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BUSINESS RECIPROCITY AND THE ANTITRUST LAWS.

I Introduction

In the complicated area of antitrust law, recent government scrutiny of a traditional nonprice-oriented, growth-fostering technique known as reciprocity has caused considerable concern among corporate lawyers entrusted with the difficult duty of advising their "clients" as to the legality of competitive activities or proposed acquisitions. As generally understood, reciprocity describes the practice whereby firms, overtly or tacitly, make concessions to one another in order to promote their own business interests.¹ The best-known form of business reciprocity is reciprocal buying, that is, the use by a firm of its buying power to promote its sales.² In this context it involves nothing more than the simple idea that, "I will buy from you, if you will buy from me," or the unspoken, "If I buy from him, he will buy from me." An extremely important form is a type of three-way reciprocity — company A prodding company B to buy from C which is affiliated with A or has close business relations with it. It is obvious that opportunities to practice reciprocity are quite extensive and several surveys indicate the frequency with which these opportunities are converted into organized reciprocal buying programs.³

Despite the antiquity and universality⁴ of this practice, especially when it in-

1 "The practice is analogous in principle to the old-fashioned bilateral reciprocal agreements in international trade."

Hadley, more than sixty years ago, defined reciprocal trade agreements as "a relation between two independent powers such that the citizens of each are guaranteed certain commercial privileges at the hands of the other." In making such agreements, negotiators no doubt believe that they promote their countries' interests. So it is with business reciprocity, except that one of the parties may be confronted with a choice of the lesser of two evils rather than the better of two attractive propositions.

Stocking & Mueller, *Business Reciprocity and the Size of Firms*, 30 J. OF BUS. U. OF CHICAGO 73, 74-5 (1957).

2 An example of a type of reciprocity that is not strictly reciprocal buying is found in *United States v. National City Lines*, 186 F.2d 562 (7th Cir. 1951), cert. denied, 341 U.S. 916 (1951).

Here, several suppliers, among them, Standard Oil and General Motors, furnished capital to defendant, a public transportation holding company which enabled it to monopolize local bus lines in 45 cities. The defendant reciprocated by entering into requirements contracts with these suppliers. The court held that this was a conspiracy to monopolize trade.

3 In Lewis, *The Present Status of Reciprocity As a Sales Policy*, 16 HARV. BUS. REV. 299, 311 (1938), the author's study reveals that over 50 of the 176 firms whose purchasing agents responded to a questionnaire had set up definite procedures for handling reciprocal purchases and sales. Some companies designated their departments for handling reciprocity problems as "trade relations departments." The Interstate Commerce Commission's report on *Reciprocity in Purchasing and Routing*, 188 ICC 417 (1932), reveals that during the 1920's and early 1930's the railroads generally resorted to reciprocity. They customarily allocated the purchase of steel rails and coal in proportion to the freight traffic given them by different steel mills. The record indicates that many railroads tried systematically to increase business through reciprocal buying. Their purchasing departments notified their traffic departments of the firms from which they bought, and the traffic departments used this information in soliciting traffic. Since shippers were sometimes persuaded to ship by a particular line when it was not economical to do so, the practice "made the handling of existing traffic more expensive." *Id.* at 434.

4 The Wall Street Journal, June 26, 1963, p. 1, col. 6, points out that in a recent poll, 51% of purchasing agents and 45% of the sales managers answering, reported reciprocity influenced their companies' buying and selling.

In some industries, such as chemicals, steel, and petroleum. All executives responding to the questionnaire said reciprocity was of factor. Over 25% of the respondents, concentrated in chemicals and petroleum said they used three-way reciprocity.

The Wall Street Journal, Dec. 4, 1963, p. 1, col. 6, reports that last year, executives charged with handling reciprocity for their corporations formed an organization called the Trade Relations Association. The group has 113 members. Fenton Truck, head of a consulting firm that sometimes advises clients on trade relations, estimates that some 500 companies use the technique on an organized basis, accounting for as much as 20% of total sales volume, "and often the most profitable and stable 20%."

volves large companies, both the Justice Department and the Federal Trade Commission have recently charged that reciprocity may amount to an illegal restraint of trade, especially where it is coupled with coercion. This note will investigate the economic factors which make possible an effective plan of reciprocity and the legal implications of the resulting effect on competition with emphasis on delineating where ordinary "mutual back-scratching" crosses the line into such illegal realms as "restraint of trade" and "tending to create a monopoly." It will also stress the mutual dealing possibilities arising from conglomerate mergers — a corporate form which brings together companies in different lines of business thus facilitating the so-called three-way reciprocity.

II *Economic Significance of Reciprocity*

"Reciprocal buying is economically significant when its use enables a firm to make sales that it could not otherwise make, or could make only at greater costs."⁵ It is a characteristic of imperfectly competitive markets, for in a purely competitive market, producers have no pecuniary incentive to seek out particular buyers, or buyers to seek out particular producers. A good example of a purely competitive market, where nonprice-oriented competitive activities, such as reciprocity, would be ineffective is found in the market for agricultural products. Thus, "[A]ny farmer can sell all he produces at prevailing prices, and any buyer can obtain at prevailing prices as much of any farm product as he wishes to buy."⁶ However, in an imperfectly competitive market, where a few sellers provide the entire supply of any commodity, resort to reciprocity is a very advantageous way to increase sales. But, while reciprocal buying can be effective only in imperfectly competitive markets, it is not equally adapted to all markets of imperfect competition. Its effectiveness depends on the existence of one or more of the following conditions.

First, the suppliers or potential suppliers of a firm must be its potential customers or potential customers of a company it controls. Unless these suppliers buy the goods made by the firm wishing to practice reciprocity, or by a company it controls, they do not lend themselves readily to such arrangements. Firms selling direct to consumers or to distributors of consumer's goods cannot use reciprocal buying effectively, "Their suppliers are at best only small potential customers, and their customers may have nothing to sell to them."⁷ Thus, production for sales to industry rather than for direct sales to consumers would appear to be a necessary condition for effective reciprocity.⁸

The second condition is what economists refer to as, "[A] sloping demand curve in an industry in which marginal costs are constant over a wide range of output."⁹ Over the long run, aggressive firms are unlikely to accept their demand curves as uncontrollable external factors and will frequently resort to reciprocity to expand

5 Stocking & Mueller, *supra* note 1, at 75.

6 *Ibid.*

7 *Ibid.*

8 An example of this is given by Stocking & Mueller, *supra* note 1, at 75-6, using General Motors:

In the early 1920's when General Motors made nothing but automobiles, trucks, and automobile accessories, it had little use for reciprocal buying, because through its distributors it sold its output largely to the final consumer. Although it was heavy buyer of raw materials, automobile parts, shipping services and labor, its suppliers bought relatively few cars. It could not readily use its purchasing power to coerce or persuade its suppliers to buy heavily from it.

9 *Id.* at 76. The demand curve is the graphic depiction of the relationship between supply and demand. This relationship, in a market characterized by imperfect competition, is that demand will increase as prices decrease (within the relevant capacity). When this relationship is portrayed graphically, the prices are on the left vertical axis and quantities on the horizontal, with zero at the vertex. Thus, at the highest price the demand is negligible; as the price decreases, the demand increases, and the plotting shows a sloping effect from left to right. Marginal costs, or variable costs, are the additional costs incurred in producing one more unit.

sales, thus "moving the demand curve to the right"¹⁰ resulting in growth at the expense of rivals who fail to work out long-term reciprocal arrangements.

A third condition conducive to reciprocity, although not essential to it, is surplus capacity. Thus when an industry is overbuilt, or demand slackens, for example, as a result of a recession, a firm may be tempted to get business by cutting prices. But since rival firms are likely to meet such price cuts promptly, "A firm that can increase its sales through the use of its buying power may force less fortunate firms to bear the main burden of declining demand."¹¹

A fourth condition conducive to the effective use of reciprocity is, "[S]ome lack of symmetry in the market."¹² Thus, if all firms in an industry were of the same size, sold identical products, and bought identical inputs, reciprocal buying would give none an advantage over any other. "Each firm could use its buying power as effectively as any rival. And if all used it with equal effectiveness, none could expand sales at the expense of others."¹³

A fifth, and perhaps most important, factor conducive to reciprocal buying is diversification. "The large diversified firm has better opportunities for using reciprocal buying than the single line producer."¹⁴ As was previously pointed out, to use its buying power readily to increase sales, a firm must find a potential buyer for the goods it sells that is also a potential supplier of the goods it buys. A firm that makes many products can more readily do this. If it is a large purchaser it is much easier to persuade its suppliers to buy from it.

A diversified firm may [also] use its purchases in making one product to push its sales of others; and if, as is not infrequent, a diversified firm has a near-monopoly of some product . . . it can use its purchases of raw materials for this product to increase its sales of products encountering more nearly competitive market.¹⁵

III *Legal Significance of Reciprocity:*

The legal significance of reciprocity lies in its effects on competition and, thus, it was first attacked under section 5 of the Federal Trade Commission Act¹⁶ which makes unlawful unfair methods of competition in commerce. However, the obvious tendency of reciprocity, as a growth-fostering technique, to create situations where monopoly power could be effectively utilized, has led to recent government attacks on the practice under the Sherman Act¹⁷ and Section 7 of the Clayton Act.¹⁸ Cases under these three sections will be examined in order to determine the factors necessary to sustain a complaint under each section with special emphasis on the necessity of overt activity or coercion on the part of the instigator of the plan of reciprocity. In this context, special emphasis will be placed on the merger area, i.e., situations where the corporate structure necessary for three-way reciprocity is in existence, to determine whether the mere existence of substantial buying power, or economic leverage in a particular market is, by itself, so potentially anticompetitive in the reciprocity area as to require some government regulation.

A. *Federal Trade Commission Act Cases:*

Section 5 of the Federal Trade Commission Act makes unlawful, "[U]nfair methods of competition in commerce, and unfair or deceptive acts or practices in

10 This refers to a totally new supply-demand relationship occasioned through some extrinsic force. The higher quantity will be purchased at the same price whereas before it was necessary to lower the price to achieve the same sales volume.

11 Stocking & Mueller, *supra* note 1, at 76.

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 *Id.* at 77.

16 38 Stat. 719 (1914), as amended by 52 Stat. 115 (1938), 15 USC § 45 (1958).

17 26 Stat. 209 (1890), as amended by 50 Stat. 693 (1937), 69 Stat. 282 (1955), 15 USC §§ 1-2 (1958).

18 38 Stat. 731 (1914), as amended by 64 Stat. 1125 (1950), 15 USC § 18 (1958).

commerce,"¹⁹ and the Federal Trade Commission, which is responsible for the administration of the Act, is empowered to enforce it with cease and desist orders.²⁰ Three landmark cases, which arose during the 1930's, deal specifically with business reciprocity as such an unfair method of competition and indicate the economic and legal significance of reciprocity as a method of foreclosing competitors from a specific market. These cases also indicate some of the cruder and more obvious types of activities utilized to make a plan of reciprocity effective.

Thus, in *Waugh Equipment Co.*,²¹ the corporate respondent was a minor manufacturer of draft gears for railroad cars. Two high officials of the large meat packing concern, Armour & Co., were large stockholders in Waugh, and because of their position as traffic directors at Armour, commenced to use this company's vast power as a major rail shipper to induce railroad companies to buy draft gears from Waugh. The effectiveness of this plan is indicated by the fact that in 1924, when the reciprocity campaign commenced, Waugh's gear was practically unknown. As a direct result of this reciprocity, the company was enabled to vault from obscurity to industry leadership in only six years. Waugh's sales increased in this time from less than one percent of those sold for new freight equipment to over thirty-five percent of the market.

The methods used were to give traffic officials of the railroads promises and assurances of substantial increases of freight traffic by Armour & Co., if the railroads would purchase Waugh gears. These officials, in their dual role as Waugh stockholders and Armour officials, also utilized threats of withdrawal and actually did withdraw substantial amounts of traffic from those railroad companies which refused to purchase Waugh gears. In finding a violation of section 5, the Commission pointed out that other draft gear manufacturers made their sales presentations to the mechanical, operating, and purchasing departments of the railroads, rather than to their traffic departments, and that the factors ordinarily considered by the railroads were price, quality and salesmanship.²² The Commission further found that the efforts of the Armour officials on Waugh's behalf resulted, in many instances, in railroads purchasing Waugh gears in contradiction to the recommendations of their mechanical officials and in disregard of the bids of competitors. These competitors had no appreciable traffic to offer the railroads and were therefore unable to meet Waugh's competition.

It was pointed out in this case that the combination of Armour's size with the fierce competition between the railroads, who were all eagerly seeking routing by their respective roads, accentuated Armour's power over the railroads. The combination of this economic power with the coercive reciprocity program designed to sell Waugh gears, constituted a clear example of unfair competition in commerce. The Commission concluded that Waugh and the Armour officials had, "[T]aken advantage of a competitive weapon, oppressive and coercive in nature,"²³ which tended to unduly suppress competition by preventing the customers to whom Waugh and its competitors were trying to sell their products, "[F]rom exercising their free will and judgment in determining which device is the most efficient and would best serve their needs at the lowest net cost over a period of time."²⁴ The commission stated that this then:

[I]njected an element in the competitive field . . . which is unfair and abnormal, and tends to reduce the efficiency and economy in the production and sales methods of competing manufacturers and gives to the concern that

19 This section reads: (1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful.

20 (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.

21 15 FTC 232 (1931).

22 *Id.* at 245.

23 *Id.* at 246-7.

24 *Id.* at 247.

controls the largest volume of freight traffic an unfair advantage that will more than offset the higher efficiency in the production and sales methods of competing concerns which control no such traffic . . . and [thus] hinder[s] and restrain[s] the freedom of competition in the natural, customary, and prevailing channels of trade in the . . . industry.²⁵

The next section 5, Federal Trade Commission Act case dealing with reciprocity was *Mechanical Manufacturing Co.*²⁶ Mechanical Manufacturing Co., a maker of railroad draft gears, bumping posts and coupler centering devices, was controlled by important employees of the large packer, Swift & Co., along with the Swift estate and members of the Swift family. It is important to note that two of the stockholders of Mechanical were transportation officials of Swift and were in direct charge of the latter's traffic negotiations with the railroads and were in control of the freight car routings of its products and those of its subsidiaries. This involved a business in meat products and by-products carried on through more than 500 branch distributing warehouses and the utilization and control of approximately 7,500 refrigerator cars.²⁷ As in the *Waugh* case, the volume of freight traffic thus controlled by these transportation officials was used to induce purchase of Mechanical's bumping posts, draft gears and coupler centering devices in preference to those of competitors through promises and assurances of shipments or increased shipments for the lines concerned, and in some instances threats of withdrawal and actual withdrawal of traffic from lines of companies declining such purchases. This persuasion was also effectuated by these officers, with the assistance of Mechanical Manufacturing Co., by personal interviews and "official" letters informing traffic and other railway officials that the packing company "family" or "interests" controlling it and owning Manufacturing would be favorably disposed to railroads using this corporation's gears. It was also stated in these interviews and letters that they expected their "railroad friends" and those carriers whom they "patronized liberally" to buy products on a "reciprocity basis" or "reciprocate" through buying a portion or specified portion of their requirements, and that they were disappointed or dissatisfied with traffic officials of roads which failed to purchase the articles in substantial or specified numbers.²⁸ They also advised the railroads that other competing roads were using Mechanical's products in substantial quantities. On these facts the Federal Trade Commission found an illegal combination of substantial economic leverage combined with overt coercion amounting to an unfair method of competition which, "[R]estrains the freedom of competition in the natural and customary channels of trade in the draft gear industry."²⁹

The last Section 5, Federal Trade Commission case in this area is *California Packing Corp.*³⁰ California Packing was one of the largest packers and distributors of food products in the world.³¹ One of its subsidiaries was Encinal Terminals, a corporation operating wharves, sheds, warehouses and switch tracks on San Francisco Bay for the purpose of handling rail and steamship freight at the waterfront in competition with a number of similarly engaged terminals. California Packing was a large purchaser of raw materials and manufactured products, such as wood, paper and fiber boxes, containers, cartons, tin, steel, copper and paint. The Commission found that the purchasing agent for California Packing, the vice-president, a director, and a general manager of the subsidiary, Encinal Terminals, and a former traffic director of the terminal corporation, who was now the traffic manager of California Packing, entered upon a plan of using the tonnage of freight shipped by the corporation over steamship lines, together with the buying power of California Packing, to influence routing of tonnage to Encinal. Thus, steamship companies

25 *Ibid.*

26 16 FTC 67 (1932).

27 *Id.* at 71.

28 *Id.* at 72-3.

29 *Id.* at 75.

30 25 FTC 379 (1937).

31 *Id.* at 382.

were coerced into diverting freight tonnage to Encinal even when the move was uneconomical for them, by the employment of California Packing's power as an important shipper. California Packing also compelled their suppliers of raw and manufactured materials to utilize the facilities of Encinal Terminals to the exclusion of Encinal's competitors, even though these suppliers, had it not been for these coercive activities, would have normally routed their products through other competing terminals on San Francisco Bay. Again this coercion was effectuated by assurances of increased purchases from these concerns if they directed shipments to Encinal, and threats of reducing or discontinuing purchases from those concerns which continued to route shipments through competitive terminals. Even California Packing's competitors were exploited by the device of soliciting their customers and suppliers to induce them to divert shipments through Encinal.³² The Commission found that the principal consideration for California Packing's purchases from its suppliers became, "[T]he volume of tonnage routed by said industrial concerns through the said Encinal Terminals . . . instead of the usual and normal competitive considerations such as quality, service, and price;"³³ this was clearly an unfair method of competition in the terminal business which had anticompetitive effects in the food packing business, i.e., the routing through Encinal enhanced California's revenues by reducing their distribution expenses, "[T]o the unfair competitive disadvantage of . . . competitors."³⁴

These three decisions represent specific applications of the general principle that abuse of large buying power to restrict competitive market opportunities is illegal. As the Supreme Court has held:

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.*³⁵

This quotation pinpoints precisely the evil of reciprocity as demonstrated in the above cases. It transforms substantial buying power, "[I]nto a weapon for denying competitors less favorably situated, access to the market."³⁶

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.³⁷

In the above cases, the alien and irrelevant factor was the tremendous purchasing power of the large controlling, or parent corporation used as a lever to induce its suppliers, who had need of the services or products of the controlled company, to reciprocate by using these services or products to the exclusion of those of competitors. Thus, sales were made in this way where they would not ordinarily have been made because of the fact that the competitor's price, quality and service package was often superior to that offered by the controlled company.

These cases also indicate the way in which diversification may enhance the likelihood that reciprocity may be practiced to stifle competition. As was pointed out,³⁸ a single-line corporation is far less likely to both buy from and sell to another corpo-

32 *Id.* at 398.

Said corporate respondents . . . have spied upon the business of . . . competitors . . . by securing from said Encinal Terminals the names and addresses of customers of said competitors, to enable . . . corporate respondents to bring pressure and influence to bear upon said customers, to divert their shipments of products purchased from said competitors, through said Encinal Terminals.

33 *Id.* at 398-9.

34 *Id.* at 398.

35 *United States v. Griffith*, 334 U.S. 100, 108 (1948). (Emphasis added.)

36 *Consolidated Foods Corp.*, FTC Docket No. 7000, Trade Reg. Rep. FTC Complaints, Orders, Stipulations, Par. 16,182 at p. 20,977 (1962).

37 *Ibid.*

38 See note 7 *supra* and accompanying text.

ration than one that is diversified, i.e., one that deals in a variety of product or service lines. Thus, the officials of Armour & Co. and Swift & Co. could not exercise reciprocal buying power over the railroads so long as their companies produced only meat products, which the railroads did not consume. But once they established relationships with firms that produced railroad equipment, they could employ Armour's and Swift's power as shippers of meat products to force the railroads to buy the equipment from the sources in which they were interested. It was precisely the lack of diversification that prevented other equipment manufacturers from meeting the reciprocity competition generated by Armour and Swift. Similarly, California Packing Corporation's use of reciprocity depended upon linking the purchase of supplies and transportation for its food products to the operation of a wholly unrelated terminal business. Thus:

[T]o the extent that . . . diversification . . . produces an industry structure that facilitates and furthers reciprocal buying, it is likely to lead to the most serious of anticompetitive consequences, *viz.*, to confer upon large, diversified corporations a crushing weapon against small, single-line competitors. The potential practical consequences are dramatically illustrated in the *Waugh* case. . . .³⁹

What is proscribed by Section 5 is some *activity* or *practice* which interposes a circumstance extrinsic to the worth of a product causing the most efficient producer to suffer loss because of his inability to compete on this basis.⁴⁰ Since this section speaks in terms of *acts* and *practices*, and since the Commission has clearly pointed out that what is reprehensible is the combination of large-scale buying power with *coercive activity*, a reasonable conclusion would be that the mere fact that a corporation's size gives it economic leverage sufficient, aside from any activity on its part, to induce reciprocation ("If I buy from him, he will buy from me") is not sufficient to sustain a cease and desist order.

B. *Sherman Act*:

Conglomerate mergers are now being attacked under the Sherman Act on the grounds that the utilization of reciprocal buying power had tended to create monopolies in the carbonic gas, and the electro-diesel locomotive industries. Presently, cases against General Dynamics and General Motors are being tried in conjunction with complaints of violations of section 7 of the Clayton Act. In a complaint filed by the justice department against General Dynamics Corp.,⁴¹ there is an alleged violation of Section 1 of the Sherman Act. General Dynamics is the largest defense contractor in the United States; because of its size and diversification, it requires commensurately large quantities of goods and services from others. It also subcontracts a substantial amount of government business in connection with defense contract awards. Liquid Carbonic Division, one of its subsidiaries, is the largest manufacturer and distributor of carbon dioxide in the country. The complaint charges that General Dynamics had adopted a "Special Sales Program" which was designed to, and did, utilize the extensive economic leverage of General's purchasing power to coerce suppliers and subcontractors to purchase carbon dioxide and industrial gases from its Liquid Carbonic division, "[T]hus depriving independent suppliers of these gases the opportunity to compete."⁴² The government contends that this, "[R]eciprocity plan has been effectuated by contracts, agreements and understandings, express and implied, entered into between General and its suppliers."⁴³

The situation giving rise to the complaint against General Motors further illustrates what government attorneys, as well as economists, feel are the economic

39 Consolidated Foods Corp., *supra* note 36, at 20,978.

40 *Id.* at 20,977.

41 Complaint, United States v. General Dynamics Corp., filed (S.D.N.Y. Nov. 8, 1962).

42 *Ibid.*

43 *Id.* at 8.

conditions necessary for reciprocity and how this device in turn can affect growth. Thus, Stocking and Mueller⁴⁴ point out that as long as General Motors was primarily a producer of automobiles it had little incentive or opportunity to resort to reciprocal buying. As it broadened the scope of its operations, more particularly as it engaged in the production of goods used by other industries,⁴⁵ "[I]ts opportunities to utilize its purchasing power to increase its sales have multiplied."⁴⁶ In describing General Motors' expansion into the field of manufacturing diesel locomotives, these authors, as well as the government, point to the unpretentious acquisition of Winton Engine Co. in 1930, and General Motors' present position as the country's largest maker of diesel locomotives.⁴⁷ "Many factors no doubt contributed to this dramatic growth . . . but . . . it would be strange indeed if General Motors' heavy purchases of transportation services were not also an important factor in General Motors' outstripping all rivals in selling diesels."⁴⁸

In its complaint,⁴⁹ the justice department contends that General Motors, the largest shipper of freight on the railroads of the United States, violated Section 2 of the Sherman Act⁵⁰ by illegally monopolizing the railroad locomotive business. The government points out that Electro Motive Division, one of General Motors' acquisitions, is now the largest manufacturer of diesel-electric railroad locomotives. The complaint charges that General Motors used its tremendous volume of freight shipments illegally to induce railroads to buy their requirements of locomotives from General Motors' subsidiary, Electro Motive Division, thus monopolizing the locomotive industry. The result, according to the government, has been that two of General Motors' competitors have not sold a locomotive since 1958. This power over price and the power to exclude competitors in the railroad locomotive industry was brought about, the government contends: (1) by giving preference in routing freight to railroads which purchase locomotives from Electro Motive Division; (2) by routing freight traffic so as to remove or reduce the volume of freight traffic shipped over the lines of railroads which purchase locomotives from competitors of Electro Motives Division; and (3) :

[B]y discussing or referring to General Motors' freight shipments during the course of sales efforts for its locomotives and by discussing or referring to the railroad's purchase of locomotives from Electro Motives Division or its

44 Stocking & Mueller, *Business Reciprocity and the Size of Firms*, 30 J. OF BUS. OF THE U. OF CHICAGO 73, 75 (1957).

45 Especially see generally, Stocking & Mueller, *supra* note 44. This is especially true with respect to the railroad industry. General Motors is not only a large buyer of railway services but sells many products essential to railroads. Its Hyatt Bearing Division is one of the country's leading makers of railway journal boxes and bearings for diesel locomotives and for passenger and freight cars. Its Allison Division makes transmissions for passenger and freight cars. Its Frigidaire Division produces complete air conditioning equipment for railway cars. Its Delco Products Division makes motors and generators for heating, cooling, and power, all of which are required for diesel locomotives. Its Electro-Motive Division makes diesel locomotives.

46 Stocking & Mueller, *supra* note 44, at 89-90.

47 *Id.* at 90.

From these simple beginnings General Motors had become by 1955 the country's largest maker of diesel locomotives, accounting for more than three-fourths of all domestic sales.

48 *Id.* at 91. Despite the testimony of General Motors officials that General Motors deliberately renounced the use of "traffic reciprocity," one competitor testified: "I think we would be naive to assume that General Motors' tremendous volume of traffic over the railroads does not have a profound influence on railroad purchasing." Testimony of O. De Gray, *Hearings before Subcommittee on Antitrust and Monopoly of Senate Committee on the Judiciary*, 84TH CONG., 1ST SESS. (1955) at p. 2370.

49 Complaint, *United States v. General Motors*, filed (N.D. Ill. Jan. 4, 1963).

50 § 2 states in 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 . . . shall be deemed guilty of a misdemeanor. . . .

competitors in the course of dealings in relation to the routing of its freight shipments.⁵¹

It is obvious that the first two situations, if proved, would comprise sufficient coercive activity which, when combined with substantial economic power, would render the plan illegal under the Federal Trade Commission Act, as these are precisely the tactics utilized in *Waugh* and *California Packing*. However, the government must go further and prove the illegal effect on competition resulting from this practice — creation of or attempt to create a monopoly. Thus, the court's determination of the legality or illegality of the third type of activity takes on added importance. The government in this charge is contending that the mere discussion by General Motors of its freight shipments when it is in the process of selling locomotives to railroads, or the discussion of its connection with Electro Motives Division when it is discussing the routing of traffic with railroads, would be sufficient coercive "activity" to constitute a violation of the Sherman Act, when combined with the economic leverage and the anticompetitive effect. Certainly the coercion or intimidation here is less odious than that evidenced in the Federal Trade Commission cases, or the activity complained of in the first two allegations against General Motors. In a recent complaint against a soda ash producer,⁵² the government reiterated its insistence that even a low degree of intimidation is reprehensible. In this situation, the "coercion" complained of was a suggestion in a letter from an executive of this company to an executive of Ford Motor Co. to the effect that FMC would be willing to purchase large numbers of Ford automobiles in return for Ford's continued purchases of FMC's soda ash.⁵³ Thus, the court's discussion of these allegations may prove helpful in delineating just how slight an activity is sufficient to constitute coercion. It might very well be that only slight intimidation is required when that activity is combined with great economic leverage, and a more coercive reciprocity program required when the economic power is less substantial.

One of the basic problems in the successful maintenance of an action based on the Sherman Act, or section 5 of the Federal Trade Commission Act, is the necessity of proving the activities upon which the complaint is predicated. Since the complaints against General Motors and General Dynamics allege the illegal combination of economic leverage and overt coercion used to enforce a plan of reciprocity by a meaningful economic threat, the government is put to the proof of such coercive activity. It can be generally stated that while the fact that a company engages in reciprocity may be public knowledge, the elements of the necessary proof of the inner workings of these reciprocal transactions are generally closely guarded secrets.⁵⁴ This problem of proof is emphasized by the fact that in both complaints

51 Complaint, *United States v. General Motors*, *supra* note 49, at 12.

52 The Wall Street Journal, Dec. 4, 1963, p. 1, col. 6, indicates that material turned up by a Government suit against FMC Corp., a supplier of soda ash, suggests that this company uses reciprocity.

53 One such letter from an executive of FMC Corp. to a Ford Motor Co. vice-president said in part:

This is just a note to express . . . appreciation . . . for the good news we had that your company has decided to purchase part of your Nashville requirements for soda ash from our company.

Effective as of now wherever possible, our people are to purchase Ford Products. . . .

The Wall Street Journal, Dec. 4, 1963, p. 1, col. 6.

54 In Lewis, *The Present Status of Reciprocity as a Sales Policy*, 16 HARV. BUS. REV. 299, 312 (1938), the author concluded:

One of the most interesting things about this whole problem is the extreme reticence with which many businessmen talk about reciprocity. Some deny that their companies practice it, even in the face of common knowledge to the contrary. Others deny it publicly, but will occasionally admit in confidence that they do follow it, and even describe in considerable detail their method of handling the problem. Still others, although they

there is also an alleged violation of section 7 of the Clayton Act, which, as will be pointed out, requires no proof of coercive activity. It appears that the government, by buttressing its complaint with the Clayton Act, is acknowledging the difficulty of proof required under the Sherman Act. This difficulty of proof has great significance in the area of straight-line reciprocity in which no third corporation or subsidiary is involved,⁵⁵ thus negating the possibility of a Clayton Act violation. The government's success in producing the required proof, and the judicial determination of the activities necessary to prove coercion — whether mere insinuations, or outright threats — will greatly affect further reciprocity complaints under the Sherman Act.

C. *Under Section 7 of the Clayton Act:*

Perhaps the area where reciprocity poses the greatest problem to large diversified corporations is the increasing possibility that the government agencies may, in situations where its anticompetitive effects are patent, make widespread use of it to pry apart "conglomerate" mergers under the Clayton Act. Section 7⁵⁶ of the Clayton Act is designed to arrest in its incipency, not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of a competing, or even noncompeting corporation, but also to arrest in their incipency restraints or monopolies in a relevant market which, "[A]s a reasonable probability, appear at the time of the suit likely to result from the acquisition . . ."⁵⁷ This section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, "[H]ave occurred or are intended."⁵⁸ Thus, it must be emphasized that in a section 7 case (as distinguished from one brought

state quite frankly that they have such a policy, refuse to discuss even the general organization and procedure for handling the problem.

The Wall Street Journal, Dec. 4, 1963, p. 1, col. 8, reports that General Motors was so reluctant to bare documents related to the subject that it fought government subpoenas for two years. Only recently has General Motors begun to hand over the papers, and most of these are under a court protective order, which restricts availability of the documents to specified Justice Department personnel.

55 The record in *United States v. Du Pont Co.*, 126 F. Supp. 235 (N.D. Ill. 1954), is one of the most informative sources of knowledge as to the inner workings of an effective plan of straight-line reciprocity, and the apparent lack of secrecy surrounding the situation is, to say the least, quite unusual. For example, Stocking & Mueller, *supra* note 44, at 81 and 83, reprint two letters illustrative of the extent of the organization:

Having secured the cooperation of the Purchasing Department, who agreed to send us copies of all their orders and contracts . . . we devised a system to take care of this data, carding up all the names and indicating by signals important information. In addition we advise our sales executives and branch offices of purchases not only daily, but also by means of statements monthly and a general summary semiannually, showing the status of all concerns from whom we buy. . . .

[W]e desire to put before the Jones & Laughlin Steel Company interests and the Inland Steel Company interests the facts as to what of their products the du Pont Company and its affiliated companies buy from them. For this purpose could you have someone send me a statement of the 1927 purchases by General Motors Corporation and its subsidiaries from . . . [them]. . . .

It is, of course, understood that in presenting these figures to our customers it will be for the purpose of retaining trade now enjoyed. There will be no promise or assurance that these purchases will continue or that the Du Pont Company's efforts in the past have caused G.M. to place this business. . . .

56 § 7 of the Clayton Act states in part:

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.

57 *United States v. Du Pont & Co.*, 353 U.S. 586, 589 (1957).

58 *Ibid.*

under the Sherman Act, or section 5 of the Federal Trade Commission Act), "[T]he inquiry does not focus on overt anticompetitive trade practices as such, but rather on changes in market or industry structure that are effected by the challenged merger and that may have anticompetitive consequences."⁵⁹

Thus, section 7 is directed, "[A]t the anticompetitive effect of anticipated business practices that would be immune from legal attack had the structure of the merged corporation been developed by growth rather than acquisition."⁶⁰ While a cease and desist order would eliminate any overt reliance on reciprocity *as might be proved*, "[I]t would do nothing to eliminate the anticompetitive effect inherent in the corporate structure created by the merger."⁶¹

Congress used the words "*may be substantially to lessen competition*," . . . to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition. . . . Mergers with a probable anticompetitive effect were to be proscribed by this Act.⁶²

There are two very real advantages to the government in attacking reciprocity under section 7. First, since they are concerned with probabilities of anticompetitive effect, the extensive burden of proof, required under both the Sherman Act and the Federal Trade Commission Act, to show overt, coercive and intentional activity is substantially lessened, and perhaps may be completely unnecessary. Second, while the sanction for a Federal Trade Commission Act violation is a cease and desist order, and treble damages can be recovered under the Sherman Act, the sanction imposed under section 7 is divestiture of the acquisition, characterized in the *Du Pont* case as, "[T]hat most drastic, but most effective, of antitrust remedies."⁶³ Thus, the severity of the penalty combined with the tendency of section 7 to require less proof of coercive activity, accentuates the threat which reciprocity prosecutions pose to conglomerate mergers.

*Consolidated Foods Corp.*⁶⁴ is the first case in which a conglomerate merger was successfully attacked under section 7 of the Clayton Act. The decision requiring divestiture was based solely on the corporate structure produced by a merger facilitating reciprocal buying which in turn produced an anticompetitive effect. Consolidated Foods was a large food wholesaler which operated eight manufacturing divisions and processed certain food products. In 1951 Consolidated acquired Gentry Inc., a supplier of dehydrated onion and garlic, one of only four firms that constitute the entire dehydrated garlic and onion industry.

The gravamen of the case was that the merger with Gentry was illegal under section 7 of the Clayton Act, "[B]ecause it created the serious danger that Gentry would acquire a protected market, in which fair competitive opportunities would be denied to other sellers of dehydrated onion and garlic, as a result of the trade practice known as 'reciprocity.'"⁶⁵ The first question presented to the Federal Trade Commission was whether the effect of the acquisition, "[M]ay be *substantially* to lessen competition."⁶⁶ The respondent contended that the proof of such substantiality was lacking and introduced a statistical presentation that Gentry had not come to dominate the industry in the years since the merger.⁶⁷ The commission answered this contention:

Respondent seems to think that it cannot be found to have violated section 7 since it has not driven competitors from the field or sharply curtailed their sales. But we have already indicated that our inquiry must focus on *probable* effect, and that one such probable effect of respondent's acquisi-

59 Consolidated Foods Corp., *supra* note 36, at 20,974-5.

60 *Id.* at 20,979.

61 *Ibid.*

62 Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

63 United States v. Du Pont & Co., 366 U.S. 316, 326 (1961).

64 FTC Docket No. 7000, Trade Reg. Rep. FTC Complaints, Orders, Stipulations, Par. 16,182 at 20,972 (1962).

65 *Id.* at 20,974.

66 *Id.* at 20,975.

67 In fact, the statistics showed that Gentry's sales had fallen.

tion of Gentry is the discouragement of new competition. This could occur even if Gentry does not drive competitors from the field or obtain unilateral industry dominance. If reciprocal buying creates for Gentry a protected market, which others cannot penetrate despite superiority of price, quality, or service, competition is lessened whether or not Gentry can expand its market share.⁶⁸

The Commission then concluded that the acquisition of Gentry by Consolidated has conferred upon Gentry the power to foreclose competition from a substantial share of the markets for dehydrated onion and garlic:

[T]hereby jeopardizing the competitive opportunities of its small, relatively undiversified competitors and tending to lend further rigidity to an already heavily concentrated industry and to discourage the entry of new competitors, all "without producing any countervailing, competitive, economic, or social advantages."⁶⁹

The Commission goes on to describe the way in which such a conglomerate merger may enhance the likelihood that reciprocity may be practiced to stifle competition:

Diversification not only increases the number of opportunities for reciprocal buying; it increases their magnitude. A single-line producer, even though a near-monopolist, may buy so little of some material that reciprocal buying has little influence on suppliers as potential customers. But by diversifying — making other products requiring the same input — a firm may so enlarge its buying as to give it the power to increase its sales.⁷⁰

Relating this principle to the consolidated situation, the commission points out that the acquisition of Gentry presented Consolidated with an opportunity, previously unavailable, to reap a profit from sales in one product area, dehydrated onion and garlic, "[O]n the sheer strength of its buying power in other markets, and not on the basis of a better product or a lower price."⁷¹ Furthermore, the Commission found that Consolidated admittedly did overtly exercise this power on occasion with some success, but then went on to say that since Consolidated acquired the power to "extort or simply attract" reciprocal purchases from suppliers when it acquired Gentry, "[T]he casual relationship between the merger and the injury to competition implicit in reciprocal buying is patent."⁷²

While respondent has admitted the overt exercise of the power inherent in its corporate structure, expressly conditioning purchases from processors on their purchases from Gentry, it seems clear that merely as a result of its connection with Consolidated, *and without any action on the latter's part*, Gentry would have an unfair advantage over competitors enabling it to make sales that otherwise might not have been made.⁷³

Thus, this case indicates a classic example of three way reciprocity. As a wholesaler and retailer of food, Consolidated buys the products of many food processors. A substantial number of these processors require dehydrated onion and garlic in packaging their foods. The commission pointed out that these food processors who used dehydrated onion or garlic and, "[A]re anxious to sell or to continue to sell their products to Consolidated, will, to say the least, consider Gentry's connection with Consolidated in selecting a source of supply of onion and garlic."⁷⁴

The basic difference, then, between this case and those under the Sherman Act or the Federal Trade Commission Act is that in this situation the advantages accruing to a supplier who favors Gentry would not have to be pointed out by Consolidated in order to violate the Clayton Act. The commission stated that the fact that Consolidated failed to systematize or vigorously enforce its reciprocal buying policy was of far less significance than that it "obtained the power to do so by merger," and that by actually using its power on occasion to "disadvantage competitors unfairly," Consolidated, "[D]emonstrated that its possession of such

68 Consolidated Foods Corp., *supra* note 64, at 20,981.

69 *Id.* at 20,981-2.

70 *Id.* at 20,978.

71 *Ibid.*

72 *Ibid.*

73 *Id.* at 20,979 (emphasis added).

74 *Id.* at 20,975.

power posed a real and substantial, and not merely abstract or theoretical, threat to competition."⁷⁵

Section 7 reads "may be," not "has." The evidence may show that the respondent has not thus far severely impaired competition in the industry by reciprocity but it does not show that respondent may not do so when it chooses or that it will not so choose in the future. * * *

Any suggestion that such power cannot effectively be exploited fails to account for clear-cut historical instances when it has been. . . . Indeed . . . the industry structure seems tailor-made to the exploitation of reciprocal buying power.⁷⁶

As was already pointed out the *Consolidated Foods* case was the first time that the Federal Trade Commission has overruled a merger under the terms of the Clayton Act without finding the usual "horizontal" or "vertical" competitive effects. "An economic arrangement between companies performing similar functions in the production or sale of comparable goods is characterized as horizontal."⁷⁷ However, in this case, Consolidated and Gentry were not competitors but were in diversified lines of manufacture so no "horizontal merger" was involved. Furthermore, there were no "vertical" aspects of the merger, that is, no, "[E]conomic arrangements between companies standing in a supplier-customer relationship,"⁷⁸ because any sales from Gentry to Consolidated were insubstantial. The Commission thus relied on the legislative history of amended section 7 that makes it clear, that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal which have the specified effects of substantially lessening competition. . . .⁷⁹

The *Brown Shoe Co. v. United States*,⁸⁰ case also pointed out the applicability of section 7, not only to mergers between actual competitors, "[B]ut also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country."⁸¹ However, Commissioner Elman, who wrote the opinion in *Consolidated*, indicated that the effects of reciprocity in a conglomerate merger situation were very similar to a vertical merger and also to product tying arrangements. A greater insight into the illegal anticompetitive effects of reciprocity then can be gained by comparing it to these traditional forms of trade restraints.

D. Comparison to Vertical Merger:

In a vertical merger, the danger to competition lies in the likelihood that the union of the previously independent supplier and customer companies, "[W]ill foreclose their share of the market to competitors who previously had an equal opportunity either to buy from the supplier company or to sell to the customer company."⁸² The Court in *Brown Shoe* stated: "Every extended vertical arrangement by its very nature . . . denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement."⁸³ The same results clearly follow from a conglomerate or diversification merger in which reciprocity is effectively practiced. Here, competition will be adversely affected if the reasonable likelihood arises that the subsidiary's competitors will be to some extent foreclosed, by the merger, from having the opportunity of selling to that portion of the market composed of the parent's suppliers. "Consequently, the extent of potential foreclosure greatly exceeds that resulting from the slight vertical relationship between Gentry and Consolidated."⁸⁴

⁷⁵ *Id.* at 20,980.

⁷⁶ *Ibid.*

⁷⁷ *Brown Shoe Co. v. United States*, 370 U.S. 294, 334 (1962).

⁷⁸ *Id.* at 323.

⁷⁹ H.R. Rep. No. 1191, 81st Cong., 1st Sess., p. 11.

⁸⁰ 370 U.S. 294 (1962).

⁸¹ 370 U.S. 294, 317 (1962).

⁸² *Consolidated Foods Corp.*, *supra* note 64, at 20,975.

⁸³ 370 U.S. 294, 324 (1962).

⁸⁴ *Consolidated Foods Corp.*, *supra* note 64, at 20,975.

E. *Similarity to Product Tying Arrangements:*

In many respects, reciprocal buying bears a close resemblance to the unlawful business practice of entering into tying arrangements, *i.e.*, agreements by one party to sell one product only on condition that the buyer also purchase a different product. The latter product is said to be "tied" to the former.⁸⁵ Where such conditions are successfully exacted, competition on the merits with respect to the tied product is inevitably curbed. "Indeed tying agreements serve hardly any purpose beyond the suppression of competition."⁸⁶ As the Supreme Court pointed out in *Northern Pacific Railway Co. v. United States*:⁸⁷

They (tying arrangements) deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. . . .

Again, in the *Brown Shoe* case, the court stated:

The usual tying contract forces the customer to take a product or brand he does not necessarily want in order to secure one which he does desire. Because such an arrangement is inherently anticompetitive, we have held that its use by an established company is likely "substantially to lessen competition" although only a relatively small amount of commerce is affected.⁸⁸

Similarly, "[R]eciprocal buying may also enable one seller to succeed over another not on the basis of a better product or a lower price but because of his power or leverage in another market;"⁸⁹ viz., the market in which the seller is an influential buyer of other products. A frequent condition, express or implied, of his purchase of goods from his supplier is that the supplier also buy from him. "The prospective customer 'ties' the sale of his product to his purchases from his supplier and competition on the merits with respect to the tied product is inevitably curbed."⁹⁰ By acquiring Gentry, Consolidated has provided itself with a basis on which to tie sales to its suppliers to purchases from them.

Thus, Consolidated demonstrates the Commission's position that reciprocity is illegal under section 7 even without a showing of overt coercion. The fact that a company has obtained the "power" to coerce by merger is sufficient regardless of whether that power was ever effectively utilized. Consolidated's latent force of buying power, combined with the need among Consolidated's suppliers for the products sold by Gentry, resulted in a high probability of potential foreclosure of Gentry's competitors from the market. "Since Consolidated acquired the power to extort or simply attract reciprocal purchases from suppliers when it acquired Gentry,"⁹¹ and the injury to competition resulting from the use of reciprocity in such a situation is highly probable, the Federal Trade Commission ordered Consolidated to divest itself of Gentry.

A more recent decision involving reciprocity under Section 7 of the Clayton Act, and one which appears to take the *Consolidated Foods* decision one step further is *United States v. Ingersoll-Rand Company*.⁹² In this case the government used an argument similar to that in *Consolidated Foods* to block a proposed merger between Ingersoll-Rand and three large coal mining machinery producers. There was obviously no question here of any overt coercive activity in the reciprocity area because the merger was never consummated, but the district court found that the merger would create a corporate structure which in turn would facilitate the practice of reciprocity and result in an injury to competition; on this basis the court granted an injunction against the merger. The court pointed out that

⁸⁵ *Id.* at 20,977.

⁸⁶ *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305 (1949).

⁸⁷ 356 U.S. 1, 6 (1958).

⁸⁸ 370 U.S. 294, 330 (1962).

⁸⁹ *Consolidated Foods Corp.*, *supra* note 69, at 20,977.

⁹⁰ *Ibid.*

⁹¹ *Id.* at 20,978.

⁹² 218 F. Supp. 530 (W.D. Penn. 1963).

Ingersoll-Rand's position as the fourth largest general industrial machinery manufacturer requires it to purchase large quantities of steel and that its purchases are important to the steel companies. In turn, the steel industry constitutes one of the largest markets for coal. The court then pointed out that it would not be overly speculative to assume that, "[T]he judicious use of its steel purchasing power by Ingersoll-Rand could immeasurably increase the sales by the acquired companies of machinery and equipment to the coal mining companies which acutely need the continued goodwill of the steel industry."⁹³ The court then went on to explain again the "latent power to foreclose competition" theory laid down in *Consolidated*:

Moreover, the mere existence of this purchasing power might make its (Ingersoll-Rand's) 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 goodwill of the possessor. Certainly the steel producer who seeks orders from Ingersoll-Rand may tend to prefer the acquired companies as the source of supply of equipment used in his "captive" mines, and the advantages accruing to him from so favoring the acquired companies would not have to be pointed out by Ingersoll-Rand. . . . The competitor may thereby suffer loss because of a circumstance not bearing directly on the worth of his product. In this situation it is the relative size and conglomeration of business rivals, rather than their competitive ability, that may determine success. Obviously, this practice strikes at one of the basic premises of a free enterprise economy. Therefore, a merger which would result in its extension should be closely scrutinized.⁹⁴

Conclusion:

As both *Consolidated Foods* and *Ingersoll-Rand* indicate, the government may now look at a proposed conglomerate merger and decide if it would foreclose competition for a market because of reciprocity. If such foreclosure appears likely to occur, the government can immediately seek an injunction to prevent the merger without being required to wait for the adverse effect on competition. The seriousness of this is emphasized by the ever lessening degree of "substantiality" of probable foreclosure now required as a result of the *Brown Shoe* and *Consolidated Foods* decisions. Thus, it can be readily seen that if any large company wishing to merge with a wholly unrelated company could exercise extensive power in one market to induce purchases from its acquisition, such power alone would be sufficient to block the proposed merger. This would tend to make large-scale buying power unlawful *per se* when combined with a certain corporate structure, i.e., one where reciprocity could be effectively practiced. There would be no requirement that this large-scale buying power ever be used to injure competition.

In the straight-line reciprocity area, where no merger is involved, the government will have a more difficult time maintaining an action under the Sherman Act. The necessity of proof of reciprocity practices, combined with corporate secrecy as to the inner workings of any reciprocal purchasing plan indicates that the government may choose to stress the antimerger area rather than the attempted monopoly area. If the *General Motors* and *General Dynamics* decisions point out a tendency to hold inferences as well as outright coercive activities as reprehensible, it is submitted that the slighter burden of proof then required for the Sherman Act should make it unnecessary to take such an extreme position under the Clayton Act as indicated by *Consolidated* and *Ingersoll-Rand*. Certainly in the case of a corporation which has never shown a tendency to practice reciprocity the government should be required to prove some activity or tendency to activity on the part of such corporation, however slight, before they can block an acquisition or order a divesture.

Hurley D. Smith

⁹³ *Id.* at 552.

⁹⁴ *Ibid.*