Washington and Lee Law Review

Volume 27 | Issue 2 Article 7

Fall 9-1-1970

Reciprocity As A Basis For Preliminary Injunctive Relief Denying Proposed Conglomerate Merger

RECIPROCITY AS A BASIS FOR PRELIMINARY INJUNCTIVE RELIEF DENYING PROPOSED CONGLOMERATE MERGER

Inasmuch as preliminary injunctive relief may have a conclusive effect in merger cases, causing the parties to abandon their plans rather than await the result of expensive and prolonged litigation,[1] courts have recognized preliminary relief as a serious remedy.[2] Courts also realize that the record is less comprehensive at the time of the application for preliminary relief than at the time of a final hearing, and thus the rule has developed that the party seeking the relief must show a reasonable chance of ultimately prevailing on the merits by showing a *probability* of a lessening of competition[3] and a reasonable *probability* of success on final hearing.[4] It is therefore significant in the light of the development of this rule that preliminary injunctive relief was granted in *Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc.*[5] on grounds of mere *possibility* of reciprocity.

Reciprocity is the business practice of favoring one's customers in purchasing commodities sold by them to obtain favorable treatment in return. To the extent that reciprocity may substantially lessen competition, it will be deemed one of the anticompetitive practices which the antitrust laws prohibit.[6] Since a merger increases the potential for

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[1]United States v. Chrysler Corp., 232 F. Supp. 651, 659 (D.N.J. 1964) (The merger was abandoned shortly after the granting of preliminary injunctive relief. 1964 ANTITRUST & TRADE REG. REP. No. 180, at B-2); United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 541 (W.D. Pa.), *aff'd.* 320 F.2d 509 (3d Cir. 1963).

[2]Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 510 (3d Cir. 1969); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 743 (2d Cir. 1953); United States v. Northwest Indus., Inc., 301 F. Supp. 1066, 1097 (N.D. Ill. 1969); United States v. Crysler Corp., 232 F. Supp. 651, 659 (D.N.J. 1964).

[3]FTC v. Consolidated Food Corp., 380 U.S. 592, 598 (1965); United States v. Ingersoll-Rand Co., 320 F.2d 509, 525 (3d Cir. 1963); United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969); United States v. Penick & Ford, Ltd., 242 F. Supp. 518, 523 (D.N.J. 1965).

[4]United States v. Ingersoll-Rand Co., 320 F.2d 509, 525 (3d Cir. 1963); United States v. International Tel. & Tel. Corp., 306 F. Supp. 766, 774 (D. Conn. 1969); United States v. Northwest Indus., Inc., 301 F. Supp. 1066, 1095 (N.D. Ill. 1969); United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969); United States v. Penick & Ford, Ltd., 242 F. Supp. 518, 523 (D.N.J. 1965).

[5]414 F.2d 506, 519, 532 (3d Cir. 1969), *cert. denied,* 90 S. Ct. 567 (1970), *rev'g* 294 F. Supp. 1263 (D. Del. 1969) [hereinafter referred to as *Allis-Chalmers*].

[6]In *FTC v. Consolidated Foods Corp.,* 380 U.S. 592, 594 (1965), the Supreme Court stated that reciprocity was one of the "anti-competitive practices at which the antitrust laws are aimed." *Accord, Allis-Chalmers* at 519; United States v. Ingersoll-Rand Co., 320 F.2d 509, 525 (3d Cir. 1963); United States v. International Tel. & Tel. Corp., 306 F. Supp. 766, 774 (D. Conn. 1969); United States v. Northwest Indus., Inc., 301 F. Supp. 1066 (N.D. Ill 1969); United States v. General Dynamics Corp., 258 F. Supp. 36, 57 (S.D.N.Y. 1966).

reciprocal buying practices through economic concentration, the anti-competitive effect of reciprocity may be thwarted in its incipiency by granting preliminary injunctive relief in the pre-acquisition stage[7] under section 16 of the Clayton Act[8] to deny the accomplishment of a proposed merger.

In *Allis-Chalmers,* a private antitrust action, White Consolidated, a diversified manufacturer, purchased 31.2 percent of the outstanding stock of Allis-Chalmers for the purpose of acquiring Allis-Chalmers.[9] To facilitate the acquisition, White Consolidated proposed to make a tender offer to Allis-Chalmers' stockholders. A preliminary injunction was then sought by Allis-Chalmers to prevent White Consolidated from acquiring any additional stock and from exercising its share of ownership in any manner that would promote its takeover objective. Following the filing of this preliminary relief application, the district court issued an ex parte temporary restraining order to prohibit White Consolidated from taking any steps to acquire additional Allis-Chalmers stock.[10]

The particular facts in *Allis-Chalmers* in regard to the issue of reciprocity were that Allis-Chalmers annually purchased approximately $44,000,000 in steel products.[11] A White Consolidated subsidiary, Blaw-Knox, was a major supplier of metal rolling mills to the steel industry. White Consolidated bought approximately $42,000,000 in steel mill products annually. If the proposed merger were allowed,

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[7]FTC v. Proctor & Gamble Co., 386 U.S. 568, 577 (1967); United States v. Ingersoll-Rand Co., 320 F.2d 509, 524 (3d Cir. 1963); United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1066 (S.D.N.Y. 1969); American Smelting & Ref. Co. v. Pennzoil United, Inc., 295 F. Supp. 149, 152 (D. Del. 1969); United States v. Chrysler Corp., 232 F. Supp. 651, 657 (D.N.J. 1964).

[8]Injunctive relief is provided for in section 16 as follows:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, *and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger or irreparable loss or damage is immediate, a preliminary injunction may issue....*

Clayton Act § 16, 15 U.S.C. § 26 (1964), *formerly* ch. 323, § 16, 38 Stat. 737 (1914) (emphasis added).

[9]*Allis-Chalmers* at 508.

[10]Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 294 F. Supp. 1263, 1265 n.1 (D. Del. 1969).

[11]*Allis-Chalmers* at 517-18, 519 n.22.

an Allis-Chalmers and White Consolidated combination (Allis-Chalmers/White) would be the largest purchaser of steel products ($86,000,000 annually) in the relevant rolling mill market and through its Blaw-Knox subsidiary would be a substantial supplier of rolling mill machines to the steel producers. This perhaps would compel the selection of Allis-Chalmers/White as a rolling mill supplier to the disadvantage of other rolling mill producers.

The issue of reciprocity was not presented to the district court for its consideration, and the court held that Allis-Chalmers had failed to show a probability of anticompetitive effects or a reasonable probability of success on a final trial of the antitrust issues. Hence, preliminary injunctive relief was denied.[12] On appeal, the reciprocity issue was presented and the Third Circuit reversed, holding that the proposed merger of Allis-Chalmers and White Consolidated threatened to enhance the power of these combined companies to engage in reciprocal dealing in the rolling mill market. Thus the preliminary injunction was granted, although only a possbility of reciprocity was shown.[13]

Inasmuch as the concept of reciprocity exists in other areas of the law,[14] a definition of reciprocity as a business practice will be helpful. Reciprocity has been defined by the Supreme Court as "[a] threatened withdrawal of orders if products of an affiliate cease being bought, as well as a conditioning of future purchases on the receipts of orders for products of that affiliate...."[15] Reciprocity may be expressed in its most common form as "I will buy from you if you will buy from me." A more complex form of reciprocity, referred to as "secondary reciprocity,"[16] involves a third party and occurs where *A* agrees to buy from *B* because *C*, who is a customer of *A*, sells to *B*.[17]

Reciprocity has been categorized by legal writers as either coercive

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[12]Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 294 F. Supp. 1263, 1268 (D. Del. 1969).

[13]Although the opinion of the court and the dissenting opinion discussed other aspects of the case, the concurring opinion was limited to the issue of reciprocity so that a majority was collected on that single issue. *Allis-Chalmers* at 526-27.

[14]Reciprocity is used "in international law to describe the relation between states or nations when each of them extends privileges and special advantages to the subjects of the other...." Clostermann v. Schmidt, 215 Ore. 55, 332 P.2d 1036, 1042 (1958). The term reciprocity is also employed in insurance law to denote a "reciprocal insurance exchange." Farmers Auto. Inter-Ins. Exch. v. MacDonald, 59 Wyo. 352, 140 P.2d 905, 914 (1943).

[15]FTC v. Consolidated Foods Corp., 380 U.S. 592, 594 (1965).

[16]Krash, *The Legality of Reciprocity under Section 7 of the Clayton Act*, 9 ANTITRUST BULL. 93, 97 (1964) [hereinafter cited as Krash].

[17]*See* United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 532 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

or tacit.[18] Coercive reciprocity involves express threats or promises by the supplier which are intended to induce purchases by customers. The anticompetitive effect of coercive reciprocity has been likened to tie-in contracts[19] since the company is saying in effect, "My order for your goods is tied to the receipt of an order from you for my goods."[20] Tacit reciprocity occurs where a large purchaser is able to influence the purchases of his suppliers without express threats or promises. Tacit reciprocity has been attributed to a "predilection of businessmen for an easy sale and the propensity to show gratitude to those who have favored a seller with orders."[21] The reciprocity need not ensue from bludgeoning or coercion to be an antitrust violation.[22] Thus either coercive[23] or tacit[24] reciprocity may be deemed an anticompetitive practice. It has been suggested that the standard of proof for coercive reciprocity should be higher than it is for tacit reciprocity because coercive reciprocity involves express threats or promises which must be clearly demonstrated.[25]

The prohibition of reciprocity as an anticompetitive practice first developed in the 1930's when the FTC decided three cases holding that corecive reciprocity was violative of section 5 of the Federal Trade Commission Act[26] as an unfair method of competition.[27] Prior to its

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[18]Hinnegan, *Potential Reciprocity and the Conglomerate Merger: Consolidated Foods Revisted,* 17 BUFFALO L. REV. 631, 638 (1968) [hereinafter cited as Hinnegan]; Handler, *Gilding the Philosophic Pill—Trading Bows for Arrows,* 66 COLUM. L. REV., 1, 5 (1966) [hereinafter cited as Handler].

[19]Handler, *supra* note 18, at 5.

[20]In the tie-in arrangement the purchaser is allowed to buy Product X, a commodity in high demand, only if Product Y, a less desirable commodity, is also purchased. International Bus. Machs. Corp. v. United States, 298 U.S. 131 (1936). In the coercive reciprocity arrangement, using *Allis-Chalmers* as a hypothetical illustration, the tied product, rolling mills, is the one being sold to steel manufacturers, and the tying product is Allis-Chalmers/White's offer to place a steel order.

[21]Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures,* 49 VA. L. REV. 433, 435 (1963).

[22]FTC v. Consolidated Foods Corp., 380 U.S. 592, 594 (1965).

[23]Califronia 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).

[24]*See* FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963); United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966); *cf.* United States v. R.J. Reynolds Tobacco Co., 268 F. Supp. 769 (D.N.J. 1966).

[25]Handler, *supra* note 18, at 5.

[26]38 Stat. 719 (1914), *as amended,* 15 U.S.C. § 45 (1964).

[27]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).

amendment in 1950 by the Celler-Kefauver Act,[28] Section 7 of the Clayton Act[29] was not construed as a prohibition of reciprocity.[30] However, the amended section[31] has now been interpreted by courts to prohibit reciprocal buying practices.[32] It specifically prohibits any corporation engaged in commerce from acquiring all or part of the stock or assets of any corporation also engaged in commerce if the effect in any section of the country may be substantially to lessen competition or tend to create a monopoly in any line of commerce. Courts have frequently employed section 7 in recent years to curtail the anticompetitive effects of the current enormous merger movement[33] in the American business community.[34]

At the time that the Celler-Kefauver Act was being drafted, Congressional hearings on the Act suggested that section 7 was meant to be limited to situations where actual competition exists.[35] There has also been a feeling that section 7 should not be construed by the courts as a Congressional directive to attack economic concentration unless

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[28]15 U.S.C. § 18 (1964).

[29]Ch. 323, § 7, 38 Stat. 731 (1914).

[30]*See* Hinnegan, *supra* note 18, at 638-39.

[31]The pertinent provision of section 7 of the Clayton Act is as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share of 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 tend to create a monopoly.

Clayton Act § 7, 15 U.S.C. § 18 (1964), *formerly* ch. 323, § 7, 38 Stat. 731 (1914).

[32]FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506 (3d Cir. 1969); United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963); United States v. International Tel. & Tel. Corp., 306 F. Supp. 766 (D. Conn. 1969); United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966).

[33]The trend toward economic concentration was described by a government official in a Senate hearing:

> Over the period 1948-66, 912 manufacturing and mining companies with combined assets of $31 billion were acquired. About one-half of these assets were acquired in the last 5 years of this 19-year period.
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> ...Quite clearly, we are in the midst of an enormous merger movement.

Meuller, *Hearings on the Status and Future of Small Business Before the Senate Select Comm. on Small Business,* 90th Cong., 1st Sess., pt. 2, at 452 (1967).

[34]FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Gottesman v. General Motors Corp., 414 F.2d 956 (2d Cir. 1969); Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp., 303 F. Supp. 1344 (S.D.N.Y. 1969); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968).

[35]H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949).

there has been a showing of harm to competition.[36] Yet the attitude of the present administration in the Antitrust Division of the Justice Department strongly suggests that section 7 is considered a Congressional mandate to curb the trend toward economic concentration.[37] Although officials in the present administration have urged that section 7 be construed in various ways to prohibit anticompetitive practices, their statements indicate that they have only begun to restrain reciprocity.[38]

Only five years ago, reciprocity was characterized by the Supreme Court as a novel theory in *FTC v. Consolidated Foods Corp.*[39] That case was the Court's first construction of the amended section 7 on the subject of reciprocity as an anticompetitive practice. In 1951, Consolidated Foods, a large, diversified processor, wholesaler and retailer of food products, acquired Gentry, Inc. Gentry had been one of the two leading producers of dehydrated onion and garlic. Prior to the Consolidated Foods/Gentry merger, Gentry had 28 percent of the dried onion market in 1950 while Basic Vegetables Products, Inc., its principal competitor, accounted for 60 percent of the same market. By 1958, Gentry's percentage had risen to 35 percent while Basic's portion had dropped to 57 percent of the market.[40]

The merger was challenged almost seven years after its consummation when the FTC issued a complaint in late 1957 for violation of section 7 of the Clayton Act. The merger was struck down in a hearing before the FTC because it gave Gentry the anticompetitive ad-

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[36]Donald F. Turner, immediately prior to becoming Chief of the Antitrust Division of the Justice Department, stated: "I do not believe Congress has given the courts and the FTC a mandate to campaign against super-concentration in the absence of any evidence of harm to competition." Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1395 (1965).

[37]Richard W. McLaren, new Chief of the Antitrust Division of the Justice Department, has said that the government will institute litigation "even at the risk of losing some cases to find out how far § 7 will go toward halting the trend toward economic concentration." [1967-1969 Transfer Binder], 5 TRADE REG. REP. ¶ 50,235 (1969).

[38]McLaren stated that the government has made "only a start in the reciprocity area" in its attempt to restrain reciprocity as an anti-competitive practice. The Evening Star (Washington, D.C.), Dec. 24, 1969, at A-4, col. 5. *See also* Wilson, *FTC Division Chief Gives His Views on Reciprocity*, 440 ANTITRUST & TRADE REG. REP. A-13 (Dec. 16, 1969).

[39]380 U.S. 592, 602 (1965); *cf.* 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).

[40]Although Consolidated-Gentry's share of the dehydrated onion market increased 7% in the period following the merger, its percentage of the garlic market fell 12% below Gentry's market share at the time of acquisition. FTC v. Consolidated Foods Corp., 380 U.S. 592, 598 (1965).

vantage of reciprocity which was not available to its competitors and would tend to foreclose them from a substantial market.[41] Although the Seventh Circuit reversed this holding by the FTC,[42] the Supreme Court unanimously reversed the court of appeals, reinstated the FTC decision and held that the merger should be invalidated.[43] Mr. Justice Douglas delivered the opinion of the Court, declaring that section 7 of the Clayton Act is concerned "with probabilities, not certainties."[44] He further stated that reciprocity would violate section 7 only "if the probability of a lessening of competition is shown,"[45] adding that

> [n]o group acquiring a company with reciprocal buying opportunities is entitled to a "free trial" period. To give it such would be to distort the scheme of § 7. The "mere *possibility*" of the prohibited restraint is not enough.[46]

Ostensibly, Douglas was making a distinction between the requirements for demonstrating illegal reciprocity. There need not be a *certainty* that reciprocal buying will ensue upon consummation of the merger but there must be at least a demonstration of a *probability*. The mere *possibility* of reciprocity occurring after completion of the merger will not be sufficient.

In a concurring opinion, Mr. Justice Stewart argued that "the opportunity for reciprocity is not alone enough to invalidate a merger under § 7."[47] There must be more than a "bare potential for reciprocal buying to bring a merger within the ban of § 7."[48] He further stated that "the record should be clear and convincing that the requisite probability [of illegal reciprocal buying] is present."[49]

Because *Allis-Chalmers* did not require clear and convincing evidence that the potential for reciprocity be present before invalidating the proposed merger between Allis-Chalmers and White Consolidated, the dissenting opinion in that case viewed "this approach to be an uncharted excursion into a sensitive area of the American economic community, embracing a truly radical concept . . . in antitrust law . . . ."[50]

White Consolidated had contended that Allis-Chalmers' steel purchases of $44,000,000 would amount to only 1/4 of one percent of the

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[41]Consolidated Foods Corp., [1961-1963 Transfer Binder] 3 TRADE REG. REP. ¶ 16,182 (FTC 1962).

[42]Consolidated Foods Corp. v. FTC, 329 F.2d 623 (7th Cir. 1964).

[43] 380 U.S. 592 (1965).

[44]*Id.* at 595; *accord,* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[45]380 U.S. at 595.

[46]*Id.* at 598.

[47]*Id.* at 603.

[48]*Id.*

[49]*Id.* at 605.

[50]*Allis-Chalmers* at 532.

total steel sales of the principal buyers of rolling mills from Blaw-Knox and that this was an insignificant amount.[51] In support of the contention, counsel for White Consolidated cited *Consolidated Foods* for the proposition that "[s]ome situations may amount only to *de minimis*."[52] They also cited *Tampa Electric Co. v. Nashville Coal Co.*, where it was stated that "less than 1% [actually .77%] is, conservatively speaking, quite insubstantial."[53] The concurring opinion rejected this contention, stating that the proper comparison was between the steel purchasing power of Allis-Chalmers and that of Blaw-Knox's competitors in the rolling mill industry. This comparison would demonstrate that Allis-Chalmers is a substantial buyer of steel in relation to other rolling mill suppliers.[54] The majority opinion also stated that Allis-Chalmers/White "would buy a far larger amount of steel than any of Blair-Knox's competitors in the rolling mill market."[55] The dissenting judge vehemently disagreed, declaring that

> From the barest of facts, the majority have conjured vivid overtones of reciprocity in the rolling mill—steel industries. . . .
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> . . . .
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> The trial record on this point is anything but clear and convincing; it suffers from factual anemia and an examination discloses that it is symptomatic of only a bare suspicion of possible reciprocity.[56]

It may be that *Allis-Chalmers* is vulnerable to criticism on the point that the Allis-Chalmers' steel purchases were sufficient to demonstrate a potential for reciprocity.[57] Although these purchases were larger than those made by Blaw-Knox's competitors in the relevant rolling mill market, they amounted to only ¼ of one percent of all steel sold by those steel companies who also bought rolling mills. In adopting a realistic approach, it can hardly be said that ¼ of one percent is a sufficient percentage of the market to constitute leverage for reciprocity.[58]

It has been suggested that the inherent danger of reciprocity potential in conglomerate mergers can be reduced by a showing that

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[51]*Id.* at 527.

[52]Appellant's Brief for Certiorari at 12, White Consol. Indus., Inc. v. Allis-Chalmers Mfg. Co., 90 S. Ct. 567 (1970).

[53]*Id.* In Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961), the Court had to determine whether the national or local sector was the relevant market. The .77% figure was used in relation to the national market.

[54]*Allis-Chalmers* at 527.

[55]*Id.* at 518.

[56]*Id.* at 533.

[57]*Id.* at 518, 527.

[58]Handler, *supra* note 18, at 8.

suppliers of the acquiring company are substantial, powerful firms who are unlikely to be influenced by a relatively small volume of purchases from them by the acquiring company.[59] In *Allis-Chalmers* the huge steel companies who sold to Allis-Chalmers and bought rolling mills from Blaw-Knox were substantial, powerful firms who were not likely to be persuaded to engage in reciprocity on account of Allis-Chalmers' relatively small volume of steel purchases.

On the other hand, it might be said that Allis-Chalmers' steel purchases, even if small in comparison to total steel purchases, amounted to $44,000,000 and that this is a substantial dollar volume by any standard.[60] In addition, Allis-Chalmers/White would annually purchase $86,000,000 in steel products from the purchasers of rolling mills.[61] This volume of steel purchases would be far larger than the amount purchased by any of Blaw-Knox's competitors. If the Allis-Chalmers/White management were shrewd in channeling this volume to those steel companies who expressed a willingness to increase their rolling mill purchases from Blaw-Knox, the volume might be sufficient to foreclose Blaw-Knox's four principal competitors from the substantial steel rolling mill market.

To demonstrate any significant potential for reciprocity it has been said that (1) a company must be a larger purchaser of the buyers' products than its competitors; (2) these purchases must be in such quantity as to constitute effective reciprocity leverage (purchases, insubstantial as compared with total sales, even if larger than the competitor's, will not normally cause a shift in buying); (3) the nature of the product and the market must be conducive to reciprocity practices; and (4) there must be more than the mere possibility that reciprocity will cause an anticompetitive effect.[62]

In *Allis-Chalmers* there was no evidence or suggestion that reciprocity had been practiced in the rolling mill market or that the structure of the market or the nature of the product was conducive to reciprocity practices.[63] There was no evidence that Allis-Chalmers/White steel purchases, even if larger than those of other rolling mill

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[59]Krash, *supra* note 16, at 100.

[60]*See* United States v. General Dynamics Corp., 258 F. Supp. 36, 61 (S.D.N.Y. 1966) (the court emphasized the substantial dollar volume of purchases by General Dynamics in holding that a potential for reciprocity leverage existed).

[61]*Allis-Chalmers* at 518.

[62]Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1387-88 (1965); Krash, *supra* note 16, at 100; Justice Dept. Merger Guidelines, [1967-1969 Transfer Binder] 1 TRADE REG. REP. ¶ 19(a), at 4430 (1967).

[63]Appellant's Brief for Certiorari at 11-12, White Consol. Indus., Inc. v. Allis-Chalmers Mfg. Co., 90 S. Ct. 567 (1970).

manufacturers, were so significant in volume as to influence steel companies to shift their buying of rolling mills to Blaw-Knox, the White Consolidated subsidiary. Notwithstanding the lack of such evidence, the court held that there had been a sufficient demonstration of potential reciprocity to grant the preliminary injunctive relief thwarting the proposed merger.[64]

Inasmuch as the sole evidence introduced on the reciprocity issue was data showing that Allis-Chalmers was a larger steel purchaser than any of Blaw-Knox's competitors in the rolling mill market,[65] the court based its holding on the reciprocity issue entirely on this data. The court failed to differentiate between coercive or tacit reciprocity,[66] to ascertain if reciprocity had been practiced in the past by Allis-Chalmers or White Consolidated, or to find whether it had been practiced in the rolling mill market.[67] The court did not pause to define the essential nature of the potential reciprocity but merely labeled the volume of Allis-Chalmers' steel purchases as sufficient to constitute potential for illegal reciprocity.[68] This method of finding reciprocity potential without pausing to consider whether reciprocal dealing will actually ensue from the proposed merger has been criticized as "the modern practice of painting with a broad brush."[69] The Supreme Court cautioned against the use of this method in *Consolidater Foods,* when it stated that "[t]he 'mere *possibility*' of the prohibited restraint is not enough. . . . [T]he force of § 7 is still in probabilities . . . ."[70]

It therefore follows that a finding that reciprocity will possibly lessen competition should not be sufficient.[71] Although it has been

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[64]*Allis-Chalmers* at 519, 527.

[65]*Id.*

[66]Although either coercive or tacit reciprocity may be violative of section 7, it has been suggested that courts should require a higher standard of proof for coercive reciprocity than for tacit reciprocity because the former involves express threats or promises which must be clearly demonstrated. Handler, *supra* note 18, at. 5.

[67]Other courts have considered evidence of previous practices of reciprocity by the acquiring company or its customers in ascertaining whether a potential for reciprocity exists. United States v. International Tel. & Tel. Corp., 306 F. Supp. 766 (D. Conn. 1969); United States v. Northwest Indus., Inc., 301 F. Supp. 1066 (N.D. Ill. 1969).

[68]*Allis-Chalmers* at 518-19, 526-27.

[69]Handler, *supra* note 18, at 3.

[70]380 U.S. 592, 598 (1965).

[71]United States v. Ingersoll-Rand Co., 320 F.2d 509, 525 (3d Cir. 1963); United States v. Northwest Indus., Inc., 301 F. Supp. 1066, 1097 (N.D. Ill. 1969); Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp., 303 F. Supp. 1344, 1347 (S.D.N.Y. 1969).

suggested that words such as "probable" and "possible" are meaningless by themselves as tests or standards of legality,[72] the word "probable" indicates that there should be a substantial demonstration that illegal reciprocity may ensue if the proposed merger is consummated. As a matter of degree, "probable" lies somewhere between "possible" and "certain."[73] The stricter test of "probability," even if meaningless by itself, becomes significant when applied to the context of a particular fact situation.[74] If this standard of probability is ignored and the more lenient standard of mere possibility applied, as *Allis-Chalmers* apparently did, the effect may be to prohibit acquisitions which otherwise would have been lawful because the granting of preliminary relief may cause the acquiring company to abandon its plans rather than await the result of expensive and prolonged litigation.[75]

Two of the three judges in *Allis-Chalmers* may have sensed the ramifications of basing potential reciprocity on the single fact that Allis-Chalmers was a larger steel purchaser than any of Blaw-Knox's competitors. Only the concurring judge felt that the single fact of being a larger purchaser was sufficient to establish illegal reciprocity potential.[76] One judge, writing the opinion of the court, included other issues in his holding, apparently feeling that the ground for reciprocity was inadequate by itself to justify granting the preliminary injunction.[77] The dissenting judge feared that such a holding would deny the accomplishment of many lawful mergers because "[n]early every acquisition has, to some extent, elements of reciprocity."[78]

In two more recent decisions the courts apparently sensed the far-reaching consequences of the *Allis-Chalmers* holding and were careful not to apply the *Allis-Chalmers* standard. In *United States v. Northwest Industries, Inc.*,[79] the court denied the government's application for a preliminary injunction to block a proposed merger between Northwest Industries and B. F. Goodrich. The government had presented evidence showing that Northwest had been engaged in

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[72]Hinnegan, *supra* note 18, at 645.

[73]*Id.*

[74]*Compare* FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965), *with Allis-Chalmers.*

[75]United States v. Chrysler Corp., 232 F. Supp. 651 (D.N.J. 1964) (The merger was abandoned shortly after the granting of the preliminary injunction. 1964 ANTITRUST & TRADE REG. REP. No. 180, at B-2); United States v. Indersoll-Rand Co., 218 F. Supp. 530, 541 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

[76]*Allis-Chalmers* at 526-27.

[77]*Id.* at 508-26.

[78]*Id.* at 533.

[79]301 F. Supp. 1066 (N.D. Ill. 1969).

reciprocity in the past,[80] and that a substantial number of the customers or suppliers of both Goodrich and Northwest were companies which practice reciprocity.[81] The government also introduced the testimony of a packing company representative who said that his company had considered purchasing plastic film and tires from Goodrich to obtain favorable treatment by Chicago and Northwestern Railway, a Northwest subsidiary.[82] In spite of such evidence apparently showing a potential for illegal reciprocity,[83] the court held that there had been no specific demonstration of a substantial lessening of competition as required by the Clayton Act.[84]

United States v. International Telephone & Telegraph Corp.[85] also required clear evidence to establish the potential for illegal reciprocity. The court refused the government's motion for a preliminary injunction to enjoin the proposed ITT-Grinnell Corp. merger. The government had introduced evidence showing that ITT annually purchased at least $350,000,000 worth of goods and services from industries which account for 28 percent of total new plant expenditures by all industries. Many of these ITT suppliers practice reciprocity and would almost surely transfer their purchases of automatic fire protection systems to Grinnell in order to enlarge the respective amounts of goods and services purchased by ITT.[86] The court held that even if the proposed merger would create an opportunity for illegal reciprocity, it would not necessarily follow that this would occur because ITT had a written policy against reciprocity and ITT's organizational structure was not conducive to reciprocity.[87]

Allis-Chalmers may have lessened the requirements for a showing of potential reciprocity by initiating a doctrine which apparently

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[80]*Id.* at 1089-91.

[81]*Id.* at 1088-89.

[82]*Id.* at 1081.

[83]The court stated that increasing the reciprocity potential was not sufficient:

> While it is clear that the potential for reciprocity would be substantially increased, the extent to which actual reciprocity would be practiced and, therefore, the probable actual anti-competitive effect thereof is, on the basis of the present record, difficult if not impossible to forecast.

Id. at 1095.

[84]*Id.* at 1096-97.

[85]306 F. Supp. 766 (D. Conn. 1969).

[86]*Id.* at 781.

[87]ITT introduced evidence that it has separate, decentralized purchasing and sales departments for each of its divisions or subsidiaries which are called "profit centers," and that this decentralized management is not conducive to reciprocal dealing. *Id.* at 782-83.