Washington University Law Review

Volume 62 | Issue 4

January 1985

Commentary: Focus of Antitrust Markets

Warren G. Lavey

COMMENTARY: FOCUS OF ANTITRUST MARKETS

WARREN G. LAVEY*

There are several problems in Dr. Werden's analysis of my support for the affected-buyers approach to antitrust market delineation, and of my concerns about the Justice Department's Merger Guidelines. Werden does not understand the purpose of my article,[1] and thus criticizes points beyond its scope. While my article and others taking similar positions are intended to make an important contribution to market delineation, the thrust is not to present a fully specified alternative to the Guidelines. In fact, my concerns could be satisfied by two easy amendments to the Guidelines. Moreover, Werden misapplies the affected-buyers model to mergers, indirect competitors, multi-output firms, and repair services.

I. PURPOSE OF AFFECTED-BUYERS MODEL

The purpose of my article was to address a dispute over *how to establish a baseline from which competitive checks should be determined when defining antitrust markets.* One position in this dispute is that the competitive-check analysis (delineation of close substitutes) should focus on a demand by a group of consumers who may be harmed by the action subject to antitrust scrutiny (the buyers-alternatives model). The opposite position is that the analysis should focus on the product(s) and location(s) of a seller engaged in the action subject to antitrust scrutiny (the firm-competitors model). Courts have applied each of these approaches to antitrust market delineation. The position I support involves a twist on the buyers-alternatives model—first focus on a demand by a group of consumers who may be harmed by the action subject to antitrust scrutiny, but then expand the baseline to include the demand by other (linked) consumers who would also be affected by an action harming the group (the affected-buyers model). In contrast, the Guidelines employ the firm-competitors model with a twist. The Guidelines focus first on each of the narrowly defined products and locations of each of the merg-

* Associate, Skadden, Arps, Slate, Meagher & Flom. B.A., Harvard College; M.S., Harvard Univ.; Dip. Econ., Cambridge Univ.; J.D., Harvard Law School. I am grateful for the word-processing assistance of Mary Ann Lack.

1. Lavey, *A Close Analysis of Buyers and Antitrust Markets,* 61 WASH. U.L.Q. 745 (1983).

ing firms. The Guidelines go on to consider, however, differences among groups of buyers conducive to price discrimination that may warrant defining additional, narrower markets.

According to the Supreme Court[2] and many leading scholars,[3] Congress designed the antitrust laws to promote consumers' welfare, i.e., protect consumers from the higher prices and lower quality flowing from anticompetitive actions. Given the focus of the antitrust laws on protecting consumers, using groups of possibly harmed consumers as a baseline helps courts define markets more accurately. A baseline of sellers may lead courts to miss particular consumer-seller relationships important to certain consumers and foster mistaken conclusions about the legality of some actions. Scholars supporting the use of consumers as a baseline for defining antitrust markets include Landes and Posner,[4] Dunfee, Stern, and Sturdivant,[5] and Harris and Jorde.[6]

---

2. The Supreme Court observed that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting R. BORK, THE ANTITRUST PARADOX 66 (1978)). In 1984, the Court analyzed a claim under Section One of the Sherman Act "from the standpoint of the consumer—whose interests the statute was especially intended to serve. . . ." Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551, 1559-60 (1984). In another case under Section One of the Sherman Act, the Court quoted from *Reiter* and spoke broadly of the consumer-protection goal of antitrust law, presumably encompassing the Sherman and Clayton Acts: "A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal [consumer welfare] of antitrust law." NCAA v. University of Okla., 104 S. Ct. 2948, 2964 (1984); *see also* Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2740 (1984) ("the sort of competition that promotes the consumer interests that the Sherman Act aims to foster").

3. Leading scholars have concluded that the objective of the antitrust laws is buyer protection (or, somewhat more broadly phrased, economic efficiency). *See, e.g.*, 1 P. AREEDA & D. TURNER, ANTITRUST LAW 7-31 (1978); R. BORK, *supra* note 2, at 66, 81, 89; R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 8-22 (1976); R. POSNER & F. EASTERBROOK, ANTITRUST CASES, ECONOMIC NOTES, AND OTHER MATERIALS 152-54 (2d ed. 1981); Harris & Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CALIF. L. REV. 1, 43-45 (1984) (recognizing also concern about seller protection in market-foreclosure cases). In contrast, Werden recently wrote that "[n]either the Clayton Act nor judicial interpretations of the Act require this focus [on consumers], however, and the Guidelines do not adopt it." Werden, *Market Delineation and the Justice Department's Merger Guidelines*, 1983 DUKE L.J. 514, 521 n.27.

4. In Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 967 (1981), the authors state that market definition should involve two steps: "[I]dentification of a group of consumers large enough to be entitled to the protection of the antitrust laws, and identification of the sellers who can readily supply *this* group of consumers."

5. In Dunfee, Stern & Sturdivant, *Bounding Markets in Merger Cases: Identifying Relevant Competitors*, 78 NW. U.L. REV. 733, 737 (1983), the authors describe three steps to designate an initial group of competitors that courts could include in the relevant market: (1) the plaintiff identifies a group of distinct consumers upon which the analysis of competitive effect will focus; (2) the court determines the needs of that group being satisfied by the products or services of the merged

Defining a seller's product or products—even with the Guidelines' admonition against broad definitions—often is difficult and requires analysis of buyers. Employing a seller baseline may require identification and application of a buyers baseline in order to define products, thereby calling into question the benefits and clarity of a seller-based approach to market definition. My article discussed several examples of misleading product markets caused by insufficient analysis of buyers when defining a seller's product(s). Without buyers analysis, the view of a seller's product may be too broad. While it is possible to view a consumer finance company's product as consumer loans, the fact that these firms supply many loans to high-risk customers, who cannot turn to other financial institutions, favors a product definition of high-risk consumer loans or consumer loans by consumer finance companies.[7] In other cases, lack of buyers analysis means that the view of a seller's product is too narrow. While it is possible to define a firm's product as air conditioners for Volkswagon automobiles, analysis of buyers' choices across auto brands favors a product definition of auto air conditioners.[8]

The law is clear that courts should use a buyers baseline to define products in tying cases. An arrangement can be an unlawful tie only if it involves two separate product markets.[9] The United States Supreme Court's standard for "whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items."[10] Some physical or operational characteristic of the seller's output cannot define products, and the relevant inquiry is not how the seller defines what it is supplying. Rather, the proper inquiry should employ the perspective of a group of buyers. In *Times-Picayune Publishing Co. v. United States*,[11] the product definition

firm; and (3) the court identifies the companies actually serving, or companies with the potential to serve the needs of that group.

6. In Harris & Jorde, *supra* note 3, at 43-45, the authors recommend that the plaintiff should identify a group of buyers (or, in a market foreclosure case, sellers) alleged to be the victim of the anticompetitive harm and protected by the antitrust laws. The plaintiff must establish a prima facie market defined by the products used interchangeably by the group and the geographic area to which the group turns to supply its demands.

7. Lavey, *supra* note 1, at 761.

8. *Id.* at 753-55, 758-59.

9. Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 499 (1969).

10. Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551, 1562 (1984). *See also id.* at 1572 (O'Connor, J., concurring) ("For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product.*").

11. 345 U.S. 594 (1953).

turned on using advertisers who might be harmed by an arrangement linking advertising in morning and evening newspapers as the relevant buyers baseline. Advertisers viewed the city's newspaper readers, morning or evening, as fungible customer potential. The Court held that the arrangement was not an unlawful tie because it did not link two distinct products in the eyes of buyers (advertisers).[12] In *Fortner Enterprises v. United States Steel Corp.*,[13] the Court concluded that sale of a house and credit to purchase the house involved two independent transactions, separately priced and purchased from the buyer's perspective.[14] Most recently, the Court in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*[15] concluded that two separate products were tied because "consumers differentiate between anesthesiological services and the other hospital services. . . ."[16]

A merger case illustrates possible product-definition problems in employing a seller baseline rather than buyers analysis. In *United States v. General Dynamics Corp.*,[17] the Justice Department challenged the acquisition of one coal producer by another coal producer under Section 7 of the Clayton Act. The Justice Department claimed that coal was the relevant line of commerce and that a firm's total coal production should be used in determining market concentration. The Supreme Court found that many coal buyers had long-term supply contracts and therefore the acquisition would not affect them. Given that the potentially harmed buyers were only those looking for new supply contracts, the Court found that the relevant product of the firms was coal supplies not committed under long-term contracts rather than all actual coal production. It is unlikely that a firm-competitors analysis focusing solely on the product(s) of coal mines and not analyzing buyers' demands would come to this correct product definition.[18]

12. *Id.* at 613-14.

13. 394 U.S. 495 (1969).

14. *Id.* at 507.

15. 104 S. Ct. 1551 (1984).

16. *Id.* at 1564.

17. United States v. General Dynamics Corp., 415 U.S. 486, 501 (1974); *see also* Posner & Easterbrook, *supra* note 3, at 481-82.

18. Contrary to Werden's contention, I believe that the Justice Department does follow explicit direction from the Supreme Court to consider uncommitted coal supplies. Werden, *A Closer Analysis of Antitrust Markets*, 62 WASH U.L.Q. 647, 664 n.50 (1985). The point of this discussion is to illustrate the mistaken product definitions that could flow from insufficient buyers analysis. *See also* United States v. Waste Management, 588 F. Supp. 498 (S.D.N.Y. 1983), *rev'd*, [1984-2] TRADE CAS. (CCH) ¶ 66,190 (2d Cir. 1984). Both the district court and the appellate court rejected the Justice

Defining a product market by focusing on the demand by a group of consumers is not always crystal clear. Yet, antitrust analysis favors focusing the delineation of a product and its competitive checks on consumer buyers' demands. The buyers-baseline approach to market definition involves a consistent focus on buyers when establishing an initial product definition. In contrast, a sellers baseline requires defining a sellers' product through a confusing mix of supply and demand considerations. The likely outcome of this paradigm is that courts will delineate misleading product markets more often.

A second problem with a sellers baseline is that delineating markets to reflect possible price discrimination requires analysis of differences among buyers in their demands and alternatives. My article used several examples of buyers with different product or geographic demand characteristics, or different supply alternatives, such as small versus large businesses regarding geographic access to banking services.[19] I also explained the analysis of linkages among buyers necessary to define the contours of possible price discrimination, delineate a meaningful buyers baseline, and determine relevant markets. For example, diabetics' demand for diet soda may be linked to the demand of nondiabetics for either diet or nondiet soda, limiting possible price discrimination against only diabetics and leading to a relevant market that includes diet and nondiet sodas.[20]

The importance of price discrimination to models for market delineation depends on the frequency with which the conditions necessary for price discrimination are expected to arise. Maisel observed that price discrimination is a widespread but often unidentified economic phenomenon,[21] and the Supreme Court has pointed to the need to search for the possible existence of noncompetitive segments within a proposed market.[22] My view is that conditions conducive to price discrimination are sufficiently widespread that an approach to market definition should fo-

---

Department's argument that the courts should define the products of two waste collectors in terms of the equipment type used by the sellers, and that front-load and roll-off waste collection services each constituted a separate product market. The courts identified various relevant classes of customers, analyzed their demands and alternatives, and defined a relevant product market in terms of a customer grouping—all trash collection except at single-family residences, multi-family residences, and small apartment complexes.

19. Lavey, *supra* note 1, at 763-64.

20. *Id.* at 755-56.

21. Maisel, *Submarkets in Merger and Monopolization Cases,* 72 GEO. L.J. 39, 55-57 (1983).

22. United States v. Continental Can Co., 378 U.S. 441, 457 (1964).

cus on consumers and linkages among consumers. Harris and Jorde take a similar position.[23] On the other hand, the Justice Department's Guidelines initially assume that price discrimination is impossible and delineate markets accordingly using a seller baseline. Next the Guidelines consider whether price discrimination is possible and, if so, finally delineate additional, narrower markets oriented to the consumer groups (buyers baselines) that could be the targets of discrimination.[24] Even examination of whether price discrimination is possible requires buyers analysis. The Guidelines' bi-directional approach involving sellers as well as buyers baselines is likely to confuse courts, and result in market delineations that fail to consider price discrimination.

In summary, the purpose of my article was to analyze the advantages of a buyers baseline in defining products and determining competitive checks, and to explain why the buyers baseline should reflect the linkages among buyers. This affected-buyers model could replace two aspects of the Guidelines. First, the Justice Department could replace the starting point of a seller's product and location with a demand by a group of buyers that a merger or acquisition could harm (protected buyers). Second, the Justice Department could replace the Guidelines' departure from the seller baseline to analyze possible price discrimination. Market definition should employ a consistent focus on buyers, with price discrimination analyzed through inquiry into linkages between the protected buyers and other buyers that would be affected if the acquisition or merger harmed the protected buyers. Other aspects of the Guidelines could remain. It was not the purpose of my Article to explore or replace such aspects of the Guidelines as pairwise versus collective comparisons, or to examine use of competitive versus prevailing price levels. The two recommended changes would reduce court confusion and generate market definitions that better promote the purposes of the antitrust laws.

II. APPLICATION OF THE AFFECTED-BUYERS MODEL

This section addresses four issues raised by Werden. First, Werden finds ambiguity in applying the affected-buyers model to mergers. While my Article's initial description of this model was not phrased in terms of two merging firms, the analysis does not vary much across different types

23. Harris & Jorde, *supra* note 3, at 46, 50, 56.

24. 2 TRADE REG. REP. (CCH) ¶ 4492, at 6879-9 - 6879-11. *See also* Werden, *supra* note 3, at 522, 529-30, 572, 578 (new Guidelines do not presume price discrimination and will not narrow markets if present).

of antitrust cases. The discussion of *United States v. Continental Can Co.*[25] illustrated the affected-buyer's approach in merger cases. The case involved the merger of a glass container manufacturer with a metal container manufacturer. The affected-buyers model starts with a group of buyers that the action subject to antitrust scrutiny may harm, such as beer-container buyers. Potentially harmed beer-container buyers are most likely to be premerger buyers of glass bottles or metal cans, but buyers of other types of beer containers also may be protected buyers.[26] The protected buyers are not limited to premerger buyers from both firms, or to buyers who find the products of both firms to be good substitutes. The affected-buyers model next determines whether other buyers would be affected if the merger lessened competition and the protected buyers faced higher prices. Linkages in the purchases and the prices paid by buyers may, for example, lead to the inclusion of some other beverage-container buyers in the buyers baseline. Then the affected-buyers model delineates close substitutes with respect to this buyers baseline. The court, the Justice Department, or the Federal Trade Commission would calculate and evaluate market shares in the context of this relevant market.

Second, Werden claims that the affected-buyers model does not consider the link between affected buyers and buyers from indirect competitors. A hypothetical increase in the price charged by a firm to the protected buyers may affect the firm's sales to another group of buyers. The latter buyers should be included in the buyers baseline (affected buyers) along with the protected buyers. The next step in the affected-buyers model includes in the relevant market the competitive check on sales to the affected buyers, not just on sales to the protected buyers. This step sweeps into the relevant market all the competitors of a firm that check the firm's prices to the protected buyers. Werden seems to argue that the relevant market should include even sellers to whom the affected buyers would not turn to as competitive alternatives in case the firm raised its price to the protected buyers. However, any expansion of the relevant market to such sellers would overstate the competitive check on the firm's prices to the protected buyers, and possibly lead to the conclusion that an anticompetitive act is lawful.[27]

25. 378 U.S. 441 (1964), discussed in Lavey, *supra* note 1, at 757, 761-63.

26. For example, there may be concern that an increased likelihood of collusion among container manufacturers after the merger will harm keg buyers.

27. I accept the view in Landes & Posner, *supra* note 4, at 967 that the protected buyers should

Next, Werden points to my analysis of *Spectrofuge Corp. v. Beckman Instruments, Inc.*,[28] and claims that I erred by immediately grouping in the same market all of the types of instruments sold by a firm. I used a simplified scenario drawn from this case to illustrate the analysis of linkages among buyers of related products. The related products that I analyzed were sales of an instrument and sales of repair service for that instrument.[29] The affected-buyers analysis may divide a firm's output into separate relevant markets, as described in my Article.[30] A buyers baseline is superior to a sellers baseline for developing such delineations as I explained in Section I. Affected-buyers analysis may determine that there is a strong linkage between buyers of an instrument (x) and buyers of repair service for this instrument (y); for example, a price increase for y would harm buyers of instrument x because they are future buyers of repair service for it (y). When buyers of y constitute the protected buyers, this linkage would warrant including buyers of x and buyers of y in the same baseline for purposes of delineating a relevant market. There may be a weak linkage, however, between buyers of another of the firm's instruments (z) and buyers of x and y. Also, z may be a poor substitute for x and y. Then, z would be in a separate product market from x and y.

Finally, Werden strains the application of affected-buyers analysis to a merger between the only supplier of an instrument and the only supplier

---

be economically substantial enough to merit the antitrust laws' protection. My Article discussed market analysis when there are many more alternatives available to the affected buyers than to the protected buyers, and when the affected buyers barely exceed the protected buyers. Lavey, *supra* note 1, at 752. *See also* Harris & Jorde, *supra* note 3, at 56 (need to limit the weight given to a small percentage of highly mobile buyers).

28. 575 F.2d 256 (5th Cir. 1978), *cert. denied,* 440 U.S. 939 (1979), discussed in Lavey, *supra* note 1, at 753-55.

29. Other recent cases have found related products resulting in linked buyers. For example, in Dimidowich v. Bell & Howell, 590 F. Supp. 45 (E.D. Cal. 1984), the court emphasized the linkage between buyers of micrographic equipment and buyers of replacement parts:

> The impact of diminished competition is measured at the consumer level, i.e., the owners of machines being served, rather than the organization servicing the machine. Some of plaintiff's evidence created the inference that Bell & Howell "lost" potential equipment purchases because of their restrictive policy re sale of replacement parts. This, of course, would tend to *increase* plaintiff's competitive stance [in machine repair services] by creating more potential [non-Bell & Howell] customers.

Id. at 50 n.6. *See also* Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984) (linkage between buyers of operating system software and buyers of central processing units).

30. *See* Lavey, *supra* note 1, at 762 (beer containers may be in a separate product market from other containers); *id.* at 763-64 (banking services supplied to small depositors and small business may be in a separate geographic market from banking services supplied to large depositors and large businesses); *id.* at 765 n.58 (protective service provided in each locality may be in a separate geographic market).

of repair service for this instrument. Linked demand for these related products may mean that these firms should be viewed as in the same market: they supply a package in competition with other packages of instruments and repair services.[31] The linkage between these two suppliers from the buyers' perspective, however, does not mean that their merger lessens competition. The set of substitutable packages of instruments and repair services would be unchanged by the merger. Furthermore, there would continue to be for buyers choosing this instrument and its repair service only one source (albeit from one rather than two firms) for supply of each of these related products.[32] The merger is not likely to lessen competition for sales to any group of affected buyers. Correct application of affected-buyers analysis probably would not oppose this merger.

III. CONCLUSION

I am pleased to find a growing scholarly literature and body of antitrust law supporting a buyers-baseline approach to defining antitrust markets. The mixed approach in the Guidelines using sellers as well as buyers baselines is likely to confuse courts and lead to wrong decisions about antitrust injury. Correct applications of affected-buyers analysis satisfy Werden's concerns.

---

31. *Id.* at 754.

32. This assumes that the nonhorizontal merger does not create barriers to entry or otherwise facilitate anticompetitive practices.

WASHINGTON UNIVERSITY
LAW QUARTERLY

VOLUME 62 NUMBER 4 1985