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Ohio v. American Express: The Exception That Should Not Become a Rule

NANCY L. ROSE AND JONATHAN SALLET

THE SUPREME COURT DECISION IN *Ohio v. American Express Co.*,[1] has sparked more than its share of controversy. Indeed, the decision has been described as "what may be the worst antitrust decision in many decades."[2] The Court ruled that the product market for use of credit cards needed to be defined to include both cardholders and the merchants that accepted those cards, and that because the plaintiffs did not establish harm in that relevant market, they thereby failed to establish a prima facie case that would require the defendant to offer evidence justifying its conduct.[3] In a manner not contemplated by past Supreme Court precedent, the Amex Court introduced a new measure of market definition, based on the presence of "transaction platforms."[4]

There are many reasons to believe that *Amex* is destined to be considered bad law.[5] But, for the moment at least, *Amex* is the law and antitrust defendants are eager to expand its scope—a phenomenon we both saw first-hand at the Department of Justice when private firms, then in possession of the Secord Circuit opinion that the Supreme Court affirmed, rushed to the Antitrust Division to defend their behavior and discourage further investigation by arguing that any antitrust analysis would require a full effects assessment of all sides of any multi-sided business platform.[6]

Our purpose is to examine the key arguments for applying *Amex* even where the relevant market participants are not transaction platforms, and the key court decisions that in the last four years have grappled with them. Our view is that any expansion of *Amex* would threaten basic principles upon which effective antitrust enforcement is built, including that (i) market definition begins with fact-specific inquiries into demand substitution and (ii) market definition is involved in only one process for identifying market power. As we will show, nothing in *Amex* supports the needless abandonment of these key principles in circumstances different than those considered by the *Amex* Court, even if one were to take the *Amex* decision as correct in the circumstances of that case.

Indeed, starting with demand-side analysis and taking each side separately at the outset limits the extent to which *Amex* could be inappropriately expanded to mask the improper exploitation of market power.[7] Adopting this approach also reduces the risk that defendants would successfully "take all possible steps to shoehorn the facts into the ambit of 'transaction platform,' forcing courts and litigants into expensive and difficult analysis that is likely to cause more Type 2 errors (false negatives) in antitrust cases."[8]

This article briefly reviews what the *Amex* Court actually did decide. Next it offers thoughts on how, consistent with the *Amex* analysis, that ruling should be applied and explains why courts should reject application of *Amex* beyond its facts. A brief conclusion follows.

What the *Amex* Court Decided

The *Amex* Court had a view of the facts that is difficult to square with the district-court's factual findings and the traditional deference due to the fact-finder—or, indeed with Supreme Court precedent. But, even on its own terms, the decision describes a very limited set of conditions. Recall that the Department of Justice had brought a Section 1 case alleging, in essence, that anti-steering limitations on merchants who accept American Express cards harmed competition.[9] The district court ruled for the government, finding that, for example, the Amex restrictions prevented merchants from providing consumers truthful information about alternative credit cards.[10] Importantly, the government recognized that credit cards impact the interests of both cardholders and merchants that accept them; it alleged, and the district court accepted, that "by disrupting the price-setting mechanism ordinarily present in competitive markets, the [contractual terms] reduce American Express's incentive—as well as those of Visa, MasterCard, and Discover—to offer merchants lower discount rates" and that the restrictions on the merchants harmed consumers "as inflated merchant discount rates are passed on to all customers—Amex cardholders and non-cardholders alike—in the form of higher retail prices."[11]

The *Amex* Court believed that the circumstances before it required a market to be defined even though the Department of Justice at trial had relied on direct evidence of harm (in other words, had not relied on market share to establish market power).[12] The *Amex* Court asserted that because

Nancy L. Rose is Charles P Kindleberger Professor of Applied Economics in the MIT Economics Department. Jonathan Sallet is a Research Fellow at the Mossavar-Rahmani Center for Business and Government at the Harvard Kennedy School and a special assistant attorney general for the State of Colorado. *The authors thank Daniel Francis, Scott Hemphill, Jennifer Pratt and Steven Salop for their valuable comments and discussion and Sadev Parikh for his excellent research assistance. Rose thanks the Radcliffe Institute for Advanced Study for support. The views expressed herein are those of the authors alone and should not be attributed to any other source, including the Colorado Office of Attorney General.*

the alleged restraint was vertical, (i) market definition was required in a manner not required in cases of alleged horizontal restraints and (ii) that in the circumstances before it, market power "cannot be evaluated unless the Court first defines the relevant market."[13] Both parts of this assertion are dubious because, as Justice Breyer explained in dissent, "proof of actual adverse effects on competition is, a fortiori, proof of market power" and the district court had found such adverse effects.[14] The difficulty is that the Court's analysis can lead to the view that market definition is a necessary step in showing market power, which unnecessarily reverses the usual relationship between market power and market definition and, if used beyond the boundaries of the Amex opinion itself, would mask, rather than identify, market power.

Nonetheless, and while taking a very different view of the evidence than the district court, the Court moved on to analyze market definition in a manner moored in the Court's understanding of the relevant competitive conditions. It is worth parsing the steps in the Court's analysis:

1. Because all credit card companies operate in the same way vis-à-vis cardholders and merchants, the Court describes "the credit-card market,"[15] not the business model of a single firm.
2. There is only one "product" because "the [credit-card] network can sell its services only if a merchant and cardholder both *simultaneously* choose to use the network" (emphasis added).[16]
3. Thus, a credit-card network "*cannot* sell transaction services to either cardholders or merchants individually" (emphasis added).[17]
4. That is because, "whenever a credit-card network sells *one transaction's* worth of card-acceptance services to a merchant, *it must* also sell one transaction's worth of card-payment services to a cardholder" who "jointly consume a single product" (emphasis added).[18]
5. In these market-wide circumstances, a credit card network is therefore a "transaction platform," which is "a special type of two-sided platform"[19] that "exhibit[s] more pronounced indirect network effects and interconnected pricing and demand" than exist in other circumstances.[20]
6. By contrast, a market is not composed of transaction platforms where the companies being examined do not compete for the same distinct groups of users, such as when "[a] newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers."[21]

Even if one does not agree with the Court's conclusion that a single market is appropriate and required in this setting,[22] these are a highly restrictive set of circumstances. Indeed, when the Supreme Court subsequently decided the antitrust implications of the operation of a multi-sided platform in *Apple Inc. v. Pepper*,[23] it did not even cite *Amex,* consistent with Tim Wu's suggestion that Amex is "narrower than some have suggested."[24]

Applying *Amex*

In a case where a defendant asserts that the appropriate market is composed of transaction platforms, and a court reaches the point where product market definition is appropriate,[25] that court should take a series of steps to carefully evaluate the choices available to the users on each side of the alleged multi-sided platform in order to understand the existence and nature of substitutes that are available to any user on any side. This is critical in order to limit the likelihood that market definition becomes a mechanism that obscures rather than helps to reveal market power, a point to which we return below.[26]

First, a court must consider whether a relevant product market is composed solely of multi-sided businesses. That requires scrutiny of the competitive substitutes available for each distinct group of sellers or buyers for which the defendant is a trading partner. For sellers, market definition begins with demand-side analysis: Where do buyers look for alternatives to a given product? That makes sense because when we analyze a seller's potential market power, market definition is used to identify the competitors and circumstances under which a firm has the ability to profitably increase its price by a small but significant amount. A similar, mirrored analysis applies when examining market power of a buyer or group of buyers: where do sellers or suppliers look for alternatives to a given buyer? In this case, market power enables buyers to suppress the price they pay to suppliers, creating harm in upstream markets. In other words, relevant substitutes, identified using the kind of analysis set forth in the 2010 Horizontal Merger Guidelines, must be assessed from the perspective of *each* set of users on each side of the multi-sided platform.[27]

If for any distinct group, substitutes exist that demonstrate the existence of markets that are not solely composed of multi-sided businesses serving those distinct user groups, then, by definition, *Amex* is inapplicable. This is consistent with *Amex's* recognition, noted above, that a "nontransaction platform" exists when "[a] newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers."[28]

The failure to understand the appropriate starting point for the Amex market-definition analysis is at the heart of the error in *United States v. Sabre Corp.*,[29] where the court concluded that, having found Sabre to be serving both travel agents and airlines, then as a matter of law, Farelogix, which supplied only airlines, could not be a competitor. The problem is that the *Sabre* court applied the reasoning backwards; first asking whether Sabre was a transaction platform and, having concluded that it was, then ruling that no non-transaction platform could be a competitor. But this is not

what the *Amex* Court did; it first asked whether the market was composed solely of transaction platforms and only then concluded that the market definition should be limited to such business models. Indeed, it unequivocally rejected the approach the *Sabre* district court adopted, expressly noting that "[n]ontransaction platforms…often do compete with companies that do not operate on both sides of their platform."[30] Had it proceeded in the correct order, the *Sabre* court would have first asked whether Sabre and Farelogix were providing competing services to airlines by, for example, looking at whether introduction of Farelogix's product resulted in lower negotiated Sabre fees from airlines.[31] If the court concluded, as the government urged, that they were competitors, then, again by definition, the *Amex* analysis would be inapplicable.

Indeed, the *Sabre* conclusion would surely come as news to any consumer who has chosen between an advertising-supported streaming service, like those offered by Hulu or Pandora, and those that provide content on a subscription basis free from advertising, like Apple TV or Apple Music or Pandora ad-free subscriptions. As commentators have explained, competitive alternatives are not necessarily the same on different sides of even what might resemble a transaction platform, as in the example of Uber's matching of drivers and riders where alternatives exist for both riders (e.g., Zipcar or public transportation) and drivers (e.g., working in other occupations).[32]

Second, even if all of the businesses competing for the same defined set of distinct user groups are multi-sided, the key inquiry remains: Do they all qualify as transaction platforms? A transaction platform as defined by the Court requires the simultaneous presence of users on each side to effectuate a transaction that jointly consumes a single unit of output and displays the necessary indirect network effects. The requirement of joint consumption deserves emphasis; it exists "only if a merchant and cardholder both *simultaneously* choose to use the network."[33]

The firms under examination in a different case may not qualify. Some may be, for example, newspaper-like. In such circumstances, the business models would fail the requirement that they "*cannot* sell transaction services to either cardholders or [users on another side of the platform] individually."[34] Even in situations where consumption is joint and simultaneous on both sides, non-transaction platforms can compete with a "transaction" platform. Cash might compete with credit card transaction services. Direct bookings might compete with a hotel booking platform.

To be a market comprised solely of transaction platforms, that business model must not only be adopted by all of the competitors for the same set of users, and not only be a service that cannot be sold separately to one set of users individually, but that service must also require the participants from each side of the market to use the platform at the exact same time in order the effectuate the transfer of "one transaction's worth"[35] of output.

Thus, the court in *In re Delta Dental Antitrust Litig.* (N.D. Ill. 2020) held that health insurance markets are not two-sided markets under *Amex* because those markets "[lack] the 'key feature' of a transaction platform: simultaneity of the exchange."[36] As the court explained:

> As common experience teaches, consumers of dental services typically pay insurers fixed premiums at regular intervals, regardless of when or even whether they visit the dentist. And the amount of the insured's premium generally depends on the terms and coverage of her plan, not on the cost of the goods or services she receives on any particular visit. Yet as plaintiffs allege, insurers reimburse dental providers based on the goods and services they actually provide to patients. So a dental provider receives no payments at all on behalf of an insured who paid her premiums in full but did not actually receive dental care during the plan year. And reimbursements paid on behalf of an insured who does receive covered services during her plan year are untethered in both time and cost from the insured's premium payment. In these ways, dental insurance operates decidedly differently from the "two-sided transaction platform" in *Amex*.[37]

The fidelity of the Delta Dental court to the *Amex* reasoning is critical because, of course, many business models have some form of simultaneous conduct. Dentists generally provide dental services like teeth-cleaning at the precise moment that a patient receives the benefit of the service. Contracts becomes effective simultaneously for the contracting parties. For a newspaper advertisement to be effective, the reader and the newspaper have to agree at a point in time that the reader will purchase a subscription, the advertiser and the newspaper also have to reach an agreement at a point in time and, of course, a reader has to be looking at the page at the same time the advertisement appears for the advertiser to receive value from its purchase. But in none of those cases are the reader and the advertiser "simultaneously choosing to use" the newspaper to interact with one another. Moreover, for *Amex* to apply the defendant must facilitate the transfer of "one transaction's worth" of services to both (assuming two) audiences to both audiences for joint consumption.[38] But, as one commentator has concluded, "it is hardly true that a one-to-one correspondence exists between a viewer's activity and the purchase of advertising" because, for example, "[i]n a market such as free television, advertising volume and rates might be based on Nielsen or other surveys that assess the size and composition of the audience."[39]

Third, and as a matter of law, the *Amex* decision was also quite specific to the circumstances of the case, in which the government alleged a violation of Section 1 of the Sherman Act. Nothing in the Court's opinion reflects the distinct jurisprudence of Section 2 or, as in the *Sabre* case, Section 7 of the Clayton Act. In this vein, the court in *FTC v. Surescripts, LLC,* expressly distinguished the Section 1 claim in *Amex* from the Section 2 claim it was considering.[40] Similarly, the court in *In re NCAA* distinguished the conduct before it from *Amex* because it involved a horizontal restraint, whereas *Amex* was a vertical restraint.[41]

Limiting *Amex*

There is a natural tendency for antitrust defendants to seek a broad application of favorable precedent. In this section we review writings that seek to expand *Amex* beyond the factual and legal boundaries of the Court's reasoning.[42] In essence, they invoke characteristics of the business models of multi-sided platforms in order to place unwarranted burdens on antitrust enforcers, to replace facts with doctrine, to misdescribe the economic principles underlying the operation of multi-sided platforms and, in general, to shrug off the actual reasoning of *Amex*.[43] We move now to three specific subjects where the broadening of Amex has been urged.

Pricing: First are suggestions that pricing by multi-sided platforms cannot or is unlikely to be harmful. Joshua Wright and John Yun assert that: ". . . the very definition of the exercise of monopoly power—the reduction of *market-wide* output and increase in the market price—cannot be satisfied by evidence of a price effect on only one side of a given platform."[44]

But remember that a non-transactions platform is, by definition, active in two or more distinct product markets. Consider the example employed by the *Amex* Court itself[45] in which a newspaper and television station compete for advertisers while not competing for users. It is certainly possible to imagine circumstances in which the newspaper would face significant competition from other newspapers such that "an increase in subscription prices may lead to a fall in the number of subscribers, which would then adversely affect advertisers' demand for ads and, thus, advertising revenues."[46] But suppose the newspaper faces little if any competition from other newspapers and holds market power in the user-side market for newspaper subscriptions. That would mean that it could increase prices to its readers above competitive levels—an outcome that would not be thwarted by the presence of the television station as a competitor for advertisers. Readers without a competitive choice would be less likely to flee in the face of small but significant price increases, thus allowing the newspaper to charge supra-competitive prices to its subscribers without harming its ability to attract advertisers. In other words, neither the characteristics of a multi-sided platform nor possible indirect network effects inherently eliminate adverse price effects for any group of a platform's customers.[47]

Further problems arise from the suggestion that courts look only at the total price charged across the multiple sides of a platform (sometimes referred to as the "net price,"[48] for a multi-sided "market"), rather than looking to the individual prices charged to each group of customers for the platform (the "price structure"[49]). As illustrated by the example in the previous paragraph, the economic literature on multi-sided platforms highlights the essentiality of the role played by the price structure (that is allocation of prices across different users of a platform), not merely the net price (or price level) for analysis.[50] While that literature emphasizes the importance of mutual feedback loops (or externalities) from pricing on one side of a platform to others in defining a multi-sided platform, it makes clear one cannot collapse the analysis into a single net price independent of the price structure. Moreover, for many if not most platforms, there may be no economically meaningful way to define a "net price." Even for a simultaneous transaction platform like credit cards, the two-part transaction fee charged to merchants (typically a fixed fee plus an amount proportional to the amount of the transaction) appears simple compared to the highly nonlinear and heterogeneous pricing structure for cardholders, which may have elements of annual fees (lump sums) that may or may not be waived, varying interest rates and fees that depend primarily on balances rather than transactions, cardholder points or cash back that may be earned linearly in transaction volume but valued nonlinearly (e.g., for airline affinity cards whose points earn frequent flyer rewards), and myriad other cardholder benefits (e.g., insurance, concierge services, travel fee reimbursements, access to travel perqs and upgrades, etc.) that vary with "tier" of the card and are either fixed or nonlinear in transaction volume. Any proposal for how to compute a "net price" per transaction from this complexity is likely inherently misguided and doomed to be wrong.

Output: Finally, some commentators have suggested that plaintiffs should have to demonstrate output reduction not only in the two-sided simultaneous transactions markets to which the Court cabined its *Amex* decision, but more generally. For example, Evan Chesler and David Korn argue that "[t]he Supreme Court made clear that, in the context of two-sided platforms, courts should carefully scrutinize evidence of increased prices to ensure that the price effects are linked to reduced output."[51] Judge Douglas Ginsburg and Koren Wong-Ervin suggest this means that "changes in market-wide output are the best indicator of competitive effects in two-sided markets."[52]

To begin, the *Amex* Court's discussion of the role of output evidence for the determination of competitive harm was both problematic and misguided. The Court cites 30% growth in credit card transactions between 2008 and 2018 as evidence against the proposition that under the alleged conduct, "output was restricted or prices were above a competitive level."[53] As a matter of logic as well as economics, that conclusion stands as a non sequitur. As Justice Breyer explained:

> the relevant restriction of output is as compared with a hypothetical world in which the restraint was not present and prices were lower. The fact that credit-card use in general has grown over the last decade, as the majority says, see *ante,* at 17–18, . . . says nothing about whether such use would have grown more or less without the nondiscrimination provisions. And because the relevant question is a comparison between reality and a hypothetical state of affairs, to require actual proof of reduced output is often to require the impossible—tantamount to saying that the Sherman Act does not apply at all.[54]

Importantly, the *Amex* decision does not require that its one-sided analysis of output be adopted in any other case because the relevant language clearly represents a case-specific reading of the record.

Even were it possible reliably to measure counterfactual output levels, higher output is not necessarily indicative of greater welfare, and particularly not in the presence of contractual restrictions like the anti-steering terms at the heart of the *Amex* challenge. Indeed, those restrictions are intended to prevent consumers from responding to information about the cost of *Amex* credit card transactions by precluding the provision of that information by merchants. Michael Katz and Doug Melamed note that "in a two-sided market, changes in transaction volumes and changes in user welfare can diverge because the interests of the users on the two sides are not aligned, and a platform may be able to exploit this fact to increase its profits in ways that increase output but harm competition and the platform's users."[55] As Steven Salop and his collaborators point out, "higher merchant fees caused by these parallel antisteering rules placed consumers into a prisoners' dilemma game, which led inevitably to increased use of credit cards above the efficient, competitive level, making the volume of card transactions a poor proxy for welfare effects."[56]

Rule of Reason: Chesler contends that *Amex* created a new rule for application of the rule of reason under which "[a] shorthand review in the form of *per se* rule or 'quick' look . . . is inappropriate"[57] for vertical agreements between a platform and its customers.[58] But there is no basis for that view in the text of *Amex,*[59] nor in Justice Breyer's dissent (a conclusion that would likely have registered with him given his earlier writings on the "quick look" standard),[60] nor even in the unclear dicta about the analysis of vertical restraints generally. The test of whether a vertical agreement is subject to per se or "quick look" treatment should not turn on whether the defendant is a "transaction" platform, it should turn, as it traditionally has, on whether the conduct at issue is so likely to be anti-competitive as to be conclusively illegal[61] or whether, under the quick look test, "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and market."[62] The attempt to derive a general rule based on the status of the defendant rather than focusing on the specific conduct at issue is part and parcel of a dangerous, and unjustified, trend of assuming the irrelevance of facts pointing to competitive harm, which needlessly burdens antitrust enforcement.[63]

Conclusion

So long as it remains in place, the decision in *Ohio v. American Express* must be recognized as precedent that, by its own terms, is very narrow and fact-specific. Neither the decision itself nor the arguments pressing for its expansion justify adding to the burdens on antitrust enforcement through novel applications of bad law, erroneous economics, or any combination thereof.

As we have emphasized, a prime risk of the over-application of *Amex* is that by too broadly combining distinct user groups, the role of market definition can be distorted to serve as a means of cloaking, not identifying, market power. That can happen where harm can be inflicted to the users on one side without harming users on another, such as where geographic markets differ[64] or in the case of labor markets[65] or more generally where companies compete on one "side" of a platform but not on the other. Moreover, "[p]utting production complements into the same market simply because making a deal requires both introduces economic nonsense into the law and economics of market power."[66] We argue on the side of clarity, not economic nonsense, in advancing the cause of effective antitrust enforcement. ■

[1] 138 S. Ct. 2274 (2018).

[2] Steven Salop, Daniel Francis, Lauren Sillman and Michaela Spero, *Rebuilding Platform Antitrust: Moving on from Ohio v. American Express*, 1 & n.1, *forthcoming* Antitrust L. J. (2022).

[3] 138 S.Ct. at 2287, 2290.

[4] *Id.*at 2286.

[5] For persuasive critiques of the *Amex* decision, see e.g., Salop et al., *supra* n. 2 at 14 ("The most bizarre of the Amex Court's errors was its odd insistence on a formal market definition and market share evidence to establish market power."); Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust,* 168 U. Pa. L. Rev. 2061, 2085 (2020) ("[T]he Court adopted a sweeping legal rule and based that rule on its highly imperfect understanding of the economic literature."); Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 Colum. Bus. L. Rev. 35, 88 (2019) ("One danger of the Amex decision is its signal that neither close economic analysis nor careful examination of the record is necessary to apply antitrust law under the rule of reason.").

[6] In fact, a danger of indiscriminate use of two-sided platforms as a mode of analysis lies precisely in the fact that its definitions are amorphous and can be stretched in surprising ways. *See* Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2149-50 (2018).

[7] An additional important issue, beyond the scope of this paper, is whether in-market harm should be balanced against claimed out-of-market benefits. Two points should be noted. First, the claim that out-of-market benefits should be weighed against in-market harm "is distinct from the need to consider feedback effects… in the presence of feedback effects, a platform's treatment of one group of users may be constrained by the behavior of another group (for example, charging higher prices to newspaper subscribers may not be profitable if an exodus of subscribers causes a newspaper to lose substantial advertising revenue when advertisers respond to the loss of subscribers). One can properly account for feedback effects when assessing harm to competition while using a separate effects analysis" that treats a multi-sided platform as operating in multiple product markets. Katz & Sallet, supra n. 6 at 2164-65 & n. 75. Second, as we have said previously in the context of horizontal mergers, the call for out-of-market balancing threatens to over-complicate economic analysis by requiring an analysis of the general equilibrium, fails to consider "significant distributional implications as some groups lost and others win," and ignores the fundamental legal principle that competition "'cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.'" Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right,* 168 U. PENN L. REV 1941, 1978, 1979-1980 (2020)(quoting United States v. Topco Asscos., 405 U.S 596, 610 (1972)); *see* also Laura Alexander & Steven C. Salop, *Rejecting*

Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers, U. CHI. L. REV. (forthcoming).

[8] Sarah Oxenham Allen, Brian Christensen, Joseph Conrad, Nicholas Grimmer, and Jennifer Pratt, *Market Definition in The Digital Economy: Considerations for How to Properly Identify Relevant Markets,* 3-4 American Antitrust Institute (June 17, 2020).

[9] The original 2010 complaint was filed by the DOJ and plaintiff states against this conduct by American Express, Mastercard, and Visa; the latter two companies settled, leaving American Express alone in defending the conduct in the subsequent litigation. *See* U.S. at al. vs. American Express Co., et al., Complaint for Equitable Relief (October 4, 2010) and other case documents at https://www.justice.gov/atr/case/us-and-plaintiff-states-v-american-express-co-et-al.

[10] United States v. Am. Express Co., 88 F. Supp. 3d 143, 165 (E.D.N.Y.) (reversed).

[11] *Id. at* 207-8; *Id.* at 215 (noting a higher net price for American Express services).

[12] 138 S.Ct. at 2284-85. Importantly, in Chase Manufacturing Inc., v. Johns Manville Corp., 2022 WL 522345 (D. CO 2022), the court rejected the contention that *Amex* bars direct evidence of market power: "The Rule of Reason offers two ways to show that a restraint on trade has an unreasonable effect on competition: either through direct evidence of such harm or through indirect evidence from which such harm may be inferred. Plaintiff relies on the direct evidence option. Am. Express does not foreclose that approach as a matter of law." (page 9).

[13] 138 S.Ct at 2285 n.7. The *Amex* Court was "not clear" whether it intended "to define a rule of reason for vertical cases," Michael L. Katz & A. Douglas Melamed, *supra* n. 5 at 2079; moreover the observation is dicta. *Id*., at 2080; see Jonathan Sallet, *Antitrust Reform: A Litigation Perspective,* 36 ANTITRUST 14, 16 (2022) (discussing dicta).

[14] 138 S Ct. at 2297 (Breyer J., dissenting). The majority cited two cases in this context, *id.*, at 2285 n.7, but those do not support its emphasis on market definition as the starting point of market-power analysis. See FTC v. Indiana Federation of Dentists,, 476 U.S. 447, 460-61(1986)("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition; proof of actual detrimental effect, such as a reduction in output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effect."(internal quotation omitted); Catalano, Inc. v. Target Sales, Inc. 446 U.S. 643 (1980) (price fixing claim does not require application of the rule of reason).

[15] 138 S.Ct. at 2286; see 2282 n. 4 (describing the business models of the major competing credit cards).

[16] *Id.* at 2286.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 2280. The Court explained that, "[a]s the name implies, a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them."

[20] *Id.* at 2286.

[21] *Id.* at 2287 n.9; see *id*., at 2286 (explaining why "the market for newspaper advertising" is not one that consists of transaction platforms).

[22] The Court's insistence that failure to define a single credit card transaction market dooms the plaintiff's case seems fundamentally misguided. As the OECD concluded, "provided the competitive effects analysis examines the interrelationship between the different *sides* or *markets*, the framing of the market definition as a multi-sided market or as multiple interrelated markets, or indeed the absence of a market definition, need not distort the conclusion." OECD, Rethinking Antitrust Tools for Multi-sided Platforms (2018) at 13. Despite the Court's (erroneous) assertion to the contrary, the District Court judge explicitly considered whether higher merchant fees were offset by increased cardholder benefits, and rejected the defendant's claim. 138 S. Ct. at 2293 (Breyer, J., dissenting) ("The District Court added that it found no offsetting pro-competitive benefit to shoppers. Indeed, it found no offsetting benefit of any kind. See ibid." (internal citations omitted).

[23] *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

[24] Tim Wu, *The* American Express *Opinion, the Rule of Reason, and Tech Platforms*, 7 Antitrust Enf't 117, 118 (2019).

[25] Market definition is the first step in *one* process that may be used to identify market power, which then moves on to calculate the shares of affected firms in that market. This is not the only process that can be used to identify market power; direct evidence of competitive effects, where available, may be preferable; see *supra* n.14. Moreover, the OECD notes that for multisided platforms, "market definition is often unnecessary and can be counterproductive. Rasek & Wismer suggest that in multi-sided markets, market definition in itself may be less informative than in one-sided markets." OECD, *supra* n. 22 at 13 (citing Louis Kaplow, *Why Ever Define Markets?*, 124 Harvard L. Rev. 438 (2010); Louis Kaplow, *Market Definition: Impossible and Counterproductive*," Antitrust L. J. 79 (2013); and Sebastian Wismer and Arno Rasek, *Market Definition in Multi-sided Markets*, in OECD, *supra* n. 22 at 55.)

[26] In Epic Games, Inc. v. Apple, 559 F.Supp.3d 898, 1037 (N.D. Cal. 2021), the district court held that the Apple app store was a transaction platform but seemed to look specifically at the app developer side of the platform and pass-through of higher costs from that side of the platform to consumers in assessing whether the plaintiff had produced evidence of anticompetitive effects: "The evidence here shows that, unlike the increased merchant fees in *Amex*, Apple's maintenance of its commission rate stems from market power, *not competition* in changing markets.") (emphasis in original).

[27] For example, the *Epic* court, 1559 F.Supp.3d at 1047, concluded that the plaintiff had "presented no evidence that demand exists for [in-app payments] as a standalone product" when it applied the *Amex* analysis.

[28] 138 S.Ct. at 2287 n.9; see id. at 2286 (explaining why "the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such.").

[29] United States v. Sabre Corp., 452 F. Supp. 3d 97, 136, 137 (D. Del. 2020) (subsequently vacated) ("The first dispositive flaw in the government's case is that, as a matter of antitrust law, Sabre, which is a two-sided platform facilitating transactions between airlines and travel agencies, does not compete with Farelogix, which indisputably only interacts with airlines and is not a two-sided platform") ("Because Farelogix indisputably does not supply this product—it offers services to airlines, not to travel agencies—it does not compete with Sabre.")

[30] 138 S.Ct. 2287 & n.9. The passage on which the Sabre court relied, 138 S. Ct. at 2286-87; see 452 F. Supp. 3d at 136-37, reflected the *Amex* Court's factual conclusion after market examination, not an inexorable legal rule that permits courts to ignore the facts of competition.

[31] See Salop et al., *supra* n. 2 at 22 ("Historically, airlines had relied on booking services provided by Sabre and two other global distribution systems ("GDS") to sell tickets to travel agents. Farelogix offered an alternative booking services solution, that allowed airlines to bypass the GDSs and connect directly to travel agencies. Farelogix's entry provided travel agencies with additional leverage to negotiate lower GDS booking fees and reduced their reliance on the GDSs for booking services.") (footnotes omitted).

[32] Katz & Melamed, *supra* n. 5 at 2087.

[33] 138 S. Ct. at 2286 (emphasis added).

[34] *Id.*

[35] *Id.*

[36] *In re Delta Dental Antitrust Litig.*, 484 F. Supp. 3d 627, 637 (N.D. Ill. 2020) (quoting 138 S. Ct at 2280).

[37] 484 F. Supp. 3d at 637.

[38] 138 S.Ct. at 2286.

[39] Hovenkamp, supra n. 5 at 42-43; id., at 82-84 (providing descriptions of other businesses that would not qualify as transaction markets).

[40] Federal Trade Comm'n v. Surescripts, LLC, 424 F.Supp.3d 92, 103 (D.D.C. 2020).

[41] See Brief for the United States of America as Amicus Curiae In Support of Neither Party, The PLS.Com, LLC v. The Nat'l Assn. of Realtors, et al. (9th Cir. 2021) (No. 21-55164) at 28, n. 8 ("it is not clear that Amex should

apply to horizontal restraints"); *cf*. *In re NCAA Grant-In-Aid Cap Antitrust Litig.*, 2018 WL 4241981, *3-*6 (N.D. Cal. Sept. 3, 2018) (declining to apply *Amex* in part because the challenged restraints were horizontal)

[42] Evan Chesler & David Korn, *Lessons from Amex for Platform Antitrust Litigation,* 98 NEB. L. REV. 345 (2019); Douglas H. Ginsburg and Koren W. Wong-Ervin, *Amex: Beyond Transaction Platforms and Section 1*, COMPETITION POLICY INTERNATIONAL (May 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3601790; Joshua D. Wright and John M. Yun, *Ohio v. American Express: Implications for Non-Transaction Multisided Platforms,* in Antonio Bavasso, David S. Evans, and Douglas H. Ginsburg, eds., MEDIA MARKETS AND COMPETITION LAW, Competition Policy International (2019) , available at https://dx.doi.org/10.2139/ssrn.3308516.

[43] Such trends exist outside the scope of Amex and can unnecessarily frustrate and complicate antitrust enforcement. See Sallet, *supra* n. 13 at 15.

[44] Joshua D. Wright & John M. Yun, *Burdens and Balancing in Multisided Markets: The First Principles Approach of Ohio v. American Express*, 54 REV. INDUS. ORG. 717, 732 (2019) at 9 (emphasis and citation omitted).

[45] 138 S. Ct. at 2287 n. 9 ("A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers.")

[46] Katz & Sallet, supra n. 6 at 2160.

[47] See n. 7 supra (discussing the distinction between application of *Amex's* single-market approach from treatment of feedback effects).

[48] See, e.g., U.S. v. Am. Express Co., 838 F.3d 179, 204 (2d Cir. 2016) (arguing the District Court "failed to consider the two-sided *net price* accounting for the effects of the [antisteering provisions] on both merchants and cardholders." (emphasis added).

[49] See, e.g., Jean-Charles Rochet & Jean Tirole, *Two-sided Markets: A Progress Report*, RAND J. OF ECON. 37 (2006) at 646-7.

[50] *Id.* at 657 ("We defined two-sided markets as ones in which the price structure (the choice of *pB* and *ps* for a given price level *p = pB + ps)* affects the economic outcome (volume, profits, and/or welfare).").

[51] Chesler & Korn, *supra* n. 42 at 356.

[52] Douglas H. Ginsburg & Koren W. Wong-Ervin, *supra* n. 42 at 6.

[53] 138 S.Ct. at 2278. The Court cites *Brooke Group Ltd.* for the proposition that where "output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." 138 S. Ct. at 2288. While this is true, all else equal, output expansion when all else is not equal—as is the case for aggregate trends over a decade—is uninformative.

[54] 138 S.Ct. at 2302 (Breyer, J., dissenting).

[55] Katz & Melamed, *supra* n. 5 at 2096.

[56] Salop et al., *supra* n. 2 at 1. *See* also John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. R. 563, 609 (2022) (Making the general argument for why output expansion in neither necessary nor sufficient for consumer welfare benefits, but also observing that: "Not only did *AmEx* embrace the Output–Welfare Fallacy, it did so in exactly the type of case where output and welfare can and will diverge.")

[57] Chesler and Korn, *supra* n. 42 at 352 ("An important starting point for the analysis in *Amex* is that a challenge to provisions in contracts between a defendant that operates a two-sided platform and the customers on one side of that platform are properly reviewed under the rule of reason as vertical agreements. A shorthand review in the form of a *per se* rule or "quick look" rule of reason analysis is inappropriate." *Id*., at 352.

[58] Chesler and Korn introduce their discussion of the rule of reason with specific reference to the kind of vertical arrangements at issue in *Amex*: "A Full Rule of Reason Analysis—Not Some Form of Relaxed Review Advocated by the Government—Applies to Vertical Agreements Between a Platform and Customers on One Side of the Platform." Chesler and Korn, *supra* n. 42 at 345.

[59] The term "per se" is used by the Court to describe clearly anticompetitive conduct that is "[t]ypically" only horizontal, 138 S. Ct. at 2283-84, and to explain the scope of an earlier decision. See id., at 2290 n. 10. The term "quick look" does not appear at all, in either the majority or dissenting opinions.

[60] See FTC v. Actavis, Inc., 570 U.S. 136 (2013) (Justice Breyer for the majority), California Dental Assn. v. FTC, 526 U. S. 756, 770 (1999); id., at 781 (Breyer, J., concurring in part and dissenting in part). In his *Amex* dissent, Justice Breyer uses the term "per se" to explain the reasoning of the Supreme Court in *Leegin*, where it applied the rule of reason rather than a per se rule. Id., at 2297; see Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[61] Jefferson Parish Hospital Dist. 2 v. Hyde, 466 U.S. 2 (1984) at 15, note 25 (explaining the rationale for per se rules for "situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct.")

[62] California Dental Ass'n v. FTC, 526 U.S. 756 (1999) at 770 (confining quick look rules to situations in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.") (quotation omitted)

[63] Sallet, supra n. 13 at 15-16.

[64] Cf. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007) (upstream, local lumber market can exist where a furniture manufacturer sells into a broader downstream furniture market). Wismer and Rasek, *supra* n. 25 at 60, observe that "if the products or services considered as substitutes (and, hence, competition conditions) differ substantially across groups, defining a separate market for each distinct customer group seems more appropriate; in these cases, the resulting markets usually differ in product and/or geographic scope."

[65] See Katz & Melamed, *supra* n. 5 at 2087-8.

[66] Hovenkamp, *supra*, n. 5 at 57; see Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, 11 ANTITRUST 21 (1997).