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Recommended Citation

Hal. M. Smith, & Thomas M. Wilson III, *Reciprocity and the Private Plaintiff*, 32 Md. L. Rev. 91 (1972)

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Maryland Law Review

VOLUME XXXII

1972

NUMBER 2

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RECIPROCITY AND THE PRIVATE PLAINTIFF

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Business reciprocity is the use of buying power to obtain some preference in the sale of one's products or services. For example, a baker of bread might agree to buy some amount of yeast from a food distributor provided the food distributor agreed to buy some quantity of bread from him. Although the practice typically involves direct reciprocal purchases between two parties, it can be indirect or secondary, taking the form of securing favors from a customer of a customer. Thus *A* might preferentially buy from *B*, who preferentially buys from *C*, with *C*, in turn, preferentially buying from *A*. Such preferential buying can be viewed as a restraint of trade because it interferes with the basic antitrust goal of open competition based on price, quality and service. If a reciprocal purchasing arrangement is held to be an illegal restraint of trade under the federal antitrust laws, then any businessman injured by the restraint is entitled to recover his provable damages, trebled, plus his reasonable attorneys' fees.¹

There are two types of potential private plaintiffs who may seek to recover damages flowing from illegal reciprocity. A businessman who is a party to a reciprocal purchasing arrangement may claim that he has been injured by having to pay too much for what he buys. A competing businessman may claim that he has been injured by being improperly prevented from selling to a party to the reciprocity agreement.

Under federal law, the claim of either type of plaintiff will arise under section 1 of the Sherman Act,² which proscribes every contract,

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1. Clayton Act § 4, 15 U.S.C. § 15 (1970). The same remedy is now available under Maryland law. MD. ANN. CODE art. 83, § 41(2) (Supp. 1972).

2. 15 U.S.C. § 1 (1970). The law of Maryland [MD. ANN. CODE art. 83, §§ 36-49 (Supp. 1972)] is in accord, but this article will limit its discussion to federal law.

combination or conspiracy in restraint of trade. To recover, the private plaintiff must establish (1) a contract or combination, (2) his injury and damage and (3) the illegality of the reciprocity. He is apt to face difficult legal and practical problems in proving the element of contract or combination to engage in the reciprocity. Although many of these problems of proof will be encountered by either type of plaintiff, a party to a reciprocity agreement faces additional difficulty if he seeks to recover for the consequences of his own agreement. The major problems in proving the fact of injury and the amount of damages will be different for the two types of plaintiffs, with the party to the reciprocity having the problem of showing injury flowing from a bargain which probably conferred reciprocal benefits on him, and the excluded competitor having the problem of showing that he would have gotten some of the business absent the reciprocity.

Even if combination to engage in reciprocity and resulting injury and damage are proven, there may be no recovery. As yet there is little legal authority setting forth the circumstances under which agreements to engage in reciprocity are illegal under the Sherman Act. Perhaps reciprocity is illegal only where one party thereto is coerced. Perhaps only reciprocity which involves some substantiality in terms of dollar amount or percentage of the market is illegal. Perhaps illegality will in some way depend upon a combination of coercion and substantiality:

This article will examine the hurdles facing a private plaintiff in proving contract or combination, injury and damages and illegality. To provide a framework for that analysis, the economics of reciprocity will be considered and the scant direct authority on the illegality of reciprocity reviewed.

THE ECONOMICS OF RECIPROCITY

With the increasing growth and visibility of conglomerate enterprises which engage in various businesses in separate markets, the concern about the anti-competitive effects of reciprocity has grown.³ Reciprocity between two single-line firms does not obviously depart from the open competition model. If a truck manufacturer conditions his purchases of paint upon a paint supplier's reciprocal purchases of trucks needed in the supplier's paint business, he is not offering or securing some advantage which other truck manufacturers or paint suppliers could not offer. Although ideal price competition may be

3. An excellent, concise treatment of the practice and economics of reciprocity is found in Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873, 874-80 (1964).

blunted, competing truck suppliers have a chance to counter the reciprocity by themselves offering to engage in reciprocity, or by offering alternative terms. Where a truck manufacturer, however, has other divisions with paint requirements and some of his competitors do not, his added purchasing power may give him leverage in the sale of his trucks which can lead to foreclosure of part of the truck market from his less favorably situated competitors.

Assuming that the truck manufacturer has some purchasing "power," generated by his need for paint, it is not obvious why he would choose to use this power in order to sell more trucks rather than to obtain paint on better terms. Rational minimization of costs and maximization of profit would seem to dictate bargaining for cheaper paint. A common sense explanation could be that the paint supplier is unwilling to cut his prices, so the reciprocally tied sale of trucks would be the only advantage the truck manufacturer could get. This explanation has been put in a more sophisticated manner:

In markets of relatively few firms . . . sellers recognize their mutual interdependence; each of the individual firms, knowing that its own price decisions can influence the industrywide price level, carefully avoids *price* competition. These firms have, therefore, a powerful incentive to use the various *nonprice* strategies to promote sales, e.g., advertising, promotion, innovation, tying arrangements, and reciprocal selling. The latter practice, as noted, is most prominent in particular industrial settings and generally can be practiced most successfully by conglomerate firms.⁴

The nonprice strategy of reciprocity can be used to grant or secure a discount or concession without disturbing formal market pricing. That is, if a purchaser pays more than he needs to pay, he is, in effect, giving a discount on the reciprocal purchases from him. Thus, reciprocity can be used not only as a means for avoiding the Robinson-Patman Act rule against price discrimination,⁵ but also as a means of prolonging price rigidity in the marketplace.

The way reciprocity can work is best illustrated by viewing it through the eyes of a potential participant. The businessman may well believe that he can use his purchasing power to gain more sales without cost to him. Using the example of the truck manufacturer, he probably thinks that he is in business to sell trucks, not to buy paint.

4. Mueller, *The Rising Economic Concentration in America: Reciprocity, Conglomeration and the New American 'Zaibatsu' System II*, 4 ANTITRUST L. & ECON. REV. 91 (Summer 1971) at 92.

5. 15 U.S.C. § 13 (1970).

He may believe that he is already getting sufficient service and quality in his paint purchases, and that the paint supplier could improve neither the service nor the quality of the paint even if he should desire to do so. More important, the truck manufacturer is likely to believe that the price he is paying for paint is competitive and that his chances of selling trucks to his paint supplier are much better than his chances of effecting a break in the market price of paint.

Our hypothetical businessman also knows that the sale of a truck based on reciprocity is more profitable to him than the sale of one at the same price to a non-reciprocal customer, because sales expense almost disappears as the customer becomes a "house account." Moreover, reciprocal prices tend to be higher initially and to increase over time because of the captive nature of the account. Outsiders become reluctant to quote as they learn that they cannot share in the business, regardless of the price they quote. They think that the maximum they may accomplish is to force their competitor, who has a lock on the business, to lower his price. Such a result is viewed as merely depressing the profitability of their own industry, in other words, as an act which is not "constructive," and which might well precipitate a program of vindictive price-cutting. Although the businessman selling his trucks on reciprocity may realize that in the future he will probably experience the same problems in obtaining paint at a competitive price that his customer is presently experiencing in purchasing trucks, he is likely to conclude that his immediate increase in sales justifies the risk.

The effects of reciprocity may not always be undesirable. Open price, quality and service competition is desirable because it moves toward better allocation of resources and maximization of business efficiency. But it must be admitted that price competition is not perfectly operative in our economy, and reciprocity may tend to promote economic efficiency in stable price situations. As already noted, one economic effect of reciprocity in a given situation may be that a buyer gets an indirect discount on purchases. In our hypothetical example, the truck manufacturer could be viewed as buying paint more cheaply rather than as selling more trucks. Moreover, if our hypothetical truck manufacturer has considerable unused capacity, expansion of his sales without cutting his standard price may be economically beneficial, whether he uses more salesmen, advertising, reciprocity, merger or some other technique.⁶

6. For a fuller treatment of the possible economic benefits see Markovits, *Tie-ins, Reciprocity, and the Leverage Theory*, 76 YALE L.J. 1397, 1399-1443 (1967).

The legal relevance of such economic considerations is not clear. The antitrust laws, because they are enforced through decisions of lawyer-judges, probably cannot be overly concerned with fine points of economic analysis, even if the applicable economic theories were consistent and the economic data available.⁷ By legal standards, there is a good case for the anti-competitive effect of reciprocity. Not only does it seem to exclude some competitors from the market unfairly and uneconomically,⁸ but it also encourages bigness, diversification and conglomeration.⁹

ANTITRUST DECISIONS INVOLVING RECIPROCITY

Although it is generally considered a modern restraint of trade, coercive reciprocity was proscribed by the Federal Trade Commission (FTC) in a series of actions in the 1930's.¹⁰ Despite the widespread practice of reciprocity since then, these early cases were not followed by further enforcement efforts. The issue of reciprocity was not brought to the fore again until the Supreme Court discussed it in 1965 in a case applying section 7 of the Clayton Act.¹¹ In *FTC v. Consolidated Foods Corp.*,¹² the Commission held illegal a merger between Consolidated, which bought large quantities of goods from the food processing industry, and Gentry, Inc., a major supplier of dehydrated onion and garlic to the food processing industry. The Commission found that the acquisition of Gentry provided "the advantage of a mixed threat and lure of reciprocal buying in its competition for business and 'the power to foreclose competition from a substantial share of the markets for dehydrated onion and garlic.'"¹³

7. See D. DEWEY, *THE THEORY OF IMPERFECT COMPETITION: A RADICAL RECONSTRUCTION* 142-64 (1969), for the proposition that the economic impact of particular business decisions is not now provable.

8. Donnem, *The Antitrust Attack on Reciprocity and Reciprocity Effect*, 38 A.B.A. ANTITRUST L.J. 637 (1969).

9. See generally G. STOCKING, *WORKABLE COMPETITION AND ANTITRUST POLICY* 294-95, 297-304, 315-18 (1961).

10. *Waugh Equip. Co.*, 15 F.T.C. 232 (1931); *Mechanical Mfg. Co.*, 16 F.T.C. 67 (1932); *California Packing Corp.*, 25 F.T.C. 379 (1937). In those cases, the FTC branded *coercive* reciprocity as one of the "unfair methods of competition" made unlawful by section 5 of the Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914), *as amended*, 15 U.S.C. § 45 (1970). Until 1972, it was generally thought that unfair trade practices under section 5, which is not strictly an antitrust act, embraced only practices which violated other antitrust laws, or would do so if there were a conspiracy to engage in the proscribed practices. A broader interpretation of section 5 was adopted in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

11. 15 U.S.C. § 18 (1970).

12. 380 U.S. 592 (1965).

13. *Id.* at 593.

The Supreme Court, citing its section 1 tie-in cases,¹⁴ upheld the Commission's decision, stating that reciprocity "results in 'an irrelevant and alien factor' . . . intruding into the choice among competing products, creating at the least 'a priority on the business at equal prices.'" ¹⁵ Except for this broad language, the decision will not be particularly helpful in future reciprocity cases, for the case presented an extreme situation of essentially coercive use of reciprocity by a seller having much greater buying power than his competitors and having a large or dominant share of the restrained selling market.¹⁶

The element of buying power relative to competitors in the reciprocal *selling* market was emphasized by the Court of Appeals for the Third Circuit in *Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc.*¹⁷ In that private action brought to prevent a takeover of Allis-Chalmers, the court reversed the denial of a preliminary injunction on several grounds. One ground was that a part of the business of the merged company was to be the sale of rolling mills by its Blaw-Knox division to the steel industry; finding that "a White-Allis combination would buy a far larger amount of steel than any of Blaw-Knox's competitors in the rolling mill market,"¹⁸ the court concluded that a substantial basis existed for the challenge to the merger because of opportunities for reciprocity. The finding of relative power vis-à-vis existing competitors by the Commission in *Consolidated Foods* and by the court in *Allis-Chalmers* focused on the most visible anti-competitive effect of reciprocity, namely, the foreclosure of markets through bigness and conglomeration.

In recent non-merger actions, the Justice Department has obtained a large number of consent decrees prohibiting corporate defendants from engaging in reciprocity.¹⁹ To date, however, no Government complaint claiming a section 1 Sherman Act violation based on reciprocity in a non-merger setting has produced a court decision on the Government's theory of illegality.

Reciprocity was expressly placed within the category of restraints deemed per se unreasonable by the district court in *United States v. General Dynamics Corp.*²⁰ In that case, the Government sought divestiture by General Dynamics of its Liquid Carbonics Division on claimed

14. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958), discussed at notes 83-87 *infra*; *International Salt Co. v. United States*, 332 U.S. 392 (1947).

15. 380 U.S. at 594.

16. *Id.* at 595.

17. 414 F.2d 506 (3d Cir. 1969).

18. *Id.* at 518.

19. For a discussion of those cases see text accompanying notes 74 & 75 *infra*.

20. 258 F. Supp. 36 (S.D.N.Y. 1966).

violations of sections 1 and 2 of the Sherman Act. The Government's contention that the agreement to merge constituted a violation of section 1 was accepted by the court. As to the claim that defendant's contracts with its customers based on reciprocity violated section 1, the court concluded that reciprocity is sufficiently analogous to "tying"²¹ to make the practice per se illegal provided a "not insubstantial" amount of commerce is restrained.²² It also stated that it made no difference whether the reciprocity was coercive or non-coercive. The court ruled that evidence that General Dynamics had systematically interjected reciprocity into its sales presentations and that its suppliers did, in fact, buy large quantities of goods from General Dynamics was not sufficient to support a finding of illegality under section 1. Rejecting the circumstantial evidence of substantial reciprocity, the court looked only at the specific purchases from General Dynamics which were proven to have resulted from reciprocity. The court held that the substantiality requirement for illegality was not met by aggregate purchases by two suppliers amounting to \$177,225.

*Columbia Nitrogen Corp. v. Royster Co.*²³ is the only reported case in which a private litigant has sought treble damages based on alleged reciprocity. Plaintiff sued for breach of contract and defendant relied on its reciprocal purchasing agreement with plaintiff both as an affirmative defense and, by way of counterclaim, as a basis for damages. The jury did not find coercion, and the court rejected defendant's claims without reaching the question of the legality of non-coercive reciprocity.²⁴ In holding that a willing participant cannot recover, the court stated: "We think it plain, therefore, that a party, who voluntarily formulates and equally participates in a non-coercive agreement for reciprocal dealing until a declining market makes its purchases unprofitable, cannot maintain an action under § 1 of the Sherman Act against its trading partner."²⁵

21. See page 111 *infra*.

22. 258 F. Supp. at 66. The court had so held in its prior opinion denying defendant's motion to dismiss. *United States v. General Dynamics Corp.*, 246 F. Supp. 156 (S.D.N.Y. 1965).

23. 451 F.2d 3 (4th Cir. 1971).

24. Since the reciprocal practices had terminated by the time Royster brought the action, the court had no need to consider the enforceability of the allegedly illegal agreement, and it expressly stated that it was not deciding whether a non-coercive reciprocity agreement was illegal under section 1 of the Sherman Act. It also expressed "no opinion on whether . . . a person not a party to the reciprocal dealing, could maintain an action under § 1 . . . based on the agreement between Royster and Columbia." *Id.* at 14 n.19.

25. *Id.* at 16.

CONTRACT, COMBINATION OR CONSPIRACY

The *Columbia Nitrogen* opinion considered and properly distinguished the decision of the Supreme Court in *Perma Life Mufflers, Inc. v. International Parts Corp.*²⁶ In that case Midas Muffler franchisees were seeking damages for monetary losses allegedly caused by illegally restrictive terms in their franchise agreements. They alleged a conspiracy between International Parts Corporation, three of its wholly owned subsidiaries and six individual officers or agents of the corporations to restrain trade in violation of section 1 of the Sherman Act and section 3 of the Clayton Act.²⁷ The court of appeals affirmed the district court's judgment for defendants on two grounds. First, since plaintiffs had entered into the illegal agreements, they were *in pari delicto* and thus could not recover from their joint wrongdoers. Second, there was no showing of a combination or conspiracy, because the defendants were all part of one business entity which could not conspire with itself. The Supreme Court reversed.

Seven members of the Court (in four opinions) concluded that the facts established that plaintiffs did not so participate in the illegality as to be barred from recovery. When the several concurring opinions are combined with Justice Black's opinion for the plurality of four, the case clearly holds that the technical doctrine of *in pari delicto*, "with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."²⁸ The broad principle underlying the doctrine, however, was not totally rejected. Justice Black said that he was not deciding whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action."²⁹ The five justices who concurred or concurred and dissented went further. Although the logical foundations for their conclusions are different, the net effect of the various opinions is a rule that when a plaintiff is the moving force or an equal force in establishing the restraint, he cannot recover. Thus the holding in *Columbia Nitrogen* that an equal participant in non-coercive reciprocity cannot recover was correct under the *Perma Life Muffler* decision.³⁰

26. 392 U.S. 134 (1968).

27. An allegation of illegal price discrimination under the Robinson-Patman Act was not involved in the appeal to the Supreme Court.

28. 392 U.S. at 140.

29. *Id.*

30. In addition to the *Columbia Nitrogen* decision, see *Premier Elec. Constr. Co. v. Miller Davis Co.*, 422 F.2d 1132, 1138 (7th Cir. 1970). There can, of course, be variations on this theme. For example, in *American Mfrs. Mut. Ins. Co. v.*

Justice Black's discussion of the conspiracy issue, however, confuses the application of this new equal fault rule. Justice Black first held that a corporation and its wholly owned subsidiary can be found to have combined or conspired under section 1 of the Sherman Act.³¹ He went on to suggest alternative conspiracy theories, stating that a finding of combination could equally well be based on the particular franchise agreement between one plaintiff and the defendant Midas, Inc., or on the agreements between Midas and the other franchise dealers "whose acquiescence in Midas' firmly enforced restraints was induced by 'the communicated danger of termination.'"³² Justice Harlan, joined by Justice Stewart, dissented on the ground that there were unresolved fact questions as to the equality of the participation of plaintiffs. He noted that the application of the bar of *in pari delicto* may be proper where the illegal combination is an agreement between the plaintiff and defendant, but improper where the illegal combination or conspiracy is found elsewhere and the plaintiff merely "knowingly allowed an offense to be committed against him."³³

Certainly under Justice Harlan's approach, and probably under the more general rules of the other opinions, the application of the new equal fault rule could turn on who is found to have conspired or combined in the particular case. If a reciprocity case plaintiff relies on the combination between himself and his trading partner, then the *Columbia Nitrogen* result is very likely. Typically, each party initially and recurringly during the continuation of the reciprocal dealing makes an uncoerced decision that he can profit by the relationship. To use a word employed by Justice Harlan in *Perma Life Muffler*, it would be "bizarre"³⁴ for such a willing party to a reciprocal purchasing arrangement to recover. If, on the other hand, the focus is on a combination or conspiracy between defendant and its subsidiaries, or defendant and other suppliers, the bar of equal fault is not so obviously applicable. A large buyer who enters into reciprocity agreements with a number

American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131 (2d Cir. 1971), the court affirmed the dismissal of a tie-in case on the ground that the plaintiff had acted unreasonably in failing to negotiate further to eliminate the unwanted contractual provisions.

31. *Accord*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951). The policy of the Department of Justice has been to apply this rule only where "the practice has a coercive or restrictive effect on outsiders." Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to Thomas J. O'Connell, Feb. 22, 1971, 1972 TRADE REG. REP. ¶ 50,122 at 55,197.

32. 392 U.S. at 142, quoting United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967).

33. 392 U.S. at 154.

34. *Id.*

of suppliers could, under one of Justice Black's theories, be held to be engaged in a combination with all of them, and it is arguable that no one of the individual supplier-participants is participating in such larger combination equally with the large buyer.

Justice Black's rule allowing free choice of alternative theories of combination may not yet be firmly embedded in the law. The difficulties with the rule are illustrated by *Albrecht v. Herald Co.*,³⁵ in which the freewheeling approach to finding combination led to the plaintiff recovering for invasion of his exclusive territory by defendant, even though the Court seemed to assume that the exclusivity was illegal. Future cases may elucidate the relationship between the theory of combination or conspiracy and the restraints and damages in anti-trust cases; this article, like Justice Harlan in *Perma Life Mufflers*, makes "no attempt to drain the bog at this point."³⁶ Suffice it to say that a party to a reciprocity agreement has a better chance of avoiding the equal fault defense if he establishes a conspiracy between his trading partner and someone else, such as his partner's parent corporation, to engage in the reciprocity.

Regardless of where the combination or conspiracy is to be found, the plaintiff must offer evidence of its existence. Assuming that the intra-enterprise conspiracy doctrine is not available,³⁷ it may often be difficult for either the Government or a private plaintiff to obtain direct evidence of an agreement to engage in reciprocal purchasing. Especially since the initiation of the Government's campaign against reciprocity, it is likely that reciprocal purchasing arrangements will be subtly developed and essentially tacit. The conclusion of one court³⁸ that tacit reciprocity cannot violate section 1 may overstate the point, but the general rule is said to be that proof of consciously parallel (or,

35. 390 U.S. 145 (1968).

36. 392 U.S. at 156.

37. When only one corporation is involved, it is usually held that the enterprise cannot conspire with itself. *E.g.*, *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969); *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969) (reversing the trial court's finding of an intra-enterprise conspiracy), *cert. denied*, 396 U.S. 1062 (1970); *cf.* *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (hiring independent agent to further price fixing scheme held to constitute combination). *But see* *Handler, Through the Antitrust Looking Glass — Twenty-First Annual Antitrust Review*, 57 CALIF. L. REV. 182, 185 (1969); *Symposium: United States v. General Tire and Rubber Company: Intracorporate Conspiracy and Sherman Act Reciprocity*, 36 A.B.A. ANTITRUST L.J. 102, 122 (1967); *Unincorporated Divisions of a Single Corporation Are Legally Capable of Conspiring Among Themselves in Violation of Section 1 of the Sherman Act*, 43 NOTRE DAME LAW. 786 (1968).

38. *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966).

here, consciously reciprocal) action is, without more, not sufficient to sustain a finding of contract, combination or conspiracy.³⁹

The Supreme Court's pronouncements on the sufficiency of circumstantial evidence to prove contract, combination or conspiracy are clouded by the fact that two of the key decisions, *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*⁴⁰ and *Interstate Circuit, Inc. v. United States*,⁴¹ merely upheld the findings of fact in the trial courts.⁴² The Court's 1969 decision in *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*,⁴³ however, was not such a decision and may indicate that little, if any, evidence is required to support a finding of combination or conspiracy. In that case, both the district court and the court of appeals held that summary judgment for defendants was proper because extensive discovery had produced no evidence of a conspiracy to exclude the plaintiff from the market for bronze grave markers. The Supreme Court reversed. In deciding that the case should go to trial, the Court could simply have relied on its usual rule rejecting summary procedures in antitrust cases.⁴⁴ Instead, it affirmatively concluded that "there remained material issues of fact which could only be resolved by the jury after a plenary trial."⁴⁵

Briefly, the facts, as established through pretrial discovery, were that one defendant manufactured and sold bronze grave markers; the other five defendants were operators of cemeteries which had rules which made it unlikely that their customers would buy grave markers from anyone except the cemetery operator. The manufacturer-defendant supplied the bulk of operator-defendants' requirements for bronze markers, and by the circulation of a pamphlet encouraged the tie-in practices of the operator-defendants. The complaint alleged that defendants had jointly adopted various restrictive devices to prevent and restrict sales by plaintiff, a retailer of bronze grave markers.

The per curiam Supreme Court opinion stated at one point that the Court was holding "only that the alleged conspiracy had not been conclusively disproved by pretrial discovery."⁴⁶ However, the opinion

39. For a conclusion that nothing much more can be said about the law in this troubling area see A.B.A. SECTION OF ANTITRUST, *ANTITRUST DEVELOPMENTS 1955-1968* (1968), at 22-24.

40. 346 U.S. 537 (1954).

41. 306 U.S. 208 (1939).

42. *But cf.* *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (finding combination and liability contrary to the jury verdict).

43. 394 U.S. 700 (1969).

44. The benchmark case on this rule is *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962); *cf.* *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253 (1968).

45. 394 U.S. at 704.

46. *Id.*

had earlier made it clear that its reversal was not dependent upon the absence of additional evidence. The Court said, in effect, that if a manufacturer encourages his customers to do their own retailing with the expectation of getting more of their business, then the jury is entitled to draw the inference of a conspiracy between the manufacturer and the various customers who decided that they could make more money by doing their own retailing. In support of this *non sequitur*, the Court cited the statement in the *Theatre Enterprises* case that "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement."⁴⁷ The current Director of the Bureau of Competition of the Federal Trade Commission, Alan S. Ward, has commented that "*Norfolk Monument* and similar conscious parallelism cases reflect a willingness to penalize essentially unilateral conduct under certain circumstances, that is, where proof of restraint is *strong* though proof of *any agreement* is weak."⁴⁸

Certainly in the area of resale price maintenance, the Court has gone far toward abolishing the requirement of proof of agreement.⁴⁹ Announcement by a seller of a policy that "we will deal with you only if . . .," and subsequent acquiescence in that policy contrary to the isolated self-interest of the buyer do suggest conventional notions of implied contract or acceptance of an offer by action. Perhaps such an announcement of policy is what Ward had in mind when he spoke of strong proof of restraint.

On the other hand, if *Norfolk Monument* means that conscious parallelism alone is sufficient to prove conspiracy even when there are legitimate business reasons for each partner to undertake the parallel actions, it permits an improper inference. The only logical rule for finding agreement from consciously parallel behavior was that stated in *Interstate Circuit*: such an inference is permitted where each party "knew that cooperation was essential to successful operation of the plan."⁵⁰ As Professor Turner has so persuasively demonstrated, it must be shown that the decisions of the conspirators were interdependent.⁵¹ This proper, limited rule would allow a finding of combina-

47. *Id.*, quoting *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954).

48. Ward, *Contract, Combination and Conspiracy*, 38 A.B.A. ANTITRUST L.J. 627, 630 (1969).

49. *E.g.*, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).

50. 306 U.S. 208, 226 (1939). See also *FTC v. Cement Institute*, 333 U.S. 683 (1948).

51. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

tion in many tacit reciprocity cases. Where there is proof that the parties could have purchased equal goods from others at lower prices, and especially where one or both parties are charging the other more than they are charging third parties for the same goods, then the inference that they have combined or agreed to the reciprocal purchases is logical. Otherwise, why would one or both have paid the higher prices? The credibility of rebuttal evidence that the higher prices on reciprocal purchases were an accidental result of decisions based on short-term considerations of quality and service or long-term considerations of price, quality and service would probably have to be weighed by the trier of fact. The once common practice of one or both parties compiling and distributing to their purchasing departments statistics identifying the companies' customers⁵² might not itself establish a joint motive;⁵³ but such evidence would make testimony that the purchasing decisions were made on the basis of considerations of long-range quality and service far less credible.

INJURY AND DAMAGES

Antitrust cases distinguish injury from damages and impose a stricter burden of proof as to injury than as to damages. The dual standard has been stated as follows:

The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage; the burden as to the former is the more stringent one. In other words, the *fact* of injury must first be shown before the jury is allowed to estimate the *amount* of damage.⁵⁴

Where the reciprocity involves higher prices, and a competitor has unsuccessfully sought the business on more favorable terms, the fact of injury to both the excluded competitor and the overcharged participant might be thought to be obvious, and the more stringent burden of proof as to injury easy to meet.⁵⁵ For example, suppose that the

52. The practice is enjoined under some current consent decrees. See text accompanying note 74 *infra*.

53. See *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 66 (S.D.N.Y. 1966); *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 552 (W.D. Pa. 1963).

54. *Flintkote Company v. Lysfjord*, 246 F.2d 368, 392 (9th Cir.), *cert denied*, 355 U.S. 835 (1957). This rule was laid down by the Supreme Court in *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931).

55. It might be argued that a competitor precluded from making sales by reason of coercive reciprocity cannot recover because he was not within the target area and thus has no standing under section 4. See *Wright, Legal Cause in Treble Damage Actions Under the Clayton Act*, 27 Md. L. Rev. 275 (1967). This judicially developed

price paid in a reciprocal arrangement is \$5,000 per truck and that a third party competitor was willing to sell an equal truck for \$4,500. It would seem that the purchaser of the truck has been injured to the extent of \$500 (less his profit on reciprocal sales to the truck manufacturer which he otherwise would not have made) and that the third party competitor has been injured to the extent of his lost profit.

Unless he is to be shielded from the consequences of his bargain, however, a party to a reciprocity arrangement should seldom, if ever, be deemed to be injured by the arrangement. A party does not make a bargain unless he thinks that the benefits to him will at least equal the detriments. The necessity of considering the provable benefit to the plaintiff who claims he was overcharged was recently recognized in the analogous tie-in area. In *Siegel v. Chicken Delight, Inc.*,⁵⁶ the Court of Appeals for the Ninth Circuit held that the price paid for a tie-in package, not just the higher prices on the tied products, had to be considered in determining the damages of the plaintiff franchisee. Plaintiff had paid nothing for the tying product, namely, the right to use defendant's trade name. With the nature of the tie-in bargain so starkly visible, the court held that the value of the use of the name should be offset against the allegedly higher prices paid for the tied products.

The reasoning of that decision should apply in most or all reciprocity cases. Parties who enter into a reciprocal bargain must believe it will benefit them, and the law should not relieve them of the consequences. In the *Consolidated Foods* case,⁵⁷ for example, suppliers of Consolidated were apparently induced to take inferior dehydrated garlic. However, it is likely that they recouped this economic detriment through their reciprocal sales to Consolidated.

The *Perma Life Muffler* case,⁵⁸ although involving the somewhat different problem of offsetting benefits to an antitrust plaintiff, casts some doubt on the legal applicability of the foregoing mutual benefit

rule barring recovery by remotely injured parties serves, in part, to prevent double recovery. In *Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481 (1968), it was held that the fact that the plaintiff had passed on the overcharge did not bar his recovery. Unless there is to be double recovery, those to whom the cost was passed on cannot recover. See Analysis, ANTITRUST & TRADE REG. REP. No. 547, B-1 (1972). No double recovery would result from allowing both injured parties to recover in a reciprocity case.

56. 448 F.2d 43, 52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). The court, however, did not abandon its holding in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 471 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), that the overcharge establishes "prima facie, that [the buyer] has been damaged."

57. See text accompanying notes 12-16 *supra*.

58. Discussed at notes 26-33 *supra*.

analysis. The Supreme Court's opinions in that case rejected the notion that because the plaintiffs had made a good profit from their Midas franchises they could not recover. Implicit in this holding must have been the assumption that damages to a franchisee are not to be measured by how much better off he would have been had he not entered the relationship. Instead, the legal and illegal parts of the franchise arrangement are to be separated, with damages being the losses resulting from the illegal part. Justice Black recognized that this could result in a windfall gain, but found that the interest of enforcing the antitrust laws justified the result. He did say, however, that "[t]he possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages."⁵⁹

If a similar approach of separating the legal from the illegal parts of the agreement were applied to reciprocity, a party to the reciprocity might be able to retain the benefits of his increased sales while recovering, trebled, the excessive amount paid for the reciprocally tied product. Such a rule would ignore the unitary nature of a reciprocal purchasing agreement and would create a legal incentive to engage in, rather than refrain from, reciprocity. The economic harm of reciprocity is the foreclosure of competitors, and the person who engages in reciprocity is furthering that harm. Unlike the usual franchisee, who may have made a long term investment and, thus, finds it expensive to refuse to comply with illegal restrictions and be terminated, the party to reciprocity would very seldom have an investment peculiar to the reciprocal arrangement, so his continued participation in the scheme must be motivated by expected benefit. In other words, the benefit from increased sales or from sales at higher prices should at least be deemed to be a benefit from the restraint to be offset against the damages to the party to the reciprocity within the *Perma Life Muffler* dictum.⁶⁰

Competitors who have been foreclosed from making sales because of reciprocity may also encounter difficulties in proving injury. Competitors who have had the business and lost it would have the best chance of establishing injury.⁶¹ When a proven supplier is replaced

59. 392 U.S. at 140.

60. Assuming that the *Perma Life Mufflers* doctrine of equal fault is applied, there should be no cases of claim and counterclaim based on the mutual overcharges. Unusual situations might occur where one party to the reciprocity could prove consequential damages.

61. A decline in sales and profits coinciding with the imposition of the restraint is an accepted basis for showing injury and damages, and the loss of specific sales is even more convincing. *E.g.*, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). The rule of *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953), that a terminated distributor could not

on orders from top management for purposes of exercising reciprocity, someone in the buyer's purchasing department may make statements to the replaced supplier to the effect that the loss of business is in no way attributable to factors of price, service or quality. Such statements, together with purchase orders and invoices available through normal discovery procedures, should go far toward establishing the fact of injury.

Proof of injury will be more difficult for competitors who only anticipated doing business with one of the parties to the reciprocal agreement. The typical antitrust case in which the claimed damages are lost profits on anticipated sales involves a loss of sales to the general public due to some act of defendant. In such situations, courts have approved various methods of estimating the lost sales and profits.⁶² Those cases holding that particular evidence sufficiently established a reasonable probability that some approximate amount of sales would have been made to unknown buyers indicate that there should be ways for a reciprocity plaintiff to prove that, absent the restraint, he would have sold some amount to a particular buyer. In fact, several decisions have upheld damage awards based on losses of sales to particular buyers.

In *Richfield Oil Corp. v. Karseal Corp.*,⁶³ defendant Richfield had illegally prevented its service stations from purchasing Karseal's wax, which generally outsold all competing products. The court of appeals noted that plaintiff's counsel "realistically approached the problem and presented to the jury a realistic formula"⁶⁴ for computing the lost sales and affirmed the judgment on the verdict for the lost profits. That case could be distinguished from the typical reciprocity case, however, because plaintiff's formula was based on a prediction of purchases by the general public, with the assumption that the service stations would have, if not restrained, met the public demand. Essentially the standard was one of comparing sales of like businesses not

recover because he could not prove a contract, combination or conspiracy, has been made obsolete by the more sophisticated theories of combination and conspiracy enunciated by the Supreme Court in *Albrecht v. Herald Co.*, 390 U.S. 145, 150 and n.6 (1968) and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968).

62. See Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954). The principal methods are comparison of plaintiff's actual sales and profit or loss with (1) plaintiff's profits prior to the restraint [*Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)], (2) profits of a comparable business not subject to the restraint [*Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), cert. denied, 342 U.S. 909 (1952)], and (3) plaintiff's profits after the restraint was lifted [see *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906 (2d Cir.), cert. denied, 369 U.S. 965 (1962)].

63. 271 F.2d 709 (9th Cir. 1959), cert. denied, 361 U.S. 961 (1960).

64. *Id.* at 715.

subject to the restraint. In the typical reciprocity case, the question is the probability of sales to a particular buyer, and general sales statistics may not be helpful.

The other two decisions approving recovery of profits on lost potential sales are not distinguishable on such a ground. In *Advance Business Systems & Supply Co. v. SCM Corp.*,⁶⁵ involving a tie of paper to copying machines, the court did not discuss the evidence of damages but did affirm as not clearly erroneous the non-jury award of damages for " 'the small loss of specific sales which plaintiff proved and the probable loss of some sales of paper for use with the few Model 55 machines proved to have been on copy service in Baltimore.' "⁶⁶ The applicability of this holding to other cases, however, might be limited by the finding that the plaintiff offered "approximately 90% of the competition SCM encountered in the sale of electrostatic paper in Maryland."⁶⁷ In such a situation, where the plaintiff is virtually the only alternative source of supply, it should be easiest to establish the probability of lost sales.

The decision which should be most helpful to the excluded competitor-plaintiff is *Rangen, Inc. v. Sterling Nelson & Sons*,⁶⁸ in which liability was imposed under the brokerage section of the Robinson-Patman Act.⁶⁹ Plaintiff's competitor, Rangen, had made payments to a state official to secure preferential treatment in the purchase of fishfood by the state. Including the two parties, there were eight companies who were potential suppliers of fishfood to the state. During an extended period, in which Rangen was the state's sole supplier, and was making substantial payments to the purchasing agent individually, the plaintiff's solicitations of the state's business at list prices lower than the prices the state was paying were unsuccessful. After the illegal payments stopped, the state accepted competitive bids for its fishfood requirements, and plaintiff, as the low bidder, was awarded the first contract. As might be expected, plaintiff's list prices, although lower than defendant's prices to the state, were higher than defendant's operative prices to others. On the basis of these facts, the court of appeals affirmed the award below of damages based on the finding that plaintiff probably would have supplied approximately one-fourth of the state's

65. 415 F.2d 55 (4th Cir. 1969).

66. *Id.* at 69.

67. *Id.* at 60.

68. 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

69. 15 U.S.C. § 13(c) (1970). This unusual application of the brokerage section of the Robinson-Patman Act was cited by the Supreme Court, seemingly with approval, in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

requirements if it had not been for the illegal payments. It further held that the use of plaintiff's list prices to compute the damages was not error, even though the competitive prices would likely have been lower, on the ground that it was enough that plaintiff's list prices were lower than defendant's prices to the state.

There is great similarity between the facts in *Rangen* and the typical reciprocity situation. As was noted earlier, one characteristic of reciprocal trade arrangements is that prices, particularly those charged by the party doing more reciprocal buying than selling, tend to be higher than those prevailing in the open market. Another characteristic of such an arrangement is that usually there is more than one reciprocity supplier for a given item, with the market share for each such supplier being negotiated with the reciprocal customer. A third characteristic is that all suppliers who have successfully negotiated a reciprocal share tend to sell the commodity at identical prices.

Where the plaintiff possesses the capacity to offer equal service and quality, repeated unsuccessful solicitation of the business in question at a lower price may be enough to establish injury.⁷⁰ Such evidence would be even more convincing if the potential customer had requested quotations from the plaintiff. Such a case is not unlikely. If a party to reciprocity who is paying the higher price is to retain what he considers to be the benefits of conducting business in this manner, he is not free to replace any of his reciprocal suppliers for reasons of price. But he may well seek outside price quotations for use in bargaining with his reciprocal suppliers. Typically, such a quotation is requested from a party who the potential customer believes is capable of performing adequately in regard to service and quality. It is to be expected that unless the non-reciprocal potential supplier quotes high purposely, because he has no expectation of securing any business, he will follow up his quotation with sales calls and will seek information as to the competitive level of his prices. Such price information is normally available to an experienced businessman. It is at this point, assuming that he has quoted prices lower than those charged by the reciprocal suppliers, and assuming further that such suppliers will not meet his prices, that the potential supplier develops a reasonable expectation of doing business. At a trial, the potential customer would be hard put to say that his request for price quotation was made only to obtain a comparison, with no expectation of placing an order, since such a statement would tend to prove the existence of

70. The injury could as easily be proven where the price is the same but the quality or service is better.

the restraint. Similarly, he would be loath to say that such request for quotation was only one of many made by him to various potential suppliers, particularly if all the quotations received by him contained prices lower than those he was paying. There appears to be no reason why a plaintiff who offers such evidence should not be held to have established the fact that he has been injured.

Where the plaintiff is claiming as damages only lost profits based on a former level of sales or on sales reasonably anticipated and not received, the problem of causal relationship seems minimal. If injury is established, the causative link to loss of the business need not be firmly established to get to the jury. Since *Story Parchment Co. v. Patterson Parchment Paper Co.*,⁷¹ the Supreme Court has consistently held that once the plaintiff shows that a violation of the antitrust laws has occurred and that he has sustained a loss, then if the violation is of the kind which might well cause the damage, the trier of fact may infer from available circumstantial evidence that a causal relation existed.⁷²

Although the law does not require much proof as to the amount of damages, the typical private reciprocity case does present a peculiar difficulty not usually present in other types of antitrust cases and not discussed in the *Rangen* opinion. If there are many potential supplier-competitor-plaintiffs, then there might be no reasonable limit to the defendant's potential liability. For example, ten competitors might each believe that, absent any restraint, he could reasonably expect to be awarded thirty percent of the business in question. As this would constitute three times the available business, a trebled award to each such plaintiff would subject the defendant to liability for nine times the amount of profit represented by the total purchases involved. This situation, however, calls for a limitation of liability, not a denial of it. The number of suppliers who sought the business at lower prices could be used as the basis for determining what proportion would have gone to any plaintiff, as was done in the *Rangen* case. Furthermore, excessive recovery would be improbable because it is unlikely that any later plaintiff could show that he would have received a larger share of the business.

The alternative to the *Rangen* approach would be to leave the enforcement of antitrust policy as it pertains to reciprocity to the Federal Trade Commission and the Justice Department.⁷³ The numer-

71. 282 U.S. 555 (1931).

72. *E.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962).

73. Another alternative, a class action on behalf of all potential suppliers, is inappropriate because of the probable conflicts of interest within the class. Such an

ous consent decrees which have been entered into in reciprocity cases broadly enjoin not only agreements or understandings to engage in reciprocity but also unilateral statements to suppliers that a preference will be given based on the suppliers' purchases and even the mere discussion with suppliers of the relationship between purchases and sales between the parties. They further enjoin internal corporate communication of information which could form the basis for reciprocal purchasing.⁷⁴ Two of the consent decrees obtained in 1972 go further, enjoining even totally unilateral reciprocity.⁷⁵ In these circumstances, the Government will be able to establish violation of a reciprocity consent decree on the basis of facts which would not independently establish a contract or combination in violation of section 1.

Nevertheless, the limited resources of the Antitrust Division of the Department of Justice and the FTC and the scanty history of Government enforcement of antitrust decrees suggest that the additional tool of private enforcement is still needed to counter effectively the anti-competitive practice of reciprocity.⁷⁶ If a consent decree does, in fact, result in abandonment of the practice, then no private action will be maintainable. If, on the other hand, the effect is merely to stabilize the reciprocal behavior at its level at the time of the Government suit or of the decree, or to prevent finely adjusted reciprocal bargains by limiting the availability of sales and purchase data, the illegally excluded competitor should be entitled to recover his damages in a private action.

Private reciprocity actions are peculiarly suited to achieving the desired end result. As the prospective plaintiff is seeking only the profits represented by a portion of the business, the defendant, if he happens to

approach may not, in any case, avoid the problem of allocating the lost sales among the potential suppliers. See Note, *Federal Rule 23(b)(3)(D): The Manageability Requirement In The Treble Damage Consumer Class Action*, 31 MD. L. REV. 354 (1971).

74. *E.g.*, *United States v. Owens-Illinois, Inc.*, 1972 Trade Cas. ¶ 73,828 (N.D. Ohio 1972); *United States v. W. R. Grace & Co.*, 1972 Trade Cas. ¶ 73,829 (S.D.N.Y. 1972).

75. *United States v. Martin Marietta Corp.*, 1972 Trade Cas. ¶ 73,858 (D. Md. 1972) (clause V(A)); *United States v. H. K. Porter Co.*, 1972 Trade Cas. ¶ 73,917 (W.D. Pa. 1972) (clause V(A)).

The only completely effective bar to reciprocal dealing would be to enjoin the parties from dealing with each other. Such ultimate relief is being sought by the FTC in its proposed complaint in *In re Southland Corp.*, File No. 6910076 (F.T.C. June 2, 1972), 3 TRADE REG. REP. (1972 Trade Cas.) ¶ 20,015.

76. See M. GREEN, B. MOORE & B. WASSERSTEIN, *THE CLOSED ENTERPRISE SYSTEM* 179-80 (1972); Comment, *Antitrust Consent Decrees: A Proposal to Enlist Private Plaintiffs in Enforcement Efforts*, 54 CORNELL L. REV. 763 (1969).

be the desired customer rather than the competitor, has an easy solution at hand; give the prospective plaintiff a portion of the business.

LEGAL STANDARDS FOR PER SE ILLEGALITY

The Tie-In Analogy

Reciprocity is one way to establish relatively firm outlets for one's goods or services. "House accounts" can also be established by such other means as tie-ins and exclusive dealing agreements. A typical tie-in is the sale of one product on the condition that the buyer purchase some other product from the seller. Reciprocity is, like a tie-in, a partial foreclosure of a market without easily provable economic justification. Thus the tie-in cases may be crucial in determining under what circumstances agreements to engage in reciprocity will be deemed illegal under the antitrust laws. Although the Supreme Court has suggested that a private plaintiff is always entitled to a day in court under the rule of reason,⁷⁷ the discussion here will be limited to the question of whether and under what circumstances reciprocity is likely to be held to be "per se illegal," as that term has been used by the Supreme Court in tie-in cases.⁷⁸

77. The rule of reason was elaborated at length by Justice White in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). Its most notable application in recent years was in *White Motor Co. v. United States*, 372 U.S. 253 (1963), a decision which met a youthful death in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). In its most recent tie-in decision, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 499-500 (1969), the Court held that a private plaintiff should be allowed an opportunity to prove unreasonableness even if the standards of per se illegality were not met. It is submitted that this holding of *Fortner* makes no sense unless it is intended to allow an opportunity for the plaintiff to show specific intent or bad means other than the tie-in. Absent such additional elements, the only possible grounds for unreasonableness would exceed the per se standards. See Dam, *Fortner Enterprises v. United States Steel: "Neither a Borrower nor a Lender Be,"* in 1969 SUP. CT. REV. 1, 32-36 (P. Kurland ed.). Cf. *Anderson v. American Auto. Ass'n*, 454 F.2d 1240, 1246 (9th Cir. 1972) (case remanded, apparently for trial on motive and perhaps on whether the agreements were "fairly necessary").

78. E.g., *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498-501 (1969). The Supreme Court's use of the term "per se illegal" in any area can be a device to avoid the problem of deciding whether a particular agreement represents price fixing, a boycott or some other forbidden activity. See generally Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165 (1959).

In the tie-in cases, however, illegality depends upon a finding of substantiality, and certain economic justifications may serve to avoid liability. The one clear "defense" is that there is no other practicable way to protect the good will of the seller. See Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 WIS. L. REV. 88, 113-16. Cf. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374 (1967); *Brown Shoe Co. v. United States*, 370 U.S. 294, 330, 331 (1962);

Although tying arrangements can be illegal under both the Sherman and Clayton Acts, the private plaintiff seeking damages based on reciprocity can rely only on the Sherman Act, as was done in the *Columbia Nitrogen* case. Section 3 of the Clayton Act deals with a sale of goods on the condition that the "purchaser thereof shall not use or deal in the goods . . . of a competitor . . . of the . . . seller."⁷⁹ Reciprocity could be said to be the sale of goods on the condition that the seller will not deal in the goods of a competitor of the *purchaser*. So viewed, reciprocity arguably violates the spirit of section 3, but there is no way to stretch the language of section 3 to apply to it.⁸⁰

The inapplicability of section 3 to reciprocity may be important. The rule that the standards for illegality of tie-ins are different under section 3 of the Clayton Act and section 1 of the Sherman Act was first announced by the Supreme Court in 1953 in *Times-Picayune Publishing Co. v. United States*.⁸¹ The Court there held that a tie-in is illegal under section 1 only if "the seller enjoys a monopolistic position in the market for the 'tying' product *or* if a substantial volume of commerce in the 'tied' product is restrained"; on the other hand, under section 3 only substantiality of the tied sales is required to establish illegality.⁸² In three subsequent cases, the Court has applied the *Times-Picayune* standard of illegality of a tie-in under section 1.

In the 1958 case of *Northern Pacific Railway Co. v. United States*,⁸³ clauses in deeds and leases of railroad land which required the grantees and lessees to ship their goods on the Northern Pacific unless competing routes or modes were cheaper were held to be per se illegal. The "monopoly power" language of *Times-Picayune* was construed as not "requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product."⁸⁴ Justice Black, writing for the majority, made two arguments for the sufficiency of the evidence of such power. First he pointed out that some land is uniquely advantageous for some users of the land. "Not only the testimony of various witnesses," he said, "but common sense makes it evident that this particular land was often prized by those who purchased or leased it and was frequently essential

United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961).

79. 15 U.S.C. § 14 (1970).

80. See Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873, 884 (1964).

81. 345 U.S. 594 (1953).

82. *Id.* at 608.

83. 356 U.S. 1 (1958).

84. *Id.* at 11.

to their business activities.”⁸⁵ His second argument was based on the fact that millions of acres were subject to the tying clause and that acceptance of the clauses conferred no benefit on the purchasers and lessees. Unlike the usual tie-in situation, the absence of benefit to the purchasers was incontestable because Northern Pacific was precluded by the law against freight rebates from arguing a *quid pro quo* in the form of a cheaper price for the land. In this unusual setting, it was found that the “very existence of this host of tying arrangements is itself compelling evidence of the defendant’s great power.”⁸⁶

The holding of the *Northern Pacific* case, that the necessary power could be based on the fact that *some* of defendant’s land was “often prized” and “frequently essential” to buyers, served to avoid any complex questions as to the relevant market in which the power was to be measured. This holding as to uniqueness or relative uniqueness was not supported by any findings of fact by the trial court⁸⁷ and was a departure from prior cases. Traditional market power analysis would have required an economic comparison of defendant’s land holdings with other available land.

In its 1962 decision in *United States v. Loew’s, Inc.*,⁸⁸ and its 1969 decision in *Fortner Enterprises, Inc. v. United States Steel Corp.*,⁸⁹ the Court carried forward Justice Black’s first argument in *Northern Pacific* as to unique advantage to some buyers. In *Fortner* plaintiff alleged a tying of unique credit arrangements to the sale of prefabricated houses. The Court held that the case should go to trial on the slightly different theory of whether defendant credit corporation, a wholly owned subsidiary of United States Steel Corporation, had the unique advantage of power over some borrowers. The Court said:

Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. (Citations omitted). As we said in the *Loew’s* case (citation omitted): “Even absent a showing of market dominance, the

85. *Id.* at 7.

86. *Id.* at 7-8.

87. The trial court had assumed that the relevant “market” in which to measure the power was that for the defendant’s land alone. *Id.* at 15. In a footnote in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 505 n.2 (1969), the majority came close to approving the trial court’s approach by citing the *Northern Pacific* case as involving uniqueness based on physical characteristics. See *Smith v. Scrivner-Boogaart, Inc.*, 447 F.2d 1014 (10th Cir. 1971) (court held tying involving retail store leases properly submitted to the jury, which found for defendant).

88. 371 U.S. 38 (1962).

89. 394 U.S. 495 (1969).

crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."⁹⁰

The *Fortner* decision also diluted considerably the second requirement for illegality of the tie-in, substantiality of commerce tied. The complaint alleged the tying of cheap credit to be used to defray the cost of development of certain land to the purchase of prefabricated houses built on the land. Justice Black, writing for the majority, said that "normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie."⁹¹ Applying that standard to the annual sales of tied houses to plaintiff the opinion concluded, "we cannot agree with respondents that a sum of almost \$200,000 is paltry or 'insubstantial.'"⁹²

These tie-in decisions have created a curious type of quasi-per se illegality. Although price fixing agreements, horizontal divisions of territory, group boycotts and restraints on alienation are illegal regardless of the economic setting,⁹³ the per se illegality of tie-ins is somewhat different. Perhaps modifying *Northern Pacific*, *Fortner* seemed to say that some inquiry as to the economic setting was required to determine whether there was sufficient power in the tying market to make a tie-in per se illegal.⁹⁴ The economic inquiry, however, need

90. *Id.* at 502-03. The four dissents in *Fortner* agreed with the standard that power or uniqueness is required.

91. *Id.* at 501.

92. *Id.* at 502.

93. Some economic inquiry may be relevant even as to these restraints. See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945) (approving some aspects of what could have been termed a group boycott); *Cartrade, Inc. v. Ford Dealers Advertising Ass'n*, 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972) (group refusal to deal not illegal because no anti-competitive intent was shown); *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960) (approving what could have been termed horizontal price fixing). Although the Supreme Court in the recent decision of *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), said that no special justification is permitted as to price fixing and division of territories, one suspects that limited arrangements might still be permitted as they were in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918), and *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953).

94. The court in *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 69 (4th Cir. 1969), after extensive analysis of *Fortner*, held: "Acquiescence in the burdensome term by an appreciable number of customers gives rise to an inference that SCM had 'some power over some buyers' in the market." The interpretation of *Fortner* used by the court in *SCM* is not easy to derive from the *Fortner* opinion. Justice Black did say that the existence of the seemingly burdensome tie "may suggest that respondents had some special economic power in the credit market." 394 U.S. at 504. He went on, however, to discuss other possible evidence of power or "unique economic advantages over his competitors." 394 U.S. at 505. Although it can be argued that the *Northern Pacific* "host of tying arrangements" language

not be directed at finding a threat to competition. The "pernicious effect on competition"⁹⁵ is invoked but assumed.

The empty appeal to effect on competition without opportunity for the real effect to be considered, found in the tie-in cases, is also found in Justice Black's 1959 opinion in *Klor's v. Broadway-Hale Stores*.⁹⁶ In that case, the Court held that a complaint alleging damages flowing from a group boycott stated a cause of action even though there was no allegation of public injury. The opinion relied heavily upon the hoary 1911 *Standard Oil* opinion,⁹⁷ in which Justice White discussed the meaning of the Sherman Act at great length. Justice Black paraphrased that opinion as stating that the effect of both sections 1 and 2 of the Sherman Act "was to adopt the common-law proscription of all 'contracts or acts which it was considered had a monopolistic tendency . . . ' and which interfered with the 'natural flow' of an appreciable amount of interstate commerce."⁹⁸ It is not clear from the *Klor's* opinion whether Justice Black had in mind a "quantitatively not insignificant" test similar to that of the tie-in cases. He noted that the complaint alleged a "wide combination consisting of manufacturers, distributors and a retailer"⁹⁹ and concluded that the alleged combination

clearly has, by its "nature" and "character," a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his

[see text accompanying note 86 *supra*] supports the holding in *SCM*, the *Fortner* decision does not.

After remand, the district court in the *Fortner* case directed a verdict for plaintiff on the issue of liability. The court of appeals reversed [452 F.2d 1095 (1971), *cert denied*, 406 U.S. 919 (1972)], interpreting the Supreme Court's decision as requiring proof of unique advantage in the credit market. But it went on to make the strange suggestion that to find United States Steel and its wholly owned credit subsidiary liable as co-conspirators, the jury might infer the necessary unique advantage from the fact that United States Steel did not require its credit subsidiary to maximize its profits and guaranteed some of its loans. 452 F.2d at 1102, 1103. That United States Steel chose to offer cheap credit, whatever that means, should not be evidence of unique advantage. From the court of appeals opinion it would appear that *Fortner* offered no logical evidence of uniqueness, so a verdict should have been directed for defendants. *But see* *Smith v. Scrivner-Boogaart, Inc.*, 447 F.2d 1014, 1017 (10th Cir. 1971) (apparently approving of submission of tie-in count to jury on little or no evidence).

95. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1953), *discussing* *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). For a similar leap from harm to a competitor to harm to competition see *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 699-700 (1967), decided under the Robinson-Patman Act.

96. 359 U.S. 207 (1959).

97. 221 U.S. 1 (1911).

98. 359 U.S. at 211.

99. *Id.* at 213.

destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,'" whether "the tendency is a creeping one" or "one that proceeds at full gallop."¹⁰⁰

Not only did the Court in *Klor's* find it unnecessary to consider the possible impact of the boycott in any market or submarket, but it also seemed to have decided that there need not be an inquiry even as to the degree of harm to plaintiff's ability to compete. No evidence was required that plaintiff could not carry on its business just as well by handling products of other manufacturers. Rather Justice Black found it sufficient that the alleged combination to boycott drove plaintiff "out of business as a dealer in the defendants' products" and deprived defendants "of their freedom to sell to Klor's" on equal terms.¹⁰¹ In other words, despite Justice Black's reference to the *Standard Oil* language describing the Sherman Act as outlawing combinations which "tend to create a monopoly," he seemed to hold that a group boycott for the express purpose of restricting the business opportunities of a particular business is an unacceptable form of economic warfare and is per se illegal. The *Klor's* dictum requiring interference with "an appreciable amount of interstate commerce" was probably nothing more than a reference to interstate commerce jurisdictional standards.¹⁰²

If the antitrust cases are analyzed on their facts rather than on their language, there would seem to be three types of illegal restraints of trade: (1) those which are in their nature torts, with the essential concern being unfair injury to a particular business; (2) those which involve what seems to be an abuse of power, giving those with the power more reward than they deserve, with some minimal disadvantage to competitors or consumers; and (3) those which, viewing

100. *Id.* at 213-14.

101. *Id.* at 213.

102. The federal courts of appeal generally impose such a jurisdictional standard. *E.g.*, *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966); *United States v. Starlite Drive-In, Inc.*, 204 F.2d 419 (7th Cir. 1953). Justice Black's suggestion that the *Standard Oil* decision established an "appreciable amount" rule was probably inadvertent. Justice White had said that the reference in the statute to "any part" of trade or commerce had "a geographical and a distributive significance," with the distributive significance being "any one of the classes of things forming a part of interstate or foreign commerce." *Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911).

the economic circumstances, pose a likelihood of substantially lessening competition or tending to create a monopoly.¹⁰³

In considering the applicability of the tie-in cases to reciprocity, it is important but difficult to determine which of the three basic restraints is being applied. Group boycotts and coercive tie-ins would seem to be illegal because they fall in the first two categories, so that in dealing with these activities the Supreme Court could be said to be fashioning rules of fair competition. The Court's opinions, however, including those in *Klor's* and in the recent decision on horizontal division of territory,¹⁰⁴ do not expressly reveal such a simple motivation.¹⁰⁵ Instead, a broader theory of threat to competition is nominally invoked to declare tie-ins to be per se illegal in some circumstances. The per se rules are the result of a statistical type of justice and are based on the likelihood of substantial injury in most cases, or at least in the most important cases; on the low level of economic cost of total prohibition because of the unlikelihood of economic justification; on the desire for efficiency of administration of the laws; and on the limitations on the ability of judges to decide complex economic questions.¹⁰⁶ Guided by these factors, the Court may well utilize its tie-in rules in devising rules for the per se illegality of reciprocity, but consideration of the minimal restraining effect of non-coercive reciprocity could lead to a less restrictive approach.

BEYOND THE TIE-IN ANALOGY

The Case for a Stricter Test

In rough terms, it can be said that the Supreme Court's requirement of market power means that only a "coercive" tie-in is illegal

103. The *Klor's* case fell in the first category. At least some of the "coercive" tie-in and reciprocity cases would seem to fall in the second. One recent example of the third group is *United States v. Container Corp. of America*, 393 U.S. 333 (1969) (exchange of pricing information). See Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 *YALE L.J.* 775, 826-33 (1965); Day, *Exclusive Dealing, Tying and Reciprocity — A Reappraisal*, 290 *OHIO ST. L.J.* 539, 587-88 (1968).

104. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

105. The closest the Court has come to expressly adopting a theory of harm to a particular competitor as the ultimate basis for illegality is the restraint on alienation theory of the *Schwinn* case and of *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

106. In *United States v. Topco Associates*, 405 U.S. 596 (1972), Justice Marshall, writing for the Court, quoted with approval Justice Black's statement of the reasons for per se illegality in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). In summary, these reasons are (1) pernicious effect of the agreements or practices, (2) lack of any redeeming virtue, (3) value of certainty in the law and (4) avoidance of a complicated and prolonged economic investigation "so often wholly fruitless when undertaken." *Id.*

under section 1 of the Sherman Act. Of course, given the minimal requirements for a showing of market power, only *some* likelihood of some slight "coercion" is required. As emphasized by the court of appeals in the *White-Allis* merger case, reciprocity introduces an anti-competitive element in the marketplace because of the advantage over other competing sellers. Thus a requirement of some dominance, uniqueness or other leverage before reciprocity will be held illegal seems appropriate.

Although the Supreme Court has never considered a case posing the issue, it is generally assumed that the *Times-Picayune* dictum — that power to impose the tie is not required for illegality under section 3 of the Clayton Act — accurately states the law. Professor Handler has argued that the anomaly of the differing standards under the Sherman and Clayton Acts should be removed by eliminating the requirement of power under section 1 of the Sherman Act.¹⁰⁷ Although such a change might require some further development of the distinction between a tie-in and the sale of one product having separate elements,¹⁰⁸ it would certainly be in accord with the Supreme Court's 1949 description of tie-ins as serving "hardly any purpose beyond the suppression of competition."¹⁰⁹ However, the *Times-Picayune* dictum as to section 3 may not be the law, for in the *Northern Pacific* case the majority said: "Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most."¹¹⁰ Although the power or uniqueness requirement for section 1 tie-ins has been diluted, the *Fortner* decision suggests that it will be retained. Thus, the Court, if ever asked, may well refuse to declare a tie-in without power illegal, even under section 3 of the Clayton Act, because the restraint of trade, in the words of the *Northern Pacific* opinion, "would obviously be insignificant at most."

107. Handler, *Antitrust: 1969*, 55 CORNELL L. REV. 161, 162 (1970). See also Day, *Exclusive Dealing, Tying and Reciprocity — A Reappraisal*, 29 OHIO ST. L.J. 539, 568-76 (1968).

108. In the *Fortner* case, the Court expressly avoided the problem of whether the usual sale of goods on credit could be considered to involve a tying of the sale to the credit. See *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753, 764 (6th Cir. 1965); *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 559 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 67-72 (1958).

109. *Standard Oil Co. v. United States (Standard Stations)*, 337 U.S. 293, 305-06 (1949).

110. 356 U.S. at 6. See also *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 520 (1969) (Fortas, J., dissenting).

If some power is to be required for reciprocity to be illegal, then there is a difficult question of how to measure the power. The basic rationale for illegality may be the determining factor, that is, whether the practice is objectionable because of coercion of buyers or because of exclusion of third parties. If the coercive element is the important factor, then power in a reciprocity arrangement could be measured in terms of dollars, with power to impose the restraint being found whenever a firm's dollar volume of purchases from one or more suppliers exceeded the dollar volume of sales to those suppliers.¹¹¹ Such a rule would be in accord with the tendency of the tie-in cases to hold that any sort of superior bargaining power is sufficient for a finding of illegality.

The difficulties with applying this "coercive" tie-in approach to reciprocity can be illustrated by a hypothetical situation. Suppose *X*, a large manufacturer of tin cans, agrees to buy its requirements of tinplate from *Y* so long as *Y* buys its requirements for fibre drums from a division of the can company. The drums are to be used to package welding rods produced by the tinplate manufacturer, *Y*, and the dollar volume represented by the drum purchases is considerably less than that represented by the tinplate purchases. The amount of tinplate purchases is analogous to the "tying" product; the dollar volume of drums sold is analogous to the "tied" product. In a suit brought by a competitor of the fibre drum division based on foreclosure from the market for such drums, the tie-in analogy would require the plaintiff to show that the can manufacturer possessed power in the tinplate market and that the amount of drum business so restrained was not insubstantial. In such a situation, the relative dollar volume would provide an appropriate basis for finding power, dominance or leverage used to foreclose a portion of the fibre drum market.

Suppose, however, that the plaintiff is *Z*, a competitor of *Y* in the tinplate market. If *Z* does not need fibre drums, or other products sold by the can manufacturer, he will still be excluded from a portion of the tinplate market. It seems illogical that he should be denied recovery because *Y* does not have any leverage over the can manufacturer, but rather appears to have been the "coerced" party to the reciprocity.¹¹²

111. Relative profitability would more accurately define the power but may be uncertain and excessively complicated to derive.

112. Perhaps the tie-in theory would allow *Z* to recover from the can manufacturer on the basis of his abuse of power leading to unnatural foreclosure of competition in both the tinplate and the fibre drum markets, but such result would provide relief only as an accidental result of theory rather than by application of the basic purpose of a rule requiring power or coercion. Furthermore, the target area

The power relationship between the parties to reciprocity seems to be beside the point. The foreclosure of *Z* from the tinsplate market would not be the result of "coercive" power. Rather it would be primarily a function of the fact that his competitor, *Y*, buys fibre drums while he does not. His injury would be the same even if *X* and *Y* made equal purchases from each other. Parties to an agreement who are in equilibrium with each other are not likely to be in equilibrium with their competitors. As already noted, it was the purchasing power relative to competing sellers of rolling mills which the Third Circuit emphasized in the *Allis-Chalmers* cases. Thus, if any market power is to be required, it should be measured against the power of competitors, rather than in terms of the parties to the agreement. If such were the test, then very few reciprocity cases would raise an issue as to whether there was sufficient power. Virtually all reciprocity arrangements will involve dollar power vis-à-vis some competitors, especially since illegality can be based on power on either side of the reciprocal arrangement. Thus it may be an easy step to acceptance of the suggestion of one writer that reciprocity should be illegal without regard to power.¹¹³

If the power part of the tie-in rule is not applicable or is almost always found to be satisfied by the "not insignificant" substantiality standard, then the rule against reciprocity will be very inclusive. As has been pointed out above, the *Fortner* case has eroded the \$500,000 figure of *International Salt*, and it is probable that the Court in *Fortner* did not intend its \$190,000 per year figure as a final minimum.

Moreover, a narrow focus on the volume of commerce foreclosed by the particular contract or contracts in suit would not be appropriate, because it is the total restrictive effects which are important in determining illegality. Therefore, in determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, the relevant figure is the total volume of purchases or sales affected by the "policy under challenge,"¹¹⁴ not the portion of this total foreclosed to the particular plaintiff who brings suit. Moreover, since harm to competition, not to a plaintiff, is the basis for the illegality, the requisite substantiality could be found on either side of the challenged arrangement.

doctrine is apt to bar recovery. See Wright, *Legal Cause in Treble Damage Actions Under the Clayton Act*, 27 MD. L. REV. 275 (1967).

113. Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873 (1964).

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

The Case for a Rule Related to Effect on Competition

It can be argued that the tie-in rule goes too far. The recent decision of the Ninth Circuit Court of Appeals in the *Chicken Delight* case that the exclusiveness of the trade name, the alleged tying product, satisfied the uniqueness requirement for illegality of a tie-in under the Sherman Act further illustrates the broadly inclusive nature of tie-in illegality and any reciprocity rule based on the tie-in cases.¹¹⁵ The *Fortner* case is one of the most dramatic examples of the extreme reach of the tie-in rules.¹¹⁶ The defendant steel company was struggling to gain acceptance in the prefabricated homes market, and its sales were undoubtedly not a significant percentage of that market, however delimited. Fortner was a successful real estate developer who insisted that United States Steel provide one hundred percent financing of the cost of the land and its development as well as credit for the purchase of the prefabricated houses. Although such liberal credit was contrary to defendant's usual policy, it acquiesced. When Fortner became dissatisfied with the deal, apparently on justifiable grounds of defects in the houses, he relied on the credit terms which he had imposed to state a cause of action for an illegal tie-in. Even if the plaintiff had been an excluded manufacturer of pre-fabricated homes, it is difficult to perceive a frustration of any of the purposes of antitrust laws in the *Fortner* situation. Even if there had been a clear tie-in in *Fortner*, a regulatory rule which reaches a \$190,000 deal in a multi-million dollar industry may interfere with, rather than promote, competition. Thus it may make better sense for the courts to reject the tie-in analogy and apply another substantiality test.

There are limitations to the *International Salt* dictum that it is "unreasonable, *per se*, to foreclose competitors from any substantial market."¹¹⁷ Justice Frankfurter, in the *Standard Stations* case,¹¹⁸ contrasted tie-ins with exclusive dealing or requirements contracts: "Tying

115. *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). *Accord*, *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1003 (5th Cir. 1972). *Contra*, *Susser v. Carvel Corp.*, 332 F.2d 505, 519 (2d Cir. 1964). As discussed in note 94 *supra*, the holding in *Advance Business Sys. & Supply Co. v. SCM*, 415 F.2d 55, 69 (4th Cir. 1969), that, in essence, no showing of power is required, seems to be wrong.

116. For a more complete statement of the facts and an incisive criticism of the *Fortner* decision and of the Court's application of standards to antitrust plaintiffs different from those applicable to defendants see Dam, *Fortner Enterprises v. United States Steel: "Neither a Borrower nor a Lender Be,"* in 1969 SUP. CT. REV. 1 (P. Kurland ed.).

117. 332 U.S. at 396.

118. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

agreements serve hardly any purpose beyond the suppression of competition. . . . Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public."¹¹⁹ He went on to consider the difficulties of having a court examine the economic effect of exclusive dealing in a particular case and adopted instead a limited per se illegality rule: "We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."¹²⁰ In a context of virtually all retail gasoline stations being bound exclusively to one supplier and the defendant having 23 percent of total market sales with 6.8 percent of the stations owned by defendant and 6.7 percent bound to defendant by exclusive dealing contracts, the Supreme Court, with four justices dissenting, affirmed the judgment against Standard Oil.

In *Tampa Electric Co. v. Nashville Coal Co.*,¹²¹ the Supreme Court was faced with a challenge to a contract to purchase coal requirements for a generating station in Florida for twenty years. As the Court defined the relevant market, the contract involved less than one percent of coal sales. Under the "substantial share of the relevant market" test of *Standard Stations* it was held that the contract was not illegal. The Court's elaboration of the "substantial share" concept was somewhat helpful to this unsettled area of the law:

To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.¹²²

The Court made it clear that it was not just the percentage of the market foreclosed which was determinative. Distinguishing its earlier decisions, the Court said: "There is here neither a seller with a dominant position in the market as in *Standard Fashions, supra*; nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil, supra*; nor a plainly restrictive tying arrangement as in *International Salt,*

119. *Id.* at 305-06.

120. *Id.* at 314.

121. 365 U.S. 320 (1961).

122. *Id.* at 329.

supra.”¹²³ In finding that the twenty-year term of the contract was not excessive, the Court also considered the general economic justification in the particular industry.¹²⁴

Before the *Tampa Electric* decision, there was great doubt as to the proper interpretation of the *Standard Stations* decision. Kessler and Stern, analyzing the earlier case in 1959, were remarkably predictive. They advocated the share-of-the-market substantiality rule as the proper interpretation and approved of it, but mildly criticized the Court for not requiring the Government to present uncomplicated, available economic evidence of barriers to entry.¹²⁵ *Tampa Electric* probably repairs that minor flaw.

Writing in 1958 in reaction to the *Northern Pacific* decision, Professor Turner argued that some tie-ins should be illegal without regard to power or uniqueness of the tying product if non-trivial substantiality were present, but that other tie-ins should be judged under the rule of reason and still others under the exclusive dealing, market-share test of *Standard Stations*.¹²⁶ The rule of reason, he suggested, should be applied where the tying product is given free or sold at a loss¹²⁷; the *Standard Stations* test should be used where the tied product is purchased for resale. “Tie-in sales to distributors foreclose competing sellers of the tied product from the consuming market,” he wrote, “only if those competing sellers cannot obtain other outlets with comparable access to that market.”¹²⁸ As yet there is no indication that the courts are willing to engage in such refined distinctions in the tie-in cases. But if, as Turner suggests, the tie-in rules reach many situations involving no significant anti-competitive effect, there is reason to hesitate before applying the rules to the uncharted area of reciprocity. The underlying basis of the tie-in cases should first be re-examined.

123. *Id.* at 334.

124. *Id.* at 334-35. As the Court did not analyze or place much reliance on the economic justification in the industry, it is not clear whether such a defense is generally available in an exclusive dealing case. See Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, in 1961 SUP. CT. REV. 267, 283-84 (P. Kurland ed.).

125. Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 24-37 (1959). For a sharply different view of the workability of the rule, see Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, in 1961 SUP. CT. REV. 267 (P. Kurland ed.).

126. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

127. *Id.* at 65-66.

128. *Id.* at 72. Discussing the *Standard Stations* case, he emphasizes that his test is foreclosure of a part of the ultimate consuming market, and that assessment of the degree of access through alternative middlemen depends on the consumer preferences for dealing with particular types of dealers or distributors.

The test of substantiality related to likelihood of harm to competition was very likely what Justice Jackson had in mind when he wrote the opinion in the benchmark *International Salt* case, despite later Supreme Court interpretation to the contrary. The defendant there required users of its patented salt dispensing machines to use only its salt in the machines. As noted in the *Northern Pacific* case,¹²⁹ the opinion did not seem to rely on the fact that the machines were patented. Without explanation, Justice Jackson stated, "the tendency of the arrangement to accomplishment of monopoly seems obvious."¹³⁰ Although this conclusion might have been based on the Court's prior patent misuse cases,¹³¹ it is more likely that the conclusion of obvious monopolistic tendency was based on the admitted fact that defendant was the country's largest producer of salt for industrial uses. For the largest producer to use restrictive agreements, with the likely effect of entrenching or increasing its market share, could be deemed to pose a probability of harm to competition.¹³²

Given the lack of evidence of power in land markets, the *Northern Pacific* tie-in case could have been decided in similar terms, that is, in terms which reverse the now settled tie-in law. Northern Pacific was undoubtedly a leading, or "dominant," factor in some of the transportation markets or submarkets in its area. Its tie-in arrangements were, like International Salt's, designed to enhance its position in its primary business. Thus the Court's casual treatment of the question of the power of Northern Pacific in the tying product, land, was appropriate. Similarly, if a percentage-of-the-market standard is used in reciprocity cases, courts may be expected to treat casually or ignore the question of purchasing power where the buyer has a leading position in the market in which he is promoting his sales through reciprocity.¹³³

The *Standard Stations* holding was that requirements contracts are not per se illegal because "they may well be of economic advantage

129. 356 U.S. at 9. *But see* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608 (1953); Standard Oil Co. v. United States (Standard Stations), 337 U.S. 293, 307 (1949).

130. 332 U.S. at 396.

131. *E.g.*, Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942).

132. *See* Comment, *Franchises, Requirements Contracts and Tie-Ins: One Test For a Tangled Two*, 74 YALE L.J. 691 (1965), wherein it is argued that the exclusive dealing and requirements contracts test should be applied to tie-ins, and it is concluded that the courts should look to the purpose and probable effects of both types of vertically integrating arrangements.

133. In an unusual case, substantiality of foreclosure might be found in the buying market. *See* Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138 (6th Cir. 1972) (buyer's aggregation of exclusive selling rights illegal only if a resulting foreclosure of market alternatives shown).

to the buyers as well as the sellers." Although the type of business advantage involved in exclusive dealing is arguably different, certainly reciprocity is typically believed by the parties to be of mutual benefit. Both are methods for obtaining relatively dependable customers, a business arrangement which is not necessarily harmful to long-run competition.

Although the percentage-of-the-market substantiality test is theoretically attractive as proscribing only arrangements which are shown to pose a likelihood of restraining trade, it does present difficulties of proof which may pose too great a barrier to antitrust enforcement in the reciprocity area.¹³⁴ If a percentage is to be shown, the market must be defined, and this can be difficult. Moreover, it is likely that the competitive effect of the foreclosure can be shown by aggregating restrictive foreclosure practices of a number of competitors as well as by the percentage foreclosure achieved by one defendant. Proof that virtually the entire market was foreclosed by written exclusive dealing contracts was probably not too difficult in *Standard Stations*. But in the absence of express contracts, the problem is quite different. Proof of bilateral reciprocity agreements between one defendant and a number of customer-suppliers sufficient to meet the substantiality requirement may be difficult, as shown by the *General Dynamics* case, but should not be insuperable where the essence of the proof is the pattern of non-competitive, higher prices being paid. However, a private plaintiff who would have to prove substantial market foreclosure by showing that a number of competitors engage in the practice with a number of customer-suppliers would be apt to forego the lawsuit.

CONCLUSION

Existing authority suggests three possible rules as to the illegality of reciprocity. By analogy to tie-ins, reciprocity may be illegal in all cases involving a not insubstantial amount of commerce or it may be so only where there is quantitative substantiality and it is imposed by superior bargaining power, retaining the power of uniqueness rule of the section 1 tie-in cases. By analogy to exclusive dealing, it may be illegal only where percentage-of-the-market substantiality is present on at least one side.

Business reciprocity is but another form of the fundamental cultural norm of returning favors.¹³⁵ This norm is reinforced by a natural tendency to deal with those whom we know and, therefore, have reason

134. See Bok, *supra* note 122.

135. ARISTOTLE, *NICOMACHEAN ETHICS*, Book VIII, ch. 13.

to trust. The propriety of the current broad attack by the Government on reciprocity practices of very large corporations does not dictate the proper rule for smaller businesses buying non-trivial amounts of goods or services. Perhaps what is needed is some alternative quantitative substantiality test. Justice Black said in *Fortner*, "it is easy to see how a big company with vast sums of money in its treasury could wield very substantial power in a credit market."¹³⁶ Such an absolute bigness consideration probably played a part in the *Northern Pacific* tie-in decision.

There is, as yet, however, no antitrust tool for overtly dealing with absolute bigness absent a showing of market or monopoly power.¹³⁷ The possibilities for unnecessary and wasteful interference with business practices by a rule of strict illegality for reciprocity must be weighed against the apparent lack of any economic justification for the practice. Justice White's statement in a footnote in *Fortner*, that tie-ins "may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market,"¹³⁸ applies as well to reciprocity, but this fact was not accepted by the Court as a justification for the practice.

The Supreme Court has not indicated that it will be swayed in future reciprocity cases by the legitimate value of avoiding unnecessary interference with business choice.¹³⁹ Absent a reversal of the Court's pattern of rejection of economic justifications for tie-ins and reciprocity, and assuming the continuation of the apparent policy that anti-trust cases should go to the jury on very little evidence, it must be concluded that any business which engages in "not insignificant" reciprocity, even though tacitly arrived at, should stand ready to show that it pays competitive prices considering the quality and service obtained. Otherwise, the inference of combination is permissible, and

136. 394 U.S. at 509.

137. *But see* Complaint in *In re Kellogg Co.*, File No. 7110004 (F.T.C. Jan. 24, 1972) 1972 ANTI-TRUST & TRADE REG. REP. No. 547, D-1, seeking under section 5 of the Federal Trade Commission Act divestiture, sharing of brand names, limitation of promotional practices and other relief against four manufacturers of ready-to-eat cereal.

138. 394 U.S. at 514 n.9.

139. On the other hand, except for the unfortunate *Fortner* case, it might be said that the Court has not been presented with situations calling for it to accept some presumption in favor of the legality of business methods and activities. Although rare, there are some court of appeals decisions which seem to use such a presumption, so that a burden of establishing illegality is cast on the Government or other plaintiff. *E.g.*, *Belliston v. Texaco, Inc.*, 455 F.2d 175, 183-84 (10th Cir. 1972) (Texaco's commission arrangement on tires, batteries and accessories supplied to its dealers not illegal in absence of coercion of the dealers).

the pattern of reciprocal purchases may lead to a finding of violation of section 1 of the Sherman Act.

Most of the troubling tie-in litigation has been initiated by parties to tie-in agreements, seeking relief from bad bargains. Assuming that the willing participant in reciprocal dealing will not be allowed to recover, a rule declaring agreements to engage in reciprocity illegal if they involve a not insubstantial amount of commerce, either in terms of dollar amount or percentage of the market, would not be likely to produce a large amount of litigation. The business incentives toward settlement where one party is considering naming his desired customer as a party defendant, coupled with the unique availability of settlement on terms acceptable to all parties, should tend to make instances of litigation rare. Assume that four suppliers share all of one buyer's business on the basis of reciprocity. A third-party competitor, thinking that he has been illegally foreclosed because his offer to sell at lower prices was rejected, threatens the competitors and their customer with suit. A likely solution would be for the customer to settle by giving a share of his business to such potential plaintiff. Assuming further than none of the reciprocal suppliers consent to being replaced, each of their shares would be reduced to accommodate the newcomer. It may also be expected that the reciprocal suppliers will be forced to lower their prices to a level competitive with that of the newly admitted supplier. The maintenance of two price levels, the higher being paid to reciprocal purchaser-suppliers, would be unlikely because such a price differential would be strong evidence of restraint by reciprocity. As other potential suppliers enter the picture, get a share of the formerly tied business, and probably drive the price down, the reciprocity will be minimized and, probably, abandoned.

Reciprocity involves more than an economic manifestation of the golden rule. Although occasional placement of a relatively small order for reasons other than service, price and quality certainly constitutes no barrier to competition, a large corporation's policy of consistently engaging in reciprocity almost certainly is anti-competitive. When the process of selling is reduced to the negotiation of one's fair share of the market, competition is displaced and the economy injured. Foreclosed competitors, with occasional help from the courts, should be able to do much to eliminate such reciprocity from the American economy.