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Expert Analysis

'US Airways v. Sabre Holdings': A Tale of a Two-Sided Market

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The past year and a half witnessed important antitrust law developments for cases involving "two-sided" transaction markets, i.e., markets in which a sale on one side cannot be made without also making a sale on the other side of the market. Recently, the U.S. Court of Appeals for the Second Circuit issued a decision in *US Airways v. Sabre Holdings*, No. 17-960, 2019 WL 4281729 (2d Cir. Sept. 11, 2019) (*US Airways*), which is the next chapter in this evolving story.

The Second Circuit overturned a $15.3 million jury verdict secured by US Airways after a nine-week trial against the travel-planning firm Sabre Holdings and remanded the case to a district court for retrial. In doing so, the Second Circuit relied on last year's groundbreaking U.S. Supreme Court decision *Ohio v. American Express*, 138 S. Ct. 2274 (2018) (*Amex*), in which the court held that certain products that provide transaction services, such as credit cards, must (as a matter of law) be treated as two-sided markets for defining the relevant market for antitrust purposes—which an antitrust plaintiff must do under the "rule of reason" to establish a §1 claim under the Sherman Antitrust Act—and for calculating potential damages. The Second Circuit also reinstated US Airways' claims that Sabre was operating an illegal monopoly, despite the fact that Sabre's product was the only brand within that purported market.

There are several key takeaways from the *US Airways* decision: (1) practitioners and courts must be careful to distinguish between one-sided and two-sided markets, and in particular two-sided transaction markets; (2) counsel, expert witnesses, and clients must be mindful of the impact a two-sided transaction market may have on the ability to show anticompetitive impact and on putative damages, as the impact of the allegedly anticompetitive conduct on the second side of the market may substantially reduce or even eliminate the alleged damages suffered by a plaintiff on the first side of the market; and (3) it is still possible to have a single-brand monopoly under the antitrust laws, proving yet again that the Supreme Court's 1992 holding in *Eastman Kodak v. Image Tech. Servs.*, 504 U.S. 451 (1992) is alive and well.

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Factual Overview of 'US Airways'

Sabre provides a travel technology platform known as a global distribution system (GDS). This computerized network allows travel agents to search for and book flights and permits airlines to list available flights and thereby access travel agents. Sabre collects booking fees from an airline whenever a travel agent uses Sabre's platform to book a ticket. Travel agents receive a payment from Sabre whenever they use Sabre's platform to book at ticket.

Sabre is one of only three GDS competitors and is by far the largest provider, controlling over half the market. Notably, no new GDS competitors have emerged since the 1980s. Sabre structures its contracts with travel agents to turn its GDS platform as a "single-home" for travel agents, i.e., travel agents are incentivized to only use Sabre's GDS platform. Sabre does this principally by requiring travel agents to meet a minimum volume of bookings in order to obtain incentive payments under the

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contract. These incentive payments can be lucrative. For example, Sabre paid more than $1.2 billion in such fees to travel agents between 2006 and 2012. Once the travel agents are locked into Sabre's GDS platform, the airlines are effectively required to use Sabre's GDS platform to reach Sabre's travel agent clients. Nearly 40 percent of US Airways revenues comes from bookings made through travel agents using Sabre's GDS platform. Sabre's contracts with US Airways contain "full content" provisions that prohibit the airline from financially incentivizing travel agents to bypass Sabre's GDS platform, such as through discounts offered through direct bookings on US Airways' website, and from otherwise encouraging travel agents to bypass Sabre's GDS platform.

The Lawsuit and Trial

In April 2011, US Airways sued Sabre in the U.S. District Court for the Southern District of New York. The airline alleged that the "full content" provisions in its contracts with Sabre constituted unlawful vertical restraints of trade and that Sabre had an unlawful horizontal agreement with its GDS competitors, all in violation of §1 of the Sherman Act. In addition, US Airways alleged that Sabre violated and conspired to violate §2 of the Sherman Act by monopolizing the distribution of GDS services to Sabre subscribers. The court dismissed US Airways' §2 claims before trial.

Section 1 of the Sherman Act prohibits unreasonable restraints of trade. Some restraints—such as anticompetitive horizontal agreements among competitors to fix prices—are per se unreasonable. See *Bus. Elecs. v. Sharp Elecs.*, 485 U.S. 717, 723-24 (1988). US Airways did not allege that Sabre's contractual provisions fit into this category. Rather, the provisions were analyzed under the "rule of reason," a fact-specific analysis focusing on the restraint's harms and benefits to consumers. The first step of rule of reason analysis requires the plaintiff to identify consumers in the relevant market, i.e., the market in which the anticompetitive effects of the challenged restraint are to be measured for antitrust purposes. See *Amex*, 138 S. Ct. at 2284; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993). Hence, US Airways had to identify the market for Sabre's GDS platform. This brought to the fore whether the GDS market was, in the antitrust context, one-sided (from Sabre to US Airways), or two-sided (travel agents-Sabre-US Airways). (Application of the rule of reason involves a three-step burden-shifting analysis. Under this framework, the plaintiff has an initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff proves this, the burden shifts to the defendant to show a procompetitive rationale for the challenged restraint. If the defendant makes this showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. See *Capital Imaging Assocs.*, 996 F.2d at 543.)

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After over five years of litigation, the §1 claims were scheduled for trial in October 2016. The timing of the trial presented practical and legal challenges for the district court in light of the Second Circuit's Sept. 26, 2016 decision in the *Amex* case, which was being appealed to the Supreme Court while the *US Airways* case approached its Oct. 24, 2016 trial date.

In the appellate decision that preceded the Supreme Court's decision in *Amex*, the Second Circuit "addressed for the first time an issue that had become central to US Airways's action against Sabre: For purposes of an antitrust case, when the relevant market is to be considered 'two-sided,' i.e., when the effects of a challenged restraint on a market are to be judged by the net impact on customers on both sides, not either side, of a market." *US Airways*, 2019 WL 4281729, at *4. In that case, the Second Circuit held that the credit card market was two-sided, in that credit cards provided a service to cardholders on one side and to merchants on the other. In such two-sided markets, prices often cannot be raised on one side of the market without reducing overall demand for the product, a phenomenon economists refer to as "indirect network effects." Id. at *8. As such, in most (but not all) cases involving two-sided markets, courts must include both sides of the market in defining the market for antitrust purposes. Id. For example, where the impact of the "indirect network effects" are shown to be minor, the relevant market can be defined as one-sided for antitrust purposes even though there were two sides to the market out in the world. Id. This left open the possibility that the market at issue in US Airways could be defined as "one-sided" for antitrust purposes, which would permit the jury to only consider the impact of the alleged unlawful restraint on US Airways' side of the market.

Rather than adjourn the *US Airways* trial to await further guidance from the Supreme Court, the district court opted to proceed with its October 2016 trial. At trial, US Airways and its expert argued that the relevant market should be defined as one-sided, while Sabre

contended it should be defined as a two-sided market. After nine weeks of trial, the case was submitted to the jury.

To address the possibility that a two-sided market or a one-sided market should be used to define the relevant market for antitrust purposes, the district court permitted the jury to decide which market test applied as a factual matter, but instructed the jury on both doctrines and required the jury to deliver alternative verdicts, i.e., a one-sided market verdict (which only considered the alleged effects of the restraints on US Airways) and an alternative two-sided market verdict (which purportedly considered the effects of the alleged restraint on travel agents as well). The jury found that Sabre charged US Airways supracompetive ticket booking fees, which were nearly double the fees what would have been charged in a competitive market. In addition, the jury concluded that the market was one-sided and awarded US Airways $5 million in damages, which was automatically trebled under the Sherman Act. The jury alternatively awarded the same amount under the two-sided market test. The jury, however, rejected US Airways' claim asserting that Sabre had entered into an unlawful horizontal agreement with its GDS competitors.

After the district court denied Sabre's post-trial motion, both parties appealed. Sabre appealed from the court's order declining to grant its post-trial motion for judgment as a matter of law, or in the alternative, a new trial. US Airways' appeal argued, in part, that the district court had erroneously dismissed its claims under §2 of the Sherman Act.

After briefing to the Second Circuit concluded, the Supreme Court decided *Amex*. The Court of Appeals then solicited and received supplemental briefing from the parties. Sabre argued that the district court erred by allowing the jury to determine, as a matter of fact, that the relevant market was one-sided. Further, Sabre argued that the court issued erroneous instructions to the jury as to whether the GDS market was required, as a matter of law, to be treated as two-sided.

Supreme Court's 'Amex' Decision

In *Amex*, the Supreme Court affirmed the Second Circuit's decision, but significantly the court did so on alternative grounds that carved out a subset of two-sided markets that must, as a matter of law, be treated as two-sided markets for antitrust purposes. In so doing, the court effectively eviscerated the district court's jury instructions in the *US Airways* case and the jury's verdict that was nine weeks in the making.

The *Amex* decision concerned a suit brought by the United States and several individual states against American Express for violating §1 of the Sherman Act. The suit challenged certain "anti-steering" provisions in Amex's contracts with merchants that accepted payments on Amex cards. These provisions prohibited merchants from implying a preference for non-Amex cards or for taking other measures to dissuade customers from using Amex cards. The central issue on appeal was how to analyze and define the relevant market.

The Supreme Court defined two-sided platforms as businesses that offered "different products or services to two different groups who both depend on the platform to intermediate between them." *Amex*, 138 S. Ct. at 2280. In such circumstances, "the value of the services that a two- sided platform provides increases as the number of participants on both sides of the platform increases." Id. at 2281. As the court explained, Amex's credit card platform becomes more valuable to merchants when more cardholders use the card, and the platform becomes more valuable to cardholders when more merchants accept the card.

The court then focused on a special subset of two-sided platforms: two-sided *transaction* platforms. The court defined such platforms as businesses that "cannot make a sale to one side of the platform without simultaneously making a sale to the other." *Id*. at 2280. Given the pronounced indirect network effects of raising pricing for one side of a two-sided transaction platform, the court held that it was necessary as a matter of law for courts in such circumstances to evaluate the alleged restraints' impact on *both* sides of the platform to assess potentially anticompetitive restraints. As the court explained, "[t]o demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market." *Id*. at 2287. The court found that the plaintiffs failed to produce such evidence at trial and affirmed. This holding placed the *US Airways* trial and verdict in peril.

Second Circuit's Ruling In 'US Airways'

In light of the *Amex* decision, the Second Circuit vacated the jury's verdict in *US Airways* and remanded the case for a new trial. On other grounds, the Second Circuit also reversed the district court's dismissal of US Airways' §2 allegations.

The Second Circuit observed that the Supreme Court's conclusion in *Amex* "differs from the conclusion we had reached: It was that in a case brought under the Sherman Act that involves a 'two-sided *transaction* platform,' the relevant market must *always* include

both sides of the platform." *US Airways*, 2019 WL 4281729, at *7. In contrast, the Second Circuit's decision in *Amex* had left open the possibility that a two-sided transaction platform could be treated as a one-sided market for antitrust purposes as an evidentiary matter. In other words, the district court in *US Airways* went into trial with the understanding that the GDS transaction platform could be treated as a one-sided market, but the Supreme Court subsequently shifted the goal posts by holding that such platforms must always be treated as two-sided markets.

As the Second Circuit explained, this turn of events invalidated the jury's verdict because it was impermissibly based on a one-sided market analysis and the GDS platform was a two-sided transaction platform, i.e., there could not be a transaction with an airline without a corresponding transaction with a travel agent. Id. at *9. The Second Circuit then turned to the jury's alternative, two-sided market verdict, and vacated it. As an initial matter, the Second Circuit explained that the alternative verdict was predicated on an erroneous jury instruction that permitted the jury to find as a factual matter that the market was two-sided, whereas that Supreme Court had found that this was a question of law for transaction platforms. Id. at *9-10. Moreover, the jury's award of the same amount in damages for a one-sided or two-sided market suggested that they jury had not appropriately considered the travel agent side of the GDS platform market. "In a market that took into account both sides of the Sabre platform, the prices would be supracompetitive only to the extent that the net prices charged to travel agents … and airlines … *combined* exceeded the prices that would have been charged in a competitive market." Id., at *10. In other words, the relevant question was not if US Airways was overcharged, but rather whether the GDS platform market network was charged net supracompetitive prices. Accordingly, the Second Circuit held that "[i]n a two-sided platform, the payments made by Sabre to travel agents would therefore necessarily reduce any damages US Airways might receive: Two-sided damages must, in this case, then, be lower than one-sided damages would have been." Id.

While US Airways had lost its hard-fought $15 million verdict, its §2 claims were reinstated. The district court had dismissed these claims, concluding "that a claim that a defendant has monopolized a market which is limited to a defendant's product or service is not viable." Id. at *14. On appeal, US Airways argued that an antitrust monopolization claim can be restricted to a single-brand market. Id. at *15. The Second Circuit agreed. The appeals court explained that US Airways had adequately pled four grounds for concluding that there was a cognizable submarket for antitrust purposes: (1) there were no reasonably interchangeable alternative distribution services to Sabre's GDS platform; (2) travel agents using Sabre do so almost exclusively and rarely switch to a competitor; (3) it was expensive to switch to other systems; and (4) Sabre's payment structure with travel agents further entrenched this single brand market. Id. To reach this conclusion, the Second Circuit relied on the Supreme Court's 1992 decision in *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 481 (1992) (holding that "a single brand of a product or service" may "be a relevant market under the Sherman Act" if no substitute exists).

Implications

There are several implications from the *US Airways* decision. As an initial matter, when applying the rule of reason test under §1 of the Sherman Act, practitioners, expert witnesses, and courts must carefully consider whether a two-sided market is a transaction platform, mandating that both sides of the market be considered to determine if, and to what extent, the market was unlawfully restrained. This analysis could apply to a wide array of two-sided markets, including online retailers, app stores, and other digital platforms. The *US Airways* case illustrates the potential waste of resources that can flow from a failure to engage in this analysis.

This evolving transaction platform market area of the law also raises practical and strategic issues for lawyers and clients. As the Second Circuit explained, the dynamic of two-sided transaction markets may lead to the conclusion that the *net* impact of the alleged conduct was not anticompetitive, or may reduce that potential damages claim. Plaintiffs' lawyers, as well as their clients and expert witnesses, may not simply rely on the amount the plaintiff was overcharged to assess the value of a case, but instead may need to reduce that value by the impact of the defendant's actions on the other side of the market. This calculus may militate in favor of settling a case at an earlier stage, rather than have the waters muddied by opposing counsel's expert or a jury's or court's interpretation of that evidence, or even foregoing the case entirely to avoid the cost of litigation. Conversely, the *Amex* and *US Airways* decisions provide defense counsel with a tool for arguing that there was no net anticompetitive effect on the market, or that damages are much lower than suggested by the plaintiff.

Separately, *US Airways* reaffirms that the Supreme Court's single-brand market theory in *Eastman Kodak* is alive and well.