CPI TALKS…

…WITH ALDEN ABBOTT & BRUCE HOFFMAN


In this month's edition of CPI Talks we have the pleasure of speaking with Alden Abbott & Bruce Hoffman of the Federal Trade Commission ("FTC"). Alden Abbott is the General Counsel of the FTC. Bruce Hoffman is Director of the Bureau of Competition at the FTC.

Thank you, Mr. Abbott & Mr. Hoffman, for sharing your time for this interview with CPI.

1. **In light of the Supreme Court's *Ohio v. American Express* case (*Amex*), what are some of the biggest implications for non-transaction multisided platforms? Please discuss the distinction the Court made between "transaction" and "non-transaction" platforms.**

2. **Do the Court's distinctions between transaction and non-transaction platforms prohibit the application of the economic logic to the ruling on non-transaction platforms?**

Questions 1 and 2 raise a set of related issues. As those questions implicitly recognize, the Supreme Court's opinion dealt with a rather special set of circumstances, and should be read in that light. Three points merit highlighting.

First, in *Amex* the Court by its own terms limited its precedential analysis to cases involving a multisided transaction platform, where the output is a transaction itself, and parties on both sides of the market are engaging in a simultaneous transaction. Although multi-sidedness characterizes many different sorts of platforms, only in the narrow set of circumstances of a transaction platform is a two-sided market definition specifically called for, under the terms of the Court's decision. This counsels against reading the case too broadly.

Second, *Amex* was a vertical restraints case, involving a platform that holds only roughly one-fourth to one-third of the relevant market. As such, it should not be read to say anything about appropriate tests for monopolization, nor about the treatment of horizontal restraints. (Indeed, an agreement among competing digital transaction platforms to impose similar anti-steering arrangements would raise major competitive problems, but such a situation was not presented in the *Amex* case.)

Third, the Court in *Amex* did not specifically address the application of economic logic derived from multi-sided markets analysis to cases involving non-transaction platforms. The Court merely stated, "it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor. . . [For example,] b]ecause of. . . weak indirect network effects, the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such." *Amex*, slip op. at 12-13. The Court's language left it to the lower federal courts to determine factually, case-by-case, what (if any) non-transaction platforms have sufficiently robust indirect network effects to merit application of two-sided market analysis. It is too early to determine how that analysis will play out.

3. Please give us your thoughts on the Supreme Court's approach as to whether each side of a platform constitutes a separate relevant product market for the purposes of antitrust analysis.

As we discussed above, the Court's analysis suggests that whether each side of a platform constitutes a separate relevant product market will turn on the specific facts and economics presented in a particular case. In the case before it—involving a Sherman Act Section 1 challenge to vertical restraints in a two-sided transactional platform market where the firm whose conduct was challenged did not have market power—the Court determined that both sides of the platform were part of a single relevant product market. The Court did not hold that both sides of a platform would always be considered part of a single relevant product market; to the contrary, it pointed out situations in which the different sides of the platform would appropriately be treated as different markets. Under the Court's analysis, we believe that market definition in cases involving two-sided platforms will involve considering the facts and economics of the particular platform at issue, as well as the type of allegedly anticompetitive conduct at issue and the legal theory under which that conduct is challenged.

4. What are your reactions to Justice Breyer's dissent overall, and in particular with regard to the distinction between products sold by two-sided platforms and complementary products?

Justice Breyer's dissent focused on factual and economic analysis of the credit card market and the anti-steering restraints, and as such represents a further positive contribution to the Court's analytical approach to antitrust cases. That said, we find the description of products sold by two-sided transactional platforms (such as the transaction completion services at issue in the case) as complements to be somewhat debatable. It is likely correct that demand for transaction completion services on each side of the platform is increasing in demand for the other side; this is a standard feature of complementarity. However, there is no separate merchant and consumer demand for completion of a credit card transaction; if the merchant does not accept a credit card, or a consumer does not carry it, no transaction exists to be completed. This is unlike most complementary products, such as hot dogs and ketchup; while demand for the one is increasing in demand for the other, the products face independent demand and can be (and are) sold separately. Credit card transactions—the specific product at issue in the case, as distinct from some of the other card services and features offered to merchants and consumers—are not independent products facing independent demand from merchants and consumers. While this could be viewed as strict complementarity, in some ways, such transactions may be better viewed as a single product with two simultaneous consumers and a single price that needs to be apportioned between those consumers.

5. What is the role of *Ohio v. American Express* in the "continued evolution of economic reasoning in Supreme Court jurisprudence"?

This decision demonstrates that the Court continues to be willing to recognize and apply well-attested and accepted new methodologies in economic science to enrich antitrust analysis. Of immediate interest to the antitrust community is how the particular innovations set forth in *Amex* will be applied by the lower federal courts. We have a limited amount of data on that topic, which will expand over time, as new cases are litigated and "two-sidedness" arguments are briefed to the courts. Let us briefly examine relevant case law as of mid-April 2019.

As of April 16, 2019, twenty federal court decisions have cited to the Court's *Amex* decision.

A. NCAA Decision

On market definition, the only in-depth discussion is the decision in *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation* (N.D. Cal.),[1] which distinguishes the student athletic market from a two-sided transaction platform in that there is no "simultaneous" sale. On summary judgment, the court held that the relevant markets are athletic services in men's and women's Division I basketball and FBS football, where each class member participates in his or her sport-specific market. The court had excluded Defendants' expert's opinion regarding a multi-sided market definition. After the Supreme Court's *Amex* decision, defendants argued that the district court erred in excluding the opinion. The court invited both sides to argue the issue. In reaffirming the decision to exclude the expert testimony, the court noted key differences between this case and *Amex*, particularly the "simultaneity" aspect and the distinction between vertical and horizontal restraints:

1 *In re National Collegiate Athletic Assoc. Athletic Grant-in-aid Cap Antitrust Litigation*, 2018 WL 4241981, No. 14-md-02541 CW (N.D. Cal. Sept. 3, 2018) (Wilken, J.).

In this litigation, the market participants and their interactions are nothing like what the Supreme Court observed in the context of credit-card transactions in American Express. There is no simultaneous interaction or proportional consumption through a platform by different market participants of what essentially constitutes "only one product." Additionally, the restraints at issue in this litigation are horizontal agreements among competitors to limit student-athlete compensation, which is alleged to constrain competition among the universities; by contrast, the restraint analyzed in *American Express* was a vertical agreement between a single credit card company, American Express, and the merchants who participate in that credit card company's network, which American Express claimed allowed it to better compete with other credit card companies.[2]

The court also found that the expert did not perform an economic analysis to support a multi-sided market definition, and suggested that was required by *Amex*:

Nothing in *American Express* supports the notion that a relevant market can be defined to include more than one side without performing any economic analysis. To the contrary, the law review articles cited in *American Express* indicate that the presence and degree of the economic relationships discussed in that case present "an empirical issue." See, e.g. David S. Evans & Michael Noel, Defining Antitrust Markets When Firms Operate Two-Sided Platforms, 2005 Colum. Bus. L. Rev. 667, 671 (2005) (Evans & Noel).[3]

B. Two Monopolization Cases

Two monopolization cases cite the "effects" portion of *Amex*, i.e. that a plaintiff must show increased prices or reduced output. *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*[4] cited *Amex* in passing for the proposition that a showing of a restricted market output effect supported a jury finding of competitive harm in a private antitrust action.

Viamedia v. Comcast[5] rejected an exclusive dealing claim in part because the plaintiff (a competitor) only showed harm to itself rather than price or output effects. Viamedia brought its claims under Section 2 of the Sherman Act. The crux of the complaint was that monopolist Comcast refused to deal with its competitor, Viamedia. Comcast prevailed on a motion to dismiss because court found that Comcast had no duty to deal with Viamedia. On summary judgement, Viamedia restructured its claims as tying and exclusive contracting. The court rejected the exclusive dealing claim in part by citing *Amex* for the proposition that the plaintiff did not show evidence of a price higher than one would expect to find in a competitive market.

2 *Id.* at 4.

3 *Id.* at 6.

4 *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*, No. 16-56823, 2019 WL 495139 (9th Cir. Feb. 8, 2019) (unpublished) (Fletcher, Paez, Gleason, Circuit Judges) (merely citing).

5 *Viamedia, Inc. v. Comcast Corp.*, 335 F. Supp. 3d 1036, 1066–67 (N.D. Ill. 2018) (St. Eve, J.).

C. Passing References in Other Cases

The other citing references to *Amex* include decisions related to credit card cases[6] and cases citing *Amex* only for general propositions.[7]

6. What are some of the ways the Supreme Court's opinion underscores (or doesn't) the Court's weighing of efficiency justifications in a rule-of-reason analysis and in the assessment of vertical restraints?

The Court's holding did not directly address efficiencies. It did not need to because it held that plaintiffs had not carried their burden of proving, under step one of the rule of reason, that Amex's antisteering provisions had anticompetitive effects. Thus, although the Court described "Amex's business model [as one that] has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions[,]" *Amex*, slip op. at 20, it did not evaluate the potential efficiency arguments for the company's antisteering provisions. Although some commentators have referred to those provisions as designed to prevent merchant "free riding" on American Express's investments in goodwill, we believe it may be more accurate to characterize the possible efficiency at issue as preventing opportunism. Opportunism problems are well-known in settings involving sequential performance, because the party who performs second may have the incentive and ability to fail to perform. Here, for example, it is possible that merchants, having received the benefit of American Express's performance (attracting AmEx cardholders to patronize the merchant) might then fail to perform (by paying AmEx the agreed price), and instead persuade customers to use other cards. Opportunism often creates market inefficiencies, both in its direct effects and in costly attempts to guard against it. Avoiding opportunism may have been an efficiency benefit to be weighed had the Court proceeded past the first step of the rule-of-reason.

6 *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 361 F. Supp. 3d 324 (E.D.N.Y. 2019) (merchant plaintiff private action); In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05MD1720MKBJO, 2019 WL 359981, at *2 (E.D.N.Y. Jan. 28, 2019) (merchant class action); In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (MKB), 2018 WL 4158290, at *3 (E.D.N.Y. Aug. 30, 2018); *B&R Supermarket v. Visa, Inc.*, No. 17CV2738MKBJO, 2018 WL 4921661, at *4 (E.D.N.Y. July 20, 2018) ("In short, Discover seizes on the AmEx court's findings that 'Discover has 'only a 5.3% share of the network services market" (which allows the inference that 'merchants can profitably drop Discover if the network overplays its hand'") and that American Express's anti-steering rules harmed Discover."); *B & R Supermarket, Inc. v. MasterCard Int'l Inc.*, No. 17CV02738MKBJO, 2018 WL 4445150, at *6 (E.D.N.Y. Sept. 18, 2018) ("Discover contends that the reversal of the district court's decision in Amex and the Supreme Court's ruling that American Express' anti-steering rules are lawful, contrary to Judge Orenstein's findings in the R&R, further strengthen Discover's argument that it could not have been motivated by the "impending" fall of the anti-steering rules.").

7 *Lifewatch Servs. Inc. v. Highmark Inc.*, 902 F.3d 323, 336 (3d Cir. 2018) (citing for proposition that "[s]ome horizontal restraints may warrant only a "quick look," rather than a complete rule-of-reason analysis"); *Cinetopia, LLC v. AMC Entm't Holdings, Inc.*, No. 18-2222-CM-KGG, 2018 WL 6804776, at *3 (D. Kan. Dec. 27, 2018) (citing for proposition that vertical restraints of trade are analyzed under the "rule-of-reason" instead of the *per se* rule.); *Wholesale All., LLC v. Express Scripts, Inc.*, No. 4:18CV01015 AGF, 2019 WL 423378, at *4 (E.D. Mo. Feb. 4, 2019) (citing for proposition that Section 1 restraints can be analyzed under the *per se* rule or the rule-of-reason); *United States v. Sanchez*, No. 17-10519, 2019 WL 325151, at *1 (9th Cir. Jan. 25, 2019) (cited for proposition that Supreme Court continues to recognize categories of *per se* violations); *CollegeNet, Inc. v. Common Application, Inc.*, 355 F. Supp. 3d 926, 948–49 (D. Or. 2018) (citing for proposition that for unlawful restraints, plaintiff can show anticompetitive effects either directly or indirectly); *Cedra Pharmacy Houston, LLC v. UnitedHealth Grp., Inc.*, No. CV H-17-3800, 2019 WL 1433600, at *5 (S.D. Tex. Mar. 7, 2019) (citing for proposition that "[t]he Supreme Court has construed section 1 to outlaw unreasonable restraints of trade."); *Panhandle Cleaning & Restoration, Inc. v. Nationwide Mut. Ins. Co.*, No. 3:17-CV-117, 2018 WL 3717108, at *3 (N.D.W. Va. Aug. 3, 2018) (citing for proposition that restraints can be unreasonable either as *per se* or under the rule-of-reason).

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