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RECIPROCAL DEALING: A REBIRTH?

EDWARD D. CAVANAGH[†]

INTRODUCTION

Reciprocal dealing, also known as reciprocity, describes ways in which a buyer may unlawfully use its economic position in one market coercively to secure a competitive advantage in another. Reciprocity typically refers to the use of the buyer's power as buyer of product A to induce the supplier of A to purchase buyer's product B. More colloquially, reciprocity "exists when one party tells the other: 'I'll buy from you, if you buy from me.'"¹ For example, auto maker ABC may say to USX that it would buy steel from USX if USX would buy ABC trucks. Another example of reciprocity is an agreement by a seed producer to buy products grown from its seed if and only if the farmer growing the product purchases its seed from the seed producer. The reciprocity label is also used in the situation in which a party conditions its decision to purchase (or sell) product A on the willingness of the supplier (or customer) to sell product B to it.

Reciprocity has long been recognized as "one of the congeries of anticompetitive practices at which the antitrust laws are aimed."² The earliest cases, dating back to the 1930s, involved challenges to reciprocal dealing by the Federal Trade Commission (FTC) as an unfair method of competition.³ Since that time, reciprocal dealing has been attacked under the antitrust laws on three fronts: (1) under section 1 of the Sherman Act⁴ as a restraint of trade analogous to unlawful

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¹ *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 511 (3d Cir. 1998).

² *FTC v. Consol. Foods Co.*, 380 U.S. 592, 594 (1965).

³ *See, e.g., In re Cal. Packing Corp.*, 25 F.T.C. 379 (1937); *In re Mech. Mfg. Co.*, 16 F.T.C. 67 (1932).

⁴ 15 U.S.C. § 1 (2000).

tying; (2) under section 2 of the Sherman Act⁵ as unlawful monopolization and attempted monopolization; and (3) under section 7 of the Clayton Act.⁶ At the height of its popularity in the late 1960s and early 1970s, reciprocal dealing was widely viewed as anticompetitive and reciprocity theory was used by federal antitrust enforcers to challenge conglomerate mergers and to challenge certain corporate buying practices as exclusionary.⁷ In these enforcement efforts, the government enjoyed some modest success and was able to obtain consent decrees ending reciprocal dealing practices.⁸

The view that reciprocal dealing posed a threat to competition, however, was not unanimous. Thomas Kauper was skeptical about reciprocity as a theory of competitive harm, and under his leadership (1972-76), the Antitrust Division began to

⁵ 15 U.S.C. § 2 (2000).

⁶ 15 U.S.C. § 18 (2000).

⁷ See, e.g., Stephen J. Dunne, *Reciprocity: The Hazards of Backscratching*, 11 WILLIAMETTE L.J. 159 (1974); Milton Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures*, 49 VA. L. REV. 433 (1963); Robert M. Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873 (1964); Richard W. McLaren, *Reciprocity: The "Hobgoblin" of the Antitrust Critics*, 39 ANTITRUST L.J. 224 (1969). But see Richard S. Markovits, *Tie-ins, Reciprocity and the Leverage Theory*, 76 YALE L.J. 1397 (1967) (questioning the legal bases for attacking reciprocity).

⁸ See, e.g., *United States v. Grow Chem. Corp.*, 1974-1 Trade Cas. (CCH) ¶ 75,133 (S.D.N.Y. 1974); *United States v. Cont'l Can Co.*, 1974-1 Trade Cas. (CCH) ¶ 75,132 (S.D.N.Y. 1974); *United States v. Yellow Freight Sys., Inc.*, 1973-1 Trade Cas. (CCH) ¶ 74,338 (W.D. Mo. 1973); *United States v. Crane Co.*, 1973-1 Trade Cas. (CCH) ¶ 74,329 (S.D.N.Y. 1973); *United States v. Westinghouse Elec. Corp.*, 1973-1 Trade Cas. (CCH) ¶ 74,574 (W.D. Pa. 1973); *United States v. Jackson's Atlanta Ready Mix Concrete Co.*, 1972 Trade Cas. (CCH) ¶ 73,827 (N.D. Ga. 1972); *United States v. Martin Marietta Corp.*, 1972 Trade Cas. (CCH) ¶ 73,858 (D. Md. 1972); *United States v. Uniroyal Inc.*, 1972 Trade Cas. (CCH) ¶ 74,070 (S.D.N.Y. 1972); *United States v. Owens-Ill., Inc.*, 1972 Trade Cas. (CCH) ¶ 73,828 (N.D. Ohio 1972); *United States v. Westinghouse Elec. Corp.*, 1972 Trade Cas. (CCH) ¶ 74,053 (W.D. Pa. 1972); *United States v. H.K. Porter Co.*, 1972 Trade Cas. (CCH) ¶ 73,917 (W.D. Pa. 1972); *United States v. T.I.M.E.-DC., Inc.*, 1972 Trade Cas. (CCH) ¶ 74,069 (N.D. Tex. 1972); *United States v. Kennecott Copper Corp.*, 1971 Trade Cas. (CCH) ¶ 73,437 (S.D.N.Y. 1971); *United States v. Aluminum Co. of Am.*, 1971 Trade Cas. (CCH) ¶ 73,587 (W.D. Pa. 1971); *United States v. Nat'l Steel Corp.*, 1971 Trade Cas. (CCH) ¶ 73,495 (W.D. Pa. 1971); *United States v. Reynolds Metal Co.*, 1971 Trade Cas. (CCH) ¶ 73,626 (E.D. Va. 1971); *United States v. Inland Steel Co.*, 1970 Trade Cas. (CCH) ¶ 73,197 (N.D. Ill. 1970); *United States v. Republic Steel Corp.*, 1970 Trade Cas. (CCH) ¶ 73,246 (N.D. Ohio 1970); *United States v. Armco Steel Corp.*, 1970 Trade Cas. (CCH) ¶ 73,283 (S.D. Ohio 1970); *United States v. Bethlehem Steel Corp.*, 1970 Trade Cas. (CCH) ¶ 73,376 (E.D. Pa. 1970); *United States v. PPG Indus., Inc.*, 1970 Trade Cas. (CCH) ¶ 73,373 (W.D. Pa. 1970).

re-examine its approach to reciprocal dealing. Kauper did not view reciprocal dealing as sufficiently pernicious as to warrant per se condemnation and argued that reciprocal dealing practices should not be challenged by the government absent proof of anticompetitive effect on consumers. The Antitrust Division ceased initiating reciprocity cases. At about the same time, reciprocity as a theory of antitrust wrongdoing also came under heavy attack from antitrust scholars⁹ and, until recently, has remained largely dormant.¹⁰

Reciprocity, however, may be in the midst of a rebirth, albeit in 1990s dress. Reciprocity claims were upheld as per se unlawful under section 1 of the Sherman Act and also violative of section 2 of the Sherman Act by the trial court in *Intergraph Corp. v. Intel Corp.*¹¹ wherein plaintiff had alleged that Intel Corporation ("Intel") had declined to sell microprocessors unless plaintiff licensed certain technology to Intel free of charge. The trial court's decision in *Intergraph* is intriguing. First, *Intergraph* is a natural extension of the Supreme Court's ruling in *Eastman Kodak Co. v. Image Technical Services, Inc.*¹² on leveraging and provides plaintiffs a plausible theory of exclusionary anticompetitive harm. Second, and more specifically, *Intergraph* arms equipment purchasers and independent service organizations (ISO) with another weapon to utilize in their ongoing battle with original equipment manufacturers (OEM). Third, the decision tends to level the playing field in the give-and-take of purchase negotiations by limiting OEMs in the terms that they can extract as part of a sale. Fourth, OEMs facing reciprocity may encounter even more difficulty in disposing of claims by motion or on summary judgment.

This article will examine the retooled reciprocity theory and the anticompetitive potential of reciprocal dealing practices under the law of (1) mergers, (2) monopolization, and (3) tying.

⁹ See, e.g., Frank H. Easterbrook, *Antitrust Law Enforcement in the Vertical Restraints Area: Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 144 (1984) (criticizing leverage objection to reciprocity as "naive").

¹⁰ See Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CAL. L. REV. 311, 339 (1983) (stating that the merger guidelines do not mention reciprocity because of the unwillingness of several successive Federal Trade Commission administrations to bring such cases).

¹¹ 3 F. Supp. 2d 1255 (N.D. Ala. 1998), *vacated*, 195 F.3d 1346 (Fed. Cir. 1999).

¹² 504 U.S. 451 (1992).

I. BACKGROUND TO RECIPROCITY: MERGER LAW

The case law on reciprocity is sparse. The Supreme Court has spoken on the issue directly only once, and that was in the context of a merger. In *FTC v. Consolidated Foods Corp.*,¹³ the Supreme Court set aside the acquisition of Gentry, a manufacturer of dehydrated onion and garlic, by Consolidated Foods Corporation ("Consolidated Foods"), the owner of a food processing plant and wholesale and retail food stores, because the acquisition would likely encourage reciprocal dealing.¹⁴ Consolidated Foods, the acquiring company, purchased products of food processors that, in turn, purchased dehydrated onion and garlic in preparing or packaging food.¹⁵ The Supreme Court expressed concern that the merger would create reciprocal buying patterns in which prospective suppliers to Consolidated Foods would purchase their requirements of dehydrated onion and garlic from Consolidated Foods' new subsidiary, Gentry, thereby insulating Gentry from competition in dehydrated onion and garlic on the merits.¹⁶ The Supreme Court stated: "If reciprocal buying [by a customer of Consolidated Foods] creates for Gentry a protected market, which others cannot penetrate despite superiority of price, quality, or service, competition is lessened"¹⁷

The Court further noted that an acquisition which facilitates reciprocity is anticompetitive because that acquisition imports "an irrelevant and alien factor" . . . intruding into the choice among competing products, creating at least 'a priority on the business at equal prices.'"¹⁸ As a result, inferior goods may be insulated from vigorous competition and may deprive a superior product of access to a supplier.¹⁹ Equally important, a potential rival may suffer antitrust injury because it has been foreclosed from meaningful access to the market.²⁰

In the wake of *Consolidated Foods*, the lower courts proceeded cautiously and have applied a three-prong test in

¹³ 380 U.S. 592 (1965).

¹⁴ See *id.* at 593-94.

¹⁵ See *id.* at 595.

¹⁶ See *id.* at 593.

¹⁷ *Id.* at 599.

¹⁸ *Id.* at 594 (citations omitted).

¹⁹ See *id.* at 598-99.

²⁰ See *id.* at 597.

determining whether a merger is unlawful because it promotes reciprocity:

First, the merger must significantly increase the opportunities for reciprocal dealing by creating a market structure conducive to reciprocity or reciprocity effect;

Second, there must be a reasonable probability that those opportunities will be exploited; and

Third, the resulting reciprocal dealings, if any, must have a tendency substantially to lessen competition.²¹

Consolidated Foods thus poses a formidable hurdle to plaintiffs challenging a merger on a reciprocity theory. This demanding standard explains in part the low visibility of the reciprocity theory in merger enforcement.²² Indeed, the last challenge to a conglomerate merger on reciprocity grounds was in 1971, and the government lost.²³ A more fundamental, and perhaps more compelling, explanation for the virtual disappearance of *Consolidated Foods* is that conglomerate mergers in general are no longer viewed as a significant competitive threat; and pure conglomerate mergers today are almost never challenged.²⁴

II. RECIPROCITY REBORN: THE NEW LAW OF MONOPOLIZATION?

Consolidated Foods is the one and only time that the Supreme Court addressed reciprocal dealing. Historically, as more fully discussed below, reciprocity actions have been confined to section 1 of the Sherman Act and viewed as analogues to tying. However, recent case law developments, specifically the Ninth Circuit's decision in *Eastman Kodak*²⁵ and

²¹ *Carrier Corp. v. United Tech. Corp.*, 1978-2 Trade Cas. (CCH) ¶ 62,393, at 76,371 (N.D.N.Y. 1978).

²² See Spencer Weber Waller, *Can U.S. Antitrust Laws Open International Markets?*, 20 NW. J. INT'L. L. & BUS. 207, 220 (2000) (stating that after the *Consolidated Foods Corp.* decision there was a flood of litigation which eventually subsided).

²³ See *United States v. ITT Corp.*, 1971 Trade Cas. (CCH) ¶ 73,169 (N.D. Ill. 1971).

²⁴ See Baker & Blumenthal, *supra* note 11, at 339 (stating that challenges to conglomerate mergers are steadily declining and most conglomerate violations theories "fallen into disfavor and disuse").

²⁵ *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998).

the district court holding in *Intergraph*²⁶ have created renewed interest in reciprocity as a theory to attack monopolistic behavior.²⁷ In the *Eastman Kodak* case, Eastman Kodak Corporation ("Kodak") instituted a sales policy under which it would sell Kodak replacement parts only to those customers who would agree to use Kodak maintenance services.²⁸ But for the conditions dictated by Kodak, many of its customers would have preferred to buy maintenance services from independent service organizations (ISO) which were cheaper and of a higher quality than those offered by Kodak.²⁹ Forced to make a hard choice, most customers opted to abandon the ISOs. The Ninth Circuit made clear that Kodak's attempt to leverage its monopoly over replacement parts into a monopoly in the servicing of Kodak equipment, thereby excluding independent service organizations from maintaining Kodak machines, constituted unlawful monopolization.³⁰

The trial court in *Intergraph* took the *Eastman Kodak* holding one step farther.³¹ Intergraph Corporation's ("Intergraph") business was the design and production of graphics subsystems, which are critical systems for high-end workstations used by graphics and design engineers and graphics artists.³² Intel sold Intergraph microprocessors—the "brains" of the computer—for use in its graphics subsystems and provided technical information about Intel's products.³³ Intergraph had its own microprocessors—the Clipper technology—but chose to abandon development of Clipper technology in favor of Intel products as technical innovations evolved.³⁴ In the meantime, Intel became a competitor of Intergraph in graphic subsystems.³⁵ Intel began to condition its sale of microprocessors and the providing of technical information on Intergraph's agreement to license the Clipper

²⁶ 3 F. Supp. 2d 1255 (N.D. Ala. 1998), *rev'd*, 195 F.3d 1346 (Fed. Cir. 1999).

²⁷ See Waller, *supra* note 22, at 221 (asserting that the Supreme Court is responding favorably to new theories of exclusive dealing).

²⁸ *Eastman Kodak*, 125 F.3d at 1201.

²⁹ See *id.*

³⁰ *Id.* at 1208.

³¹ See *Intergraph*, 3 F. Supp. 2d at 1278–79.

³² See *id.* at 1270.

³³ See *id.* at 1269.

³⁴ See *id.* at 1263–64.

³⁵ See *id.*

technology free of charge to Intel.³⁶ Intergraph balked at this demand, and its supply of microprocessors was cut off by Intel.³⁷

Citing *Eastman Kodak*, the trial court found that Intel had unlawfully used its monopoly power in microprocessors to leverage its power into the market for graphic subsystems.³⁸ The trial court further concluded that using economic leverage in one market coercively to secure competitive advantage in another market constituted unlawful reciprocal dealing.

Accordingly, the court concluded that Intel's overall course of conduct, including its tying of a continued supply to Intergraph of both Central Processing Units (CPU) and technical information with its demand for Intergraph's relinquishment of its Clipper technology patents without costs to Intel, was a form of coercive reciprocity proscribed under both sections 1 and 2 of the Sherman Act.³⁹

The trial court in *Intergraph* thus concluded that Intel's anticompetitive conduct could be attacked on several theories—leveraging, reciprocity, tying, and monopolistic refusal to deal.⁴⁰ The common thread in these theories is that Intel used its monopoly power in microprocessors to exclude a rival in another market.

On appeal, the Federal Circuit reversed the district court on all counts and dissolved the injunction against Intel.⁴¹ One could surely argue that based on the Federal Circuit reversal, the trial court decision in *Intergraph*, as it addresses exclusionary conduct by dominant firms—including refusals to deal, leveraging and reciprocity—is a dead letter. It would, however, be a mistake to write off the district court ruling in such a cavalier fashion. The Federal Circuit's overarching rationale for reversal was that Intel's acts directed at Intergraph did not, as a matter of law, harm competition because Intel and Intergraph were not competitors in microprocessors.⁴² Far from rejecting reciprocity as a basis for recovery under section 2 of the Sherman

³⁶ See *id.* at 1267.

³⁷ See *id.*

³⁸ See *id.* at 1278.

³⁹ See *id.* at 1279.

⁴⁰ See *id.* at 1277–79.

⁴¹ See *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1367 (Fed. Cir. 1999).

⁴² See *id.* at 1353.

Act, the Federal Circuit accepted the theory.⁴³ Unfortunately, the appellate court's specific discussion of reciprocity is at best cursory and disappointing.

While the Federal Circuit criticizes the "terse holding" below, it sheds little light on the law of reciprocal dealing.⁴⁴ It notes that Intel's conduct does not fit the classic reciprocal dealing formula of "I'll buy from you, if you buy from me."⁴⁵ In *Intergraph*, Intel said to Intergraph "I'll sell to you, if and only if, you provide technology on my terms."⁴⁶ For that reason, the appellate court treats Intel's allegedly coercive tactics as simply failed negotiations for licensing Intergraph's Clipper technology.⁴⁷ Query whether the Federal Circuit's attempt to distinguishing Intel's conduct from classic reciprocal dealing is meaningful. Moreover, the Court of Appeals finds no record evidence that competition was distorted in any market by Intel's licensing proposals.⁴⁸ Unfortunately, the decision contains almost no analysis of the substantive reciprocity claims. Rather, the Federal Circuit simply characterizes Intel's tactics as "hardball" and states that "it is not the judicial role to readjust the risks in high-stakes commercial dealings."⁴⁹

In short, reciprocity as a theory of monopolistic conduct lives to do battle another day. Notwithstanding its reversal, the trial court's holding in *Intergraph* remains significant for antitrust litigants for at least two reasons. First, the decision below on reciprocity provides plaintiffs with an additional weapon for their antitrust arsenal. The trial court could have viewed the reciprocity claim as cumulative and ended its analysis with leveraging. It may well be that the conduct in question would have been subject to attack under section 2 as more generic "exclusionary conduct." By recognizing reciprocity as an independent theory of liability, the court is forcing defendants to deal with a whole new range of factual and legal issues under

⁴³ See *id.* at 1361.

⁴⁴ See *id.*

⁴⁵ *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 511 (3d Cir. 1998); see also *Intergraph*, 195 F.3d at 1361 (noting that a finding of reciprocal dealing requires a presence of conspiracy).

⁴⁶ *Intergraph*, 195 F. 3d at 1361.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ *Id.* at 1362.

section 2. The Federal Circuit ruling does not in any way undermine, and indeed supports, this point. Second, in condemning Intel's reciprocal dealing, the trial court applied a *per se* rule. The *per se* rule provides the antitrust plaintiff with distinct benefits. Most notably, under a *per se* analysis, anticompetitive effect is presumed and need not be proven by the plaintiff.⁵⁰ In addition, the defendant is precluded from offering evidence of procompetitive benefits of the acts in question and is thus limited in the defenses that may be put forward.

In adhering to the *per se* standard, the trial court in *Intergraph* relied on case law that predated the Supreme Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde*⁵¹ on tying issues.⁵² That case law is decidedly favorable to plaintiffs. Query whether other courts will take a similar approach or will those courts view reciprocity through a post-*Hyde* lens and require detailed economic analysis of market data. The Federal Circuit did not address this issue and thus has given lower courts some leeway in deciding the issue. If the courts take the latter approach, the plaintiffs' road to recovery will be rockier. On the other hand, if the courts choose to follow the trial court in *Intergraph* defending reciprocity claims under section 2 will become even tougher.

III. TYING ANALOGY

A. Government Enforcement

A third legal basis for attacking reciprocal dealing practices grew out of the law of tying. Government enforcement actions arose in the context of specific business practices that had arisen during the late 1960s and early 1970s. Companies, in order to enhance sales, targeted suppliers as potential customers. Some

⁵⁰ *Intergraph Corp.*, 3 F. Supp. 2d 1255, 1279 (1998).

⁵¹ 466 U.S. 2 (1984).

⁵² See *id.* (following *Betaseed Inc. v. U & I, Inc.*, 681 F.2d 1203 (9th Cir. 1982) and *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978)). Both cases were cited for the proposition that "[c]ourts have held that coercive reciprocity is a *per se* violation of the antitrust laws because of its pernicious effect and economic similarity to illegal tying cases." *Intergraph*, 3 F. Supp. 2d at 1279. The court also cited *Betaseed* in reasoning that once a *per se* violation is established "no specific showing of anticompetitive effect is necessary." *Id.* (citing *Betaseed*, 681 F.2d at 1228).

firms created an office of trade relations or customer relations to monitor purchasing activity and, based on purchasing activity, aggressively promoted sales to suppliers. In at least some cases, the strategy worked, giving rise to claims by the government that reciprocal dealing had, in fact, unlawfully excluded rival sellers from making sales. As noted, the government was able to obtain consent decrees in most cases.⁵³ The decree contained provisions which would (1) abolish the office of trade relations, requiring separation of the purchasing and selling functions, and (2) bar reciprocal dealing in the future.

As also pointed out above, the Antitrust Division, under Thomas Kauper, ceased bringing reciprocity actions in the second term of the Nixon Administration.⁵⁴ The Antitrust Division re-evaluated reciprocity and came to the view that it was not invariably anticompetitive. Put another way, in absence of some showing of actual anticompetitive effects, reciprocity ought not to be condemned. This approach mirrors the views of Professor Areeda,⁵⁵ discussed below, that reciprocity should not be condemned as per se unlawful.

B. Private Enforcement

In the private sector, reciprocity actions historically have also relied on the law of tying, and the courts have recognized that the competitive harm caused by reciprocal dealing is closely akin to that caused by tying:

[T]he two labels (tying and reciprocal dealings) refer to similar phenomena: In each case one side of a transaction has special power in the market place. It uses this power to force those with whom it deals to make concessions in another market. In tying arrangements, a seller with economic power forces the purchaser to purchase something else to obtain the desired item. In reciprocal dealings a buyer with economic power forces a seller to buy something from it to sell its goods. In both cases, the key is the extension of economic power in one market to another market.⁵⁶

⁵³ See *supra* note 8 and accompanying text.

⁵⁴ See *supra* notes 9-10 and accompanying text.

⁵⁵ See PHILLIP E. AREEDA, HERBERT HOVENKAMP & EINER ELHAUGE, X ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1777 (1996) [hereinafter AREEDA].

⁵⁶ *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 425 (5th Cir. 1978).

Yet, there remains a crucial difference in the law of tying and the law of reciprocal dealing. Over time, the law of tying has developed and has been refined through court decisions, most notably, *Jefferson Parish Hospital District No. 2 v. Hyde*.⁵⁷ While the *Hyde* majority nominally adheres to the per se standard for tying, it adopts a de facto rule of reason approach by requiring a detailed market analysis to ascertain market power in all tying cases.⁵⁸ In marked contrast to the extensive case law development in the tying area, the law on reciprocal dealing has stagnated and remains largely undeveloped.⁵⁹ In part, this is due to the fact that government enforcement actions were almost universally resolved administratively by consent decree so that public sector cases had no opportunity to percolate through the judicial system. This is also due to the fact that reciprocity, as a theory of antitrust wrongdoing, fell out of favor with enforcement agencies, private litigants and courts during the Chicago School antitrust revolution of the 1980s. As a result, much of the authority available to courts on reciprocity issues is pre-*Hyde*, and hence suspect. The Supreme Court has not addressed reciprocal dealing in the context of a section 1 Sherman Act violation.

C. *Per Se Analysis*

The lower courts, borrowing from the law of tying, have analyzed reciprocal dealing under both the per se rule and the rule of reason. To establish a per se violation, plaintiff must prove (1) an agreement conditioning the purchase of a product on the sale of another product; (2) market power sufficient to force the plaintiff to do something it would do in a competitive market; and (3) anticompetitive effect.

⁵⁷ 466 U.S. 2 (1984).

⁵⁸ See *id.* at 34.

⁵⁹ See, e.g., *Brokerage Concepts, Inc. v. U.S. Healthcare Inc.*, 140 F.3d 494 (3d Cir. 1998) (noting that the Third Circuit has no test for the legality of reciprocal dealing); *Betaseed Inc. v. U & I, Inc.* 681 F.2d 1203, 1221 (9th Cir. 1982) (stating that "[t]he similarity between coercive reciprocity and tying arrangements, both in form and in anticompetitive consequences, leads to the conclusion that the two practices should be judged by similar standards"); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 425 (5th Cir. 1978) (opining that the label of "tying" or "reciprocal dealing" is irrelevant; per se rule applies to both); *E.T. Barwick Indus. v. Walter E. Heller & Co.*, 692 F. Supp. 1337 (N.D. Ga. 1987), *aff'd*, 891 F.2d 906 (11th Cir. 1989).

1. Agreement

It is fundamental that some level of agreement involving two products is necessary to meet the "contract, combination or conspiracy" requirement of section 1 of the Sherman Act.⁶⁰ Under the tying analysis, the wrongdoer conditions the sale of one product (the tying product) on the purchaser's willingness to buy a second product (the tied product). In the context of reciprocity, the agreement prong is met by a showing that purchases are made as a quid pro quo for sales. Fortuitous or incidental purchases from the customer of a seller do not constitute an agreement within the meaning of section 1 of the Sherman Act. Where a quid pro quo can be shown, the courts further distinguish between "coercive" and "mutual" reciprocity. Coercive reciprocity arises from imbalance in market power and permits the larger trading partner to take advantage of the smaller. Mutual reciprocity occurs where both trading partners perceive an advantage in the reciprocal dealing arrangement.⁶¹

2. Market Power

Market power is the key element in proving coercive reciprocity; absent market power, there is no plausible basis for arguing coercion. The tying cases have held that a plaintiff must establish sufficient economic power in the market for the tying product appreciably to restrain commerce in the market for the tied product.⁶² In *Hyde*, the Supreme Court held that the essence of market power was the seller's ability to force a purchaser to do something that it would not do in a competitive market.⁶³ The Court said that market power could be established in several ways: (1) a dominant market share; (2) a patent; or (3) a unique product that rivals cannot offer.⁶⁴ In *Hyde*, the Court concluded that a 30% share of the relevant market was insufficient to permit anticompetitive forcing,⁶⁵ and that surgical services were not sufficiently unique to confer

⁶⁰ 15 U.S.C. § 1 (1999).

⁶¹ See generally AREEDA, *supra* note 57, at ¶ 1777.

⁶² See *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).

⁶³ See *Hyde*, 466 U.S. at 16-17.

⁶⁴ See *id.*

⁶⁵ See *id.* at 7.

market power.⁶⁶ Subsequently, in *Eastman Kodak* the Supreme Court concluded that requisite market power may exist where high switching costs effectively “lock-in” the buyer to the bundled goods.⁶⁷

Translated to reciprocal dealing, the test is whether the buyer has sufficient economic power in the market in which it purchases appreciably to restrain commerce in the market in which it sells.⁶⁸ Clearly, this standard is met where the buyer controls a dominant share of the relevant market. The reciprocal dealing cases have held that actual coercion need not be shown but may be implied from the fact that many sellers have accepted burdensome terms.⁶⁹ While lower courts in tying cases have adopted a similar position,⁷⁰ the view that economic power may be inferred from the existence of the tie-in arrangements has been discredited by the Supreme Court in *Hyde*.⁷¹ A court reviewing a reciprocal dealing arrangement anew may very well take a different approach.

3. Anticompetitive Effect

When a case falls within the per se pigeonhole, anticompetitive effect is presumed and need not be shown.⁷² Again relying on the tying cases, courts in reciprocal dealing cases have held that the anticompetitive effect prong is met where a “not insubstantial” volume of commerce is affected.⁷³ That threshold is relatively low and poses no substantial obstacles to a reciprocal dealing action.

Courts have viewed the anticompetitive effects of coercive reciprocity as similar to those of tying and applied a per se rule.⁷⁴

⁶⁶ See *id.* at 43.

⁶⁷ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 472–73 (1992).

⁶⁸ See *Betaseed Inc. v. U & I, Inc.*, 681 F.2d 1203, 1222–23 (9th Cir. 1982).

⁶⁹ See *id.*

⁷⁰ See, e.g., *Moore v. Jas. H. Mathews & Co.*, 550 F.2d 1207, 1216–17 (9th Cir. 1977).

⁷¹ See *Hyde*, 466 U.S. at 34.

⁷² See *id.*

⁷³ *Id.* at 8; see also *Int'l Salt Co. v. United States*, 332 U.S. 932, 936 (1947) (stating that “agreements are forbidden which ‘tend to create a monopoly,’ and it is immaterial that the tendency is a creeping one rather than one that proceeds at a full gallop”).

⁷⁴ See *Betaseed*, 681 F.2d at 1216–17.

Like tying, coercive reciprocity (1) erodes traditional purchasing criteria of price, quality and service; (2) forecloses rivals who are without market leverage; and (3) fosters creation of monopolistic or oligopolistic market conditions.⁷⁵ In both cases, the key is the extension of economic power in one market to another.⁷⁶ Indeed, it is the imbalance in market power that effectuates the "anticompetitive forcing" characteristic of coercive reciprocity.⁷⁷

Surprisingly, even in those courts applying this lenient per se liability standard, decisions condemning reciprocity have been few in number. Courts have denied recovery based on: (1) absence of market power or coercion;⁷⁸ (2) lack of motive to engage in reciprocity;⁷⁹ (3) transactions not involving separate products;⁸⁰ (4) insufficient amount of commerce foreclosed;⁸¹ and (5) inability to prove a contract combination or conspiracy.⁸²

On the other hand, in cases of mutual reciprocity, where coercion by definition is lacking, courts have generally eschewed per se analysis and looked carefully for proof of anticompetitive effect.⁸³ Where anticompetitive effect is lacking, mutual reciprocal dealing arrangements have been upheld.⁸⁴

D. Rule of Reason

The focus of the antitrust analysis under the rule of reason is two-fold: first, the existence of actual, as opposed to presumed, anticompetitive effects caused by the conduct in question; and second, whether the anticompetitive effects are outweighed by the procompetitive benefits of the conduct.⁸⁵ The potential anticompetitive effects of reciprocity have been detailed above.

⁷⁵ See *id.* at 1220-21.

⁷⁶ See *id.* at 1218.

⁷⁷ *Id.* at 1216.

⁷⁸ See, e.g., *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 537-38 (7th Cir. 1986).

⁷⁹ See, e.g., *DeVoto v. Pac. Fidelity Life Ins. Co.*, 618 F.2d 1340, 1346 (9th Cir. 1980).

⁸⁰ See, e.g., *Ryals v. Nat'l Car Rental Sys.*, 404 F. Supp. 481, 486-87 (D. Minn. 1975).

⁸¹ See, e.g., *Great Escape*, 791 F.2d at 540.

⁸² See, e.g., *United States v. Empire Cross Corp.*, 393 F. Supp. 903, 914-15 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976).

⁸³ See, e.g., *Great Escape*, 791 F.2d at 540.

⁸⁴ See *id.* at 539.

⁸⁵ *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

Whether reciprocity has any procompetitive benefits is a matter of some intellectual debate. Proponents of per se condemnation of reciprocal dealing would obviously argue that such procompetitive benefits are non-existent or invariably outweighed by anticompetitive effects.

On the other hand, Professor Areeda has catalogued a series of potential procompetitive benefits of reciprocal dealing. According to Professor Areeda reciprocity may:

- a. Create production or transaction economies;
- b. Permit optimal output at plants to be maintained;
- c. Reduce any risk of expansion and promote stability;
- d. Permit better quality control;
- e. Thwart cartel or oligopolistic behavior by enabling sellers to disguise price reductions and thereby effectively cheat on the cartel.⁸⁶

Even if the foregoing effects can be proven as a matter of fact, it is questionable whether any of the benefits—alone or in combination—are sufficiently weighty to balance the potential anticompetitive effects of reciprocal dealing. The first three “benefits” would appear to be the same as any cartel would produce. The fourth justification—quality control—has long been discredited in the tying context. The fifth justification appears more theoretical than real. There would appear to be more efficient ways to thwart cartel behavior than reciprocal dealing: specifically, by non-participation or by prosecution. Nevertheless, Areeda would reject a per se approach to reciprocity and favor a structured rule of reason analysis focusing on: (1) the existence of an agreement; (2) a theory explaining how price and/or output are adversely affected; (3) facts triggering that theory; and (4) the severity of the harm to competition.⁸⁷

Areeda is not alone in his criticism of reciprocity. Chicago School writers, who view reciprocity as a form of tying, have also demeaned the notion that reciprocity is anticompetitive.⁸⁸ In their view, if a firm has sufficient market to exact a supracompetitive price for its product, it should make no difference whether the firm chooses to exact its premium from

⁸⁶ See AREEDA, *supra* note 57, ¶ 1777, at 456–60.

⁸⁷ See *id.*

⁸⁸ See Easterbrook, *supra* note 10, at 144–45.

that product alone or by bundling that product with another good.⁸⁹ Accordingly, tying and reciprocity theories involve "double counting" of defendant's alleged wrongdoing. While this view has gained a following in the antitrust community, it has not fared well in the courts and indeed was rejected by the Supreme Court in *Eastman Kodak*⁹⁰. At the end of the day, the Chicago School is correct that tying and reciprocity should be treated the same analytically under the antitrust laws. However, under that view, if tying is harmful to competition, then so is reciprocity.

CONCLUSION

Reciprocity has come back to life after three decades of hibernation as a new weapon to attack monopolistic behavior. Its contours remain largely undefined; and it is not yet clear whether, and the extent to which, the courts will embrace this theory. Antitrust practitioners should prepare themselves to deal with the new law of reciprocity.

⁸⁹ See *id.* at 143-45.

⁹⁰ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 472-73 (1992).