's analysis of the case, however, indicates hostility to the viability of such a claim.

In their attempt to save their case against the findings that Blue Cross lacked market power, the hospitals argued that, under section 2, "any firm with a large market share has an obligation not to augment that share at the expense of rivals and may not drive hard bargains."<sup>152</sup> The court considered the hospital's contention an argument that "intent to get the best price is a bad intent."<sup>153</sup> Thus

---

146. *Kartell*, 749 F.2d at 931.

147. 603 F. Supp. 1077 (S.D. Ind. 1985), *aff'd*, 784 F.2d 1325 (7th Cir. 1986).

148. A "preferred provider organization" or "PPO" is a health care financing mechanism that uses financial incentives to prompt insureds enrolled in the PPO to select designated or "preferred" providers of health care services. The incentive typically used is to require insureds to make a substantial co-payment when they select a "non-preferred" provider while paying 100 percent of the covered expenses when they select a "preferred" provider. See 603 F. Supp. at 1078, 1081-83; Youle & Daw, *supra* note 3, at 302-04. PPOs may be contrasted with traditional prepaid health insurance, which usually provides coverage regardless of the provider selected by the insured, and with "health maintenance organizations" or "HMOs," which generally provide coverage only when the insured uses a provider affiliated with the HMO. See *Ball Memorial Hosp.*, 784 F.2d at 1329-30.

149. *Ball Memorial Hosp.*, 603 F. Supp. at 1079.

150. *Ball Memorial Hosp.*, 784 F.2d at 1334-40. The same defect in section 2 claims by physicians against a prepaid medical service insurance plan was recently found in *Barry v. Blue Cross*, 805 F.2d 866, 874 (9th Cir. 1986).

151. See *Ball Memorial Hosp.*, 784 F.2d at 1340-41. Indiana Blue Cross had argued on appeal that the Seventh Circuit should direct a judgment against the plaintiffs' monopsony claim. Brief of Defendants-Appellees at 18-25, *Ball Memorial Hosp.*, 784 F.2d 1325 (7th Cir. 1986). The court considered the question not ripe for decision because the appeal was from denial of a motion for a preliminary injunction and the record was not closed. *Ball Memorial Hosp.*, 784 F.2d at 1331, 1341.

152. *Ball Memorial Hosp.*, 784 F.2d at 1337.

153. *Id.* at 1338. In advancing the argument, the hospitals had relied on *Mandeville Island Farms*, 334 U.S. 219 (1948). The court, however, recognized that that case was inapposite because "*Mandeville* was a conspiracy to depress prices, and price-fixing car-



stated, the infirmity in the argument became transparent. As explained by the court, the defendant's "intent . . . to buy medical care for less . . . is just another description for hard bargaining and even a monopolist may bargain hard."<sup>154</sup>

#### IV. MONOPSONY AND A RULE OF PER SE LEGALITY

No court has yet accepted monopsonization as a viable section 2 claim, notwithstanding the implications of its viability in some cases.<sup>155</sup> The *Kartell* court rejected such a claim,<sup>156</sup> and no case law precedent provides a sound basis for the proscription of monopsony by section 2.<sup>157</sup> More importantly, the goal of antitrust policy and the danger of deterring competitive conduct recommend the result that unilateral exercise of monopsony power ought not be subject to Sherman Act sanction.

##### A. Antitrust Policy

Courts and commentators generally agree that the policy goal of antitrust law is to enhance consumer welfare through the preservation of competition and the promotion of economic efficiency.<sup>158</sup> Hard bargaining by buyers, regardless of their size, advances that goal. It forces sellers to compete more vigorously, to cut prices or improve products to win the business, and to seek ways to produce more efficiently. When the buyer is the consumer, these benefits flow directly to the intended beneficiaries of antitrust policy. Even when the buyer is an intermediary, as is generally the situation in health care markets where third-party payors predominate, consumers still benefit because the intermediaries, for their own competitive purposes, tend to pass on the savings to their customers.<sup>159</sup>

---

tels are unlawful independent of their efficacy." *Ball Memorial Hosp.*, 784 F.2d at 1338; see *supra* note 56. In contrast, the defendant in *Ball Memorial Hosp.* was "a single firm, and the acts of single firms are judged by a different standard under § 2." *Ball Memorial Hosp.*, 784 F.2d at 1338; see *supra* notes 19-20 and accompanying text.

154. *Ball Memorial Hosp.*, 784 F.2d at 1339; see *supra* notes 88-91 and accompanying text.

155. See *supra* notes 45-154 and accompanying text.

156. See *supra* notes 136-46 and accompanying text.

157. See *supra* notes 45-154 and accompanying text.

158. See *supra* notes 9-10 and accompanying text.

159. See *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973). In that case, a competitor claimed that a Blue Cross plan's use of alleged monopsony power to obtain hospital discounts which enabled the plan to charge cheaper premiums than its rivals violated Sherman Act sections 1 and 2. The court, assuming the existence of the alleged monopsony power, nevertheless rejected the claims:

In its negotiating with hospitals, Blue Cross has done no more than conduct its business as every rational enterprise does, i.e., get the best deal possible. This

These fundamental economic principles apply to health care markets. Physicians, for example, are professionals marketing extraordinary skill under high ethical standards. But that does not insulate them either from the economic realities of the marketplace or the reach of antitrust law.<sup>160</sup> Likewise, not-for-profit hospitals and medical centers perform laudable and necessary social services in providing charity care and medical research. But that suspends neither the operation of the marketplace nor the application of antitrust law.<sup>161</sup>

---

pressure encourages hospitals to keep their costs down; and, for its own competitive advantage, Blue Cross passes along the saving thus realized to consumers. To be sure, Blue Cross' initiative makes life harder for commercial competitors such as [the plaintiff]. The antitrust laws, however, protect competition, not competitors; and stiff competition is encouraged, not condemned.

*Id.* at 84.

In *Ball Memorial Hosp.*, the hospitals had argued that Blue Cross' efforts to get lower prices were forcing them to "cost-shift" to other insurers the amounts of the discounts to Blue Cross, thereby raising the costs of Blue Cross' rivals to their competitive disadvantage. See *Ball Memorial Hosp.*, 784 F.2d at 1339-40. Among the many infirmities in this "cost-shift" theory is that it attempts to condemn rational efforts by buyers to get the lowest possible price, which has the effect of promoting seller-efficiency and enhancing competition. See *Feldman v. Health Care Serv. Corp.*, 562 F. Supp. 941, 950 (N.D. Ill. 1982); *Sausalito Pharmacy, Inc. v. Blue Shield*, 544 F. Supp. 230, 238 n.2 (N.D. Cal. 1981), *aff'd per curiam*, 677 F.2d 47 (9th Cir.), *cert. denied*, 459 U.S. 1016 (1982); *Youle & Daw*, *supra* note 3, at 311-12, 369.

In rejecting the "cost-shift" theory in *Ball Memorial Hosp.* because of the absence of market power, the Seventh Circuit made the accurate observation that "[i]t is . . . hard to see why, if the Hospitals can raise their prices to other buyers of their services, they do not do so whether or not they join the [Blue Cross] PPO plan." *Ball Memorial Hosp.*, 784 F.2d at 1340.

160. See *FTC v. Indiana Fed'n of Dentists*, 106 S. Ct. 2009 (1986) (dentists' coalition "not entitled to preempt the working of the market by deciding for itself that its customers do not need that which they demand"); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (ethical canon prohibiting competitive bidding violates Sherman Act § 1); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (bar association rule setting minimum legal fees violates Sherman Act § 1). See generally *Weller*, *supra* note 3. Some commentators have suggested that health care practitioner licensure and credentialing diminish consumer welfare by restraining competition. See *Baron, Licensure of Health Care Professionals: The Consumer's Case for Abolition*, 9 AM. J.L. & MED. 335 (1983); *Havighurst & King, Private Credentialing of Health Care Personnel: An Antitrust Perspective* (pts. 1 & 2), 9 AM. J.L. & MED. 131, 263 (1983). For a response to these views, see *Rankin & Hubbard, Private Credentialing of Health Care Personnel: A Pragmatic Response to Academic Theory*, 10 AM. J.L. & MED. 189 (1984).

161. In *In re Hospital Corp. of Am.*, 106 F.T.C. 361, 504 (1985), *enforced*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 975 (1987), a merger case, the Federal Trade Commission warned: "If hospitals have a definition of output maximization or quality maximization that is different from the competitive [i.e., economically efficient] levels of output and quality, then any concerted action in furtherance of their goals will be anticompetitive."

In *Ball Memorial Hosp.*, the hospitals moved for a preliminary injunction, asserting that the lower prices sought by the Blue Cross PPO would reduce their ability to fund

The providers' clientele is changing. While it remains the individual which needs the care, it has become the insurer, the employer, or government that usually pays the bill. It is these payors that, in an antitrust sense, are the consumers of health care,<sup>162</sup> and it is they that are demanding constraints on the size of their health care bills. Among the most effective constraints is the workings of an open marketplace. The cost-containment demands of these payors, won through hard bargaining with providers forced to compete for their business, thus serves well the policy goals of antitrust by rewarding the efficient provider which can offer the better product or the same product at a lower price.<sup>163</sup> Thus, to permit health care providers, indeed, any sellers, to invoke section 2 to discipline powerful buyers who seek low prices is to subvert the pro-consumer goals of the Sherman Act.<sup>164</sup>

Moreover, the test for application of the rule of per se illegality—conduct that “facially . . . always or almost always tend[s] to restrict competition and decrease output”<sup>165</sup>—supports a rule of per se legality for monopsony. Hard bargaining to extract low prices, even by a monopsonist, is conduct that facially appears to increase economic efficiency and render markets more competitive.

An exercise of monopsony power may theoretically cause consumer harm by reducing output in the market in which the monopsonist buys and thereby causing resource misallocation.<sup>166</sup> This was indeed the thrust of the competitive injury asserted by the phy-

---

medical education and charity care, thereby resulting in a public harm. See Brief of Plaintiffs-Appellants at 23, *Ball Memorial Hosp.*, 784 F.2d 1325 (7th Cir. 1985). The Seventh Circuit did not bother to address these non-economic issues. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978) (“that competition is not entirely conducive to ethical behavior . . . is not a reason, cognizable under the Sherman Act, for doing away with competition”).

162. See *supra* note 3 and accompanying text.

163. In *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978), the Supreme Court emphasized

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

164. As one court succinctly put it: “The failure to make more money . . . is simply not the kind of problem which the antitrust laws address. Quite the contrary, the primary goal of the antitrust laws is consumer welfare, not competitor welfare.” *Sausalito Pharmacy, Inc. v. Blue Shield*, 544 F. Supp. 230, 235 (N.D. Cal. 1981), *aff'd per curiam*, 677 F.2d 47 (9th Cir.), *cert. denied*, 459 U.S. 1016 (1982).

165. *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 19-20 (1979); see *supra* notes 16-18 and accompanying text.

166. See *supra* notes 35-38 and accompanying text.

sicians in *Kartell*<sup>167</sup> and the hospitals in *Ball Memorial Hospital*.<sup>168</sup> But if the monopsonist is not also a monopolist, consumers will receive the tangible benefit of lower prices in the monopsonist's output market because of the monopsonist's hard bargaining. Absent a monopoly in its output market, any reduction in a monopsonist's output would only result in lost sales and reduced market share to the benefit of its output competitors.<sup>169</sup>

Thus, an exercise of monopsony power to obtain "below competitive" input prices by a firm, such as a third party payor, that faces output competition should redound to the benefit of consumers in the form of cheaper products in the output market.<sup>170</sup> Penalizing that conduct under section 2 would diminish a direct and tangible consumer benefit in favor of avoidance of an indirect consumer harm caused by the resource misallocation that economic theory predicts should occur.<sup>171</sup> If the firm with monopsony power also has a monopoly, then any anticompetitive or exclusionary practices can be reached by the section 2 prohibitions against monopolization, and prohibition of monopsonization is not needed to remedy the anticompetitive effects.

### B. *Danger of Deterring Competitive Conduct*

While the consumer welfare goal of antitrust law weighs heavily in favor of per se legality for monopsony, this is not a complete answer. Monopsony may be rare,<sup>172</sup> but if it exists, it theoretically would cause economic inefficiency.<sup>173</sup> What tips the balance conclusively in favor of per se legality is that the judicial system lacks devices sufficiently delicate to detect the difference between hard bargaining and abuse of buyer power.

Because the outcome of antitrust litigation often turns on infer-

---

167. See *supra* notes 136-46 and accompanying text.

168. See *supra* notes 147-54 and accompanying text.

169. See IV P. AREEDA & D. TURNER, *supra* note 10, at 204.

170. See *FTC v. Indiana Fed'n of Dentists*, 106 S. Ct. 2009, 2020 (1986) (insurers "are themselves in competition for the patronage of the patients . . . and must satisfy their potential customers not only that they will provide coverage at a reasonable cost, but also that that coverage will be adequate to meet their customers' dental needs"). Cf. *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1391 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1975 (1987).

171. Any competitive advantage in the output market gained simply through the exercise of a firm's monopsony purchasing power would not be sufficient to support a section 2 claim. See *supra* note 159.

172. The Supreme Court has cautioned that the rarity of an anticompetitive practice is not a sufficient basis for declaring it per se legal. *Cargill, Inc. v. Monfort of Colo., Inc.*, 107 S. Ct. 484, 495 (1986).

173. See *supra* notes 35-38 and accompanying text.

ences drawn by the trier-of-fact from generally ambiguous evidence of conduct, intent and purpose,<sup>174</sup> the litigation process used to determine the division between antitrust violation and exoneration is inherently imperfect. Neither judge nor jury has available an absolute litmus test for truth; rather, each must rely on such things as perceptions, credibility, and nuance to try to decipher if challenged conduct really is anticompetitive. That task, difficult in any context, is especially difficult when the trier-of-fact is asked to draw the line between legitimate efforts of a large buyer to get low prices and abuse of monopsony power to depress price below competitive levels.

The cost of a mistake in making that determination is very high in terms of social welfare. It would result in disciplining hard bargaining, the very competitive activity the Sherman Act protects, by submitting powerful buyers mistaken as monopsonists to treble damages and the other considerable expense and burden of antitrust litigation. This is what nearly occurred, for example, in *Kartell*, where Massachusetts Blue Shield's efforts to control costs to its insured by delivering a fully prepaid product were almost thwarted by the district court's view that the balance billing ban unreasonably restrained physicians' freedom to charge as much as they wished.<sup>175</sup>

The Supreme Court recently recognized the negative implications for antitrust policy when the potential for such grave mistakes is likely. Addressing claims of predatory pricing in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>176</sup> the Court acknowledged that "cutting prices in order to increase business often is the very essence of competition."<sup>177</sup> The Court then stressed that "mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect."<sup>178</sup>

This observation is perhaps even more true when applied to purchasing activities that yield low prices. Indeed, to allow com-

---

174. See *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962).

175. See *supra* notes 136-40 and accompanying text.

176. 106 S. Ct. 1348 (1986).

177. *Id.* at 1360.

178. *Id.* In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984), the Supreme Court similarly observed:

In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

petitive conduct like hard bargaining to serve as a basis for a Sherman Act claim "could have the very serious consequence of deterring, and indeed prohibiting (if a court made an improper diagnosis of the defendant's conduct) desirable and competitive behavior."<sup>179</sup>

The very threat that disgruntled sellers could invoke the Sherman Act when displeased with the deals offered by powerful buyers is sufficient to chill hard bargaining and its beneficial impact on competition and consumers. Antitrust litigation is notoriously protracted and expensive. Consequently, its avoidance, even when claims are frivolous, has a significant value.<sup>180</sup> To end this threat and the even greater harm to the goals of antitrust law that would flow from misconstruing hard bargaining as monopsony abuse, a rule of per se legality should be adopted. Courts should reject on their face section 2 claims premised on unilateral abuse of buyer power.

## V. CONCLUSION

Health care markets have become fertile grounds for the cultivation of section 2 theories premised on monopsony power. Providers under the pinch of cost containment have been particularly adventurous in seeking antitrust theories to discipline the hard bargaining tactics of third-party payors. Out of these adventures has emerged the use of monopsony as a section 2 weapon. That weapon should be blunted by a declaration that unilateral exercise of monopsony power does not violate section 2 of the Sherman Act.

The consumer welfare goals of antitrust are particularly well-served when hard bargaining is encouraged. The cost that would flow from deterring legitimate bargaining by subjecting it to the potential of section 2 liability is too high to permit monopsony claims that threaten to tame big buyers' efforts to get low prices.

Those principles apply in health care markets as in any other.

---

179. *General Communications Eng'g Inc. v. Motorola Communications & Elecs., Inc.*, 421 F. Supp. 274, 290 (N.D. Cal. 1976). *Cf. Hovenkamp, Vertical Restrictions and Monopoly Power*, 64 B.U.L. REV. 521, 545-46 (1984) (arguing for a rule of per se legality for certain vertical relationships).

180. The *Shapiro* court, for example, remarked that the *in terrorem* impact of an antitrust complaint often has settlement value "out of any proportion to its prospects of success at trial." *Shapiro*, 472 F. Supp. at 660. *Cf. MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1112-14 (7th Cir. 1983) (commenting on how expensive and unworkable an "intent-test" to determine below-cost pricing would be), *cert. denied*, 464 U.S. 891.

Indeed, perhaps to a greater extent because of the market imperfections and complexity of health care delivery and the apparent willingness of providers to use the Sherman Act as a sword to attack cost-containment initiatives of third-party payors. There should be no special rule that insulates health care providers from competitive pressures. The social goals of antitrust law serve consumers in health care markets as well as in other markets. Those goals will be better served by adoption of a rule of per se legality for unilateral exercises of monopsony power.