THE CASE FOR EMPLOYING HYBRID WELFARE STANDARDS IN ANTITRUST MATTERS

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I. INTRODUCTION

A key goal of antitrust law in the United States is to protect economic freedom by promoting fair and competitive markets.[2] Over the years, many lawyers, economists, and scholars argued that the promotion of economic efficiency was the dominant reason why antitrust laws were passed.[3] Today, however, such argument lies at odds with current thinking regarding antitrust. In fact, one is hard pressed to find "economic efficiency" for its own sake being articulated as a primary goal by antitrust practitioners, commentators, or courts reviewing antitrust matters.

On the contrary, antitrust's current articulated goal is, at a basic level, "to protect consumers from paying higher prices to firms that have unfairly gained or maintained market power."[4] The majority of federal court decisions in recent decades have held the protection of consumers as the *overarching goal* of the antitrust laws.[5] The U.S. Supreme Court clarified that goal in 1979 when it said antitrust laws are a "consumer welfare prescription," thereby espousing a focus almost entirely directed towards the consumer.[6] This consumer focus has taken center stage in modern antirust analysis.

Antitrust practitioners and scholars have proposed other focal points — many falling under the broad umbrella of a "welfare" standard. This article describes and discusses some of these alternatives, identifying the "consumer welfare standard" ("CWS") as the predominant mode of thinking in modern antitrust analysis. CWS however, has its shortcomings, particularly in instances where consumer harm is not apparent over the long term and price increases or potential price increases do not rise to anticompetitive levels. Hybrid welfare analyses could address these shortcomings for non-price or non-consumer-focused market issues and also in cases where CWS fails to accurately predict impacts on certain input and output markets.

2 *Mission*, U.S. Dep't of Just. Antitrust Division, https://www.justice.gov/atr/mission (last visited July 15, 2019).

3 John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 191, 192 (2008).

4 *Id.* at 196.

5 John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 Fordham L. Rev. 2425, 2443 (2013).

6 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing Robert H. Bork, The Antitrust Paradox 66 (1978)).

II. WELFARE STANDARDS

Over the years, antitrust scholarship has addressed various approaches to analyzing potentially anticompetitive conduct. Many paradigms or welfare standards have evolved along the way, and a quick look at some will provide useful context. They include: (1) total welfare;[7] (2) consumer choice;[8] (3) worker welfare;[9] (4) "structural" welfare;[10] and (5) the current standard-bearer, consumer welfare.[11]

The total welfare or aggregate economic welfare standard attempts to measure the effect of a transaction or some conduct on the totality of welfare of all market participants, not just consumers. This standard focuses on the aggregate value created in the market and disregards distribution of gains and losses among participants.[12] Under this standard, conduct is condemned only if it decreases the sum total welfare of consumers (buyers) and producers (sellers) as a whole, with no regard to any wealth transfers — efficiencies can therefore trump consumer injury.[13]

The consumer choice standard sees antitrust's role as that of ensuring a competitive marketplace, such that producers provide worthwhile options available to consumers, and the range of options is not impaired or distorted by anticompetitive practices.[14] Further, under the consumer choice standard, antitrust laws should see to it that the economy responds to aggregate consumer demand, not to government directives or the preferences of individual businesses.[15]

The worker welfare standard reasons that because some employer restraints have the potential to decrease prices, a focus solely on consumer effects in output markets might erroneously inflate perceived pro-competitive benefits.[16] Antitrust laws, it argues, have no methodology to compare the welfare of different groups of consumers, e.g. customers and employees, in different markets when their interests are not aligned.[17] Therefore, under this standard, consideration of the welfare of all consumers (customers and workers) and a focus on the competitive effects of a restraint only in the market where it has *a direct effect*, is key.[18] If a conduct directly impacts workers, even though prices may decrease, the emphasis should shift to labor market welfare. In this scenario courts should consider worker welfare first, and consumer welfare only if workers experience *de minimis* harm related to the alleged anticompetitive conduct.[19]

A "structural welfare" standard broadly seeks to evaluate economic activity as competitive or anticompetitive in the context of the "underlying structure and dynamics of markets."[20] This paradigm observes that markets composed of a small number of large firms will tend to be less competitive than markets composed of a large number of small to medium sized firms, and will analyze conduct and transactions through that lens.[21]

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7 Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? 8 (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

8 *Id.*

9 Clayton J. Masterman, Note, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 Vand. L. Rev. 1387, 1414 (2016).

10 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 737 (2017).

11 *The Consumer Welfare Standard, 40 Years Old & Under Fire*, Law360 (Jan. 25, 2019, 6:51 PM), https://law360.com/articles/1122472/prnt?section=competition.

12 Wilson, *supra* note 7, at 12.

13 See Steven C. Salop, *Question: What Is The Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 337 (2010).

14 Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antirust,* 62 U. Pitt. L. Rev. 503, 504 (2001).

15 *Id.* at 503.

16 Masterman, *supra* note 9, at 1414.

17 *Id.* at 1401.

18 *Id.* at 1414.

19 *Id.*

20 Khan, *supra* note 10, at 717.

21 *Id.* at 718.

III. THE CONSUMER WELFARE STANDARD

The dominant standard, CWS, is firmly entrenched in modern antitrust thought — generally prohibiting practices that lower output and increase prices for consumers.[22] Under CWS "business conduct and mergers are evaluated to determine whether they harm consumers in any relevant market. Generally speaking, if consumers are not harmed, the [enforcers] do not act."[23] CWS, as used today, considers the welfare of consumers as consumers, pure and simple.

Much ink has been spilled discussing the virtues and disadvantages of CWS. Some say it falls short at the intricate task of weighing all the relevant factors to determine if conduct is anticompetitive or pro-competitive, particularly when price is not involved. Indeed, many currently argue, "the undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends — including our interests as workers, producers, entrepreneurs, and citizens. It also mistakenly supplants a concern about process and structure (i.e. whether power is sufficiently distributed to keep markets competitive) with a calculation regarding outcome (i.e. whether consumers are materially better off)."[24]

Others seem to believe that CWS, when used properly, does what it is supposed to do.[25] Still others rest somewhere in the middle — recognizing CWS's shortcomings while remaining reluctant to discard it for a different, perhaps equally imperfect paradigm. Amid such variance, courts and enforcers could identify matters where CWS may not be an entirely appropriate analytical framework and consider hybrid welfare analyses that preserve the existing goals of CWS, but also add the best features of other standards. This hybrid approach could provide new frameworks capable of properly evaluating the varied complexities encountered in antitrust today.

IV. WHEN NEITHER PRICE NOR CONSUMER ISSUES PREDOMINATE

There are countless examples where price is not a predominant factor, yet competitive concerns nonetheless exist. The technology sector provides illustrations for how competition concerns may arise in non-price ways — myriad potential anticompetitive issues may exist in the context of "free" online products and services, like privacy issues, harm to innovation, the squashing of nascent competition, etc.[26] And, in the market for bulletproof vests, for instance, price is likely *not* the key competitive factor.[27] Indeed, in this market, a low-priced product may be the complete opposite of what consumers want.

When consumers are not adversely impacted, CWS is inadequate and artificial. The recent case *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation* provides a good example.[28] In this case, student athletes brought a class action antitrust suit against the NCAA and certain of its conferences. They alleged that NCAA rules limiting their compensation for athletic services, as set and enforced by the NCAA and its members, violated antitrust laws.[29] The relevant market was defined as comprising national markets for the students' *labor* in the form of athletic services in men's and women's Division I basketball and FBS ("Football Bowl Subdivision") football wherein each class member participates in his or her sport-specific market.

22 Professor Herbert Hovenkamp uses the term consumer welfare principle ("CWP") to mean essentially the same as the consumer welfare standard: "[A]ntitrust policy should encourage markets to produced two things for the benefit of consumers: (1) output that is as high as is consistent with sustainable competition and (2) prices that are accordingly as low." Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, Wharton Pub. Pol'y Initiative Issue Brief, Sept. 2018, at 1.

23 Wilson, *supra* note 7, at 1.

24 Khan, *supra* note 10, at 737.

25 See Elyse Dorsey et al., Consumer Welfare & the Rule of Law: The Case Against the Populist Antitrust Movement 3-4 (2019).

26 For fuller discussion of these examples *see* Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, *Public Comments of 43 State Attorneys General* 6-15. (June 11, 2019), https://www.regulations.gov/document?D=FTC-2019-0031-0003.

27 The example of quality competition being paramount in this market, as opposed to price competition, is discussed in Lande, *supra* note 14, at 515.

28 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Ca. 2019).

29 *Id.* at 1097.

NCAA makes clear that CWS is not the optimal tool to analyze a labor market antitrust violation. When consumers are discussed in this case, it is in the context of their demand for the athletes' labor and how certain NCAA rules regarding payment to the students might impact their demand for the Division I contests. The crux of the case was not whether *consumers* of sports contests would be harmed but rather the harm to the student athletes "because the rules deprive them of compensation" they would have otherwise received.[30]

This case focused almost entirely on labor. Notwithstanding the Supreme Court's pronouncement decades ago that antitrust laws are a "consumer welfare prescription,"[31] this recent NCAA case reminds us that consumers are not the whole story. In fact, when antitrust analysis is narrowly circumscribed to contextualize all issues within the bounds of the unitary CWS box, it can become difficult to think outside of that box. But when labor, technology, or non-price issues predominate, thinking outside of the box is exactly what is needed. CWS's contours should be expanded and complimented lest antitrust appear as a one-trick pony. Indeed, if the antitrust toolkit contains only a "consumer welfare hammer," then every potential antitrust issue will look like a "consumer harm nail." To properly analyze today's complex competition issues outside of the imperfect consumer-centric framework, the all-purpose hammer will not suffice: Antitrust needs screwdrivers, awls, and wrenches, too.

This is not to suggest that the hammer is obsolete, only that it is less than ideal when there is wood to be cut or bolts to be tightened, and different tools are necessary. Courts and antitrust practitioners should begin to embrace the other tools in the antitrust toolkit. Do labor issues predominate although there are related consumer concerns as well? If so, then perhaps a hybrid "CWS-worker welfare" standard that takes into account a fulsome labor market analysis makes more sense. Will a merger/acquisition lead to significant negative labor impacts in the name of efficiency? Again, additional "welfares" may need to be considered alongside CWS. Antitrust analysis choice is not binary — antitrust is flexible enough to engage with more than one standard concurrently when evaluating today's complex antitrust issues.

V. CONCLUSION

Antitrust analysis should not be confined to a single standard. While CWS works well for certain conduct and transactions, for many others, it is less than optimal. Antitrust is indeed flexible enough to incorporate multiple paradigms at the same time to reach its ultimate analytical goals.

30 *Id.* at 1098.

31 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing Robert H. Bork, The Antitrust Paradox 66 (1978)).

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