

## Ohio v. American Express: Anti-Steering Rules May Guide Application of the Rule of Reason

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When advising clients on the potential antitrust risk of proposed agreements with competitors, customers, and suppliers and other business practices, antitrust attorneys often must evaluate whether the proposed arrangement is likely to be treated as per se illegal or evaluated under the more lenient rule of reason. If an arrangement is likely to be evaluated under the rule of reason, the attorney then must predict the likely outcome of such evaluation before advising her client on the level of antitrust risk. Although this task has always required extensive analysis, it has become increasingly theoretical, without clear guidance from the U.S. courts on how the rule of reason is applied in practice. This lack of guidance has resulted in business uncertainty and high legal costs.

The Supreme Court will have a rare opportunity to ease this uncertainty in the next few months when it decides the fate of American Express's "anti-steering" rules. Following disagreement between the district court and Second Circuit regarding whether the plaintiffs met their burden of showing that the anti-steering rules are anticompetitive, the Supreme Court is being asked to articulate the proper application of the rule of reason standard. As a result, the Court may shed additional light on the practical application of the rule of reason test, and provide long-awaited guidance on which antitrust attorneys can rely when advising their clients, including the importance of market power in the analysis and the appropriate application of the burden-shifting framework.

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