

In Defense Of The Antitrust Rule Of Reason

By **William Kolasky** (March 8, 2018, 4:42 PM EST)

I am writing in response to the cleverly titled March 7 Law360 guest article by Randy Gordon, "Is The Antitrust Rule Of Reason Reasonable?" As often is the case in articles with clever titles, Gordon's piece is wide of the mark. What his article overlooks is that both the Supreme Court and the federal circuit courts of appeals have made great strides over the last four decades in developing a sound analytical framework for applying the rule of reason that largely undercuts the petitioners' complaint in the AmEx case that the Supreme Court has left the "lower courts with no clear standards" for applying the rule of reason.



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As the most recent edition of the American Bar Association Section of Antitrust Law's oft-cited treatise, "Antitrust Law Developments (Eighth)," explains, "[s]ince the early 1980s, the lower courts have imposed greater structure on rule of reason analysis by casting it in terms of shifting burdens of proof." Under this more structured rule of reason analysis, "the plaintiff bears the initial burden of proving that an agreement has had or is likely to have a substantially adverse effect on competition." If the plaintiff meets this initial burden, "the burden shifts to the defendant to produce evidence of the procompetitive virtues of the conduct." If the defendant is able to do so, the burden then shifts back to the plaintiff to "show that the conduct is not reasonably necessary to achieve the stated objective or that the anticompetitive effects nonetheless outweigh the procompetitive virtues."

Although this structured rule of reason analysis is still generally described as a balancing test, the courts use a sliding scale in applying that balancing test much as they do in applying the First Amendment guarantee of free speech or the Fourteenth Amendment guarantee of equal protection. Thus, the stronger the plaintiff's evidence of anti-competitive effect, the more closely the courts will scrutinize the defendant's proposed pro-competitive justifications, including whether the alleged restraint is reasonably necessary to achieve its claimed pro-competitive objectives. The clearest statement of this "sliding scale" is in the Supreme Court's decision in *California Dental Association v. Federal Trade Commission*, where the court explained, "What is required ... is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."

The courts have also made substantial progress over the last four decades in laying out a clearer analytical framework for determining whether a restraint is likely to lessen competition, relying in part on the framework the antitrust agencies have developed for evaluating horizontal mergers in their Horizontal Merger Guidelines, which were last updated in 2010. The courts have likewise identified a

number of pro-competitive justifications they may accept for an alleged restraint, such as increasing output, creating operating efficiencies, introducing new products, or enhancing the quality of products or services. The key question, then, is whether the alleged restraint is reasonably necessary to achieve those objectives. Applying this framework, with the guidance the courts have already provided, the rule of reason can sometimes be performed, as the late professor Phillip Areeda put it, “in the twinkling of an eye.”

As with common law jurisprudence generally, the best guides to how the courts are likely to decide particular cases under this well-structured analytical framework are the prior cases that have been decided under the rule of reason. To the extent some may feel that the courts have not provided sufficient guidance as to how they will apply the rule of reason in future cases, the problem lies more in the relative dearth of rule of reason cases that have made it to summary judgment or beyond than it does from any defects in this analytical framework itself. The U.S. Department of Justice should be applauded, therefore, for bringing cases like AmEx, which give the Supreme Court and the lower courts more opportunities to put flesh on the bones of this analytical framework through decided cases.

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