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BUSINESS RECIPROCITY AS A SHERMAN ACT VIOLATION: A GENERALLY ACCEPTED, BUT AS YET UNADJUDICATED, DOCTRINE

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I. INTRODUCTION

Although no court has yet issued a judgment that evidence of business reciprocity establishes a violation of sections 1 or 2 of the Sherman Act¹ there is, nevertheless, an apparent general acceptance that most, if not all, practices involving such reciprocity violate that Act. This acceptance is inferred from several grounds, including: dicta in one Supreme Court and at least two lower court opinions; the Department of Justice's filing of twelve cases based solely upon allegations of reciprocity charged as Sherman Act violations; the settlement of all these cases by consent decrees containing stringent provisions against practices constituting or facilitating reciprocity; and views expressed in legal periodicals.

What may not be so clear, however, is whether practices of business reciprocity in which the decision to deal with another firm is made unilaterally and not under coercion or by express agreement violate the Act. Other uncertainties include possible action by governmental regulatory commissions against firms which practice reciprocity, the possibility of claims by injured firms for treble dam-

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

   Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopo-
   lize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misde-
   meanor. . . .

ages in private antitrust cases brought under section 4 of the Clayton Act,² and the possibility of criminal prosecution under the Sherman Act for corporations and individuals charged with engaging in business reciprocity.

Outside the scope of this discussion is the subject of reciprocity effects, an important criterion in evaluating the possible anticompetitive impact of conglomerate mergers under Section 7 of the Clayton Act³ which, however, involves different issues from reciprocity as conduct in violation of the Sherman Act. Reciprocity effects pertain to the tendency of firms, absent coercive or voluntary agreement, express or implied, to buy from or otherwise favor those to whom they sell or to whom they feel obligated for any other reason. Such effects are attributed to mergers in which the suppliers of one merger partner are the customers of the other, or there is a potentiality for such relationships.

The practice of reciprocity has been widespread in the American economy, particularly by large industrial concerns. According to a 1961 survey of purchasing agents 100 per cent of those in the petroleum, chemical, iron and steel industries admitted that reciprocity was a factor in buyer-seller relationships in their companies, while 45 per cent of those in service industries and 36 per cent in consumer goods industries made the same admission.⁴ A leading business publication in 1965 estimated that 60 per cent of the 500 largest industrial corporations in the country employed trade relations managers to effectuate policies of reciprocal dealing. The Trade Relations Association, Inc., formed in 1962, was asserted to have 135 large companies as members with many nonmembers also participating unofficially.⁵ In the opinion in United States v. Northwest Industries,⁶ a suit under Clayton section 7 attacking a corporate acquisition, the

   No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
⁴ Reciprocity: Where Does the P.A. Stand? PURCHASING, Nov. 20, 1961, at 70-79.
⁵ McCreary and Guzzardi, A Customer is a Company's Best Friend, FORTUNE, June 1965, at 180.
court referred to evidence indicating the practice of reciprocity by numerous large corporations including Alcoa, Allied Chemical, American Oil, Cities Service, Du Pont, FMC Corp., Goodrich, Humble Oil, Monsanto, Shell Oil, Tenneco and Texaco. A recent study of business reciprocity concluded that "(t)he vast majority of corporations in the industrial market practice reciprocal dealing. Probably all do." This conclusion was in part based on the author's interviews of some 30 management personnel in large companies in the shipping, railroading, chemical, petroleum, basic metals, rubber, banking, heavy machinery, paper and packaging, printing inks, plastics, and miscellaneous industrial equipment industries.7

In view of the apparently pervasive practice of reciprocity by big business, and the asserted anticompetitive effect thereof on smaller concerns, the significance of any newly evolving and perhaps not yet widely appreciated antitrust doctrine applicable to such practice is manifest. It is important therefore to examine the bases claimed to support the contention that various forms of reciprocal dealing are now generally regarded by the courts, enforcement authorities and the antitrust bar as Sherman Act violations.

II. BASES OF THE DOCTRINE

A. Dicta

Apparently the first judicial suggestion of the illegality of reciprocity under the antitrust laws was made by Judge Rosenberg in United States v. Ingersoll-Rand Co.,8 a merger case under Clayton section 7, in which he stated:

What may here be involved is the trade practice known as 'Reciprocity.' This is particularly destructive of competition because it transforms substantial buying power into a weapon for 'denying competitors less favorably situated access to the market.' United States v. Griffith, 344 U. S. 100, 108 (1949). It distorts the focus of the purchaser by

8 218 F. Supp. 530 (W.D. Pa. 1963), aff'd, 320 F.2d 509 (3d Cir. 1963). The cited opinion is believed to be the first in which the practice of business reciprocity was the subject of antitrust analysis by a federal court. However, the Federal Trade Commission had held coercive reciprocal dealing to violate section 5 of the Federal Trade Commission Act, 15 U.S.C. §45(a) (1) (1970) (which provides that "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are
interposing between him and the traditional standards of price, quality and service, an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit. The competitor may thereby suffer loss because of a circumstance not bearing directly on the worth of his product. In this situation, it is the relative size and conglomeration of business rivals, rather than their competitive ability, that may determine success. Obviously, this practice strikes at one of the basic premises of a free enterprise economy.9

Although these comments were made in the context of a merger case and were thus directed toward reciprocity effects, the court's strong condemnation of the practice of reciprocity as "particularly destructive of competition" clearly implies that that practice by itself constitutes a Sherman section 1 violation, given facts which establish the requisite contract, combination or conspiracy between a firm and its suppliers and a sufficient amount of interstate commerce affected. Since Standard Oil v. United States10 it has been clear that Section 1 of the Sherman Act is "an all embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation."11

The only Supreme Court comment on reciprocity occurred in FTC v. Consolidated Foods Corp.,12 which held defendant's acquisition of another company violated Clayton section 7 where the acquired company had substantial shares of its markets and there was a probability of reciprocal buying as a result of the acquisition. Reciprocity was termed13

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9 218 F. Supp. at 552.
10 221 U.S. 1 (1911).
11 Id. at 59.
13 Id. at 594.
one of the congeries of anti-competitive practices at which the antitrust laws are aimed. . . . A threatened withdrawal of orders if products of an affiliate cease being bought, as well as a conditioning of future purchases on the receipt of orders for products of that affiliate, is an anticompetitive practice.

Again, while made in the context of a merger case, the Court's dictum that reciprocity was one of the practices "at which the antitrust laws are aimed" clearly indicated a view that the practice was condemned by the Sherman Act.

The only decided case in which reciprocity had been charged as a violation of the Sherman Act was *United States v. General Dynamics*14 in which the Government alleged that defendant's acquisition of Liquid Carbonics, a leading producer of carbon dioxide and industrial gases, violated Clayton section 7 and Sherman section 1. In addition, the Government alleged as a separate violation of Sherman section 1 that defendant carried out a special sales program designed to use its large purchasing power to promote sales of the acquired company. The court held that defendant's acquisition of Liquid Carbonics violated Clayton section 7 and Sherman section 1 due to a probable lessening of competition in the carbon dioxide market resulting from reciprocal dealing and ordered divestiture. It declined, however, to uphold the separate charge that the reciprocal dealing itself violated Sherman section 1. That charge, the court said, must be proved by evidence of reciprocity with respect to "particular contracts involving a given amount of business."15

The Government's proof included evidence of numerous incidents in which General Dynamics' representatives emphasized its importance as a customer while soliciting selected suppliers to purchase carbon dioxide and industrial gases from Liquid Carbonics. The evidence further showed the latter's sales to these accounts amounted to nearly $6 million in 1960 and increased to nearly $8 million in 1962. The court, however, limited its consideration of the amount of commerce affected by defendant's reciprocity program to specific sales of carbon dioxide as to which there was evidence that "customers' decisions were predicated, or significantly influenced, by reciprocity..."16 The Government's proof of specific sales of carbon

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15 Id. at 52.
16 258 F. Supp. at 51.
dioxide\textsuperscript{17} made pursuant to these conditions amounted to a total of only $177,225. The court deemed this amount insufficient to have a "not insubstantial"\textsuperscript{18} effect on interstate commerce. It was on this ground, therefore, that the only charge of reciprocity as a Sherman Act violation thus far litigated was dismissed.

The court in \textit{General Dynamics} defined business reciprocity as "the practice whereby a company, overtly or tacitly, agrees to conduct one or more aspects of its business so as to confer a benefit on the other party to the agreement; the consideration being the return promise in kind by the other party..."\textsuperscript{19}

The most common form of reciprocity, and the one involved in the cited case, is reciprocal buying. Such buying, the court noted, ranged from coercive reciprocity, where a firm's substantially larger purchases from a supplier than the latter's purchases from it are said to provide a leverage by which additional sales to the supplier can be obtained by threat of reduction or discontinuance of purchases, to mutual patronage, where the purchasing power of the parties is relatively equal but they agree to purchase from each other.\textsuperscript{20} The court

\textsuperscript{17} The opinion in \textit{General Dynamics} provided no explanation why sales of industrial gases made pursuant to reciprocal arrangements were not included in the court's consideration of the Sherman § 1 charge of reciprocal dealing. The Government's complaint, paragraphs 11-13, had included industrial gases as well as carbon dioxide in its charge that defendant entered into contracts for reciprocal dealing in violation of Sherman § 1. Liquid Carbonics' sales of industrial gases appear to have been approximately equal in dollar amount to its sales of carbon dioxide, \textit{id.} at 39, 50.

\textsuperscript{18} The court adopted this phrase from \textit{International Salt v. United States}, 332 U.S. 396 (1947), where it was held "unreasonable, per se, to foreclose competitors from any substantial market" by a tying arrangement. The tying arrangement required lessees of defendant's patented salt dispensing machines to purchase from it salt for use in those machines. The Court there said that the test was one of absolute rather than relative (market share) foreclosure and that defendant's sales of the tied product amounting to some $500,000 were "not insubstantial." In \textit{Northern Pacific v. United States}, 356 U.S. 1, 6 (1958), the Court said that tying arrangements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." In the latest tying case to be decided by the Supreme Court, \textit{Fortner Enterprises v. U.S. Steel}, 394 U.S. 495, 501-02 (1969), it was indicated that commerce in the amount of $190,000 was not "insubstantial." More significantly, the Court stated that "normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely 'de minimis,' is foreclosed to competitors by the tie..." This rule, if the Court adheres to it, may all but eliminate the amount of commerce affected as an issue in future tying cases and possibly in reciprocity and other types of antitrust litigation as well.

\textsuperscript{19} 258 F. Supp. at 57.

\textsuperscript{20} \textit{Id.}
indicated however that both coercive and mutual patronage reciprocity violated Sherman section 1, analogizing both of these practices to tie-in sales, where power in one market is used to promote sales in another.21

B. Recent Reciprocity Cases Filed by the Department of Justice

Less than a year after the General Dynamics decision the Government instituted United States v. General Tire & Rubber Co.22 naming as defendants General Tire and three of its subsidiaries and alleging a “combination and conspiracy to utilize reciprocity” in violation of Sherman section 1 and an attempt to monopolize, through coercion and persuasion of suppliers to purchase products and services from defendants, in violation of Sherman section 2. After several years of pre-trial proceedings23 this case was terminated by consent decree.24

By alleging a combination and conspiracy among General Tire and its subsidiaries the Government may have avoided the problem alluded to by the Court in General Dynamics25 of establishing a section 1 violation, which requires a contract, combination or conspiracy, on evidence of a single defendant’s unilateral conduct. However, a year after the filing of General Tire the Supreme Court in Albrecht v. Herald Co.,26 a private treble-damage action under Sherman section 1 involving vertical price fixing, set forth an expanded concept of “combination”, as that term is used in the Sherman Act. Mere acquiescence by one party to an anticompetitive practice urged by another and accompanied by threat of termination of dealing was held to create a combination between them. Subsequently, in United States v. Container Corp. of America,27 decided less than a year after Albrecht, the Court held that the practice of

21 Id. at 66.
24 1970 Trade Cases ¶ 73,303 (N.D. Ohio).
25 Vendors of General Dynamics to curry favor or protect present sales to the defendant, might unilaterally decide to purchase the products of Liquid Carbonic. In such instances, no actual contacts would occur and thus no agreements would be present to serve as a predicate for a Sherman § 1 violation. . . . To prove the presence of vendor contracts on condition, particular contracts with identifiable parties must be introduced into evidence, or legitimately inferred from the conduct of such identifiable parties. 238 F. Supp. at 66.
competitors checking with each other as to prices offered to particular customers constituted a combination or conspiracy under section 1. An agreement could be established, the Court indicated, upon the inference "that when a defendant requested and received price information, it was affirming its willingness to furnish such information in return." The decision appears to have significant import for the future application of the term "conspiracy" as used in the Sherman Act. The reasonably inferred expectations of two or more firms in their dealings may provide the necessary element of agreement in situations where no express agreement is indicated or evidence thereof is lacking. With respect to reciprocity cases, for example, where there is no evidence of express agreement between two firms to engage in reciprocal buying, evidence of discussion by their representatives of their respective sales and purchase data or of other similar circumstances may be held to reasonably justify an inference that each, by its purchases from the other, is "affirming its willingness" to engage in reciprocal buying.

All eleven reciprocity cases under the Sherman Act filed by the Government subsequent to Albrecht have each named only a single defendant who has been charged with violating section 1 of the Act by "entering into combinations involving reciprocal purchasing arrangements" or, in one, by "entering into agreements and combinations involving" such arrangements. With one exception each defendant has also been charged with violating section 2 of the Act by attempting to monopolize the requirements of actual and potential supplier-customers of the defendant for products sold by the defendant. The exception involved the compliant filed against the fifth-

28 Id. at 335.
30 E.g., U.S. Steel complaint, § 13.
31 Republic Steel complaint, ¶ 14.
32 E.g., U.S. Steel complaint, ¶ 14.
ranking steel company. It is not apparent why that complaint, unlike the others, omitted a charge of attempting to monopolize in violation of Sherman section 2. Six of these cases each have as defendant a single large steel company; one, a diversified company having railway equipment manufacturing and service operations as well as substantial plywood and building material manufacturing and distributing operations; one, a leading producer of plate glass and chemicals; one, the largest domestic copper producer; and two, the first and second ranking domestic aluminum producers.

Common to the complaints in all of these cases were allegations that pursuant to the alleged combination and attempt to monopolize (as noted, one complaint omitted the attempt to monopolize charge) each defendant had done certain acts. These allegations may be paraphrased as follows:

1. compiled and coordinated comparative purchase and sales data and other information relating to its customers and suppliers;
2. utilized this information to determine which suppliers should be favored and the extent to which they should be permitted to participate in supplying defendant's requirements of goods and services;
3. discussed with actual and potential suppliers and customers their sales and purchase positions relative to defendant;
4. purchased goods from certain suppliers on the understanding that such suppliers would purchase goods or services from defendant.  

It will be noted that the first three of these allegations concern the defendant's alleged compilation and use of comparative purchase and sales data. Since the Government's proof in General Dynamics included evidence of defendant's regular compilation of purchase

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34 These allegations have been pleaded in substantially uniform language in all the complaints filed after Albrecht until the recently-filed complaints in United States v. Aluminum Co. of America and United States v. Reynolds Metals Co. (cited supra, note 29). The charging portions of these latter two complaints, ¶ 13 and 10 respectively, are in some respects couched in different phraseology but in substance do not appear at variance with the earlier complaints. The Reynolds Metals complaint does not specifically allege that defendant compiled comparative purchase and sales data but from the allegation (¶ 10(e)) that defendant "(d)iscussed with actual and potential suppliers their sales and purchase positions relative to Reynolds" it would appear that the compilation of comparative data in some form is involved in this allegation.
data\textsuperscript{35} and the General Tire complaint alleged that defendants “directed their respective purchasing personnel to report their purchases to General Tire's Trade Relations Department”\textsuperscript{36} it can be said that a defendant’s alleged systematic compilation of this type of information has been a distinguishing feature of every Sherman Act reciprocity case filed by the Government up to this time. The Government's concentration thus far on cases allegedly involving such systematic compilations is indicative of the significance accorded this type of activity.

There would appear to be little use for information on comparative sales and purchases other than the implementation of a reciprocal dealing policy. A company may claim that it compiles this information for legitimate purposes such as market and purchasing studies. Any claim of this nature should be subjected to scrutiny. From the compilations themselves and from related documents it may be possible to determine whether the data is collected in a form suitable for such studies or whether the system of compilation concentrates on data primarily useful for determining the balance of trade between the company and its supplier-customers. If little or no effort is made to compile sales and purchase figures for wholesale and retail customers, for example, or for others with whom the company is unlikely to be able to engage in reciprocal dealing, such as government agencies and institutions, the claim will be unpersuasive. Furthermore, if the company does little in the way of preparing market or purchasing studies which utilize such compilations the claim will probably not stand up. Considerable expense is involved in compiling this type of information for a large company and any mere casual or infrequent use of the data for legitimate purposes does not persuade that such is its main function. There may also be related documents, which the company may be required to produce under process, clearly evidencing that the purchase and sales data have been used for determining the company’s balance of trade with its supplier-customers.

In United States v. ITT (Hartford),\textsuperscript{37} a merger case under Clayton section 7, the Court said that “such data would appear to be necessary to practice reciprocity.”\textsuperscript{38} The Court in this instance may

\textsuperscript{35} 258 F. Supp. at 42-45.
\textsuperscript{36} \S 25(e).
\textsuperscript{38} Id. at 790.
have overstated the point since it must be recognized that a firm could engage in relatively simple reciprocal arrangements, having substantial anticompetitive effects nevertheless, without the benefit of comparative sales and purchase data. Any organized or systematic practice of reciprocity, however, would seem to require the compilation of this type of data.

All of these cases have been terminated by final judgments (consent decrees) entered upon the consent of the Government and of each defendant.39

The consent decrees, which terminate after ten years, appear to afford the Government almost all the injunctive relief prayed for in the complaints. Pursuant to the salient provisions of these decrees each defendant, its officers and employees, was enjoined and restrained from committing certain acts. These provisions may be paraphrased as follows:

1. purchasing products or services from any supplier on the condition or understanding that purchases by defendant will be conditioned upon defendant's sales to such supplier;

2. communicating to suppliers that in purchasing products or services preference will be given to any supplier based upon defendant's sales to such supplier;

3. discussing with any customer or supplier the relationship between purchases by defendant from and sales by defendant to such customer or supplier;

4. preparing statistical compilations which compare purchases from any supplier with sales to such supplier; and

5. issuing to personnel with primary sales (purchasing) responsibilities any lists or notices which pertain to purchases (sales) that have been made by defendant from (to) particular customers (suppliers).40

39 The final judgments are reported or were entered as follows: U.S. Steel, 1969 Trade Cas. ¶ 72,826 (W.D. Pa.); Inland Steel, 1970 Trade Cas. ¶ 73,197 (N.D. Ill.); Republic Steel, 1970 Trade Cas. ¶ 73,246 (N.D. Ohio); Armco Steel, 1970 Trade Cas. ¶ 73,283 (S.D. Ohio); PPG Industries, 1970 Trade Cas. ¶ 73,376 (E.D. Pa.); Kennecott Copper, 1971 Trade Cas. ¶ 73,437 (S.D.N.Y.); Evans Products, 1971 Trade Cas. ¶ 73,450 (N.D. Ill.); National Steel, 1971 Trade Cas. ¶ 73,495 (W.D. Pa.); Aluminum Co. of America, 1971 Trade Cas. ¶ 73,587 (W.D. Pa.); Reynolds Metals, 1971 Trade Cas. ¶ 73,626 (E.D. Va.).

40 The U.S. Steel decree, sec. V, ¶ (B), prohibited the issuance to purchasing personnel of lists or notices which identify customers and their
In addition, each defendant was ordered and directed to do certain things, including acts of the following nature:

6. abolish or refrain from reestablishing units variously known as the Trade Relations Division, Business Development Division, or Commercial Relations Department or Section and to refrain from establishing any successor offices or positions having the same or similar duties involving reciprocal purchasing arrangements;

7. issue to each officer and employee having sales or purchasing responsibilities a policy directive prohibiting reciprocal dealing arrangements; and

8. furnish a copy of the consent decree to and by written notice advise each supplier from whom defendant has purchased, or customer to whom it has sold, more than $25,000, (or, in several decrees, $50,000), of products or services during any year of the three years preceding entry of the decree that all of its officers and employees are prohibited from engaging in reciprocal dealing arrangements.

The General Tire decree contained provisions substantially similar to the foregoing. However, it went further than the other decrees in several significant respects. It prohibited defendants, their officers and employees from belonging to or participating in the activities of the Trade Relations Association, Inc. and from assigning a trade relations function to any office or position. It also ordered each defendant to issue a policy directive to all officers and employees which, in addition to forbidding reciprocal dealing, required those having purchasing responsibilities to make purchasing decisions “based upon consideration of price, quality, service and financial responsibility . . .” with no consideration to be given to the fact that a supplier does or does not buy or use the products or services sold by defendants. Specifically included as a purchasing decision was the placing of any firm on any bidding list or the designation of any firm as a qualified bidder. All officers and employees were to be forbidden from “influencing, requesting or suggesting” purchases or which specify or recommend that purchases be made from any of such customers but this decree does not contain a specific provision prohibiting the issuance to sales personnel of lists or notices which identify suppliers.

41 1970 Trade Cas. ¶ 73,303 (N.D. Ohio).
42 Final judgment, sec. VI, ¶ (C).
43 Id., sec. VI, ¶ (A).
44 Final judgment, sec. VI, ¶ (D)(3).
to those having purchasing responsibilities to make any exception to this policy.\textsuperscript{45}

These consent decrees provided, as is customary, that consent to entry was made without trial, adjudication or admission of any issue of fact or law. Also customary, was the provision in each decree that the complaint "states claim upon which relief may be granted against the defendant under §§ 1 and 2 . . . of the Sherman Act, as amended."\textsuperscript{46} Thus, while the decrees did not, of course, constitute evidence or admission of wrongdoing on the part of any defendant they did signify the concurrence of defense counsel that the allegations of the complaints, which related solely to reciprocal dealing and acts in effectuation thereof, set forth violations of the Sherman Act for which relief may be granted. However, the significance of this point must be qualified by acknowledging that defendants and their counsel may agree to enter into consent decrees when they deem it in their best interest to do so even though counsel may be of the opinion that the complaint fails to allege an antitrust violation.

C. Comments in Legal Periodicals

For an issue which has yet to be decided by the courts, the subject of reciprocity as a Sherman Act violation has engendered an unusually large number of law review articles. Presumably, this is due to the prevalence of the practice in the business world and to the uncertainties attributable to the lack of adjudication. The articles have not dealt so much with interpretation of decisions, for \textit{General Dynamics} is the only Sherman Act case in the field, as with analysis of the competitive effects of reciprocity in its various forms.

Most articles appearing in law reviews have expressed the opinion that business reciprocity violates the Sherman Act.\textsuperscript{47} A few commentators have taken the position that application of a \textit{per se} rule of illegality should be limited to the coercive form of reciprocity and advocated that other forms be tested by the standard of reasonableness in the particular setting in which they occur.\textsuperscript{48} As at least one

\textsuperscript{45} Id., sec. VI, ¶ (D) (4).

\textsuperscript{46} Sec. I of each final judgment cited in note 39, supra. As noted, the National Steel complaint did not charge a violation of Sherman § 2.


\textsuperscript{48} E.g., Handler, \textit{supra} note 47, at 10.
writer has pointed out, however, the practice of reciprocity systematically or by agreement can be just as injurious to competition as the coercive form since the result in any case is the cutting off of suppliers who cannot or do not buy the products of the reciprocal dealer. The question of the applicability of a per se rule to reciprocity practiced by agreement or by systematic procedures will be discussed subsequently.

There remains, however, one category of writing in the subject area which warrants examination and comment. Certain writers have undertaken to show by economic analysis that the practice of reciprocity can not increase a firm's market power but simply provides a different way for the firm to exercise such power as it already has. In competitive markets, it is pointed out, there is little incentive to engage in reciprocity since sellers are able to dispose of their output at the market price. Also, no firm in a competitive market accounts for a large enough share to have leverage over suppliers. It is suggested, therefore, that when firms in competitive markets engage in reciprocity they do so in order to promote goodwill with supplier-customers, to reduce selling costs, or to achieve greater stability of sales to counter fluctuations of demand. It is denied, however, that reciprocity becomes anticompetitive under these conditions by foreclosing competitors from the business of firms engaging in the practice.

If the practicing firms are selling to each other at noncompetitive prices then it is said that competitors could overcome the reciprocal dealing by offering competitive prices. If the firms are doing business with each other at prices determined by competition the argument is made that competitors are still not foreclosed but would simply have to make offers sufficiently advantageous to the practicing firms to induce them to abandon reciprocal dealing. Since competitors must usually offer more advantageous prices, quality or service to capture business enjoyed by an existing supplier it is argued that reciprocal dealing is really not different from any other form of non-price competition.

It would seem, however, that some foreclosure may result from reciprocal dealing even where the practicing firms are selling to

49 Hausman, supra note 47, at 879-882.
51 22 STAN. L. REV. at 820-21.
each other at competitive prices. Competitors, or some of them, may not be able to offer prices sufficiently advantageous to induce such firms to abandon the practice. If the market is competitive, profit margins can be expected to be small and only slight reductions may be possible if sales are to be made at a profit. A slight reduction, however, may not provide sufficient inducement for a firm engaged in reciprocal dealing to switch suppliers and at the same time forego its own sales to the existing supplier. The argument that competitors must usually offer more advantageous prices, quality or service to supplant an existing supplier and therefore can also do so to capture business from firms engaged in reciprocal dealing appears not to take into account that reciprocity becomes an additional obstacle under these circumstances. An even greater inducement therefore in the form of lower prices or otherwise would seem to be required to persuade the buyer to switch suppliers than would be expected without the element of reciprocity. As noted, however, in competitive markets profit margins may be too small to make offers sufficiently attractive to overcome the dual obstacles of reciprocity and the prospect firm's reluctance to change suppliers. Consequently, it would seem that foreclosure may result from reciprocal dealing even when practiced at competitive prices.

In oligopolistic markets it is argued that if a firm has buying power it may use it either to obtain lower prices from its suppliers or to coerce them into engaging in reciprocal dealing but not both. Theoretically, the power would be exhausted by its full application to one of these purposes and nothing would remain which could be exercised for the other. Therefore, it is claimed, a firm with buying power cannot increase its market share by engaging in reciprocity. According to this type of analysis, new entrants should have little difficulty in obtaining business in oligopolistic supplier markets because the existing firms are selling at noncompetitive prices which the entrant should be able to undercut. Consequently, it is urged, there is no foreclosure and no anticompetitive effects from the practices of reciprocity in these markets either.\(^\text{52}\)

Considering first the argument that reciprocity does not raise entry barriers in oligopolistic markets it is believed that this view

52 Id., at 823: "Thus, even in a market where all firms practice reciprocity with their suppliers, there is no reason why reciprocity should lessen the chances of successful entry, provided the new entrant could match the terms of the established suppliers. This is particularly true in concentrated supplier markets where established firms are earning supracompetitive profits. Reciprocity, then, does not foreclose competitors, except on equal terms, and it cannot be used to increase horizontal market power."
fails to attach sufficient importance to the entry barriers which exist in such markets absent reciprocal dealing. By definition oligopolistic markets are those in which barriers are high due to such factors as large capital requirements, difficult technology protected by patents or secret processes, or limited natural resources. A market cannot properly be considered oligopolistic unless entry is substantially deterred by such factors. A firm considering an attempt to enter a market under these circumstances presumably will consider every competitive factor including those affecting its ability to sell its output. It does not seem reasonable to suppose that the potential new entrant would not be additionally deterred from its attempt by its discovery that a substantial share of the oligopolistic market is subject to reciprocal dealing arrangements. To attempt entry confronted by this situation surely requires greater resolve, or compensating advantages of a higher degree, than would otherwise be required.

Furthermore, the existing firms practicing reciprocity in the oligopolistic market have advantages over the new entrant attempting to supplant them at particular accounts through offers of lower prices. The existing firms should be able to meet lower prices offered by the new entrant to such accounts without undue effect on their overall profits since they are selling at supracompetitive prices to other accounts. They may also be able to shift their reciprocal buying from less threatened accounts to those which the new entrant is making its strongest efforts to capture, thereby increasing the reluctance of the latter accounts to switch suppliers. The reciprocal dealing can be made more attractive to threatened accounts by increasing the prices which the existing firms are willing to pay for their reciprocal purchases, by upgrading the quality of the products or services sold, or by assuming certain freight or other costs normally borne by the threatened accounts. The existing firms practicing reciprocity have the advantage of great flexibility, therefore, in countering the efforts of a new entrant attempting to supplant them. If the considerations outlined are valid, potential new entrants to an oligopolistic market would properly consider the use of reciprocity by existing firms in that market a disadvantage to be added to the other hurdles normally surrounding such markets. Any raising of entry barriers effects foreclosure.

Finally, the argument that a firm having buying power can exercise it fully either by obtaining the lowest price from its suppliers or by requiring them to engage in reciprocity, but not both, may be
questioned. It is conceded that if a firm’s buying power is fully exercised to obtain the lowest price that no leverage remains by which to insist that a supplier buy from the firm at above-market prices. It would seem, however, that the firm may still have some residuum of power after bargaining for the lowest price from a supplier which can be applied to aspects of their dealing not involving prices or costs. The purchase by a supplier of products or services from the firm at market prices would not be an aspect involving prices or costs (unless substantial costs were involved in switching from another supplier). Would not the firm with buying power, after using that power to obtain the lowest price from a supplier, still be able to insist upon reciprocal purchase by the latter as long as the former was willing to sell at market prices? In the bargaining between the firm and its supplier it must be presumed that the latter, confronted by the firm’s buying power, has agreed to sell at a lower than normal price but at a level which is still profitable. The supplier’s costs may preclude further concessions on price but there appears to be no reason why he should not be willing to grant any additional concession not affecting price or costs which the firm may demand, including reciprocal purchases at market prices. If this is true, then the firm with buying power can fully exercise that power to obtain the lowest price and at the same time expand its sales through coercive reciprocity. Barriers to entry would also be raised under these circumstances since, for reasons outlined above, a new entrant would appear to be forced to sell at lower prices to obtain the supplier’s business because of the reciprocal dealing than would be required in the absence of that factor.

III. SOME UNSETTLED ISSUES OF RECIPROCITY AS A SHERMAN ACT VIOLATION

A. The Various Forms of Reciprocity as Violations

Coercive reciprocity, mutual patronage, and organized or systematic reciprocity have been adopted for purposes of this discussion as terms which seem reasonably descriptive of the apparently more common practices by which companies exercise their buying power to promote sales. Secondary reciprocity refers to situations involving third parties, such as an arrangement between company A and its supplier B whereby the latter agrees to purchase from A’s customer C in exchange for A’s purchases from B. Conglomerate reciprocity refers to the practices of a firm which operates in two or
more distinct industries and has buying power in one market which it exercises to promote sales in an unrelated market.

In *General Dynamics* the court indicated that both coercive reciprocity and mutual patronage would have been held per se violations of Sherman section 1 had there been proof of a "not insubstantial" amount of commerce affected. "Reciprocity," the court said, "whether mutual or coercive, serves to exclude competitors by the exercise of large scale purchasing power."

Any contract, combination or conspiracy which unreasonably restrains competition in or affecting interstate commerce violates Sherman section 1. Moreover, where the subject conduct is deemed to have a "pernicious effect on competition" and to lack "any redeeming virtue" it is conclusively presumed to be unreasonable and is said to constitute a per se violation of the Sherman Act. Where the coercion of large buying power is employed to exact reciprocal purchasing by a supplier there are two effects: 1) the freedom of choice of the supplier is impaired, and 2) competitors are excluded from making sales to the supplier. These effects may be fairly judged as pernicious to competition. The absence of any apparent "redeeming virtue" in the form of economies of distribution or otherwise indicates that this practice is properly relegated to the per se category of Sherman Act restraints.

Where two firms having a relatively equal balance of trade between them agree to buy from each other, their mutual patronage excludes competitors but their freedom of choice in selecting suppliers remains unimpaired. The court in *General Dynamics* considered the factor of exclusion of competitors sufficiently anticompeti-

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53 These terms have been defined previously. See text accompanying note 20 supra.
54 258 F. Supp. at 65-66.
55 Id. at 66.
56 Standard Oil v. United States, 221 U.S. 1, 59 (1911).
57 Northern Pacific v. United States, 356 U.S. 1, 4-5 (1958).
58 It has been suggested that under certain circumstances reciprocity can effect economies of distribution. See, Adelman, *Recent Reports on Antitrust Policy: An Economist's View*, 25 Record of N.Y.C.B.A. 566, 572 (1970). Presumably, any such economies would result from reduced selling costs. If the lower selling costs were reflected in lower prices there would be legitimate economies of distribution. The seller who is prepared to reduce prices, however, could probably obtain the business on that basis alone (perhaps with comparable savings in selling costs) without the need for a reciprocal arrangement. If a reciprocal arrangement did bring about lower selling costs but the price was not correspondingly reduced no socially useful economies of distribution would be effected.
tive by itself to bring mutual patronage within the interdiction of the
per se rule also. In the context of mutual patronage practiced by
large companies having leading market positions the court's position
seems warranted. The reciprocal dealing of such firms can be expect-
ed to cause substantial market foreclosure with resultant injury to
small competitors. The harder case is the effect of mutual patronage
practiced by small firms having relatively insignificant market shares.
The exclusion of competitors under these circumstances may have
little or no discernible effect on competition. Nevertheless, it is not
unlikely that the courts will apply the per se rule to small firms as
well as large. The purposes of the per se rule, which are to provide
certainty in the law and make unnecessary elaborate proofs of market
shares and economic conditions, are better served by giving it a
general applicability without exceptions. Furthermore, in the absence
of any apparent "redeeming virtues" the practice can be condemned
even as to small firms without fear of interfering with proper busi-
ness operations.

Another form of reciprocity consists of a firm's organized pro-
gram of directing purchases to those suppliers which purchase from
it. An organized program (also sometimes referred to as systematic
reciprocity), may be considered as one in which one or more com-
pany officials, who may be given such titles as director of trade re-
lations or vice-president for corporate development, are assigned
to compile comparative data on the company's purchases from and
sales to its suppliers and customers and to coordinate purchases with
sales so that those suppliers who are also good customers receive pre-
ference. If the coordination is carried to the point of relating purchas-
es to sales arithmetically in accordance with some ratio or formula
the program may be considered systematic (although, as noted, that
term is sometimes applied to what is here called organized recipro-
city). For the purpose of considering the legality of organized or
systematic reciprocity it will be assumed that the firm so engaged
does not attempt to coerce or make mutual patronage agreements
with its suppliers but confines itself to unilateral decisions regarding
the placement of purchase orders with suppliers.

It is believed that the organized or systematic forms of recipro-
city also violate Sherman section 1. As with the other forms there is

59 258 F. Supp. at 66.
61 See, Finney, supra, note 7.
a use of purchasing power to exclude competitors which may be no less effective because express agreements with suppliers are avoided. If anything, an organized or systematic program persistently adhered to may become the most pervasive form of reciprocity, maximizing the use of the firm's purchasing power for anti-competitive purposes. Reciprocity practiced in this manner should be easily distinguishable from purchases made according to normal purchasing criteria. The assignment of personnel to coordinate purchases and sales, the compilation of comparative data, and internal documents evidencing a program under which purchases are related to sales all serve to distinguish these forms of reciprocity from normal sales and purchases. While Sherman section 1 requires a contract, combination or conspiracy involving two or more parties there would seem not to be a problem in this connection. Under the Albrecht interpretation, the practicing firm can be alleged to have engaged in a combination with its supplier-customers, assuming there is at least some evidence that supplier were aware of the firm's reciprocity policy or of the likelihood of their sales to the firm being terminated or reduced for failure to engage in reciprocal buying in amounts satisfactory to the firm. Evidence that suppliers knew that the firm assigned an official to conduct trade relations or to compile comparative purchase and sales data might by itself be sufficient to establish such an awareness. Or, under the rationale of Container Corp. a conspiracy between the practicing firm and its suppliers may be alleged where there is evidence supporting an inference that purchases were made upon the mutual expectation that reciprocal purchase orders would be forthcoming.

Furthermore, the unilateral acts of the firm engaged in organized or systematic reciprocity are subject to attack under section 2 of the Sherman Act as an attempt to monopolize the market constituted

62 390 U.S. at 147-50.
63 There is a suggestion in Albrecht that a combination might be held to exist between a firm engaged in an anticompetitive practice and its customers even though the latter could have had little or no knowledge of the firm's purpose. After holding that defendant newspaper publisher, which had objected to plaintiff home delivery carrier's charging a higher price than that suggested and had replaced plaintiff with a new carrier, was engaged in a combination with the latter the Court referred to the possibility of a combination existing between the publisher and plaintiff's home delivery customers: "Plaintiff's amended complaint did allege a combination between respondent and petitioner's customers. Because of our disposition of this case it is unnecessary to pass on this claim. It was not, however, a frivolous contention." 390 U.S. at 150, n. 6.
64 393 U.S. at 335. See, text accompanying notes 27, 28 supra.
by the demand of its suppliers for the lines of products and services sold by the firm. As noted, all but one of the Government complaints filed since General Dynamics have included such charges of attempts to monopolize in violation of section 2.

B. Possible Consequences Arising from Reciprocity Conduct

1. Regulatory Commission Proceedings

If a company practicing reciprocity has a division or subsidiary in a regulated industry it may suffer loss of licenses or other adverse regulatory action.

An illustration of how this may occur was provided by Federal Communication Commission proceedings involving General Tire & Rubber Co. which, as noted earlier, was a defendant, along with three subsidiaries, in a Government complaint charging reciprocity filed in 1967 and settled by consent decree in 1970. In 1970 a hearing examiner for the FCC recommended that RKO-General, one of the subsidiaries named as a defendant in the reciprocity case, be denied renewal of its television station license in Los Angeles on two grounds. One ground was the poor quality of its programs. The other was evidence that General Tire had purchased from suppliers on condition that the latter purchase advertising time from the station.

The examiner reasoned that the practice of reciprocity might adversely affect television programming quality, the service provided by the station, and competition in nonregulated industries (it would also affect competition among television stations in the subject area). The Department of Justice filed a brief with the FCC taking no position on whether the examiner’s findings with respect to reciprocity were supported by the evidence but indicating that if the Commission concluded that the examiner’s findings did have support in the record then such findings should be given great weight by the Commission. The Justice Department brief expressed the view that reciprocity was a per se violation of the antitrust laws and that ordinarily the Commission should not renew a license where it has found the licensee to have engaged in an antitrust violation.

65 See text accompanying note 22-24 supra.
67 Id., Department of Justice filing June 10. A recent action by the FCC in this matter is reported in 31 F.C.C. 2d 7070 (1970). See, Address by Mr. Donnem, Director of Policy Planning in the Antitrust Division of the Department of Justice, Association of Interstate Commerce Commission Practitioners in Louisville, Kentucky, June 17, 1970, entitled Diversification of Transportation Companies — Some Antitrust Considerations.
2. Treble Damage Claims

Firms practicing reciprocity may be subject to treble damage claims in private actions if competitors, suppliers, customers or others can establish the fact of damage and a casual connection between the illegal reciprocal dealing and the injury to their "business or property."\(^{68}\)

Assuming the private plaintiff has evidence to establish illegal reciprocal dealing the perhaps greater difficulty remains of proving damage to his own business or property and the causal connection between that damage and the defendant's practice of reciprocity.\(^{69}\)

Where the firm practicing reciprocity is in an oligopolistic industry, and particularly if it is the dominant firm, the possibility of establishing a causal connection between the illegal activity and injury to a competitor, supplier or customer appears much stronger than where the treble damage defendant has a relatively small share of a market composed of a sizeable number of companies. Even in an oligopolistic market, however, it may be difficult to establish that a plaintiff would have made sales to specific customers had it not been for defendant's reciprocal arrangements with such customers.

Two private cases have been filed which present in an unusual context the issues of injury to business or property and of casual connection.\(^{70}\) Plaintiff in each case was alleged to be a beneficiary of trust accounts managed by a leading New York bank. Each complaint reportedly alleged that the defendant bank entered into understandings with broker-dealers whereby securities transactions in trust accounts were allocated to such broker-dealers in proportion to their deposits and loan business. Trust beneficiaries as a class were alleged to have been injured because these arrangements foreclosed opportunities to obtain portfolio advice available from other broker-dealers, interfered with the obtaining of brokerage services on the basis of quality of performance, impaired the banks' judgment as to proper portfolio turnover, and resulted in inadequate use of over-the-counter

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\(^{68}\) Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."


broker-dealers for purchase and sale transactions. Injunctive relief as well as treble damages were prayed for.

3. Criminal Prosecution

A violation of the Sherman Act may be prosecuted by civil proceedings, criminal action or both. The problem of possible unfairness to defendants indicted in criminal proceedings for conduct not known by them to be unlawful was considered in a report prepared in 1967 for the President's Commission on Law Enforcement and Administration of Justice:

The Supreme Court has held that the Sherman Act is not unconstitutionally vague. But an indictment in a particular case might unfairly attack conduct not known to the defendants to be unlawful. The solution of the Antitrust Division to this problem of potential unfairness has been to lay down the firm rule that criminal prosecutions will be recommended to the Attorney General only against willful violations of the law, and that one of two conditions must appear to be shown to establish willfulness. First, if the rules of law alleged to have been violated are clear and established — describing per se offenses — willfulness will be presumed. The most common criminal violation of the antitrust laws is price fixing; upwards of 80 per cent of the criminal cases filed charge conspiracies to fix prices. Second, if the acts of the defendants show intentional violations — if through circumstantial evidence or direct testimony it appears that the defendants knew they were violating the law or were acting with flagrant disregard for the legality of their conduct — willfulness will be presumed.

Dicta in the Supreme Court's Consolidated Foods and district court's General Dynamics opinions support the view that business reciprocity will be held illegal per se when that issue is adjudicated in some appropriate future case. The criminal prosecution of companies and individuals participating in reciprocal arrangements is, therefore, a possibility to be seriously considered. A recent Assistant Attorney

71 Violation of the Sherman Act is a misdemeanor punishable by fine not exceeding $50,000 and by imprisonment not exceeding one year. 15 U.S.C. §§ 1, 2 (1970).

General in charge of the Antitrust Division in a public address warned that “we believe systematic reciprocity still continues in some major industries, and we expect to file additional cases against the practice in the not too distant future. At this juncture, we cannot rule out the possibility of criminal prosecution.”

IV. CONCLUSION

Business reciprocity as a Sherman Act violation has been one of the most important antitrust developments of recent years. Virtually unheard of before the filing of the General Dynamics complaint in 1962, reciprocity as conduct violative of the antitrust laws has burgeoned into a major area of antitrust enforcement with eleven Government cases filed in the past two years. Undoubtedly these cases have brought about substantial changes in ways of doing business not only by the companies directly involved as defendants but by many others which have taken steps to conform their sales and purchasing activities to the standards incorporated in the consent decrees.

It is remarkable that this development occurred without benefit of a single case having been tried and a court holding that evidence of reciprocal arrangements had established a Sherman Act violation. However, as this article has attempted to demonstrate, there is ample basis for the position that most, if not all, forms of reciprocal dealing violate the Sherman Act, particularly where the firm engaged in such dealing is a large company or an important factor in its industry.