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A Re-evaluation of Reciprocal Dealings under the Federal Antitrust Laws: *Spartan Grain & Mill Co. v. Ayers*

**INTRODUCTION**

In *Spartan Grain & Mill Co. v. Ayers,* the Fifth Circuit observed that the market ramifications of reciprocal dealings and tying arrangements are similar when considered within the context of federal antitrust laws. As such, the court held that, within certain antitrust law proscriptions, the standard used to judge the illegality of reciprocal agreements should be equivalent to that standard used to judge the illegality of tying arrangements. Moreover, the Fifth Circuit became the first to recognize that a reciprocity suit can be maintained as a private action by a party to the reciprocal arrangement.

1. 581 F.2d 419 (5th Cir. 1978), cert. denied, 444 U.S. 831 (1979).
2. Professor Sullivan defines a reciprocal dealing arrangement as one which "involves an undertaking by one firm to buy from another on the condition that the second also buy from it." The author demonstrates the consummate reciprocal arrangement by the following hypothetical:
   Assume that firm A produces aluminum and that firm B manufactures machines and parts, some of which use aluminum, and some of which are used in aluminum production. The two firms face each other in two markets, that in which A is a seller of aluminum and B a buyer of raw material which it will use in manufacturing operations, and that in which B is a seller of machinery and parts and A a buyer of equipment used in producing aluminum. If A were to tell B that it would buy parts from B if B agreed to buy aluminum from it, and if B were to accept this proposal, a classic reciprocal dealing arrangement would be [perfected].
3. See *Sulli*
4. See notes 139-141 infra and accompanying text.
5. The right of an individual to maintain a private civil action under the federal antitrust laws is recognized under §4 of the Clayton Act, 15 U.S.C. §15 (1976), which provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . ."

See notes 91-102 and 133-136 infra and accompanying text for a discussion of the rela-
The purpose of this article is to explore the potential usefulness of the Spartan Grain approach as a means of adjudging the illegality of reciprocal agreements. First, this article will examine the different types of reciprocal dealings that have been traditionally recognized and discuss how each has been dealt with under sections one and two of the Sherman Act and section five of the Federal Trade Commission Act prior to the Spartan Grain decision. Next, the article will discuss and critically analyze the Spartan Grain case. Then it will explore the ramifications of that decision on the analysis and disposition of future reciprocity suits under the federal antitrust laws. Finally, this article will demonstrate that the Spartan Grain decision may, with certain qualifications, act as the definitive precedent by which to analyze all forms of reciprocity which may come to be adjudicated under the appropriate federal antitrust laws.

6. 15 U.S.C. §1 (1976) provides in pertinent part: "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. . . ."

7. 15 U.S.C. §2 (1976) provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."

8. 15 U.S.C. §45(a)(1) (1976) provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

9. The element of reciprocity has also come to play an important part in analyzing the anticompetitive effects of conglomerate acquisitions or mergers challenged under §7 of the Clayton Act, 15 U.S.C. §18 (1976). In F.T.C. v. Consolidated Foods Corp., 380 U.S. 592 (1965), the seminal case addressing this issue, the Court held a conglomerate merger to be in violation of §7 of the Clayton Act because it resulted in a market structure conducive to reciprocal dealing by the resulting corporation. Because essentially different issues from contractual arrangements in violation of §§ 1 and 2 of the Sherman Act and §5 of the Federal Trade Commission Act are involved in analyzing mergers, a discussion of reciprocity within that context is outside the scope of this article. It suffices to say that reciprocity, when considered within such a context, refers to the "reciprocity effects" of the merger and the tendency of firms, absent coercive or voluntary agreements, express or implied, to buy from those to whom they sell, desire to sell, or feel obligated to regardless of the reason. For a broader discussion of reciprocity, its effects, and §7 of the Clayton Act, see, e.g., 1 TRADE REG. REP. (CCH) ¶4300 (1977); SULLIVAN, supra note 2, §209; VON KALINOWSKI, 16 G. Business Organizations, ANTITRUST LAWS AND TRADE REGULATIONS §63.06(1) (6th ed. 1979) [hereinafter cited as VON KALINOWSKI].

10. It should be noted here that although §3 of the Clayton Act, 15 U.S.C. §14 (1976), has been held to apply to certain exclusive dealings and tying arrangements, it is of no consequence in attacking reciprocal dealings. The provision forbids sales which are made on the condition that the purchaser will not use or deal in the goods of a competitor of the seller. In reciprocal dealings, the condition of the arrangement is attached to purchases. The section, therefore, is inapplicable to reciprocal dealings on jurisdictional grounds. See note
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In practice, three types of reciprocal dealings are generally recognized: unilateral or voluntary reciprocity; mutual or negotiated reciprocity; and coercive or leverage reciprocity. The less-than-consistent rules and legal precedents which have been used to analyze the validity of reciprocal dealings under the antitrust laws may reflect the different economic impact of each of these forms of reciprocity. Accordingly, in evaluating the legality of reciprocal arrangements, the nature and anticompetitive consequences of each of these three types of arrangements must be separately considered.

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104 infra.
11. See generally Dunne, Reciprocity: The Hazards of Backscratching, 11 WILL. L. J. 159, 169 (1975); Harvith, Reciprocity and the Federal Antitrust Laws, 40 WASH. L. REV. 133, 136 (1965); von Kalinowski, supra note 9, §63.03.
12. Unilateral reciprocity is the purchasing from another to promote sales to that other party absent any guarantee of that second party's acting. See generally Hausman, Reciprocal Dealing and the Antitrust Laws, 77 HARV. L. REV. 873, 877 (1964) (hereinafter cited as Hausman]. This kind of reciprocity can be characterized by, "if I buy from you, I hope that you will buy from me."
13. In a mutually reciprocal arrangement, two parties with equal bargaining power agree to purchase each other's products or services motivated simply by the mutual benefits flowing from purchasing upon that condition. See Flinn, Reciprocity and Related Topics Under the Sherman Act, 37 ANTITRUST L. J. 156, 158 (1968). This kind of reciprocity can be expressed simply as, "if you will buy from me, I will buy from you."
14. Coercive reciprocity involves the assertion of economic force by a customer or his suppliers for the purpose of making them buy his own products. See Asper, Reciprocity, Purchasing Power and Competition, 48 MINN. L. REV. 523, 524 (1964). This kind of reciprocity involves the expressed or implied threat of "if you want me to buy from you, you had better buy from me."
15. See notes 41-77 infra and accompanying text.
16. It should be noted that other forms of reciprocity have been recognized. For example, in United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa.), aff'd, 320 F.2d 509 (3d Cir. 1963), a kind of three-way or "secondary" reciprocal arrangement was considered within a merger context. The arrangement can best be depicted by the following illustration:

![Diagram of reciprocal arrangement]

This and other species of reciprocal arrangements differ from those discussed in the text only with respect to the number of parties involved and, as such, they present no unique economic or substantive considerations. Therefore, they will not be separately addressed in
Perhaps no single business practice addressed by the antitrust laws has created as much controversy concerning its inherent market logic and economic effects as has reciprocity. Although the Department of Justice and Federal Trade Commission have for some time demonstrated concern over the practice, academic economists have failed to reach any consensus as to the market ramifications generated by reciprocal arrangements. Still, even when considered in its most elementary form, reciprocity does present certain economic disadvantages to particular market competitors. As such, the practice is necessarily worthy of redress under the antitrust laws.

The Anticompetitive Effects of Reciprocal Dealings: The Setting

Certain market conditions underlie the practice of reciprocity. First, by definition, there must necessarily be a two-way flow of buying and selling between two industries. Second, reciprocity is usually related to an oligopolistic market structure because of the fact that the practice is incompatible with the severe price compe-
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...tition found in freely competitive markets. Specifically, oligopolists, in preferring non-price rivalry to price competition, will necessarily regard the practice of reciprocity and its tendency to militate against price competition as highly desirable. Third, suppliers must possess an excess capacity which renders them susceptible to filling orders on other then price mechanism grounds. For example, the pressure to engage in reciprocal practices would be at its highest during periods of recession and at its lowest during times of economic boom.

Fourth, reciprocal practice typically assumes the presence of a diversified multi-unit firm, engaged in various businesses, that provides goods and services to many industries. The mere use of purchasing power is not usually sufficient to induce an effective reciprocal dealing program. Thus, only diversified firms will possess sufficient economic leverage to initiate reciprocal arrangements with suppliers. Finally, reciprocal dealing favors assymetry in size on the initiating competitor level. The larger the firm, the greater is its economic leverage in contrast with that of smaller sized purchasers. Consequently, the probability of a larger, diverse firm successfully initiating an effective reciprocal dealing program with its suppliers is greater.

21. See notes 27 and 28 infra and accompanying text.
23. The diversified multi-unit firm discussed is typically referred to as a conglomerate. A conglomerate is a firm, or a group of jointly owned or controlled firms, operating in several markets neither horizontally nor vertically related. SULLIVAN supra note 2, §207 (1977).
24. In the context of reciprocal arrangements, “economic leverage” reflects not only a firm’s qualitative ability to purchase from a certain supplier, but also its quantitative ability to purchase a greater volume of goods more frequently than its competitors from that supplier.
25. Effective reciprocal practices ordinarily are not perpetrated by single-unit firms. Assuming that all competitors of a single unit firm purchase from the same suppliers, no one, outside of a competitor wielding excessive market share power, will have any distinct advantage over the others in terms of possible economic leverage. Consequently, it is unlikely that any one will be successful in acting as the initiator of an effective reciprocal arrangement. See Finney, Reciprocity and Public Policy, 2 ANTITRUST L. AND ECON. 97, 101 (1969), for a comparison of attempted reciprocal dealings of multi-unit firms with those of single-unit firms.
26. The relevance of this factor is best demonstrated by a comparison of the conglomerate giant with that of its rival sellers specializing in a limited amount of product lines. See note 25 supra and accompanying text. Two instances most notably demonstrate the advantages adhering to the wielding of economic leverage by a conglomerate concern with relation to reciprocal dealings. The first concerns that market structure where the conglomerate giant sells only one or a very few narrow segments of its product line to a supplier who in turn is anxious to satisfy the demand input by all of the conglomerate’s divisions. The second...
The Anticompetitive Effects of Reciprocal Dealings: Generally

There are three anticompetitive effects associated with the practice of reciprocity. First, when a supplier decides from whom he will purchase his requirements within a reciprocity context, his choice will not necessarily be based upon the merits of the product or services. In a freely competitive market, purchases are made of the best available goods at the lowest possible prices to ensure the buyer maximum profits and minimum competitive risks. However, reciprocity erodes the traditional purchasing criteria of price, quality, and service. Instead, the potential for personal economic benefits suggested by the reciprocal arrangement itself becomes the dominant if not exclusive reason for a party’s purchasing decision. Further, should a supplier decide not to participate in a proposed reciprocal dealing arrangement, he may risk a substantial loss of that customer’s business and goodwill. As a result of reciprocal practices, then, the offer of superior goods at lower prices will no longer function as controlling, and price and quality allocative efficiency will increasingly lose their market effect.

A second anticompetitive effect attributed to reciprocity is the creation of oligopolistic and monopolistic industries inimical to the national economy. As particular firms within a given market increase their sales through the successful implementation of effective reciprocal dealings programs, they also increase their market leverage to the detriment of their competitors. The market structure, thus, becomes more concentrated and the number of competitors becomes fewer. Further, the personal advantages inherent in deals with those business situations where the smaller firms do not, and typically cannot, offer more attractive sales terms to the supplier than does their rival conglomerate concern. See Scherer, supra note 19.

27. See von Kalinowski, supra note 9, §63.05(2).
28. The personal economic benefits involved would be higher profit margins for the initiating seller and guaranteed purchasing markets for the supplier.
29. See FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965). Reciprocity "results in an 'irrelevant and alien factor' intruding into the choice among competing products, creating at the least 'a priority on the business at equal prices.'" Id. at 594. See also Hausman, supra note 12. But cf. Scherer, supra note 19, at 281-282 (firm's purchases are generally awarded even in connection with reciprocal arrangements only when the price, quality, and delivery conditions offered by the seller are equal with that of its competitors).
30. See von Kalinowski, supra note 9, §63.05(3).
31. See Blair, Reciprocity and Competition: A Problem of Conflicting 'Assumptions', 6 Antitrust L. & Econ. 77 (1973) [hereinafter cited as Blair, Assumptions]. Blair views the problem as one turning on a firm’s ability to diversify and on the likely maintenance of entry barriers. An expansion of a firm’s sales through reciprocity would raise the firm’s own profits even without an increase in its unit prices above the competitive level. However,
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the practice encourage businesses to expand, through merger or diversification, to the level of oligopolies in order that they may acquire economic leverage that will allow the promotion of an effective reciprocal dealings program.

Finally, and perhaps most significantly, reciprocity has been said to foreclose from a particular market those competitors of the seller who are without economic leverage.\textsuperscript{32} If the seller desires to assure itself a significant amount of business from a particular supplier, the seller may exert the economic leverage found in its purchasing relationship with that same supplier. The supplier will then succumb to the seller's efforts lest it risk the loss of a significant amount of sales. One consequence of this relationship, then, is that actual competitors of the seller who do not possess any corresponding economic leverage will be denied the opportunity to engage in market trading with the supplier based upon the merits of their products.\textsuperscript{33} Further, market entry by potential competitors will be discouraged when it is known that economic leverage, rather than marketing quality and efficiency, will produce business solvency.\textsuperscript{34} In the final analysis then, reciprocity tends to draw financial rewards increasingly toward those firms capable of applying market leverage and away from those competitors unable to do so.

\textit{The Anticompetitive Effects of Reciprocal Dealings: The Specific Forms}

When considered separately, the market ramifications of unilateral, mutual, and coercive reciprocal arrangements may or may not be similar and, in fact, may or may not be anticompetitive. The particular set of anticompetitive effects attributable to a reciprocal arrangement can only be identified if the nature and substance of that arrangement are considered.

Unilateral reciprocity serves as possibly the least malevolent

\begin{footnotes}
\footnotetext{32}{See von Kalinowski, supra note 9, §63.05(1).}
\footnotetext{33}{See Scherer, supra note 19.}
\footnotetext{34}{See Hausman, supra note 12, at 879-880.}
\end{footnotes}
trading practice of the three traditional forms of reciprocal arrangements. This type of purchasing practice cannot be said to have any adverse market structure ramifications because by definition the purchases may not be sufficiently capable of stimulating actual reciprocity. Further, because unilateral reciprocity usually occurs where there is no economic leverage, the traditional purchasing criteria of price, quality, and service are not obstructed. Finally, the term unilateral reciprocity is itself inherently contradictory. Because there is never any actual arrangement between the trading parties, the practice can never constitute actual reciprocity. Thus, if the practice is to be considered anticompetitive for purposes of antitrust law scrutiny, it can only be so where certain monopolistic ramifications are at issue.

Consensual reciprocity is most often motivated by the prospect of mutual benefits flowing to both parties concerned. Price and quality mechanisms may no longer serve as allocative guides in the market and, consequently, significant market structure ramifications may result if the arrangements represent a substantial portion of trade within the relevant selling market. The problems presented by this type of reciprocal dealing are even further compounded because the practice is difficult to isolate and even harder to substantiate.

35. See Kintner, The Anatomy of Reciprocity, 56 A. B. A. J. 232 (1970) [hereinafter cited as Kintner]. The author reasons that reciprocity can be stimulated only if there is an expectation of additional future purchases of significant volume. Typically, a continuous course of dealings gives the purchaser economic leverage over the seller. When such leverage is achieved, the purchasing patterns take on a coercive form. At that point, the purchasing arrangements will fall into one of the two other categories of reciprocity and there is no longer any need to examine them on a unilateral basis.

36. See notes 66-69 infra and accompanying text.

37. But see Handler, Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures, 49 Va. L. Rev. 433, 437 (1963). Handler suggests that, in the absence of coercion, "we should leave to the market place and the processes of education the elimination of practices which may be unbusinesslike or uneconomical but are not demonstrably anticompetitive." See also Blair, Reciprocity in an Uncertain Environment, 21 Antitrust Bull. 273 (1976) [hereinafter cited as Blair, Environment]. There, the author suggests that, in a freely competitive market, the parties to the arrangement as well as the consumer will benefit because, given the existence of random demand functions, the arrangements will encourage a larger output by the firms.

38. See M. Handler, Cases and Materials on Trade Regulation, 712, 713 (1975) [hereinafter cited as Handler]. However, the gravity of the problem may be to a great degree lessened by the strong probability that mutual reciprocity is now rare. See Kintner, supra note 35. There, the author suggests that businessmen have come to realize not only the illegality of mutually reciprocal dealings but also the damaging effect that the practice may have on corporate flexibility. Where neither party is at the economic mercy of the other, it simply would be bad business to invest in a transaction devoid of the advantages of trading
Finally, coercive reciprocity and the exercise of economic leverage to exact reciprocating purchases from a disadvantaged supplier is the most predatory and anticompetitive activity of the three. With respect to the parties to the arrangements themselves, the seller's wielding of economic leverage serves as a threat to the supplier. If the supplier refuses to engage in the reciprocal activity, it suffers the risk of losing the seller as a customer. With respect to competitors within a market tinged with coercive reciprocity, the malevolent economic results of market foreclosure and the raising of entry barriers to competitors of the selling firm are clearest. Thus, coercive reciprocity tends to benefit a single party within a market at the expense of viable business competition within that market.

AN HISTORICAL PERSPECTIVE

Legal redress for reciprocal dealings has been sporadic. Although attacks against the practice began in the early 1930's, further pursuit lay dormant for approximately thirty years. Even when the attacks were resumed in the mid-1960's, the cases resulted in weak and sometimes inconsistent, legal precedent.

The Initial Trend Toward the Recognition of the Illegality of Reciprocal Dealings

The earliest cases involving reciprocal dealings were instituted by the Federal Trade Commission. In administrative proceedings, the Commission attacked the "coercive" use of purchasing power in the free marketplace.

39. But see Blair, Assumptions, supra note 31, at 80-82. The supplier would consider the seller's threat to stop buying from it a credible one only if its own competitors were capable of taking over its role of supplying products to the threatening firm. Further, if the product offered by a seller and its competitors is considered homogeneous by the supplier and if the price is not being raised above the competitive level, the supplier will presumably be indifferent as to a seller's wielding of economic leverage to effect a reciprocal dealings program.

40. But see Blair, Environment, supra note 37, at 279-84, where the effects of reciprocal dealings are considered within the context of an imperfectly competitive market. Blair's mathematical models suggest that when the selling firms behave as quantity setters, the parties to the agreement as well as the consumer benefit because the arrangement will encourage a larger output by the firms. It is only when the selling firms behave as price setters that higher prices along with market foreclosure and entry barriers to actual and potential competitors will be encountered.

41. This dormancy may have resulted from the distinction drawn between coercive reciprocity and voluntary reciprocal arrangements for mutual benefit. See Note, Business Reciprocity: A Growing Field of Development Under the Antitrust Laws and an Important Consideration for Businesses in Their Purchasing Arrangements, 4 Loy. Chi. L. J. 446, 448-49 (1973).
as an unfair method of competition. Without any substantial consideration of the market ramifications of the practice the Commission merely indicated that reciprocity unfairly diverted business from competitors of the participants because considerations regarding the freely competitive market criteria of price and quality were absent. In those cases, the Commission established the general principle that the abuse of large scale buying power to restrict market competition is illegal.

The first judicial suggestion of the illegality of reciprocity under the antitrust laws was made in United States v. Ingersoll-Rand Co. The strength of the court's dicta in condemning the practice of reciprocity as "particularly destructive of competition" clearly suggested that the practice could be prohibited by the federal antitrust laws. However, the issue of whether the practice of reciprocity, by itself, constituted an antitrust violation remained unresolved.

Two years later, in F.T.C. v. Consolidated Foods Corp., the Su-

42. These actions were instituted pursuant to §5 of the Federal Trade Commission Act. 15 U.S.C. §45 (1976). In the first two cases, In re Waugh Equip. Co., 15 F.T.C. 232 (1931) and In re Mechanical Mfg. Co., 16 F.T.C. 67 (1932), large meat packing firms with vast power as major railroad shippers acquired control of minor manufacturers of railroad equipment. During subsequent negotiations with railroads, the firms indicated that unless the railroads purchased equipment from the manufacturers controlled by the meat packers, their dealings with the railroads would be severely curtailed. In the third case, In re California Packing Corp., 25 F.T.C. 379 (1937), a large diversified food processing company used its purchasing power and freight volume to require suppliers and transport companies to patronize its subsidiary terminal corporation.

44. See also United States v. Griffith, 334 U.S. 100 (1948) (large scale buying may not be used to stifle competition by denying market access to less favorably situated competitors Id. at 108).
45. 218 F. Supp. 530 (W.D. Pa.), aff'd, 320 F.2d 509 (3d Cir. 1963). The case was brought under §7 of the Clayton Act which prohibits acquisitions which would tend to lessen competition or create a monopoly. The suit involved the propriety of three acquisitions in light of the probability that the acquiring corporations would be able to promote "secondary" reciprocal arrangements after the mergers. See note 16, supra.
46. The trial court stated:
[W]hat may here be involved is the trade practice known as 'Reciprocity' . . . . [In it,] [t]he 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.
The Supreme Court made its first and thus far only comment upon reciprocity. The Court in broad terms deemed the practice anticompetitive and worthy of redress under the federal antitrust laws. The Court’s general language further suggested that reciprocal dealings, even through subtle or voluntary arrangements, might give rise to antitrust issues in contexts other than that of mergers. Nonetheless, the Court did not indicate what those contexts might be or what mode of analysis should be employed to determine when or whether an antitrust violation has occurred.

Finally, one year later, United States v. General Dynamics addressed the issue of whether the practice of reciprocity could, standing alone, constitute an antitrust violation under section one of the Sherman Act. In analyzing the competitive consequences of reciprocal dealings, the court initially determined that both coercive reciprocity and mutual patronage agreements were anticompetitive in nature. The court then analogized the practice of reciprocal dealings to that of “tying-in” arrangements. As such, the court adopted the standards enunciated by the Supreme Court

49. This case also dealt with reciprocity in a merger context. The Federal Trade Commission sought to divest a major producer of food products of a subsidiary it had acquired which was one of the two dominant producers of dehydrated onion and garlic. The Commission held that the acquisition would present the producer with the opportunity to exercise leverage through its purchasing power against food processors who used dehydrated onion and garlic in their products in order to increase its onion and garlic sales with them. In re Consolidated Foods Corp., 62 F.T.C. 929 (1963), rev’d, 329 F.2d 623 (7th Cir. 1964). The Court of Appeals, relying mainly on ten years of post-acquisition experience, held that no probability of a substantial lessening of competition had been shown.

50. The Court termed reciprocity: “One of the congeries of anticompetitive 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 order for products of that affiliate, is an anticompetitive practice.” 380 U.S. at 594.


53. The government alleged that the defendant’s acquisition of a leading producer of carbon dioxide and industrial gases violated both §7 of the Clayton Act and §1 of the Sherman Act. As a separate allegation under §1, the government asserted that the defendant utilized its vast purchasing power to gain sales for its acquired company.

54. 258 F. Supp. at 57-59.

55. Id. at 65-66. The court stated that in the same way a prospective vendor ties the sale of one product to the purchase of another within a tying arrangement context, so too does a prospective buyer “tie” its purchases from a present or prospective vendor to that vendor’s own purchases from it within a reciprocal arrangement. Thus, whether it be through a transference of selling or of purchasing power to inflate sales in other markets, a frustration of competitive criteria in determining which firms receive which purchasing orders would be accomplished.
with respect to tying arrangements and engrafted them onto the practice of reciprocal dealings. It was thus recognized for the first time that contracts generated by reciprocity considerations could in themselves violate section one of the Sherman Act.

The court, however, refused to find a section one violation on the facts before it. Its failure to set forth a clear standard of evaluation as well as the rather inconsequential grounds upon which it refused to find the reciprocal arrangements violative of section one of the Sherman Act renders the General Dynamics case an inad-

56. The court predicated its analysis and decision primarily on three cases in which tying arrangements were evaluated under the federal antitrust laws. In International Salt Co. v. United States, 332 U.S. 392 (1947), the Court held it to be "unreasonable, per se, to foreclose competitors from any substantial market" by a tying arrangement. Id. at 396. With qualifications, the position was rearticulated in Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). Five years later, the Court, in Northern Pacific Ry. v. United States, 356 U.S. 1 (1958), defined the standard of evaluation still employed in holding 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 commerce is affected." Id. at 6.

57. 258 F. Supp. at 66.
58. Id. at 67.
59. Although asserting that its mode of analysis was to be similar to that used in evaluating tying arrangements, the court did not adequately address the issues before it in terms of the dual requirement test of "sufficient economic power" and "an effect on a not insubstantial" amount of interstate commerce promoted by the then most recent Northern Pacific decision. See note 56 supra. Rather, the court seemed to more heavily rely on the standard set forth by the International Salt Court in which the "sufficient economic power" factor was not considered. This led one commentator to suggest that the General Dynamics court established a modified per se rule. Under it, reciprocity would be illegal where a not insubstantial amount of commerce was adversely affected. See Ford, supra note 16, 640.

If this interpretation is correct, the court's decision comes exceedingly close to holding that any reciprocal agreement is unlawful so long as the transaction represents a significant dollar volume. Such a standard would in effect be harsher than that used to evaluate tying arrangements under the Northern Pacific decision. It should be noted, however, that the court did state that "the government has proven the other prong of the Sherman §1 case, viz., that the merger itself is violative of the statute. . . ." 258 F. Supp. at 67. See note 53 supra. It remains unclear, however, whether this language stands merely as dicta or whether the finding of an illegal merger itself was intended by the court to serve as its consideration of the "sufficient economic power" requirement of Northern Pacific.

60. The court found that the "not insubstantial amount of commerce" element had not been met. The court noted that the $500,000 in sales of tied products held sufficient in International Salt was "the lowest figure so designated . . . to date, in situations analogous to the present case." Id. at 67. The court determined that, insofar as only $177,225 worth of sales was involved, the case was an "inappropriate vehicle for finding an amount considerably less than $500,000 as 'not insubstantial'", especially where the government had already proved that the merger itself violated §1. Id. at 67.

The issue which the General Dynamics court was reluctant to address was considered by the Supreme Court in Fortner Enterprises, Inc v. U.S. Steel Corp. (Fortner I), 394 U.S. 495 (1969), where it was indicated that commerce in the amount of $190,000 was not insubstan-
equate legal precedent with which to appropriately address and analyze reciprocal dealings under the antitrust laws. Nonetheless, the decision is significant because it foreshadowed the broader bases of future attacks on reciprocity.

Post-General Dynamics Developments

Less than one year after the General Dynamics decision, the Department of Justice began to file a series of complaints attacking reciprocal agreements pursuant to both sections one and two of the Sherman Act. Each complaint named only a single defendant and each asserted that, pursuant to an alleged combination and monopoly, the defendants had engaged in similar activities. These
cases bore the potential for clarifying the rather obscure legal precedent relating to the practice of reciprocity. However, all but one of these cases resulted in consent decrees, thereby affording the Government almost all of the injunctive relief prayed for in the complaints. Thus, these cases are of no legal value in suggesting the analytical framework to be employed in evaluating the practice. Nevertheless, the suits did serve to warn the business community of the possible adverse consequences of reciprocal dealings.

In addition to those cases adjudicated on the initiative of the Department of Justice, a limited amount of private litigation arose subsequent to the General Dynamics decision. Most of these cases were resolved on grounds not addressing the anticompetitive nature of reciprocal dealings and they are therefore lacking in relevant substantive analysis. However, W.L. Gore & Associates, Inc.

63. In United States v. Airco, Inc., 386 F. Supp. 915 (S.D.N.Y. 1974), the court adopted the rationale of General Dynamics and similarly analogized reciprocal dealings to tying arrangements. However, the court found no violation of §1 of the Sherman Act because insufficient evidence was presented demonstrating that any actual reciprocal arrangements were made. Further, the court held that the government's failure to introduce evidence defining the relevant market and showing the defendant's intent to monopolize was fatal to its §2 charge that the defendant attempted to monopolize the requirements market of its suppliers through the use of reciprocal dealings.

64. See Ferguson, Business Reciprocity as a Sherman Act Violation: A Generally Accepted, But as Yet Unadjudicated, Doctrine, 74 W. V. L. Rev. 343, 353-55 (1972) for an extensive discussion of the particular acts from which the court enjoined and restrained each defendant, its employees and officers.

65. In Fidelity Television, Inc. v. F.C.C., 515 F.2d 684 (D.C. Cir.), cert. denied, 423 U.S. 926 (1975), the court held that the Federal Communications Commission did not err when it failed to disqualify a station for license renewal on the basis of the station's reciprocity practices. The court stated in dicta, however, that it doubted that unilateral, unsuccessful attempts at reciprocity constituted antitrust violations. Further, it questioned whether successful, noncoercive attempts at reciprocity constituted antitrust violations outside of the merger context.

In Ryals v. National Car Rental Sys., Inc., 404 F. Supp. 481 (D. Minn. 1975), the court granted the defendant's motion to dismiss a complaint attacking mandatory buy-back provisions in purchase agreements between an automobile rental company and an automobile dealership. The court held as matter of law that the provisions failed to qualify as an unlawful reciprocal dealing for two reasons. First, only one product was involved because of the fact that the used automobiles returned to the dealership were the same automobiles that the rental company had purchased. Second, the provisions were not anticompetitive because the rental company's assumed monopoly in the current model used car market was an unavoidable and reasonable outgrowth of the business practice of supplying rental customers with new cars.

In Stavrides v. Mellon Nat'l Bank and Trust Co., 353 F. Supp. 1072 (W.D. Pa. 1973), one count of a Sherman Act complaint was dismissed. The court held that a mortgagor's open-
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v. Carlisle Corp.\textsuperscript{66} is a useful case in illustrating a means, other than section one of the Sherman Act, to prosecute reciprocity activities.\textsuperscript{67} In Gore, the court held that a unilateral attempt to create a reciprocal relationship could not be a violation of section one of the Sherman Act.\textsuperscript{68} However, the court found that the defendant possessed the requisite specific intent to monopolize and that there existed a dangerous probability of successful market domination. Thus, it held that the threatened reciprocity constituted an attempt to monopolize in violation of section two of the Sherman Act.\textsuperscript{69}

Finally, the Federal Trade Commission revived its attack against the practice of reciprocity pursuant to section five of the Federal Trade Commission Act. In the earliest of the cases, the Commission accepted Assurances of Voluntary Compliance from a number of major corporations which agreed to dismantle their respective trade relations departments whose alleged function was to promote reciprocal arrangements.\textsuperscript{70} However, the Commission announced in 1970 that it would no longer accept such assurances in reciprocal dealing situations.\textsuperscript{71} In recent years, the Commission has limited its efforts in the area of reciprocal dealings to securing several consent decrees\textsuperscript{72} and issuing a single advisory opinion.\textsuperscript{73} Because the po-

\textsuperscript{67} The case was an outgrowth of settlement discussions relating to a patent infringement suit. The plaintiff, Gore, held two patents on the manufacture of a certain type of cable. It sued the defendant, Carlisle, for infringement. During the course of settlement negotiations, Gore threatened that if the suit went to trial, it would discontinue purchasing from the defendant's subsidiary a product unrelated to the disputed cable. The court held that Gore's conduct constituted a form of reciprocity. 381 F. Supp. at 702.
\textsuperscript{68} \textit{Id.} at 703.
\textsuperscript{69} \textit{Id.} at 704.
tential for application of section five of the Federal Trade Commission Act to all types of reciprocity would appear to be substantial, it seems incongruous that the Commission has not further pursued the practice as a violation of the Act.

In summary then, the law prior to the Spartan Grain decision suggests the following. First, section one of the Sherman Act is probably applicable to both overt or coercive reciprocity and to negotiated or mutual patronage reciprocity. Second, section five of the Federal Trade Commission Act is certainly applicable to the former type of reciprocity. However, it remains unclear whether or not it applies to the latter type as well. Third, both sections are probably not applicable to unilateral reciprocity although this pattern of conduct may sometimes constitute attempted monopolization in violation of section two of the Sherman Act. Finally, depending upon who is a party to the action, the evidence disclosed, and the standard of analysis employed, the practice of reciprocity may or may not constitute a per se violation under the federal antitrust laws. It thus becomes apparent that, given the relatively scarce amount of adjudication and the manner by which most cases were disposed of, neither a clear nor consistent set of significant rules or guidelines can be said to have been established prior to the Spartan Grain decision.

Spartan Grain & Mill Co. v. Ayers

Factual Background

Spartan Grain & Mill Company was a feed merchant operating mostly on a non-integrated basis. As such, its markets for feed were slowly disappearing as other feed merchants increased their

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73. See Giant Food, Inc. [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,416 (1978), where the Commission unanimously advised that Giant Food's development and sale of market data to marketers of food products would not violate a prior FTC order. However, the Commission further advised that any attempt by Giant Food to condition its patronage of suppliers upon their purchase of the information service might well constitute an illegal and anticompetitive trade practice.

74. See notes 48-54 supra and accompanying text.

75. See notes 42-44 and 70-73 supra and accompanying text.

76. See notes 66-69 supra and accompanying text.

77. See notes 58-60 and 65 supra and accompanying text.

78. 581 F.2d 4199 (5th Cir. 1978), cert. denied, 444 U.S. 831 (1979).
control over producers and growers through integration. The producers involved in the case had raised egg-laying chickens both on a contract basis and on an independent basis. However, under either system, the producers would only buy chickens when someone was committed to buying their eggs, thus guarding against the risk that the eggs could not be marketed.

In 1967 and 1968, the broiler industry in northeastern Georgia fell into disarray. No guaranteed markets existed for the producers' eggs on either a contract or an independent basis. Thus, the producers were threatened with abandoning their producing efforts in the industry.

Spartan Grain seized upon the opportunity presented by the business distress of the producers and introduced its own form of contractual integration. It negotiated with broiler hatcheries in Pennsylvania and Ohio for commitments to take eggs. It also arranged for primary breeders to produce flocks of laying chicks. Spartan Grain then offered these flocks to the producers in northeastern Georgia, guaranteeing that it would buy the eggs and sell them to the already committed hatchery markets in Pennsylvania and Ohio. However, Spartan Grain had pursued this contractual integration solely to maintain its own feed market. Thus, it offered its program to the producers upon the condition that they purchase only Spartan Grain's feed at a price substantially higher than that of its competitors.

Four producers subsequently joined in Spartan Grain's program.

After phasing out its contractual integration program, Spartan Grain filed suit against three of the four producers for the unpaid balances of their feed accounts. The three producers asserted antitrust counterclaims, which were severed by the district court for

79. 581 F.2d at 421.
80. Id.
81. Id. at 421, 422.
82. Id.
83. The court noted that the cost of the feed was a subject of controversy at trial. Spartan Grain admitted that its price was higher but pointed out that it performed services that some of the other feed companies did not. The producers urged that the difference was even greater than that charged because Spartan's feed was inferior. Id. at 442 n.3
84. Id. at 422.
85. The producers asserted that Spartan Grain's dealings illegally tied the sale of feed to both the sale of chicks and the purchase of eggs. These actions, they argued, were reciprocal dealings prohibited by §1 of the Sherman Act, 15 U.S.C. §1. They also urged that these were tie-in arrangements which violated §1 of the Sherman Act and §3 of the Clayton Act, 15 U.S.C. §14. Id. See note 104 infra for the Fifth Circuit's characterization of the transactions.
After the contract portion of the case was adjudicated,86 the producers’ antitrust claims were tried. At the close of the producers’ evidence, Spartan Grain moved for a directed verdict.87 The trial court denied the motion and ruled as a matter of law that, whether viewed as reciprocal dealings or as traditional tie-ins, the transactions were tying arrangements that constituted per se violations under established antitrust analysis.88 The court then refused to accept Spartan Grain’s evidence dealing with the reasonableness of its program and the alternatives open to the producers, thereby leaving only the question of damages for trial. After the jury returned verdicts for the producers,89 all parties appealed.

The Fifth Circuit Decision

The central issue on appeal before the Court of Appeals for the Fifth Circuit was whether the trial court had correctly ruled that Spartan Grain’s activities were illegal business arrangements constituting per se violations under the federal antitrust laws. This question permitted the court to formulate certain rules and guidelines not adequately addressed by prior courts. Thus, the Fifth Circuit was able to articulate an analytical framework which adds both clarity and substance to the laws surrounding reciprocity.

The Private Remedy Under Section Four of the Clayton Act

The court’s initial problem involved determining whether a party to a reciprocal arrangement could maintain an action against its trading partner90 under section four of the Clayton Act.91 The court noted92 that previously the only reported private action

86. In that same month, the fourth producer with which Spartan Grain contracted filed suit against Spartan Grain on similar antitrust grounds. His suit was consolidated with the counterclaims of the other producers. 581 F.2d at 422.
87. See Spartan Grain and Mill Co. v. Ayers, 517 F.2d 214 (5th Cir. 1975).
88. 581 F.2d at 423.
90. The jury verdicts for the four producers, before trebling, ranged from $7,000 to $15,000. 581 F.2d at 423.
91. The producers and Spartan Grain were co-participants in the reciprocal dealing arrangement.
92. See note 5 supra.
93. 581 F.2d at 424.
brought by a party to the arrangement was Columbia Nitrogen Corp. v. Royster Co. The Columbia Nitrogen court had held as a matter of law that a party to a non-coercive reciprocal agreement could not maintain the antitrust action. The Fifth Circuit refused to adopt the Columbia Nitrogen rationale and allowed the producers to maintain their antitrust claims against Spartan Grain.

Significantly, the Columbia Nitrogen rationale is directly predicated on the doctrine of in pari dilecto. However, it is not clear how the doctrine applies within an antitrust context if it applies at all. Columbia Nitrogen should support the position that the de-

94. 451 F.2d 3 (4th Cir. 1971). However, it should be noted that the court overlooked several other reciprocity cases brought as a private action by a party to the arrangement. See note 65 supra.

95. "[W]hen parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other." 451 F.2d at 15-16, cited in Spartan Grain, 581 F.2d at 424.

96. The extent of the Fifth Circuit's comment on this issue is:

"We find no reason to adopt the view expressed in Columbia Nitrogen Corp. v. Royster Co., 4 Cir. 1971, 451 F.2d 3, concerning the damages available in a private reciprocity action. That decision assumed a violation of the Act was made out, then held that there were no damages. Our decision rests on the earlier question, whether there was a violation."

Id. at 425 n.7. It is possible that the court's reluctance to adopt the Columbia Nitrogen position simply reflects the opinion that the Columbia Nitrogen rationale was inapplicable to the Spartan Grain facts. In Columbia Nitrogen, the Fourth Circuit held that the district court committed no error by declining to instruct the jury that the plaintiff could recover on its counterclaim involving an alleged non-coercive reciprocal agreement. 451 F.2d at 13. In the Spartan Grain case, on the other hand, the relationship between Spartan Grain and the producers is clearly one suggestive of coercive reciprocity and an alleged wielding of economic leverage on the part of Spartan Grain. See note 83 supra and accompanying text. This factual distinction between non-coercive and coercive reciprocity may explain the Fifth Circuit's different approach concerning who can sue in a reciprocity case. This interpretation is undermined, however, by the court's reference to "cases brought by parties to the agreement," 581 F.2d at 425, without distinguishing between mutual and coercive reciprocity.

97. BLACK'S LAW DICTIONARY (5th ed. 1979) defines in pari dilecto as "[i]n equal fault; equally culpable or criminal; in a case of equal fault or guilt."

98. In Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), the Court considered a defendant's right to invoke the equitable defenses of in pari dilecto and "unclean hands." Recognizing that a plaintiff's conduct may be no less reprehensible than that of a defendant, Mr. Justice Black, in speaking for the Court, nevertheless ruled that an antitrust plaintiff was not to be barred from suit under the doctrine of in pari dilecto. Id. at 140. However, the Court refused to decide whether a plaintiff's involvement in monopolistic activities could bar suit wholly apart from the doctrine. Id.

The proper scope within which the pronouncements of the majority opinion should be viewed drew considerable comment from the other justices: Id. at 142 (White, J., concurring); Id. at 147 (Fortas, J., concurring in the result); Id. at 149 (Marshall, J., concurring in the result); Id. 153-154 n.1 (Harlan, J., concurring in part and dissenting in part). These
fense of *in pari delicto* still retains some vitality. The decision in *Spartan Grain*, however, is consistent with other Fifth Circuit cases which suggest that the defense may no longer be invoked in an antitrust case. Although the *Spartan Grain* court never precisely addressed this question, its result nonetheless represents a position which would ensure a fair and adequate disposition of all reciprocal arrangement cases regardless of who asserts the antitrust claim.

The Tying Arrangement Analogy

The Fifth Circuit recognized that "reciprocal dealings have not been the subject of extensive case law development." Therefore, the court was called upon to articulate the standard by which to analyze the transactions between Spartan Grain and the producers. The court found little assistance in the established legal precedent addressing the practice of reciprocity. The court did

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individual comments have caused a great deal of difficulty for lower federal courts trying to determine whether the defense of *in pari delicto* applies in antitrust cases.

99. See also Dreibus v. Wilson, 529 F.2d 170 (9th Cir. 1975) (plaintiff's high degree of involvement in an illegal act could constitute a defense to his claim). But cf. Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276 (9th Cir. 1976) (plaintiff will be barred from asserting his claim only when the illegal conspiracy would not have been formed but for the plaintiff's participation).

100. See Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975) (court suggested, in dicta, that it would not recognize the *in pari delicto* defense in antitrust cases). Cf. Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975) (court held that plaintiff's voluntary participation in an illegal act could reduce the amount of damages which might be secured).

101. See note 96 supra.

102. See notes 134-136 infra and accompanying text for a discussion of the application of *in pari delicto* within a reciprocity context.

103. 581 F.2d at 424.

104. The court noted that the transactions at issue in the case could be characterized as either tie-ins or reciprocal dealings. A tie-in resulted when Spartan Grain arranged for the producers to buy flocks as well as its feed. The reciprocal arrangement involved Spartan Grain's buying eggs on the condition that the producers buy its feed. Id. at 424-425. Because of the analytical reasoning adopted, the court did not consider the characterization of the agreement as critical. See note 106 infra and accompanying text.

However, the court had to identify the nature of the arrangements to address the producer's claims brought pursuant to §3 of the Clayton Act which bars only tying arrangements. See note 10 supra. There, the court did recognize that Spartan Grain's purchase of the eggs was crucial to its transactions with the producers. 581 F.2d at 428. Further, in ruling that §3 of the Clayton Act was inapplicable to the transactions, id., the court necessarily implied that the transactions were primarily reciprocal in nature.

not, however, view this as particularly troublesome. It asserted that reciprocal dealings and tying arrangements reflected similar economic phenomena.106 Thus, the court held that “the standard for judging reciprocal agreements should be no higher than the standard for judging tie-in arrangements.”107

The analogy adopted by the Fifth Circuit is one which most appropriately recognizes the practice of reciprocity in its most basic form, i.e., a seller using economic leverage in one market to gain an unfair advantage in another. As such, the approach presumes that the supplier is in some way coerced to make purchases from a particular seller. The language of the Spartan Grain decision itself continually stresses the role that economic leverage plays in reciprocal relationships.108

However, there may be an inherent problem underlying the Fifth Circuit’s analogical reasoning because the court failed properly to differentiate between coercive and mutual reciprocity.109 In mutual reciprocity arrangements, both parties enjoy equal purchasing power. The economic leverage presumptions found in the case of coercive arrangements are not present. Consequently, the extension of the tying arrangement analogy to all forms of reciprocity may be improper.

Nonetheless, certain anticompetitive effects may result from a

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3 (4th Cir. 1971) (see notes 94-99 supra and accompanying text). It found that these decisions either did not have clear implications for non-merger cases or did not suggest an unambiguous standard of application to all reciprocity arrangements. 581 F.2d at 424.

106. “In each case one side of a transaction has special power in the market place. It uses this power to force those with whom it deals to make concessions in another market. In tying arrangements, a seller with economic power forces the purchaser to purchase something else to obtain the desired item. In reciprocal dealings a buyer with economic power forces a seller to buy something from it to sell its goods. In both cases the key is the extension of economic power in one market to another market.”

Id. at 425 (emphasis added).

The analogy of reciprocal dealings to tying arrangements is not a novel one. See Hausman, supra note 12, at 883; Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1387 (1965). See also note 55 supra and accompanying text. But see Ferguson, Tying Arrangements and Reciprocity: An Economic Analysis, 30 L. & Cont. Prob. 552 (1965), where the author rejects the analogy contending that tying arrangements, which are dependent on horizontal market power, perpetuate monopoly income while reciprocal dealings, not dependent on any such power, do not typically lessen competition.

107. 581 F.2d at 425.

108. See note 106 supra.

109. The problem is especially significant because the analogy is the basis of the analytical framework under which the Fifth Circuit would scrutinize all reciprocal arrangements which allegedly violate section one of the Sherman Act. See notes 137-138 infra and accompanying text.
mutual reciprocity agreement. Competitors of the seller may still be foreclosed from the relevant purchasing market despite the merits of their respective products.\textsuperscript{110} Extending the tying arrangement analogy to mutual reciprocity transactions is not, then, improper when one considers the protective purposes of the antitrust laws.\textsuperscript{111} Thus, although the tying arrangement analogy would fail to account for the economic distinctions inherent in coercive and mutual reciprocity, it would properly subject both types of reciprocity to an adequate form of antitrust law scrutiny.

### The Standard for Judging Reciprocal Arrangements

Having held that the standard for judging reciprocal agreements should be no higher than the standard for judging tying arrangements, the Fifth Circuit next discussed what that standard is and how it should be applied to the Spartan Grain transactions. First, the court recognized that not all tying arrangements are in fact illegal. Rather, their \textit{per se} illegality is to be determined by an evaluation of the dual factors of “sufficient economic power” and a “not insubstantial amount of interstate commerce” being affected.\textsuperscript{112} The court asserted that reciprocal dealings, then, are to be reviewed under this same modified \textit{per se} standard.

The Fifth Circuit found that a substantial amount of interstate commerce was involved in the transactions between Spartan Grain and the producers.\textsuperscript{113} The court then focused on whether Spartan Grain had sufficient economic power in the relevant market. The court relied on standards enunciated in the Supreme Court decision of \textit{United States Steel Corp. v. Fortner Enterprises, Inc.}

\textsuperscript{110} See note 37 supra and accompanying text.

\textsuperscript{111} See United States v. General Dynamics, 258 F. Supp. 36 (S.D.N.Y. 1966): “If antitrust legislation was designed primarily to insulate customers from abuse, the ‘tying-in’ analogy would be without merit with reference to non-coercive reciprocity. However, this is not the case. The legislation is intended to preserve free competition. Reciprocity, whether mutual or coercive, serves to exclude competitors by the exercise of large scale purchasing power. This court concludes that the analogy of reciprocity to ‘tying-in’ arrangements applies to both forms of reciprocity.”

\textit{Id.} at 66.

\textsuperscript{112} 581 F.2d at 423.

\textsuperscript{113} The court never specifically addressed what would constitute a “not insubstantial” amount of interstate commerce but simply stated, with reference to the Spartan Grain transactions, that “[t]here is no doubt here that a substantial amount of interstate commerce is involved. . . .” 581 F.2d at 425. This result, although the product of a cursory review, would nonetheless be consistent with the United States Supreme Court decision in \textit{Fortner I}. See note 60 supra.
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(Fortner II). In Fortner II, the Court held that such power could only be attributed to a defendant upon a showing that it had some market advantage over its competitors.

However, the trial court in Spartan Grain had focused on the relative power of Spartan Grain and the producers. There was no discussion of its power relative to competitors. Therefore, the requirements for a per se violation under Fortner II were not shown. The Fifth Circuit held it necessary to reverse and remand the case for a determination of whether Spartan Grain had sufficient economic power.

This portion of the Spartan Grain decision presents two significant analytical developments in the area of reciprocal dealings. First, the Fifth Circuit predicated its entire analytical framework on the dual requirement test of "sufficient economic power" and a "not insubstantial amount of interstate commerce" being affected. Thus, by adhering strictly to the framework, the court appropriately refrained from articulating a standard which could immediately subject all reciprocal dealings to per se illegality.

114. 429 U.S. 610 (1977). The case involved the sale of prefabricated homes by United States Steel with one of its subsidiaries offering 100 percent financing at a particularly low interest rate to the purchaser. The financing was available only on homes offered by U.S. Steel. The prices of those homes were significantly higher than those of U.S. Steel's competitors. Fortner Enterprises, a multi-home purchaser, brought an action against U.S. Steel alleging that the finance terms had been tied to the sale of the homes in violation of §1 of the Sherman Act.

115. Id. at 617-619, discussed in Spartan Grain, 581 F.2d at 426.

116. The trial court's determination was based on Spartan Grain's ability to deal with hatcheries in other states and on the producers having no reason for entering into a requirements contract with Spartan Grain but for their need for egg markets and flocks. The Fifth Circuit noted that the Supreme Court in Fortner II found neither of these factors, the existence of tying arrangements or the uniqueness of the offered package, to be suggestive of economic power in the relevant market. Id. at 427.

117. The Fifth Circuit stated: "The producers must show that Spartan had some economic advantage which enabled it to offer this arrangement when its rivals could not. . . . The economic power Fortner II requires . . . must come from Spartan's relationship with its competition. If it had effective competitors in this field, economic power would not have been shown, even though all the companies be more sophisticated and powerful than the producers."

Id. at 427, 428.

118. Id. at 429.


120. The Fifth Circuit standard should be compared with the General Dynamics holding where that court seemingly took no account of the sufficient economic power factor. See note 59 supra. In light of the low amount of sales considered not insubstantial in Fortner I (see note 60 supra), any standard for judging reciprocal agreements comparable to that im-
Second, the Fifth Circuit held that, in order for the "sufficient economic power" requirement to be met, it must be shown that the defendant had some economic advantage not shared by its competitors in the purchasing market. This standard imposes certain unique considerations when applied to all forms of reciprocity.

Conceptually, the predatory nature of reciprocity rests in the defeat of quality and price as allocative guides in the market, the creation of oligopolistic and monopolistic industries, and the acceleration of market foreclosure. Within the context of coercive reciprocity, these market effects result from the exercise of economic leverage to exact reciprocating purchases from a disadvantaged seller. The Fifth Circuit's test would require only a clear showing that the defendant possessed that economic leverage in the purchasing market. Thus, the court's standard of sufficient economic power works well with respect to coercive reciprocity.

Mutual reciprocity arrangements, however, may present a somewhat difficult problem under the Fifth Circuit directives because this practice does not reflect a wielding of economic leverage by either of the parties to the arrangement. Yet, even under the Fifth Circuit test, mutual reciprocity arrangements could still be judged per se illegal in those not atypical situations where one firm possesses a unique market position in relation to its competing sellers by reason of its ability to deal with a particular supplier on both a purchase and sales basis.

Thus, the sufficient economic power factor of the Fifth Circuit's test is a valuable consideration in evaluating reciprocal arrangements. Indeed, by comparing a seller's market status with that of its other buying competitors, the factor necessarily prevents a court from arbitrarily finding that a defendant possessed the kind of economic power sufficient to warrant that the reciprocal dealings involved constituted violations of section one of the Sherman Act. Thus, the analysis propounded by the Fifth Circuit may tolerate

pliedly used by the General Dynamics court would render nearly every reciprocal agreement a per se violation of §1 of the Sherman Act.
121. See notes 27-34 supra and accompanying text.
122. See notes 39 and 40 supra and accompanying text.
123. See notes 37 and 38 supra and accompanying text.
124. This situation would be represented by the classic instance of the conglomerate involved in the sale of a product within a market composed of primarily single-unit firms. The attractiveness of the demand input presented by all of its divisions to a particular supplier might encourage the initiation of mutual reciprocity arrangements. See notes 25 and 26 supra and accompanying text.
those reciprocal agreements that have insignificant anticompetitive effects, but not tolerate those transactions clearly operating against the protective purposes of the federal antitrust laws.

Unfortunately, one problem may arise from the approach taken by the Fifth Circuit. The *Spartan Grain* court may have too strictly applied the tying analogy to determine whether the defendant had sufficient economic power. The court reversed the decision of the lower court on the basis that no evidence was introduced at trial demonstrating that Spartan Grain had any cost advantage over its rivals. Yet it never precisely defined who those "rivals" were. Assuming that the court intended to implement a mode of analysis which would guard against anticompetitive effects, those "rivals" necessarily would have been the competitors engaged in the egg purchasing market. Following the analogy through, the buying power of Spartaain Grain, if greater than that of its buying "rivals", would have been the factor that allegedly induced the producers to participate in the reciprocal arrangements.

However, the court implicitly spoke of the rivals of Spartan Grain as other feed retailers, competitors of those in the selling, not the purchasing, market affected by the reciprocal arrangements. The Fifth Circuit's incorrect characterization of Spartan Grain's rivals most probably reflects the difficulty that the court had in understanding a unique industry in the process of accelerated integration. That analysis, however, should not undermine the significance of the analytical framework articulated by the court.

**The Rule of Reason Test**

In addition to the modified *per se* rule articulated, the Fifth Circuit noted that reciprocal dealings could be subject to a rule of

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125. *See* notes 116-118 *supra* and accompanying text.
126. Within the context of reciprocal dealings, the economic leverage which the antitrust laws are designed to guard against is rooted in a seller’s quantitative and qualitative ability to purchase. *See* note 24 *supra*.
127. On remand, then, the trial court should conceptually have been required by the Fifth Circuit to consider whether Spartan Grain had any significant cost advantages over other egg purchasers.
128. 581 F.2d at 427, 428.
129. *See* notes 79-81 *supra* and accompanying text. It is also possible that the court may have substantively misconstrued the application of the sufficient economic power standard and thus inappropriately defined the relevant market from which Spartan Grain’s alleged economic power flowed.
reason analysis.130 Prior to the Spartan Grain decision, any adjudication of an issue relating to reciprocity had centered narrowly on the per se standard to be applied to the facts presented.131 However, the Fifth Circuit now suggests that even if a defendant’s reciprocity activities are not illegal under the modified per se rule, they may still violate the Sherman Act if the defendant entered into the transactions with the intent of injuring competition or if the transactions themselves had the effect of injuring competition.132 Of course, the plaintiff’s burden of proof under such a rule of reason analysis would be more stringent than that imposed under a modified per se rule. However, by allowing a plaintiff the opportunity to base a cause of action on either a modified per se rule or rule of reason analysis where reciprocal activities are concerned, the Fifth Circuit provides the broadest possible analytical framework for redress of both coercive and mutual reciprocity arrangements.

The Unsettled Questions

The Spartan Grain decision represents an important judicial pronouncement in the area of reciprocal dealings. However, several questions of analysis remain unsettled.

First, it is not certain under what circumstances a party to a reciprocal arrangement may maintain an antitrust action against a co-participant to the transaction. The result may depend upon the court’s disposition toward the in pari dilecto defense in an antitrust context.133 The in pari dilecto problem will necessarily arise in cases involving mutual reciprocity where participation in an agreement is voluntary and uninfluenced by the economic domination of one party over the other.134 The nature of this arrangement, however, is not easily susceptible to governmental or private com-

130. 581 F.2d at 425, n.5.
133. See notes 97-100 supra and accompanying text.
134. The entire issue of whether a party to a reciprocal arrangement can maintain an antitrust action against the co-participant becomes moot where the arrangement is one involving coercion. The alleged wielding of economic leverage by the defendant would necessarily eliminate any in pari dilecto defense.
petitor discovery.\textsuperscript{135} Therefore, if the arrangement is to be subject to antitrust law scrutiny, it must be because a party to the arrangement brings it to the attention of a court. A court's refusal to allow that party to maintain the action would only serve to shield mutual reciprocity from antitrust scrutiny, thereby perpetuating the practice.

If the \textit{Spartan Grain} decision is viewed as sanctioning private actions to redress illegal reciprocity practice, the application of the appropriate antitrust laws to all illegal reciprocal arrangements would be guaranteed. Thus, both coercive and mutual reciprocity as anticompetitive business practices\textsuperscript{136} would be subject to potential governmental and private policing efforts. The warning to the business community that all forms of reciprocity are illegal would thus be complete.

A second closely related problem presented by the Fifth Circuit's decision is whether the court intended to extend its analytical framework to both coercive and mutual reciprocity arrangements.\textsuperscript{137} It is possible that the failure of the court to precisely differentiate between the two forms of reciprocity can be attributed to its failure to recognize the different nature of the two practices. This position erroneously assumes that all reciprocity actions brought by parties to the arrangement necessarily involve an element of coercion. However, a more feasible interpretation of the decision, consistent with prior case law,\textsuperscript{138} is that the court intended its standard of analysis to extend to all reciprocity agreements, both coercive and consensual in nature, in cases brought by parties to the transaction.

A final question engendered by \textit{Spartan Grain} is whether the test propounded will apply if the government brings suit. The Fifth Circuit was hesitant to extend its standard for judging reciprocal agreements beyond those instances where the action is brought by a private party.\textsuperscript{139} Although a distinction can be drawn

\textsuperscript{135} See Handler, supra note 38.
\textsuperscript{136} See notes 37-40 supra and accompanying text.
\textsuperscript{137} It should be recalled that the Fifth Circuit referred to "cases brought by parties to the agreement," 581 F.2d at 425, without distinguishing between mutual and coercive reciprocity.
\textsuperscript{139} The court stated:
"We intimate no view as to the proper standard in a suit brought by the government against reciprocal dealings. The government's concern in such cases is with the preclusion of other dealers from the market, not with the effects of the agree-
between the microeconomic and macroeconomic anticompetitive market effects of reciprocal dealings, it is difficult to see the relevance of this distinction with respect to antitrust values and the promotion of a freely competitive market environment. Further, this distinction necessarily implies that different analytical standards would have to be used to address the practice of reciprocity depending simply on whether suit was brought by the Department of Justice, the Federal Trade Commission, a competitor of a party to the reciprocal arrangement, or one of the parties itself. These disjointed approaches would only serve to hinder effective antitrust scrutiny of reciprocal dealings. Moreover, no such distinction is found in the tying arrangement cases from which the court adopted its analytical framework. Thus, the Fifth Circuit's mode of analysis should be extended to all reciprocity actions regardless of who brings the action. Given the sufficiency of *Spartan Grain* for judging the arrangements, the modified *per se* rule set forth by the court should be readily adopted to evaluate all reciprocal practices regardless of the manner and procedural routes by which the arrangement might be prosecuted.

**CONCLUSION**

Historically, reciprocal dealings have not been the subject of much litigation. This has generated two problems. First, although the business community has become increasingly aware that the practice of reciprocity carries with it potential criminal and civil liability under the federal antitrust laws, the absence of litigation may perpetuate the practice. Second, even if suit is brought against a firm engaging in the practice, the dearth of legal precedent and analysis may result in an improper evaluation of the arrangement. The *Spartan Grain* decision, by sanctioning private suits and providing the needed analytical framework where reciprocity is involved, may provide the answer to both problems.

It would be premature to suggest that final judicial comment has been made in connection with reciprocal dealings. The Department of Justice must further pursue its attacks against reciprocity under

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140. *Compare* notes 27-29 *supra* and accompanying text with notes 30-34 *supra* and accompanying text.
141. *See* notes 122-124 *supra* and accompanying text.
sections one and two of the Sherman Act. The Federal Trade Commission must more fully exercise its broad powers against the practice pursuant to section five of the Federal Trade Commission Act. Most importantly, the pursuit of private remedies under section four of the Clayton Act must become more prominent in matters concerning reciprocity. Although ninety percent of all antitrust cases are brought by the private sector of the bar, its role in the area of reciprocity has been grossly obscure. However, the Spartan Grain case demonstrates the potential effect such litigation can have. Perhaps the potential for ensuring that reciprocal dealings are properly prosecuted as violations of the federal antitrust laws does rest in that private sector.

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