TRADE REGULATION: DISTRICT COURT CLARIFIES TEST FOR CONGLOMERATE MERGER VIOLATION OF CLAYTON ACT

In a divestiture suit under the Clayton Act, the Southern District of New York limited the investigation necessary to ascertain a section 7 violation on the basis of reciprocity and brought reciprocal dealing standing apart from an acquisition within the purview of section 1 of the Sherman Act by analogy to tying arrangements. The reasoning and conclusions of the court may give significant impetus to the reciprocity concept as a basis for antitrust regulation with important implications for business expansion by diversification acquisition.

THE APPLICATION of antitrust legislation to reciprocal buying, or the practice of preferring one's customers when purchases are made,[1] was a dormant issue for over thirty years[2] until its recent emergence

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[1] Reciprocal buying may be more specifically defined as a business practice whereby "one firm buys from another with the explicit or tacit understanding that the other firm will buy from it in return." Note, 49 VA. L. REV. 852 n.2 (1963). Reciprocity, in the general sense, is a pervasive and widely accepted business practice, reportedly affecting all sales in some industries. See Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures,* 49 VA. L. REV. 433, 435-36 (1963).

Commentators and the courts have generally delineated four types of reciprocal dealing. Leverage, or *coercive,* reciprocity, whereby *A* buys from *B* only on the condition that *B* buy from *A's* new division (see note 8 *infra* and accompanying text) is but one of these. Related to leverage reciprocity is "secondary reciprocity" whereby *A* and *B* have merged and *A* could, through purchasing power, force its vendor, *C,* to force in return its vendor, *D,* to purchase from *B.* See United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963). See generally Harvith, *Reciprocity and the Federal Antitrust Laws,* 40 WASH. L. REV. 133, 178 (1965); Note, 32 GEO. WASH. L. REV. 832, 833 (1964). On the other hand, mutual, or "consensual," reciprocity refers to the practice by which two firms simply agree, without the use of leverage by either party, to purchase from one another. See notes 44, 56-63 *infra* and accompanying text. A second type of non-coercive reciprocity is "accommodative" or "psychological" reciprocity whereby a company buys without any agreement or other overt expression of its purpose but in the hope merely of currying favor so that the vendor will buy from it in return. See Day, *Conglomerate Mergers and the "Curse of Bigness,"* 42 N.C.L. REV. 511, 530 (1964); Krash, *The Legality of Reciprocity Under 7,* 9 ANTITRUST BULL. 93, 99 (1964); see note 84 *infra.*

See generally Austin, *A Survey of the Problems Encountered in Combating Reciprocal Trading Under Existing Trade Regulation Laws,* 41 IND. L.J. 165, 167-70 (1966); Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis,* 30 LAW & CONTEMP. PROB. 552, 566-67 (1965); Harsha, *The Conglomerate Merger and Reciprocity—Condemned by Conjectures?,* 9 ANTITRUST BULL. 201, 208 (1964).

[2] Reciprocity involving the coercive use of market power was first held illegal over thirty years ago by the FTC as an unfair method of competition under § 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1964).

as a subject of growing concern among both courts[3] and commentators.[4] Revitalization of the reciprocity concept was given renewed impetus by *FTC v. Consolidated Foods Corp.*,[5] wherein the Supreme Court held that section 7 of the Clayton Act[6] proscribes conglomerate mergers[7] which may enable the acquiring company to use its purchasing power to compel its vendors to initiate or

California Packing Corp., 25 F.T.C. 379 (1937); Mechanical Mfg. Co., 16 F.T.C. 67 (1932); Waugh Equip. Co., 15 F.T.C. 232 (1931). See generally Marshall, *Reciprocity as an Emerging Issue*, 29 A.B.A. ANTITRUST SECTION 195, 196 (1965). The question of the legality of reciprocity did not arise again until recent years. See note 3 *infra.*

[3] Reciprocity has recently been the significant issue in the decision of three prior cases, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963); and United States v. Penick & Ford, Ltd., 242 F. Supp. 518 (D.N.J. 1965). Reciprocity is also the basis of the Government's allegations in a pending suit, United States General Motors Corp., TRADE REG. REP. ¶ 45,063 (Case 1733) (N.D. Ill. 1963). Moreover, reciprocity has been mentioned in the Government's or enforcement agency's allegations in at least two other cases: United States v. Penn-Olin Chemical Co., 217 F. Supp. 110, 126 (D. Del. 1963), *vacated and remanded,* 378 U.S. 158 (1964), *dismissed,* 246 F. Supp. 917 (D. Del. 1965) (joint venture) Procter & Gamble Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16673 (FTC 1963), *remanded for dismissal,* 358 F.2d 74 (6th Cir. 1966), *rev'd,* 35 U.S.L. WEEK 4329 (U.S. April 11, 1967).

[4] *E.g.,* Asper, *Reciprocity, Purchasing Power and Competition,* 48 MINN. L. REV. 523 (1964); Austin, *supra* note 1; Handler, *Gilding the Philosophic Pill-Trading Bows for Arrows,* 66 COLUM. L. REV. 1 (1966); Hausman, *Reciprocal Dealing and the Antitrust Laws,* 77 HARV. L. REV. 873 (1964); Krash, *supra* note 1; Note, 32 GEO. WASH. L. REV. 832 (1964); Note, 49 VA. L. REV. 852 (1963); Note, 1 VALPARAISO L. REV. 114 (1966); Comment, 11 WAYNE L. REV. 739 (1965).

[5] 380 U.S. 592 (1965), *reversing* 329 F.2d 623 (7th Cir.), *reversing* 62 F.T.C. — (1963), 20 Sw. L.J. 192 (1966), 44 TEXAS L. REV. 1019 (1966). See generally United States v. Penick & Ford, Ltd., 242 F. Supp. 518 (D.N.J. 1965); Handler, *Eighteenth Annual Review of Antitrust Developments,* 20 RECORD OF N.Y.C.B.A. 540, 557 (1965); *The Supreme Court, 1964 Term,* 79 HARV. L. REV. 56, 181-85 (1965).

[6] 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964). Section 7 provides in relevant part as follows: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[7] A conglomerate merger is, theoretically, a merger of companies which are not related as suppliers, customers, or competitors; that is, mergers "in which there is no discernible relationship in the nature of business between the acquiring and acquired firms." Jacobs, *Mergers and the Small Business Man,* 16 A.B.A. ANTITRUST SECTION 83, 84 (1960). See H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949). Actually, the term is a residual one, denoting mergers which are neither horizontal (between companies producing the same or similar products) nor vertical (between a company and one of its suppliers or customers) and includes a wide variety of acquisitions ranging from the true conglomerate to those which more nearly resemble horizontal or vertical relationships. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1315 (1965). See, *e.g.,* Blair, *The Conglomerate Merger in Economics and Law,* 46 GEO. L.J. 672 (1958).

increase purchases from the acquired company.[8] In *United States v. General Dynamics Corp.*,[9] the District Court for the Southern District of New York expanded the scope of reciprocal practices proscribed by section 7 and detailed the process by which illegal reciprocity effects arising from a merger are to be identified. Moreover, the court held that reciprocity is within the ambit of section 1 of the Sherman Act.[10]

General Dynamics, one of the nation's largest industrial enterprises, merged with Liquid Carbonic, the largest domestic producer of carbon dioxide in an oligopolistic industry in which it accounted for approximately thirty-five per cent of the market.[11] At the time of the acquisition, General Dynamics possessed extensive purchasing power by virtue of its annual purchases totaling over 500 million dollars.[12] Because many of its suppliers were also purchasers of carbon dioxide,[13] General Dynamics developed a "Special Sales Program" through which it was suggested to the major suppliers that their sales might be reduced unless they agreed to make reciprocal purchases of carbon dioxide;[14] the program successfully procured sales for Liquid Carbonic.[15] The district court ordered divestiture, concluding that the conglomerate merger violated section 7 since it created leverage power in General Dynamics which would result in coercive reciprocity likely to foreclose Liquid Carbonic's competitors from a substantial share of the carbon dioxide market.[16] With regard to section 1 of the Sherman Act, the court dismissed allegations that contracts arising out of the Special Sales Program constituted an unreasonable restraint of trade.[17] Nevertheless, the court found that since both companies intended at the time of the merger to engage in

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[8] For a discussion of reciprocity with particular reference to *Consolidated Foods*, see Asper, *supra* note 4, at 524-25; Hausman, *supra* note 4, at 873; Comment, 11 WAYNE L. REV. 739, 780 (1965).

[9] 258 F. Supp. 36 (S.D.N.Y. 1966).

[10] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964). The statute provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

[11] 258 F. Supp. at 39.

[12] *Ibid.*

[13] *Ibid.*

[14] *Id.* at 42.

[15] *Id.* at 48.

[16] *Id.* at 62-65. See notes 71-79 *infra* and accompanying text.

[17] 258 F. Supp. at 66. See notes 105-17 *infra* and accompanying text.

reciprocal dealing, the merger itself was an illegal combination within the proscription of section 1.[18]

The original prohibition upon reciprocal dealing was promulgated during the 1930s in three decisions[19] which concerned the application of section 5 of the Federal Trade Commission Act.[20] Each of these cases involved highly abusive and coercive use of the acquirer's dominant purchasing position to increase a subsidiary's sales volume.[21] Following these decisions, however, reciprocity disappeared as a major concern from the antitrust arena until the advent of *Consolidated Foods.* There, the FTC utilized the amended section 7 of the Clayton Act rather than section 5 of the FTC Act, apparently because the latter provision, offering a cease and desist order as the only remedial device, was insufficient to attack the basic cause of reciprocity, which was deemed to be the corporate acquisition itself.[22]

SECTION 7 OF THE CLAYTON ACT

Since the amendment of section 7 in 1950,[23] the Clayton Act has applied to all categories of mergers, including conglomerates.[24]

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[18] 258 F. Supp. at 67. See notes 119-20 *infra* and accompanying text.

[19] See note 2 *supra.*

[20] 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1964).

[21] In Waugh Equip. Co., 15 F.T.C. 232 (1931), Armour Co., a major meat packer, used its position as a major shipper to force the railroads to buy from the gear manufacturer, Waugh, which it had acquired. The subsidiary's share of the market increased from less than one to thirty-five per cent in six years. Similarly, in Mechanical Mfg. Co., 16 F.T.C. 67 (1932), Swift & Co., also a major meat packer, used its power as a shipper to force purchases by the railroads from its gear manufacturer. In California Packing Co., 25 F.T.C. 379 (1937), a major food processor compelled its suppliers to route their products through a shipping terminal which the food processor owned.

[22] See Consolidated Foods Corp., [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16182, at 20973 (FTC 1962); Note, 32 GEO. WASH. L. REV. 832, 849-50 (1964).

[23] 64 Stat. 1125 (1950), amending 38 Stat. 731 (1914). See note 6 *supra.*

[24] Prior to 1950, § 7 was a relatively infrequent source for antitrust litigation because of a twofold limitation: (1) the provision was worded so as to apply only to mergers by stock acquisition. Thus, "almost every company with legal advice took the asset route in making acquisitions." Turner, *supra* note 7, at 1314; (2) the section was generally considered applicable only to horizontal mergers. Brown Shoe Co. v. United States, 370 U.S. 294, 313 (1962); United States v. E. I. duPont & Co., 353 U.S. 586, 613-15 (1957) (dissenting opinion).

Congressional concern over the trend towards economic concentration, facilitated by the narrow construction of § 7 and reinforced by a desire to formulate antitrust provisions applicable to mergers beyond those reached by § 1 of the Sherman Act, culminated in the 1950 amendment of § 7, 64 Stat. 1125 (1950). ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 117 (1955) [hereinafter cited as ATT'Y GEN. REP.]. See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362-63 (1963); Brown Shoe Co. v. United

Despite a clear expression of legislative intent,[25] however, controversy over the applicability of the modified section to conglomerate acquisitions[26] ceased only after dictum in *Brown Shoe v. United States*[27] listed such combinations as fully within the section's scope.[28] In *Brown Shoe,* the Supreme Court concluded from an examination of

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States, *supra* at 315. Thus, the amendment was designed to cover acquisitions by assets as well as by stock and was intended to make clear that § 7 applied to "all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . . ." H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949). See Note, 10 VILL. L. REV. 734, 754-55 (1965). Furthermore, the amended section was to apply before the effects of a merger warranted invocation of the Sherman Act and the determinative standard utilized was to be more stringent than that under the Sherman Act. S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950). See H.R. REP. No. 1191, *supra* at 7-8. Thus, the words "may be substantially to lessen competition" were added to illustrate that the emphasis was to be on the *probability* of anticompetitive effects and not on the aetual results of the merger. S. REP. No. 1775, *supra* at 4-6; ATT'Y GEN. REP. 118.

Congress articulated no specific standards to determine a violation of the section although the factors to be considered included whether the competitive role of any of the market's substantial members had been ended; whether the relative size of the acquirer was such that it had a decisively definite advantage over its competitors; and whether the number of competitors who would be eliminated from competition was significant. H.R. REP. No. 1191, *supra* at 8. Furthermore, Congress imposed no standards to delineate the relevant market and did not adopt "a definition of the word 'substantially' . . . by which a merger's effects on competition were to be measured. While providing no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger . . . Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry." Brown Shoe Co. v. United States, *supra* at 320-22.

Apparently Congress intended merely to prescribe a broadly defined test, thereby enabling the courts to evaluate the probable effects of each merger without the restriction of a rigidly defined standard. See Harvith, *supra* note 1, at 167 & n.117.

See generally H.R. REP. 1191, 81st Cong., 1st Sess. (1949); S. REP. No. 1775, 81st Cong., 2d Sess. (1950); Hrusoff, *Conglomerate Mergers, Joint Ventures, Market Extensions and Section 7 of the Clayton Act,* 69 DICK. L. REV. 113-18 (1965); Note, 52 COLUM. L. REV. 766 (1952); Note, 10 VILL. L. REV. 734 (1965).

[25] H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949). See note 24 *supra.*

[26] It was suggested that Congress had never intended conglomerates to be included within § 7 because they could not injure competition and because Congress did not understand the nature of "true" conglomerates and thus did not intend to reach them. Addresses by M. A. Adelman and Robert A. Bicks, Meeting of the Antitrust Section of the Association of the Bar of the City of New York, Nov. 13, 1956, cited in Blair, *supra* note 7, at 673-74 nn.9-10. See Harvith, *supra* note 1, at 169-70; Note, 49 VA. L. REV. 852, 853-54 (1963).

[27] 370 U.S. 294 (1962).

[28] *Id.* at 317 & n.31. Brown Shoe Co. was a leading manufacturer of shoes and the third largest domestic shoe vendor, controlling over 845 retail outlets. *Id.* at 301. The acquired company, G. R. Kenney Co., was the eighth largest seller of shoes and controlled over 400 retail outlets. *Id.* at 303. As both Brown and Kenney were distributors and Brown was a manufacturer, the merger had both horizontal and vertical aspects. *Id.* at 323-36. The Court concluded that the result of the vertical integration would be a lessening of competition, *id.* at 334, and that the horizontal merger would foreclose competitors from five per cent of the market, *id.* at 343-46, and therefore held both aspects violative of § 7.

congressional intent that a merger must be "functionally viewed,"[29] in light of all relevant evidence of the economic and competitive structure in which it was to take place, in order to ascertain its probable effects upon competition.[30] Thus, judicial inquiry was not to be limited merely to consideration of the amount of competition likely to be foreclosed as evidenced by the projected post-merger market shares.[31] However, the amended section was to prevent only

[29] *Id.* at 321-22. See note 24 *supra.*

[30] Thus, the *Brown Shoe* Court refused to adopt the "quantitative substantiality" doctrine which was enunciated in Standard Oil Co. of Calif. v. United States, 337 U.S. 293 (1949), an action under § 3 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 14 (1964). In that case, the Supreme Court concluded that the exclusive supply agreements which Standard Oil had with independent service station operators foreclosed a substantial share of commerce in the relevant product line since almost sixteen per cent of the retail gasoline dealers in the area had entered into the exclusive arrangements. This foreclosure percentage was held sufficient to demonstrate a violation of § 3 and therefore further examination of the agreements' probable anticompetitive effects was deemed unnecessary. It may be noted that § 3 prohibits certain leases, sales, or contracts of sale where the effect thereof "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Because of the similarity between this language and that of § 7, see note 6 *supra,* it had been argued that the relatively simple "quantitative substantiality" test, relying primarily upon market shares, should be applied to the amended § 7 as well. See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226, 249, 256 (1960).

[31] The Supreme Court interpreted the considerations articulated by Congress, see note 24 *supra,* as reflecting "a conscious avoidance of exclusively mathematical tests." Brown Shoe Co. v. United States, 370 U.S. 294, 321 n.36 (1962). Moreover, although market shares are "the primary index of market power," *id.* at 322 n.38, and "one of the most important factors to be considered," *id.* at 343, "the percentage of the market foreclosed . . . cannot itself be decisive." *Id.* at 329. Thus, the Court noted that "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Id.* at 322 n.38. Factors to be weighed include the degree of fragmentation or concentration of the industry; recent trends towards domination of the industry; the ease of access of buyers and sellers to each other within the market or the extent of foreclosure therein; and the ease and probability of entry by new competitors. *Id.* at 322. See Handler, *Fifteenth Annual Review of Antitrust Developments,* 17 RECORD OF N.Y.C.B.A. 411, 433 (1962); Rahl, *Current Antitrust Developments in the Merger Field,* 8 ANTITRUST BULL. 493, 505-10 (1963); Note, 10 VILL. L. REV. 734, 776-82 (1965).

It is arguable, however, that in spite of its theoretical rejection of a market share test the Supreme Court actually placed heavy reliance on that factor at least in determining the invalidity of the horizontal aspect of the merger. In concluding this aspect violative of § 7, the Court stated: "The market share which companies may control by merger is one of the most important factors to be considered when determining the probable effects . . . on . . . competition . . . . If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered . . . ." 370 U.S. at 343-44. The Court then emphasized that this share would be held by a large national company, a circumstance which increased the likelihood of resulting anticompetitive effects. *Id.* at 344. After thus stressing market shares, the Court considered one further factor furnishing those mergers with "demonstrable anticompetitive effects."[32] The provision was not directed at those mergers which improved the competitive position of small companies or mergers intended to save a failing firm.[33]

Subsequently, however, in *Philadelphia Nat'l Bank v. United States*,[34] the Supreme Court refused to rule that every merger must be subjected to the extensive factual inquiry directed by *Brown Shoe*. Rather, the Court, emphasizing the necessity and utility of devising a simpler test by which economic inquiry could be limited within workable bounds,[35] held that where the relative size of the merger qualified it as "inherently suspect," elaborate analysis of market characteristics may be eliminated.[36] Thus, the Court established

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"additional support," namely, the structure of the industry and the growing concentration therein. *Id.* at 343-44. Thus, two aspects received consideration, but it seems apparent that the market share element was the predominant consideration.

[32] *Id.* at 319.

[33] *E.g.*, H.R. REP. No. 1191, 81st Cong., 1st Sess. 6-8 (1949) (small companies); S. REP. No. 1775, 81st Cong., 2d Sess. 7 (1950) (failing firms).

[34] 374 U.S. 321 (1963). Philadelphia National Bank and Girard Trust Corn Exchange Bank, the second and third largest respectively of the commercial banks in the Philadelphia metropolitan area, planned a merger which would have resulted in the largest bank in the area with approximately 34% of the net loans, 36% of the total assets, and 36% of the aggregate deposits. The new bank, together with the then second largest, would have controlled 59% of total assets, 58% of net loans, and 58% of all deposits. Moreover, the four largest banks would then have had 78% of the net loans, 78% of total assets, and 77% of all deposits. *Id.* at 331.

[35] The Supreme Court expressed its concern with the need for a more limited test by referring to the complexity and elusiveness of economic data, the need for guidelines by which businessmen could assess the legal consequences of mergers, and the danger of subverting legislative intent by allowing "too broad" an economic inquiry and concluded that "in any case in which it is possible . . . to simplify the test of illegality, the courts ought to do so in the interest of . . . judicial administration." 374 U.S. at 362. In support of its argument, the Court cited Bok, *supra* note 30. See Turner, *supra* note 7, at 1315-94.

[36] 374 U.S. at 363. "[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a siguificant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. . . . Such a test lightens the burden [of proof] only with respect to mergers whose size makes them inherently suspect . . . ." *Ibid.* Although the Court stated that it was following the directives of *Brown Shoe, id.* at 355, the more limited inquiry in *Philadelphia Nat'l Bank,* and in its sequel, United States v. Aluminum Co. of America, 377 U.S. 271 (1964), represents a departure from the broad factual approach of *Brown Shoe* in order to avoid the danger of becoming involved in a "too-broad economic investigation." 374 U.S. at 362. However, this approach is not entirely inconsistent with *Brown Shoe,* for it represents the delineation of *specific* circumstances under which the broader factual analysis may be confined where such an analysis would occupy a court beyond the necessity for deciding the case at hand. Note, 10 VILL. L. REV. 734, 789 (1965). See generally Comment, 11

market shares and foreclosure percentages as the sole determinants of a section 7 violation when a horizontal merger would greatly increase the concentration of an already oligopolistic industry.[37]

In *FTC v. Consolidated Foods Corp.*, the Supreme Court for the first time invalidated a conglomerate merger under section 7 solely on the basis of its resultant potentiality for reciprocity.[38] Consolidated Foods, a large distributor of food products, acquired Gentry, Inc., a manufacturer of dehydrated garlic and onion, which together with another producer controlled ninety per cent of the relevant

WAYNE L. REV. 739, 743, 770 (1965). Thus, where a merger both significantly increases the market's concentration and places an "undue percentage" of the market in the hands of one company, "elaborate proof of market structure, market behavior, or probable anticompetitive effects" may be dispensed with and a presumption that anticompetitive effects will follow arises. 374 U.S. at 363; Asper, *supra* note 4, at 544. The courts have not clearly defined the point at which the share of the market to be held by the impending merger becomes "undue." See *Merger Developments in the Supreme Court, A Panel Discussion,* 26 A.B.A. ANTITRUST SECTION 233, 236 (1964). However, in light of the wide variance between the foreclosure percentages found violative in *Philadelphia Nat'l Bank* (30%) and *Aluminum Co. of America* (1.3%), it seems apparent that this figure will depend to some extent on an economic analysis of the market and heavily upon the degree of concentration disclosed. See 377 U.S. at 280-81.

[37] 374 U.S. at 362-67.

[38] The first actual application of the amended § 7 to invalidate an apparent conglomerate merger and the first thorough discussion of the problems involved in such an application was undertaken in Procter & Gamble Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16673 (FTC 1963), *remanded for dismissal,* 358 F.2d 74 (6th Cir. 1966), *rev'd* 35 U.S.L. WEEK 4329 (U.S. April 11, 1967). In that case, which arose before *Consolidated Foods,* the FTC attacked a merger through use of the "deep pocket" test utilized in Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962). See Donnem, *Conglomerate Mergers and Reciprocity,* 8 ANTITRUST BULL. 283, 285-86 (1963). The "deep pocket" test is based on the presumption that the competitive advantage given to the acquired company by the wealth of its parent and the structure of the market is likely to result in the suppression of competition. See Note, 25 U. PITT. L. REV. 683, 700 (1964); Note, 49 VA. L. REV. 852, 854-61 (1963).

Reynolds concentrated on the advantage given by the larger company's wealth in waging price wars in the context of a vertical merger. In *Procter & Gamble,* the FTC adopted the test as applicable to conglomerate mergers and emphasized, in addition to the size of the acquirer, the broader spectrum of advantages in such areas as advertising and marketing which would accrue to the acquired company. See Procter & Gamble Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16673, at 21580 (FTC 1963). See generally Donnelly, *The Supreme Court, The Federal Trade Commission and the Not-So-Conglomerate Merger,* 43 U. DET. L.J. 35, 36-41 (1965).

On appeal, the Sixth Circuit reversed the Commission's decision on the ground that "the Supreme Court has not ruled that bigness is unlawful, or that a large company may not merge with a smaller one in a different market field. Yet the size of Procter . . . seems to be the motivating factor which influenced the Commission . . . ." 358 F.2d at 84. The Sixth Circuit thus attacked the fundamental basis of the "deep pocket" theory, the simple fact of relative size. Unimpressed by this objection, the Supreme Court reversed the Sixth Circuit and substantially affirmed the FTC's approach as a valid test of § 7 violations. See 35 U.S.L. WEEK at 4329.

market.[39] After characterizing reciprocity as an "anticompetitive practice,"[40] the Supreme Court suggested that, since many of Consolidated's suppliers bought Gentry's products, Consolidated's purchasing strength gave it leverage power to coerce its suppliers into buying from Gentry and concluded that such practices would result in a substantial lessening of competition.[41] However, the Court's approach was not clearly defined. Concentrating upon questions of fact, the Court based its decision primarily upon the oligopolistic nature of the garlic and onion industry, Consolidated's purchasing power, and the actual increase in Gentry's market shares. In doing so, it is apparent that while the Court did not apply a test as simple as that employed in *Philadelphia Nat'l Bank,* neither did it engage in a full economic analysis of all relevant factors.[42]

Assuming the anticompetitive character of coercive reciprocity to be settled by *Consolidated Foods,* the district court in *General Dynamics* drew upon a dictum in that opinion[43] to conclude that

[39] 380 U.S. at 596.

[40] *Id.* at 594. Mr. Justice Douglas prefaced the body of the majority opinion by statiug: "We hold at the outset that the 'reciprocity' made possible by such an acquisition is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in 'an irrelevant and alien factor' . . . intruding into the choice among competing products, creating at least 'a priority on the business at equal prices.'" *Ibid.*

[41] See *id.* at 596-600.

[42] Although there was no question of the concentrated nature of the industry, the Court did not consider certain other factors which arguably would seem pertinent under a *Brown Shoe* analysis: (1) whether Gentry's market share increase was due to the production of an improved product or to more intense competition, see *id.* at 603-04 (Stewart, J., concurring); (2) whether the economics of the market actually gave Consolidated the leverage power assumed to be present, see Turner, *supra* note 7, at 1393; (3) the ease of access to the market by suppliers and access to suppliers by buyers; (4) the extent to which there had actually been foreclosure; (5) whether new competitors were barred from entering the market in light of the fact that at the time of the Commission's decision a new firm had entered the market, 380 U.S. at 605 (Stewart, J., concurring). See Brown Shoe Co. v. United States, 370 U.S. 294, 322 (1962).

[43] 258 F. Supp. at 58. The aspect of the *Consolidated Foods* opinion which the district court interpreted as indicating a proscription of mutual reciprocity was the following textual statement: "Reciprocal trading may ensue not from bludgeoning or coercion but from more subtle arrangements. A threatened withdrawal of orders if products of an affiliate cease being bought, as well as a conditioning of future purchases on the receipt of orders for products of the affiliate, is an anticompetitive practice." 380 U.S. at 594. Arguably, this statement does not iuvolve mutual reciprocity at all but concerns different ways in which reciprocity may be coerced. Recognizing that the passage "certainly does not require the conclusion that mutual patronage reciprocity is within the ambit of the anti-trust laws," the district court relied on a footnote to the above statement. 258 F. Supp. at 58. The footnote in question quotes Edwards, *Conglomerate Mergers as a Source of Power,* in NATIONAL BUREAU OF ECONOMIC RESEARCH, BUSINESS CONCENTRATION AND PRICE POLICY 331, 342 (1955), to the effect that mutual

mutual reciprocity, whereby companies freely agree to reciprocate,[44] is similarly anticompetitive.[45] Nevertheless, in considering the alleged violation of section 7, the court purported to limit its discussion to the potential for coercive reciprocity and the probable effects thereof.[46]

In determining whether sufficient leverage power was present to constitute a threat to competition, *General Dynamics* employed a more mechanical approach than that of *Consolidated Foods.* In the latter case, leverage power was assumed from the nature of the acquirer's purchasing strength and the fact that the acquirer's vendors also bought the products of the acquired company.[47] *General Dynamics,* however, concluded that where a supplier sells more to the acquirer than he purchases from the acquired company a "predictable threat to competition is presented."[48] On the other hand, those suppliers who purchase nearly as much or more than they sell to the acquirer are automatically excluded from those upon whom coercive reciprocity may be practiced.[49]

It may be seriously questioned, however, whether such a test in fact indicates the presence of *actual* coercive power.[50] Arguably, in

buying agreements prevent competitors from selling to either company and afford both companies the advantages of an assured place as a supplier. 380 U.S. at 594 n.2.

[44] See note 1 *supra.*

[45] The thrust of the district court's conclusion is summarized as follows: "[T]he actual or potential implementation of coercive reciprocity, which presupposes the existence of leverage, is inimical to a competitive economic society. 'Mutual patronage' reciprocity, on the other hand, occurs when both parties stand on equal footing with reference to purchasing power . . . yet agree to purchase from one another. While the former practice certainly is the more offensive, the latter arrangements are equally disruptive of the competitive processes." 258 F. Supp. at 59.

[46] *Id.* at 61.

[47] See 380 U.S. at 595; Austin, *supra* note 1, at 179.

[48] 258 F. Supp. at 61.

[49] The district court stated: "If the [sales differential] figures approach equipoise, the only reciprocity approach possible is one of mutual patronage." *Ibid.*

[50] It may be noted, however, that the recent cases, including *General Dynamics,* may arguably be interpreted to necessitate only a showing that a particular merger would create a circumstance which might produce anticompetitive effects. In other words, precise economic analysis is largely unimportant since the question is merely whether that potentially anticompetitive situation will be allowed to come into existence. Essentially, a burden is placed on the merging parties to demonstrate that they deserve the privilege to merge rather than on the Government to establish that they should be denied the right to do so. In this context, then, a test such as the one laid down in *General Dynamics* may be acceptable to the extent it does reveal situations in which reciprocity may operate. The test's imprecision may be ignored in the absence of evidence that the prediction of anticompetiveness is inaccurate. See United States v. Von's Grocery Co., 384 U.S. 270 (1966); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965).

order for potential coercive reciprocity to exist, the acquirer's vendors must sell a significant portion of their output to the acquirer in order to create a relationship of economic dependency so that decreases in purchases by the acquirer would force a reaction.[51] In this light, it would seem that by failing to consider the degree to which the acquirer's vendors depend upon the acquirer's purchases, *General Dynamics* overlooked a necessary step in accurate analysis by assuming coercive power on the basis of sales differentials alone. Moreover, if economic dependence is the accurate determinant, not only may there be no actual leverage power with reference to some companies within the class bearing gross sales differntials, but leverage might in fact be successfully exerted against some of those corporations arbitrarily excluded.[52]

On the other hand, *General Dynamics,* following *Consolidated Foods,*[53] buttressed its assumption that coercive power was present by reference to post-acquisition evidence of actual reciprocal practice.[54] Thus, because a company which *practices* coercive reciprocity necessarily had a pre-existing capacity to do so, post-acquisition evi-

[51] See, *e.g.,* STOCKING, WORKABLE COMPETITION AND ANTITRUST POLICY 291-92 (1961); Krash, *supra* note 1, at 98; Turner, *supra* note 7, at 1387-88.

In its defense, General Dynamics relied upon the theory that effective leverage power depends primarily on the degree to which the acquirer's suppliers depend on the acquirer for sales. Thus, the company argued that since its "purchases from significant users of carbon dioxide . . . represent such an insignificant portion of the total sales of these suppliers it could not have any leverage . . . ." Defendant's Memorandum in Support of Motion to Dismiss, p. 74, United States v. General Dynamics Corp., 246 F. Supp. 156 (S.D.N.Y. 1965).

Turner makes a similar argument with reference to *Consolidated Foods*: "Consolidated's testimony that it was pointless to exert pressure on national suppliers is more than plausible. To refuse to carry national brands that command widespread consumer acceptance would probably cost Consolidated far more money . . . than it would gain from . . . greatly increased sales of onion and garlic; and national suppliers, knowing this, could safely assume that Consolidated would not alter its own purchasing decisions on the basis of whether its suppliers purchased from Gentry." Turner, *supra* note 7, at 1393.

[52] For example, as in the case of Transitron Electronics: the supplier's total sales approximated 48 million dollars; its sales to the acquirer, General Dynamics, were approximately 500 thousand dollars; and its purchases from the acquired company were only 31,000 dollars. The court noted that "no meaningful unilateral threat, express or implied, could be made to Transitron to require that company to purchase the products of liquid Carbonic." 258 F. Supp. at 51. On the other hand, even where the supplier purchases more than he sells, if what he does sell is a significant portion of his total production, it may be plausibly argued that threats to reduce those sales would at least operate to maintain the level of the supplier's purchases.

[53] 380 U.S. at 598.

[54] 258 F. Supp. at 63. See note 82 *infra* and accompanying text.

dence validated the result reached by the court.[55] However, in the absence of such after-the-fact validation, the precision of the sales differential criterion to infer potentiality for coercive reciprocity is open to question. Arguably, however, the inaccuracy of the court's test may be mitigated if utilized to indicate the potential for mutual, in addition to coercive, reciprocity. Gross sales differential might indicate a likelihood of mutual reciprocity agreements to "lock in" or increase existing sales.[56] Even though the supplier may not be susceptible to coercion, he may favor reciprocity as a means to prevent any diminution in his present sales. Since both forms of reciprocity may be illegal, if the test is interpreted to encompass both practices, it no longer need accurately reflect actual coercive power.

Moreover, the court does in fact give practical effect, albeit sub silentio, to its purportedly only theoretical proscription of acquisitions which give rise to a potential for mutual reciprocity. The percentage of market foreclosure upon which the court relies to determine that the potential for coercive reciprocity constituted a violation of section 7[57] represented the fraction of total industry sales of carbon dioxide made by Liquid Carbonic through the Special Sales Program.[58] As such, this figure includes sales which resulted from both mutual and coercive reciprocity.[59] In light of this unarticulated reliance upon mutual reciprocity, the court's leverage test may be legitimized since the "leverage" disclosed includes both the power to coerce and to induce reciprocity.

The district court rested its proscription of acquisitions giving

[55] Another ground on which the court's test might be justified is that General Dynamics purchased from over 80,000 suppliers, of which approximately 75% were present or potential buyers of one or more of Liquid Carbonic's products. 258 F. Supp. at 39. Since § 7 is concerned merely with probabilities (see note 24 *supra*), arguably, it may be reasonable to presume that some members of this aggregate would be susceptible to coercion since many of them buy less from Liquid Carbonic than they sell to General Dynamics. Thus, even though the potential for coercion has not been specifically identified, it may be plausible to assume that a threat to competition exists. However, while a *threat* might be presumed, there would still be no indication that the threat is significant or that competition may be substantially affected.

[56] 258 F. Supp. at 60.

[57] See note 74 *infra* and accompanying text.

[58] 258 F. Supp. at 64.

[59] The court separately identified certain mutual agreements which arose under the Special Sales Program. See *id.* at 59. As the foreclosure fignre represents *all* sales made to companies encompassed by that Program and those made through coercive reciprocity are at no time separated, the figure by definition includes both forms of reciprocity. See notes 74-79 *infra* and accompanying text.

rise to mutual reciprocity on the notion that mutual and coercive reciprocity produce similar effects.[60] This identification, however, disregards the qualitative difference between the two forms: the existence of coercion. The equation is defensible to the extent that the manner in which market foreclosure arises does little to alter its effect. Nevertheless, it is arguable that the two forms of reciprocity should be distinguished in applying section 7. Coercive reciprocity manifests an additional anticompetitive aspect beyond mere foreclosure by *forcing* the customer to buy from a supplier other than the one which he may have chosen voluntarily. It thus seems reasonable that a merger evincing a clear probability of such abusive practices should fall within the ambit of section 7. Assuming an equally clear probability of mutual reciprocity, it appears less justifiable to proscribe a merger merely on the basis of actual or potential mutual agreements since their anticompetitive effects cannot be so automatically predicted. Mutual reciprocity may encompass a broad spectrum of bilateral transactions:[61] it may involve an exchange of products to enable each company to compete more effectively in its own market;[62] the transaction may be a simple barter arrangement;[63] or it may be devoid of leverage and result in little or no foreclosure.[64] Moreover, such arrangements may quickly fall to improvements in price, quality, or service on the part of competitors.[65] The court itself, however,

[60] See note 45 *supra* and accompanying text.

[61] See Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows,* 66 COLUM. L. REV. 1, 6-8 (1966).

[62] See Note, 1 VALPARAISO L. REV. 114, 128-37 (1966). See also Hausman, *Reciprocal Dealing and the Antitrust Laws,* 77 HARV. L. REV. 873-81 (1964).

[63] See Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows,* 66 COLUM. L. REV. 1, 6 (1966); Hausman, *supra* note 62, at 881.

[64] See Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows,* 66 COLUM. L. REV. 1, 6-8 (1966); *cf.* Turner, *Conglomerate Mergers And Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1389-90 (1965).

[65] Of course, the effects of competitive inducements are limited to the extent that the supplier is unwilling to forego the acquirer's less attractive terms in order to avoid any risk of losing his profit margin on sales to the acquirer. Nevertheless, where the supplier reciprocates out of economic convenience rather than economic compulsion, the agreement may remain palatable to him only when he suffers no deficiency in the product or services he receives. Furthermore, an arguable basis for applying a blanket proscription upon mergers which may give rise to coercive reciprocity is the fact that it is unilaterally self-perpetuating. An equally stringent prohibition open mergers involving mutual reciprocity seems inapt, for the practice requires the continued rapport of two parties, either of whom may freely terminate the association. It does not seem compelling that a merger should be invalidated because (1) there may be a potential for mutual agreements; (2) such do result and (3) they may restrict competition when

provides the most telling argument for according separate treatment: "[I]t borders on the impossible to anticipate the number and scope of mutual arrangements that will [result from] . . . a conglomerate merger."[66] Short of assuming that all conglomerate mergers will result in mutual reciprocity, it seems unreasonable to impose divestiture on the basis of a mere possibility except where, as in the instant case, post-acquisition evidence proves both existence and effect. Thus, as it is inaccurate to categorize all mutual reciprocity as anticompetitive and because prediction of its existence is at best speculative, it seems proper to require proof of a clear likelihood or actual evidence that substantially anticompetitive mutual reciprocity has occurred or will ensue.[67]

After assuming the presence of coercive power on the basis of sales differentials, *General Dynamics* presumed that where leverage power exists, its implementation will follow and that, in any event, "the public would best be served by eliminating the temptation."[68] With any intermediate question as to the actual use of reciprocal power ignored,[69] the only consideration remaining once leverage has been ascertained is whether its effects may be sufficiently anti-

(*a*) they may never come into being; (*b*) those which do evolve may be of that type which carries no anticompetitive consequence and (*c*) any that do result may fall rapidly to new counteractive vigor on the part of competitors.

[66] 258 F. Supp. at 60. The district court continued: "Viewed as of the time of the merger . . . there being no dominating spur to this type of reciprocity, its future presence or absence is difficult to gauge . . . . The results of leverage reciprocity on competition are far more subject to prognosis than . . . mutual patronage reciprocity." *Ibid.* Compare note 80 *infra* and accompanying text.

[67] The potential for mutual reciprocity alone does not give rise to a likely reprehensible effect, namely coercion, and thus the inquiry in merger litigation where mutual reciprocity is the issue should comport with the basic standard of § 7: whether competition in a relevant line of commerce is likely to be lessened substantially. The potential for mutual reciprocity without more provides at the very most an unsatisfactory answer to this question. See Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows,* 66 COLUM. L. REV. 1, 6-8 (1966).

The proof required for invalidation of a merger on the basis of mutual reciprocity would preferably take the form of post-acquisition evidence of the actual practice and its effects. Where such evidence was unavailable, perhaps some type of "predisposition" approach could be utilized whereby a violation would be established through evidence of repeated previous antitrust violations, intent to engage in the reciprocal practice, or a high incidence of reciprocal dealings in the market of the acquirer, the acquired, or both.

[68] 258 F. Supp. at 62.

[69] *Contra,* United States v. Penick & Ford, Ltd., 242 F. Supp. 518, 524-25 (D.N.J. 1965). In that case, the court held that the question of substantiality became relevant only after it was determined that leverage power would probably be used. See note 70 *infra.*

competitive to bring the merger within the prohibition of section 7.[70]

Consolidated Foods provided no clear test to determine when competition is substantially lessened within the meaning of section 7.[71] *General Dynamics,* on the other hand, defined a simplified test to be applied by utilizing market shares and foreclosure percentages as the determinative criteria.[72] In contrast to the detailed economic investigation manifested by *Brown Shoe,*[73] the court based its conclusion squarely on its finding that the reciprocity program resulted in a foreclosure of Liquid Carbonic's competitors from a five per cent share of the carbon dioxide market.[74] In so restricting the scope of the analytic inquiry, the court relied upon the necessity of preventing further concentration in oligopolistic industries as expressed in *Philadelphia Nat'l Bank*[75] and its progeny[76] and the simple

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[70] Section 7 of the Clayton Act reads "where . . . the effect of such acquisition may be substantially to lessen competition . . . ." 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964). See generally Consolidated Foods Corp. v. FTC, 380 U.S. 594 (1965); 39 St. John's L. Rev. 343, 352 (1965). In United States v. Penick & Ford, Ltd., *supra* note 69, at 525, however, the court explicitly rejected any strict or absolute approach to deal with the problem of reciprocity. In that case, the acquiring company, Reynolds Tobacco, had not previonsly engaged in reciprocity and argued tbat company policy would prevent such practices in the future. In light of this consideration and in the absence of any convincining indication that reciprocity would be practiced, the district court expressly refused to assume that leverage would be used and declined to enjoin the merger. See generally Day & Bodner, *Developments in Antitrust During the Past Year,* 28 A.B.A. Antitrust Section 7, 52 (1965).

It should also be noted, however, that the broad language of the court in *General Dynamics* may be limited by its reference, ostensibly for purposes of substantiation, to previous antitrust violations by Liquid Carbonic and General Dynamics and to post-acquisition evidence that leverage had in fact been used. 258 F. Supp. at 62-63.

[71] See note 42 *supra* and accompanying text. See generally Harvith, *Reciprocity and the Federal Antitrust Laws,* 40 Wash. L. Rev. 133, 171-74 (1965). One commentator argues that, since conglomerate mergers present new and unfamiliar problems, the Supreme Court purposely refrained from presenting precise standards in *Consolidated Foods* so as to allow flexibility in the development of an applicable prospective standard. Donnelly, *supra* note 38, at 78.

[72] See 258 F. Supp. at 63-65.

[73] See notes 29-33 *supra* and accompanying text.

[74] 258 F. Supp. at 63-65; see note 58 *supra* and accompanying text.

[75] See notes 34-37 *supra* and accompanying text.

[76] In *Philadelphia Nat'l Bank,* the Supreme Court concluded that the tbrust of § 7 was the the prevention of concentration and remarked as follows: "[I]f concentration is already great, the importance of preventing even slight increases in concentration . . . is correspondingly great." 374 U.S. at 365 n.42. The district court in *General Dynamics* relied both on this footnote and upon the sequel decision to *Philadelphia Nat'l Bank,* United States v. Aluminum Co. of America, 377 U.S. 271 (1964) (see note 36 *supra* and accompanying text). 258 F. Supp. at 65.

In *Alcoa,* the Court considered a merger between Alcoa and Rome Cable Corp.

foreclosure test promulgated therein.[77] Concluding that the pre-merger character of the carbon dioxide industry was excessively concentrated and that the five per cent foreclosure was "more than the 'slight increase' condemned by dictum in *Philadelphia National Bank*," the court held that the section 7 violation was established.[78] Thus adopting both the test and underlying philosophy of *Philadelphia Nat'l Bank, General Dynamics* went beyond the ambivalence of *Consolidated Foods* to establish that the detailed analysis of *Brown Shoe* may also be unnecessary in considering the probable effects of reciprocity in a *conglomerate* acquisition.[79]

It may be questioned, however, whether the foreclosure test should be uniformly applied to conglomerate mergers. When employed to determine the effects of horizontal mergers, such a test has much to recommend it. In that situation it places workable limitations on the extent to which an economic analysis is required in a category of mergers where the effects on competition are made reasonably apparent merely by adding the market shares of the merging competitors.[80] However, as no competitor is removed from the market by a conglomerate acquisition, the foreclosure effects of

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when Alcoa held 27.8% of the aluminum conductor market and Rome 1.3%. 377 U.S. at 278. The industry was oligopolistic in nature with Alcoa and another company accounting for 50% of the market and nine producers accounting for 95.7%. *Ibid.* Relying expressly on the above footnote in *Philadelphia Nat'l Bank*, the Court concluded that the 1.3% foreclosure or increase in concentration which would result from the removal of Rome from the market through the merger constituted a violation of § 7. *Id.* at 279.

[77] See note 36 *supra* and accompanying text.

[78] 258 F. Supp. at 65. The court also supported its conclusion by noting that the 5% foreclosure in the instant case was at least three times the 1.3% condemned by the holding in *Alcoa* (see note 76 *supra*). 258 F. Supp. at 65.

[79] An attempt to develop a more limited test for application to conglomerate mergers, involving aspects of both *Brown Shoe* and *Philadelphia Nat'l Bank*, is found in Procter & Gamble Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16673 (FTC 1963) (see note 38 *supra*). Rather than expressly apply such a test to a conglomerate, however, the Commission labored to classify the merger between Procter and Clorox as belonging in a subcategory of horizontal and vertical mergers. See Donnelly, *supra* note 38, at 39-45, 55-57; Comment, 6 B.C. IND. & COMM. L. REV. 254, 260-71 (1964).

For analysis of the difficulties involved in an overly complex economic inquiry and for an argument in favor of more limited standards for all mergers, see generally Bok, *supra* note 30, at 258-350; Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955); Turner, *supra* note 64, at 1318-86.

[80] See United States v. Continental Can Co., 217 F. Supp. 761, 786 (S.D.N.Y. 1963), *rev'd on other grounds*, 378 U.S. 441 (1964); Asper, *Reciprocity, Purchasing Power and Competition*, 48 MINN. L. REV. 523, 544 (1965); Day, *Conglomerate Mergers and the "Curse of Bigness,"* 42 N.C.L. REV. 511, 525 (1964); Donnelly, *supra* note 38, at 57. *Cf.* Turner, *supra* note 64, at 1389.

such a merger are not so immediately nor accurately predictable.[81] Thus, use of the limited test in considering the effects of reciprocity upon such an acquisition would seem proper only where, as in *General Dynamics*, brief "functional" analysis has revealed a concentrated market and the court is able to base its "predictions" of market foreclosure on post-merger evidence[82] of resulting market

[81] It has been argued that a strict percentage foreclosure test is inapposite when dealing with conglomerate mergers since "unlike the vertical and horizontal mergers, the conglomerate merger does not automatically eliminate competition in a certain percentage of the market. . . . [A] simple percentage test cannot be constructed where there is a conglomerate merger. No competition existed between the two firms before the merger. . . . One cannot say that the merger will increase the acquired firm's share of the market by a certain fixed percentage." Donnelly, *supra* note 38, at 57-58. See United States v. Continental Can Co., 217 F. Supp. 761, 786 (S.D.N.Y. 1963), *rev'd on other grounds*, 378 U.S. 441 (1964) ("such tests are particularly inapposite where a conglomerate merger is under scrutiny"); KAYSEN & TURNER, ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS 131 (1959); Jacobs, *Mergers and the Small Business Man*, 16 A.B.A. ANTITRUST SECTION 83, 85 (1960); Turner, *supra* note 64, at 1315-16.

[82] The district court's reliance on post-acquisition evidence is revealing in light of the Supreme Court's admonition in *Consolidated Foods* that such evidence is not to be given conclusive weight. 380 U.S. at 598. *Accord*, Ecko Prods. Co. v. FTC, 347 F.2d 745, 751 (7th Cir. 1965). The Seventh Circuit, in reversing the FTC, had stated that "probability can best be gauged by what the past has taught." Consolidated Foods Corp. v. FTC, 329 F.2d 623, 627 (7th Cir. 1964). The court of appeals had then concluded on the basis of ten years of post-acquisition evidence that the merger in question did not violate § 7 because Consolidated's attempts to utilize its buying power to influence sales had had little effect and no substantial impact upon competition. In reversing the court of appeals, the Supreme Court ruled that the Seventh Circuit had not erred in considering post-acquisition evidence but had been incorrect in giving it conclusive weight. The Court's decision is couched in negative terms, however, and offers no explicit instruction as to the proper weight to be accorded post-acquisition evidence. Moreover, two members of the Court themselves differed as to the proper disposition of the issue. To Mr. Justice Stewart, "probabilities" should be determined on the basis of post-acquisition evidence because it is the most accurate determinant of anticompetitive effects, 380 U.S. at 605-06 (concurring opinion), and Mr. Justice Harlan implied that the actual results of the merger should control, *id.* at 601-02 (concurring opinion).

In effect, however, the majority's opinion in *Consolidated Foods* seems to indicate that post-acquisition evidence may be used affirmatively to support a conclusion of illegality but that it may not be equally used negatively to override "probabilities" and illustrate the illusory nature of a merger's predicted effects. See Harvith, *supra* note 71, at 175. Arguably, this interpretation is substantiated not only by *Consolidated Foods* but also by *General Dynamics* willinguess to rely heavily on post-acquisition evidence.

Re-emphasizing that the "force of § 7 is still in probabilities," 380 U.S. at 598, the Supreme Court reasoned that according conclusive weight to such evidence would be to confer a "free trial period" upon a company with reciprocity potential and would encourage "acquisitions [to] . . . go forward willy-nilly, the parties biding their time until reciprocity was allowed fully to bloom." *Ibid.* Arguably, however, these considerations should not prevent the conclusive use, affirmatively or negatively, of post-acquisition evidence in all situations. Since suit may be brought under § 7 whenever the merger gives rise to a probability of anticompetitive effects, United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 597-98 (1957), and the effects of the shares.[83]

By presuming that gross differentials in sales and purchases give rise to leverage power in the acquirer and that such leverage will always be used, *General Dynamics* in effect promulgates a conditionally "per se" rule for application to conglomerate mergers under section 7: where the opportunity for reciprocity exists, the result of which may be a substantial lessening of competition, a violation of section 7 is adjudged. Especially as to mutual reciprocity, it is questionable whether the probability for reciprocal activity can be accurately gauged.[84] With regard to both forms, the effect on future conglomerate mergers is at least to make them hazardous and apprehensive adventures. The court's statement that the "mere presence of reciprocity power . . . alone indicates the need for divestiture"[85] implies that the only legal conglomerates may be those in which the acquired company is wholly unrelated to the acquirer with no interaction among the buyers and sellers of each. The fact that this type of diversification may also be the least advantageous economically and the least supportable on principles of sound business management seems now an unimportant consideration.[86]

acquisition are to be measured at the time of the suit rather than at the time of the merger, United States v. Penn-Olin Chemical Co., 378 U.S. 158, 168 (1961), it seems doubtful that many merged corporations would initiate reciprocity after a long period of joint operation. Not only would the initiation of such activity immediately expose the merged company to liability under § 7, but the prospect of litigation is likely to be especially distasteful after a long period of consolidation in light of the prohibitively high cost of divestiture. Moreover, allowing post-acquisition evidence to establish or to disprove the substantiality of the competitive effect would yield advantages both to the courts and to businessmen by simplifying the task of applying § 7. At the same time, some of the apprehension facing a company upon a decision to merge may be dispelled by the knowledge that it will be able to disprove predicted illegality.

[83] However, where the merger has not taken place and no evidence of actual effects is available, a reasonably valid prediction of probable effects would seem to require a more detailed economic inquiry similar to that advised by *Brown Shoe*. See notes 29-33 *supra* and accompanying text.

[84] See notes 66-67 *supra* and accompanying text. It is also arguable that the difficulties in ascertaining and proving the potential for mutual reciprocity mean that the test would not be enforced on a strict probability basis. The strict enforcement of such a policy arguably would require the virtual elimination of conglomerate mergers between companies of large size with mutual customers or suppliers. See Asper, *supra* note 80, at 554-55; Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures*, 49 VA. L. REV. 433, 439-40 (1963). To one commentator, "it would be preposterous to outlaw a merger simply on the grounds that the merged firm would have a greater ability [to join in agreements which would restrain trade] . . . ." Turner, *supra* note 64, at 1389.

[85] 258 F. Supp. at 67.

[86] Moreover, in light of the present restraints upon horizontal mergers (see United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Aluminum Co. of

The broad implications of the opinion may, however, be limited by the circumstances in which the case arose. Like *Consolidated Foods,*[87] *General Dynamics* represents the intrusion of a large company with extensive purchasing power into an oligopolistic market. Moreover, to a greater degree than in *Consolidated Foods,* there was extensive post-acquisition evidence of actual reciprocal dealing. Nevertheless, although a lessening of competition would seem most likely where an oligopolistic industry is involved, no such qualification on the scope of the proscription presented in *General Dynamics* is expressed or inferable from the opinion.[88]

America, 377 U.S. 271 (1964)) and vertical mergers (see United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), *aff'd,* 385 U.S. 37 (1966); United States v. Standard Oil Co. (New Jersey), 253 F. Supp. 196 (D.N.J. 1966); United States v. Yellow Cab. Co., 332 U.S. 218 (1947)), and the evolving restrictions on conglomerates, as exemplified by the instant case, disposition of assets to a buyer who can gain from the transaction becomes an increasingly difficult endeavor.

[87] See notes 38-42 *supra* and accompanying text.

[88] Purely as dictum, the district court intimated that acquisitions giving rise to "accommodative" reciprocity, where the seller patronizes his huyer through a totally independent and unilateral action merely in the hope that the bnyer will reciprocate, may constitute a violation of § 7. 258 F. Supp. at 66. While the application of § 7 to mutual and coercive reciprocity may be justifiable on the basis of resultant effects, the inclnsion of the accommodative variation seems unwarranted. It is difficult accurately to label such transactions as reciprocal in any form since the seller's purchase from the acquired company is a purely voluntary act, the purpose of which is uncommunicated to the acquirer. See, *e.g.,* Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows,* 66 COLUM. L. REV. 1, 5-6 (1966). Whatever "foreclosure" resnlts is only that which ensues from the making of any purchase; at the moment of consummation all other competitors are foreclosed from making that sale. Where sellers voluntarily favor the conglomerate, in the words of Professor Turner, "it would be wholly unreasonable, even if possible, to prohibit such behavior; it can be eliminated only by forestalling the creation of the conglomerate structure that fosters it." Turner, *supra* note 64, at 1390. While this of course presents the optimum course for prevention of these practices, a policy of outlawing this form of business expansion and diversification merely because it may result in "accommodative reciprocity" seems questionable. This conclusion is based upon the considerations that "accommodative reciprocity" may affect an insubstantial part of the market, have no forelcosure effect, fall easily to better price or service elsewhere, and be easily separable from the more justifiedly prevented practices of mutual and coercive reciprocity. Thus, such an expansion of the reciprocity doctrine under § 7 has been opposed by many of the commentators. See, *e.g.,* Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures,* 49 VA. L. REV. 433, 436-37 (1963); Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows,* 66 COLUM. L. REV. 1, 6 (1966); Harsha, *The Conglomerate Merger and Reciprocity—Condemned by Conjecture?,* 9 ANTITRUST BULL. 201, 208-10 (1964); Hausman, *supra* note 62, at 881.

It may perhaps be arguable that the Supreme Court offered an unarticulated proscription of acquisitions promoting accommodative reciprocity by quoting as follows from the FTC opinion in *Consolidated Foods*: "[M]erely as a result of its connection with Consolidated, and without any action on the latter's part, Gentry would have an unfair advantage over competitors enabling it to make sales that otherwise might not have been made." 380 U.S. at 597. However, as both the language and reasoning of

SECTION 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act provides that agreements in restraint of trade are illegal.[89] Thus both business contracts[90] and mergers[91] are encompassed within the section's proscription. In *General Dynamics*, the Government's allegations that contracts arising out

Consolidated Foods went to the issue of coercive reciprocity, this veiled reference to the characteristics of accommodative reciprocity seems to be little more than dictum.

The most direct application of § 7 to accommodative reciprocity is found in United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963), which arose before the decision in *Consolidated Foods*. There the Third Circuit affirmed the issuance of an injunction under § 7 to bar Ingersoll-Rand, a large designer and manufacturer of industrial machinery, from merging with three manufacturers of underground mining equipment. Concluding that "the public interest required the interlocutory relief granted by the court below," *id.* at 525, the court based its decision on the grounds that Ingersoll-Rand would possess thirty per cent of the underground mining equipment and machinery market; that it would "be in a favorable position to finance extended operations should it seek to . . . enlarge its nascent capabilities of engrossing the market"; and that it would be able to further dominate the market by offering a complete line of equipment and by extending consumer financing through its wholly owned finance company. *Id.* at 524. Finally, the court of appeals quoted from the court below as follows: "[T]he judicious use of its steel-purchasing power by Ingersoll-Rand could . . . increase the sales by the acquired companies . . . to the coal mining companies which acutely need the continued good will of the steel industry. Moreover, the mere existence of this . . . power might make its conscious employment toward this end unnecessary; the possession of the power is frequently sufficient, as sophisticated businessmen are quick to see the advantages in securing the good will of the possessor. . . . [T]he advantages . . . from so favoring the acquired companies would not have to be pointed out by Ingersoll-Rand." *Ibid.* While this "three-cornered" reciprocity was certainly not the only basis for the decision, the language of the court may be read to imply that conglomerates creating reciprocity power "should be barred *ab initio*." See Harvith, *supra* note 71, at 177-79. However, the accuracy of this contention may be doubted since it is arguable that the merger was not of the conglomerate type but rather a combination of competitors. See United States v. FMC Corp., 218 F. Supp. 817, 822 (N.D. Cal. 1963).

[89] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964). The statute reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations is declared to be illegal." Section 1 initially applied to proscribe *any* contract in restraint of trade. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341 (1897). Recoguizing the stringency of such an application, the Supreme Court later adopted a "rule of reason" which proscribed only those contracts which unreasonably restrained trade. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911). However, certain practices such as price fixing and tying arrangements have been designated unlawful per se on the theory that they are so inherently harmful to the competitive system that they are not reasonable in any form. *E.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927). See ATT'Y GEN. REP. 1-100; Schwartz, *A Law Professor's View of the Sherman Act—Fluid Fronts in the War Against Excessive Concentration of Economic Power*, 27 A.B.A. ANTITRUST SECTION 87 (1965).

[90] *E.g.*, United States v. Loew's Inc., 371 U.S. 38 (1962); Timken Roller Bearing Co. v. United States, 341 U.S. 539 (1951).

[91] *E.g.*, United States v. First Nat'l Bank of Lexington, 376 U.S. 665 (1964); United States v. Columbia Steel Co., 334 U.S. 495 (1948).

of the reciprocity program and the merger itself were in violation of section 1 presented questions of first impression.[92]

In order to provide guidelines for applying section 1 to contracts based on reciprocity and to establish such agreements as within the scope of that proscription, *General Dynamics* analogized both coercive and mutual reciprocity to tying arrangements.[93] The Supreme Court has viewed "tie-ins" as per se unlawful because they deny competitors access to the market of the tied product and represent the use of economic power in one market to restrain competition in another.[94] Viewing reciprocity is analogous to such tying practices

[92] See notes 18-22 *supra* and accompanying text. However, the applicability of § 1 to reciprocity had been raised in passing during argument before the Supreme Court in *Consolidated Foods.* Counsel for Consolidated Foods conceded that reciprocity might violate § 1. 33 U.S.L. WEEK 3302 (U.S. March 16, 1965). On the other hand, the Solicitor General curiously took the position that reciprocal buying, standing alone, is not subject to the proscription of § 1:

"Mr. Cox: If it used the power of reciprocial buying, or perhaps if it attempted to use it, then there would be a case under Section 5 of the Federal Trade Commission Act. . . . I think it would be under that . . . rather than Section 1 of the Sherman Act . . . .

"JUSTICE WHITE: And, query, would there be a Section 1 case?

"Mr. Cox: I think we would have a Section 5 case . . . .

"JUSTICE WHITE: I understand that. But I am asking about Section 1.

"Mr. Cox: I think that it would be Section 7 of the Clayton Act that we would use if anything.

"JUSTICE WHITE: You would probably lose . . . .

"JUSTICE WHITE: You are just suggesting effective reciprocity as such, it is not a violation of anything except perhaps Section 5.

"Mr. Cox: Yes . . . ." Transcript of Argument, FTC v. Consolidated Foods Corp., pp. 76-77, quoted in Defendant's Memorandum in Support of Motion to Dismiss, pp. 50-51, United States v. General Dynamics Corp., 246 F. Supp. 156 (S.D.N.Y. 1965).

[93] 258 F. Supp. at 66. A tying arrangement is "an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958). See generally Bowman, *Tying Arrangements and the Leverage Problem,* 67 YALE L.J. 19 (1957); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 HARV. L. REV. 50 (1958).

[94] See, *e.g.,* United States v. Loew's Inc., 371 U.S. 38, 44-46 (1962); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953); Standard Oil Co. of Calif. v. United States, 337 U.S. 293, 305-06 (1949); Burrus, *Tying Arrangements and Reciprocity: A Lawyer's Comment on Professor Ferguson's Analysis,* 30 LAW & CONTEMP. PROB. 581 (1965); Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis,* 30 LAW & CONTEMP. PROB. 552 (1965).

Tying arrangements are violative of both § 1 of the Sherman Act and § 3 of the Clayton Act. Times-Picayune Publishing Co. v. United States, *supra* at 608-09. However, it has been questioned whether § 3 applies to reciprocity, since that provision bars *sales* to which certain conditions are attached, whereas in reciprocal dealing the condition is attached to the *purchases* made from the supplier. See Harvith, *supra* note 71, at 165-67; Hausman, *supra* note 62, at 884. *Contra,* Note, 32 GEO. WASH. L. REV. 832, 853 (1964).

since both involve the transfer of economic power with a resultant restraint upon competition, the court adopted the Supreme Court's standard that tie-ins are unlawful per se if "a not insubstantial amount of commerce is affected" as determinative of the legality of reciprocal agreements.[95]

In general, the tie-in analogy seems appropriate in the case of coercive reciprocity. A fundamental basis for imposing conditionally per se illegality upon tie-ins is that they involve the coercive use of economic power to obtain sales.[96] The mechanics are the same with respect to coercive reciprocity, and both tie-ins and coercive reciprocity further result in market foreclosure.[97] As there is little evident virtue in either practice, it seems reasonable to accord coercive reciprocity the same unsympathetic treatment given tie-ins under the Sherman Act.[98]

On the other hand, the rules of tying arrangements seem to provide a less compelling and instructive analogy to mutual reciprocity. The court justified the analogy by emphasizing the similarity in effects between tie-ins and reciprocity.[99] However, mutual reciprocity may not always produce, in fact, an anticompetitive effect, at least to the extent that it represents an exchange of products to

[95] 258 F. Supp. at 66-67.

[96] *E.g.*, United States v. Loew's Inc., 371 U.S. 38, 45 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1, 5-17 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605, 611 (1953); Standard Oil Co. of Calif. v. United States, 337 U.S. 293, 305-06 (1949); International Salt Co. v. United States, 332 U.S. 392 (1947); United States v. Jerrold Electronics Co., 187 F. Supp. 545, 555 (E.D. Pa. 1960) (dictum), *aff'd per curiam*, 365 U.S. 567 (1961); Handler, *Eighteenth Annual Review of Antitrust Developments*, 20 RECORD OF N.Y.C.B.A. 540, 544 (1965); Singer, *Market Power and Tying Arrangements*, 8 ANTITRUST BULL. 653, 657-60 (1963); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 60-62 (1958).

[97] Both tying and coercive reciprocity encompass two anti-competitive aspects: (1) an unwilling buyer or seller is forced to make a purchase which he otherwise might not have made; (2) this process results in a foreclosure of competition and a restraint of trade. See Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows*, 66 COLUM. L. REV. 1, 5-6 (1966); Hausman, *supra* note 62, at 881-82.

[98] See Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows*, 66 COLUM. L. REV. 1, 3-8 (1966); Hausman, *supra* note 62, at 880.

[99] After acknowledging that the tie-in analogy may not be equally applicable to mutual reciprocity, the court concluded in the following manner: "If anti-trust legislation were designed primarily to insulate customers from abuse, the 'tying-in' analogy would be without merit with reference to noncoercive reciprocity. However, this is not the case. The legislation is intended to preserve free competition. Reciprocity, whether mutual or coercive, serves to exclude competitors by the exercise of large scale purchasing power. This court concludes that the analogy . . . applies to both forms of reciprocity." 258 F. Supp. at 66.

enhance competition or a barter arrangement.[100] Moreover, in emphasizing effects the court disregards the substantive difference in means. Since a primary basis for the imposition of a per se rule upon tie-ins is the use of leverage power,[101] arguably that rule depends both upon the effects of the arrangement and upon the means utilized to achieve those effects. By definition, however, mutual reciprocity does not involve the coercive use of leverage; rather the purchase is voluntarily made.[102] Where the purchase is freely negotiated, no tie-in exists[103] and as the tying rule is inapplicable in the absence of coercion, it seems inappropriately applied to mutual reciprocity. Thus, because the analogy between tying arrangements and mutual reciprocity is imprecise and because the latter practice may not always give rise to anticompetitive results, a flexible rule of reason would seem to be more suitably applied to situations involving mutual reciprocity.[104]

After establishing reciprocity agreements as within the purview of section 1, the court considered the Government's contract allegations by examining the transactions between Liquid Carbonic-General Dynamics and six compaines with which the court believed the practice of reciprocity to be "most evident."[105] The court construed section 1 as applicable only to those contracts which reflected a direct causal relation between the contract and the reciprocity program. Thus, only contracts based on proven agreements to reciprocate or expressly stated to have been procured through

[100] See notes 61-71 *supra* and accompanying text. For an economic analysis of reciprocity intended to show that in some forms it does not lessen but may in fact enhance competition, see Ferguson, *supra* note 94.

[101] See note 96 *supra* and accompanying text.

[102] 258 F. Supp. at 66. Handler, *Eighteenth Annual Review of Antitrust Developments,* 20 RECORD OF N.Y.C.B.A. 540, 554-56 (1965).

[103] "[W]here the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6 n.4 (1958). The Supreme Court further illustrated that the tying rule is founded on the use of leverage by the following statement: "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 . . . would . . . be insignificant . . . ." *Id.* at 6. "[T]he vice of tying arrangements lies in the use of economic power in one market to restrict competition . . . in another . . . ." *Id.* at 11.

[104] See Burrus, *supra* note 94, at 588; Ferguson, *supra* note 94, at 570-80; Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows,* 66 COLUM. L. REV. 1, 6-8 (1966); Note, 1 VALPARAISO L. REV. 114 (1966); *cf.* White Motor Co. v. United States, 372 U.S. 253, 261-63 (1963).

[105] 258 F. Supp. at 51-56.

reciprocity were held to be within section 1.[106] All other contracts were rejected, even though the court found that the company involved had been successfully subjected to coercive reciprocity.[107]

Insistence upon a high degree of causal connection between the reciprocity program and contracts arising out of it places a heavy burden of proof on the enforcement agency[108] while leaving a substantial loophole for the clever and cautious practitioner of reciprocity. Arguably, such a stringent standard is unnecessary, for agreement may be inferred from the conduct of the parties.[109] In light of a systematically applied and successful program of reciprocity, it seems unnecessary to require that agreements to reciprocate be based solely upon written contracts or express agreements.[110] If

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[106] Thus, a contract with Standard Oil "attributable to an agreement . . . calling for each company to purchase certain products from the other" qualified for the § 1 proscription, *id.* at 54, as did a sale of 420,000 lbs. of carbon dioxide to Shell Oil based on a statement made by an officer of General Dynamics that the sale had been procured by reciprocity. *Id.* at 55.

[107] It was established that coercive reciprocity was imposed upon Raytheon and that contracts with that company had been vigorously and successfully pursued. Nevertheless, no contracts arising between Liquid Carbonic-General Dynamics and Raytheon were subjected to the proscription of § 1, because individual contracts did not expressly reflect a reciprocity basis. *Id.* at 53-54.

[108] The reality of the Government's burden where it is clear that reciprocity has produced sales far beyond those ascribable to specific contracts is demonstrated in the instant case. The district court found that reciprocity, systematically applied tbrough the Special Sales Program, had resulted in 1,085,066 dollars of carbon dioxide sales. *Id.* at 49. Nevertheless, the court conservatively concluded that less than twenty per cent of that figure resulted from contracts procured by reciprocity, and ultimately determined that a total of two contracts were directly the result of reciprocity. See note 106 *supra*. On the other hand, Transitron was "engaged in a 'mutual patronage' arrangement" but no "particular contracts" were shown, 258 F. Supp. at 52; in the case of Raytheon, it was "proven that leverage was applied by the defendant," *ibid.*, but "no all embracing agreement" was shown. *Id.* at 54.

[109] United States v. Loew's Inc., 371 U.S. 38 (1962); see United States v. Paramount Pictures, 334 U.S. 131, 142 (1948); Interstate Circuit v. United States, 306 U.S. 208, 226-27 (1939). "A tying arrangement . . . 'need not be expressly embodied in written contracts. Such arrangements may be deduced from a course of conduct.'" Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 765-66 (6th Cir.), *cert. denied,* 382 U.S. 820 (1965). *Accord,* Osborn v. Sinclair Ref. Co., 286 F.2d 832, 837 (4th Cir.), *cert. denied,* 366 U.S. 963 (1961); ATT'Y GEN. REP. 30; Rahl, *Conspiracy and the Antitrust Laws,* 44 ILL. L. REV. 743, 744-48 (1949).

[110] See Harvith, *Reciprocity and the Federal Antitrust Laws,* 40 WASH. L. REV. 133, 154-55 (1965). In fact, the district court, in its opinion denying the motion to dismiss, seemingly adopted the view that specific agreements to reciprocate were not required: "The clear inference to be drawn is that [resulting] sales agreements . . . contained implied reciprocity considerations. These agreements which emerged from a course of conduct clearly declared anticompetitive are suspect themselves because of the circumstances which surround them, although no express condition is evident on the fact of the agreements . . . . The defendant has systematically injected reciprocal dealing into its sales negotiations. Thus the agreements which are the product

produced by the reciprocity program, even a simple contract between buyer and seller could validly be held sufficient to satisfy the section 1 requirement.[111] By refusing so to infer, the court markedly limited the effective scope of section 1.

Moreover, the court rigidly applied a second requirement to determine whether particular contracts were proscribed, namely, that each contract be represented by a specific dollar value.[112] This standard, based upon the notion that the amount of commerce affected by the contracts must explicitly be shown,[113] further reduced the efficacy of the Government's evidence.[114] In fact, such a requirement has not been uniformly imposed in the tying cases.[115] Thus its use in the instant situation does not seem to comport fully with the tie-in analogy and furthermore restricts within narrow bounds the manner in which a section 1 violation may be established.

Ultimately, the district court concluded that the amount of commerce represented by the contracts meeting the imposed requirements was insufficient to be termed "not insubstantial"[116] and there-

of this anticompetitive practice . . . are in restraint of trade . . . ." 246 F. Supp. 156, 167 (S.D.N.Y. 1965). The same approach could easily have been followed in the final decision, and no clear reason for the change in emphasis is apparent from the opinion. See 258 F. Supp. at 51-56; Austin, *A Survey of the Problems Encountered in Combating Reciprocal Trading Under Existing Trade Regulation Laws*, 41 IND. L.J. 165, 193-95 (1966).

111 The proscription of § 1 in terms reaches every contract which unduly restrains trade. Thus, "a contract between buyer and seller . . . is enough to satisfy the joint conduct requirement of Section 1 of the Sherman Act." Albert H. Cayne Equip. Corp. v. Union Asbestos & Rubber Co., 220 F. Supp. 784, 787 (S.D.N.Y. 1963).

112 "[F]or the practice to be unlawful however, a not insubstantial amount of trade must be foreclosed. . . . [N]o dollar amounts . . . could be ascribed to the unlawful agreements. This being the case, the government has failed to prove that the relationship . . . was violative of Section 1 . . . ." 258 F. Supp. at 52.

113 See *id.* at 52-56, 66; note 112 *supra*. Compare notes 96-100 *supra*.

114 For example, the purchases from Liquid Carbonic by one of General Dynamics' vendors, Transitron, multiplied more than fourteen times between 1960 and 1962, and the court found a mutual reciprocity arrangement to be in effect. Nevertheless, these transactions were dismissed because no dollar amounts could be ascribed to the agreements. See 258 F. Supp. at 52.

115 See, *e.g.*, United States v. Loew's Inc., 371 U.S. 38 (1962) (partially dollar value and partially inference from the volume of trade); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) (substantiality assumed from the amount of commerce involved, without quantitative definition); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir. 1965), *cert. denied*, 382 U.S. 820 (1965) (same).

116 Comparing the total value of the contracts meeting the court's criteria, 177,225 dollars, to the 500,000 dollars found "not insubstantial" in International Salt Co. v. United States, 332 U.S. 392 (1947), the court concluded: "[That] is the lowest figure so designated by the court to date, in situations analogous to the present case. Since the government has proven the other prong of the Sherman § 1 case, viz., that the merger itself is violative of the statute, this aspect of the case is an inappropriate vehicle for

fore that the Government had failed to prove the section 1 violation.[117] By construing section 1 to require a strict causal relation and specific dollar value, the court promulgated a proscription which seems inadequate to prevent all but the most extensively documented reciprocity programs. Alteruatively, the court might have accepted the Government's contention that agreements restraining trade should be inferred from transactions arising within the scope of a pervasive and broadly applied reciprocity program.[118] However, by fully accepting this approach the court might have been understood to imply the illegality of any contract which the acquired company entered into with a supplier of the acquiring company where reciprocity is "in the air." Seemingly unwilling to apply the proscription of section 1 so broadly, the court chose the more demanding but more clearly delineated analysis with its consequent restricted and easily avoidable prohibitory effect.

However, since "both parties had the intent, at the time of the merger, to employ the anti-competitive device of reciprocity" and a "not insubstantial amount of commerce was affected as a result," the court held that the merger itself was in violation of section 1.[119] Although the court engaged in little discussion or analysis, cursory treatment seems justifiable on the ground that the decision comports with substantial authority.[120]

The district court's broad theoretical proscription of reciprocity under section 1 involves the application of the rules concerning

finding an amount considerably less than $500,000 as 'not insubstantial.'" 258 F. Supp. at 67.

[117] *Ibid.*

[118] The Government argued as follows: "[W]here a practice is engaged in which has such a pernicious effect on competition and is without redeeming virtue, it will be held illegal '. . . without elaborate inquiry as to the precise harm . . . caused or business excuse for [its] use.' Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). It is settled law that where a course of conduct is pernicious and illegal, agreements growing out of it are themselves illegal because of the surrounding circumstances, even though nothing illegal appears on their face. American Tobacco Co. v. United States, 147 F.2d 93, 107 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946); United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99 (1920); Swift & Co. v. United States, 196 U.S. 375, 396 (1905)." Government's Memorandum in Opposition to Defendant's Motion to Dismiss, pp. 18-19, United States v. General Dynamics Corp., 246 F. Supp. 156 (S.D.N.Y. 1965). The district court seemingly accepted the Government's contention in its opinion denying the motion to dismiss. See note 110 *supra*.

[119] 258 F. Supp. at 67.

[120] *E.g.*, United States v. Columbia Steel Co., 334 U.S. 495, 523-25 (1948) (dictum); United States v. Griffith, 334 U.S. 100, 104-06 (1948). See United States v. Yellow Cab Co., 332 U.S. 218 (1947).

tying arrangements to both mutual and coercive reciprocity and thus provides an important addition to the weapons which may be used to combat these practices.[121] However, after promulgating its broad formula, the court then proceeded to interpret it so strictly as to greatly negate its practical effect. Nevertheless, the scope of much of the court's language is not restricted to the case at hand and stands as an ominous and uncertain portent for the future of reciprocal dealing and the companies which practice it.

CONCLUSION

The *result* reached in *General Dynamics* is eminently justifiable. There can be little doubt that General Dynamics engaged in reciprocal arrangements which affected competition in a manner that cannot be condoned. As we have seen,[122] however, the language utilized by the court in reaching its decision seemingly goes beyond

[121] The immediate effect of the court's decision is to broaden the antitrust coverage of reciprocity, but it seems likely that § 7 will continue as the primary weapon to combat offeusive mergers because of the less stringeut burden of proof which that provision imposes. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609-10 (1953). Section 7 requires that only a probability that competition will be lessened be proved while § 1 demands proof of actualities. See note 24 *supra;* ATT'Y GEN. REP. 115-18 & n.1. Section 1 also requires proof of an agreement or conduct from which agreement may be inferred. See note 109 *supra* and accompanying text. Where no reciprocity agreement or intent can be proved, § 7 provides the remedy. In any event, the less demanding standards of § 7 are likely to be preferred althongh no bar prevents the further use of § 1 where the facts iudicate that its invocation would be appropriate.

It is doubtful, however, that reciprocity litigation will be confined to §§ 1 and 7. Other antitrust provisions may provide remedies both in merger and non-merger contexts. These alternative procedures include:

(1) Section 5 of the Federal Trade Commission Act, which provides that "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 38 Stat. 719, as amended, 15 U.S.C. § 45 (1964). Section 5 provides a way in which to avoid the agreement requirements of § 1, as stated by Mr. Donald Turner: "That particular problem of the courts, the necessity of finding agreement, is not present where the [FTC] . . . proceeds under Section 5 . . . . It seems to me that this is . . . the easiest vehicle for attacking . . . reciprocity." *Interview with the Honorable Donald F. Turner,* 30 A.B.A. ANTITRUST SECTION 100, 114 (1966). See Waugh Equip. Co., 15 F.T.C. 232 (1931); Austin, *supra* note 110, at 186-92;

(2) The provisions against monopoly, attempts to monopolize, and conspiracies to monopolize under § 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1964). A reciprocity suit is presently pending agaiust General Motors under this provisiou, United States v. General Motors Corp., TRADE REG. REP. ¶ 45,063 (Case 1733) (N.D. Ill. 1963). See Phillips, *Reciprocity Under the Antitrust Laws: Observations On the Hales' Comment,* 113 U. PA. L. REV. 77, 79 (1964);

(3) The price discrimination provisions of § 2 of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (a) (1964). See Harvith, *supra* note 110, at 159-64.

[122] See notes 60-67, 99-104 *supra* and accompanying text.

the bounds of necessity to impose rigid and inflexible proscriptions of practices which are not equally absolute in effect. In this light, it would seem advisable to reappraise the phenomenon of reciprocity and more judiciously apply the available sanctions to avoid a reciprocity policy which may be "repugnant to common sense, human nature and business reality."[123]

[123] Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows,* 66 COLUM. L. REV. 1, 11 (1966).