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U.S. Supreme Court Hears Oral Argument over How to Apply the Rule of Reason to Two-Sided Markets in *American Express* Case

By Leane K. Capps, Amy D. Fitts and Caitlin J. Morgan

On February 26, 2018, the United States Supreme Court heard oral argument in *Ohio, et. al. v. American Express Company, et. al.*, No. 16-1454. This case involves allegations that American Express unlawfully restrained trade in violation of Section 1 of the Sherman Act through the use of an "anti-steering" provision in its merchant agreements. This provision prohibits merchants from directly or indirectly steering customers towards using a particular card, which the Plaintiffs allege results in decreased price competition between the various credit card companies. The issue before the Court is how to apply the antitrust law's "rule of reason" analysis in cases implicating a two-sided market, *i.e.* a market in which the defendant's business serves two different, but interrelated, groups of customers.

The Supreme Court's decision to take up the case has garnered significant attention, not only because it stands to shed light on some of the vagaries involved in applying the rule of reason, but also because of the far reaching implications for businesses, which increasingly operate in multi-sided markets. For example, healthcare markets often have multi-sided aspects, focusing on the separate but related interests of both insurers and patients.

In general, courts apply the rule of reason to determine when allegedly anticompetitive conduct unreasonably restricts competition in the absence of an overt agreement to fix prices or restrain output. The rule of reason begins with a three-step analytical process: initially, the plaintiff must come forward with evidence of an anticompetitive restraint in the relevant market; assuming the plaintiff can establish this *prima facie* case, the burden of production then shifts to the defendant to come forward with evidence of legitimate procompetitive justifications for the restraint; if it does so, the burden then shifts back to the plaintiff to establish that the restraint's legitimate objectives could be accomplished through substantially less restrictive alternatives (or, in some circuits, that the restraint is not reasonably necessary to achieve the restraint's legitimate objectives).

Authors:

Leane K. Capps
214.661.5537
lcapps@polsinelli.com

Amy D. Fitts
816.218.1255
afitts@polsinelli.com

Caitlin J. Morgan
214.661.5513
cmorgan@polsinelli.com

In *American Express*, the district court and the Second Circuit [1]both agreed that the rule of reason applied, but the courts disagreed as to how to frame the relevant market and therefore at which step the anticompetitive effects on both sides of the two-sided market should be considered.

The Petitioners (the states who had brought the Sherman Act suit), along with the United States Department of Justice, which appeared in support of the Petitioners, argued that they met their burden under the first step of the rule of reason analysis by demonstrating that American Express's anti-steering provisions stifled competition among the four credit card brands (American Express, Visa, MasterCard, Discover) and raised the prices that all credit card companies charged merchants. While the Petitioners did address the consumer side of the transaction, the crux of their argument was that they had met their *prima facie* burden under the rule of reason because, at the first step, only proof of the anticompetitive effects on the merchant market was required. Further, the Petitioners argued that even if the relevant market included both the merchant and the consumer sides, the market itself should decide the appropriate ratio between merchant fees and consumer benefits, and thus it would be inappropriate to consider the benefits to the consumer side of that market at the first step in the rule of reason analysis.

American Express, a Respondent, also addressed the rule of reason and how to apply it to a two-sided market. American Express argued that the relevant market encompasses both the merchant and consumer sides and thus both portions of the market should be considered at the first step of the analysis. In other words, American Express argues that it was the Petitioners' burden to show that the restraint has a net anticompetitive effect across both sides of the multi-sided market. Only after the Petitioners met this burden, American Express argued, should the burden shift to it to provide evidence that there was a pro-competitive justification for the anti-steering provision.

In sum, the Petitioners advocated that only one side of the two-sided market need be considered at step one of the rule of reason analysis — meaning that to meet their initial burden, Petitioners would only need to establish that American Express's conduct had an anticompetitive effect on the merchant side of the market. American Express, by contrast, advocated for considering both sides of the two-sided market at the outset, which would require Petitioners to present evidence, at step one, demonstrating a net anticompetitive effect when viewed across both the merchant and consumer sides of the market.

In addition to asking pointed questions about the relevant market and where the multi-sided analysis belongs in the rule of reason analysis, the Justices were also concerned with market output and the ultimate impact on consumers. For instance, Justices Sotomayor and Kagan discussed the impact of the anti-steering provision on consumers, asking whether there was any ability for a low cost/low price product to enter the market and whether the anti-steering provision removing the competition among brands was impacting the ultimate price to consumers.

It is unclear how the Supreme Court will ultimately rule, but the issue of whether anticompetitive effects on both sides of a two-sided market should be considered in the plaintiff's initial burden, or later, in the context of defendant's procompetitive justifications, is now squarely before the Court. While both Petitioners and Respondents shied away from advocating for an overarching rule of law applicable to all antitrust cases, it is clear that this opinion will have wide-ranging implications, not only for the credit card industry, but for any business operating in a multi-sided market.

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[1] Polsinelli published an e-Alert on the Second Circuit's opinion in October 2016, which focused largely on the decision's potential ramifications for health care providers. You can access that alert here: https://www.polsinelli.com/intelligence/ealert-antitrust-doj-amex-case.

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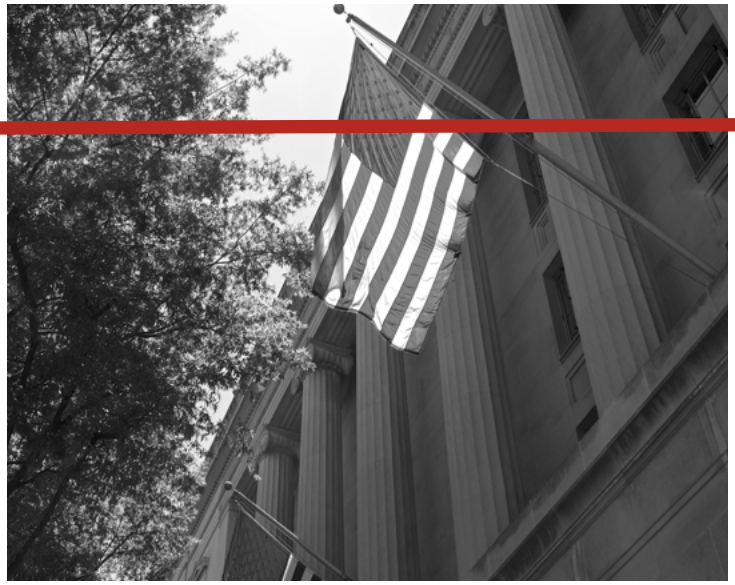

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