New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
An ALM Publication
NYSBA Annual Meeting
WWW.NYLJ.COM
January 25-30 | Hilton New York
MONDAY, JANUARY 25, 2016

Applying the Rule of Reason In Antitrust Cases

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Among many topics explored by the Antitrust Section this past year, we devoted several programs to courts' interpretation and application of the "rule of reason," the presumptive mode of analysis for determining whether restraints of trade violate antitrust law. Although it varies from circuit to circuit, rule of reason analysis typically involves a burden-shifting approach designed to evaluate whether the restraint's anticompetitive effect outweighs the procompetitive effect for which the restraint is reasonably necessary. We examined how two courts—*O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) and *U.S. v. American Express*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015)—applied the rule of reason.

O'Bannon involved a challenge to the National Collegiate Athletic Association's (NCAA's) rules prohibiting universities from compensating student athletes for the use of their names and likenesses in video games. Applying the rule of reason burden-shifting structure, the U.S. Court of Appeals for the Ninth Circuit found that the NCAA's rules caused anticompetitive effects, but also valid procompetitive purposes: preserving the NCAA's brand by promoting amateurism, and integrating athletics with academics. 802 F.3d at 1070-74. Turning to the necessity of the restraint, the court conducted a probing inquiry of potentially less restrictive alternatives to the NCAA's rules. Id. at 1074-79. The court found that one alternative, permitting schools to give athletes grants covering the cost of their attendance, was a viable less restrictive alternative, as the grants would not undermine amateurism or hamper the integration of athletic and academic life. Id. at 1074-76. However, the court found that the other alternative—allowing athletes to receive cash compensation—did not promote amateurism as effectively as the current NCAA rules. Id. at 1076-79. Accordingly, the court held that the NCAA rules violated the antitrust laws, and that although the schools could give athletes grants to cover the cost of attendance, they could not pay athletes cash compensation. Id. at 1079.

By contrast, the analysis in *United States v. American Express*, where the district court found that American Express' (Amex's) anti-steering rules violated the antitrust laws, did not dive as deeply into the "less restrictive alternatives" inquiry. The court first found that the anti-steering rules adversely affected competition, and then recognized one viable procompetitive justification: The anti-steering rules could prevent parties from "freeriding" on Amex's investments in data analytics and cardholder benefits. 88 F. Supp. 3d at 187-238. Notably, the court did not analyze alternatives as an independent part of its decision, instead collapsing that inquiry into its discussion of procompetitive purposes. On the data analytics freeriding issue, the court found that charging merchants for analytics services was a less restrictive alternative. However, on the cardholder benefits issue, the court did not conduct a less restrictive alternatives analysis. Id. at 234-38. The Court of Appeals for the Second Circuit heard oral argument on Amex's appeal on Dec. 17, 2015, when Amex argued that the lower court improperly neglected to account for benefits to cardholders in its rule of reason analysis.

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