MUCH ADO ABOUT *AMEX*

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I. INTRODUCTION

Ohio v. Amex[2] has gained a great deal of attention because of its implications for digital platforms,[3] though it is mostly an old economy case, given that credit cards have been in existence since the 1950s. The case involved an antitrust challenge to Amex's anti-steering provisions, which sought contractually to prevent a merchant from persuading a consumer to use some other method of payment than the Amex card. *Amex* treats the credit card network as a two-sided market involving consumers, on one side, and merchants on the other.

Amex holds that both sides of a two-sided market must be taken into account in an assessment of the relevant market and market power. Evidence that merchants are being charged high prices is insufficient to generate an inference of market power without some analysis of the benefits accruing to consumers on the other side of the credit card network.

The Court's decision has been harshly criticized,[4] and one would think it presages major changes in antitrust enforcement from the tenor of the complaints it has generated. However, *Amex* is likely to have a limited impact on both antitrust law and enforcement.[5]

II. *AMEX*'S LIMITED REACH

The reason *Amex* has a limited reach is that it is mostly a response to the plaintiffs' (the Department of Justice and several state attorneys general) proof of market power. Plaintiffs' expert in *Amex* presented evidence that Amex increased its charges to merchants numerous times without losing a substantial number of them. The immediate inference from this evidence is that Amex was able to impose a "small but significant non-transitory increase in price" ("SSNIP") without losing so many of its customers on the merchant side of the network as to make the price increases unprofitable.

This "pricing evidence" method of inferring market power has been referred to as the "direct evidence" approach.[6] The reasoning behind the direct evidence approach is straightforward. If a firm can increase its price

2 585 U.S. ___; 138 S. Ct. 2274 (2018).

3 See, e.g. Mark MacCarthy, *What 'Ohio v. AMEX' really means for tech*, CIO: TECH POLICY PERSPECTIVES (Mar. 26, 2018), https://www.cio.com/article/3265454/what-ohio-v-amex-really-means-for-tech.html; Joyce Jung Min Yeo, *Ohio v. American Express: Should Tech Giants Thank AMEX?, ?*, 2018 Colum. Bus. L. Rev (Oct. 7, 2018), https://cblr.columbia.edu/ohio-v-american-express-should-tech-giants-thank-amex/.

4 See, e.g. Tim Wu, *The Supreme Court Devastates Antitrust Law*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/opinion/supreme-court-american- express.html.

5 In this note I am mostly elaborating on an argument in Hylton, Keith N., Digital Platforms and Antitrust Law (May 2019). Boston Univ. School of Law, Law and Economics Research Paper No. No. 19-8, May 2019. Available at SSRN: https://ssrn.com/abstract=3381803 or http://dx.doi.org/10.2139/ssrn.3381803.

6 *Id.*

significantly without losing a substantial number of customers, then the firm must be relatively unconstrained by demand-side substitutes or supply-side substitutes. Demand-side substitutes are other firms offering similar products, who would immediately become more attractive to the consumers of the dominant firm after the firm raises its price. Supply-side substitutes are other firms who would shift to produce similar products in competition with the dominant firm after the firm raises its price. For example, a firm making men's shoes might shift to produce children's shoes after a dominant maker of children's shoes increases its price by a substantial amount.

The alternative to the direct evidence approach is the "circumstantial evidence" approach. The circumstantial evidence approach, which is also the traditional method of proving market power, involves the definition of a relevant market and proof of a high market share protected by entry barriers. The circumstantial evidence approach is the traditional method used to infer market power in antitrust cases, most notably *United States v. Microsoft* ("*Microsoft III*").[7]

With these two approaches distinguished, *Amex* should be understood as a statement about the direct evidence approach to proving or inferring market power. Under *Amex*, in cases involving two-sided markets where plaintiffs present such direct evidence, courts must conduct market power analyses with a view toward both sides of the market.

The *Amex* rule therefore targets a subset of antitrust cases having to do with a specific method of proof. It does not require any modifications in the more common and traditional "circumstantial evidence approach" to proving market power. In other words, the market power analysis in *Microsoft III* is unaffected by *Amex*.

III. MARKET POWER GENERALLY AND *AMEX*

Of course, some of the criticism of *Amex* could stem from the view that the market power requirement is itself an inappropriate burden to put on antitrust plaintiffs. If one is inclined to be skeptical of the market power requirement, then a decision, such as *Amex*, raising the plaintiff's burden of proof on market power will appear to be an unalloyed negative. Even some courts, notably the Ninth Circuit in *Lessig v. Tidewater Oil Co.*,[8] have weakened the market power requirement in the belief that sufficiently bad conduct should be reachable under the antitrust laws even in settings where the traditional market power requirements are not satisfied. This perspective reflects not a critique of *Amex* but of the market power test generally.

Market power determinations by courts – including both the definition of the market and the assessment of power – are often difficult to predict in advance and tend to provide attractive openings to criticize a court judgment in retrospect. The likely reason for this appearance of precariousness is that market power determinations often serve as a preliminary checkpoint or weigh station where courts balance several considerations often having more to do with the social costs of antitrust intervention than with the technical search for market boundaries.[9] The technical search for market boundaries is an entirely appropriate method of analysis within enforcement agencies, and provides the additional benefit of constraining discretion within the agencies, but courts oversee the application of antitrust law from a broader perspective. Theories of specific legal rules that are appropriate for constraining agency discretion are not necessarily desirable as constraints on the courts.[10]

Market power determinations by courts are similar to duty determinations in tort law. They enable a court to screen out cases when the court fears that the standard legal test governing the determination of reasonableness, sometimes applied by a jury, might generate a result that is inconsistent with the aims of the law. If the anti-steering contractual provisions of *Amex* are efficient,[11] which seems plausible in light of their functional similarity to the resale price maintenance agreements examined in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[12] then rules that tend to raise the burden of proof on market power will have the desirable effect of shielding such provisions from repeated attacks under the antitrust laws.

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7 253 F.3d 34 (D.C. Cir. 2001).

8 327 F.2d 459 (9th Cir. 1964). The Ninth Circuit's *Lessig* doctrine, which permitted plaintiffs to prove attempted monopolization using only evidence of anticompetitive intent, has been superseded by Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).

9 Keith N. Hylton, *Brown Shoe Versus the Horizontal Merger Guidelines*, 39 Review of Industrial Organization 95 (2011).

10 *Id.*

11 See Hylton, *supra* note 5.

12 551 U.S. 877 (2007).

Of course, the Court's aim in *Amex* was not to raise the burden of proof on market power, but to correct a potentially erroneous application of the direct evidence method of proving market power. Still, the impact of that correction is the same as a decision to raise the burden of proof for a particular set of cases. In a decision theoretic approach to antitrust law, legal standards and burdens of proof should respond to perceptions of the social cost of erroneous applications of the law.[13]

IV. IMPACT OF *AMEX*

Will the *Amex* rule severely constrain antitrust litigation or enforcement? The answer depends on how many cases involve two-sided markets, and whether the benefits to one side appear to be substantial relative to the charges to the other side. My suspicion is that *Amex* may turn out to be an unusual case on this score.

One set of examples of two-sided markets in the tech sector consists of search platforms, such as Google and Bing. Both Google and Bing have search consumers on one side of the platform and advertisers on the other. Each search is a transaction where the advertiser pays a positive price (bidding to reach the consumer) and the consumer pays either zero (in the case of Google) or a negative price (in the case of Bing rewards customers). While not every Bing search consumer is a member of its rewards program, the fact that some Bing search consumers are members implies that the average price charged to Bing search consumers is negative.

Suppose Bing were to become sufficiently attractive in the future to some segment of search consumers that it could charge exorbitant prices to advertisers and at the same time offer substantial rewards to search consumers.[14] For example, since Bing tends to attract older search consumers than Google, it might develop a special attraction to advertisers who wish to reach an older population of consumers.[15] A plaintiff might attempt to prove market power by showing that Bing had imposed a SSNIP (small but significant non-transitory increase in price) on advertisers without losing so many of them as to make the strategy unprofitable. *Amex* would require the plaintiff to also examine the rewards Bing provides to its search consumers, to show that the net price charged by the search platform had increased substantially.

The foregoing hypothetical – of Bing and its rewards program – suggests a reason the *Amex* holding on the assessment of market power may be defensible.[16] In the hypothetical, Bing charges advertisers exorbitant prices and uses the revenue from advertisers to fund substantial rewards to search consumers on its platform. This would be an example of differentiated product competition where Bing targets a specific subset of search consumers and Google continues to serve the vast majority of consumers. If an antitrust plaintiff were to point to the high charges to advertisers as evidence demonstrating Bing's market power – on the theory that the charges show that Bing could impose a SSNIP without losing advertisers – then it would seem questionable, to say the least, for a court to embrace the plaintiff's argument. If a court were to do so, then it might be confusing evidence of a particular competitive strategy with evidence of market power.[17]

Although *Amex* may seem to impose a serious burden on plaintiffs in proving market power through the direct evidence approach, the seriousness of the burden will depend on how often cases of two-sided markets arise, and how substantial the benefits (or negative prices) are on the subsidized side of the market. In many cases involving two-sided markets, the benefits on the subsidized side will not be substantial enough to move the net price far from the price charged to the unsubsidized side of the market. Bing, as it is currently constituted (unlike the hypothetical above), is an example. The rewards available to Bing search consumers appear to be small in comparison to the rewards available to Amex customers. It is unlikely that the net price charged to Bing advertisers, at present, would be much different from the price charged to advertisers on the platform. In light of this feature, *Amex* would not impose a substantial burden on a plaintiff who attempted now to use evidence of its charges to advertisers in an effort, most likely quixotic, to prove that Bing possesses market power in the online search market.

13 See, e.g. C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 Antitrust L.J. 41 (1999); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 Antitrust L.J. 469 (2001)

14 Hylton, *supra* note 5.

15 *Id.* at 6 (discussing age demographics of search consumers).

16 *Id.*

17 *Id.*

For antitrust plaintiffs, *Amex* does not mean that the sky is falling. As Steve Calkins once put it, antitrust law has "equilibrating tendencies."[18] Decisions that seem to tilt the playing field in favor of one party are often counterbalanced by decisions that tilt the field in favor of that party's opponents. *Amex* is likely to reveal this tendency in antitrust doctrine as time passes. Courts are likely to read it as the somewhat narrow decision that it is.

18 Stephen Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of. Equilibrating Tendencies in the Antitrust System, 74 Geo. L.J. 1065 (1986).

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