Vertical Restraints After *Amex*: Quietly Imposing New Burdens on Section 1 Plaintiffs

BY DAVID KULLY AND JOSEPH VARDNER

IN ONE OF THE LAST OPINIONS THE U.S. Supreme Court released in its 2017–18 term, the Court on June 25, 2018 ruled in favor of American Express in *Ohio v. American Express*,[1] finding that the government had not met its burden at trial to prove that nondiscrimination provisions in Amex's contracts with merchants harmed competition among credit card networks and violated Section 1 of the Sherman Act.[2] The central issue before the Court concerned the plaintiff's initial burden under the rule of reason when the market in which the defendant competes has "two-sided" features. Much ink has been spilled over how the Court's determination that the government needed to account for effects on both sides of the two-sided platform will apply in upcoming cases involving markets with similar characteristics.[3]

In addition to what *Amex* says in the text of the opinion about application of the rule of reason to two-sided platforms, the opinion quietly delivered another pronouncement, in a footnote (footnote 7), that will also have important implications for Section 1 litigation in the years to come. In footnote 7, the Court suggested for the first time that the rule of reason inquiry might be different—and more difficult for plaintiffs—in Section 1 cases challenging vertical restraints than it is when applied to horizontal restraints.

In a number of past Section 1 cases, plaintiffs have successfully established a violation by showing actual anticompetitive effects from the challenged restraint.[4] After *Amex*, this path under the rule of reason might no longer be available in cases challenging vertical restraints. In footnote 7, the Court rejected the government's argument that it met its initial burden under the rule of reason by demonstrating directly that Amex's vertical restraints harmed competition. The Court stated that, because vertical restraints often pose "no risk to competition unless the entity imposing them has market power," a plaintiff must define a relevant antitrust market in which the defendant possesses market power to satisfy its burden.[5] A direct showing of actual anticompetitive effects alone is not enough.[6]

This is far from the first time that the Court has observed important distinctions between horizontal and vertical restraints. Indeed, through a series of decisions over the past several decades beginning with *Continental T.V., Inc. v. GTE Sylvania Inc.*,[7] the Court has all but declared vertical restraints free from per se condemnation under Section 1.[8] Having largely finished the project of stripping the per se illegal label from vertical restraints, footnote 7 now takes things a step further and suggests that even the rule of reason should be applied differently, and more stringently, in the vertical context.

Although there is no indication that plaintiffs in vertical restraints cases made widespread use of the actual-adverse-effects approach to establishing liability under the rule of reason (other than in *Amex* itself), footnote 7 still represents a departure from how the Court previously addressed vertical restraints and forecloses one avenue available to plaintiffs in an already challenging litigation environment. Imposition of heightened requirements on plaintiffs challenging vertical restraints also does not constitute a simple extension of past precedent. The Court instead broke new ground in tilting the scales against challenges to vertical restraints and in determining for the first time that an evenhanded framework for the application of the rule of reason across all environments was no longer suitable.

Why the Court took this step, when it does not appear to have been necessary to its holding that the government failed to establish that Amex's vertical restraints caused actual adverse effects on competition,[9] is unclear. But the result is a more complicated rule-of-reason framework and still greater challenges for plaintiffs pursuing challenges to vertical restraints under Section 1 of the Sherman Act.

Unpacking the District Court's Decision

In the *Amex* case, the government challenged provisions in Amex's card-acceptance agreements with merchants that prohibited merchants from encouraging their customers to use

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a credit card other than an Amex card.[10] The government and Amex agreed that Amex's nondiscrimination provisions were vertical restraints because Amex offers credit card acceptance services to merchants, its customers, and that, "like nearly every other vertical restraint, the . . . provisions should be assessed under the rule of reason."[11]

The district court, which heard the case in a seven-week trial in Brooklyn in the summer of 2014,[12] described the rule of reason as it has been described in countless prior Section 1 cases, recognizing that the goal of the inquiry is to determine whether the challenged restraints harmed competition and thus "qualify as unreasonable restraints on competition."[13]

The district court also outlined "[t]wo independent avenues" under which the government could discharge its initial burden under the rule of reason of establishing that Amex's nondiscrimination rules harmed competition.[14] The government could do so "directly," by showing "an actual adverse effect on competition," or "indirectly," through proof that Amex possessed market power and that there were reasons to believe that the nondiscrimination provisions were likely to harm competition.[15] In the end, the district court found that the government had succeeded under both avenues, determining that Amex possessed market power in the general purpose card network services market and that its nondiscrimination provisions had produced "actual, concrete harms on competition."[16]

In reaching its determination that the government had met its burden under the "direct" avenue, the district court found that the nondiscrimination provisions had harmed competition primarily by eliminating the "competitive reward" that credit card networks would receive by lowering prices to merchants.[17] If merchants were prohibited by the nondiscrimination provisions from steering transaction volume to lower-cost networks, no network would have an incentive to reduce its prices or to become the low-cost provider.[18] The district court found "emblematic of the harm done to the competitive process by Amex's rules against merchant steering" Discover's abandonment of its effort to compete on price after finding that "its lower prices would not drive incremental volume to its network."[19] The result, the court found, was that "all four networks [raised] their swipe fees more easily and more profitably than would have been possible were merchants able to influence their customers' payment decisions."[20] Removal of the nondiscrimination provisions would place downward pressure on fees the credit card networks charge to merchants and, the court found, lower retail prices to consumers.[21]

The Supreme Court: No Platform-Wide Harm to Competition

None of these findings mattered to the Supreme Court because it believed the government failed to meet its burden and the district court failed to consider both sides of the two-sided transaction platform through which Amex competed with Visa, MasterCard, and Discover. To meet its burden under the "direct," actual-adverse-effects path of proving Amex violated Section 1,[22] the Court stated that the government needed (but failed) to prove "that Amex's anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market."[23]

Although the Court had previously recognized important distinctions in Section 1 cases between vertical and horizontal agreements, footnote 7 represents the first time that the Court has stated that application of the rule of reason varied depending on the nature of the restraint at issue.

The Court explained that increases in merchant fees would not establish harm to competition unless they were "higher than . . . one would expect to find in a competitive market,"[24] and it identified benign explanations for higher prices to merchants observed by the district court, including the greater value Amex offered to merchants, Amex's increased costs, and increased competition among credit card networks for cardholders.[25] The Court also found that evidence of significant increases in the use of credit cards—an output expansion—precluded a finding that any price increases by Amex reflected an anticompetitive exercise of market power.[26] The Court also squarely rejected the very premise of the government's case and the district court's principal findings by observing that Amex's nondiscrimination provisions have not "ended competition between credit-card networks with respect to merchant fees," pointing to evidence suggesting that Amex faces some constraints on its pricing power.[27]

In the end, the Court held that the government had not established "that Amex's anti-steering provisions have anticompetitive effects."[28]

Footnote 7: New Obstacles for Plaintiffs in Vertical Restraints Cases

The Court's determination that the government's actual-adverse-effects evidence failed to meet its burden under the direct path was enough to end the case, in light of the government's abandonment of arguments based on the alternative "indirect" path to establishing Amex's liability under the rule of reason.[29] There was no need for the Court to consider or even discuss the existence of market power, which under the established rule-of-reason framework that preceded *Amex* would be an issue only if the government maintained its indirect-path arguments.[30] Yet the Court addressed market definition and market power in footnote 7 and ensured that they will be central issues in future Section 1

challenges to vertical restraints. The Court explained in footnote 7 that, even if the government had shown actual harm to competition across both sides of the transaction platform, it still would not have met its burden under the rule of reason without properly defining the contours of a relevant product market in which Amex possessed market power. As the Court stated:

> The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees. . . . We disagree. The cases that the plaintiffs cite for this proposition evaluated whether horizontal restraints had an adverse effect on competition. . . . Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. . . . But vertical restraints are different. . . . Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market.[31]

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Direct Proof of Harm in Past Vertical Cases

As observed in footnote 7, the Court and courts of appeals in numerous past challenges to horizontal agreements have determined that proof of actual adverse effects on competition established a Section 1 violation under the rule of reason, even without separate proof of market power. This is because "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"; direct proof of adverse effects thus "obviate[s] the need for an inquiry into market power."[32]

Because the ultimate issue in Section 1 litigation is whether the challenged agreement is likely to harm competition, there is no obvious reason why direct proof of harm to competition would not satisfy a plaintiff's burden in any Section 1 case, regardless of the nature of the relationship between the parties to the challenged agreement. The Supreme Court itself has, in fact, evaluated direct proof of harm to competition as an independent and viable alternative to the market power-based approach to establishing a Section 1 violation.

In *Jefferson Parish Hospital District No. 2 v. Hyde*, the Supreme Court considered a challenge to an exclusive contract between a hospital and a firm of anesthesiologists that the plaintiff anesthesiologist alleged improperly excluded him from offering his services to the hospital's patients and harmed competition in the provision of anesthesiological services.[33] The challenged agreement was a vertical contract between the hospital and a group of physician providers. The Court first considered whether the exclusive agreement, which required patients purchasing certain services from the hospital to also purchase its anesthesiological services, constituted an illegal tying arrangement. The Court reaffirmed that tying arrangements remain per se unlawful violations of Section 1,[34] but explained that tying harms competition only if the defendant has sufficient market power "to force a purchaser to do something that he would not do in a competitive market."[35] Because the defendant lacked market power to force the purchase of anesthesiological services on unwilling patients, the Court rejected the tying claim.[36]

Under *Amex*'s footnote 7, a finding that the defendant lacked market power in a Section 1 challenge to a vertical restraint would have ended the inquiry. There would have been no need to proceed to evaluate direct evidence of anticompetitive effects, because vertical restraints harm competition only if "the entity imposing them has market power."[37] But in *Jefferson Parish*, the Court left open to the plaintiff the opportunity to establish that the vertical restraint harmed competition:

> In order to prevail in the absence of per se liability, respondent has the burden of proving that the . . . contract violated the Sherman Act because it unreasonably restrained competition. That burden necessarily involves an inquiry into the actual effect of the exclusive contract on competition among anesthesiologists.[38]

Although the Court concluded in *Jefferson Parish* that the plaintiff could not show actual adverse effects on competition,[39] it was clear that the direct path to establishing a Section 1 violation was not foreclosed by the absence of proof of market power.

Footnote 7, which blocks use by plaintiffs of actual-adverse-effects evidence in the absence of a showing of a relevant market in which the defendant possesses market power, not only offers no explanation for its departure from the *Jefferson Parish* approach, it fails to mention *Jefferson Parish* at all.

Presuming Procompetitive Benefits from Vertical Agreements

Since the Supreme Court's 1977 decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[40] the Court has drawn important distinctions between Section 1 challenges to agreements between vertically aligned non-competitors and horizontally aligned competitors. Based on the important observation that interbrand competition "is the primary concern of antitrust law,"[41] *GTE Sylvania* precipitated a reevaluation by the Court over the decades that followed of whether vertical restraints that enhance interbrand competition at the expense of intrabrand competition are deserving of continued per se condemnation. Because of the likelihood that vertical restraints offer benefits to interbrand competition, the answer in each instance considered by the Court was "no," but none of these decisions observed that vertical restraints posed no risk to competition or suggested that it was necessary to

adopt a special rule-of-reason inquiry to account for possible procompetitive benefits of the vertical agreements.

GTE Sylvania overturned a prior decision holding vertically imposed retailer territorial restrictions per se unlawful,[42] and based its determination that per se condemnation was inappropriate on extensive support for their "economic utility" and "little authority to the contrary."[43] Per se rules, the Court explained, "are appropriate only when they relate to conduct that is manifestly anticompetitive,"[44] a characterization that did not apply to practices with such well-recognized benefits to interbrand competition.[45] In the years that followed, the Court extended this reasoning to other vertical restraints and found per se treatment inappropriate for a vertical agreement between a manufacturer and distributor to terminate a price-cutting distributor,[46] maximum resale price maintenance,[47] and minimum resale price maintenance.[48]

In this line of cases, the Supreme Court did not declare any vertical restraints to be per se lawful or even presumptively procompetitive.[49] The Court instead recognized expressly that vertical restraints can harm competition. In *Leegin*, for instance, the Court cautioned that "the potential anticompetitive consequences of vertical price restraints—primarily the possibility that resale price maintenance can help facilitate a manufacturer or retailer cartel—"must not be ignored or underestimated."[50] The Court expressed confidence, however, that "rule-of-reason analysis will effectively identify those situations in which [a vertical restraint] amounts to anticompetitive conduct."[51]

Amex's footnote 7 indicates a sudden lack of confidence on the part of the Court that the potential benefits of vertical agreements—which "often pose no risk to competition"[52]—will receive appropriate recognition in future assessments under the rule of reason. By imposing additional rule-of-reason requirements on plaintiffs challenging vertical restraints, and basing the need for such requirements on its observation that vertical restraints are often benign, *Amex* effectively puts a thumb on the scale in favor of the permissibility of the challenged vertical restraints. Past decisions had articulated the importance of adhering to the lessons of *GTE Sylvania* and its progeny,[53] but none felt that doing so required presuming procompetitive benefits of vertical restraints or adjusting the rule-of-reason inquiry accordingly.

Abandoning the Evenhanded Application of the Rule of Reason

Until *Amex*'s footnote 7, the Court had articulated the inquiry under the rule of reason in a consistent and evenhanded way, without suggesting that it applies differently depending on the nature of the relationship between the parties to the challenged agreement.[54] The rule of reason, regardless of the context, had been described as an inquiry into the likely competitive effects of a challenged restraint. For instance, in *National Society of Professional Engineers v. United States*, a challenge to a horizontal agreement among engineers, the Court described the "inquiry mandated" by the rule of reason to be "whether the challenged agreement is one that promotes competition or one that suppresses competition."[55] In *NCAA v. Board of Regents*, another case challenging a horizontal agreement, the question was characterized as "whether or not the challenged restraint enhances competition."[56] More recently, the Court in *FTC v. Actavis, Inc.*, which involved a challenge to patent litigation settlement agreements between potential horizontal competitors, directed district courts to fashion a rule-of-reason inquiry to "shed light on the basic question—that of the presence of significant, unjustified anticompetitive consequences."[57]

The Court described the rule of reason in the same way in challenges to vertical restraints. *Leegin*, for instance, stated that the "design and function" of the rule of reason is to "distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[58] *Amex*'s own recitation of the rule of reason is that it seeks "'to assess the restraint's actual effect' on competition" and that its "goal is to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer'" and ones "in the consumer's best interest."[59]

Courts have also adopted the same "three-step, burden-shifting framework"—with two independent paths available to plaintiffs to satisfy their initial burden—to evaluate the likely competitive effects of both vertical and horizontal agreements.[60]

This evenhanded articulation of the rule of reason is not surprising, when the purpose of the rule-of-reason exercise is to evaluate whether a challenged restraint—whether vertical or horizontal—harms competition. *Amex*, again for the first time and without explanation, states that the rule-of-reason inquiry will be different, and more difficult for plaintiffs, in the vertical context.

What Footnote 7 Means for Future Vertical Restraint Plaintiffs

Past cases have identified two independent ways in which plaintiffs could establish a restraint as unreasonable under the rule of reason. Plaintiffs could prove their cases directly, by showing actual adverse effects on competition, or indirectly, by showing that the defendant possessed market power and providing some evidence that the agreement harms competition. *Amex* collapses the direct and indirect avenues for vertical restraints only, and declares that, regardless of any evidence that a plaintiff provides of the actual effects of a vertical restraint on competition, the plaintiff must also show "market power, which cannot be evaluated unless the Court first defines the relevant market."[61]

Amex imposes this new standard for applying the rule of reason in vertical restraints cases without needing to do so to decide the case before it and without recognizing or adhering to the guidance of prior cases. Why it did so, when few plaintiffs had appeared to pursue direct proof of competitive

harm from a challenged vertical restraint, is unclear. But the implications going forward are clear: plaintiffs in already difficult vertical restraints cases must prove that the defendant possesses market power in a well-defined product market—regardless of any evidence they possess of harmful effects of the challenged practice. ■

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[1] Ohio v. Am. Express Co,, 138 S. Ct. 2274 (*Amex*).

[2] *See id.* at 2287.

[3] *See id.* at 2285–86 (distinguishing two-sided transaction platforms, in which both sides of the platform should be viewed as a single market, from other two-sided platforms where "weak indirect network effects" make each side of the platform "behave[] like a one-sided market").

[4] *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460–61 (1986); Toys "R" Us v. FTC, 221 F.3d 928, 937 (7th Cir. 2000); MacDermid Printing Sols. LLC v. Cortron Corp., 833 F.3d 172, 183 (2d Cir. 2016) ("If a plaintiff proves that consumers have already experienced harm from the challenged behavior because of higher prices, reduced output, or lower quality, then proof of market power is not required. Otherwise, it is.").

[5] *Amex*, 138 S. Ct. at 2285 n.7.

[6] *Id.*

[7] 433 U.S. 36 (1977).

[8] *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (1977) (vertically imposed exclusive territories); Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726, 728 (1988) (agreement between manufacturer and distributor to terminate a price-cutting distributor); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007) (minimum resale price maintenance). Tying is the only category of vertical conduct that is still subject (at least nominally) to per se condemnation under Section 1 of the Sherman Act. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984) ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'"). Companies that join a per se illegal horizontal conspiracy, even if vertically aligned with those conspirators, can also be found to have committed a per se violation of Section 1. *See* United States v. Apple, Inc., 791 F.3d 290, 325 (2d Cir. 2015) ("[T]he question is whether the vertical organizer of a horizontal conspiracy designed to raise prices has agreed to a restraint that is any less anticompetitive than its co-conspirators, and can therefore escape *per se* liability. We think not.").

[9] *Amex*, 138 S. Ct. at 2290 ("In sum, the plaintiffs have not satisfied the first step of the rule of reason. They have not carried their burden of proving that Amex's antisteering provisions have anticompetitive effects.").

[10] *See id.* at 2280. During the litigation, the government referred to these provisions as "antisteering" rules, and Amex referred to them as "nondiscrimination" provisions. *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 149 (E.D.N.Y. 2015) (*Amex EDNY Decision*) ("[Amex] elected to litigate Plaintiffs' challenge to their anti-steering rules, which they term [Amex's] Non-Discrimination Provisions . . . ."). These provisions prohibited Amex-accepting merchants from "offering discounts or other monetary incentives to customers who pay with a particular type of card, offering nonmonetary benefits for using a lower-cost card, displaying the logo of one brand more prominently than others, expressing the merchants' preference as to which type of card it would rather accept, or posting each card's cost of acceptance and letting customers make their own decisions as to which mode of payment they prefer." *Id.* at 165.

[11] *Amex*, 138 S. Ct. at 2284.

[12] *See Amex EDNY Decision*, 88 F. Supp. 3d at 152. The court heard testimony from over 30 fact witnesses and four experts and accepted over 1,000 exhibits into evidence. *Id.*

[13] *Id.*

[14] *Id.* at 169.

[15] *Id.* (citations omitted).

[16] *Id.* at 207, 224.

[17] *Id.* at 209–10 ("Price competition is a critical avenue of horizontal interbrand competition, and yet it is frustrated to a point of near irrelevance in the network services market as a result of American Express's [nondiscrimination provisions].").

[18] *Id.* at 213.

[19] *Id.* at 214.

[20] *Id.* at 215.

[21] *Id.* at 219–20.

[22] The government pursued at the Supreme Court only arguments concerning whether it met its burden under the "direct" avenue under the rule of reason. It "abandoned" its previous arguments that "indirect evidence" also established Amex's violation of Section 1 of the Sherman Act. *See Amex*, 138 S. Ct. at 2284–85 & n.6.

[23] *Id.*

[24] *Id.* at 2288.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 2289. The district court based its finding that Amex possessed market power in part on evidence that it was able to "profitably impose . . . price increases across a broad swath of its merchant base with little or no meaningful buyer attrition." *Amex EDNY Decision*, 88 F. Supp. 3d at 196–97. The Supreme Court pointed to those findings to support the existence of vigorous competition among credit-card networks on merchant fees, as "some merchants chose to leave its network" in response to Amex's price increases. *Amex*, 138 S. Ct. at 2289.

[28] *Id.* at 2290.

[29] *Id.* at 2285 n.6.

[30] Under the indirect path, a plaintiff can meet its initial burden by showing that the defendant possesses market power, along with "some evidence that the challenged restraint harms competition." *Id.* at 2284.

[31] *Id.* at 2285 n.7 (citations omitted).

[32] *Indiana Federation*, 476 U.S. at 460–61.

[33] 466 U.S. 2, 4–7 (1984).

[34] *Id.* at 9 ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'").

[35] *Id.* at 13–14.

[36] *Id.* at 28–29.

[37] *Amex*, 138 S. Ct. at 2285 n.7.

[38] *Jefferson Parish*, 466 U.S. at 29; *see also id.* at 17–18 ("When . . . the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.").

[39] *Id.* at 29–31.

[40] 433 U.S. 36 (1977).

[41] *Id.* at 52 n.19; *accord Leegin*, 551 U.S. at 895 ("[T]he antitrust laws are designed primarily to protect interbrand competition . . . ."); State Oil Co. v. Khan, 522 U.S. 3, 15 (1997) ("Our analysis is also guided by our general view that the primary purpose of the antitrust laws is to protect interbrand competition."); *Business Electronics*, 485 U.S. at 726 ("[I]nterbrand competition is the primary concern of the antitrust laws . . . .").

[42] *GTE Sylvania*, 433 U.S. at 58 (overturning United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).

[43] *Id.*

[44] *Id.* at 49–50.

[45] *Id.* at 54–55, 58.

[46] *See Business Electronics*, 485 U.S. at 726–27 ("There has been no showing here than an agreement between a manufacturer and a dealer to ter-

minate a 'price-cutter,' without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and reduce output.").

47 *See Khan*, 522 U.S. 3, 18 (1997) ("[W]e conclude that there is insufficient economic justification for per se invalidation of vertical maximum price fixing.").

48 *See Leegin*, 551 U.S. at 894 ("Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending on the circumstances in which they are formed. . . . As the rule would proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for per se condemnation.").

49 *See, e.g.*, *Khan*, 522 U.S. at 22 ("[W]e of course do not hold that all vertical maximum price fixing is per se lawful.").

50 *See Leegin*, 551 U.S. at 892–94.

51 *Khan*, 522 U.S. at 22; *see also Leegin*, 551 U.S. at 897–98 (observing that "diligent" courts have the ability to "design[] and use[]" the rule of reason "to eliminate anticompetitive transactions from the market").

52 *Amex*, 138 S. Ct. at 2285 n.7.

53 *See Business Electronics*, 485 U.S. at 726.

54 Of course, the anticompetitive potential of some horizontal agreements might be sufficiently obvious that the scope of rule-of-reason inquiry can be abbreviated, but the ultimate purpose in evaluating the likely competitive effect of a challenged restraint remains the same. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779–81 (1999).

55 435 U.S. 679, 691 (1978).

56 468 U.S. 85, 104 (1984).

57 570 U.S. 136, 160 (2013).

58 551 U.S. at 886.

59 *Amex*, 138 S. Ct. at 2284 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984) and *Leegin*, 551 U.S. at 886). *Amex* quotes *Copperweld* further as describing the rule of reason as a "fact-specific assessment of 'market power and market structure,'" *id.*, but the cited discussion in *Copperweld* addresses generally how the evaluation of "combinations, such as mergers, joint ventures, and various vertical agreements" differs from conduct per se illegal under Section 1 and unilateral conduct under Section 2, and cannot reasonably be read as support for the need to show market power when actual-adverse-effects evidence is available or for different requirements in vertical and horizontal cases. *Copperweld*, 467 U.S. at 768.

60 *See Amex*, 138 S. Ct. at 2284 (citing sources that describe the burden-shifting framework without distinguishing between vertical and horizontal agreements).

61 *Id.* at 2285 n.7.

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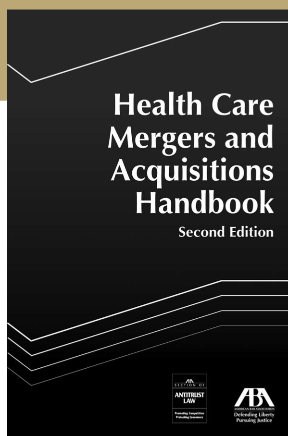

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