COMMENTS

Monopsony and Backward Integration: Section 2 Violations in the Buyer's Market

I. INTRODUCTION

Monopsony[1] and backward integration[2] are the converse of the terms monopoly and forward integration. The former terms refer to a condition or activity[3] in the buyer's market, the latter terms to a condition or activity in the supplier's market.[4] While monopolization has received substantial judicial and scholarly attention, its counterpart in the buyer's market, monopsonization, has received little notice.[5] This inattention

1. Monopsony is the economic term used to describe a market involving a buyer with sufficient market power to exclude competitors and affect the price paid for its product. In the buyer's market it is the counterpart to monopoly. Monopsony will generally exist when there is a corresponding monopoly in the seller's market since all firms in a market generally need to purchase similar products. Thus, if a monopoly is held in the output market, the monopolist will generally hold monopsony power in the input market. K. LANCASTER, INTRODUCTION TO MODERN MICROECONOMICS 232 (1969) [hereinafter LANCASTER].

2. Vertical integration normally involves a producer's integration into the next level of production, closer to the end use customer, e.g., a manufacturer may seek to take over distribution of its product. This type of vertical integration is termed forward integration. Backward integration occurs when the producer seeks to integrate into its supply market, e.g., the manufacturer seeks to take over production of its own source of supply. A firm will generally use monopoly power to integrate forward and monopsony power to integrate backward. This Comment will use the terms first and second market to distinguish between the market in which the market power is initially held (first) from the market in which the power is being asserted (second).

3. Monopsony is a condition, not an activity. The act of being a monopsonist is not a violation of the antitrust laws; rather, the antitrust laws are violated by a monopsonist's abuse of its monopsony power. *See infra* note 54 and accompanying text. Backward integration is an activity that may violate § 2 of the Sherman Act.

4. The courts have often used the term "buyer's market" to identify a market in which the buyer has substantial power. Monopsony is the extreme form of this power. As used in this Comment the term "buyer's market" will refer to those situations in which the buyer, rather than the supplier, is the primary actor.

5. The courts have occasionally recognized the distinction between a buyer's and seller's market. *See, e.g.*, Shapiro v. General Motors Corp., 472 F. Supp. 636, 648 (D. Md. 1979), *aff'd*, 636 F.2d 1214 (4th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981) ("What is unusual about this case is that it appears to present an example of monopsony

to the basic difference between antitrust violations in the buyer's and seller's markets under section 2 of the Sherman Antitrust Act[6] is unfortunate, and may often be legally fatal.[7]

The majority of antitrust claims arise from activity in the seller's market.[8] Suppliers may be prohibited from setting the price at which they will sell their products (price fixing), from requiring the purchase of one product in order to acquire another (tying), and, under certain conditions, from acquiring

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rather than monopoly, and this feature serves to complicate not only the legal analysis but the economic and policy aspects of the case as well."). Other courts and scholars have noted the distinction while summarily rejecting any real difference. *See, e.g.*, Williams v. St. Joseph Hosp., 629 F.2d 448, 453 n.6 (7th Cir. 1980) (discussing a § 1 claim the court stated: "monopsony is as evil as monopoly"); 1 CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES ¶ 4.34 at 201 (Callaghan 4th ed. 1981) [hereinafter CALLMAN] ("The evils of price fixing are essentially the same whether effected by the buyer (through monopsony or oligopsony) or the seller (through monopoly or oligopoly)."); Note, *Preferred Provider Organizations and Provider Contracting; New Analysis Under the Sherman Act*, 37 HASTINGS L.J. 377, 385 (1985) [hereinafter Note, *New Analysis*] ("Monopsony power, like monopoly power, generally is presumed by the courts to be inherently dangerous to competition and public welfare."). A recent article, however, has explored monopsony power in some detail. *See* Rovner, *Monopsony Power in Health Care Markets: Must the Big Buyer Beware Hard Bargaining?*, 18 LOY. U. CHI. L.J. 857 (1987) [hereinafter Rovner].

Interestingly, Congress and the Executive have acted affirmatively to counter the consequent harm from excessive purchasing power. Thus, the feared abuse of purchasing power was a major factor in passage of the Robinson-Patman Act, 15 U.S.C. § 13 (1987). *See infra* note 15. Similarly, Congress recognized the propriety of applying the antitrust laws to actions in the buyer's market by enacting the Capper-Volstead Act, 7 U.S.C. § 291 (1987). The Act permits "farmer-producers to . . . fix prices at which their cooperative will sell their produce . . . without thereby violating the antitrust laws," in order to counter processors' purchasing power. Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982) (citing Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960)).

The fear of monopsony has affected regulation in other areas as well. *See, e.g.*, Associated Gas Distributors v. Federal Energy Regulation Comm., 824 F.2d 981, 995 (9th Cir. 1987) (Natural Gas Act "ended or sharply reduced pipeline monopsony power over wellhead purchases, a power that had the tendency to keep wellhead prices below competitive levels."); California Energy Conservation and Dev. Comm. v. Bonneville Power Admin., 831 F.2d 1467, 1479 (9th Cir. 1986) (Dissent asserted that court was erroneously upholding regulatory agency's decision to protect Northwest energy companies from an asserted exercise of monopsony power. Norris, J., dissenting, stated, "If the Northwest energy companies believe that the Southwest utilities are exercising some sort of unfair monopsony power, let them sue under the applicable antitrust laws. It is not the mission of the BPA [Bonneville Power Administration] to fight this battle for the Northwest utilities through the promulgation of a regionally biased access policy.").

6. 15 U.S.C. § 2 (1987).

7. *See infra* note 80.

8. As discussed *infra* notes 41 & 42 and accompanying text, seller's claims against purchasers have long been recognized under § 1, while monopsony claims under § 2 have not.

their retail outlets (vertical integration). If these activities are conducted in the buyer's market, however, they are rarely the subject of an antitrust claim under section 2 of the Sherman Antitrust Act. There is even legislative history indicating that the Act was never intended to reach into the buyer's market.[9]

A seller's action may arise in the following manner: Seller (S), a manufacturer of widgets, sells to Purchaser (P). P is the sole purchaser of widgets. As a result of this monopsony, P has the power to set the price it will pay for widgets. Since S has no other market for its product, it is forced to sell at the price P has set.

Courts, litigators, and the reader may believe it appropriate that P should be able to set the price at which it will purchase its widgets without incurring antitrust liability. Initially, the arguments against recognition of a seller's claim appear substantial. First, P may not have sufficient economic incentive to use its monopsony power in an anticompetitive manner. If P reduces the price it will pay for widgets below S's cost, S would be required to continue selling at a loss. Yet, prolonged loss-selling behavior does not appear either rational or feasible from the viewpoint of either S or P. Since such an action may force S out of business or into a different product market because of continued loss selling, P would be left without a supplier—leaving little incentive for P to engage in such anticompetitive conduct.[10] S's incentive to avoid loss-selling behavior is more obvious.

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9. Upon the formation of [the] bagging trust the cotton farmers . . . agreed that they would not purchase jute bagging, and by that agreement . . . the rich reward anticipated by the . . . trust [was] defeated. The fact that the bill . . . applie[d] to all arrangements, . . . by whomsoever made, would bring within its reach all defensive agreements made by farmers for the purpose of enhancing the price of their products.

20 CONG. REC. 1458 (1889) (Statement of Senator George).

That is a very extraordinary proposition. There is nothing in the bill to prevent a refusal by anybody by buy anything. All that it says is that the people producing or selling a particular article shall not make combinations to advance the price of the necessaries of life.

20 CONG. REC. 1458 (1889) (Statement of Senator Sherman).

Application of the antitrust laws to the buyer's market, however, was apparently not that "extraordinary." When the Sherman Act was subsequently enacted, it was applied to abuses in the buyer's market, involving concerted activity, without any discussion of legislative intent. *See, e.g.*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 223-24 (1948); Swift & Co. v. United States, 196 U.S. 375, 400-02 (1905).

10. H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 17 (Law. ed. 1985) [hereinafter HOVENKAMP]. *But see infra* notes 91-92 and accompanying text.

Second, it has become axiomatic that the asserted purpose of the antitrust laws is the protection of competition, not competitors.[11] This asserted purpose may be construed to argue against recognition of a claim in the buyer's market, since permitting P to obtain the lowest possible price for its widgets would appear to embody the concept of free competition.[12] Conversely, prohibiting P from engaging in such activity may only protect and safeguard S's profit margin. Reduction of a business' net profit margin, however, is not the type of antitrust injury that the antitrust laws were designed to prevent. Thus, in *Cargill, Inc. v. Monfort of Colo., Inc.*,[13] the Supreme Court rejected on standing grounds a claim alleging behavior that had the effect only of reducing the plaintiff's profit margin without adversely affecting competition.[14]

Despite these arguments against recognition of antitrust violations in the buyer's market, certain circumstances create a condition in which the buyer's activities are anticompetitive and of the type the antitrust laws were designed to prevent. Exclusionary conduct is particularly susceptible to such a claim. Thus, if P engages in more than mere price setting, and predatorily sets its purchase price, refuses to deal, or vertically integrates into S's market for the purpose of excluding either S

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11. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). *See also* Shapiro v. General Motors Corp., 472 F. Supp. 636, 651 (D.C. Md. 1979) (Inventor's allegations that oligopsony purchaser's activities denied them their proper profit did not state proper antitrust claim. Plaintiff also lacked standing.), *aff'd*, 636 F.2d 1214 (4th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981).

As noted by Justice Black:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958).

12. *See, e.g.*, Brillhart v. Mutual Medical Ins., Inc., 768 F.2d 196, 201 (7th Cir. 1985) (antitrust laws do not prohibit a buyer from bargaining for the best deal possible). The Supreme Court has expressly held, however, that standing is not limited to puchasers. *See infra* note 40 and accompanying text. *See also infra* note 16.

13. 107 S. Ct. 484 (1986).

14. *Id. See also* Sausalito Pharmacy, Inc. v. Blue Shield, 544 F. Supp. 230, 235 (N.D. Cal. 1981) (In dismissing a seller's action, the court noted that "The failure to make more money . . . is simply not the kind of problem which the antitrust laws address."), *aff'd*, 677 F.2d 47 (9th Cir.), *cert. denied*, 459 U.S. 1016 (1982).

or a competitor at P's own level, P will have violated the antitrust laws.

This Comment will focus on the application of section 2 of the Sherman Antitrust Act to actions in the buyer's market.[15] After briefly reviewing general antitrust law, this Comment will explore the status of antitrust claims in the buyer's market under both section 1 and section 2. The necessary elements of a section 2 monopsony claim will then be reviewed with particular emphasis on the types of buyer activities that might support a seller's claim under this section. As will be shown, the anticompetitive effect of these activities provides the major distinction between actions in the buyer's and seller's market. Despite these distinctions, monopsony claims are cognizable under section 2, particularly when exclusionary activities are involved. The viability of such a claim may not be immediately apparent and should be carefully considered by litigants and thoughtfully reviewed by the courts. The Supreme Court's most recent review of anticompetitive injury in *Cargill*,[16] and the Court's adoption of stricter summary judg-

15. This Comment does not address several types of actions under § 2, such as tying and reciprocal dealing arrangements, which may also provide a seller with relief. In addition, this Comment does not address application of the Robinson-Patman Act, 15 U.S.C. § 13 (1987), which contains specific provisions addressing buyer's conduct regarding illegal payments, allowances or services. Section 13(f) states: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. 13(f) (1987). Another statute not addressed in this Comment, § 5 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45 (1987), prohibits unfair methods of competition, and has been used to prohibit a buyer from inducing a seller to provide it with promotional allowances or services. *See, e.g.*, Alterman Foods, Inc. v. FTC, 497 F.2d 993 (5th Cir. 1974). Private litigants may not bring suit under § 5 of the FTCA, however. Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973). Pursuant to § 4 of the Clayton Act, 15 U.S.C. § 12 (1987), private litigants may bring an action for treble damages under 15 U.S.C. § 13(f). Just as under § 2 of the Sherman Act, however, a seller may have a difficult time alleging and proving an anticompetitive injury sufficient to support standing to sue. Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.D.C. 1988). For more on buyer's liability under the Robinson-Patman Act, see C. HILLS, ANTITRUST ADVISER 301-11 (1985) [hereinafter HILLS].

16. 107 S. Ct. 484 (1986). The *Cargill* Court reviewed the standing requirement of antitrust injury under § 16 of the Clayton Act, 15 U.S.C. 326 (1987), relating to mergers. Claims brought under the Sherman Act must meet the standing requirements of § 4 of the Clayton Act. While the standing analysis under § 4 is not identical to that required under § 16, the requirement of antitrust injury is substantially similar.

A seller's claim may not merely assert that the plaintiff is receiving less money than it normally would. This alone merely states a harm to a competitor and is not

ment standards in *Matsushita Elec. Ind. v. Zenith Radio*,[17] however, make it imperative that litigants recognize, plead, and prove the proper antitrust injury and effect when pursuing a claim in the buyer's market.[18]

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itself an anticompetitive injury. *See, e.g.*, Michigan State Podiatry Ass'n v. Blue Cross & Blue Shield, 1987-2 Trade Cas. (CCH) ¶ 67,687 at 58,520 (E.D. Mich. 1987).

In certain circuits, however, financial injury to the plaintiff may be sufficient. *See* Syufy Enter. v. American Multi-cinema, Inc., 793 F.2d 990, 999-1000 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 876 (1987); Catlin v. Washington Energy Co., 791 F.2d 1343, 1347 (9th Cir. 1986); Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 580 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982). As noted in Hasbrouk v. Texaco, Inc., 830 F.2d 1513, 1518 (9th Cir. 1987), "The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that harm competitors harm competition. . . . Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition. . . ." *See also* Bell Memorial Hosp., Inc. v. Mutual Hosp., Inc., 784 F.2d 1315, 1338 (7th Cir. 1986) ("Sometimes injury to rival firms can be a presursor [sic] to injury to consumers; after knocking rivals out of the market, a firm may curtail output and raise price."). The plaintiff's claim in *Hasbrouk* was brought under the Robinson-Patman Act, 15 U.S.C. § 12 (1987).

In addition to requiring antitrust injury for standing under the Sherman Act, some courts have dismissed a seller's claim on the basis of the Supreme Court's rejection of the offensive use of the passing-on defense. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). In *Illinois Brick*, the court held that a secondary purchaser did not have standing to sue under the antitrust laws — only the direct purchaser could recover. (An exception to this statement arises when the secondary purchaser purchased on a cost-plus basis.) In the buyer's market this has been called the "Pass-back" defense, where "what is being passed-on is lower prices rather than higher prices." Shapiro v. General Motors Corp., 472 F. Supp. 636, 649 n.10 (D. Md. 1979), *aff'd*, 636 F.2d 1214 (4th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981). *See also In re* Beef Antitrust Litigation, 600 F.2d 1148, 1159 (5th Cir. 1979) ("We conclude that 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." Court found that sellers had no standing against indirect purchasers of beef.); 1 CALLMAN, *supra* note 5, ¶ 4.48 at Supp. 167; Note, *Monopsonistic Price Fixing and Umbrella Pricing as a Theory of Antitrust Standing: A New View of Illinois Brick*, 50 U. CIN. L. REV. 52 (1981).

17. 475 U.S. 574 (1986). In reviewing plaintiff's § 1 claim, the *Matsushita* Court held that to overcome an antitrust summary judgment motion, the plaintiff must establish that there is a genuine issue of material fact as to whether the petitioner entered into an illegal conspiracy that caused the plaintiff to suffer a cognizable antitrust injury. If the factual context renders the plaintiff's claim implausible, i.e. the claims make no economic sense, the plaintiff must offer more persuasive evidence to support its claim than would otherwise be necessary. If the claim is brought under § 1, such evidence must "tend to exclude the possibility" that the alleged conspirators acted independently. Although the Court was addressing a § 1 rather than a § 2 action, the summary judgment standard should be analagous.

18. As will be seen there may be a decreased incentive and opportunity for a monopsonist to abuse its power. *See infra* notes 88-95 and accompanying text. The complainant should be careful to allege, where applicable, the requisite circumstances in which a monopsonist's actions would be anticompetitive in order to escape dismissal or summary judgment.

Throughout this Comment the author emphasizes the requirements for defeating

II. ANTITRUST OVERVIEW

Despite the plethora of antitrust statutes,[19] the Sherman Antitrust Act remains central to antitrust analysis. Claims brought under the Act generally allege a violation of either section 1 or section 2. Section 1 provides that "every contract, combination . . . or conspiracy, in restraint of trade . . . among the several states . . . is . . . illegal."[20] Section 2 provides that "[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty . . . ."[21] The major distinction between these provisions is that while section 1 violations require an agreement between two or more people, section 2 violations reach the unilateral action of a party who possesses or attempts to gain monopoly or monopsony power.

Antitrust violations under section 1 are analyzed under either the per se rule or the rule of reason. An activity that is illegal per se will not be reviewed by the court for its anticompetitive effect; the plaintiff will only need to prove that the defendant engaged in the activity.[22] In contrast, the rule of reason requires an in-depth review of the activity's anticompetitive effect in the particular application confronting the court.

The per se rule is limited to "agreements or practices that, because of their pernicious effect on competition and lack of

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motions to dismiss or for summary judgment. Emphasis on pre-trial motions does not indicate a lack of concern over trial activities but merely indicates that antitrust actions, particularly those based on conduct in the buyer's market, may be particularly susceptible to such pre-trial motions. *See, e.g.*, Calkins, *Summary Judgment, Motions to Dismiss and Other Examples of Equilibriating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986).

19. *See, e.g.*, Hart-Scott Rodino Antitrust Improvement Act of 1976, 90 Stat. 1390 (1976) (exclusively procedural); Robinson-Patman Anti-Discrimination Act, 15 U.S.C. § 13 (1936) (prohibiting discriminatory practices in the sale of commodities); McCarran-Ferguson Act, 15 U.S.C. § § 1011-1015 (1945) (providing for state regulation and taxation of insurance industry and limited immunity from antitrust laws); Capper-Volstead Act, 7 U.S.C. § § 291-292 (1922); Webb-Pomerene Act, 15 U.S.C. § § 61-65 (1918) (granting export associations a qualified exemption from antitrust laws); Clayton Act of 1914, 15 U.S.C. 12-27 (1914); FTC Act, 15 U.S.C. § § 41-77 (1914).

20. Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1987), states in part:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

21. Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 (1987), states:

> 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. . . .

22. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry about the precise harm they have caused or the business excuse for their use."[23] The per se rule will apply only to a particular activity after the court has had "experience with a particular kind of restraint . . . [and may reach] a conclusive presumption that the restraint is unreasonable."[24] Those activities falling within the per se category have been limited in recent years, and the rule will generally apply only to horizontal arrangements[25] under section 1 that involve activities such as price fixing,[26] division of markets,[27] group boycotts,[28] or tying arrangements.[29]

If an activity has not been declared illegal per se, the court, in reviewing a section 1 claim, will evaluate the practice under the rule of reason. The rule of reason requires the court to review the competitive effects of the business practice and weigh any potential benefits against the practice's negative effect on competition.[30] While the rule of reason analysis under section 1 is not identical to the anticompetitive effects analysis conducted under section 2, the competitive objectives and economic goals are similar. In recent years, the Chicago School of Economics, with proponents such as Areeda and Turner, Judge Robert Bork, and Judge Richard Posner, has domi-

23. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (Black, J.).

24. Arizona v. Maricopa Medical Soc'y, 457 U.S. 332, 344 (1982).

25. Horizontal arrangements are agreements among competitors at the same level, e.g., manufacturers conspiring to set the price at which they will sell to all retailers. Vertical arrangements are agreements between those at different levels of the marketing-manufacturing structure, e.g., a distributor and its retailer conspiring to set the price at which they will sell products within a certain region. Vertical arrangements are considered to have potential benefits not present in horizontal arrangements. Thus, they are generally reviewed under the rule of reason, and are not considered illegal per se. *See* Continental T.V., Inc. v. G.T.E.-Sylvania, Inc., 433 U.S. 36 (1977) (market division). Some vertical arrangements that set prices or price levels to be charged, such as re-sale price maintenance agreements, are still considered illegal per se. They are, however, increasingly scrutinized. *Compare* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) *with* Albrecht v. Herald Co., 390 U.S. 145 (1968). *See also* Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 1515 (1988).

26. United States v. Container Corp. of Am., 393 U.S. 333 (1969); *but see* NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984); Broadcast Music Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

27. United States v. Topco Associates, Inc., 405 U.S. 596 (1972) (horizontal).

28. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

29. Jefferson Parrish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

30. Standard Oil Co. v. United States, 221 U.S. 1, 65 (1911).

nated this analysis. While each of these proponents has his own variation on this school of thought, each has participated in the shift of focus away from the goal of free competition through decentralization.[31] Rather, the Chicago School focuses on consumer welfare as the goal of antitrust law.[32] Emphasis is placed on whether the activity decreases output and increases prices. If the activity does not have this effect, then the activity does not have an anticompetitive effect, and thus does not violate the antitrust laws.[33]

Often the tests of decreased output or increased price do not address the anticompetitive effect of exclusionary conduct. Thus, Krattenmaker and Salop have recently argued that claims of anticompetitive exclusion should be judged according to whether the challenged activity places competitors at a cost disadvantage sufficient to allow the defendant firm to exercise monopoly power by raising its prices.[34] This test requires the court to ask first "whether the challenged conduct unavoidably and significantly increases the cost of competitors," and second "whether raising rivals' costs enables the firm to exercise market power—that is, raise prices above the competitive level."[35]

The approach taken by the monopsony plaintiff in alleging

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31. Decentralization is the promotion and protection of small, local business. The earlier emphasis on small business is exemplified by the statement in Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962), that Congress enacted the antitrust laws "to promote competition through the protection of viable, small, locally owned businesses." In this Comment, "Chicago School of Economics" or "Chicago School of thought" is used in its broadest sense to identify the recent emphasis on economics in defining the goals of antitrust law. This shift in emphasis has been recognized by both courts and commentators. *See* Continental Television v. GTE-Sylvania, 433 U.S. 36, 54-56, 58-59 (1977); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST ch.2A (1977) [hereinafter SULLIVAN]; Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1985). *See also* Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) (Brandeis, J., dissenting).

32. *See, e.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984) (consumer welfare a "fundamental goal of antitrust law"); 1 AREEDA & TURNER, ANTITRUST LAW 7 (1978) [hereinafter AREEDA & TURNER, ANTITRUST LAW] ("economic objective . . . is to maximize consumer economic welfare"); R. BORK, THE ANTITRUST PARADOX 72-89 (1978) [hereinafter BORK].

33. 1 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, at ¶ ¶ 103-13; HOVENKAMP, *supra* note 10, at 49.

34. Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals Costs to Achieve Power Over Price*, 96 YALE L.J. 208, 214 (1986) [hereinafter Krattenmaker & Salop]. Although Krattenmaker's and Salop's article was not directed at activities under § 2, the test is equally applicable. *Id.* at 218 ("[o]ur analytical framework also applies to exclusion cases arising from the conduct of a single firm.").

35. Krattenmaker & Salop, *Analyzing Anticompetitive Exclusion*, 56 ANTITRUST L.J. 71, 74 (1987).

anticompetitive effect will vary depending on the school of thought adopted by the court. One commentator, relying exclusively on the Chicago School, has argued that monopsony should be considered legal per se.[36] The Chicago School's emphasis on consumer welfare will often obscure the harm to competition caused by exclusionary activities—particularly in the buyer's market. Thus, when the monopsonist's activities are exclusionary, it may be more appropriate to apply the Krattenmaker and Salop variant of raising rivals' costs,[37] rather than Areeda and Turner's monopsony anticompetitive effects test discussed below. Conversely, litigants may attempt to rely on theories of decentralization and the promotion of

36. Rovner, *supra* note 5, at 860. Rovner concedes that monopsony may "theoretically cause economic inefficiencies." *Id.* at 883. He believes, however, that "the judicial system lacks devices sufficiently delicate to detect the difference between hard bargaining and abuse of buying power." *Id.* He further believes "that the reliance upon the jury to determine the inferences to be drawn from the evidence is 'inherently imperfect.' " *Id.* at 884. Rovner does not rely on the complicated economics involved in antitrust cases, but rather on the jury's ability or inability to make an inference from the facts. This role, however, is precisely that of the jury in every trial. Rovner states that "[t]he cost of a mistake in making that determination is very high in terms of social welfare." *Id.* Yet in criminal trials, juries are called upon to draw an inference from the defendant's conduct or other circumstantial evidence. Is economic social welfare so much more important than the criminal defendant's welfare? While utilitarianism may argue affirmatively, the question need not be answered here. The jury system is an institution that the American people and courts rely upon daily, and it can surely be relied upon to determine whether the defendant has merely engaged in "hard bargaining" or has acted with the general intent of abusing its buying power. *See also* Cargill, Inc. v. Monfort of Colo., Inc., 107 S. Ct. 484, 495 (1986) (while recognizing "mistaken inferences" that might be made from mechanisms that may be either competitive or anticompetitive, court rejected per se rule in favor of evaluating such claims with care).

To declare a monopsonist's activities legal per se is to give unscrupulous companies rein to take advantage of those situations in which such conduct is anticompetitive. Interestingly, the call for per se legality has been raised for other activities as well. *See, e.g.*, Note, *Antitrust Treatment of Competitive Torts: An Argument for a Per Se Rule of Legality Under the Sherman Act*, 58 TEX. L. REV. 415 (1980). Judge Bork, for example, has argued for a rule of per se legality for predatory pricing. BORK, *supra* note 32, at 154 (expressly rejecting Areeda and Turner's prevailing objective test, which shifts the burden of proof as the probability of such behavior shifts). *See infra* notes 119-22 and accompanying text. Legality per se has never been adopted by the courts in the case of predatory pricing or any other activity. *See, e.g.*, *Cargill*, 107 S. Ct. at 495 (rejecting per se rule denying competitors standing to challenge acquisitions on the basis of predatory pricing theories). Although not discussed by Rovner, shifting the burden of proof in such circumstances would appear more appropriate than declaring such activity legal per se. This Comment, however, rejects either approach. With a fuller understanding of the potential for abuse in monopsony power, both the jury and the court may identify those circumstances, particularly when exclusionary conduct is shown, in which abuse of monopsony power has occurred.

37. *See supra* text accompanying notes 34-35.

small business when alleging an anticompetitive effect. By applying tests enunciated by Areeda and Turner, or Krattenmaker and Salop, however, monopsonization remains a viable theory even under the current economic tenants of antitrust law.[38]

III. ANTITRUST CLAIMS IN THE BUYER'S MARKET

One of the first Supreme Court cases to recognize an antitrust violation in the buyer's market was *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*[39] In *Mandeville Island*, sugar beet growers brought a conspiracy claim against several refiners under section 1 and section 2. The claim alleged that the refiners had conspired to set the price at which they would purchase sugar beets. The Court held that the refiners had violated the Sherman Act. As noted by the Court,

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.[40]

As a result of the Court's decision in *Mandeville Island*, concerted action in the form of buyer cartels has generally been accorded the same antitrust treatment as any form of horizontal collusion under section 1.[41] Abuse of a single purchaser's

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38. *See infra* text accompanying notes 88-95.

39. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

40. *Id.* at 236.

41. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (agreement among competitors to purchase gasoline on spot market in order to check rapid decline in prices violated § 1); National Macaroni Manufacturers Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965); General Cinema Corp. v. Buena Vista Distribution Co., 532 F. Supp. 1244 (C.D. Cal. 1982) (practice of splits whereby film exhibitors agreed to divide up future films was per se violation of § 1). While some courts will adhere to the per se rule of illegality used in *Mandeville Island*, occasionally the court will apply the rule of reason. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85 (1984) (agreement between NCAA and broadcasters, which had effect of providing only one buyer, would ordinarily be held illegal per se under § 1, but was reviewable under rule of reason because the restraint involved an industry in which horizontal restraints on competition are essential if product is to be available at all); Vogel v. American Soc'y of Appraisers, 744 F.2d 598 (7th Cir. 1984) (appraiser association's adoption of by-laws that set fee structure was not a per se violation, but court recognized that such arrangements usually are).

monopsony power under section 2, however, has only recently been accorded attention by the courts.[42]

The majority of claims based on a single purchaser's activity in the buyer's market have involved insurance programs.[43] Whether the claim is based on a health insurance company's refusal to pay more than a set price for health care or prescriptions,[44] or an automobile insurer's refusal to pay more than a set price for repairs,[45] litigants have generally attempted to bring their claims under section 1 by alleging some form of concerted activity. Litigants' failure, or inability, to allege a single purchaser's abuse of monopsony power under section 2 has led to dismissal, summary judgment, or a restatement by the court of the proper claim.[46]

Certain situations may, of course, present a valid section 1 claim. A combination of facts may prove a conspiracy and transform action previously perceived as unilateral into a cognizable section 1 claim. In the health insurer example, a horizontal section 1 violation might be proved if the insurer's fee-setting board was controlled by service providers.[47] A vertical

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42. Although the claims in *Mandeville Island* were brought under both § 1 and § 2, the § 2 claim was limited to conspiracy and thus did not directly sanction a § 2 monopsony claim. *See* Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) (rejecting analogy to *Mandeville Island*: "*Mandeville* was a conspiracy to depress prices, and price-fixing cartels are unlawful independent of their efficacy.").

43. Professional sports have also been an area in which monopsony claims are prevalent. *See* Flood v. Kuhn, 407 U.S. 258 (1972); Fishman v. Estate of Wirtz, 807 F.2d 520, 532 n.9 (7th Cir. 1986) (although monopsony was not alleged the court noted that "[i]f the relevant market were the market for franchises, the charge would be monopsony. . . ."); Note, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953).

44. *See* Rovner, *supra* note 5.

45. Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F.2d 1195, 1204 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); Proctor v. State Farm Mutual Automobile Insurance Co., 675 F.2d 308, 337-38 (D.C. Cir. 1982); Custom Auto Body, Inc. v. Aetna Casualty and Surety Co., 1983-2 Trade Cas. (CCH) ¶ 65,629 (D.C. R.I. 1983).

46. *See infra* note 107. In Barry v. Blue Cross of California, 805 F.2d 866, 874 (9th Cir. 1986), the plaintiff alleged monopsonization but "produced no data concerning Blue Cross's share of the medical insurance in California or in any region of California." Relying on other evidence the court found that 16% market share was insufficient to survive summary judgment.

47. *See, e.g.*, Ratino v. Medical Service of Dist. of Columbia, 718 F.2d 1260 (4th Cir. 1983) (board would not alter plan without approval of participating physicians); Michigan State Podiatry Ass'n v. Blue Cross and Blue Shield of Michigan, 1987-2 Trade Cas. (CCH) ¶ 67,687 (E.D. Mich. 1987); Addino v. Genesee Valley Medical Care Inc., 593 F. Supp. 892 (W.D.N.Y. 1984) (majority of physicians controlled critical committees that set rates, membership and board composition). *But see* Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pennsylvania, 745 F.2d 248, 258 (3d Cir. 1984) (although

section 1 violation may be shown if the contract between the insurer and service provider set the price that providers charge their patients.[48]

Proof of conspiracy is difficult and has defeated many claims in the buyer's market.[49] The Supreme Court's recent decisions in *Monsanto v. Spray-Rite*[50] and *Northwest Wholesale Stationers*[51] have made the requisite proof element increasingly difficult. In view of the increasing difficulty in proving conspiracy, it is essential that antitrust litigants seriously review, and consider, a potential section 2 claim.

IV. SECTION TWO—MONOPSONIZATION

Section 2 claims are not subject to a per se analysis.[52] In order to state a claim of either monopolization or monopsonization under section 2 of the Sherman Act, a plaintiff must allege: (1) possession of monopoly (or monopsony) power in the relevant geographic and product market; *and*, (2) willful acquisition or maintenance of that power as distinguished from a justifiable business decision (general intent).[53] Thus, the

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providers constituted a majority of the review and policy committees, these competitors were only one sixteenth of the board). *See also* Note, *New Analysis*, *supra* note 5, at 392 n.114 and cases cited therein.

For a review of evidence tending towards a finding of concerted action, see *Custom Autobody*, 1983-2 Trade Cas. (CCH) at 69, 181. *Custom Autobody* also contains a review of the horizontal effects of vertical agreements in the automobile insurance industry. *Id.* 1983-2 Trade Cas. at 69,185 n.11.

48. In this example, the insurer and provider would be in a vertical relationship, and the fixed fee agreement would be considered resale price maintenance ("RPM"). *See, e.g.*, Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979). Many of these cases, however, have been rejected for lack of a resale component. *See, e.g.*, Medical Arts Pharmacy of Stamford, Inc., v. Blue Cross & Blue Shield of Connecticut, Inc., 518 F. Supp. 1100, 1107 (D. Conn. 1981), *aff'd*, 675 F.2d 502 (2d Cir. 1982).

49. *See, e.g.*, *Garshman*, 641 F. Supp. at 1370; Shapiro v. General Motors Corp., 472 F. Supp. 636, 642 (D. Md. 1979) (alleged conspiracy by automobile manufacturers to deny inventors royalties), *aff'd*, 636 F.2d 1214 (4th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981). *See also Barry*, 805 F.2d at 870 (horizontal agreement not proved, but express vertical agreement found). *But see Custom Autobody*, 1983-2 Trade Cas. at 69, 181-82 (agreement could be proved).

50. Monsanto Company v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

51. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

52. 4 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 965(a) at 205.

53. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Garshman v. Universal Resources Holding, Inc., 641 F. Supp. 1359, 1367 (D.N.J. 1986) (charge of monopsonization in the purchase of natural gas).

An attempted monopsonization claim may also be alleged under § 2. This analysis, however, will focus exclusively on monopsonization claims. Although attempted

mere possession of a monopoly or monopsony does not constitute the offense of monopolization (monopsonization)—rather, there must be abuse of that power.[54] The ultimate question in such a claim is whether the monopolist's (or monopsonist's) activity has an anticompetitive effect. Claims involving abuse of existing monopsony power may be based on a variety of activities including price fixing, refusals to deal, and vertical integration. Each of these areas is subject to its own particular analysis and will be reviewed in greater detail below.[55]

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monopsonization claims have been made for violations in the buyer's market, they have generally fallen at the heels of the anticompetitive effect analysis.

In DeModena v. Kaiser Foundation Health Plan, 743 F.2d 1388 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985), the court dismissed the plaintiff seller's attempted monopolization claim. The court found no evidence of predatory intent or coercion. *Id.* at 1395.

54. HILLS, *supra* note 15, at 28.

55. An additional cause of action may be monopoly leveraging or, in this case, monopsony leveraging. The courts have clearly condemned the use of monopoly power in one market to obtain a monopoly in a second market. United States v. Griffith, 334 U.S. 100 (1948) (geographic market); Smith Kline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir.) (tying sale of product for which there was no competition with one for which there was competition), *cert. denied*, 439 U.S. 838 (1978). *See also* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 375 (1927) (use of monopoly power in one market abused when defendant refused to sell rival monopolized goods for use in second market); Poster Exchange Inc. v. National Screen Service Corp., 431 F.2d 334, 339-40 (5th Cir. 1970) (monopoly power at manufacturing level used to eliminate competition at distributor-jobber level), *cert. denied*, 401 U.S. 912 (1971); R. GIVINS, ANTITRUST: AN ECONOMIC APPROACH § 3.08 (1983) [hereinafter GIVINS]. Some courts, however, have extended this doctrine to condemn the use of monopoly power to obtain merely a competitive advantage and not a monopoly position in the second market. Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). This antitrust theory is called monopoly (monopsony) leveraging and may provide a secondary cause of action.

The elements of this action have been defined as follows: (1) monopoly power in a relevant market; (2) challenged activities in a market distinct from the first market; (3) use of monopoly power rather than mere employment of other advantages that the monopolist enjoys by virtue of size, integration or other similar factors; (4) unwarranted competitive advantage in the leveraged market; and, (5) causal antitrust injury. Catlin v. Washington Energy Co., 791 F.2d 1343, 1349 (9th Cir. 1986) (citing Grayson Elec. Co. v. Sacramento Municipal Utility District, 571 F. Supp. 1504, 1518-19 (E.D. Cal. 1983)). *See also* Grand Light & Supply Co., Inc. v. Honeywell, Inc., 771 F.2d 672 (2nd Cir. 1985).

Courts and commentators are generally reluctant to adopt this theory because it is viewed as prohibiting "any competitive advantage in another market." *Catlin*, 791 F.2d at 1349. The *Grayson Electric* formulation reviewed by the *Catlin* court, however, distinguished proper and improper use of monopoly power. *Id. Berkey Photo* itself may be construed in this more restricted sense. *See Berkey Photo*, 603 F.2d at 276 (finding no violation when a company obtains benefits from efficient size, integration or competitive advantages derived from its broad based activities).

This reluctance, however, has led many courts to specifically refuse to adopt the theory until decision of the question is necessary. *See* Catlin v. Washington Energy Co., 791 F.2d 1343, 1346 (9th Cir. 1986). *See also* Ass'n for Intercollegiate Athletics for

A. Market Power

The market power requirement of a monopsony or monopoly claim recognizes that a firm without such power has no alternative but to accept or reject the market price.[56] If a firm has sufficient market power, however, it has the ability to control prices and exclude competition,[57] and may thus have an anticompetitive effect on the marketplace. Formal economic analysis defines market power as a function of elasticity of demand or, in the case of monopsony, elasticity of supply.[58] This formal analysis is not used by the courts, however, because the elasticity of supply or demand cannot be computed in litigation.[59] Thus, the majority of courts have adopted a market share analysis as a substitute.[60]

The market share test requires a determination of the relevant market in which to measure the firm's market share.

Women v. NCAA, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (use of monopoly power in dues and proceeds policies did not constitute monopoly leveraging where causal relationship not proven).

Monopoly leveraging is generally used to refer to anticompetitive activities involving completely separate product or geographic markets rather than markets at different levels of the market structure where vertical integration might occur. One court, however, has adopted this theory to condemn anticompetitive procurement practices. *See* United States v. AT & T, 524 F. Supp. 1336, 1379 (D.C. Cir. 1981). *See also* United States v. Griffith, 334 U.S. 100, 101-10 (1948) (large movie chain used combined buying power to acquire exclusive privileges from licensors); United States v. Cresent Amusement Co., 323 U.S. 173 (1944) (through use of their buying power, motion picture exhibitors conspired to monopolize exhibition of films in certain geographical areas).

56. GELLHORN, ANTITRUST LAW AND ECONOMICS 86 (2d ed. 1981).

57. United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) [hereinafter *Alcoa*].

58. *E.I. duPont*, 351 U.S. at 394. *See also* 4 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 964(b). Elasticity of demand refers to the variance in quantity demanded in response to a change in price. Conversely, the elasticity of supply refers to the variance in quantity supplied in response to a change in price. Often the degree of change is due to the availability of substitutes, and sometimes to the ability to do without the item. If the demand is inelastic, a change in price will have relatively little effect upon demand. Luxury items are generally considered relatively elastic, while staples are relatively inelastic.

59. HOVENKAMP, *supra* note 10, at 17. The inability to quantify economic concepts has led the courts to adopt substitute tests in other areas as well. *See, e.g.*, *infra* note 122 (accounting terms used instead of economic when identifying "appropriate cost").

60. HILLS, *supra* note 15, at 29. In *Alcoa*, 148 F. Supp. at 424, Judge Learned Hand stated that a firm has a monopoly it if sells over 90% of the relevant market. If a firm sells 60-64%, it is doubtful that it has a monopoly, and 33% is clearly not a monopoly. The Krattenmaker and Salop test for exclusionary conduct, discussed *supra* notes 34-35 and accompanying text, is a market power test and uses market share only as another factor. Salop, *New Economic Theories of Anticompetitive Exclusion*, 56 ANTITRUST L.J. 57, 62 (1987) [hereinafter Salop, *New Economic Theories*].

The relevant market is defined to include all sales that directly affect the defendant's pricing decisions.[61] While the relevant market may not generally be defined with reference to a single purchaser, a single purchaser may qualify if monopsony power is alleged.[62]

In defining the relevant market, it is necessary to first determine the relevant product market, and second, the relevant geographic market. The test for determining the relevant product market generally requires a consideration of the "reasonable interchangeability" of products.[63] "Cross-elasticity of demand"[64] or, "cross-elasticity of supply," is a significant indicator of a product market's boundaries.[65] In the case of monopoly, the relevant geographic market is the area in which competitors compete for purchasers; in the case of monopsony, it is the area in which competitors compete for sellers.[66]

Once the relevant markets are defined, the court must determine what share of the market would give the entity power to control prices or exclude competition within the relevant market. There is no set percentage which the court will apply;[67] in various cases, a sufficient percentage may vary from 90 percent to less than 50 percent.[68] The number of other firms in the market and the distribution of market shares

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61. *E.I. duPont*, 351 U.S. at 393-94; *Alcoa*, 148 F.2d at 424-25.

62. Jayco Sys., Inc. v. Savin Business Mach., 777 F.2d 306, 320 n.46 (5th Cir. 1985), *cert. denied*, 107 S. Ct. 73 (1986). *Cf.* Permian Basin Area Rate Cases, 390 U.S. 747, 794 n.64 (1968) ("[m]onopsony is the term used to describe a situation in which the relevant market for a factor of production is dominated by a single purchaser.").

63. *E.I. duPont*, 351 U.S. at 400.

64. Cross elasticity of demand refers to the interdependence among different products. If a slight increase in price would influence buyers to switch from one product to another when product substitutes are readily available, then the cross elasticity of demand is considered to be fairly high. If there is no substitute for a particular product, and purchasers are not responsive to price, then there will be little cross elasticity of demand. *See id.* Similarly, if a slight decrease in price would influence sellers to withdraw their product and produce another, the cross-elasticity of supply is fairly high. If the supplier is unable to easily switch to production of another product, and the supplier does not readily respond to price changes, there is little cross-elasticity of supply.

65. *Id.* at 394-95.

66. United States v. General Dynamics Corp., 415 U.S. 486 (1974). *See also* VON KALINOWSKI, 16B BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION 8.02[2][b] (Bender 1988) [hereinafter VON KALINOWSKI].

67. *Alcoa*, 148 F.2d at 416.

68. Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1204 (9th Cir. 1975) (45-70%), *cert. denied*, 425 U.S. 959 (1976); Yoder Bros., Inc. v. California Florida Plant Corp., 537 F.2d 1347, 1367-68 n.19 (5th Cir. 1976) (no rigid rule requiring 50%, but 20% insufficient), *cert. denied*, 429 U.S. 1094 (1977).

among these firms are factors used in determining the percentage that will give the firm monopoly or monopsony power.[69]

Determination of monopsony power may not be identical to that of monopoly power. In reviewing presumptive illegality based on market shares for merging companies, Areeda and Turner have noted that the "aggregate share of presumptive illegality should be considerably higher than that for the selling side."[70] For presumptive illegality, the commodity should be produced under significantly increasing costs, and the merging firms' aggregate purchasing share should be at least 25 percent.[71]

On the selling side, monopoly will produce anticompetitive effects whether the product is produced at either constant or increasing costs.[72] On the buying side, however, Areeda and Turner argue that monopsony will not result in decreased purchases if prices are constant. In such a situation, both a monopsonist and a competitive purchaser have an incentive to purchase the quantity of product that would equal the supply cost. If the product is produced pursuant to increasing costs, however, a monopsonist may capture greater monopsonistic profits by buying less than a competitive purchaser.[73] A small purchaser will not vary its buying habits whether dealing with a supplier with constant costs or one with increasing costs. Its price will remain constant since it has insufficient market power to affect price. For a monopsonist (the sole purchaser), however, the increase in cost will be reflected in its increased purchases. Thus, there is an incentive to reduce purchases to a

69. A larger market share in a market with numerous small competitors will suggest greater power than if there are only one or two competitors. Additionally, a monopolist or monopsonist will have no lasting power over price, despite its present market share, if there are no barriers to entry. Courts and commentators have increasingly recognized that market share is only one factor in determining market power. *See* GIVENS, *supra* note 55, § 3.01, at 3-5; Salop, *New Economic Theories*, *supra* note 60, at 62.

70. 4 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 965a.

71. *Id.* In one case concerning this issue, United States v. Pennzoil Co., 252 F. Supp. 962, 969 (W.D. Pa. 1965), the buyer concentration of the merging firms was 50% with one other firm possessing 43%. An injunction was issued to prevent the merger under § 7 of the Clayton Act. In Cargill, Inc. v. Montfort of Colo., Inc., 107 S. Ct. 484 (1986), the court appeared to look only at the firm's post-merger concentration in the output market, 21%, and did not look at its concentration in the buyer's market. The Court denied an injunction. The claim, however, alleged that "[c]ompetition in the markets for procurement of feed cattle *and* the sale of boxed beef will be substantially lessened. . . ." *Cargill*, 107 S. Ct. at 498 (Stevens, J., dissenting).

72. 4 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 964a.

73. *Id.* at 202.

level at which the marginal increase in cost equals the marginal increase in revenue.[74]

While market share percentages for merger are not synonymous with those of monopoly or monopsony, the factors arguing in favor of a higher market share for determination of monopsony power are similar.[75] The courts, however, have never explicitly required a higher market share when confronted with a monopsony case, as opposed to a monopoly case. While the courts may have implicitly recognized the difference in determining the percentage that would give the firm control, or create an anticompetitive effect, the difference has never been articulated.[76] Thus, in *Kartell v. Blue Shield of Massachusetts, Inc.*, the court applied the same standard as in a general monopoly case and found 74 percent of the relevant market to be sufficient to give the organization market power.[77] Conversely, in *Barry v. Blue Cross of California*, the Ninth Circuit found 16 percent of the relevant market to be insufficient by analogy to a case involving monopoly, rather than, monopsony power.[78]

If the firm's activities are exclusionary, the firm may have an incentive to engage in anticompetitive pricing even when it is not dealing with a supplier with increasing costs.[79] The monopsonist's incentive derives not only from a desire to increase monopsonistic profits, but also from a desire to exclude competition at either level of the production-distribu-

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74. *Id.* at 202-03 n.2. *See also* R. POSNER, ANTITRUST CASES, ECONOMIC NOTES AND OTHER MATERIALS 91 (1974) [hereinafter POSNER] ("Just as the seller has an incentive to limit output in order to increase his price and profits, so the buyer has an incentive to limit his purchases in order to reduce his input costs and thereby increase his profits.")

75. *Cf.* Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir.) (determination of improper merger and monopoly power similar), *cert. denied*, 412 U.S. 918 (1972).

76. Kartell v. Blue Shield of Massachusetts, Inc., 582 F. Supp. 734, 739-41 (D. Mass.), *aff'd in relevant part*, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985). In *Kartell*, the court discussed various factors in determining Blue Shield's market power.

77. 582 F. Supp. at 739, 741. *See also* United States v. AT&T, 524 F. Supp. 1336, 1377 (D. Md. 1981). In *AT&T*, the court appeared to apply the same monopoly share analysis to a case alleging anticompetitive conduct in procurement practices.

78. Barry v. Blue Cross of California, 805 F.2d 866, 874 (9th Cir. 1986).

79. As noted *supra* notes 72-74 and accompanying text, according to Areeda and Turner, a monopsonist will not abuse its power unless the product is produced at increasing costs, since only then would it be able to obtain increased monopsonistic profits. If the firm engages in exclusionary behavior to obtain or maintain its position at the first or second level, however, its conduct may have an anticompetitive effect by raising barriers to entry and prohibiting free competition at either level. *See also infra* notes 166-71 and accompanying text.

tion chain, and to obtain an increase in market power and share at either level.

1. Monopsony Power—Anticompetitive Effect

Complaints involving a purchaser's price setting activities under section 2 have usually been unsuccessful.[80] The court's rationale has generally rested on an absence of anticompetitive effect—either because there was no allegation of monopsony power,[81] or, if monopsony was properly alleged, because there was no allegation of facts that would lead to the necessary anticompetitive effects of decreased output or increased price within a monopsony market.[82]

2. Judicial Treatment of Monopsony Power

a. *Garshman v. Universal Resources Holding*

The problems with alleging and proving the requisite anticompetitive effect are exemplified in *Garshman v. Universal Resources Holding*.[83] In *Garshman*, the court found that a claim by natural gas producers against a pipeline company and its parent, a public utility, for monopsonization in the purchase of natural gas failed to state a cause of action.[84] The complaint alleged that the pipeline company threatened the natural gas producers with economic reprisal and future refusals to deal if they refused to agree to price concessions. The producers' brief alleged that the pipeline company's actions constituted an attempt to restrict output by producers and increase the price paid by consumers.

The court rejected the contentions raised in the complaint and stated that "the only motivation attributable to [the pipeline company] is (1) an intent to reduce the price it pays to producers, . . . (2) an intent to reduce its take-or-pay obligations by

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80. Courts reviewing these complaints have either dismissed the complaint, *see e.g.*, *Garshman*, 641 F. Supp. at 1370 (contract purchaser of natural gas), or even reversed and vacated a trial court's ruling, *see, e.g.*, *Kartell*, 749 F.2d at 931 (medical insurance company set price it would pay to providers). Even if the complaint survives a motion to dismiss, however, the court may uphold a later summary judgment motion. Portland Retail, Etc. v. Kaiser Foundation, 662 F.2d 641, 648 (9th Cir. 1980), *on remand and appeal*, De Modena v. Kaiser Found., 743 F.2d 1388, 1395 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985).

81. *See infra* note 10.

82. *See, e.g.*, *Kartell*, 749 F.2d at 927 (no reduced output, thus no anticompetitive effect). *See also Garshman*, 641 F. Supp. 1359, 1370 (D.N.J. 1986).

83. 641 F. Supp. 1359 (D.N.J. 1986).

84. *Id.* at 1369.

reducing prices, . . . and (3) an intent to retain all available gas under the contract."[85] The court found that even if every allegation was proved, the pipeline company's conduct could not have violated section 2. Rather, the plaintiff's complaint should have alleged that the transaction either excluded competition or suppressed supply in order to maintain a monopsony and increase prices charged to consumers.[86]

The error of the *Garshman* plaintiffs, then, lay in their failure to allege the proper anticompetitive effects of the pipeline company's conduct, such as decreased output or reduced competition. The court refused to accept contentions of increased price or decreased output, which were arguably alleged in the producer's brief, but not contained in the complaint.[87] Additionally, it does not appear that the plaintiffs alleged a factual basis supporting an allegation of decreased output and increased price in a monopsony market. These requisites will be discussed below.

b. Monopsony Anticompetitive Effects Test

Courts and scholars have generally considered monopsony power to have an anticompetitive effect only if a large-scale buyer restricts output, thereby injuring competition.[88] Reduced output injuring competition is the same economic effect used to condemn monopoly power.[89] In the buyer's market reduced output may occur if the monopsonist sets its purchase price below the product's average cost. Pricing below average cost would inevitably force the less efficient or marginal suppliers to drop out of the market since those suppliers whose costs exceed the most efficient will not recover their actual costs. The marginal producers will then switch to production of a second product that would not have been chosen in a competitive market. This inefficiency parallels that of monopoly.[90]

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85. *Id.*

86. *Id.* at 1370.

87. *Id.* at 1368-69. When ruling on a motion to dismiss, the court is not allowed to "flesh out," or amend, a complaint by reference to the brief. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th cir. 1984), *cert. denied*, 470 U.S. 1054 (1985).

88. *Kartell*, 749 F.2d at 927; Custom Auto Body, Inc. v. Aetna Casualty & Sur. Co., 1983-2 Trade Cas. (CCH) ¶ 65,629 at 69,185; 4 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 964, at 201.

89. *See supra* note 33 and accompanying text.

90. Areeda and Turner theorize that the problems inherent in seller concentration parallels that of buyer concentration. In each case output is decreased—in the seller's

As noted above,[91] however, the threatened loss of a supplier may be an incentive for a monopsonist to refrain from engaging in anticompetitive behavior. Without a supplier, the purchaser is unable to continue its manufacturing, wholesaling, or retailing operations. If the seller-manufacturer cannot easily convert its operation to another activity, however, then the monopsonist may more easily abuse its power without fear of losing its supplier.[92] This same opportunity for abuse is found in monopoly. Of course, occasionally the purchaser may be acting with an exclusionary intent and the loss of a supplier may be the precise result sought by the purchaser.

The above analogy to monopoly is incomplete. Unlike the monopolist, the monopsonist will theoretically have the capability and, thus, the incentive to indulge in anticompetitive behavior only if three conditions are met: (1) the buyer possesses significant market power, that is, its purchases are numerous enough to have an appreciable effect on total output; (2) the buyer's purchases are for a product that has a rising cost curve, that is, one for which each successive unit produced costs more to produce than the last one; and (3) the buyer possesses the power to restrict its purchases to a particular amount.[93] If these conditions are present, a rational large scale purchaser will limit its purchases to a smaller quantity of goods at a lower price than would exist in a freely competitive market.

The first condition, market power, is a necessary requirement of the section 2 requirement discussed above.[94] The second condition is a reiteration of Areeda and Turner's assertion that a monopsonist will not reduce its purchases if the product has a constant cost curve, but only if the product is produced under conditions of increasing cost.[95] The third condition rec-

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market by the ability to increase prices above competitive levels, and in the buyer's market by the ability to depress prices below competitive levels. 4 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 964 ("The principal reason for concern with undue buyer concentration parallels that for concern with undue seller concentration.").

91. *See supra* note 10 and accompanying text.

92. HOVENKAMP, *supra* note 10, at 17; POSNER, *supra* note 74, at 93 ("[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 makers to accept a monopsony price.").

93. *Custom Auto Body, Inc.*, 1983-2 Trade Cas. (CCH) at 69,185; 4 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 964(a).

94. *See supra* notes 56-79 and accompanying text.

95. *See supra* notes 72-74 and accompanying text.

ognizes that some industries, particularly regulated industries, may not have the ability to restrict purchases. If so, then it will not meet the Chicago School's condition of reduced input (and consequently reduced output) leading to an anticompetitive effect in the marketplace.

This test assumes the recent economic emphasis on decreased output and increased price. Even if relying exclusively upon economic theorists, if the monopsonist has engaged in exclusionary activities then this analysis would be incomplete and additional factors relating to the monopsonist's incentive should be considered. Thus, the first element, market power, may be determined under the Krattenmaker and Salop test of raising rivals' costs. The second and third elements may similarly require reconsideration. Litigants and courts should similarly consider the antitrust goals of decentralization and promotion of small business when determining those circumstances in which a monopsonist's activities should be curtailed.

c. *Custom Autobody v. Aetna Casualty & Surety*

The Areeda and Turner test has apparently been used by only one court, the federal District Court of Rhode Island. In *Custom Autobody v. Aetna Casualty and Surety Co.*,[96] automobile repair shops alleged that an insurance company conspired with the company's insureds to aggregate the company's buying power and restrain trade. The claim was brought under section 1, which requires concerted action, rather than section 2, which requires monopoly or monopsony power.

In reviewing defendant's summary judgment motion, the court rejected the plaintiff's contention that the claim should be reviewed under a per se analysis, and sua sponte proceeded to review the claim under the rule of reason.[97] Earlier in its opinion the court found that the insurance company's agreements with the repair shops could have substantial pro-competitive effects,[98] effectively precluding any application of the per se rule. The court, however, did not proceed to apply a typical section 1 rule of reason analysis. The plaintiff had alleged that the defendant had "used its position as a large-scale buyer to enter into provider agreements that depress the

96. 1983-2 Trade Cas. (CCH) at 69,194.
97. *Id.* at 69,184-85.
98. *Id.* at 69,184.

price of automobile repairs below competitive levels."[99] Relying on this assertion, the court restated the claim to allege monopsony power in order to determine if the claim would then allege sufficient anticompetitive effect to survive summary judgment.[100] While the court did not state that it was reviewing the claim under section 2, for purposes of this Comment this inference may be drawn since section 1 generally has no marketpower requirement.[101]

The plaintiff in *Custom Autobody* presented no evidence relating to the first two elements of the previously discussed monopsony anticompetitive effect test—market share and rising cost curve. Therefore, the court was able to review only the third element, ability to restrict purchases.[102] Arguably, the insurance company did not have this ability since it was required to arrange for the repair of its insureds' vehicles under the terms of its insurance contract. The court, however, noted that it was equally arguable that the insurance company could arrange for its preferred shops to do inferior quality work.[103] The court thus found that the insurance company

99. *Id.* at 69,185-86.

100. *Id.* at 69,185.

101. One author has asserted that the *Custom Autobody* court's analysis was improper under section 1, and did not constitute a restatement of the claim under section 2. Rovner, *supra* note 5, at 871-72 ("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. . . .[T]he court's view that a unilateral exercise of monopsony power can amount to an unreasonable trade restraint violative of section 1 is wrong.").

In arguing that such an approach is inappropriate because it asserts that "a monopsonist could be attacked under § 1 as an unreasonable trade restraint even if the monopolist had attained its market status legally under section 2," Rovner, *supra* note 5, at 871-72, Rovner ignores that the court had applied Areeda & Turner's monopsony anticompetitive effects test precisely to determine if the insurance company had engaged in the act of monopsonization, and did not merely state that monopsony power alone was bad. This is the classic test for a § 2 violation: whether "a firm acquires or maintains monopoly power by means which constitute restraints of trade in violation of § 1 of the Sherman Act. . . ." SULLIVAN, *supra* note 31, at 98.

For purposes of this Comment the case will be treated as if the court did in fact restate the claim and analyze the violation under § 2. Such an assumption is consistent with the opinion. The court's analysis may also be affirmed under § 1, however, since market power is one test of reasonableness and may be reviewed in a § 1 case when the anticompetitive effect of the conduct is not self evident. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85, 110-111 n.42 (1985).

102. *Custom Autobody*, 1983-2 Trade Cas. at 69,186.

103. *See supra* note 34-35 and accompanying text discussing the Krattenmaker and Salop test. One case to review monopsony and backward integration in terms of consumer welfare is Shapiro v. General Motors Corp., 472 F. Supp. 636 (D. Md. 1979), *aff'd*, 636 F.2d 1214 (4th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981). In *Shapiro*, the

could restrict the quality, rather than the quantity, of its purchases. Reduction of quality, however, was equated to reduction of output for repair services.

The decisions in both *Custom Autobody* and *Garshman* clearly reflect the need for the plaintiff to: (1) recognize that its monopsony claim is properly brought under section 2; (2) allege decreased output and increased price, or other recognizable antitrust injury, rather than merely lost profits, in its complaint; and, (3) allege facts supporting an incentive to engage in such behavior in a monopsony market. If the court has not embraced the Chicago School of thought, then the plaintiff may assert an anticompetitive effect resting on decentralization of the market.

B. Abuse of Monopsony Power

As noted earlier, the anticompetitive effect test may be different for various exclusionary activities. Therefore, this Comment will review some of these activities: price fixing, refusals to deal, and vertical integration. In the case of such exclusionary activity, the test advanced by Krattenmaker and Salop may be the most appropriate.[104]

1. Price Fixing

Section 1 of the Sherman Act prohibits price fixing if it is imposed pursuant to concerted action. Price fixing by a single firm does not present a cognizable claim under section 1.[105] Section 1's prohibition is limited to agreements to fix prices to be charged to third parties and not prices between the contracting parties themselves.[106] Thus, a seller's agreement to sell its products at the price set by a purchaser does not meet the concerted action requirement of section 1. If the claim is brought under section 2 and the firm possesses monopoly or monopsony power, however, a single firm may be prohibited from fixing prices. Without monopoly or monopsony power, a

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court rejected the plaintiff's antitrust claim for failure to allege and prove sufficient anticompetitive effects. As noted by the court, "Language about the 'market for innovation' is an effort by plaintiffs to temper their profit making motives with a general appeal to overall consumer welfare." *Shapiro*, 472 F. Supp. at 641.

104. *Custom Autobody*, 1983-2 Trade Cas. at 69,186.

105. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760 (1984); *Garshman*, 641 F. Supp. at 413 n.1.

106. Garshman v. Universal Resources Holding, Inc., 641 F. Supp. 1359, 1371 (D.N.J. 1986).

single firm will not have the requisite anticompetitive effect on the marketplace that is the crux of the Sherman Act.[107]

While concerted action involving price will generally be considered illegal per se,[108] a monopolist's or monopsonist's price setting activities will be reviewed to determine if they constitute an abuse of that power. Thus, a monopolist or monopsonist may often exploit its market power and set the price at which it will purchase or sell goods without incurring antitrust liability.[109] As the Supreme Court stated in *Cargill*, "[I]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition."[110] Thus, it has been held that the antitrust laws do not prohibit a buyer from "bargaining for the best deal possible;"[111] that a monopsonist's ability to obtain a price lower than that available to an individual purchaser may merely reflect its market power and its ability to "[drive] a hard bargain."[112] Similarly, a monopolist will not incur antitrust liability merely for setting the price at which it will sell its products.[113] Only if

107. *See, e.g.*, Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, 675 F.2d 502 (2d Cir. 1982) (in absence of claim of monopsony power, plaintiffs could not assert anticompetitive effect necessary to prevent summary judgment of price fixing claims); Webster County Memorial Hos. Inc. v. United Mine Workers of Am. Welfare & Retirement Fund of 1950, 536 F.2d 419 (D.C. 1976) (antitrust price fixing claim dismissed in absence of allegation of monopsony power). *See also* De Modena v. Kaiser Found. Health Plan, 743 F.2d 1388 (9th Cir. 1984) (attempted monopsony claim alleging price fixing in buyer's market dismissed because of lack of anticompetitive effect—no monopsony alleged), *cert. denied*, 469 U.S. 1229 (1985). Price fixing is illegal under § 1 whether it has the effect of "raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . ." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1939). Although the courts have expressed reluctance in finding monopsony claims to be illegal because "the prices at issue . . . are low prices, not high prices," Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922, 930 (1984), *cert. denied*, 471 U.S. 1029 (1985), this reluctance would appear to be misplaced even in a § 2 case.

108. Thus, buyer cartels that force the price that suppliers charge the members of the cartel below the competitive level have generally been declared illegal per se under § 1. *See supra* note 41. The Court's recent decision in Business Electronics Co. v. Sharp Electronics Co., 108 S. Ct. 1515 (1988), has made it clear, however, that vertical agreements must set price or price levels before they will be considered illegal per se.

109. Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922, 927 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985).

110. Cargill, Inc. v. Monfort of Colo., Inc., 107 S. Ct. 484, 492 (quoting Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984)).

111. Brillhart v. Mutual Medical Ins., 768 F.2d 196, 201 (7th Cir. 1985).

112. De Modena v. Kaiser Found., 743 F.2d at 1395. *See also Kartell*, 749 F.2d at 928.

113. Trace Chemical, Inc. v. Canadian Indus., 738 F.2d 261, 268 (8th Cir. 1984), *cert.*

the monopolist's or monopsonist's pricing is predatory will its price setting activities generally be considered anticompetitive and subject the monopolist or monopsonist to antitrust liability.

Predatory pricing meets the anticompetitive effect requirement of the antitrust laws by harming competitors without any countervailing benefit to consumers.[114] It has been loosely defined by the Supreme Court as "pricing below an appropriate measure of cost for the purpose of eliminating competition in the short run and reducing competition in the long run.[115] The Court has declined, however, to identify the "appropriate measure of cost."[116]

In defining the appropriate measure of cost, a court must distinguish between a competitive and a predatory price.[117] The antitrust laws will not protect a competitor from a loss of profits because of price competition, or forbid competition for increased market share.[118] Predatory pricing that is aimed at the elimination of competition, however, is prohibited. The "appropriate measure of cost" must, therefore, distinguish between these two types of pricing.

In determining whether a price is predatory, courts and commentators generally have rejected a subjective test based on intent and have adopted some form of objective test. The most well-recognized test for defining the appropriate measure is that enunciated by Areeda and Turner.[119] This objective test is usually defined as below cost pricing.[120] According to

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denied, 469 U.S. 1160 (1985). It has been suggested that the Court's assertion in *Mandeville Island* that "simply using size to drive a hard bargain is not necessarily illegal" may suggest that § 2 of the Sherman Act was not meant to reach monopsonization. *See* Rovner, *supra* note 5, at 868. Such an assertion, however, ignores that the use of monopoly power in general is not considered improper. Thus, a monopolist may freely sell at any price it chooses; the mere fact of its size does not make this activity illegal. Rather, improper use of its size is illegal. Thus, at this stage, there is no distinction to be made between monopoly and monopsony, and any such inference from such language is erroneous.

114. *See, e.g.*, MCI Communications v. AT&T, 708 F.2d 1081, 1112-13 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975) [hereinafter Areeda & Turner, *Predatory Pricing*].

115. *Cargill*, 107 S. Ct. at 493.

116. *See id.*

117. William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1027 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

118. *Cargill*, 107 S. Ct. at 492.

119. Areeda & Turner, *Predatory Pricing*, *supra* note 115.

120. *Id.* at 712.

Areeda and Turner, pricing below marginal or average variable cost is presumptively illegal.[121] Conversely, pricing above marginal or average variable cost is presumptively legal.[122]

The Areeda and Turner test has not been wholly embraced by the courts. Some courts have altered this formulation to encompass certain fixed costs considered variable over the long run.[123] Other courts, such as the Ninth Circuit, consider pricing above average total cost illegal if accompanied by anticompetitive intent.[124] The Supreme Court has recently

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121. *Id.* at 732-33. Areeda and Turner use the accounting term "average variable cost" as the surrogate for the economic concept of marginal cost. This facilitates determination of predatory pricing by providing a measurable formula. Variable costs are those costs that vary with output and would include direct materials, direct labor, fuel, maintenance, and other costs directly incurred to produce the product. Average variable cost is the total variable cost divided by the number of units produced.

122. Areeda & Turner, *Predatory Pricing*, *supra* note 114, at 732-33. *See also* D. E. Rogers Assoc. v. Gardner-Denver Co., 718 F.2d 1431, 1437 (6th Cir. 1983).

123. Variable cost will generally measure only the short term marginal cost. A second measure, long-run incremental cost (LRIC), may also be used. LRIC represents the average cost of adding an entire new service or product rather than merely the cost of the last unit of production. *See* A. KAHN, 1 THE ECONOMICS OF REGULATION 65-66 (1970); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention for Predatory Pricing*, 89 YALE L.J. 1 (1979); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979). *See also MCI Communications*, 708 F.2d at 1119-1120. LRIC will, therefore, measure all the costs of adding a new product or service—fixed as well as variable. Under the LRIC approach all costs will soon become variable. Such an approach may be particularly useful to capital-intensive processes where plant and equipment are relied upon heavily.

124. Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1388 (9th Cir.) (pricing above average total costs may be deemed predatory upon showing of predatory intent), *cert. denied*, 464 U.S. 955 (1983); William Inglis & Sons Baking Co., v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981) (pricing below average total cost and above average variable cost may be predatory if accompanied by predatory intent), *cert. denied*, 459 U.S. 825 (1982).

Under this test, the plaintiff makes a prima facie case upon proof that the defendant charged prices below average variable cost. The burden is then on the defendant to show "that the prices were justified without regard to any anticipated destructive effect they might have on competitors." *William Inglis*, 668 F.2d at 1036. Conversely, if the price is above average variable cost, but below average total cost, the burden will remain on the plaintiff to establish the predatory nature of the pricing. Thus, although the plaintiff bears the burden in such cases, the Ninth Circuit will recognize predatory pricing above average variable if "the defendant sacrificed greater profits or incurred greater losses than necessary, in order to eliminate the plaintiff." *Id.* at 1036.

In *Transamerica Computer Co.*, the Ninth Circuit extended its prior rulings to hold that average total cost pricing occasionally may sustain a monopolization claim if the plaintiff offers "clear and convincing evidence" of predatory pricing. 698 F.2d at 1388. Other circuits have declined to adopt the *Transamerica Computer Co.* extension. *See, e.g.*, Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1056, 1058 (6th Cir. 1984); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 233-36 (1st Cir.

declined to determine if recovery should ever be available when the pricing is above incremental cost or whether "above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation."[125]

The occurence of predatory pricing is generally criticized on the ground that it requires the monopolist to incur short term losses when the return is inherently uncertain.[126] This same criticism may not be levied against monopsony. The courts have indicated that in a monopsony case the relevant costs would be those of the plaintiff-purchaser. In such a case, the seller, not the monopsonist, would be incurring the loss.[127] In *Kartell v. Blue Shield of Massachusetts, Inc.*, the court noted that none of the parties "point[ed] to evidence of any price below *anyone's* 'incremental cost.'"[128] Similarly, in *De Modena v. Kaiser Foundation Health Plan, Inc.*,[129] the court

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1983). Although the *Transamerica* court did not find sufficient evidence of intent to support a finding of predatory pricing, subsequent Ninth Circuit cases have found pricing above average total cost to be predatory. *See, e.g.*, Western Concrete Structures Co. v. Mitsui & Co. (U.S.A.), 760 F.2d 1013 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 230 (1985); Farley Transp. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1348 (9th Cir. 1985). *But see* Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1194 (9th Cir. 1984).

125. Cargill, Inc. v. Monfort of Colo., Inc., 107 S. Ct. 484, 493 n.12 (1986); *see also* Matshushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585 n.9 (1986).

126. *Matsushita*, 475 U.S. at 589. *See also* BORK, *supra* note 32, at 153-54; 3 Areeda & Turner, ANTITRUST LAW, *supra* note 32, at ¶ 711b, 151.

127. It may be inappropriate for the courts to look exclusively at the plaintiff's actual costs since these may be higher than the industry's average costs. Additionally, intent may be an even greater consideration in a monopsony case since intent may not be inferred from the fact of pricing below variable cost. The inference of intent may be particularly inappropriate in a monopsony suit since the defendant may have been unaware of the plaintiff's costs, or average costs. The plaintiff should not be required to present proof of such knowledge, or of facts from which such an inference can be made. Of course, many courts outside of the Ninth Circuit do not accept an inference of predatory intent from the act of pricing below cost. *See, e.g.*, Indiana Grocery Co. v. Super Valu Stores, Inc., 54 ANTITRUST & TRADE REG. REPORTER (BNA) 418, 426 (S.D. Ind. 1988).

128. 749 F.2d 922, 928 (1st Cir. 1984) (emphasis supplied).

129. 743 F.2d 1388, 1395 (9th Cir. 1984). The court also noted that no evidence had been shown that the defendants had subsequently "sold drugs to their members below the cost of acquiring the drugs." *De Modena*, 743 F.2d at 1395. This would be a typical predatory pricing claim, but in this case other insurance companies, i.e. competitors of the defendant, would be the ones with standing to bring suit, as opposed to the pharmacists. Additionally, the facts of *DeModena* do not support such an analysis since the purchaser presumably would be paying higher than normal prices rather than lower. *See, e.g.*, Seattle Rendering Works, Inc. v. Darling-Delaware Co., 104 Wash. 2d 15, 21, 701 P.2d 502, 507 (1985) (purchaser paid *higher* than normal rates to suppliers without any predatory intent). In discussing the claim, the *Seattle Rendering* court stated:

> We note that this is not a traditional below-cost pricing case. The usual below-cost pricing case involves a firm lowering its prices so that the new price is

noted that the plaintiffs had offered "no evidence of predatory intent, such as proof that [defendants] coerced pharmaceutical companies into selling drugs to them below cost." It may be argued that this activity is an example of unfair trade practices that are not violative of section 2.[130] The court's language, referring to "below cost" and "incremental cost," however, indicates an intention by the court to analogize such an action to the rules relating to predatory pricing.

2. Refusal to Deal and Vertical Integration

A purchaser's or seller's unilateral action in refusing to deal[131] with another will not generally result in antitrust liability. As stated in *United States v. Colgate & Co.*:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[132]

As this statement reflects, a monopolist or monopsonist may have an added obligation to deal fairly.[133] Its refusal to deal, however, will not be considered a per se offense.[134]

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below what it cost to make that product. The facts presented here are different in that the price of the finished product stayed the same, but cost of the raw materials needed to make the product rose. Analytically, this distinction is irrelevant. *Seattle Rendering*, 104 Wash. 2d at 21 n.2, 701 P.2d at 506.

130. *See, e.g.*, A.H. Cox & Co. v. Star Mach. Co., 653 F.2d 1302, 1308 (9th Cir. 1984); Northwest Power Prod., Inc. v. Omark Indus., Inc., 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); Whitten v. Paddock Pool Builders, Inc., 376 F. Supp. 125 (D. Mass.), *aff'd*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (rejecting Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932), rule of per se illegality and requiring proof of anticompetitive effect).

131. A refusal to deal may be implied. Thus, in Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 375 (1927), the Court found that the defendant's refusal to sell to the plaintiff except at over-the-counter prices was unreasonable and was effectively a refusal to deal. Similarly, in Six Twenty-Nine Productions Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966), a radio station's refusal to pay normal commission rates for material prepared by an advertising agency was found to be a refusal to deal.

132. 250 U.S. 300, 307 (1919).

133. Byars v. Bluff City News Co., 609 F.2d 843, 855 (6th Cir. 1979).

134. *Colgate & Co.*, 250 U.S. at 307. In contrast, concerted refusals to deal are often

In *Aspen Skiing Co. v. Aspen Highland Skiing Co.*,[135] the Supreme Court held that there was no general duty to cooperate with competitors unless the monopolist's refusal was unreasonably "exclusionary" or predatory.[136] As noted by the court, "if a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[137] Thus, if a monopsonist or a monopolist acts with the purpose of excluding competitors, its refusal to deal may result in a violation of section 2.

Although a monopsonist's price setting activities or refusals to deal may be insufficient to subject it to antitrust liability, in some cases liability may be imposed if these activities are a means of accomplishing vertical integration.[138] A business vertically integrates when it obtains a certain amount of control over the distribution or sale of its products at another level of the production-distribution chain. Often this integration results in procompetitive effects such as better products or lower prices.[139] Vertical integration may have anticompetitive effects, however, such as foreclosing competition or increasing barriers to entry. Anticompetitive effects may not only be felt at the first level, but may also result in the acquisition of a monopoly at the second level.[140]

Since a monopsonist's vertical integration by refusing to deal with a supplier may have either procompetitive or anticompetitive effects, its conduct cannot be illegal per se.[141] Neither a monopolist nor a monopsonist is subject to antitrust

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per se violations of § 1 of the Sherman Act. *See* United States v. General Motors Corp., 384 U.S. 127, 145-46 (1966).

135. 472 U.S. 585 (1985).

136. *See id.* at 603.

137. *Id.* at 605 (quoting R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 138 (1978)).

138. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Poster Exchange v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970) (supplier refused to sell to resaler in order to eliminate competition at the distributor level), *cert. denied*, 401 U.S. 912 (1971).

139. 3 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ ¶ 725-26; POSNER, *supra* note 74, at 704-708.

140. *See infra* text accompanying note 169; *see also* Note, *New Analysis*, *supra* note 5, at 402-05. Anticompetitive results may occur since competitors may often be more innovative than monopolists. SULLIVAN, *supra* note 31, at 129.

141. United States v. Columbia Steel Co., 334 U.S. 495, 525-26 (1948); Paschall v. Kansas City Star, 695 F.2d 322, 327 (8th Cir. 1982); United States v. AT&T, 524 F. Supp. 1336, 1373 (D. Md. 1981).

liability merely because it competes vigorously.[142] In some cases, however, its refusal to deal to attain vertical integration may satisfy the second element of monopsonization (monopolization), willful acquisition or maintenance of monopoly or monopsony power.[143] A section 2 claim may be stated if a monopsonist's vertical integration creates monopoly power and is accompanied by an intent to exclude competition, gain a competitive advantage, or destroy competition.[144] In the presence of monopsony power, liability for a monopsonist's backward integration may, thus, be imposed upon proof of (1) specific intent to monopsonize, *or* (2) anticompetitive effects that result from the monopsonist's actions.[145]

a. Specific Intent

In the context of vertical integration, specific intent may be shown by evidence that vertical integration is part of "a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs."[146] Specific intent may be shown either by direct proof or, indirectly, by proof of anticompetitive conduct or by proof that the monopolist or monopsonist engaged in predatory tactics or "dirty tricks."[147] This latter use of the antitrust laws to prevent unfair competition has been resoundingly criticized.[148] While such tactics may be reprehensible, they are not the kind of activity that the Sherman Act seeks to curb. These tactics will rarely demonstrate the anticompetitive effect that is the target of the antitrust laws.

Valid business justifications may negate liability premised on specific intent.[149] Thus, if the defendant is able to plead and

142. *AT&T*, 524 F. Supp. at 1373.

143. *Kansas City Star*, 727 F.2d at 696 (newspaper's refusal to deal with former carriers). *See also supra* text accompanying note 53.

144. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); *AT&T*, 524 F. Supp. at 1373 (abuse of purchasing power). *See also* VON KALINOWSKI, *supra* note 67, at § 8.02[1] at 5 (Cum. Supp. 1986).

145. *Columbia Steel*, 334 U.S. at 531-32; *Griffith*, 334 U.S. at 105.

146. United States v. Paramount Pictures, Inc., 334 U.S. 131, 174 (1948) (citing United States v. Reading Co., 253 U.S. 26, 57 (1920)).

147. *Kansas City Star*, 727 F.2d at 697 (no dirty tricks found); Byars v. Bluff City New Co., 609 F.2d 843, 853-54 (6th Cir. 1979), *on remand and appeal*, 683 F.2d 981, 983 (6th Cir. 1982) (per curiam) (latter court found no dirty tricks).

148. 3 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 728(c)(5).

149. *Kansas City Star*, 727 F.2d at 698. *But see* United States v. AT&T, 524 F. Supp. 1336 (D. Md. 1981).

prove that its conduct was motivated by sound business judgment, the plaintiff will generally need to rely solely on an anticompetitive effect argument. The mere assertion of business justifications, however, will not avoid liability premised on specific intent.

i. Anticompetitive Conduct

One court reviewing a case involving a claim in the buyer's market has relied upon the defendant's anticompetitive conduct to support an inference of specific intent. In *United States v. American Telephone and Telegraph*,[150] the government charged AT&T with reinforcing and exploiting its structural incentives to its purchasing agents. These incentives influenced the agents to purchase equipment, without regard to price, from related companies rather than from independent sources.[151] Evidence presented by the government indicated that the company would not purchase independent products, but would implement crash programs to develop competing products; that employees were under pressure to buy from related companies—even at increased prices and poorer quality; and, that detailed justifications were required to purchase from independent firms, but not from related companies.[152] Despite the defendant's assertion that purchasing decisions were made pursuant to "reasonable engineering and sound business judgment which should not be second-guessed by the Court,"[153] the court found that sufficient evidence of anticompetitive conduct had been shown to survive dismissal.[154] Thus, despite the assertion that its conduct was a result of "sound business judgment," it was insufficient to defeat a claim based on anticompetitive conduct as a basis for drawing an inference of specific intent.

ii. Predatory Pricing and Dirty Tricks

As noted earlier, predatory pricing violates the antitrust laws.[155] Generally, it is defined as pricing below variable cost.

150. 524 F. Supp. 1336 (D. Md. 1981).

151. *Id.* at 1370.

152. *Id.* at 1371.

153. *Id.* at 1372.

154. *Id.* at 1372. Defendant presented no evidence of valid business justification to rebut the government's contentions, and the court refused to rely solely on the defendant's assertion of valid business reasons.

155. *See supra* notes 105-07, 114.

Predatory pricing is not necessarily pricing below variable cost, however, and may be any price that is designed to exclude competition.[156] Thus, a price above variable cost may be predatory if it raises rivals' costs and inevitably leads a competitor to withdraw from the market. As noted by Krattenmaker and Salop, the supplier's costs may increase if the purchaser "is vertically integrated into the production of some fraction of its input needs or if its input purchase price is protected by long term contract or superior bargaining ability."[157] Action designed to increase a supplier's cost for the purpose of excluding the supplier and vertically integrating into the input market should thus be considered predatory and a violation of the antitrust laws.

Dirty tricks have been alleged in integration cases, but are generally unsuccessful in supporting the anticompetitive conduct prong.[158] This lack of success may be a reflection of the general notion that unfair competition claims are to be governed by tort law rather than by antitrust law.[159] To be successful, the plaintiff alleging dirty tricks must generally show that the dirty tricks are predatory or have resulted in an anticompetitive effect.[160]

b. Anticompetitive Effect—Backward Integration

Specific intent[161] is necessary "only where the acts fall short of the results condemned in the Act."[162] Therefore, in the absence of specific intent, proof of the anticompetitive effect of the monopsonist's actions can result in liability.

Proponents of the Chicago School of Economics focus on allocative efficiency and argue that a monopolist at any single level of a distribution chain can recover all monopoly profits

156. *Cargill*, 107 S. Ct. at 493; 3 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ ¶ 737, 738.

157. Krattenmaker & Salop, *supra* note 34 at 238.

158. *See supra* note 147. *See also* Associated Radio Serv. Co. v. Page Airways, Inc. 1980-2 Trade Cas. (CCH) ¶ 63,512 (5th Cir. 1980) (court rejected per se rule, but found that acts of unfair competition had an anticompetitive effect); Hunt-Wesson Prods. v. Ragu Foods, Inc. 627 F.2d 919, 927 (9th Cir. 1980) (predatory promotional conduct could have made entry more difficult), *cert. denied*, 450 U.S. 921 (1981); 1 CALLMAN, *supra* note 5, § 4.03; 16B VON KALINOWSKI, *supra* note 66, 10.04.

Abuse of governmental process may be a particularly effective "dirty trick." *See* BORK, *supra* note 32, at 159-60; 16B VON KALINOWSKI, *supra* note 66, § 10.04(3).

159. *See supra* notes 130, 148 and accompanying text.

160. *See also supra* note 158.

161. *See supra* text accompanying note 145.

162. United States v. Griffith, 334 U.S. at 105.

available in that chain. A double monopolist of two successive levels will not make more monopoly profits than a single monopolist. Thus, there is little incentive to attempt vertical integration.[163] This analysis, however, is generally inapplicable to backward integration because the monopsonist is able to gain more profits (both monopsonistic/monopolistic and non-monopsonistic/monopolistic) by its ability to control both the price it charges and the price it pays. Although the forward integrationist is able to do this once it integrates, it has already taken all of the monopoly profits available in the end-product's price from the point of its original entry. The backward integrationist, however, may have had to split such profits with its supplier. By integrating into its source of supply, the backward integrationist is assured that it will be able to take all monopoly/monopsony profits in that chain. Thus, the monopsonist that attains backward integration is able to profit from its position in two successive levels.[164] While this analysis rebuts the increased monopoly/monopsony profit argument, it does not rebut the Chicago School's underlying argument that there is no anticompetitive effect in the form of increased prices or decreased output to consumers, since the end price and output will presumably remain the same at the monopolistic price.

Such an anticompetitive effect may be shown by increased barriers to entry. The Chicago School, however, argues that entry barriers will be erected only if the integrated business is more efficient than its unintegrated competitors.[165] Even according to the Chicago School of thought, however, an anticompetitive effect may be shown in certain fact situations.

The courts have often recited three such fact situations in which a refusal to deal as part of a vertical integration scheme is anticompetitive: (1) where integration allows price discrimination so that the monopolist or monopsonist can reap the

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163. HOVENKAMP, *supra* note 10 at 150-51; 2 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 725b (no "double" monopoly profit).

164. Note, *New Analysis*, *supra* note 5, at 403 ("The argument that a monopolist at any one level in a production chain captures all the available monopoly profits ignores the monopsony profits available to the insurer."). In some circumstances, the monopolist may also have had monopsony power, which it may use to extract monopsony profits from its supplier. In contrast to monopoly, a monopsonist would have little effect upon a third level supplier, e.g., a raw material supplier to the monopsonist's supplier. The more unrefined the product, the more likely that the supplier will have a greater number of purchasers.

165. Byars v. Bluff City News Co., Inc., 609 F.2d 843, 861 (6th Cir. 1979); E. SULLIVAN AND H. HOVENKAMP, ANTITRUST LAW POLICY AND PROCEDURE 481 (1984).

maximum monopoly or monopsony profit from different purchasers or sellers; (2) where integration erects first-level entry barriers so that potential competitors are stymied; and (3) where integration permits evasion of regulation of profits from monopoly or monopsony.[166] The first and third of these are generally limited to specific industries.[167] Increased barriers to entry, however, may create anticompetitive effects in many industries.

Increased barriers to entry may be shown if other firms would be forced to operate at two levels simultaneously. Theoretically, firms would be required to do so only if: (1) operation at the second level alone required doing business with the monopsonist; (2) the monopolist/monopsonist ceased dealing with outsiders; and (3) dual entry would be more difficult than entry at a single level. These conditions would be met if the monopsonist covered virtually all of the market.[168]

In discussing forward and backward integration it is important to realize that the backward integrationist will usually use its monopsony power to integrate into its source of supply. When it achieves backward integration it may have both a monopsony and a monopoly at the second level. Its newly acquired monopoly power, however, may be barely beneficial since it is its own primary purchaser. This new monopoly power, however, may enable it to prevent new entrants at the first level since all of its competitors would now be required to purchase their supplies from it, presumably at a higher price.[169] Thus, it may be the use of its monopoly power,

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166. *Becker*, 713 F.2d at 370; *Byars*, 609 F.2d at 861; Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 HARV. L. REV. 1720, 1727-28 (1974) [hereinafter Note, *Refusals to Deal*].

167. Certain purchasers may be segregated, so that some will be willing to pay more than another for a similar (perhaps more refined) or identical product. The monopolist is then in a position to price its product discriminatorily and reap the maximum monopoly profits from each purchaser, and not merely the average monopoly profits. 3 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 725(e). This argument may not be identical for monopsony, however.

A regulated monopolist or monopsonist may integrate into another level of production where it may evade regulation and recoup the monopoly or monopsony profits available in that chain of production. 3 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 726(e). This potential is available for both forward and backward integrationists.

168. 3 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 726.

169. In antitrust lingo, this effect is often called a "price squeeze." An integrated monopsonist's ability to control supply, however, would also give it the ability to conduct a "supply squeeze." *See* Krattenmaker & Salop, *supra* note 34, at 236. This is apparently what occurred in Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207

not its monopsony power at the first level, that will create the harmful effect from backward integration. Its monopsony power at the first level, however, may enable it to prevent entry at the second level thus requiring all new entrants to enter both markets simultaneously. Thus, a monopsonist's backward integration may result in increased barriers to entry not only by increasing its own economies of scale and increasing the capital required to enter the first market, but also by requiring simultaneous entry at two levels.

If a monopolist or monopsonist has the power to force simultaneous entry at both levels, potential competition may be reduced in a variety of ways. First, the amount of capital and the level of technological skill necessary for entry would increase. Second, integration may increase the minimum level of efficient operation in the industry thereby limiting entry only to larger firms.[170] Thus, if a monopsonist only partially integrates (e.g., a widget manufacturer integrates into a single input market when several inputs are necessary to manufacture its widgets), there will be less chance of reduced entry than if it fully integrates (e.g., widget manufacturer has one major input and integrates into and monopolizes that market).[171]

The majority of vertical integration cases have dealt with monopolists and forward integration rather than monopsonists and backward integration. This distinction is not without its problems, and it has been noted that backward integration generally cannot extend a monopolist's market control into the second level or increase barriers to entry. If the monopolist has both monopoly and monopsony power, however, then backward integration into a level in which the monopolist possesses monopsony power has consequences identical to those of

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(1959). In *Klors*, the court found that an appliance chain restricted competition through use of its buying power to deny a source of competitive supply to the plaintiff. The practice placed the plaintiff at a disadvantage by preventing the plaintiff from purchasing certain brands of appliances on the same terms of sale and delivery as the defendant.

170. Note, *Refusals to Deal*, *supra* note 166, at 1729. Recently in *Cargill*, the Supreme Court noted that capital requirements and "cost and delays" of building new plants should not generally be taken into account, because the unused facilities and equipment of those forced out of the market would be available to new entrants. Thus, the court should look at whether barriers to entry exist after the firm has eliminated its competitors. 107 S. Ct. at 494-95 n.15.

171. 3 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 726c.

a monopolist's forward integration.[172] This should not be confused with the restricted manner in which monopsony power itself has been considered improper.[173] In this case, we are discussing a monopolist's exclusionary use of its monopsony power to obtain vertical integration, and not merely price setting.[174] The assumptions used by Areeda and Turner may not apply when the added motive of exclusion, involving additional economic considerations and effects, is added to the analysis.

V. CONCLUSION

Abuse of monopsony power, particularly in the backward integration context, may clearly support an antitrust claim under section 2 of the Sherman Act. The failure of monopsony claims under section 2 to date is a result of the failure to closely analyze these claims, rather than the inability of a seller's action to state a cognizable claim under the antitrust laws. The claim cannot rest on the loss of profits, but must allege a cognizable antitrust injury. The factual basis supporting the claimed antitrust injury, and related anticompetitive effect, is not, however, the same as that required for a traditional monopoly claim. There is a more restricted opportunity and incentive for a purchaser to gain monopsonistic profits.

When the claimed abuse of monopsony power is exclusionary the court should not restrict itself to the monopsony anticompetitive effects test, but should review the monopsony claim with reference to its exclusionary effect on competition. The monopsony anticompetitive effects test merely defines those circumstances in which a monopsonist would have both the ability and the incentive to engage in anticompetitive conduct. Additional incentives are present if the monopsonist is engaging in exclusionary activity. Although predatory pricing claims have been reviewed with disfavor recently, the types of activities discussed in this Comment would involve a cost to the potential competitor—the supplier. Thus, if the monop-

172. Note, *Refusals to Deal*, *supra* note 166, at 1730-31 n.64. *See also* HOVENKAMP, *supra* note 10, § 1.2 at 17; 3 AREEDA & TURNER, ANTITRUST LAW, *supra* note 32, ¶ 725h at 207 (increased barriers to entry become significant when monopsony power held in one market).

173. See monopsony anticompetitive effects test discussed *supra* note 93 and accompanying text.

174. In addressing criticisms regarding the plausibility of predatory pricing, Krattenmaker and Salop have noted that these criticisms do not apply to exclusionary activities, that "[r]aising rivals' costs can be a particularly effective method of anticompetitive exclusion." Krattenmaker & Salop, *supra* note 34, at 224.

sonist is seeking to vertically integrate, the supplier, and not the monopsonist, would be encountering the short term loss in profits.

Regardless of the type of activity occurring in the buyer's market, however, it is important that litigators and courts recognize the distinctions between monopoly and monopsony. Only then will litigants be able to present clear and cogent pleadings; only then will courts develop rational guidelines for both buyers and sellers.

Susan E. Foster, C.P.A.