Antitrust Law: A Context & Practice Casebook
By Steven Semeraro

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Chapter I.C.

In *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018), all nine justices agreed on the burden shifting approach to determining whether the effect of a competitive restraint should be deemed anticompetitive. Although lower courts had been using this approach for many years, the Supreme Court had not definitively endorsed it before. Interestingly, the Court stated – albeit in dicta – that proof that pro-competitive benefits could have been obtained through less restrictive means would be sufficient for a plaintiff to prevail at the third step in the test.

> To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. . . . If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. . . . If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Id. at 2284; *id.* at 2290-91 (Breyer, J., dissenting) (agreeing that this approach is correct).

The question whether less restrictive alternative analysis would suffice to show that a restraint is anticompetitive had been controversial. *See e.g., National Football League v. North American Soccer League*, 459 U.S. 1074, 1079-80 (1982) (Rehnquist, J., dissenting from denial of certiorari) ("The Court of Appeals has taken this statement too far by adopting the least restrictive alternative analysis that is sometimes used in constitutional law. The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity."); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3rd Cir. 1975) ("In a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative.").

Chapter I.E.3.b

In *Methodist Health Services Corp. v. OSF Healthcare System*, 859 F.3d 408 (7th Cir. 2017), the court in an opinion by Judge Posner rejected a Section 2 claim against a dominant hospital alleging that two-to-three-year exclusive dealing agreements with insurance companies restrained competition from the smaller hospital plaintiff. The court appeared to be most significantly influenced by the short-term nature of the contracts and its belief that any hospital in the market could have bid against the defendant for an exclusive. Reiterating a point made by the Seventh Circuit 20 years earlier, "competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common." *Paddock Publications, Inc. v. Chicago Tribune Co*., 103 F.3d 42, 45 (7th Cir. 1996).

With respect to the story-telling aspect of Rule-of-Reason law, Judge Posner's opinion stressed that the plaintiff claimed that insurers, other hospitals, and consumers were injured by the defendant's agreements, yet none of these joined the law suit. Nor did the Department of Justice Antitrust Division after the plaintiff sent it a copy of the complaint. The court concluded by pointing out that the plaintiff "doesn't have any theory of how [the defendant hospital]'s exclusive contracts could have caused prices to rise." *Id.*

Chapter II - Introduction

As of August 1, 2018, civil penalties for violating the Hart-Scott-Rodino Act increased to $40,000 per day.

Chapter III.A.3

In October 2016, the Antitrust Division of the Department of Justice and the Federal Trade Commission released a document entitled "Antitrust Guidance for Human Resource Professionals." The document confirms the enforcement agencies' policies to prosecute agreements among competing employers to limit or fix the terms of employment for potential hires as *per se* and potentially criminal violations "if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities." United States Department of Justice Antitrust Division and Federal Trade Commission, Antitrust Guidance for Human Resource Professions at 1 https://www.justice.gov/atr/file/903511/download (Oct. 2016).

Chapter III.B.2

In *In re: Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186 (9th Cir. 2015), a divided panel of the court applied *Bell Atlantic v. Twombly* (Casebook p. 291) to hold that the plaintiffs failed to allege a horizontal conspiracy based on parallel conduct. The crux of the majority's holding rested on its conclusion that the manufacturers adherance to the demands of a large and powerful buyer was not a "red flag" from which a jury could infer a conspiracy among the manufactures. *Compare Toys "R" Us, Inc. v. FTC* (Casebook p. 348).

Interestingly, the court recognized that the facts alleged could violate the antitrust laws based on the vertical agreements between the defendant and individual manufacturers.

> Plaintiffs have indeed provided a context for the manufacturers' adoption of [minimum advertised pricing] policies, but not one that plausibly suggests they entered into illegal horizontal agreements. Instead, the complaint tells a different story, one in which Guitar Center used its substantial market power to pressure each manufacturer to adopt similar policies, and each manufacturer adopted those policies as in its own interest. Such conduct may be anticompetitive—and perhaps even violate the antitrust laws—but it does not suggest the manufacturers illegally agreed among themselves to restrain competition.

Id. at 1198. This vertical agreement theory was not open to the plaintiffs because they alleged only a horizontal conspiracy claim.

In *U.S. v. Apple, Inc.*, 791 F.3d 290 (2nd Cir. 2015), a divided panel of the court reached the opposite conclusion that the plaintiff had presented sufficient evidence to establish a horizontal agreement among publishers affecting the resale price of e-books. In contrast to the Ninth Circuit's holding in *Musical Instruments*, the Second Circuit concluded that book publishers would not find restraints in resale pricing attractive unless all publishers joined in the scheme. The key distinction was that in order to obtain the benefit of the agreement with Apple, publishers had to switch their agreements with Amazon to the same format that Apple proposed. And that switch, the court concluded, could only be accomplished if the publishers banded together. "Each Publisher Defendant would be able to accomplish the shift to agency—and therefore have an incentive to sign Apple's proposed Contracts—only if it acted in tandem with its competitors." *Id*. at 316.

Chapter III.B.3

In October 2016, the Antitrust Division of the Department of Justice and the Federal Trade Commission released a document entitled "Antitrust Guidance for Human Resource Professionals." The document cautions against information exchanges among employers, e.g., salary information that may have the effect of reducing competition. Explaining the information exchanges may be lawful and are not prosecuted criminally, they may nonetheless violate the antitrust laws. The document provides guidance indicating that information exchanges are likely to be lawful if they involve:

- a neutral third party manages the exchange,
- the exchange involves information that is relatively old,
- the information is aggregated to protect the identity of the underlying sources, and
- enough sources are aggregated to prevent competitors from linking particular data to an individual source.

United States Department of Justice Antitrust Division and Federal Trade Commission, Antitrust Guidance for Human Resource Professions at 4-6
https://www.justice.gov/atr/file/903511/download (Oct. 2016).

Chapter IV

In *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018), a divided Court held that in a vertical agreement case involving the two-sided credit card market in which the defendant sold to two different customer sets – merchants and cardholders – the plaintiff could satisfy its initial burden only by showing an overall restraint on competition across the system rather than merely on one side of the two-sided market.

The Court likely reached the right result in this case because in the credit card market, the restraints in the agreements between American Express and merchants accepting the card may have been essential to efficient card pricing. Economic analysis of the industry demonstrated that efficient pricing required card systems to charge merchants more than the marginal cost of serving them and cardholders less. Rivalry that reduced merchants' prices would likely increase the prices cardholders pay and produce inefficiencies in the system overall. As a result, restraints inhibiting rivalry that could lower merchant prices could be pro-competitive with respect to the system overall.

Whether similar economic considerations exist in other markets with some aspects of two-sidedness, such as health care markets, and whether the courts will effectively incorporate any such differences into their analysis, remains to be seen.

In *In re: Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186 (9th Cir. 2015), a divided panel of the court held that when a large and powerful buyer forces manufacturers to impose a minimum advertised pricing policy, the vertical agreement could violate that antirust laws

> Plaintiffs have indeed provided a context for the manufacturers' adoption of [minimum advertised pricing] policies, . . . Guitar Center used its substantial market power to pressure each manufacturer to adopt similar policies, and each manufacturer adopted those policies . . . . Such conduct may be anticompetitive—and perhaps even violate the antitrust laws . . .

Id. at 1198. This vertical agreement theory was not open to the plaintiffs in this case because they alleged only a horizontal conspiracy claim.

Chapter V

In *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202 (2nd Cir. 2015), the court held that the Supreme Court's decision *Volvo Trucks* (Casebook p. 356) required a plaintiff to show that it lost more than *de minimis* sales to the favored purchaser in a price discrimination scheme. In this case, the plaintiffs showed that the defendant discriminated on price with respect to brand name drugs. But the plaintiffs were unable to show that they lost more than *de minimis* sales to the favored purchasers. The court thus affirmed a finding of summary judgment.

In *Woodman's Food Market, Inc. v. Clorox*, 833 F.3d 743 (7th Cir. 2016), the district court held that a plaintiff small grocery store had stated a claim under The Robinson-Patman Act, 15 USC § 13(e). The plaintiff alleged, and the district court agreed, that product size constituted a "promotional service" and that, if the allegations in the complaint were true, the defendant unlawfully discriminated against the plaintiff by making extra-large packaging available only to warehouse stores and not to stores like the plaintiff's.

The Seventh Circuit reversed and remanded the case. It held that Congress intended Section 13(e) to apply only when a manufacturer used the provision of promotional services to avoid a price discrimination claim by masking a discount for large purchasers vis-à-vis smaller ones. For example, a manufacturer might ostensibly charge the same price to all customers, but pay for advertising for only its larger customers. The package size issue in the case before it, the court held, did not constitute such an attempt to mask price discrimination and thus was not unlawful.

In dicta, the Seventh Circuit provided guidance about when package size could state a claim under the Robinson-Patman Act.

> Size alone is not enough to constitute a promotional service or facility for purposes of subsection 13(e); any discount that goes alone with size must be analyzed under subsection 13(a); and the convenience of the larger size is not a promotional service or facility. This is not to say that it would be impossible under different facts to imagine package size or design as part of a "service or facility" when combined with other promotional content. For example, the [Federal Trade] Commission distinguishes football shaped packages offered just before the Superbowl, or Halloween-branded "fun-size" individually wrapped candies near Halloween, from Clorox's large packs. These examples could fall within subsection 13(e), but they are not before us today.

Id. at 750.

Chapter VII.F

Add new sub-section – **Restraints on College and University Compensation of Athletes**

In *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), the court upheld a district court holding that NCAA rules limiting the amounts that colleges and universities may award to student athletes to anything below the full cost of attendance violate Section 1 of the Sherman Act. Although the rules resemble price fixing, the court held that they were not naked restraints because they were part of a broader set of regulations governing college athletics that had pro-competitive effects. The court nevertheless held the student-compensation restraints unlawful under the Rule of Reason because the pro-competitive benefits could be achieved through less restrictive means.

A divided panel rejected the portion of the lower court's injunction that would have required the NCAA to allow schools to pay up to $5000 in deferred compensation to student athletes beyond the full cost of attendance. The majority expressed the view that payments beyond the full cost of attendance would inevitably undermine the procompetitive rule requiring NCAA athletes to be amateurs.

Appendix 1

In early 2017, in one of its last official acts, the Obama Administration revised the Frequently Asked Questions webpage explaining the Antitrust Division's corporate and individual leniency policies.

The changes that can be gleaned from the revised FAQs are significant. The timing of a disclosure is critical to whether the Division grants leniency. The first conspirator to reveal a criminal conspiracy secures automatic leniency so long as the Antitrust Division had not previously gotten wind of it from another source.

Recognizing that counsel may become aware of a potential violation before top corporate officials can make a final determination about that violation, the policy permits antitrust counsel to seek a "marker" or reserved place in line with respect to the leniency policy. The Division has permitted so-called "anonymous" markers lasting for a few days that do not identify the company that counsel represents.

The revised FAQ's indicate that while anonymous markers may still be viable, a significant amount of information must be disclosed to secure the marker:

> In some cases, an identification of the industry may be sufficient for the Division to determine whether leniency is available. In many cases, however, it is necessary to identify specific products or services, other companies involved in the conspiracy, or the identity or location of affected customers for the Division to determine whether leniency is available and the proper scope of the marker.[1]

Corporations that are not the first to report may still secure Type B leniency, a type that has always left discretion in the hands of the Division about whether to prosecute officers, directors or employees. The revised FAQs emphasize that the Division may exclude those who are "highly culpable" from an offer of leniency.[2]

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 limits the damages recoverable in a private civil action to defendants who have leniency agreements with the Antitrust Division.[3] The revised FAQs require a defendant relying on a leniency agreement to limit the damages it will owe in a follow-on civil action to provide "the claimant with a full account of

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[1] United States Department of Justice, Antitrust Division, FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS at FAW 3 pp. 3-4, https://www.justice.gov/atr/page/file/926521/download, (Originally Published November 19, 2008; Update Published January 26, 2017) (FAQ).

[2] FAQ 22 pp. 20-21.

[3] Pub. L. No. 108-237, Title II, §§ 211 to 214, 118 Stat. 661, 666-68 (2004), as amended Pub. L. No. 111-30, § 2, 123 Stat. 1775 (2009) and Pub. L. No. 111-190, §§ 1 to 4, 124 Stat. 1275, 1275-76 (2010) (set out as a note under 15 U.S.C. § 1).

all potentially relevant facts known to the corporation or cooperating individual and all potentially relevant documents."[4]

The Antitrust Division's leniency policy has included a provision that enables a company to secure leniency even if it were not the first to report a conspiracy if it discloses its involvement in an additional conspiracy.[5] The new FAQs explain a counter policy – that the Division had previously announced in speeches and applied – that if a company receiving leniency for one antitrust conspiracy fails to report a second conspiracy in which it was involved, the company not only forgoes potential credit under the leniency policy for disclosing the first conspiracy, but also the Division will seek enhanced penalties for the second conspiracy.[6]

Finally, the revised FAQs clarify that a leniency provision does not provide protection against prosecution by other Divisions of the DOJ or other agencies for non-antitrust crimes. Although the Division will generally not prosecute non-antitrust crimes integral to an antitrust conspiracy – such as mail fraud for mailing doctored bids pursuant to a bid rigging conspiracy – it does not speak for other agencies. The FAQ uses the example of a bribe made in furtherance of an antitrust conspiracy that could be prosecuted under the Foreign Corrupt Practices Act of 1977.[7] The FAQs make clear that in the Antitrust Division does not believe that other agencies use "other criminal statutes to do an end-run around leniency."[8] But companies cannot expect antitrust leniency to provide protection against non-antitrust crimes not integral to the antitrust conspiracy.

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4 FAQ 19 p. 18.

5 FAQ 8 p. 7.

6 FAQ 10 p. 11.

7 FAQ 6 pp. 7-8 (referencing the FCPA, 15 U.S.C. § 78dd-1, et seq.).

8 FAQ 6 p. 7