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A SURVEY OF THE PROBLEMS ENCOUNTERED IN COMBATING RECIPROCAL TRADING UNDER EXISTING TRADE REGULATION LAWS

Arthur Donald Austin†

To what extent, if at all, the practice of reciprocal buying is in harmony with the trade regulation laws is one of the more perplexing conundrums that presently confronts those firms participating in the activities of today's commercial world. The recently decided Federal Trade Commission v. Consolidated Foods Corp.¹ case has certainly furnished fresh insights into the problem. That decision also illuminated some of the unknowns and complexities that must be resolved before a workable legal interpretation can be placed upon this practice. A major obstacle to analysis is the absence of official commentary by company executives on reciprocal trading.² The paucity of decisions on the subject further increases the difficulties. Hence the compatibility of reciprocal trading with the scope of the antitrust laws is still very much open to question.

Reciprocal trading is defined, in oversimplified terms, as the practice of making purchases that are expressly or tacitly conditioned upon

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¹ 380 U.S. 592 (1965).

the vendee making a complimentary purchase. "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." The theory underlying the practice is not of recent origin. Adam Smith complained that the "sneaking arts of tradesmen . . . who make it a rule to employ chiefly their own customers" should not be enlarged into a foreign trade policy. Today's corporate representatives, when they reluctantly discuss the ramifications of reciprocity, complain about the inherent disadvantages of basing the sales future of their organization upon the pressures that can be generated through the purchasing department. Reciprocity has been accused of being a "negation of scientific considerations which would normally indicate the selection of the most favorable supplier," as being "inconsistent with . . . the free enterprise ethic" and as a creator of "false markets." However, condemnatory language does not preclude a solid commitment by many enterprises to the use of this technique. Its success as a means of building sales seems to outweigh all other factors. That studies indicate almost all firms are, in some fashion, susceptible to the pressures of reciprocal buying is not surprising. Moreover, changes in the structure of the economy that encourage its continued use and favor its growth have made recourse to reciprocity even more attractive.

Most firms that generate sales through purchases do so with a great degree of circumspection. This is true regardless of the depth of their commitment to reciprocity. Excellent reasons justify this attitude.

6. Ammer, supra note 2, at 121.
8. As far back as 1938 a study revealed "that to a greater or less degree reciprocity is found in nearly every type of manufacturing business as well as in banking institutions and insurance, public utility, transportation and construction companies." Lewis, The Present Status of Reciprocity as a Sales Policy, Harv. Bus. Rev., Spring, 1938, p. 299. A more comprehensive study in 1961 indicated that the situation had not changed. "100% of the P. A.'s surveyed report that reciprocity is a major factor in buyer-seller relations in the chemical, petroleum, iron and steel, and other basic raw material industries. In addition, the majority of the buyers in these industries report an increase in the number and extent of reciprocity problems." Sloan, Reciprocity: Where does the P. A. Stand?, Purchasing, Nov. 20, 1961, pp. 70, 71.
9. In the course of an inquiry into the reciprocal buying habits of railroad carriers the Interstate Commerce Commission noted that "Notwithstanding extended examination of witnesses with the carriers' records as a basis, little information was elicited other than that contained in the documents. The result is that we were handicapped in developing the facts because of the difficulty in obtaining information as to private conversations and oral agreements as to purchases and traffic." Reciprocity in Purchasing and Routing, 188 I.C.C. 417, 433 (1932).
There are no well-defined guidelines within which it can, with legal impunity, be utilized. Few cases have dealt specifically with reciprocity. There are no statutes that prohibit it specifically or deal precisely with it. There is little, if any, mention of reciprocity in the legislative history of the various antitrust and trade regulation acts. It is the purpose of this paper to endeavor to erase some of the uncertainty surrounding reciprocal trading by examining it within the context of existing legislation. Such an investigation necessarily involves a statement of definitions, a brief review of those legally relevant economic circumstances that foster reciprocity, and a scrutiny of the few occasions courts have considered the problem.

I. Definitions

*Everything Being Equal Reciprocity*

Where the quality, service, and price of supplies are equal it is obviously sound business to purchase from those companies which are present or potential customers. Such a practice aids effectively in cultivating an acceptable type of good will that can ultimately lead to increased sales. This is a manifestation of reciprocity, if it can be labeled such, in its most innocuous form. As long as buying from customer-suppliers is practiced on this informal basis and as long as price, quality and service retain their customary importance, reciprocity has no legal significance.

*Complete Reciprocity*

When a company consciously arranges its purchasing program towards the objective of generating sales there is a total commitment to reciprocal trading. Normal purchasing criteria become secondary to the major objective of channeling purchasing pressure towards customer-suppliers. Regardless of price, quality or service, suppliers are expected to reciprocate purchases. Simply stated, buying is used as a deliberate and continuing sales instrument. This involves a concerted effort on the part of the company. Most firms which practice reciprocal buying on this level coordinate all purchasing and selling activities into a single unit that is commonly known as the Trade Relations Department. The


11. For thorough discussions of the Trade Relations Department concept see Sloan, supra note 8, at 73; Meade, The Trade Relations Function in Modern Business, American Management Ass'n, Management Bull. No. 19: Trade Relations Defined
primary purpose of this department is to "keep records of all company buying; forward information on suppliers to sales chiefs . . . coordinate purchasing to create as many big volume orders as possible . . . and make sure that all reciprocal trade is carried on quietly and without notice." 

Complete reciprocity means that persuasion of various shades and nuances is used on a firm's suppliers as a means of prompting return sales. This persuasion may take the form of the purchasing agent accompanying sales personnel on visits to big accounts, it may be reflected by articulated threats to withdraw purchases, or it may consist of a transcending awareness by the concerned parties of the firm's gigantic reservoir of purchasing power and the willingness, if the need arises, to use this power. Purchasing power has been expressly recognized as a force that can easily induce reciprocal purchases.

It is not overly speculative to assume that the 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 good will of the steel industry. Moreover, 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.

Multilateral Reciprocity

Reciprocity does not always appear in the form of a simple and direct sales relationship between two firms. Quite often there is a triangular trading connection between companies that results in what is commonly known as multilateral reciprocity. Firm A uses the buying strength that it has with its supplier, Firm B, to convince the latter to persuade one of its suppliers, Firm C, to make its purchases from Firm A. For example, a large manufacturer that specializes in underground mining machinery, a product that requires a heavy steel quota, might be able to

12. Reciprocity-Dangerous Selling Tool Winning New Users, supra note 7, at 41.
13. Sometimes the use of reciprocity pressure will cause the customer-supplier to adopt the same policy in return. Reciprocity in Purchasing and Routing, supra note 9, at 423.
16. Id. at 524.
persuade its steel suppliers to prevail upon the latter’s coal suppliers to purchase mining machinery. It should be noted that reciprocal trading is not necessarily restricted to direct or multilateral practice—a labyrinth of relationships can conceivably be developed. However, the uncertainty of effective control in anything beyond multilateral reciprocity precludes efficacious use.

**Reciprocity Through Asset and Stock Acquisition**

Reciprocity has not yet crystallized into a stereotyped market maneuver. Thus, a dominant firm need not necessarily engage in reciprocal trading to increase its sales. Often purchasing power is used to improve the sales posture of a smaller firm in which the dominant firm has a vested interest. The term “vested interest” can be defined as control through asset acquisition or influence through the purchase of stock. Reciprocity through asset acquisition is reflected in the Consolidated Foods case. Consolidated Foods was a manufacturer and wholesaler of food products which, in the normal course of business, made substantial purchases from food processors. It acquired the assets of a firm which happened to be a potential supplier of the food processors. It was alleged that through the application of pressure by Consolidated Foods upon their suppliers the overall market position of the acquired firm was improved. In other words, it was suggested that Consolidated Foods would buy its supplies only from those suppliers who purchased goods from the acquired company.

Stock acquisition in a company operating in a totally unrelated market can provide a type of situation that invites the use of reciprocity. A position of authority in the acquiring firm, resulting either from stock control or management command, is used to improve the sales position of the other company and thus enhance the value of the newly purchased stock. Just as in the asset acquisition situation the acquiring firm persuades its suppliers that it would be advantageous to purchase from the company in which the stock investment has been made. For example, three Armour and Company executives purchased a sizeable block of shares in the Waugh Equipment Company, a firm that manufactured draft gears for railroads. Since the railroads were large suppliers of transportation to Armour they were particularly receptive to the suggestion that gear purchases be made from Waugh. As a result of this persuasion Waugh’s sales increased “from a place of obscurity,” or sales of “1% of the total draft gears . . . in 1924” to 35 percent of the

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18. 380 U.S. at 593.
20. Ibid.
market in 1930.

For purposes of definition it is assumed that the acquiring firm is in such a position that it can effectively persuade its suppliers to deal with the acquired firm (or the firm in which the stock investment is made). It is likewise assumed that the suppliers are capable of exerting influence in the acquired firm's market. The texture of these relationships is of course crucial and will be examined in subsequent paragraphs.

II. The Economic Environment of Reciprocity

Before it can be determined satisfactorily whether reciprocity is significant enough to merit sustained court and legislative attention an inquiry must be made into the circumstances and factors that engender its use. What type of economic environment is favorable to the use and growth of reciprocity and why is it so attractive to the modern firm? Since complete reciprocity, as defined in this paper, has not attracted a great deal of attention until relatively recently, the answer to these questions can best be found through a condensed survey of some of the contemporary cross currents in the economy.

First, oligopoly\(^{21}\) now dominates\(^{22}\) most industries. Essentially oligopoly means that "A few large sellers account collectively for the whole or major part of production and sales"\(^{23}\) in a given industry. One of the effects of oligopoly is that the products marketed by the few manufacturers have similar, or at least substitutable, characteristics. Because of this and the fact that a lowering of prices invites swift competitor reaction,\(^{24}\) it is difficult for a firm to increase its share of the market. However, it can be done by resorting to methods other than price competition.\(^{25}\) Reciprocal trading is such a method. Its principal attraction to the oligopolist rests in the automatic relegation of price to a

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23. NATIONAL INDUSTRIAL CONFERENCE BOARD, ANTITRUST IN AN EXPANDING ECONOMY 10 (1962).

24. "It is conceivable that the oligopolist might initiate a price reduction on the assumption that rivals will leave their prices unchanged. It will soon discover ... that this assumption is not valid. If its price reduction is successful & results in shifting a significant volume of sales from rival firms, these firms will take steps to check their loss of sales. These countermoves by the rival firms will in most cases involve price reductions on their products. . . . In some cases, a series of price reductions might be set in motion, resulting in extreme price instability & a price war." CARTER & SNAVELY, INTERMEDIATE ECONOMIC ANALYSIS 219 (1961).

25. A firm often attempts, through various techniques, to distinguish its products from those of competitors. This is commonly known as "product differentiation." See BAIN, BARRIERS TO NEW COMPETITION 114 (1956). For a brief discussion of the impact of product differentiation on competition see REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 330-31 (1955).
non-influencing consideration. In other words, it is unnecessary to disturb price levels. Hence, sales can be increased without awakening the retaliatory propensities of competitors.

Second, one of the characteristics of today's economy is a movement towards extension and diversification\textsuperscript{26} into new and unrelated product lines—an objective that is accomplished through conglomerate mergers. Firms no longer depend upon a single market. By spreading interests over several markets a company can hedge against the failure of a single product. However, to maintain and support diversification obviously requires a substantial increase in the quantity of purchases. As the need to explore and utilize heretofore untapped sources of supply increases, the opportunities to engage in complete reciprocity are correspondingly multiplied.\textsuperscript{27} In fact, diversification might afford a conscious and deliberate means of dilating a firm's existing reciprocal trading power.

Third, the occurrence of the severe depression of the '30's and the periodic appearances of subsequent recessions has made reciprocity attractive to many firms which otherwise might never have used it.\textsuperscript{28} Any qualms as to the ethical and legal propriety of the practice were, and perhaps still are, considered secondary to the primary goal of keeping the company in business. One commentator describes the situation as follows:

Whatever the implications involved in this controversy may be, it does appear . . . not only that the sales volumes sought on this basis (reciprocity) in the middle and late '30's was substantially larger than in 1929, but that it was growing steadily. There were several reasons for this increased popularity (of reciprocity), among which may be mentioned the effort to maintain sales volume during a depression . . . and the belief that under competitive conditions as they prevail in some lines of business, many companies must resort to reciprocity in order to survive.\textsuperscript{29}


\textsuperscript{27} "A firm that makes many products can more readily find a supplier that is also a potential buyer of what it makes. And, if it is a large purchaser, it may readily persuade its supplier to buy from it . . . A diversified firm may 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 (in the sale of which it need not resort to reciprocal buying), it can use its purchases of raw materials for this product to increase its sales of products encountering more nearly competitive markets." Stocking and Mueller, Business Reciprocity and the Size of Firms, 30 J. Bus. U. Chi. 73, 77 (1957).

\textsuperscript{28} Id. at 296; Heenritz, op. cit. supra note 5, at 554-55.

\textsuperscript{29} Lewis, Procurement: Principles and Cases 415 (1949).
There is little empirical data (particularly of a statistical nature) available upon which to base definite conclusions about the ultimate economic effects of reciprocal trading. The judicial decisions that devote attention in depth to the practice deal mainly with the more immediate problem of legality. These cases will be discussed in detail later. In order to place proper perspective on these cases it is necessary to summarize some of the more pronounced economic implications of reciprocity.

Reciprocity disturbs the normal competitive equilibrium of those industries in which it is prevalent. The more traditional competitive components, such as price, quality, and service, lose part of their natural importance as marketplace levers. Sudden shifts in the market standings that cannot be attributed to normal causes occur. Monopoly can evolve in an affected industry. Entry into a new market, already difficult, may become impossible to a company that is unable to make reciprocal buying arrangements. Likewise, successful reciprocal trading automatically forecloses the market to the practitioner's competitors. Edwards points out that "Between two powerful concerns . . . reciprocal buying may be a device by which each supports and helps consolidate the strength of the other, so that independent producers of both commodities are deprived of market opportunities." Moreover, since reciprocal trading is predicated upon the power to make quantity purchases, the already large and diversified firm which participates in many markets is able to use this existing purchasing strength to increase geometrically its size. A final factor to consider is that reciprocity can be employed to extract higher prices for the practitioner's products than would normally be paid. For example, the Interstate Commerce Commission noted that large shippers suggested to carriers that "in view of the routing of traffic which they control, the carriers could afford to pay them a higher price for their commodities than might be necessary to pay other manufacturers . . . having little or no traffic to offer."

III. THE LEGALITY OF RECIPROCITY UNDER SECTION 7 OF THE CLAYTON ACT

The only existing avenue to the regulation or prohibition of reciprocal trading is through the network of antitrust legislation. However, as has been pointed out, there is no language in any of the various trade regulation statutes designed specifically to curb the practice. The crucial problem is to determine whether a particular reciprocal buying situation

30. See generally BAIN, BARRIERS TO NEW COMPETITION (1956).
31. EDWARDS, MAINTAINING COMPETITION 179 (1949).
32. Reciprocity in Purchasing and Routing, supra note 9, at 424.
can be fitted into the judicially recognized meaning of the words and phrases of existing statutes. The *Consolidated Foods* case is the only case to date in which the Supreme Court has furnished guidelines resolving this problem. Confronted with an alleged violation of the anti-merger section of the Clayton Act, the Court struck down reciprocity through asset acquisition.

It should be mentioned that there is a close relationship between mergers and reciprocity. All three of the recognized forms of merger—horizontal, vertical, and conglomerate—furnish fertile opportunity for reciprocal trading. By horizontally increasing its holdings a firm can obtain the purchasing strength that reciprocal buying requires for success. The other two merger types can yield a situation whereby the acquiring firm’s suppliers become potential customers of the acquired company—thus opening up an opportunity for the acquiring firm to direct pressure towards the new customer-suppliers.

In order to appreciate fully the problems involved in relating reciprocal buying to Section 7, it would be worthwhile to review the relevant history of that Act.

When Section 7 was first enacted in 1914, it was designed to serve as a shield against aggrandizement of the holding company. The holding company was, during that period, the prevalent and traditional method used to exert monopolistic control. As a result of this background, Section 7 originally dealt only with acquisition of the stock of a competing firm. Subsequent application revealed the striking impotence and limited scope of the act. A merger could still be effected by merely acquiring the assets of a competitor. The same immunity applied when

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35. "A merger movement which had begun at the end of the nineteenth century & extended through 1907 was background for the merger section of the 1914 act. During that period, most mergers were effected through the purchase of stock. The most usual form of merger was for one corporation to buy the controlling stock of a competitive corporation, because it was easier to purchase stock than assets. This was especially true in the case of holding companies, since the holding company could readily exchange some of its shares for the stock of a company it was absorbing." Federal Trade Commission, *Report on Corporate Mergers and Acquisitions* 145 (1955). See, *House Judiciary Committee Report* 1191, 81st Cong., 1st Sess. 3-5 (1949).
36. The original § 7 read as follows: “No corporation . . . shall acquire, directly or indirectly, the whole or any part of the stock or share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired & the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.” 38 Stat. 731 (1914), 15 U.S.C. § 18 (1952).
stock acquisitions were subsequently converted into asset holdings. Finally, after prolonged agitation, an amendment was passed in 1950 that closed these and other loopholes and thus converted a formerly anemic law into an efficacious antimerger weapon. The germane part of amended Section 7 now reads as follows:

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.

A prevailing explanation for the passage of the 1950 amendment "was a fear of what was considered to be a rising tide of economic concentration in the American economy." In short, it was thought that there was imminent possibility of economic strangulation through a wave of corporate mergers. The reasons advanced for the explosive proliferation of mergers since 1945 are numerous: to increase overall operating efficiency, as a means of balancing oligopoly power in a particular industry, or because the acquisition of competitors would provide "an opportunity for quick attainment of economies of scale, diversification, and stability of operation in both production and distribution without further competitive struggle." Moreover, the conglomerate merger, where a firm acquires the facilities to manufacture and market non-competing or unrelated goods, produces a pertinent advantage in that new customer-supplier relationships are opened up for reciprocal buying

43. For a summary of the factors that precipitate mergers see Burns, A Study of the Antitrust Laws 280-2 (1958).
44. The merger of two small firms might convert a "Big Four" oligopolistic industry into a "Big Five." See generally Stewart & Turner, The Significance of Oligopoly in Acquisition and Exclusive Dealing Situations Under the Clayton Act, 25 CINN. L. REV. 427 (1956).
expedition. It was a conglomerate merger situation that confronted the Court in the Consolidated Foods case.

Reciprocity As the Determinative Factor in a Section 7 Violation: The Consolidated Foods Case

Consolidated Foods Corp., incorporated as a wholesale grocery house, operates from a broad and diverse base of food industry enterprises. In keeping with the trend of the times it attained its present position of dominance through a series of mergers. In 1955 the Federal Trade Commission noted that "This outstanding example of an organization in the food industry which combines production and wholesale distribution on a large scale has developed mainly by the acquisition of existing wholesale grocery and food processing companies during the past 10 years." In 1951 Consolidated acquired the assets and business of Gentry, Inc., a firm that concentrated on manufacturing dehydrated onion and garlic. The dehydrated onion and garlic industry was an oligopoly. There were three domestic producers—Gentry, which, at the time of the merger, accounted for 28 percent of dehydrated onion sales and for 51 percent of the garlic market, Basic Vegetable Products, Inc., which controlled 60 percent and 36 percent of the dehydrated onion and garlic market respectively, and Pucinelli Packing Co., which accounted for the remainder or around 10 percent of total sales of both products. By 1958 Gentry had increased its share of dehydrated onion sales to 35 percent (Basic's share dropped from 60 percent to 57 percent) but its garlic market share dropped to 39 percent—a 12 percent loss. During the same time Basic increased garlic sales to 14 percent. The primary market for dehydrated onions and garlic is the food processing industry where firms such as Armour and Swift use these items in the manufacture of their food products.

It was necessary that Consolidated Foods, as a wholesale distributor and retailer of food products, make sizeable purchases from food processors. The gravamen of the Federal Trade Commission's complaint


47. REPORT ON CORPORATE MERGERS AND ACQUISITIONS, supra note 35, at 117.

48. Gentry had assets valued at $1,600,000 and operated two plants. Consolidated Foods' assets at the time of merger totaled $60,000,000. Consolidated Foods Corp. v. F.T.C., 329 F.2d 623, 624 (7th Cir. 1964).

49. Id. at 625.
was that Consolidated Foods used this substantial purchasing power as a means of persuading its suppliers to buy their supply of dehydrated onions and garlic from Gentry. The merger of Consolidated Foods with Gentry was, therefore, destroying competition in the dehydrated onion and garlic industry. There is complete agreement among the three bodies which heard the case that Consolidated did, on various occasions, overtly endeavor to implement reciprocal trading arrangements with their suppliers. However, there is some conflict as to the degree of success achieved by Consolidated Foods. The Seventh Circuit, relying upon a statistical comparison between 1950 and 1958, concluded:

And here 10 years of post-acquisition experience—during which Consolidated attempted overt enforcement of reciprocal buying practice where it deemed it might be successful—serves to demonstrate that neither the acquisition of Gentry, in and of itself, nor the overt attempts to use buying power to influence sellers to Consolidated to purchase from Gentry resulted in substantial anticompetitive effect. No substantial impact on the relevant market occurred, and absent some factor which requires a different approach we are of the view that the experience reflected by this post acquisition period must weigh heavily in appraising future probabilities.

In reversing the decision of the circuit court the Supreme Court suggested that too much weight had been given post-acquisition evidence. However, the essential area of dissidence between the two courts resides in the character of the interpretation that is to be given this evidence. Mr. Justice Douglas, in an opinion that abounds with quotations from the Federal Trade Commission decision, did not accept as the determining factor in the case the statistical evaluation of the relative market positions of the firms participating in the dehydrated onion and garlic industry. The fact that Gentry was unable to improve appreciably its market position even though attempts at reciprocity were made was not controlling since a close reading of the record reveals more salient factors. These factors are the peculiar nature of the industry in question and the fact that Gentry was an influential participant in an oligopoly.

50. The F.T.C. noted that the merger “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’.” Consolidated Foods Corp., Dkt. 7000, Trade Reg. Rep. ¶ 16182 at 20974 (Transfer Binder 1961-63).
52. 380 U.S. at 598.

Gentry and its competitors did not manufacture their respective products with the same technical competence. Basic Vegetable Products had historically been the leader in eliminating technical defects in the dehydration productive process. The Supreme Court adopted the Commission's findings that although Gentry had made inroads on Basic's superior technical proficiency the latter firm still maintained the lead. (It was acknowledged that Puccinelli's products were of a quality below its competitors'). Yet, even with its technical lead and the capacity to place a superior product on the market, Basic was nevertheless unable to dominate the dehydrated onion and garlic industry. The share of the market relationship between the two dominant firms remained almost constant in the years following the merger. To the Court the most plausible explanation for Gentry's ability to maintain its position against a competitor with a superior product was the use of reciprocal buying power by Consolidated Foods.53

2. The Capacity of the Acquired Firm to Command a Substantial Share of the Market.

Before reciprocity through merger can be curbed the requisite elements of a Section 7 violation must be satisfied. Mere proof that the acquisition results in the use of reciprocal buying practices is not sufficient. The Government still has the burden of demonstrating that, as a result of the acquisition, competition may be lessened or that there is the probability of a monopoly developing.54 In the Consolidated Foods case the Court indicated that the pivotal factor in fulfilling this requirement was the fact that Gentry occupied a position of considerable strength in what was actually a two firm oligopoly. Because of its power, any move that Gentry made, regardless of the acquisition, would have significant impact on the pattern of competition in the dehydrated onion and garlic industry. And the merger of Gentry with a large company which used

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53. The Court cited with approval the following analysis by the Commission: "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. . . . It is for this reason that we reject respondents' argument that the decline of its share of the garlic market proves the ineffectiveness of reciprocity. We do not know that its share would not have fallen still farther, had it not been for the influence of reciprocal buying." Id. at 599.

54. In summarizing the effects of reciprocity the Commission stated that if the action had been under § 5 of the Federal Trade Commission Act, an order to cease and desist would have been justified without further analysis. But since the action was under § 7 the Commission was required "to consider, in the context of Section 7, whether the merger . . . brought about a change in the structure of the industry whose effect—in relation to reciprocity—may be substantially to lessen competition." Consolidated Foods Corp., Dkt. 7000, Trade Reg. Rep. ¶ 16182 at 20978 (Transfer Binder 1961-63).
its newly gained strategic market position and purchasing power to exert an influence on the sales situation in the oligopoly was a strong indication that competition was being lessened. In effect, the use of reciprocity, brought about by the merger, disturbed the fragile competitive equilibrium between the two oligopolists. The Commission concluded\(^5^5\) and the Court agreed that:

> With two firms accounting for better than 85% of both product lines for eleven successive years, maximum concentration short of monopoly has already been achieved. If it is desirable to prevent a trend toward oligopoly, it is \textit{a fortiori} desirable to remove . . . obstacles to the creation of genuinely competitive conditions in an oligopolistic industry. Respondent's reciprocal buying power, obtained through acquisition of Gentry, is just such an anti-competitive obstacle.\(^5^6\)

Certainly one Supreme Court decision provides a somewhat feeble foundation for accurate prediction. However, it does seem clear that in the \textit{Consolidated Foods} case the Court revealed a commitment to the proposition that if (1) the acquired firm controls a substantial portion of the market and (2) is the recipient of the benefits of reciprocal buying due to the activities of the acquiring firm then competition has been affected sufficiently to satisfy the requirements of Section 7. This conclusion, in itself, raises significant questions. For example, what are the quantitative dimensions of "a substantial portion of the market?" Gentry exercised dominion over approximately 32 percent of the dehydrated onion and garlic industry. This was considered "substantial." Would any degree of market control below this figure be considered substantial and if so, how far below? Assuming that the acquired firm occupies a position of dominance, is it sufficient to demonstrate merely that the threat and opportunity for reciprocity were present and hence a "probability" existed that it would be used, or is it necessary to prove the actual use and success of the practice?

Another problem is foreclosure. A successful reciprocal buying arrangement automatically closes the market to competitors of the acquired firm. How great must the foreclosure be or, stated differently, how much buying influence (power to foreclose) must the suppliers of the acquiring firm have in the acquired firm's market? The Federal Trade Commission was impressed by the fact that "firms that both supplied Consolidated and bought in volume from Gentry purchased more than 25% of the onion produced by the industry and not quite 25% of the

\(^{55}\) \textit{Id.} at 20980.

\(^{56}\) 380 U.S. at 597.
A related question is how much purchasing pressure must the acquiring firm be capable of exerting? There seems little doubt that it must be sufficient to be persuasive in prompting suppliers to buy from the acquired firm. The Supreme Court merely noted that Consolidated Foods was a "substantial purchaser." However, there is added confusion in this area. A company's ostensible buying power may disintegrate under analysis. And this is exactly what occurred according to Mr. Justice Stewart's concurring opinion. Consolidated's actual field of persuasion was reduced because it was unable to influence its economically independent suppliers such as Armour and Swift. Finally, would obstacles not encountered in the Consolidated Foods case, such as delineating the relevant market and defining the line of commerce, have any effect on the central issue of determining the legality of reciprocal buying practices in terms of Section 7 of the Clayton Act? Obviously these are questions that can only be cleared up through additional decisions.

The Government subsequently used the Consolidated Foods case in support of a motion for a preliminary injunction in U.S. v. Penick and Ford, Ltd., Inc. It was charged that the impending merger of Reynolds Tobacco Co. with Penick and Ford violated Section 7 because Reynolds would take advantage of the opportunity to use its considerable purchasing power to foster Penick's growth at the expense of competition. Penick is the fourth largest of ten firms which manufacture and market corn starch products. Its share of the over-all market is 12.8 percent. The relevant market (the entire U.S.) and the line of commerce (corn wet
milling process products) were established without conflict. The primary purchaser of the corn wet milling process products is the corrugated box industry. The allegation of reciprocity was predicated on the fact that Reynolds was a large user of paper and cardboard products and hence there was an inference that this strategic relationship would be used to persuade suppliers to purchase from Penick and Ford. This inference was reinforced by the past history of reciprocity in the acquired firm's industry. The Government's position was summarized by the court:

It is urged that the presence in the industry of reciprocal trading policies and the degree to which they currently abound therein gives rise to the inference that should a major source of purchasing power be inserted into the existing structure, competition would be greatly injured as a result of the increased reciprocal power which could be generated by a corporation of great financial magnitude.~

The lack of post-acquisition evidence forced the Government to rest its case on the above theory. It is quite apparent that the core of the theory, i.e., that a history of reciprocity in an industry, plus the injection of the purchasing power of a large acquiring firm automatically lessens competition, was drastically diluted by the factual background. In dismissing the Government's motion and distinguishing the Consolidated Foods case, the court noted that Penick and Ford did not dominate the corn starch products market—12.8 percent does not constitute substantial control. Reciprocal trading as a significant influence in the corn starch industry was belied by the intense competition among the 10 firms and by the highly successful entry of a new firm.~ Moreover, Reynolds did not rely upon reciprocal buying arrangements in its dealings prior to the merger in question. "At no time did the Government show or introduce proof that Reynolds had ever deviated from the non-reciprocal policy either in its own business or in the business of the concerns acquired by it under its diversification program." Finally, there was doubt as to

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63. *Id.* at 81002.

64. "The industry structure under consideration is far different than the oligopolistic market found in Consolidated. The corn wet milling industry has ten viable, aggressive competitors none of which clearly dominates the entire market as Gentry and Basic did in Consolidated. Furthermore, the history of the industry as presented by the proofs evidence the entry into the competitive market by a new company (Grain Processing) which through the use of more efficient production means was able to effectively engage in price competition and swiftly move to the head of the industry in . . . 3½ years. While reciprocal trade relations was present in the industry, it was an insufficient factor to stifle the meteoric rise of this company." *Id.* at 81004.

65. *Id.* at 81004.
Reynolds' capacity to influence. This was because its connection with the corn starch products industry was through a single supplier whose dependence for supplies from the acquired firm or its competitors was open to question. The theory advanced by the Government has not yet received an adequate test. Given a more congenial fact foundation it would perhaps yield a different result.

Reciprocity As A Peripheral Factor in Section 7 Violations

Reciprocity has been the controlling issue very few times in any antitrust suit. Likewise it has made an infrequent and sometimes barely discernible appearance as a secondary force in Section 7 decisions. The trial court record of United States v. E. I. duPont de Nemours and Co. furnishes a worthwhile description of a case where the existence of reciprocal trading is acknowledged but is discounted as playing an inconsequential role. The case also reflects the wide range of reciprocal buying opportunities available to the large diversified organizations.

During the years 1917 to 1919, Du Pont acquired a 23 percent stock interest in General Motors. It was alleged that Du Pont used this stock ownership as a means of securing the new and potentially enormous market that General Motors represented and in doing so automatically precluded competitors from that market. The case reflects a two level view of reciprocal trading. There is the broad concept of reciprocity that motivated the entire transaction and there are specific manifestations of reciprocal buying that are discussed in detail by the trial court.

When Du Pont channeled funds earmarked for expansion purposes into the purchase of General Motors stock it did so with the anticipation of gaining a new group of customers. "A major consideration was that an expanding General Motors would provide a substantial market needed by the burgeoning duPont organization." It was, therefore, a purchase made with the primary objective of inducing return purchases. And this is, of course, the fundamental principle upon which reciprocity is predicated. While the Supreme Court directed its attention towards

66. See, e.g., cases cited note 10 supra.
67. One of the earliest § 7 cases in which the use of reciprocity is recognizable, although barely, is United States v. New England Fish Exchange, 258 F. 732 (D. Mass. 1919). In order to control fish sales, a group of Boston fish dealers arranged to have all the fresh fish caught in the immediate area channeled through one central wharf or "Exchange." Subsequent stock acquisition mergers among the dealers precipitated § 7 charges. A close reading of the decision indicates that the dealers combined purchasing power was used to persuade the trawler captains to pay a stiff fee for the use of the Exchange. Translated into contemporary reciprocity vernacular, the fish dealers said, "We will buy fish only from those trawlers who use our wharf and of course pay the accompanying fee."
69. 353 U.S. at 601.
Du Pont's defense that the stock purchases were for investment purposes only, the undercurrent of reciprocity that supported the entire transaction was also revealed. Note the following language describing the activities of a Du Pont executive which indicates Du Pont's motive for the stock purchases and their determination to make sure that their investment generated the anticipated reciprocal purchases:

Haskell frankly and openly set about gaining the maximum share of the General Motors market for duPont. In a contemporaneous 1918 document, he reveals his intention to pave the way for perhaps a more general adoption of our material, and that he was thinking how best to get cooperation (from the several General Motors Divisions) whereby makers of such of the low priced cars as it would seem possible and wise to get transferred will be put in the frame of mind necessary for its adoption (duPont's artificial leather).

Haskell set up lines of communication within General Motors to be in a position to know at all times what duPont products and what products of duPont competitors were being used. It is not pure imagination to suppose that such surveillance from that source made an impressive impact upon purchasing officials. It would be understandably difficult for them not to interpret it as meaning that a preference was to be given to duPont products.71

The reciprocity underlying the origins of the Du Pont-General Motors relationship was obscured by the ensuing proliferation of industrial might of both organizations and by the more obvious issue of whether the stock connection "led to the insulation of most of General Motors market from free competition, with the resultant likelihood . . . of the creation of a monopoly of a line of commerce."72 However, subsequent activities by both firms yielded more identifiable manifestations of reciprocal buying.73 For example, General Motors effectively utilized the Trade Relations Department concept. That is, selling and buying data from the entire G.M. structure was coordinated under the supervision of a General Purchasing Committee, which consolidated purchasing...
power into a single force. The significance of General Motor's expanding purchasing power and the stock leverage possessed by the Du Pont organization did not escape the notice of the Du Pont officials. In noting that they received special consideration from Bethlehem Steel because of the purchases G.M. made from that firm and that Bethlehem considered Du Pont and G.M. as a single interest, a Du Pont executive "conceived the idea that it might be of value to duPont to use their purchasing power for the purpose of influencing concerns from whom they purchased to purchase in turn from them, that if the purchasing power of General Motors were added to that of duPont . . . it would result in securing large business for duPont. . . ."

That Du Pont exhibited a sensitivity to the possibilities of reciprocal buying is apparent. But the trial court discovered that this "sensitivity" was restricted to Du Pont and that reciprocity did not emanate from the General Motors-Du Pont relationship. The Du Pont case does not, therefore, constitute even minimum authority on reciprocal buying. Yet, the case does raise the question of whether a situation could arise where Section 7 is violated even though there is no overt attempt by either of the merged firms to assert reciprocal purchasing power pressure. Did not Bethlehem Steel consider, without prompting, the advantages of buying from Du Pont as a means of insuring sales to General Motors? In other words, what happens when the relationship between the merged firms and suppliers is such that the advantage of reciprocity to the latter is so evident that no pressure from the possessors of the buying power is necessary? "Congress used the words 'may be substantially to lessen competition . . .' to indicate that its concern was with probabilities, not certainties." Whether the above described situation measures up to the dimensions of "probability" has not yet been given conclusive judicial treatment. However, Mr. Justice Stewart, in concurring in the Con-

74. 126 F. Supp. at 279.
75. The Supreme Court noted only one instance of reciprocity and it was not directly related to the G.M.-DuPont situation. "Chrysler bought Duco in large volume until the early 1930's when, in pursuance of a policy to obtain supplies to whom it would be the most important customer, it concentrated its purchases on one company, Pittsburgh Plate Glass." 353 U.S. at 634.
76. For a well substantiated view contra see Stocking and Mueller, Business Reciprocity and the Size of Firms, 30 J. Bus. U. Chi. 73 (1957), where at 82-3 the authors describe the cooperation between the two firms in the following language: "DuPont apparently found General Motors' disposition of its request satisfactory and from time to time took advantage of General Motors' willingness to lend its purchasing power on special occasions to DuPont to help it get business. As early as August 13, 1924, Sloan had informed Lynak that DuPont had requested General Motors' help in contacting Fisk Rubber Company and that, after a meeting in a General Motors' executive's office between DuPont & Fisk representatives, 'a very valuable business has been given to the DuPont interest by the Fisk people'."
solidated Foods case, did indicate that "It obviously requires more than this kind of bare potential for reciprocal buying to bring a merger within the ban of § 7."78 To him "the mere effort at reciprocity cannot be the basis for finding the probability of a significant alteration in the market structure."79 On the other hand, in U.S. v. Ingersoll-Rand Company,80 the mere presence of reciprocal buying power was taken into consideration as a secondary factor by the trial court in granting a preliminary injunction. The court noted that the steel suppliers of Ingersoll-Rand "may tend to prefer the acquired companies as the source of supply of equipment used in his 'captive' mines, and the advantage accruing to him would not have to be pointed out by Ingersoll-Rand." (Emphasis supplied.)81

If the few reciprocity through merger cases are analyzed in terms of the totality of Section 7 decisions, it is possible to distill some tentative conclusions. It appears that in those antimerger actions in which reciprocal buying plays the determinative role or is a prominent influence, the acquired firm must exert substantial control over the industry in which it competes. The quantitative boundaries of "substantial control" are as yet undetermined. Moreover, the tripartite relationship between the acquiring firm, its suppliers and the acquired concern must be vigorous. The purchasing strength of the acquiring firm must be powerful enough so that its suppliers find it sufficiently advantageous to buy from the acquired firm. Likewise the suppliers must possess sufficient buying

78. 380 U.S. at 603.
79. Id. at 604. This seems to be in accord with the trial court's attitude in U.S. v. Penn-Olin Chemical Co., 217 F. Supp. 110 (D. Del. 1963). The Government, citing Pennsalt's history of reciprocal trading, alleged that the joint venture between Olin and Pennsalt to manufacture and market sodium chlorate would allow them "to use their combined buying power as a basis for making reciprocal arrangements with vendors who are sodium chlorate buyers, which will give Penn-Olin an undue sales advantage over its competitors." U.S. v. Penn-Olin Chemical Co., supra at 126. The court, relying on the fact that since the inception of the venture competition increased their plant facilities and a new competitor had entered the market, concluded, at 126, that "whatever advantage Penn-Olin might be able to obtain through reciprocity arrangements... scarcely warrants the conclusion that as a matter of reasonable probability Penn-Olin will ultimately dominate the sodium chlorate market." The Supreme Court, focusing on whether there was a "reasonable probability that either one of the corporations would have entered the market by building a plant, while the other would have remained a significant potential competitor," remanded the case for further findings. U.S. v. Penn-Olin Chemical Co., 378 U.S. 158, 175-76 (1964).
80. 218 F. Supp. 530 (W.D. Pa. 1963), aff'd, 320 F.2d 509 (3rd Cir. 1963). The defendant, a world wide manufacturer of industrial machinery, acquired the assets and property of three companies: Goodman Mfg. Co., a leading manufacturer of underground coal mining machinery; Lee-Norse, who produces continuous miners and in 1961 accounted for more than 51% of that market; and Galis Electric and Mfg. Co., a manufacturer of various types of drills used in underground coal mining machinery. The size and market position of the acquiring firm and of the three acquired firms reduced reciprocal trading factors to secondary importance.
81. 320 F.2d at 524.
Reciprocal Trading

capacity so that changes in their sources of supply will affect the market position of the acquired firm and its competitors. In fact, it has been argued that "the percentage of market accounted for by the acquired firm in its line of commerce . . . is not as significant . . . as the volume of the acquiring firms' purchases from its supplier and the size and power of those suppliers." 82 There is oblique support for this comment through Mr. Justice Stewart's suggestion that the quality of the economic position of the supplier must be examined. 83 Some suppliers, because of public acceptance, or other reasons, might be immune to any reciprocal leverage attempted by the acquiring firm.

The number of Section 7 cases in which the courts' attention will be focused on reciprocal buying will increase sharply. This is due in part to an ever increasing awareness of the intrinsic anti-competitive features of the practice. Reciprocity very definitely "has little or nothing to be said in its favor." 84 And perhaps just as important to the rise in the attention being given this aspect of buying power is the ascendancy of the conglomerate merger. 85 The possible methods of attacking the vertical and horizontal mergers have, to a great extent, crystallized into recognizable patterns. This is not true with the conglomerate merger. Judicial attitudes toward this form of merger are still in a state of development. 86 It has been pointed out that:

Neither the legislative history nor the law itself provides any clue as to the legal or economic theory under which the acquisition by one company of another engaged in an unrelated or noncompeting geographical or product market might result in a 'substantial lessening of competition.' . . . 87

The expanding recognition of the conclusive manner in which reciprocal trading stifles competition means that the existence of the practice will become an inviting route through which the conglomerate merger can be attacked. If the necessary customer-supplier relationship exists and there is provable evidence of reciprocal buying pressures the

83. See, note 59 supra.
84. Turner, supra note 46, at 1387.
86. Regardless of the present state of judicial interpretation, it is clear that the amended § 7 applies "to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).
87. Burns, supra note 73, at 307.
chances of the conglomerate merger surviving successful prosecution are considerably lessened.

VI. Reciprocity Under Section 5 of the Federal Trade Commission Act

Unlike Section 7 of the Clayton Act, which depends upon asset or stock acquisition as the sine qua non for application, the language of Section 5 of the Federal Trade Commission Act\(^8\) can operate as a direct impediment to reciprocity. In three Section 5 cases to date, Waugh Equip. Co.,\(^9\) Mechanical Mfg. Co.,\(^9\) and California Packing Corp.,\(^9\) the Commission has issued cease and desist orders premised upon the anti-competitive effects of reciprocal trading. These cases, all handed down in the 1930's and none of which received appellate court review, constitute, along with the legislative commentary supporting the Federal Trade Commission Act, the only sources from which meaningful conclusions can be formed as to the scope of Section 5's coverage of reciprocity.

Section 5 is potentially the most elastic and far reaching piece of legislation in the antitrust repertory. The succinctness of its terminology is exceedingly deceptive. The germane portion reads as follows: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."\(^9\) Since amendatory language was added in 1938 the utilization of the act to shield the consumer from misrepresentation and other deceptive practices\(^9\) has overshadowed the original expansive embargo on "unfair methods of competition." But it is, of course, the latter phrasing, representing as it does a relatively untapped reservoir of regulatory power, that is relevant to the problem of reciprocity. The language is so broad as to lack definitive precision. As a result there has not been a consistent pattern in the judicial delineation of activity held to be violative of this section of the act. Moreover, the labyrinth of pre-enactment statements\(^9\) by legislators encumbers the already complex problem of interpretation. The debates accompanying the proposed piece of legislation were mixed with such


\(^{89}\) For a concise summary of the legislative background of § 5 see Henderson, Federal Trade Commission 1-49 (1924).
a cross-current of definition and explication that one commentator was prompted to remark that "almost any construction of § 5 can be found in the protracted and wearisome debates during the summer of 1914." A most notable attribute of the statute is the intentional absence of definition. A compendious and articulate explanation for this omission was furnished by Mr. Justice Brandeis in the following language:

Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the Act left the determination to the Commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing, and if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore an enumeration, however comprehensive, of existing methods of unfair competition, must necessarily soon prove incomplete, as, with new conditions constantly arising, novel unfair methods would be devised and developed.

That the Commission must give particularized substance to Section 5 of the Federal Trade Commission Act has often been stated. However, the Commission’s license to give meaning to the Act has court imposed boundaries. It is left to the courts to develop the legal standards that are to be applied in determining whether a practice is an unfair method of competition. A pertinent legal standard is that the act does apply to market activities that have not yet ripened into antitrust viola-


"From the various definitions offered, 'unfair competition' seemed to include—
A. Every act of passing off one’s business or goods for another’s.
B. All methods of competition tending to restraint of trade or monopoly which have been forbidden by the Sherman Law.
C. Substantially all violations of the antitrust laws. . .
D. All unfair methods of stifling competition.
E. All other acts which the 'Commission . . . decides . . . may lead to monopoly or restraint of trade' though not now forbidden by the Sherman Act.
F. All other acts affecting a competitor for which 'a remedy lies either at law or in equity.'
G. All other acts which either affect a competitor and are 'against public morals' or in any way interfere with economic 'efficiency' though heretofore quite lawful and not forbidden by the Sherman Law or by any other law."


In addition, Section 5 is not necessarily confined to conduct that was illegal at common law or that has been condemned by the Sherman or Clayton Acts. Obviously these legal standards are, of themselves, broad enough to invite further elucidation. In any case, it is against the wide tapestry of the original language, over which legal standards have been superimposed, that reciprocal trading must be viewed.

The Cases: A Trilogy of Coercive Reciprocity

The Waugh case provides an excellent illustration of the severe market disturbances caused by reciprocal buying and the potential advantages it can assure.

Organized in 1902 to manufacture railroad draft gears the Waugh Draft Gear Co. led, at best, a marginal existence. However, an abrupt change for the better occurred in 1924 when the company was reorganized into the Waugh Equipment Co. The new firm issued 7,000 shares of common stock—2,000 going to former shareholders while the remaining 5,000 passed, without consideration, to the two promoters of the venture. Sometime within the next four months three Armour and Co. executives (executive vice-president, vice-president in charge of traffic, and the latter's assistant) received one-third of the promotion stock. The Federal Trade Commission contended that in exchange for the stock the three Armour officials agreed “to use their influence with the officials of the railroads, particularly the traffic officials and through them the executive and other departmental officials of the railroads, to solicit and secure orders for the draft gears sold by the Waugh Equipment Co.” Armour, as a large meat packer with subsidiaries all over the U.S., was a substantial purchaser of railroad traffic facilities. The influence that it could exert on the various railroads eagerly competing for their business was considerable. This influence was magnified by the fact that Waugh’s competitors did not have the necessary relationship with a large purchaser of railroad traffic facilities and thus were unable to retaliate with reciprocal buying pressure of their own.

There was a remarkable change in the fortunes of the newly organized company. In 1924 Waugh’s sales of draft gears for new freight equipment were less than 1 percent. By 1930 their sales figure had jumped to 35 percent—tops in the market. The fact that it was not until 1929 that Waugh was able to place a product of competitive quality on the market is an impressive testimonial to the power of reciprocity.

99. 15 F.T.C. at 239.
In concluding that the activities of Waugh and the three Armour executives "under the conditions and circumstances described in the . . . findings . . . are unfair methods of competition"\textsuperscript{100} the Commission was on solid ground. The facts clearly indicated that competition had been drastically lessened and that there was an excellent chance of Waugh monopolizing the draft gear industry. Hence, the effect of the cease and desist order was "to nip in the bud practices which, when full blown, would violate the Sherman or Clayton Act."\textsuperscript{101} However, the key to the decision seems to be the unrestrained and coercive manner in which reciprocity was used. Threats to withdraw business unless purchases were made from Waugh were communicated and, on occasion, actually carried out. The effect of these threats by an economic force of the magnitude of Armour was to prevent "the customers to whom the respondent corporation and its competitors are trying to sell their products, from exercising their free will and judgment in determining which device is the most efficient and will best serve their needs at the lowest net cost. . . ."	extsuperscript{102} Moreover, the exchange of stock between the promotors of the reorganized Waugh Equipment Co. and the Armour officials was consciously predicated on the anticipated use of reciprocal buying. Finally the Commission was impressed by the respondent's monopoly on reciprocal buying. Since they were not significant customers of the railroads, it was impossible for competitors to retaliate—unless they resorted to bribery.

The factual background in \textit{Mechanical Manufacturing Co.} decision is in many respects similar to the \textit{Waugh} case.\textsuperscript{103} Swift and Co., also large meat packers, used their sizeable status as a customer of the railroads "to induce and compel the officials of railway companies to give undue preference to draft gears and bumping posts manufactured and sold by . . . Mechanical Manufacturing Co."\textsuperscript{104} Swift interests owned 65 percent of common stock and around 87 percent of the preferred stock of Mechanical. The Commission, just as in the \textit{Waugh} case, issued a cease and desist order on the theory that reciprocal buying had been used by the respondents to coercively\textsuperscript{105} suppress competition. How-

\textsuperscript{100} Id. at 247.
\textsuperscript{102} 15 F.T.C. at 246-47.
\textsuperscript{103} There was more than a superficial similarity between the two cases. In 1929 Mechanical assigned its license to manufacture and sell centering devices to Waugh. Subsequently Mechanical, on two occasions, notified its customers "that it would be satisfactory for said customers to purchase Waugh draft gears in place of Durable draft gears." 16 F.T.C. at 74.
\textsuperscript{104} Id. at 72.
\textsuperscript{105} The coercion consisted of making known to railroads, in personal interviews and letters on Swift stationary, that Swift & Co. owned Mechanical and therefore
ever, there are subtle distinctions between the two decisions. The findings by the Commission do not indicate the degree to which competition was lessened in the affected industry by the activities of Swift and Co. It was clearly established that reciprocal buying of an unconcealed nature was utilized. Yet there was no clear cut statistical determination as to the market alterations generated by the practice. Moreover, the Commission refrained from allegations of monopolization. Hence, *Mechanical Manufacturing Co.* represents a slight departure from the standards laid down in the *Waugh* decision. *Mechanical* seems to stand for the proposition that it is an unfair method of competition for a firm to make demands that business be conducted on a reciprocal basis when the threatening firm is fully capable of enforcing its demands and actually makes a move in that direction. It is obvious that the ultimate effect that reciprocal buying has on the market must be considered, but it nevertheless becomes secondary. In other words, it is not necessary to wait until the effects of reciprocity appear in a discernible violation of some other antitrust statute before Section 5 becomes applicable. The emphasis of the Commission's investigation in the *Mechanical* case was on coercive conduct and the capacity of the firm to make good its threats. However, it should be pointed out that in all three cases (*Waugh, Mechanical* and *California Packing Co.*) the affected competitors of the firm being aided by reciprocity were unable to retaliate. They did not have connections with companies capable of exerting influential purchasing power nor did they possess this power on their own. Thus, the question arises as to whether the Commission would issue cease and desist orders if reciprocal buying retaliation were possible? On principle the answer should be yes. The fact that price, quality and service are subjugated, via coercive tactics, to purchasing power is sufficient in itself to constitute a violation of Section 5—regardless of what competitors do or can do.

“Swift interests 'expected their railroad friends' or 'carriers that they patronized liberally' to buy said products on a 'reciprocity' basis or to 'reciprocate' by buying a portion of their requirements of draft gears or bumping posts . . . and, also that . . . the Swift interests were disappointed . . . with traffic officials who failed to get their railroads to order said Durable bumping posts or draft gears in substantial numbers, sometimes indicating the number which would be considered satisfactory. . . .” *Id* at 73.

106. A related question is whether a firm should be allowed to meet a competitor's reciprocal trading tactics with reciprocity pressures of its own. In other words, is a "good faith meeting of competitors' reciprocity" permissible? Although not touching directly on this point the court, in *U.S. v. General Dynamics Corp.*, 5 TRADE REG. REP. (1965 Trade Cas.) § 71518 at 81283 (S.D.N.Y. April 9, 1965) noted that "A branch of the defendant's argument . . . has been that reciprocity is a normal and expected business practice without any aura of illegality surrounding it. Insofar as the generic status of reciprocity is concerned, Consolidated Foods silences any argument of *per se* legality. Though this § 1 charge is a matter of first impression, the novel aspects concern the characterization and classification of the effects of reciprocity, not of its
The final case in the trilogy, *California Packing Corp.*, adds little to the Commission’s commentary on reciprocal trading and Section 5. However, it does provide an enlightening and revealing insight into the inherently anti-competitive qualities of the practice. California Packing Corporation, a large distributor of brand name food products, owned (through the ownership of 84 percent of the common stock of an intermediary company) Encinal Terminals—a company that was in the business of providing wharfing and the necessary accoutrements for shipping. California Packing used its substantial influence as a shipper to induce steamship lines to route their traffic through the facilities of Encinal Terminals. It also persuaded its suppliers of raw materials and other items that it would be prudent if they also used Encinal Terminals. Not satisfied with this unique double barreled reciprocity, California Packing forced many of the steamship companies to whom it gave traffic “to disclose the identity of consignees and receivers of shipments of freight cargo carried by said steamship companies . . .” so that any supplier who was not using Encinal Terminals could be brought back in line.

Based on the three decisions discussed above, the Federal Trade Commission appears to be committed to the position that it is an unfair method of competition for a firm to capitalize on the possession of substantial buying power by expressly threatening to withdraw or divert business from suppliers unless they reciprocate purchases. It has been conscious and manifest threats of economic reprisal that have caught the Commission’s attention. But economic intimations are easily disguisable. What about the situation where the purchasing agent merely accompanies the salesman on his visits to prospective customers who just happen to be suppliers? Or consider the company that coordinates purchasing and selling data within a Trade Relations Department. The mere fact that a Trade Relations Department exists is sufficient evidence to suppliers that a firm is vitally concerned with reciprocal buying. There is, therefore, no need to use less sophisticated methods, such as verbalizations, to convey threats. The essential question is whether Section 5 is sufficiently pliable to cover the more subdued and subtle techniques of economic pressure and intimidation that can be used with great effectiveness to engender reciprocal buying. It is extremely unlikely that the Commission would issue, and the reviewing courts approve, cease and desist orders in situations where a company unilaterally decides that, price and quality aside, it is good business to develop goodwill by reciprocating purchases with customers. However, in view of the broad

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107. 25 F.T.C. at 397.
principles underlying Section 5 of the Federal Trade Commission Act, and the fact that it can be used to curb an analogous device (the tying contract), it seems logical that its language should become applicable whenever an examination of an industry reveals that pressure in an identifiable form is being used to foster reciprocal buying.\footnote{108} The problem is to identify the pressure.

V. SECTION 1 OF THE SHERMAN ACT: DOES IT PROHIBIT RECIPROCAL BUYING?

Is it possible for the substantive language of Section 1 of the Sherman Act—which declares the illegality of "Every contract, combination . . . or conspiracy in restraint of trade"\footnote{109}—to be interpreted so as to prohibit reciprocal buying? The answer is yes. \textit{Consolidated Foods} furnishes support for such an interpretation by establishing that reciprocity "is one of the congeries of anti-competitive practices at which the antitrust laws are aimed."\footnote{110} However, the precise means of curbing this practice under Section 1 is still in a state of evolution. Perhaps the most meaningful approach to the problem is to review a similarly anti-competitive technique that has received Section 1 scrutiny. Such a technique is the tying contract.\footnote{111}

\textbf{The Tie-In Analogy}

A tying contract "may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."\footnote{112} The foundation of both the tying contract and reciprocal trading is the capacity to exert economic power so as to obtain a desired objective. In the former it is the possession of a protected right or a valuable product while in the latter situation the power to influence comes from purchasing strength. The normal selling determinants, price, quality, etc., are subordinated. The maximum

\begin{itemize}
\item \footnote{108} Statements by the Federal Trade Commission in the Consolidated Foods case indicate a commitment to this interpretation. \textit{Consolidated Foods Corp.}, Dkt. 7000, Trade Reg. Rep. \textit{\$} 16182 at 20978 (Transfer Binder 1961-63).
\item \footnote{109} \textit{26 Stat.} 209, as amended, 15 U.S.C. \textit{\$} 1.
\item \footnote{110} 380 U.S. at 594.
\item \footnote{112} \textit{Northern Pacific R. Co. v. U.S.}, 356 U.S. 1, 5-6 (1958).
\end{itemize}
effect of both techniques is to foreclose a portion of the market to com-
petitors. (Absolute foreclosure can result from the tying arrangement
while it is only probable that reciprocal buying pressure will foreclose.)
The minimum effect of both is to create "a priority on the business at
equal prices." These similarities support the argument that reciprocity
should receive the same treatment under Section 1 as the tying contract.

It is well established that there is a virtual per se violation of Section
1 when a seller is able to exert sufficient economic power in the market
for the tying product and the volume of business restrained in the market
for the tied product "cannot be said to be insignificant or insubstantial . . ." A translation of these requisites to the reciprocity situation
would mean that the practitioner must possess substantial purchasing
power and the reciprocated purchases must be of such volume that the
foreclosure in that market is not insignificant or insubstantial. The first
element—defining the quantitative dimensions of substantial purchasing
power that must be exercised by the practitioner—has thus far been
crucial to any attack on reciprocal trading no matter what statute is used.
What "substantial" means in this context has not yet been reduced to
authoritative standards. The second element raises even a more serious
uncertainty. Are the tying contract definitions of "not insubstantial"
applicable to reciprocity? It will be remembered that unlike the tie-in
situation, where foreclosure is definite, reciprocal buying may or may
not preclude competitors from access to a market. It will not if the
supplier is sufficiently independent or economically powerful enough to
withstand pressure. Moreover, competitors may be able to retaliate
effectively against reciprocal buying whereas once the tying contract is
effected reaction is impossible. What this means is that a higher level
of foreclosure should, and no doubt will, be required if the prevention of
reciprocity is to be predicated upon a tying arrangement analogy.

Proof of "Contract, Combination . . . or Conspiracy"

The General Dynamics case is pertinent on this point. After
merging with Liquid Carbonic Corp. in 1957 General Dynamics establish-
a Special Sales Program, which in reality was nothing more than a
Trade Relations Department. The purpose of the Program was to single
out and direct intensified sales pressure toward those firms who were on
a supplier-customer relationship with General Dynamics and its acquired

115. This was, of course, Justice Stewart's argument in the Consolidated Foods
case. 380 U.S. at 607-08.
116. U.S. v. General Dynamics, 5 TRADE REG. REP. (1965 Trade Cas.) ¶ 71518
(S.D.N.Y. April 9, 1965).
firm. In calling on customers the Purchasing Agent was often by-passed in favor of higher placed executives who would presumably be more sensitive to reciprocal trading pressures. This type of activity prompted the trial court, in denying General Dynamics' motion to dismiss, to note that the existence and the discernible functioning of a Trade Relations Department went a long way towards satisfying the level of proof necessary to establish the presence of that "Contract, combination . . . or conspiracy" which Section 1 requires. This is reflected in the following comment:

The documents in evidence lead to the altogether reasonable conclusion that reciprocity considerations were injected into sales discussion and that the intent was to rise above the normal considerations of competition by exercising the leverage which existed. The clear inference to be drawn is that the sales agreements resulting from these discussions contained implied reciprocity considerations. These agreements which emerge from a course of conduct clearly declared anti-competitive are suspect themselves because of the circumstances which surround them, though no express condition is evident on the face of the agreement. (Emphasis supplied.)

Not every firm that practices reciprocity utilizes the Trade Relations Department concept. And the increasing glare of court attention presently being given reciprocal trading makes it unlikely that firms would take a chance on inviting scrutiny by exhibiting such an obvious manifestation of intention. In other words, clear cut proof that reciprocity is the controlling ingredient in sales agreements will become increasingly difficult to establish. Hence, the decisive question is what does Section 1 require as indicia that reciprocity is the core of the arrangement? The answer could possibly depend on three related factors: 1. the volume of trade exchange between the accused and its suppliers, 2. a price, quality and service comparison between the products of the practitioner and those of his competitor, 3. the closeness of the courts' analogy between per se anti-competitive practices such as the tie-in and reciprocal buying. The larger the volume of trade exchange, a product comparison unfavorable to the accused, and the closer the analogy, the less evidence is needed to show "that reciprocity considerations were injected in sales discus-

117. "The inference is clear that to by-pass the purchasing agent—seemingly solely concerned with price, quality and service—and to go above his head, was designed to accentuate an element the purchasing agent either could not, would not, or was not able to appreciate—the existence of the supplier-customer relationship and the advantage of reciprocal trading." Id. at 81281.

118. Id. at 81284.
sions”\textsuperscript{119} and hence became a foundation of the transaction.

The necessary essentials for the efficacious use of Section 1\textsuperscript{120} against reciprocal trading are proof that sales agreements were precipitated by purchasing power leverage and that the relationship effected through the leverage resulted in market foreclosure. The level of the foreclosure requirement should not be inflexible. When customer-suppliers are sufficiently independent so that their purchases may not be the result of pressure, the level should be higher than when such conditions do not exist. Likewise, the degree of foreclosure should be greater, for reasons previously stated, than the “not insubstantial” requirement necessary for the tying contract. Of course, the main problem is in proving the existence of reciprocal buying leverage. This is the eternal problem of reciprocity.

VI. CONCLUSION

That the effect of reciprocal trading is to clog the arteries of competition is beyond dispute. The primary purpose of the practice is to make inoperative those factors that have traditionally preserved competition. The advantages flow only to the practitioner. The gain to the firms who submit to reciprocity pressures is both ephemeral and illusory. It is specious reasoning to justify acquiescence on the theory that it develops sales and promotes goodwill. Any time a firm abdicates price, quality and service as the controlling elements of its purchasing policy,

\textsuperscript{119} Ibid.  
\textsuperscript{120} § 2 of the Sherman Act likewise applies to reciprocal trading. In U.S. v. National City Lines, 186 F.2d 562 (7th Cir. 1951), five bus equipment manufacturers (including General Motors) purchased stock in City Lines at prices in excess of prevailing market quotations. City Lines used the excess cash to expand its operations by buying interest in various public transportation systems located throughout the United States. In exchange for the stock purchases City Lines agreed to buy all future supplies required by the transportation systems from the manufacturer’s. The court concluded that competing suppliers would be “completely eliminated and the business of supplying busses, tubes, tires to the public transportation system of the 45 cities is entirely in the hands of the suppliers—in other words, monopolization by them.” U.S. v. National City Lines, supra at 567. § 2’s somewhat higher standards of application will undoubtedly mean that it will be used only in those instances where the effects of reciprocal trading have reached the terminal stage. In the Government’s pending action against General Motors, U.S. v. General Motors Corp., 61-Cr-356, N.D. Ill. (indictment), the Department of Justice has charged, at 12-13:

“21. General Motors has exercised the monopoly it unlawfully acquired and maintains in the following ways, among others:
(b) By giving preference in routing traffic to railroads which purchase General Motors’ railroad locomotives with the purpose or effect of inducing purchases of railroad locomotives from General Motors.
(c) By using . . . General Motors’ freight shipments when attempting to sell railroad locomotives with the purpose or effect of inducing actual or potential customers to purchase all or a large portion of their railroad locomotives from General Motors.”
it has mortgaged its future capacity to compete. Finally, evidence seems to indicate that the practice is prevalent enough to merit concern. Hence the arguments for prohibiting reciprocal buying are overwhelming. The question is—can this be accomplished under existing statutes?

The demonstratable and intentional use of reciprocal trading is susceptible to successful trade regulation attack. The particular situation under review will, of course, determine the statute that is applicable. This is not to say that problems of amplification and interpretation do not exist. Some of these difficulties have been discussed in previous paragraphs. Nevertheless, a trend of applying existing legislation to reciprocity, given impetus by the Consolidated Foods case, is in motion. Judicial guidelines, admittedly fragmentary, are appearing. The coherent development of these guidelines must await the substance of additional decisions. This means that until a decision appears that conclusively reverses the present trend or establishes restrictive boundaries on the application of current laws, remedial legislation is not needed.

Present laws can be used to dissipate the influence of Trade Relation Departments and to erase conscious efforts at reciprocal trading. However, the perplexing problem of intangible or what one commentator calls “psychological” reciprocity remains. The presence of substantial purchasing power resulting in a unilateral decision to buy from the source of this power is beyond the pale of any statute currently in force. It is doubtful if this situation can or should be changed.