RECIPROCITY UNDER THE ANTITRUST LAWS: OBSERVATIONS ON THE HALES' COMMENT *

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Immediately following his frequently quoted comment that "people of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in conspiracy against the public, or in some contrivance to raise prices," Adam Smith made the usually neglected observation that "it is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice." [1] The general tenor of the analysis of reciprocity by the Hales is parallel to this. Reciprocity, they say, is increasingly and adversely affecting resource allocation and consumer welfare but, aside from a brief flirtation with the idea that proof of reciprocity should mean presumptive illegality under section 2 of the Sherman Act,[2] they despair of effectively treating it under the antitrust laws.

Despite Smith's pessimism, what most regard as effective policies against conspiracies in restraint of trade have been erected without abrogating the basic right "to meet together." It is my view that where reciprocity has significant market effects it too can be effectively handled without tagging it as per se illegal or attributing to it a presumption of unlawful market power. Either of these would accord to reciprocity an importance quite beyond its due. All that is necessary is to recognize reciprocity as the vehicle which *may* give rise to market effects which are proscribed by existing statutes.

Contrary to the Hales, I suspect that reciprocity is of less consequence in causing market imperfections now than in years past. Similarly, I would guess that it is less significant among major industrial concerns than in small business, the retail trades, and in local communities. Where markets are small and personal, individuals find the mutual "scratching of backs" difficult to ignore for social if not economic reasons. The owners of the livery stable and the feed mill gave one another preferential treatment. The grocer has his clothes

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* Hale & Hale, *Reciprocity Under the Antitrust Law*, 113 U. PA. L. REV. 69 (1964).

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1 SMITH, WEALTH OF NATIONS 128 (Modern Library ed. 1937).

2 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1958).

cleaned at the establishment of one of his customers. Physicians extend "professional courtesy" to one another. These reflect not conscious efforts to restrain trade, but simply gestures of goodwill among friends—which, nonetheless, may substantially reduce freedom of entry and tend to stabilize positions of market power.

Reciprocity is undoubtedly practiced by large industrial firms. But its effect on real market variables such as price and quality, and on market position, I should guess, is less substantial than when practiced among small businesses. The "corporate friendship" among purchasing agents is fragile when a stranger offers better prices or higher quality.

I do not wish to imply that reciprocity among large firms should be ignored. Rather I cannot find any situations in which reciprocity having substantial market effects would not be encompassed by present antitrust law. For example, two firms in bilateral buyer-seller relationships grant one another preferential prices. This is simply price discrimination with customer classification based on reciprocity. Subject to the well-known cost justification, meeting competition, and other defenses—none of which is of particular avail because of the reciprocal arrangements—such discrimination is proscribed by the Robinson-Patman Act [3] when the effect "may be substantially to lessen competition . . . in any line of commerce, or to injure, destroy, or prevent" competition with either reciprocal practitioner. If this is not the result, reciprocity is harmless; if it is, reciprocity is unlawful.

Similarly, where a merger such as that in the *Consolidated Foods* case [4] results in substantially lessened competition in any line of commerce because the merger makes reciprocity a viable business tool, section 7 of the Clayton Act [5] applies. Unlike the Hales, I find nothing odd in holding "a merger unlawful because it may encourage reciprocity when reciprocity itself has not been declared illegal." The only necessary qualification is that contained in the statute—it should be unlawful only where the effect may be substantially to lessen competition. It is the effect of reciprocity, not the fact of reciprocity, which is pertinent.

As the Hales point out, reciprocity could operate as a "tying" device, with one or both of the firms offering a product which in some form combined that of the other as a necessary condition of sale. Reciprocity might also result in bilateral exclusive dealerships. In both cases section 3 of the Clayton Act [6] provides a remedy, again

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[3] 49 Stat. 1526 (1936), 15 U.S.C. §§ 13-(b), 21(a) (1958).
[4] Consolidated Foods Corp. v. FTC, 329 F.2d 623 (7th Cir. 1964).
[5] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).
[6] 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

subject to the substantial-effect-on-competition test, and so here too, the fact of reciprocity does not alone violate the law.

Similar remarks apply to section 2 of the Sherman Act. It is conceivable that reciprocity could lead to monopolization, especially if the contracted Sherman Act standards of the recent *Lexington Nat'l Bank* merger case[7] are applied to monopolization without merger. In this regard, the outcome of the General Motors diesel locomotive case cited by the Hales will be most interesting. But we should not forget that price reduction or advertising—as well as reciprocity—can result in monopolization. Yet there surely is no need generally to proscribe these practices or to shroud them with presumptive illegality.

As the Hales suggest, the introduction of "reciprocity" to the antitrust vocabulary may not be entirely fortunate. First, the addition of an emotive word like "reciprocity" (or "deep pocket") to antitrust cognizance may obscure the applicability of existing laws. Second, through advocating that these practices carry special legal consequences such as presumptive illegality, analysts and enforcement officers may escape the burden of difficult evaluation imposed by existing law.

Ideally, only an inherently high probability that a particular market practice leads to substantial anticompetitive effects should invoke blanket condemnation. I doubt—as do the Hales—that reciprocity falls within this category. Still, I feel more than they that reciprocity can and should be effectively treated under the antitrust laws.

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[7] United States v. First Nat'l Bank & Trust Co., 84 Sup. Ct. 1033 (1964).