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RESPONSE

The E-Books Conspiracy: Crossing the Line Between Applying and Creating Law

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In response to John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIAMI L. REV. 1 (2014).

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The first part of Professor John Kirkwood's article, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, could stand alone as an insightful analysis of the antitrust conspiracy that book publishers allegedly launched against Amazon in early 2010.[1] Professor Kirkwood clearly identifies the interests of each side in the case: the book publishers were interested in maintaining the current price for hardcover books—which were substitute goods for electronic books[2]—while Amazon was interested in keeping the price of electronic books low because they were complementary goods to Amazon's Kindle product.[3] Both sides were therefore considering markets other than the one in which they faced each other as they strategized their presence in the e-book market.

The second part of Kirkwood's article discusses the possibility of using buyer power (monopsony power) as a justification for collusion and a defense to antitrust claims.[4] Professor Kirkwood accurately summarizes the law and the academic discussion on this possible defense and then makes his own recommendations, which include:

(1) Where there is true monopsony, allowing sellers to collude could actually benefit economic efficiency and consumer welfare, especially as compared to the alternative of having many independent sellers with no bargaining power.[5] The collusion of sellers in such a situation might desirable and should therefore be allowed.[6]

(2) Where there is buying power short of a complete monopsony, but the buyer has countervailing power and the sellers hold some market power, individualized inquiry might lead antitrust authorities and courts to accept the defense that collusion was necessary to counteract the buyer power.[7]

Under Professor Kirkwood's proposed defense to collusion, sellers would first have to show that the buyer had either monopsony or countervailing power that was "legally acquired, substantial, persistent, and durable."[8] The sellers would then have to show that their collusion enhanced downstream competition by increasing output, lowering downstream prices, or otherwise benefiting

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[1] John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIAMI L. REV. 1, 8–18 (2014).

[2] *Id.* at 8–15 (explaining how the book publishers coordinated a collective switch to the agency pricing model with Amazon, thereby forcing Amazon to raise the prices it charged on e-books and allowing the publishers to maintain higher prices for their hardcover books).

[3] *Id.* at 8–9.

[4] *Id.* at 18–33. Kirkwood also notes, however, that the Supreme Court has thus far rejected this approach, and most scholars generally agree that monopsony power should not be a valid justification for sellers to collude in a given market. *Id.* at 18–19.

[5] *Id.* at 21.

[6] *Id.*

[7] *Id.* at 57–60.

[8] *Id.* at 52.

consumers.[9] If the buyer had countervailing power, sellers could prove that their collusion enhanced downstream competition by showing that the buyer's countervailing power had depressed innovation in the past and that collusion by sellers would increase innovation.[10] If the buyer held monopsony power, however, an increase in output could be inferred rather than demonstrated.[11] At the same time, sellers would also have to show that their collusion had not created downstream market power.[12] Kirkwood admits that this test cannot purport "to capture every situation in which collusion to control a powerful customer would be desirable,"[13] but argues that this test would at least reach "the clearest cases of precompetitive collusion.[14]

Although Professor Kirkwood's requirement that colluding suppliers show competitive improvement in the downstream market is reasonable,[15] he is overly prescriptive in setting forth the other conditions necessary for an acceptable defense to collusion. On each criterion, one can imagine a case where competition is enhanced by countervailing market power, without exactly meeting the other required tests he sets forth.[16] Further, because a particularized inquiry would be necessary any time this defense is asserted, why not simply call for a rule of reason—with which antitrust law is quite familiar[17]—rather than considering all these detailed prerequisites in deciding whether to allow the power-buyer defense?

Furthermore, I have some quibbles with Professor Kirkwood's specific criteria. To meet Kirkwood's "substantial" requirement, the buyer must be shown to have seventy percent of a market and act with monopsony power, or forty percent of a market and act with countervailing power.[18] There is nothing in legal or economic theory to support those numbers, and on the surface, they appear to be reversed.[19] If a buyer is acting like a monopsonist and driving down the price

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 51.
[13] *Id.*
[14] *Id.* at 51–52.
[15] It is "the standpoint of the consumer—whose interests the [antitrust] statute was especially intended to serve . . . ." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984).
[16] Suppose, for instance, that the buyer's market power was obtained by a merger that would have violated Section 7 of the Clayton Act, but was not challenged at the time that the merger was executed. The fact that the market power was not legally acquired should increase, not diminish, our enthusiasm for opposing the exercise of that power.
[17] *See generally* Lee Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23 (1964).
[18] Kirkwood, *supra* note 1, at 54.
[19] By comparison, under the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, the higher the market share concentration of a given industry, the smaller an increase in market share needs to be in order to receive condemnation from the

offered to suppliers by threatening to withhold purchases, then why would a buyer's forty percent market share be insufficient to justify supplier collusion under Kirkwood's proposed defense? The conduct speaks for itself: if a buyer with a forty percent market share behaves this way, it is likely because the other sixty percent of the buyers are price-followers.

Kirkwood's first and fourth criterion—that the buying power be legal and that it be durable[20]— are imposed to weed out cases where a seller could use the law rather than collusion with other sellers to remedy its economic disadvantage, or where the seller could simply wait for the market to self-correct for the buyer's power imbalance. If a buyer has illegal market power, sellers should be allowed to exercise countervailing power right away if they are willing to take the risk of proving the buyer's market power. Criterion one makes them bring a lawsuit instead—a costly and time-consuming process. As for criterion four, being told to wait until the market corrects itself is the same as being denied the right to legal processes for short-term harms, however severe.

Perhaps Professor Kirkwood is setting forth guidelines that he believes antitrust enforcement agencies should use. While these criteria may be sensible in the enforcement agency context, they should not prevent a defense to a private antitrust action. The e-books case was a Department of Justice ("DOJ") prosecution.[21] However, the power-buyer defense is most likely to arise in a private action brought by a large purchaser against colluding sellers. In that kind of situation, neither the Federal Trade Commission ("FTC"), the DOJ, or the state attorneys general would likely be involved with the case, and thus Professor Kirkwood's rules, which are presumably intended as guidance to the antitrust enforcement authorities, would be irrelevant.

Professor Kirkwood likewise over-specifies with his third criterion that the buyer's market power be shown to be persistent.[22] He proposes a five-year rule to allow a buyer who legally acquired its market power to recoup the value of an investment that led to its attainment of that market power, but no more.[23] This is a huge generalization across all industries. Moreover, it is unappreciative of the economic concept that a longer period of recoupment is needed where there is a greater risk of no recoupment at all.[24] It is reminiscent of Senator Phil Hart's

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government. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 2.1.3, 5.3 (2010).

[20] Kirkwood, *supra* note 1, at 53–54, 56.

[21] *See* United States v. Apple, Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

[22] Kirkwood, *supra* note 1, at 55–56.

[23] *Id.* (explaining that this criterion is necessary to adequately reward buyers who obtained market power through efficiency and innovation, which will be constrained if a group of suppliers can collude for a share of the profits every time a buyer gained a competitive advantage).

[24] *See generally* Kenneth G. Elzinga & David E. Mills, *Testing for Predation: Is Recoupment Feasible?*, 34 ANTITRUST BULL. 869 (1989) (discussing variables relevant to the calculation of a recoupment period such as annual growth rate of demand, the price elasticity of demand, and the elasticity of rivals' supply).

attempt to establish a statute of limitations on mergers that led to market power whereby no fault needed to be proven and the merger had to be undone after a set number of years.[25] It is important to reiterate that Professor Kirkwood is dealing with buyers who acquired market power legally; thus, to impose on them a five-year statute of limitations is effectively a legislative matter. Professor Kirkwood should acknowledge that his prescription here is for a new law, not for a rule that judges should be encouraged to—or practically could—administer.

Finally, Professor Kirkwood proposes that the power-buyer defense is inappropriate where colluding suppliers ultimately create market power of their own in the downstream market.[26] The power-buyer defense was clearly inapplicable in the e-book conspiracy case. The book publishers might well have started their collaboration (facilitated by Apple) as a defense to Amazon's buyer power, but once joined as conspirators, they colluded to raise the final market prices on physical books.[27] Such action was decisively not beneficial to consumers and therefore would fail the second requirement of Kirkwood's proposed defense.

Despite the strength of argument to condemn that instance, I would still be tempted to leave that case to a separate, criminal prosecution. In *United States v. Apple, Inc.*, we were dealing with a private party's defense to a charge of collusion in e-books, not physical books. Professor Kirkwood admirably shows that the e-books case was not one where the power-buyer defense should have been allowed.[28] However, supposing that all of his conditions were met so that the publishers could have defended their collusion in this way, should we then deny them this defense at the end because the book publishers might also have been planning a bank robbery?

In summary, Professor Kirkwood shines a light on a complex economic event and provides his usual thoughtful insight into how antitrust laws should be applied. However, he performs the latter task with a degree of detail more in line with a legislator seeking to pass an antitrust amendment or an antitrust law enforcement official deciding whether to prosecute a case, rather than to advise courts on how to interpret the Sherman Act's prohibition against conspiracies in restraint of trade. Having been both a legislator and an antitrust law enforcement official, I can understand Professor Kirkwood's temptation to present his ideas in

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[25] *See* Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 873 (1997) (discussing Senator Hart as a proponent of the "no-fault monopoly" concept); *see also* Albert Foer, *The Spectrum of Monopolism: An Introduction to the Future of Monopoly and Monopolization*, 2008 WIS. L. REV. 225, 228–29 (2008).

[26] Kirkwood, *supra* note 1, at 60–63.

[27] *See* Complaint at 21, United States v. Apple, Inc., No. 12-cv-2826 (S.D.N.Y. Apr. 11, 2012).

[28] Kirkwood, *supra* note 1, at 49–52.

such a fashion. But, at the same time, I also know the difference between those roles and the proper role of an academic: offering advice to courts in applying—not creating—law.