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THE ANTITRUST IMPLICATIONS OF BARTER

JOHN R. ALLISON*

“Barter is back,” announced a well-known trade publication.¹ The normal response, upon recalling the essential clumsiness of barter, is to scoff at such a statement. An examination of available data, however, may temper one’s initial skepticism. Since 1970, the number of organized barter exchanges, which primarily perform clearinghouse, brokering, and record-keeping functions, has increased from a dozen to over one hundred.² Current estimates of the dollar value of barter transactions vary greatly; however, in view of the fact that some of the larger exchanges are handling over \$100 million worth of transactions per year, it would seem safe to assume that the value of bartered goods and services today amounts to several billion dollars annually.³ All sources indicate that volume is increasing quite rapidly, with estimates of annual growth ranging up to twenty percent.⁴

The “double coincidence of all wants” necessary for barter to function,⁵ coupled with the advent of relatively stable currencies and the need for standardized record-keeping units, led at an early date to the obsolescence of direct trading as a major factor in commerce.⁶ This most ancient of transactional forms never disappeared entirely, however. Periodic revivals of barter activity have occurred throughout history, usually in economically harsh times.⁷ For example, the early

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1. Thompson, *When Money Gets Tight, Bargain by Barter*, PURCHASING, Nov. 7, 1979, at 91 [hereinafter cited as Thompson].

2. Leff, *Trading Flourishes on Many Exchanges You Never Heard Of*, Wall St. J., Sept. 8, 1978, at 1, col. 4 [hereinafter cited as Leff].

3. See, e.g., *Bartering Gets to Be a Business in the Billions*, U.S. NEWS & WORLD REP., Mar. 21, 1977, at 47; *Business Bulletin*, Wall St. J., Sept. 18, 1980, at 1, col. 5; Graustark, *Marketing: Trading Game*, NEWSWEEK, Aug. 1, 1977, at 62; Leff, *supra* note 2; Thompson, *supra* note 1, at 91.

4. See, e.g., *Using Barter as a Way of Doing Business*, BUS. WEEK, Aug. 4, 1980, at 57 [hereinafter cited as *Using Barter*].

5. Starr, *The Structure of Exchange in Barter and Monetary Economies*, 86 Q.J. ECON. 290, 302 (1972).

6. See, e.g., A. DEL MAR, HISTORY OF MONETARY SYSTEMS (1895); Niehans, *Money and Barter in General Equilibrium with Transaction Costs*, 61 AM. ECON. REV. 773 (1971) (in which the author explains the choice between money and barter in terms of differing transaction costs).

7. See generally Jones, *The Origin and Development of Media of Exchange*, 84 J. POL. ECON. 757, 774 (1976) [hereinafter cited as Jones], where the author concludes: “Thus individual optimization implies that the pattern of trade must always be some combination of direct barter and monetary exchange.”

1930's witnessed such a resurgence, due largely to a scarcity of cash and high unemployment.⁸ The commodity shortages of the World War II era brought about a similar increase in the use of barter.⁹ These and other instances were merely temporary responses to the economic aberrations of the moment. The same factors that led to barter's obsolescence continued to prevent it from playing a significant economic role.

The revitalization of barter in the 1970's, which seems to be gaining momentum as we begin the 1980's, is also attributable at least partly to exigent economic circumstances.¹⁰ These conditions, primarily inflation of a destructive intensity and persistent shortages of many basic materials, may also prove to be transitory. And the current interest in barter may well diminish as in the past. On the other hand, the unprecedented magnitude and endurance of the present movement is such that we probably ought to pay some attention to it. Although no reasonable observer seriously expects a return to a barter-based economy, there is a pervasive notion that barter's current popularity will persist.¹¹ Providing support for this belief is the fact that computerization has enabled organized barter groups and their members to maintain acceptably precise transaction records¹² without the use of established monetary units and without the problem-ridden issuance of scrip.¹³

THE ANTITRUST ISSUE

The concern of the Internal Revenue Service that barter may produce unreported income has been well publicized.¹⁴ Very little attention has been given, however, to the fact that the barter revival may also involve antitrust implications. The problem, very simply, is that barter could easily be viewed as the transactional equivalent of *reciprocity*. Essentially, reciprocity is mutual patronage—"I'll buy from you if you'll buy from me." The recognition of reciprocity as an antitrust violation dates to the 1930's when the Federal Trade Commission

8. See, e.g., W. WEISHAR & W. PARRISH, *MEN WITHOUT MONEY* (1933) [hereinafter cited as WEISHAR].

9. See, e.g., Thompson, *supra* note 1, at 93.

10. See, e.g., G. BURTT, *THE BARTER WAY TO BEAT INFLATION* (1980).

11. See, e.g., Thompson, *supra* note 1, at 91; *Using Barter*, *supra* note 4, at 57. See also Jones, *supra* note 7, at 774.

12. See, e.g., Myers, *Bartering is Back*, *SMALL BUS.*, Oct./Nov., 1977, at 17 [hereinafter cited as Myers].

13. See, e.g., L. GRINSTEAD & W. WISSLER, *BARTER SCRIP AND PRODUCTION UNITS AS SELF-HELP DEVICES IN TIMES OF DEPRESSION* 31 (1933).

14. See, e.g., Leff, *supra* note 2, at 1, col. 4; Thompson, *supra* note 1, at 98; *Using Barter*, *supra* note 4, at 57.

successfully challenged the reciprocal dealing practices of three firms.¹⁵ Although the intent underlying a barter transaction, as well as its ultimate economic impact, will frequently differ markedly from the purpose and effect of reciprocity, the similarity in *form* dictates caution. There can be no doubt that barter may amount to reciprocity in its simplest, most direct form. The problem for corporate counsel, as well as for purchasing and sales managers, is to insure that this facial similarity does not become substantive.

In the remainder of this article, we will briefly examine the current legal status of reciprocity, consider some of the substantive differences between barter and reciprocity, and highlight those situations in which barter may engender the same risks of antitrust litigation as reciprocity.

THE LEGAL STATUS OF RECIPROCITY

The General Attitude

Reciprocity clearly would be a rare occurrence in an economy consisting primarily of firms producing only a single product or a single line of closely related products. Opportunities for reciprocity, as well as actual incidences of the practice, increase with the diversification of firms into multiple, and particularly disparate, products and lines.¹⁶

The general attitude toward reciprocity could be characterized as unreceptive at best and openly hostile at worst. The United States Supreme Court has referred to reciprocity as "an irrelevant and alien factor intruding into the choice among competing products, creating at the least a priority on the business at equal prices."¹⁷ Donald Turner, an economist and Professor of Law at Harvard, as well as former head of the Justice Department's Antitrust Division, has said:

[I]t may be stated flatly that reciprocity . . . has little or nothing to be said in its favor. Competition works satisfactorily only when success rests on lower prices, better quality, better service, and the like. Reciprocity distorts the pattern of trade away from the ideal, with no compensating economic advantages.¹⁸

15. *In re California Packing Corp.*, 25 F.T.C. 379 (1937); *In re Mechanical Mfg. Co.*, 16 F.T.C. 67 (1932); *In re Waugh Equip. Co.*, 15 F.T.C. 232 (1931).

16. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 170 (1977) [hereinafter cited as SULLIVAN].

17. *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594 (1965) (citations omitted).

18. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1387 (1965) [hereinafter cited as Turner].

Legality

Since the United States Supreme Court's 1965 decision in *FTC v. Consolidated Foods Corp.*,¹⁹ it has been recognized that a merger may be illegal under section 7 of the Clayton Act²⁰ when it creates a substantial probability of reciprocity in the relevant market. Of more direct relevance to the topic under discussion, however, is the legal status of reciprocity considered alone, in a nonmerger context. The statutory provisions which may in particular situations be offended by reciprocity are section 1 of the Sherman Act, which prohibits contracts, combinations, and conspiracies in restraint of trade,²¹ and section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition.²²

Considering the fact that there really is so little "law" on the question of reciprocity, there is a remarkable consensus as to the illegality of the practice. There are only a handful of court decisions, but reciprocity has fared very poorly in those few cases.²³ The Justice Department's reciprocity litigation has produced consent decrees rather than precedent-setting judicial opinions.²⁴ But the Justice Department has

19. 380 U.S. 592 (1965).

20. 15 U.S.C. § 18 (1976).

21. 15 U.S.C. § 1 (1976). In addition, a firm's use of reciprocity may violate the prohibition against attempted monopolization contained in § 2 of the Sherman Act, 15 U.S.C. § 2 (1976), if the firm possesses market power of a substantial enough degree that the combination of its power and conduct creates a dangerous probability of successful market domination. *See, e.g.,* W.L. Gore & Assocs. v. Carlisle Corp., 381 F. Supp. 680 (D. Del. 1974), *modified*, 529 F.2d 614 (3d Cir. 1976).

22. 15 U.S.C. § 45 (1976).

23. *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971); *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966).

24. *See, e.g.,* *United States v. Grow Chem. Corp.*, [1974-1] Trade Cas. ¶ 75,133 (S.D.N.Y.); *United States v. Continental Can Co.*, [1974-1] Trade Cas. ¶ 75,132 (S.D.N.Y.); *United States v. Yellow Freight Sys., Inc.*, [1973-1] Trade Cas. ¶ 74,338 (W.D. Mo.); *United States v. Crane Co.*, [1973-1] Trade Cas. ¶ 74,329 (S.D.N.Y.); *United States v. Westinghouse Elec. Corp.*, [1973-1] Trade Cas. ¶ 74,574 (W.D. Pa.); *United States v. Jackson's Atlanta Ready Mix Concrete Co.*, [1972] Trade Cas. ¶ 73,827 (N.D. Ga.); *United States v. Martin Marietta Corp.*, [1972] Trade Cas. ¶ 73,858 (D. Md.); *United States v. Uniroyal, Inc.*, [1972] Trade Cas. ¶ 74,070 (S.D.N.Y.); *United States v. Owens-Illinois, Inc.*, [1972] Trade Cas. ¶ 73,828 (N.D. Ohio); *United States v. Westinghouse Elec. Corp.*, [1972] Trade Cas. ¶ 74,053 (W.D. Pa.); *United States v. H.K. Porter Co.*, [1972] Trade Cas. ¶ 73,917 (W.D. Pa.); *United States v. T.I.M.E.-DC., Inc.*, [1972] Trade Cas. ¶ 74,069 (N.D. Tex.); *United States v. Evans Prods. Co.*, [1971] Trade Cas. ¶ 73,450 (N.D. Ill.); *United States v. Kennecott Copper Corp.*, [1971] Trade Cas. ¶ 73,437 (D.N.Y.); *United States v. Aluminum Co. of America*, [1971] Trade Cas. ¶ 73,587 (W.D. Pa.); *United States v. National Steel Corp.*, [1971] Trade Cas. ¶ 73,495 (W.D. Pa.); *United States v. Reynolds Metal Co.*, [1971] Trade Cas. ¶ 73,626 (E.D. Va.); *United States v. Inland Steel Co.*, [1970] Trade Cas. ¶ 73,197 (N.D. Ill.); *United States v. Republic Steel Corp.*, [1970] Trade Cas. ¶ 73,246 (N.D. Ohio); *United States v. Armco Steel Corp.*, [1970] Trade Cas. ¶ 73,283 (S.D. Ohio); *United States v. Bethlehem Steel Corp.*, [1970] Trade Cas. ¶ 73,376 (E.D. Pa.); *United States v. PPG Indus., Inc.*, [1970] Trade Cas. ¶ 73,373 (W.D. Pa.).

spoken and acted so decisively on the question, and has been so successful in obtaining out-of-court settlements prohibiting reciprocity, that we have an unusually clear picture of its status even without much formal law. Moreover, reciprocity has been subjected to a great deal of scrutiny by various writers, who have shown uncommon accord in their views and who have added much to the refinement of our ideas about the practice.²⁵

In their analyses, most authorities have identified three different factual settings in which reciprocity may occur and have labeled the practice, depending on its setting, as *coercive*, *voluntary* or *unilateral*.

Coercive Reciprocity

The coercive imposition of reciprocal dealing is not only the least defensible of the three types on ethical grounds but also is the most clearly illegal. This variety was the first to attract the government's attention, being the subject of three FTC proceedings in the 1930's.²⁶ In substance it is analogous to the almost universally condemned *tying arrangement*,²⁷ in that it represents a leveraging of market power. Tying, on the one hand, represents a leveraging of market power as a *seller*: "We'll sell you X, which you need, only if you will also buy Y from us." Coercive reciprocity, on the other hand, represents a leveraging of market power as a *buyer*: "We'll continue to buy B from you (and you *really* need us, don't you) only if you will buy C from us." Reciprocity under such circumstances usually would violate both section 1 of the Sherman Act and section 5 of the FTC Act where the evidence establishes that the leveraging firm has sufficient monopsony

25. See, e.g., Barton, *Reciprocity*, 21 BUS. LAW. 613 (1966); Dean, *Economic Aspects of Reciprocity, Competition and Mergers*, 8 ANTITRUST BULL. 843 (1963); Dunne, *Reciprocity: The Hazards of Backscratching*, 11 WILLAMETTE L.J. 159 (1975) [hereinafter cited as Dunne]; Ford, *Reciprocity, Advisory Procedures, and Class Actions*, 1969 UTAH L. REV. 633; Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures*, 49 VA. L. REV. 433 (1963); Harvith, *Reciprocity and the Federal Antitrust Laws*, 40 WASH. L. REV. 133 (1965); Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873 (1964) [hereinafter cited as Hausman]; Marshall, *Reciprocity as an Emerging Issue*, 29 ABA ANTITRUST SECTION 195 (1965); McLaren, *Reciprocity: The "Hobgoblin" of the Antitrust Critics*, 39 ABA ANTITRUST L.J. 224 (1969); Turner, *supra* note 18. Some commentators, however, have disputed the notion that reciprocity is inimical to the proper functioning of the free market. See Markovits, *Tie-ins, Reciprocity, and the Leverage Theory*, 76 YALE L.J. 1397 (1967).

26. *In re California Packing Corp.*, 25 F.T.C. 379 (1937); *In re Mechanical Mfg. Co.*, 16 F.T.C. 67 (1932); *In re Waugh Equip. Co.*, 15 F.T.C. 232 (1931).

27. Tying and exclusive dealing are the specific focus of § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), and, when tangible commodities are involved, may be challenged under this statute as well as § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Since § 3 of the Clayton Act is directed only at the use of power by a seller, reciprocity would not fall within its prohibitive language.

power over coerced firms to effectuate the arrangement.²⁸ Sufficient buying power will ordinarily be present whenever the leveraging firm is an important enough customer to overcome coerced firms' independent buying decisions. The primary result, of course, is a distortion of allocative efficiency by causing coerced firms' buying decisions to be based on something other than price, quality, or service.²⁹ Another, perhaps secondary, concern is the infringement of coerced firms' fundamental freedom as traders.³⁰

There can be yet another adverse effect where the leveraging firm's competitors in the *selling* market do not have similar capacity for reciprocal dealing, either in magnitude because of the leveraging firm's greater size, or in kind because these competitors do not have the same consumer-producer structure that creates the opportunity. In this instance, the leveraging firm's competitors in the selling market will be foreclosed from a portion of the market and placed at a competitive disadvantage for economically illegitimate reasons.³¹ Market foreclosure can, of course, have an adverse impact on *potential* as well as existing competitors. Prospective entrants into the selling market may be somewhat more reluctant to attempt entry if a significant portion of that market is inaccessible because of leveraged power. Differently stated, reciprocity possesses the potential for increasing entry barriers in the affected market.³²

Courts in the future may further analogize between tying and reciprocity and require, in addition to substantial buying power, that a substantial amount of commerce in the selling market must have been affected. Even if this additional requirement is imposed, it is ordinarily rather easy to surmount. For example, in *Fortner Enterprises v. United States Steel Corp.*,³³ the United States Supreme Court indicated that in a tying context, \$190,000 of sales in the secondary market to all customers under similar arrangements is sufficient to establish an effect on a substantial amount of commerce.³⁴

28. SULLIVAN, *supra* note 16, §§ 170-71.

29. Turner, *supra* note 18, at 1387.

30. SULLIVAN, *supra* note 16, § 170. Justice Black, in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958), stated: "The Sherman Act was designed to be a comprehensive charter of economic liberty. . . ."

31. SULLIVAN, *supra* note 16, § 170.

32. F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 282 (1970) [hereinafter cited as SCHERER].

33. 394 U.S. 495 (1969).

34. *Id.* at 502.

Voluntary Reciprocity

This form of reciprocity essentially involves an exercise of mutual volition by the participants.³⁵ It may occur because neither firm possesses sufficient market power as a buyer to enforce its own will, or because both firms are relative equals in the possession of such power.³⁶ If the former situation exists, the reciprocity is really just an outgrowth of mutual convenience rather than a leveraging of market power. Moreover, reciprocity in such a setting is unlikely to involve either foreclosure or a distortion of allocative efficiency of a substantial enough magnitude to cause any concern. There is not, therefore, a great likelihood of a violation of either section 1 of the Sherman Act or section 5 of the FTC Act in these cases.³⁷

If, on the other hand, voluntary reciprocity involves participants who each possess substantial power, the dangers to competition and the likelihood of illegality are about the same as in the case of coercive reciprocity. Indeed, the economic harm may even be greater because the effects are likely to be felt in *two* markets rather than in one.

Thus, the only real economic or legal basis for distinguishing voluntary from coercive reciprocity is that the voluntary variety *may sometimes* be harmless.³⁸

Unilateral Reciprocity

This label has been given to a firm's practice, whenever practicable, of buying from those who are also its customers for other products.³⁹ There is no agreement, coerced or voluntary, to maintain the reciprocal pattern of dealing. The economic effects of pure unilateral reciprocity rarely would be such as to cause concern. Without agreement or coercion, the volume of transactions affected ordinarily would be of small magnitude. And the probable randomness of these transactions would usually preclude any real distortion in a given market.

Legally, true unilateral reciprocity could not run afoul of section 1 of the Sherman Act. By definition, that statute applies only to agreements (either coerced or voluntary). One caution is in order at this

35. See, e.g., Dunne, *supra* note 25, at 161; Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows*, 66 COLUM. L. REV. 1, 6 (1966). It has also been called "negotiated" reciprocity or "mutual patronage." Dunne at 161.

36. SCHERER, *supra* note 32, at 281-82.

37. *Id.* at 282.

38. See, e.g., SULLIVAN, *supra* note 16, §§ 170-71.

39. See, e.g., Dunne, *supra* note 25, at 161; Hausman, *supra* note 25, at 882. It has also been called "systematic" or "volunteer" reciprocity. Dunne at 161.

point, however. For Sherman Act section 1 purposes, an agreement can be proved by circumstantial evidence.⁴⁰ Thus, if what appears on the surface to be unilateral reciprocity is so systematic that mere coincidence is unlikely, a coerced or voluntary agreement can be inferred.

Section 5 of the FTC Act can apply to unilateral conduct,⁴¹ but the usual absence of harm from *truly* unilateral reciprocity would ordinarily preclude a finding of illegality under this statute.

In antitrust analysis, it is elemental that the "rule of reason" is the governing standard for judging a particular practice. Under this standard, conduct is illegal only if it unreasonably restrains trade. Application of the standard essentially involves scrutiny of the purpose and effect of the practice. On the other hand, a few practices, such as price fixing and horizontal market division, are deemed to be "per se" illegal. Such activities, once proved to have occurred, are ruled illegal with little, if any, examination of underlying motivations or ultimate effects. They are so treated because their effects ordinarily are so clearly adverse and the likelihood of any procompetitive effects is remote.⁴² Reciprocity, particularly the coercive variety, may very well be viewed as a per se violation.⁴³ However, in the following discussion of the substantive differences between barter and reciprocity in terms of the participants' intent and the economic effects of the practices, it is presumed that barter would be examined under the rule of reason. This same analysis may also be employed, if necessary, to support an argument that barter should in fact be judged under the rule of reason rather than the per se rule.⁴⁴

BARTER VS. RECIPROCITY: THE SUBSTANTIVE DIFFERENCES

Differences in Intent

Antitrust law is primarily concerned with economic effects, either actual or predicted.⁴⁵ Intent is often important in antitrust analysis, however, for at least two reasons. First, intent is frequently an excellent predictor of effect. An adverse impact on competition is much

40. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

41. *FTC v. Cement Inst.*, 333 U.S. 683 (1948).

42. See generally SULLIVAN, *supra* note 16, §§ 63-72.

43. *Id.* § 171.

44. Allison, *Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis?*, 16 Hous. L. Rev. 761, 829-31 (1979).

45. See *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 688 (1978); *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911).

more likely to result if it was intended.⁴⁶ Second, condemning the wrongful intent by itself simplifies the judicial administration of complex legal questions and serves as a deterrent to illegal conduct.⁴⁷ Regarding proof of intent, it is basic that a particular intent may be inferred from conduct that was likely to achieve the allegedly desired result.⁴⁸

Barter and reciprocity admittedly are transactionally similar on the surface. In most cases, however, the intent behind a barter deal is quite different from the intent behind reciprocity. Barter is much more likely to be merely a *response* to uncontrollable market factors,⁴⁹ rather than a practice initiated for anticompetitive reasons. Even though computerization may increase the feasibility of systematizing and standardizing barter, it cannot make barter as easy for a firm to facilitate as reciprocity. If a firm wishes to achieve the particular economic effects of reciprocity (leveraging of power, etc.), it is not likely to think of barter as the means to that end. The far greater probability is that such a firm will employ one of the forms of reciprocity. And, as stated above, the absence of an anticompetitive purpose makes anticompetitive effects less likely.

As earlier stated, one of the most important facets of the current barter movement is the dramatic growth of organized barter exchanges. For at least two reasons, a firm's use of such an intermediary can be an important factor in the examination of intent. First, the use of an intermediary makes coercion much more difficult to accomplish. A firm wishing to engage in coercive reciprocity under the guise of barter, for instance, is quite unlikely to go semi-public with its device by using the services of a formal exchange. Therefore, the use of such an exchange should be very strong, perhaps conclusive, evidence of a legitimate motive.

Second, barter exchanges differ in their organization and in the services they provide. If an exchange merely brings the traders together, the transaction continues to bear a surface resemblance to reciprocity. If, on the other hand, the exchange employs standardized units of value (referred to by various names, such as "trade credits"), maintains records of client accounts, and permits positive and negative ac-

46. See *United States v. Columbia Steel Co.*, 334 U.S. 495, 532 (1948); *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911); see also SULLIVAN, *supra* note 16, § 71.

47. See SULLIVAN, *supra* note 16, § 71.

48. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

49. See, e.g., authorities cited in notes 8-10 *supra*.

count balances, the firm-to-firm characteristic of barter begins to blur.⁵⁰ Transactions begin to look less like barter and more like a distinct subset of the economy in which a different medium of exchange is used. This type of "barter" bears much less resemblance to reciprocity than the direct form. The less the resemblance to reciprocity, the less is the chance that a firm's motive would ever be questioned.

Differences in Actual Adverse Effects

A particular arrangement undertaken without an anticompetitive purpose may nevertheless violate the antitrust laws if its actual or probable effect is anticompetitive.⁵¹ Therefore, even though barter transactions, in comparison with reciprocity, are not as likely to be anticompetitively motivated, they will be illegal if significant anticompetitive effects are an actual or probable result.

Despite the surface similarity between barter and reciprocity, their effects usually will be quite different. The potential adverse economic effects of reciprocity, or barter, are not likely to occur unless the practice is systematic and recurring. If isolated or random, the effects will be nil. A single firm, or a handful of firms, will in most cases not be able to engage in barter with sufficient facility to cause antitrust concern. Barter on a large scale, employing standardized methods and record-keeping units, can best be accomplished through an organized exchange.⁵² As previously observed, many such exchanges presently exist and several of them are quite large.⁵³ However, they have thus far been used primarily by small firms and individuals representing a vast number of different markets.⁵⁴ Thus, the bartering presently taking place through organized exchanges is unlikely to have a measurable adverse effect on any single market. Large companies do barter, of course. Their barter activity, however, most commonly takes the form of sporadic, single transaction arrangements posing little, if any, economic or legal danger.

Greater Potential for Procompetitive Effects

Antitrust analysis takes cognizance of *procompetitive*, as well as anticompetitive effects. A practice causing anticompetitive effects may

50. For a description of the operations of one major barter exchange, Business Exchange, Inc., see Myers, *supra* note 12, at 17.

51. See, e.g., *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

52. See, e.g., Myers, *supra* note 12, at 17; *Using Barter*, *supra* note 4, at 57.

53. See text accompanying notes 1-4 *supra*.

54. See generally the authorities cited in notes 1-4 & 10 *supra*.

be legal under section 1 of the Sherman Act or section 5 of the FTC Act if the evidence also establishes substantial, counterbalancing procompetitive effects. This principle has been recognized by the United States Supreme Court in a number of decisions, such as *Continental TV, Inc. v. GTE Sylvania, Inc.*⁵⁵ and *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*⁵⁶ Included within the various effects which can be viewed as procompetitive are improvement of conditions for market entry,⁵⁷ creation of a market,⁵⁸ stimulation of activity in an existing market,⁵⁹ and improvement of the production or distribution efficiency of a given firm or group of firms.⁶⁰ Effects such as these are, of course, merely elements of total allocative efficiency. That is, they ordinarily have a positive effect on the overall efficiency of resource allocation.⁶¹ Evidence indicating that results of this type have occurred, or probably will occur, does not automatically legalize a challenged practice. But in many cases it will at least create a factual issue where the evidence has also shown the likelihood of some adverse effects.

It is quite difficult under any circumstances to make a case for any procompetitive effects of reciprocity. With barter, however, such a case can be made in *most* circumstances. In contrast with reciprocity, the procompetitive effects of barter often are the direct result of the completely different motives underlying most barter transactions.

Moving Inventory

The motive for barter in many situations is the need to move obsolete or otherwise stagnant inventory.⁶² When inventory is so moved, there are at least three positive economic results. First, particularly when an organized barter exchange is employed, the result may be the making and stimulation of a separate, identifiable market for particular low-demand goods. A market-making effect has been recognized as a legitimate goal of antitrust policy at least since the Supreme Court's decision in *Chicago Board of Trade v. United States*.⁶³

Second, regardless of whether an organized exchange is employed,

55. 433 U.S. 36 (1977).

56. 441 U.S. 1 (1979).

57. *See, e.g.*, *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960).

58. *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979).

59. *See, e.g.*, *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

60. *See, e.g.*, *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

61. *See, e.g.*, D. GREER, *INDUSTRIAL ORGANIZATION AND PUBLIC POLICY* 26-33 (1980) [hereinafter cited as GREER].

62. Thompson, *supra* note 1, at 93.

63. 246 U.S. 231 (1918).

moving stagnant inventory by barter improves production efficiency. In many cases this improvement of efficiency results simply from barter's potential for mitigating the effects of poor production planning or unforeseeable demand changes.⁶⁴

Third, moving excess inventory lowers a firm's (or an industry's) interest cost and conserves capital investment.⁶⁵ In the end, all the positive results of excess inventory movement contribute to improved allocative efficiency by transferring capital investment to more desirable goods or services. Experience has shown that a firm can often receive greater value, and thus come closer to recovering costs, by bartering excess inventory than by liquidating it under somewhat distressed conditions.⁶⁶

Utilizing Excess Service Capacity

Similar improvement in allocative efficiency may result when services are bartered. Although an excess service capacity is not properly characterized as excess inventory, a service-providing firm or individual which is capable of providing larger volumes of service than it currently sells has the equivalent of excess inventory for barter purposes. A prime example is the common practice of advertising media to barter their time or space for goods or for other services.⁶⁷

Freeing Hoarded Commodities

Producers and other holders of commodities which are in short supply sometimes tend to hoard. Such tendencies, which of course exacerbate the shortage, may result from (a) government price controls, (b) a desire to reserve supplies for favored customers, (c) a fear that the materials may end up in the hands of speculators, (d) a perception (correct or not) that market price has not yet peaked or (e) a feeling that market price during the shortage will not rise to a level the holder views as compensatory.⁶⁸

Barter apparently possesses a potential for overcoming at least part of this reluctance to release scarce commodities. For example, during the severe shortages of bulk industrial chemicals in 1973 and 1974, it was found that holders of materials such as benzene, ethylene, phenol,

64. In lessening the effects of poor production planning, barter serves to mitigate Leibenstein's "X-inefficiency." See GREER, *supra* note 60, at 472.

65. Thompson, *supra* note 1, at 93.

66. *Id.*

67. *Id.* at 95.

68. See *Bartering to Beat the Chemicals Shortage*, BUS. WEEK, Oct. 27, 1973, at 90-94.

and toluene could sometimes be induced to part with them in an exchange for other valuable chemicals when they otherwise would have stockpiled them.⁶⁹

The mitigation of hoarding tendencies in times of shortage should be viewed by antitrust enforcers and courts as a positive economic result and, when supported by evidence in a particular case, should further differentiate barter from reciprocity.⁷⁰

Capital Scarcities

Barter possesses potential utility in times of capital shortage. Although barter certainly could not be expected to resolve a major, economy-wide capital problem, firms do in fact employ barter in undertakings for which large amounts of capital are required, such as new plants and equipment.⁷¹ For particular firms, then, barter can ameliorate a capital shortage.

AREAS OF CONCERN

Although barter ordinarily should be viewed as substantively different from reciprocity, it should not be totally immunized from scrutiny. Situations can exist in which barter may pose very real antitrust concerns.

Coercion

A barter transaction, or series of them, could be imposed by one firm on another through coercion. For instance, a large customer may possess inordinate bargaining power in its dealings with a particular supplier or class of suppliers. Threatened order withdrawals could be used by the customer to induce the supplier to barter rather than to sell. A supplier with undue market power might do the same thing in reverse to obtain scarce materials. In other words, coercive barter can be employed to achieve precisely the same ends as coercive reciprocity. Such an event seemingly would not ordinarily occur, however, because purchases and sales would be more convenient. In the absence of legitimate motives for barter, a firm usually is not going to seek the less

69. *Id.*

70. Reciprocity could also be used to free hoarded goods, but this seems to rarely be the actual motive or effect of reciprocity. See generally Dauner, *The Attitude of the Purchasing Agent Toward Reciprocity*, J. PURCHASING, Aug., 1967, at 5.

71. This is true domestically, but seems to be even more common in international transactions. See, e.g., *Back to Barter*, ECONOMIST, Dec. 14, 1974, at 52 [hereinafter cited as *Back To Barter*]; *The Barter Boom*, NEWSWEEK, June 26, 1978, at 63.

convenient transactional form. If such a practice occurs, though, it should be just as illegal as coercive reciprocity.

Market Foreclosure

Consider the following scenario. Two competing oil companies, Alpha and Beta, regularly exchange refined petroleum products. For instance, Alpha may periodically have excess jet fuel on hand which it trades to Beta for unleaded gasoline. The bartered products very likely will remain at their current storage locations until needed by the new owner for distribution.⁷² Or Beta may be short on diesel fuel and obtain it from Alpha by drawing on a credit it had created by earlier providing Alpha with kerosene and naphtha. This is all well and good. At any given time it helps each firm to better correlate its existing stock with customers' current needs.

This advantage for the two firms may, however, be purchased at a cost to competition in the relevant markets. The most obvious negative effect is *market foreclosure*. In other words, a barter relationship which is systematic over a lengthy period of time is going to shut off some portion of the supply for the products involved. Similarly, it will shut off a portion of the particular market that otherwise would have been available to other suppliers. Foreclosure of other firms from supplies and markets is the most important of barter's potential negative effects for several reasons.

Certainty of Occurrence

If barter is systematic and ongoing among two or more firms, regardless of whether an organized exchange is employed, market foreclosure is a virtual certainty. Thus, foreclosure is not merely a speculative effect to be weighed against the usually benign purposes of the participants. Rather, it is a factor that must be introduced into the calculus when barter is other than random and sporadic. The question, though, is whether the degree to which a source of supply or a market is foreclosed from nonparticipants in a given case is substantial enough to be of concern. Usually, it seems, the substantiality of foreclosure would be insufficient to counterbalance the procompetitive effects we have observed.

Substantiality, of course, can be measured in different ways. As we have seen, the courts have not looked charitably on *tying agreements*,

72. This apparently has been a fairly common oil industry practice. See *Legal Developments in Marketing*, 36 J. MARKETING, 73, 75-76 (1972).

primarily because of their perceived lack of redeeming virtues.⁷³ This judicial hostility toward tying has been manifested, at least in part, by a harsh standard for measuring the substantiality of the resulting foreclosure.⁷⁴ The yardstick, as we observed earlier, is the absolute dollar volume of sales to all customers in the affected market (*i.e.*, the market for the "tied" product).⁷⁵ And the \$190,000 which the Supreme Court has indicated would be sufficient is *not much*.⁷⁶

On the other hand, the standard for determining substantiality in the case of *exclusive dealing* agreements is much less severe. An exclusive dealing agreement occurs when seller and buyer agree that the buyer will purchase particular goods or services only from the seller and not from others. It often takes the form of a *requirements contract* in which the buyer commits itself to purchase its requirements of a particular item during a particular period from the seller. Foreclosure is the concern here as well. The courts have acknowledged that exclusive dealing is much more likely than tying to have benign purposes and positive effects.⁷⁷ This attitude has similarly found its outlet in the method for determining whether foreclosure has been substantial enough for a violation. The courts ordinarily have required a showing that some *substantial portion* of the affected market has been foreclosed to others. In *Standard Oil Co. of California v. United States*,⁷⁸ in which a violation was found, the foreclosed portion was just under seven per cent. In *Tampa Electric Co. v. Nashville Coal Co.*,⁷⁹ in which the challenged arrangement was found to be legal, the foreclosed portion was less than one percent, although the value involved was \$128 million. Thus, this more lenient test for determining substantiality has resulted in far fewer successful challenges to exclusive dealing agreements than to tying agreements.⁸⁰

Although most courts probably will employ the stricter standard for measuring substantiality in cases of reciprocity,⁸¹ the facial resemblance of barter and reciprocity should not lead them to adopt this

73. *See, e.g.*, *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

74. *See* *International Salt Co. v. United States*, 332 U.S. 392 (1947).

75. *Id.*

76. *See* *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969).

77. *See, e.g.*, SULLIVAN, *supra* note 16, § 163.

78. 337 U.S. 293 (1949).

79. 365 U.S. 320 (1961).

80. SULLIVAN, *supra* note 16, § 163.

81. *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 424-25 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 13-14 (4th Cir. 1971); *United States v. Empire Gas Corp.*, 393 F. Supp. 903, 915 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 65 (S.D.N.Y. 1966); *see also* SULLIVAN, *supra* note 16, § 163.

harsher test for barter. As we have seen, the underlying intent and the ultimate effects ordinarily are just not the same. Barter should be accorded the same treatment as exclusive dealing because the former is at least as likely as the latter to spring from legitimate motives and to have neutral or positive economic effects.

Therefore, despite the certainty of foreclosure when barter is systematic and ongoing, this foreclosure is not likely to cause antitrust problems unless the firms involved account for substantial shares of affected markets. Large firms can barter, but they would be well advised to avoid permanent barter relationships.

Barter Between Competitors

In the hypothetical of Alpha and Beta, the bartering firms were competitors. The danger of supply or market foreclosure does not depend on the existence of a competitive relationship between the participants. If they *are* competitors, however, the portion of the relevant market affected stands a good chance of being greater than otherwise would be the case. Thus, in the Alpha and Beta scenario, the jet fuel market would be affected by both firms—on one occasion by Alpha, on another by Beta. Over time the effect on this market, on any other market in which they both produce, is likely to be greater than if only one were a supplier of that product.

In addition to increasing the substantiality of foreclosure, both participants being competitors may also cause other problems. To begin with, such an arrangement could lead in time to too cozy a relationship. The possibility of gradually inching into other arrangements dulling the keen edge of competition is all too likely. Furthermore, the arrangement could be used to disguise market division or price fixing agreements between the two firms. Other evidence would be required, of course, before Alpha and Beta's relationship could be so characterized.⁸²

Shortages

As we have seen, a materials shortage is one of the most important catalysts for barter activity. Lessening the adverse effects of a materials shortage is also one of the redeeming characteristics of barter. Paradoxically, barter also possesses the potential for exacerbating a commodities shortage. In effect, a shortage shrinks the base for

82. See GREER, *supra* note 60, at 429-31.

determining how much of a market is foreclosed. When the firms participating in barter transactions during times of shortage are quite large, there can be a very real danger of severing smaller firms from sources of supply. In other words, firms with substantial market power may very well be able to draw upon that power to the detriment of those without similar power.⁸³ If these smaller firms are efficient, their foreclosure represents a harm to the economy and to competition, not just to the affected firms.

CONCLUSION

The facial similarity of barter and reciprocity cannot be ignored, especially in light of the magnitude and persistence of barter's current resurgence. Bartering between individuals and small firms should have no antitrust implications. However, large firms should at least be aware of barter's resemblance to reciprocity and should plan their transactions so as to minimize the chance of antitrust litigation. The similarities between barter and reciprocity are usually superficial only. In most cases the two are quite different in substance, both in terms of the participants' motivations and the actual or probable effects of the transactions. Because barter is less likely to be motivated by an anticompetitive purpose, and more likely to produce neutral or positive economic effects, it should not be viewed as just another form of reciprocity.

The harsh standard applied to tying agreements (and probably to reciprocity) should not be applied to barter. Instead, enforcement authorities and courts should employ the less severe standard which they traditionally have used to judge exclusive dealing agreements. If the proper standard is applied, barter should infrequently cause problems under the antitrust laws. Firms holding substantial shares of affected markets should avoid the type of systematic, ongoing barter relationships that may tend to develop a degree of permanence. Caution would dictate, therefore, that large companies avoid regular and substantial involvement in organized barter exchanges. In addition, large companies should take care not to intentionally or unintentionally put a supply squeeze on smaller firms during a materials shortage. Still more care should be taken if the barter transaction is with a competitor.

Finally, the Justice Department's Antitrust Division and the Fed-

83. This concern has been expressed by both the FTC and the Justice Department. *Back to Barter*, *supra* note 70, at 53; Weckler, *Bartering Is Going On . . . But Is It Legal?*, *PURCHASING*, May 21, 1974, at 11.

eral Trade Commission will not likely be pursuing new theories of anti-trust liability under the Reagan administration. William Baxter, the new head of the Antitrust Division has, in fact, given clear indications that the Division will devote most of its resources to the more obvious violations such as price fixing and market divisions between competitors.⁸⁴ The "vertical" restraints not involving competitors, including practices such as reciprocity, will not receive as much attention as in the past. Antitrust enforcement attitudes are highly cyclical, however, and this present attitude of retrenchment may be short-lived. Knowing this, corporate counsel will surely continue to closely monitor their firms' involvement in practices such as tying, reciprocity and barter. If for no other reason, caution is still needed in these areas because the present administration probably will not be able to exercise the conservative influence on *private* antitrust litigation that it would wish.⁸⁵

84. See, e.g., Vilkin, *DOJ Antitrust Nominee Shows Conservative Colors*, Legal Times of Wash., Mar. 23, 1981, at 8, col. 1-4.

85. Mr. Baxter has indicated that the Antitrust Division will increasingly participate as *amicus curiae* in private litigation in an attempt to persuade courts to favor his views. See, e.g., Legal Times of Wash., May 18, 1981, at 7, cols. 3-4.

**NOTES
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COMMENTS**

