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MONOPSONY REVISITED: A COMMENT
ON BLAIR & HARRISON

By

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Monopsony revisited: a comment on Blair & Harrison

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Largely ignored during the first century of American antitrust, the issue of monopsony power—the market power of buyers—has finally begun to attract academic notice. Within the last year, two articles have analyzed the subject in detail: *Joint Purchasing, Monopsony and Antitrust*¹ by the present authors, followed shortly by *Antitrust Policy and Monopsony*² by Roger Blair and Jeffrey Harrison. Although the two articles proceed from similar economic premises, they reach conclusions that differ markedly. We urge a lenient approach to joint purchasing and other potentially monopsonistic practices. Blair and Harrison, however, argue that the treatment of monopsony should be comparatively harsh, symmetric to the antitrust approach to monopoly.

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¹ Jacobson & Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991) (prior version distributed as NERA Working Paper No. 1, Apr. 1990).

² Blair & Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991).

This comment compares the two approaches to monopsony problems and explains the reasons for the divergence in the analyses. The comment then examines a number of points that Blair and Harrison do not address. Taking these points into consideration, the comment concludes that serious monopsony problems are rare and that a harsh approach to monopsony issues is unwarranted.

The comment also addresses a criticism of our monopsony analysis published by Blair and Harrison in this issue of the *Antitrust Bulletin*.³ Blair and Harrison object to our proposal that rule of reason challenges to collective buyer conduct should be dismissed if the defendants' aggregate market share is below 40% to 50%. We agree with Blair and Harrison that sole reliance on market share is inappropriate but, as we explain, some device for screening out meritless cases is essential, and the market share device is the best screen available.

I.

Monopsony power is the converse of monopoly power. Monopoly power is the power of a *seller or group of sellers* to restrict output (sales) on the selling side of a market, thereby *increasing* selling prices. Monopsony power is the power of a *buyer or group of buyers* to restrict output (purchases) on the buying side of a market, thereby *decreasing* purchasing prices. Despite the obvious differences, the two concepts share one important common factor: both monopoly power and monopsony power depend on an ability to *restrict market output*.⁴

³ Blair & Harrison, *The Measurement of Monopsony Power*, 37 ANTITRUST BULL. 133 (1992).

⁴ There are theoretical exceptions to this rule. If the industry demand curve is positively sloped, the monopolist must increase output in order to increase selling prices. Similarly, if the industry supply curve is negatively sloped, the monopsonist must increase its purchases to lower purchasing prices. As a practical matter, however, industry demand curves do not slope upward, see Jacobson & Dorman, *supra* note 1, at 12 n.18, and it is virtually impossible to exercise monopsony power in an industry with a downward-sloping supply curve, see *id.* at 10 n.16. This comment therefore will ignore these theoretical exceptions.

The adverse economic effects of a successful exercise of monopsony power are analogous to the effects of monopoly. As a result of the output restriction, there is an allocative efficiency loss: too few units of the product (or service) are produced, and resources that would be more efficiently utilized in producing the product or service are diverted to less productive uses.⁵ A second effect is a wealth transfer: economic rents are transferred from the sellers of the product to the monopsonistic buyer. Put simply, the buyer's profits increase (since it pays less) and the sellers' profits decrease (since they receive less).

These effects of monopsony power are well known. A more subtle point, discussed both in our article⁶ and by Blair and Harrison,⁷ is that even though the initial effect of monopsony is to lower prices paid for an input, these lower prices may not translate into lower prices for the monopsonist's output as a seller in the downstream market. There are two possibilities: (1) If the monopsonist lacks market power on the selling side, prices in the downstream market will not be affected. By reducing its purchases of the input, the monopsonist is also reducing its output in the downstream market.⁸ Because the monopsonist lacks selling-side market power, however, its reduced output can have no effect on *market* price or output at the downstream level; other firms will simply expand to capture the lost sales. (2) If the monopsonist also has market power on the selling side, the downstream effect is different. The restriction of purchases of the input below the competitive level again results in a decrease in the monopsonist's selling-side output; but when the monopsonist with selling-side market power restricts production at the downstream level, a

⁵ If the monopsonist can engage in perfect price discrimination, there is no loss in allocative efficiency. Perfect price discrimination is virtually impossible, however, and its absence is therefore assumed in this discussion.

⁶ Jacobson & Dorman, *supra* note 1, at 8 & figures 3, 17, 65 & n.170, 75.

⁷ Blair & Harrison, *supra* note 2, at 303–06.

⁸ Alternatively, the quality of the product the monopsonist sells will be reduced. The economic effect is the same.

decrease in *market* output and an increase in price is the necessary result.

All this is common ground for the present authors and Blair and Harrison. But from these shared premises, the two perspectives diverge. Blair and Harrison see monopsony as a relatively common event with important adverse economic effects in the real world. Consequently, the antitrust analysis of buyer behavior they propose is essentially symmetrical to the antitrust treatment of seller conduct. We disagree. In our view, monopsonistic restriction of purchases below the competitive level is quite rare; and what may appear, at a glance, to be an anticompetitive exercise of monopsony power will often be procompetitive conduct yielding lower selling-side prices to consumers. Accordingly, we propose an antitrust analysis of buyer conduct substantially more lenient than that suggested by Blair and Harrison.

II.

If anticompetitive buyer conduct were common, a case might be made for correspondingly harsh treatment under the antitrust laws. Yet both theory and empirical evidence suggest otherwise.

A.

Several factors indicate that adverse effects on economic welfare resulting from the conduct of buyers are unlikely and infrequent. The most important factor is that monopsony power can be exercised only in an industry having an upward-sloping supply curve. If the supply curve is flat, a restriction of purchases will neither increase nor decrease price; by hypothesis, in an industry with a flat supply curve, variations in the quantity purchased have no effect on price at all.⁹ Similarly, if the supply curve has a nega-

⁹ The point is illustrated graphically in Jacobson & Dorman, *supra* note 1, at 11 (figure 4). The same point can be expressed mathematically. One measure of monopsony power is $1/\epsilon_s$, where ϵ_s is the elasticity of supply. See Blair & Harrison, *supra* note 3; see also Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981). If the supply curve is flat, ϵ_s is infinite, and the buyer's monopsony power is zero ($1/\epsilon_s = 0$): there is no power to affect price.

tive slope, an attempt to reduce price by restricting purchases will fail because the lower quantity will cause price to increase.

There is no monopoly analogue for this phenomenon. Unlike supply curves, which may have positive, flat, or sometimes even negative slopes depending on input scarcity and scale economies, demand curves (for all practical purposes) always slope downward. In this very important respect, monopoly and monopsony power are most certainly not symmetrical.

A second factor that must be considered in determining whether monopsony power, even if possessed and exercised, is socially harmful is the extent of market power on the selling side of the input (upstream) market. The input market may be characterized by a bilateral monopoly, i.e., a monopoly on the selling side and a monopsony on the buying side. If so, the presence of monopsony power will almost always be beneficial to downstream consumers. The unrestrained monopoly seller will of course seek to increase prices above the competitive level. Faced with a monopsony buyer, however, the monopolist's power will be constrained and market price and output will move toward the competitive level—improving economic welfare.¹⁰

Another factor to consider in evaluating whether adverse effects from buyer conduct are likely is the wide variety of potentially substantial efficiencies that can be achieved by buyers acting jointly. Most obviously, a joint buying arrangement can result in achievement of significant scale economies by the sellers. In addition, many joint buying arrangements result in savings in warehousing costs, transportation costs, and transaction costs.¹¹

¹⁰ Jacobson & Dorman, *supra* note 1, at 19. For an excellent technical discussion, see Blair, Kaserman & Romano, *A Pedagogical Treatment of Bilateral Monopoly*, 55 S. Econ. J. 831 (1989). As pointed out there, if joint profit maximization between the monopolist and monopsonist is assumed, quantity is determinate (at a point superior to the pure monopoly outcome), resulting in an expansion of output in the downstream market. Under extremely unusual supply and demand conditions and behavioral assumptions, bilateral monopoly can theoretically worsen economic welfare. The necessary conditions and assumptions, however, are unlikely ever to occur in the real world. See Jacobson & Dorman, *supra* note 1, at 19 n.33.

¹¹ For a more detailed discussion, see Jacobson & Dorman, *supra* note 1, at 62–66.

To the extent that joint buyer conduct leads to these (or other) efficiencies, social welfare will be improved (and any adverse effects offset).

B.

In light of the various analytical reasons for doubting whether buyer conduct is likely to have adverse consequences in a given case, the important question becomes whether the factors that may render buyer conduct harmless have any practical significance in the real world. Are supply curves typically flat? Is monopsony power often confronted by market power on the input product's selling side? Do joint buyer agreements regularly yield cost-saving efficiencies? To the extent the answers to these inquiries are affirmative, the monopsony problem dwindles in importance and the rationale for applying harsh antitrust rules disappears.

SLOPE OF THE SUPPLY CURVE Goods are scarce. Buyers will seek to obtain the lowest cost goods first, leaving the higher cost goods for later. At the margin, other things being equal, a buyer must therefore pay more to obtain additional units. That scarcity value, other things being equal, translates into a supply curve with an upward slope. But other things are not always equal. Over the longer run, if economies of scale are present, incremental units of a good may be produced at constant (or even decreasing) per-unit costs despite resource scarcity, causing the supply curve to flatten out (or even decline). And it is only over the longer run that monopsony should be a concern—just as antitrust policy focuses on longer-run exertion of monopoly power, rather than transitory supracompetitive pricing cured by rapid entry.¹²

There are a large number of empirical studies of cost and supply conditions in manufacturing industries. These studies provide strong evidence that, at prevailing levels of production, industrial market supply curves are typically flat. That is the conclusion reached by professors Scherer and Ross following a careful

¹² See *id.* at 18. This point is recognized by Blair & Harrison, *supra* note 2, at 319–20, but the “all or none supply curve” they present, *id.* at 316–19, is clearly a short-run phenomenon.

review of dozens of firm and industry studies.¹³ Professors Stigler¹⁴ and McGee¹⁵ have reached the same conclusion in their separate analyses.¹⁶ This conclusion that supply curves are generally flat in manufacturing industries suggests that monopsony problems in manufacturing are likely to be unusual. Since manufacturing businesses have historically been the primary subject of antitrust interest, this is a conclusion of some significance. Commerce is not limited to manufacturing, however, and our focus should not be myopic.

There are other types of markets where supply curves may tend to slope upward. Perhaps the best example is labor markets, which have a number of special characteristics that result in upward-sloping supply curves.¹⁷ Indeed, economics texts typically use labor markets to illustrate monopsony issues.¹⁸ Another type of industry historically believed to exhibit upward-sloping supply curves is agriculture, although modern farming techniques (with their attendant economies of scale) make this a matter subject to doubt today. Not surprisingly, a large proportion of the reported cases finding joint buyer conduct unlawful under the antitrust laws involve labor markets¹⁹ or agricultural markets.²⁰ This obser-

¹³ F.M. SCHERER & D. ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 106–07 (3d ed. 1990); *see id.* at 97–141 (collecting sources).

¹⁴ G. STIGLER, *THE THEORY OF PRICE* 182 (3d ed. 1966).

¹⁵ McGee, *Efficiency and Economies of Size*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 55, 58, 67, 72, 81, 96–97 (H. Goldschmidt, H.M. Mann & J.F. Weston eds. 1974).

¹⁶ *See also* Baumol, *On the Proper Tests for Natural Monopoly in a Multiproduct Industry*, 67 *AM. ECON. REV.* 809, 819–20 (1977).

¹⁷ *See* Jacobson & Dorman, *supra* note 1, at 13.

¹⁸ *E.g.*, E. MANSFIELD, *MICROECONOMICS* 412–14 (5th ed. 1985).

¹⁹ *See, e.g.*, *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926); *Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Union Circulation Co. v. FTC*, 241 F.2d 652, 654 (2d Cir. 1957); *Barr v. Dramatists Guild, Inc.*, 573 F. Supp. 555, 558–59 (S.D.N.Y. 1983); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975); *H.B. Marienelli, Ltd. v. United Booking Offices*, 227 F. 165, 170–71 (S.D.N.Y. 1914).

²⁰ *See, e.g.*, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *Reid Bros. Logging Co. v.*

vation suggests that antitrust enforcers should be more alert in monitoring buyer conduct in those and similar markets than in areas such as manufacturing.²¹

UNRESTRAINED BUYER POWER A key empirical question is whether monopsony power occurs frequently in real-world markets. A related question is whether, when monopsony power exists, the firms selling the input product have selling-side market power. In these bilateral monopoly markets, as our preceding discussion indicates, monopsony power is likely to be harmless or even beneficial.²² Unfortunately, there appear to be no empirical studies directly addressing either question. But there is some significant, albeit unscientific, circumstantial evidence.

First, antitrust cases involving plausible allegations of buyer market power are few and are vastly outnumbered by the cases involving credible allegations of power on the selling side of mar-

Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir.), *cert. denied*, 464 U.S. 916 (1983); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980), *later appeal*, 907 F.2d 510 (5th Cir. 1990); *United States v. Champion Int'l Corp.*, 557 F.2d 1270 (9th Cir.), *cert. denied*, 434 U.S. 938 (1977); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965); *Live Poultry Dealers Protective Ass'n v. United States*, 4 F.2d 840, 841-43 (2d Cir. 1924); *United States v. Rice Growers Ass'n*, 1986-2 Trade Cas. ¶ 67,287 (E.D. Cal. 1986); *Bray v. Safeway Stores*, 392 F. Supp. 851 (N.D. Cal.), *vacated following settlement*, 1975-2 Trade Cas. ¶ 60,533 (9th Cir. 1975); *United States v. Olympia Provision & Baking Co.*, 282 F. Supp. 819 (S.D.N.Y. 1968), *aff'd mem.*, 393 U.S. 480 (1969).

²¹ Many agricultural market monopsony cases involve short-run situations where crops have already been planted (or even harvested). In these situations, the quantity to be supplied is virtually fixed (resulting in a short-run supply curve that is highly inelastic, or essentially vertical), and a dominant buyer or group of buyers can exert significant short-run buying power. Over the long run, however, the sellers may have greater alternatives—for example, planting less or planting another crop. Thus, the long-run supply curve may be considerably more elastic. We reiterate that antitrust policy should focus on the longer-run exertion of monopsony power, so the slope of the long-run supply curve is the relevant issue.

²² See *supra* note 10 and accompanying text.

kets.²³ By our count, there are fewer than 50 reported cases in the 100-year history of the Sherman Act in which antitrust violations based primarily on the acquisition or abuse of buyer power have been found.²⁴ We have not tried to count the number of cases on the selling side, but it is obvious that the disparity is enormous.

²³ See 4 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 964, at 203 (1980); Jacobson & Dorman, *supra* note 1, at 43-45.

²⁴ Our fairly exhaustive search uncovered only 39 cases: *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460 (1949); *Man-deville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926); *United States v. Patten*, 226 U.S. 525 (1913); *Swift & Co. v. United States*, 196 U.S. 375 (1905); *The Movie 1 & 2 v. United Artists Communications, Inc.*, 909 F.2d 1245 (9th Cir. 1990); *City of Long Beach v. Standard Oil Co.*, 872 F.2d 1401 (9th Cir. 1989); *United States v. Portac, Inc.*, 869 F.2d 1288 (9th Cir. 1989); *Harkins Amusement Enters. v. General Cinema Corp.*, 850 F.2d 477, 485-86 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989); *United States v. Capitol Service, Inc.*, 756 F.2d 502 (7th Cir.), *cert. denied*, 474 U.S. 945 (1985); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir.), *cert. denied*, 464 U.S. 916 (1983); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980), *later appeal*, 907 F.2d 510 (5th Cir. 1990); *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1178-82 (D.C. Cir. 1978); *Kapp v. NFL*, 586 F.2d 644, 648 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *United States v. Champion Int'l Corp.*, 557 F.2d 1270 (9th Cir.), *cert. denied*, 434 U.S. 938 (1977); *Mackey v. NFL*, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed following settlement*, 434 U.S. 801 (1977); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Cinema-Tex Enters. v. Santikos Theatres, Inc.*, 535 F.2d 932, 933 (5th Cir. 1976); *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965); *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Union Carbide & Carbon Corp. v. Nisely*, 300 F.2d 561 (10th Cir.), *cert. dismissed*, 371 U.S. 801 (1962); *Union Circulation Co. v. FTC*, 241 F.2d 652, 658 (2d Cir. 1957); *United States v. New York Great Atl. & Pac. Tea Co.*, 173 F.2d 79 (7th Cir. 1949); *Live Poultry Dealers Protective Ass'n v. United States*, 4 F.2d 840, 841-43 (2d Cir. 1924); *Transor (Bermuda) Ltd. v. BP N. Am. Petroleum*, 1990-1 Trade Cas. ¶ 68,998 (S.D.N.Y. 1990); *Minpeco, S.A. v. Hunt*, 718 F. Supp. 168 (S.D.N.Y. 1989); *United States v. Seville Indus. Mach. Corp.*, 696 F.

Second, a high level of market concentration is a necessary (but usually not sufficient) condition for the exercise of market power, and high levels of buying-side market concentration are seen far less frequently than high levels of seller concentration.²⁵ It is misleading to say, as Blair and Harrison do, that "for every seller there is a buyer";²⁶ in fact, for every seller there are usually *many* buyers. Picture a McDonald's restaurant at lunchtime, or a department store having a sale, or the local supermarket on a weekend afternoon, or the line at the movie theater on Saturday night. Even in nonconsumer contexts, the number of customers is almost always larger than the number of sellers. There are, of course, exceptions, but our common experience and observation tell us that high buyer concentration is unusual.

EFFICIENCIES We are not aware of any empirical study analyzing the prevalence or magnitude of efficiencies associated with buyer combinations; but the circumstantial evidence is again instructive.

If buyer groups were more closely associated with monopsony power than the achievement of efficiencies, an expected result would be opposition from sellers. In fact, there are thousands of consumer and other purchasing cooperatives in the country,²⁷ and

Supp. 986 (D.N.J. 1988); *United States v. Rice Growers Ass'n*, 1986-2 Trade Cas. ¶ 67,287 (E.D. Cal. 1986); *Barr v. Dramatists Guild, Inc.*, 573 F. Supp. 555, 558-59 (S.D.N.Y. 1983); *General Cinema Corp. v. Buena Vista Dist. Co.*, 532 F. Supp. 1244 (C.D. Cal. 1982); *Bray v. Safeway Stores*, 392 F. Supp. 851 (N.D. Cal.), *vacated following settlement*, 1975-2 Trade Cas. ¶ 60,533 (9th Cir. 1975); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1062-66 (C.D. Cal. 1971); *United States v. Olympia Provision & Baking Co.*, 282 F. Supp. 819 (S.D.N.Y. 1968), *aff'd mem.*, 393 U.S. 480 (1969); *United States v. Pennzoil Co.*, 252 F. Supp. 962 (W.D. Pa. 1965); *United States v. Ozark Cannery Ass'n*, 51 F. Supp. 150 (W.D. Ark. 1943); *H.B. Marienelli, Ltd. v. United Booking Offices*, 227 F. 165 (S.D.N.Y. 1914); *Blue Cross v. Virginia*, 211 Va. 180, 176 S.E.2d 439 (1970) (applying Sherman Act).

²⁵ See F.M. SCHERER & D. ROSS, *supra* note 13, at 517-19.

²⁶ Blair & Harrison, *supra* note 2, at 298.

²⁷ See, e.g., U.S. DEP'T OF AGRICULTURE, COOPERATIVE FACTS 15 (1987) (listing over 41,000 cooperatives).

there is virtually no opposition, formal or otherwise. Even when purchasing groups are organized in industrial (rather than consumer) contexts, such as the stationers group involved in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*,²⁸ seller opposition is rare. This suggests either that any monopsony power attributable to these groups is trivial, or that the joint purchasing yields efficiencies of importance to the sellers as well as to the buyers.

Sellers are frequently anxious to offer "volume discounts." Selling in volume to a group of buyers typically enables a seller to achieve scale economies, utilize existing capacity, reduce transaction costs, and in many cases achieve savings in other areas such as warehousing and transportation. There is every reason to believe that achievement of these efficiencies, rather than the acquisition of monopsony power, is the typical motivation underlying joint purchasing activities by buyers.

III.

One apparent reason for the rather harsh antitrust treatment of joint buyer conduct urged by Blair and Harrison is their view that "removal of monopsony leads . . . in most cases [to] lower prices of the monopsonist's output. This result is not a special case; rather, it is the general result."²⁹ There is ample reason to doubt this generalization.

As Blair and Harrison point out in another portion of their analysis,³⁰ monopsony leads to higher prices in the downstream (output) market *only* if, in that market, the monopsony buyer also has selling-side market power. In the absence of downstream market power, removal of the buyer's monopsony power will have no effect on downstream market price or output.³¹

²⁸ 472 U.S. 284 (1985).

²⁹ Blair & Harrison, *supra* note 2, at 299 n.16 (emphasis in original); see also *id.* at 337-38.

³⁰ *Id.* at 304-06.

³¹ See *supra* text accompanying notes 6-8.

Perhaps what Blair and Harrison mean to say is that firms having monopsony power in the upstream market are likely also to possess market power in the downstream market. There is no empirical evidence supporting this idea, but we are willing to assume that it is true.³² Even so, we would need to know more about market conditions in the input market facing the monopsonist before the Blair/Harrison generalization about downstream market impact would hold. If the input sellers themselves possess market power, this bilateral monopoly or “countervailing power” condition may result in lower downstream (output) market prices than would otherwise prevail, despite the possession of downstream market power by the monopsonist buyer.³³ We would also need to know much more about the prevalence and extent of available efficiencies. If the efficiencies are substantial, they may lead to lower—not higher—prices for the buyers’ output in the downstream market, even if the buyers possess monopsony power.

Even if it were true that removal of “monopsony” would more often than not lead to lower prices in the downstream market, a point that is subject to doubt, this would not be a call for harsh rules against joint buyer conduct generally. True “monopsony” power—as distinguished from the typical buyer combination one encounters—seems highly unusual for the reasons we have discussed. Absent an upward-sloping supply curve, a substantial share of the purchases on the buying side of the market, and impediments to entry or expansion by competing buyers, monopsony power cannot exist at all. The evidence seems strong, therefore, that the layman’s intuitive reaction—that lower buying prices from joint buyer conduct translate into lower selling prices in the downstream market—is generally correct, the Blair and Harrison reservations notwithstanding.

³² It should be noted, however, that the most frequently used examples of monopsony power—labor markets in “company towns” and purchases of locally produced crops or minerals by locally dominant processors—generally involve products that are sold in geographically broader, competitive downstream markets.

³³ See *supra* note 10 and accompanying text.

IV.

In discussing the case law governing joint purchasing conduct, Blair and Harrison suggest that the courts have tended to focus narrowly on the lower input prices that result from monopsony and to assume, incorrectly, that these lower input prices will result in lower output prices in the downstream market.³⁴ They single out for special criticism a recent Sixth Circuit decision, *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*³⁵

Although we agree with Blair and Harrison that the cases on buyer conduct issues have exhibited an insensitivity to the complex economic issues presented, we have not found any instance where a court has made an improper assumption about lower downstream prices. In *Balmoral* itself, the court concluded that the challenged group-purchasing by motion picture exhibitors might result in lower consumer prices in a context where the film suppliers "have historically wielded great market power over film products at the expense of exhibitors. Exhibitors, as purchasers of films, may be justified in combating the market power of film suppliers by group action."³⁶ As indicated in our discussion of the "countervailing power" issue,³⁷ if motion picture producers and distributors in fact possess selling-side market power as the court assumed, the court's economic conclusion that lower consumer prices may result is clearly right.³⁸

A case that Blair and Harrison do not discuss, but which merits attention in this connection, is *Northwest Wholesale Stationers*

³⁴ Blair & Harrison, *supra* note 2, at 299–300, 310.

³⁵ 885 F.2d 313 (6th Cir. 1989); see Blair & Harrison, *supra* note 2, at 299–300, 303–04.

³⁶ 885 F.2d at 316–17.

³⁷ See *supra* text accompanying notes 10 & 33.

³⁸ There are several difficulties in analyzing cases involving motion picture distribution: (1) What is the proper empirical measure of "output"? (2) How is this output expanded or contracted? (3) Are theater owners properly viewed as buyers (of exhibition rights) or sellers (of distribution services)? A discussion of these issues is beyond the scope of this comment.

*v. Pacific Stationery & Printing Co.*³⁹ The Supreme Court in *Northwest*, like the Sixth Circuit in *Balmoral*, concluded that lower consumer prices would be a logical result of a joint purchasing arrangement among office supply retailers in the Pacific Northwest. Again, however, this conclusion was not based on an unsupported equation of lower input purchase prices and lower downstream sales prices. It was based, rather, on the achievement of efficiencies:

The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers.⁴⁰

We agree with Blair and Harrison that courts have tended to infer lower consumer prices from the fact of lower input prices. But in the main, the economic conclusions the courts have reached seem to be correct.⁴¹

³⁹ 472 U.S. 284 (1985).

⁴⁰ *Id.* at 295.

⁴¹ Blair and Harrison also express concern about possible buyer exploitation of sellers through purchasing price discrimination, but they ultimately recognize that monopsonistic price discrimination may "increase social welfare in the long run." Blair & Harrison, *supra* note 2, at 332. In their discussion, Blair and Harrison focus on the region of a seller's average cost curve where that curve is declining, reflecting excess capacity. They observe that this presents an opportunity for a monopsonistic buyer to engage in strategic behavior, essentially by demanding that it be allowed to purchase its input at the seller's marginal cost. This scenario is at worst a short-run problem. In the region of the average cost curve where average cost is declining, marginal cost is below average cost. If the supplier is a price-taker (as Blair and Harrison appear to assume), it should be able to avoid exploitation (except perhaps in the very short run) by refusing to produce on this declining portion of its average cost curve and expanding its output until its marginal cost rises to the market price. Alternatively, if the market price is below average cost at every level of output, the seller will shut down operations entirely in order to minimize its losses. Blair and Harrison recognize the

V.

Blair and Harrison have made a valuable contribution to the emerging economic analysis of monopsony. But by devoting insufficient attention to those factors that often make it unlikely for joint buyer conduct to affect competition adversely, they appear to have overstated the significance of the monopsony problem and to have underestimated the need to apply comparatively lenient antitrust rules. As we have explained, the evidence is strong that true monopsony power is rare and that net adverse effects on price and output from monopsony are even rarer. In developing antitrust rules, the relative infrequency of the problem is an important factor that must be taken into account. Otherwise, there is a risk that the legal prohibitions will be overinclusive and that benign or even beneficial behavior will be deterred.⁴²

In the context of analyzing buyer conduct, therefore, antitrust rules should not be symmetrical to the rules applicable to seller behavior. Rather, the rules should take into consideration the economic requirement of an upward-sloping supply curve, the comparatively unusual occurrence of high buyer concentration, the prospect of positive effects from the exertion of countervailing power, and the apparent frequency of associated efficiencies. These considerations lead to far more lenient antitrust rules than Blair and Harrison recommend.⁴³

VI.

The major point of the second monopsony article by Blair and Harrison—*The Measurement of Monopsony Power*⁴⁴—is that anal-
latter possibility and point out, correctly, that this effect is the market process at work, eliminating excess capacity over the long run. *Id.* (If the seller has market power, then the hypothetical situation is one of bilateral oligopoly or bilateral monopoly, a more complex problem discussed *supra* notes 10 & 33 and accompanying text.)

⁴² See generally *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588–95 (1986).

⁴³ The specific rules we suggest are discussed at length in Jacobson & Dorman, *supra* note 1.

⁴⁴ *Supra* note 3.

ysis of buyer market power should not be based solely on market share but, rather, on the elasticity of supply with which the buyer or buyer group is faced. To this end, Blair and Harrison construct a "Buying Power index," or BPI, which is defined as $1/\epsilon$, where ϵ is the firms' elasticity of supply.⁴⁵ The Blair/Harrison analysis is essentially the same as that suggested by William Landes and Richard Posner in their article *Market Power in Antitrust Cases* published in the *Harvard Law Review* in 1981.⁴⁶ Landes and Posner argued that selling-side market power is best measured by the Lerner index, defined as $1/\epsilon$, where ϵ is the elasticity of *demand*.⁴⁷ Blair and Harrison say, as did Landes and Posner in the selling-side context, that market share alone is inadequate as a measure of true market power, and that additional factors—the elasticity of market supply and elasticity of fringe demand—must be considered to gain an accurate appreciation of the buyers' market power.⁴⁸

We fully agree with Blair and Harrison on their major points. The only disagreement we have with them is their refusal to accept our proposal that rule of reason buyer conduct cases be dismissed at the summary judgment stage if they involve a buyer or group of buyers with a market share less than 40% to 50%. As to that comparatively minor point, the Blair/Harrison arguments leave us unconvinced, as explained below.

A.

We should point out at the outset that Blair and Harrison have mischaracterized our position. We do *not* urge "sole reliance on market share" or "rely solely on market share as a threshold indicator of monopsony power," as Blair and Harrison claim.⁴⁹ On the

⁴⁵ *Id.* at 141–42.

⁴⁶ Landes & Posner, *supra* note 9.

⁴⁷ *Id.* at 939–40 & *passim*.

⁴⁸ Blair & Harrison, *supra* note 3, at 147. The selling-side analogues are elasticity of market *demand* and elasticity of fringe *supply*. Landes & Posner, *supra* note 9, at 945–47.

⁴⁹ Blair & Harrison, *supra* note 3, at 135 & 148.

contrary, our article proposes market share only as a presumptive device, and only as a screen. Thus, if the buyer market share *exceeds* 50%, we say that any "inference [of market power] will depend upon the other conditions in the market, such as overall concentration among buyers and the ability of other firms to enter or expand."⁵⁰ Even if the buyer share is *less* than 40% to 50%, we recognize that, "[i]n a proper case, use of a more direct measure of market power will obviate the need for indirect evidence"—citing the Lerner-index analysis proposed by Landes and Posner.⁵¹ The only real difference between our approach and that of Blair and Harrison, therefore, is that we are willing to rely on market share as a screening device and they are not.

B.

The Blair/Harrison BPI approach to measuring market power, while clearly valid, is less useful in practice in the real world than the more traditional approach of defining a relevant market and analyzing power based on share and other factors within the market so defined.

The Blair/Harrison criticism of the relevant market/market share approach is that it fails to give sufficient consideration to the elasticity of market supply and the elasticity of fringe demand. But these factors are, in fact, given consideration in the more traditional approach—when properly applied. Elasticity of market supply, in particular, is the key determinant of market definition. Under the traditional approach as exemplified by the Department of Justice Merger Guidelines,⁵² market definition requires a close examination of both demand and supply substitution⁵³—the principal criteria in determining market supply elasticity. Elasticity of fringe demand, similarly, is considered in defining the relevant market and calculating market shares,⁵⁴ and

⁵⁰ Jacobson & Dorman, *supra* note 1, at 58–60.

⁵¹ *Id.* at 58 n.156.

⁵² U.S. DEPARTMENT OF JUSTICE, MERGER GUIDELINES (1984), *reprinted* in 4 TRADE REG. REP. (CCH) ¶ 13,103.

⁵³ *Id.* §§ 2.1, 2.21, 2.3.

in determining whether market share statistics should be discounted in light of entry conditions.⁵⁵

The reasons for preferring the traditional market definition/market share approach to the BPI method are practical. The data to calculate an accurate BPI are rarely, if ever, available in the real world—a point highlighted by the absence of any real-world example, using actual elasticities, in the Blair/Harrison article. To compound the problem, unless all the data are available, any BPI calculation is little more than a rough guess: if any part is missing, the whole is impaired. In contrast, the data necessary to define a relevant market and compute market shares within the market are generally available, and if gaps in the data are found, the problem is rarely fatal. Of equal importance, courts, lawyers, and businesses are familiar with the market definition/market share approach. This familiarity facilitates data gathering and, more importantly, leads in most cases to reasonably accurate results.

C.

Our original article explains in some detail why a screening device is necessary in buyer conduct cases to insure that meritless suits do not progress beyond the summary judgment stage.⁵⁶ Beyond saying that BPI is a better measurement of market power than buyer share, however, Blair and Harrison offer no basis for rejecting the 40% to 50% market share screen we propose. As we read Blair and Harrison, it seems that they would rarely, if ever, dispose of a case on summary judgment.

Given the generally (perhaps overwhelmingly) procompetitive nature of buyer agreements, it is crucial to have a device for screening out unmeritorious cases in advance of a costly trial and, as an indirect consequence, for deterring these cases from being brought in the first place. If obviously silly cases are not deterred, firms will shy away from participating in arrangements that have significant potential benefits for consumers. We propose a market

⁵⁵ *Id.* § 3.3.

⁵⁶ Jacobson & Dorman, *supra* note 1, at 38, 43–45, 50–51, 58–60.

share screen (together with some other screens that Blair and Harrison do not address) because it is relatively simple, easy to administer, and easy to understand. No one has suggested a better method and, until they do, the market share screen will continue to stand as the best device available.

