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BUSINESS RECIPROCITY: A GROWING FIELD OF DEVELOPMENT UNDER THE ANTITRUST LAWS AND AN IMPORTANT CONSIDERATION FOR BUSINESSES IN THEIR PURCHASING ARRANGEMENTS

INTRODUCTION

On May 18, 1972 the Department of Justice filed suit against General Electric Co. in the United States District Court for Northern New York.¹ The complaint charged General Electric with a violation of Section 1 of the Sherman Act² by engaging in anti-competitive practices which utilized reciprocal purchasing arrangements with its customers and suppliers. The suit sought an injunction requiring General Electric to abstain from entering into or continuing any reciprocal purchasing arrangements, from communicating to any suppliers that they will receive preferential treatment if they purchase from General Electric, from compiling statistics comparing its purchases from suppliers with its sales to such suppliers, and from communicating these statistics to its suppliers and customers. Additionally, the suit asks for an order requiring General Electric to abolish any positions or functions assigned to any employee or official relating to reciprocal purchasing, and to notify each supplier and customer that it will no longer practice reciprocal purchasing.

This suit filed against General Electric is only one of a long line of administrative and judicial actions attempting to halt the practice of reciprocity in business. The salient feature of this action compared to other similar actions is General Electric's decision to fight the suit. Many companies in recent years have been charged with the same vio-

1. Civil No. 72-CV-255 (N.D.N.Y., filed May 18, 1972).

2. Sherman Act § 1, 15 U.S.C. § 1 (1970):

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

Section 4 of the Sherman Act, 15 U.S.C. § 4 (1970) provides for jurisdiction in Federal District Courts for proceedings in equity to restrain and enjoin violations of the Act.

lation for engaging in reciprocal dealings, but have agreed prior to the formal filing of the suits to consent decrees. The consent decrees, which are not properly judicial sentences but are in the nature of agreements between the parties under the sanction of the court, settled the cases without adjudication of the issue and barred the alleged reciprocal arrangements. General Electric's decision to fight the suit may at last bring a judicial decision which faces and answers the question of whether reciprocity in purchasing arrangements violates Section 1 of the Sherman Act.³

The term reciprocity has been described in its broadest meaning 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."⁴ The most common type of reciprocity is reciprocal buying, which is simply, "I will buy from you, if you will buy from me". Reciprocity may take different forms, of which the most significant are coercive, mutual, or systematic. Coercive reciprocity arises when a business with a large purchasing power uses its leverage to force suppliers either to purchase products from it or an affiliate, or to lose orders. "Mutual patronage" reciprocity arises, on the other hand, when two businesses are on equal footing in their purchasing power, but agree to purchase from one another. Systematic reciprocity arises when a business has an organized program with the compilation of statistics on sales and purchases which results in the directing of purchases to those suppliers which purchase the most in return. The vice of this practice, whatever form used is that

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 trader by interposing between him and the traditional competitive factors of price, quality and service, an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit. The efficient producer may thereby suffer loss because of a circumstance extrinsic to the worth of his product.⁵

Although reciprocity generates obvious anti-competitive effects and

3. See Ferguson, *Business Reciprocity As A Sherman Act Violation: A Generally Accepted, But As Yet Unadjudicated, Doctrine*, 74 W. VA. L. REV. 343 (1972); Sichel, *Business Reciprocity: An Unsettled Antitrust Issue*, 13 ANTITRUST BULL. 649 (1968); Flinn, *Reciprocity and Related Topics Under the Sherman Act*, 37 ANTITRUST L.J. 156 (1967).

4. *United States v. General Dynamics Corporation*, 258 F. Supp. 36, 57 (S.D. N.Y. 1966).

5. *F.T.C. v. Consolidated Foods Corp.*, 62 F.T.C. 929, 952 (1962).

has been under attack by the Federal Trade Commission and the Department of Justice increasingly within the last decade, the practice is widespread in the American business community. A 1961 survey of purchasing agents revealed that for 100 per cent of the agents in the chemical, petroleum, iron and steel industries, 45 per cent of the agents in the service industries, and 36 per cent of the agents in the consumer goods industries, reciprocity was a consideration in the buyer-seller relationships in their companies.⁶ In 1965, a prominent business publication estimated that 60 per cent of the country's 500 largest industrial corporations utilized managers in trade relations to carry out their policies of reciprocity,⁷ while a 1968 study of business reciprocity found that the majority of industrial corporations practiced it.⁸ A poll conducted in mid-1969 indicated that many businessmen were still unsure of the status of reciprocal arrangements, and viewed the practice not as reciprocity, but rather, as corporate friendliness.⁹

The purpose of this paper is to present a concise analysis of the attacks on reciprocity, the basis for these attacks, the relief gained, and the present status of reciprocity.

EARLY ATTACKS ON RECIPROCITY

The first reciprocity cases were brought in the early 1930s by the Federal Trade Commission, and were aimed at coercive reciprocity. Two of these cases, *F.T.C. v. Waugh Equipment Co.*,¹⁰ and *F.T.C. v. Mechanical Manufacturing Co.*,¹¹ involved large meat packing firms with vast power as major railroad shippers, which acquired control of minor manufacturers of railroad equipment, and then used their leverage as major shippers to force railroads to purchase equipment from these manufacturers or lose business. The third case, *F.T.C. v. California Packing Corp.*,¹² involved a large diversified food processor which used its purchasing power and freight volume to force suppliers and steamship companies to use its subsidiary's rail and steamship

6. *Reciprocity: Where Does the P.A. Stand?* PURCHASING, November 20, 1961, at 70-79.

7. McCreary and Guzzardi, *A Customer is a Company's Best Friend*, FORTUNE, June 1965, at 180.

8. Finney, *Reciprocal Buying and Public Policy* 25, 75-77 (1968). (Unpublished Ph.D. thesis. Graduate Division of Business Administration, University of California, Berkeley.) The author based his conclusion in part on interviews of management personnel in large companies in the various fields of shipping, railroading, banking, paper and packaging, printing inks, chemical, petroleum, rubber, basic metals, heavy machinery, plastics, and miscellaneous industrial equipment industries.

9. Wall Street Journal, June 20, 1969, at 40.

10. 15 F.T.C. 232 (1931).

11. 16 F.T.C. 67 (1932).

12. 25 F.T.C. 379 (1937).

terminal. The Commission attacked this practice as an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.¹³

In commenting on the *Waugh* case, the Commission stated that the respondent manufacturer and the packing firm had

“thus injected an element in the competitive field” which was “unfair and abnormal” and tended “to reduce the efficiency and economy in the production and sales method of competing manufacturers and [give] to the concern that control[led] the largest volume of freight traffic an unfair advantage that [would] more than offset the higher efficiency in the production and sales methods of competing concerns which control[led] no such traffic . . .”.¹⁴

The Commission underscored in this decision the general principle that the abuse of large scale buying power to restrict market competition is illegal. Later in *United States v. Griffith*,¹⁵ a case not involving a charge of reciprocity, the Supreme Court referred to this point when it stated,

Large scale buying is not, of course, unlawful *per se*. It may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. Nor . . . may it be used to stifle competition by denying competitors less favorably situated access to the market.¹⁶

THE RENEWED ATTACK IN THE 1960S

Following these decisions, the attack on reciprocity lay dormant for approximately thirty years until the mid-1960s.¹⁷ The reason for this

13. Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1970). As Amended, provides in pertinent part:

(A)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are declared unlawful.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

14. 15 F.T.C. at 247.

15. *United States v. Griffith*, 334 U.S. 100 (1948). This case involved a government suit for an injunction in which the Supreme Court held that the use of combined buying power of a number of motion picture theaters operated or controlled by affiliated corporations to obtain competitive advantages from distributors was monopolizing, and a restraint of trade in violation of the Sherman Act § 1.

16. 334 U.S. at 108.

17. Following the three 1930s decisions, it appears the Federal Trade Commission did not take any further action against the practice of reciprocity as a violation of Section 5 of the Federal Trade Commission Act until the late 1960s when it accepted from several companies affidavits of voluntary compliance: American Standard Inc., Assurance of Voluntary Compliance No. 923 (January 17, 1968); G.A.F. Corp., No. 1556 (March 5, 1969); Union-Camp Corp., No. 1519 (January 31, 1969); Chase Bag Co., No. 1614 (April 28, 1969). By these affidavits, the companies agreed to cease using the leverage of their purchasing power with suppliers and to take policy steps to prevent any reciprocal arrangements.

dormancy may have been the distinction drawn between coercive reciprocity and voluntary reciprocal arrangements for mutual benefit, a distinction over which prominent commentators in the field dispute.¹⁸

The case, *United States v. Ingersoll-Rand Co.*,¹⁹ states what appears to be the first judicial indication of reciprocity as a violation of the anti-trust laws. There the court stated that reciprocity distorts the focus of the purchaser by introducing "an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit".²⁰ This comment was made in the context of a merger case as a violation of Section 7 of the Clayton Act,²¹ and was directed towards, what is referred to as, reciprocity effects, or the tendency of a firm to make purchases from another firm in the hope of future sales to that firm in return for such purchases. It is significant, for the court foreshadowed the broader base of future attacks on reciprocity under Section 1 of the Sherman Act.

In *F.T.C. v. Consolidated Foods Corp.*,²² the Supreme Court made what has been its only comment upon reciprocity when it stated that reciprocity was ". . . one of the congeries of anti-competitive practices at which the antitrust laws are aimed . . ." ²³ This case was an appeal from the 1962 decision²⁴ of the Federal Trade Commission ordering Consolidated Foods, a major producer of food products, to divest itself of the acquisition of Gentry Inc., one of the two dominant producers of dehydrated onion and garlic. The Commission held that the acquisition violated Section 7 of the Clayton Act, because it would

18. See, e.g., Hausman, *Reciprocal Dealings and the Antitrust Laws*, 77 HARV. L. REV. 873, 885 (1964): "In reciprocity, coercion is not the gravamen of the injury to competition. A supplier who has no occasion to purchase the practioner's product may be simply cut off or ignored; threats are irrelevant. Yet the injury to competition is no less for the absence of bullying." As opposed to this view see, Handler, *Emerging Antitrust Issues: Reciprocity, Diversification & Joint Ventures*, 49 VA. L. REV. 433, 437 (1963): "Where . . . there is no coercion, we should leave to the market place and the processes of education the elimination of practices which may be unbusinesslike or uneconomic but are not demonstrably anticompetitive".

19. 218 F. Supp. 530 (W.D. Pa.), *aff'd* 320 F.2d 509 (3rd Cir. 1963).

20. 218 F. Supp. at 522.

21. Clayton Act § 7, 15 U.S.C. § 18 (1970):

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.

22. 380 U.S. 592 (1965).

23. *Id.* at 594.

24. *F.T.C. v. Consolidated Foods Corp.*, 62 F.T.C. 929 (1962). The Commission's decision was reversed by the Court of Appeals, 329 F.2d 623 (7th Cir. 1964), which relied mainly on 10 years of post-acquisition experience to hold that no probability of a substantial lessening of competition had been shown.

present Consolidated Foods, which bought huge quantities from food processors who used dehydrated onion and garlic in their products, with the opportunity to use the vast leverage of its purchasing power to reap a profit from the sales of dehydrated onion and garlic to the food processors. The Supreme Court sustained the Commission's order, and condemned reciprocal buying as a violation of Section 7 of the Clayton Act,²⁵ while pointing out that reciprocal buying may result not only from bludgeoning or coercion but from more subtle arrangements, such as a threatened withdrawal of orders if an affiliate's products are not bought, or a conditioning of future orders on the purchases of an affiliate's products.²⁶

A year and a half after the decision in *Consolidated Foods*, the base of the attack on reciprocity was broadened in *United States v. General Dynamics*,²⁷ a case in which reciprocity was charged as a violation of Section 1 of the Sherman Act. The Government alleged that the acquisition of Liquid Carbonic, a leading producer of carbon dioxide and industrial gases, by General Dynamics violated both Section 7 of the Clayton Act and Section 1 of the Sherman Act. As a separate violation of Section 1, the Government alleged that General Dynamics through special sales programs utilized its vast purchasing power to gain sales from its suppliers for Liquid Carbonic. Based upon the probable lessening of competition in the carbon dioxide market as a result of the reciprocal purchasing, the court held that the acquisition violated the respective acts, and ordered divestiture. However, the court failed to find that the reciprocal purchasing as a result of the special sales programs violated Section 1 of the Sherman Act.

The court stated that to prove reciprocity as a violation of Section 1, there must be evidence of reciprocity shown in relation to "particular contracts involving a given amount of business,"²⁸ and to which the

25. Section 7 is concerned "with probabilities and not certainties", *Brown Show Co. v. United States*, 370 U.S. 294, 323 (1962); thus, reciprocal dealings as a result of a merger violates Section 7, if a probability of a lessening of competition can be shown. In *Consolidated Foods*, reciprocity was an element of proof of the lessening of competition. The Clayton Act was intended by Congress to eliminate anti-competitive practices in their incipency, while the Sherman Act was intended to operate after the fact, once monopolistic proportions have been obtained.

26. See 380 U.S. at 594, n.2, citing Edwards, *Conglomerate Bigness as a Source of Power*, Nat. Bur. Eco. Research, *Business Concentration and Price Policy*, 313, 342 (1955).

A reciprocal buying arrangement may arise either through formal contract or through an informal understanding that may be scarcely distinguishable from a mere policy of cultivating the good will of a large customer. The essence of the arrangement is the willingness of each company to buy from the other, conditioned upon the expectation that the other company will make reciprocal purchases.

27. 258 F. Supp. 36 (S.D.N.Y. 1966).

28. *Id.* at 52.

"customers' decisions were predicated, or significantly influenced by reciprocity."²⁹ The Government submitted evidence of numerous instances where personnel of General Dynamics stressed its role as a customer while soliciting suppliers to purchase products from Liquid Carbonic. However, the evidence which met the conditions set by the court showed only sales of carbon dioxide totalling \$177,225, which the court held to be insufficient to have a "not insubstantial" effect on interstate commerce.

In this case, the court was faced with a question of first impression as to the legality of the use of reciprocity under Section 1 of the Sherman Act. Consequently, in seeking guidelines the court, as have others who considered reciprocity,³⁰ analogized reciprocity to "tying-in" arrangements, the situation where the sale of one product (the tying product) is conditioned on the agreement to purchase another (the tied product). In the present case, the court viewed General Dynamics' purchases from a supplier or prospective supplier as tied to that supplier's purchases of carbon dioxide from Liquid Carbonic, and thus, the same result condemned in the "tying-in" arrangements, the frustration of competitive criteria, occurred. The court found that the analogy was valid whether the reciprocity was coercive or mutual patronage, since both exclude competitors by the exercise of vast purchasing power.

Having found the analogy valid, the court looked to the Supreme Court cases³¹ which held that "tying-in" arrangements were a per se violation of Section 1 of the Sherman Act when not insubstantial amounts of commerce were involved. In *International Salt Co. v. United States*,³² the Supreme Court stated that the test of substantiality relies on absolute, not relative, foreclosure from the market place, and the Court found that sales of \$500,000 of tied products were "not insubstantial".³³ The *General Dynamics*' court, having found the fig-

29. *Id.* at 51.

30. *See, e.g.*, Consolidated Foods, 62 F.T.C. at 953; Hausman, *supra* note 18; and Handler, *supra* note 18. While Handler does analogize the use of reciprocity to "tying-in" arrangements, he does so only as to coercive reciprocity, disputing the analogy as to mutual patronage reciprocity.

31. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

32. 332 U.S. 392 (1947).

33. In *United States v. Loew's Inc.*, 371 U.S. 38 (1962), the Supreme Court found that a "not insubstantial" amount of commerce was involved when the amount was only \$60,800 in relevant business. However, this case may have been excluded by the court in its reasoning on the basis that the tying product was a unique, copyrighted product. In the latest cases involving "tying-in" arrangements, the Supreme Court in *Fortner Enterprises v. U.S. Steel*, 394 U.S. 495, 501-02 (1969), a private treble damages and injunctive action, held that \$190,000 was "not insubstantial" an amount of commerce, stating that "normally the controlling consideration is simply

ure of \$500,000 as the lowest figure designated, and since the Government had proved the acquisition of Liquid Carbonic as a violation of both Section 7 of the Clayton Act and Section 1 of the Sherman Act, held that the case was inappropriate for determining an amount less than \$600,000 as "not insubstantial". Thus, on this point the charge of reciprocity as a violation of the Sherman Act was dismissed in the only case so far litigated.

While the Federal Trade Commission and the Department of Justice continued the attack on reciprocity in merger cases,³⁴ the Department of Justice broadened the attack on reciprocity when it instituted a suit outside of the merger context against General Tire & Rubber Co.³⁵ The Government charged General Tire and three of its subsidiaries with a combination and conspiracy between them to utilize reciprocity in violation of Section 1 of the Sherman Act, and an attempt to monopolize substantial amounts of commerce by engaging in a deliberate program to gain sales by reciprocal purchasing in violation of Section 2.³⁶ The suit was finally settled after several years of pre-trial proceedings³⁷ by a consent decree.³⁸

In establishing a violation under Section 1 of the Sherman Act, and at times under Section 2, it is necessary to prove a contract, combination or conspiracy. In *General Dynamics*, the court referred to the problem of showing a violation on evidence of unilateral action by a

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 . . ."; while a Federal District Court in *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847, 850 (N.D. Calif. 1970), held "this test is fulfilled if the dollar amount is not 'de minimis' or not 'paltry'."

The significance of these cases is that they may all but eliminate as an issue the dollar amount of commerce affected in tying cases, and by analogy possibly in reciprocity cases.

34. The Federal Trade Commission and the Department of Justice continued to attack reciprocity in merger cases as violation of Section 7 of the Clayton Act. A few of the more important cases are: *United States v. Penick & Ford, Ltd.*, 242 F. Supp. 518 (D.N.J. 1965); *United States v. Northwest Industries*, 301 F. Supp. 1066 (N.D. Ill. 1969); *United States v. ITT (Canteen)*, 1971 Trade Cas. Par. 73,667 (N.D. Ill.); *United States v. ITT (Grinnell)*, 306 F. Supp. 766 (D. Conn. 1969), consent decree entered, 1971 Trade Cas. Par. 73,665 (D. Conn.); *United States v. ITT (Hartford)*, 306 F. Supp. 766 (D. Conn. 1969), consent decree entered, 1971 Trade Cas. Par. 73,666 (D. Conn.).

35. *United States v. General Tire & Rubber Co.*, Civil No. C-67-155 (N.D. Ohio, filed March 2, 1967).

36. Sherman Act § 2, 15 U.S.C. § 2 (1970):

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 misdemeanor. . . .

37. See *United States v. General Tire & Rubber Co.*, 1968 Trade Cas. Par. 72,609 (N.D. Ohio).

38. 1970 Trade Cas. Par. 73,303 (N.D. Ohio).

single defendant.³⁹ In *General Tire*, the Government may have bypassed this problem by its allegation of the combination and conspiracy between General Tire and its subsidiaries. However, what are referred to as the traditional antitrust principles⁴⁰ hold that acceptance, without previous agreement, of an invitation to participate in a plan which proposes an illegal concert of action is sufficient to establish a conspiracy in violation of the Sherman Act.⁴¹ Thus, where a supplier purchases products from a customer or an affiliate of a customer on the basis of the customer's communication that preference will be given to suppliers who reciprocate in purchasing, a conspiracy can be shown. In *Albrecht v. Herald Co.*,⁴² a private suit for treble damages filed a year after *General Tire*, the Supreme Court stated an expanded concept of "combination", as used in the Sherman Act. The Supreme Court held that a combination was created when a party threatened with termination of business dealings acquiesced to the anti-competitive practice advocated by another. Additionally, in *United States v. Container Corp. of America*,⁴³ a Government suit for an injunction under Section 1 of the Sherman Act, the Court held that the concerted action of competitors in willingly furnishing each other with information when requested, as to the prices offered to customers, on the expectation that reciprocal information would be furnished, constituted a conspiracy or combination under Section 1. Thus, in reciprocity cases, the necessary agreement might be found in situations where there is no express agreement indicated by evidence of discussions of sales and purchases or other similar information and by the reasonably inferred expectations of the firms in purchasing from each other.

Since the initial suit filed in *General Tire*, the Department of Justice has filed over thirteen reciprocity cases as violations of the Sherman Act.⁴⁴ Of the thirteen salient cases, all named only one defendant who

39. "Vendors of General Dynamics to curry favor or protect sales to the defendant, might unilaterally decide to purchase the products of Liquid Carbonic. In such instances, no actual contracts would occur and thus no agreements would be present to serve as a predicate for a Sherman § 1 violation." 258 F. Supp. at 66.

40. Remarks by Baddia J. Rashid, Director of Operations, Antitrust Division, Before The Federal Bar Association, Antitrust Committee, entitled *The Delicate Subject of Reciprocity*, in No. 426 ATTR, X-1, October 25, 1966.

41. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965).

42. 390 U.S. 145, 149-150 (1968).

43. 393 U.S. 333 (1969).

44. *United States v. U.S. Steel Corp.*, Civil No. 69-728 (W.D. Pa., filed June 13, 1969); *United States v. Evans Products Co.*, Civil No. 70-C-540 (N.D. Ill., filed March 6, 1970); *United States v. Inland Steel Co.*, Civil No. 70C-1305 (N.D. Ill., filed June 1, 1970); *United States v. Republic Steel Corp.*, Civil No. C 70-609 (N.D. Ohio, filed June 29, 1970); *United States v. Armco Steel Corp.*, Civil No. 7-604

was charged with entering into combinations or agreements involving reciprocal purchasing in violation of Section 1; all, with the exception of two,⁴⁵ were charged with attempting to monopolize the market of the defendant's supplier-customers for the products sold by the defendant in violation of Section 2. All of the cases were terminated by consent decrees.⁴⁶

The actual workings of reciprocity in these cases is shown by the allegations common to the complaints, which basically are: compilations of comparative statistics as to purchases and sales between the defendant and its customers and suppliers; employment of this information to determine which suppliers to patronize; discussion of the comparative statistics with customers and suppliers; and the purchasing of goods on the basis of reciprocal purchasing.⁴⁷ Additionally, these allegations show the sophistication that the practice of reciprocity has taken from its early emergence as simply a naked coercive practice.

RELIEF GRANTED IN RECIPROCITY CASES

In the 1930 reciprocity cases filed under Section 5 of the Federal Trade Commission Act, the Federal Trade Commission ordered the defendants to cease and desist the practice of coercive reciprocity.⁴⁸ In the late 1960s reciprocity cases,⁴⁹ the Commission accepted affidavits

(S.D. Ohio, filed July 31, 1970); *United States v. PPG Industries*, Civil No. 70-1273 (W.D. Pa., filed November 6, 1970); *United States v. Bethlehem Steel Corp.*, Civil No. 70-3102 (E.D. Pa., filed November 10, 1970); *United States v. Kennecott Copper Corp.*, Civil No. 71-Civ.-119 (S.D.N.Y. filed January 11, 1971); *United States v. National Steel Corp.*, Civil No. 71-189 (W.D. Pa., filed February 26, 1971); *United States v. Aluminum Co. of America*, Civil No. 71-491 (W.D. Pa., filed May 26, 1971); *United States v. Reynolds Metals Co.*, Civil No. 281-71-A (E.D. Va., filed July 14, 1971); *United States v. Westinghouse Electric Corp.*, Civil No. 72-507 (W.D. Pa., filed June 23, 1972); *United States v. Uniroyal, Inc.*, Civil No. 72-Civ-2793 (S.D.N.Y. filed June 29, 1972).

45. *United States v. National Steel Corp.*, Civil No. 71-189 (W.D. Pa., filed February 26, 1971); *United States v. Westinghouse Electric Corp.*, Civil No. 72-507 (W.D. Pa., filed June 23, 1972).

46. The final judgments are reported or were entered as follows: *U.S. Steel*, 1969 Trade Cas. Par. 72,826 (W.D. Pa.); *Inland Steel*, 1970 Trade Cas. Par. 73,197 (N.D. Ill.); *Republic Steel*, 1970 Trade Cas. Par. 73,246 (N.D. Ohio); *Armco Steel*, 1970 Trade Cas. Par. 73,283 (S.D. Ohio); *PPG Industries*, 1970 Trade Cas. Par. 73,373 (E.D. Pa.); *Kennecott Copper*, 1971 Trade Cas. Par. 73,437 (S.D.N.Y.); *Evans Products*, 1971 Trade Cas. Par. 73,450 (N.D. Ill.); *National Steel*, 1971 Trade Cas. Par. 73,495 (W.D. Pa.); *Aluminum Co. of America*, 1971 Trade Cas. Par. 73,587 (W.D. Pa.); *Reynolds Metals*, 1971 Trade Cas. Par. 73,626 (E.D. Va.); *Westinghouse Electric*, 1972 Trade Cas. Par. 74,053 (W.D. Pa.); *Uniroyal Inc.*, 1972 Trade Cas. Par. 74,070 (S.D.N.Y.).

47. In *Reynolds Metals*, there was no specific allegation of the compilation of statistics on sales and purchasing, but there was the allegation of discussing with suppliers the relative purchases from and sales to Reynolds.

48. 15 F.T.C. 232 (1931); 16 F.T.C. 67 (1932); 25 F.T.C. 379 (1937).

49. Cases cited note 17 *supra*.

of voluntary compliance which contained agreements to make all future purchases and sales on the basis of price, quality and service, and a voluntary withdrawal from membership in trade relations associations.⁵⁰ While an order to cease reciprocal practices, or an agreement not to engage in them or in activities which would lead to them is found in the reciprocity cases attacked in the merger context under Section 7 of the Clayton Act,⁵¹ the courts found that this relief was not sufficient to stop the practice of reciprocity. The courts held that only a complete divestiture of the acquired company, and a prohibition against common directors, officers, executive employees, and stock ownership by these personnel in the involved companies was sufficient to remove the attraction of reciprocal purchasing.⁵² This point was stated by the *Ingersoll-Rand* court:

. . . the mere existence of this purchasing power might make its conscious employment toward this end unnecessary; the possession of the power is frequently sufficient, as sophisticated businessmen are quick to see the advantages in securing the good will of the possessor.⁵³

Injunctive relief aimed at the very system of reciprocity itself⁵⁴ was given in the *General Tire* consent decree⁵⁵ and the thirteen consent decrees⁵⁶ entered in the cases attacked under the Sherman Act. In each decree, the officers and employees of the defendant were enjoined and restrained from performing certain acts, as:

1. purchasing from any customer or supplier, or entering into any agreement or understanding with a customer or supplier that purchases are conditioned upon the defendant's sales to that customer or supplier;
2. communicating to any supplier that preference in purchasing will be given a supplier based on the defendant's sales to that supplier;
3. compiling statistical data on the relative purchases from and sales to a supplier;
4. discussing with any supplier the relationship between purchases from and sales to that supplier; and
5. issuing to personnel with the primary purchasing responsibilities

50. See, e.g., Affidavits of Voluntary Compliance, Union-Camp Corp., and Chase Bag Co., *supra* at note 17.

51. Cases cited in notes 22 and 34 *supra*.

52. See F.T.C. v. Consolidated Foods Corp., 62 F.T.C. at 961-962.

53. 218 F. Supp. at 552.

54. The consent decrees in each of the cases would terminate after ten years.

55. 1970 Trade Cas. Par. 73,303 (N.D. Ohio).

56. Cases cited note 46 *supra*.

lists, notices or other modes of specification which show the relative purchases from and sales to any supplier or customer.

Additionally, the decree ordered and directed the defendants to perform such acts as:

1. abolish any office or position relating to activities or programs promoting reciprocal purchasing, and refrain from establishing or maintaining any similar position;
2. issue a policy directive to each officer and employee with primary sales or purchasing responsibilities prohibiting reciprocal arrangements; and
3. furnish each supplier or customer with whom the defendant had purchased or sold more than \$25,000—\$50,000 in some cases and \$100,000 in one case—in any of the three preceding fiscal years⁵⁷ a copy of the consent decree and a written notice that all of its officers and employees are prohibited from engaging in reciprocal arrangements.⁵⁸

DEFENSES TO CHARGES OF RECIPROCITY

In only a few cases⁵⁹ involving mergers charged as a violation of Section 7 of the Clayton Act, have defenses to the charges of reciprocity been sustained by the courts. The bases of the defenses urged in these cases were evidence of a strong policy against reciprocity by the acquiring company;⁶⁰ evidence of the acquiring company treating its divisions and subsidiaries as separate profit centers in addition to the evidence of a policy against reciprocity;⁶¹ evidence showing the lack of compilations of purchase/sales which is essential to systematic reciprocity, plus evidence of a long-standing policy against reciprocity on economic considerations, and evidence of a profit center organization.⁶² Although these defenses were sustained by the courts, they

57. In *Westinghouse Electric*, the decree provided that Westinghouse would furnish this notice to suppliers or customers with whom it had done more than \$100,000 of business during the year 1970. 1972 Trade Cas. Par. 74,053 Sec. VI(E).

58. In both the *General Tire* and *Uniroyal Inc.* decrees, the defendants, their officers and employees were prohibited from belonging to or participating in activities of the Trade Relations Association, Inc., an association formed in 1962 for the purpose of facilitating corporate relationships. See Final Judgments, 1970 Trade Cas. Par. 73,303 Sec. VI(C); and 1972 Trade Cas. Par. 74,070 Sec. VI(C).

59. See cases cited note 34 *supra*.

60. *United States v. Penick & Ford, Ltd.*, 242 F. Supp. 518 (D.N.J. 1965).

61. *United States v. Northwest Industries*, 301 F. Supp. 1066 (N.D. Ill. 1969). Under the profit center organizational structure, each unit of the parent company has its own decentralized purchasing and sales department, staffed by personnel whose compensation and progress are based upon the performance of their unit and not upon the performance of the parent company as a whole.

62. *United States v. ITT (Canteen)*, 1971 Trade Cas. Par. 73,677 (N.D. Ill.); *United States v. ITT (Grinnell)*, 306 F. Supp. 766 (D. Conn. 1969); *United States v. ITT, (Hartford)*, 306 F. Supp. 766 (D. Conn. 1969). The policy against reciprocity based on economic considerations was illustrated by the president of ITT in his testi-

were sustained only in Federal District Courts and the cases were not litigated higher so as to test the defenses, inasmuch as four of the cases were settled by consent decrees requiring divestiture of the acquired company, and in the fourth case, the acquiring company withdrew its tender offer to the acquired company.

CONCLUSION

Business reciprocity as a violation of the antitrust laws, particularly of the Sherman Act, has become an important field of development. This is especially remarkable in that of the numerous reciprocity cases filed as a violation of the sections of the Sherman Act, there is, as of yet, none which has adjudicated the question. Though these cases have been settled by consent decrees, none is an adjudication or admission of any issue of law or fact. Consent of the defendants to such a decree can be viewed either as an admission by the defendants that the allegation of reciprocity did constitute violations of the Sherman Act, or as a decision by the defendants that it was not in their best interests to contest the charges. However, based upon the reasoning in the decisions of the reciprocity cases adjudicated, particularly the decision in the *General Dynamics* case,⁶³ the anti-competitive effect of reciprocity, the valid analogy to "tying-in" arrangements which the Supreme Court found to be per se violations of the antitrust laws when a not insubstantial amount of commerce was involved, there is a strong argument to hold that all forms of reciprocity will be found to be violations of the Sherman Act.

As to the bases for future attacks on reciprocity, specialists in the antitrust field believe that coercive reciprocity will be attacked as a violation of Section 5 of the Federal Trade Commission Act and possibly Section 2 of the Sherman Act, systematic or mutual patronage reciprocity, as a violation of Sections 1 and 2 of the Sherman Act, and reciprocity power resulting from mergers, as a violation of Section 7 of the Clayton Act.⁶⁴

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mony: ". . . he explained that ITT charges each of its purchasing agents with responsibility for lowering his cost 3 to 6% annually and that if ITT were to 'hamper him with reciprocity', the purchasing agent would be unable to make the supplier shifts necessary to attain these targeted cost reductions. Considering that the average manufacturing operation has a 20 to 25% usage of materials in relation to sales, [he] calculated that the effect of losing a saving on purchases of around 5% would amount to about 1% of the usual 8 to 10% pre-tax profit on sales. In percentage terms the impact on pre-tax profits would be from 10 to 16%." 1972 Trade Cas. Par. 73,619 at 90,551. Additionally, the president pointed out that the lack of ability to shift suppliers could result in the loss of the best delivery schedules, poor quality supplies, or reliability.

63. 258 F. Supp. at 65-66.

64. See *The Current Attack on Reciprocity*, No. 434 ATTR, B-4, November 4, 1969.