[Case Brief] Atrium Health Settlement Encourages Enforcement of Anti-tiering/Anti-steering Clauses in Healthcare Contracts

Editor's Note: *An abbreviated summary of this case appears in the research report "Preventing Anticompetitive Contracting Practices in Healthcare Markets", which provides a detailed analysis of anti-tiering/anti-steering clauses, including economic justification and procompetitive use and states that have restricted its use in healthcare contracts.*

The antitrust case against Sutter Health in California has drawn the attention of state regulators and policymakers across the country, spawning legislative reform efforts to curb dominant hospitals' market power. Prior to this, an enforcement action against Atrium Health, a large health system on the other coast, involved similar anticompetitive practices. As the first case to consider whether anti-tiering and anti-steering provisions in healthcare contracts could be anticompetitive in the wake of the Supreme Court decision in *Ohio v. American Express*,[1] it serves as the leading case against anti-steering and anti-tiering clauses in healthcare contracts.

In this case brief of the Atrium Health antitrust litigation, we take a closer look at the background facts, legal arguments, the implications of the *American Express* two-sided market analysis, and finally, the settlement, which arguably laid the groundwork for similar cases including the California

Attorney General's action against Sutter Health.

I. The Background

The antitrust enforcement action against North Carolina's largest health system, Atrium Health (formerly Carolinas HealthCare System, aka "CHS") began in June 2016. The Department of Justice (DOJ), together with North Carolina's attorney general, filed what was then a first-of-its kind civil suit in federal court,[2] alleging the dominant provider in the Charlotte area used its market power to require anticompetitive clauses in its contracts with major commercial insurers including Aetna, Blue Cross, Cigna, and United Healthcare. The specific contract provisions Atrium used allegedly prohibited insurers from offering financial incentives to encourage, or steer, patients to competing providers that provide lower-cost and higher-value care. These anti-steering clauses were allegedly coupled with additional provisions that prevented insurers from publishing Atrium's price and quality information for comparison and price shopping purposes.

A. What Are Anti-steering/Anti-tiering Clauses?

There are a variety of so-called "anti-incentive" clauses in contractual agreements between providers and insurers that may lessen competition. Some prohibit insurance carriers from giving incentives to patients to utilize cheaper or higher value healthcare facilities (anti-steering clauses), while others inhibit payers from placing a system hospital in anything other than the most favorable cost-sharing tier (anti-tiering clauses). Typically, in a tiered network, the insurer separates providers into distinct tiers based on cost and quality and assigns corresponding co-pay amounts for each tier. A low-cost and high-quality provider is considered better value that would provide savings for both the insurer

and the patient. As such, without anticompetitive restrictions, insurers could "steer" their subscribers to such higher value providers by assigning them to a higher tier with lower copay to incentivize patients to choose them. Similarly, a narrow-network plan enables insurers to exclude higher-cost providers from the provider network offered to the insured.

B. How Are the Contract Terms Allegedly Anticompetitive?

In the Justice Department's case, it claimed that because Atrium was a dominant provider with more than 50% share of the relevant market in the Charlotte area,[3] it was considered a "must-have" provider,[4] which it leveraged to force insurers to enter one-sided, anticompetitive contracts. These contracts paid Atrium providers above market rates and prevented insurers from signaling these higher rates by restricting their ability to disclose the rates through non-disclosure agreements, or price secrecy provisions, as well as their use of steering and tiering. Specifically, Atrium's anti-steering clause required insurers to place Atrium at the lowest cost-sharing rate to avoid steering patients away from that network, while the anti-tiering clause required insurers to place Atrium in the most favorable tier of providers. At the same time, Atrium prevented insurers from allowing competing providers to use and benefit from similar tiering and steering mechanisms.[5] These prohibitions also stymied insurers that wanted to offer less expensive policies that had more limited provider networks. As both tiered networks and narrow-network plans were inhibited under Atrium's contracts, patients had little to no incentive to seek services from competing providers, even if they were cheaper, because their out-of-pocket costs would be the same. What's more, the price secrecy provisions also ensured that the insureds would not have access to information about the price and quality of Atrium's healthcare services compared to its competitors.[6] The collective use of these clauses also disincentivized

competitors from offering lower prices because the price reduction offered little to no competitive benefit, which ultimately led to price increases for patients from all providers.

II. Legal Arguments in Motion for Summary Judgment

The DOJ claimed that Atrium's use of anti-steering and anti-tiering clauses constituted unreasonable restraint of trade in violation Section 1 of the Sherman Act.[7] Proving a claim of unreasonable restraint of trade under the antitrust rule of reason standard requires a showing of anticompetitive effect from the anti-steering and anti-tiering provisions, either directly or indirectly.[8] Under the direct approach, evidence of increased prices, reduced output or quality, or interference with the competitive process constitute anticompetitive harm. Alternatively, plaintiffs can prove anticompetitive harm indirectly by showing (a) sufficient market power to harm competition, and (b) grounds for believing that the anti-steering restrictions could harm competition.[9]

The DOJ alleged anticompetitive harm via both direct and indirect methods in its complaint. Under the direct approach, the DOJ alleged that Atrium's anti-steering clauses resulted in actual anticompetitive harm in the form of higher out-of-pocket costs for Charlotte area patients. Alternatively, the DOJ also alleged anticompetitive harm under the indirect method, arguing that Atrium acted as a one-sided market provider of hospitals services in the relevant market of the sale of general acute care inpatient hospital services. In that market with a high entry barrier, Atrium had (a) sufficient market power with approximately 50% market share, and regardless of *how* or *why* the market power came into existence,[10] the substantial market power allowed it to (b) affect prices and harm competition in that market.

Atrium moved for summary judgment on the pleadings to dismiss the case, arguing that the DOJ complaint failed to show actual competitive harm. DOJ countered that the anticompetitive clauses discouraged competition and restricted options for consumers and that "interference with the competitive process is actual competitive harm." However, Atrium's primary defense for its anti-steering contract use hinged on another anti-steering case in the non-healthcare context involving American Express (hereinafter *Amex*). Atrium heavily relied on the Second Circuit interpretation in that case[11] – later affirmed by the Supreme Court[12] – which rejected many of DOJ's arguments and muddied the usual antitrust analysis.

The *Amex* case stemmed from the DOJ's 2010 challenge of similar anti-steering provisions used in the credit card industry. The suit alleged that American Express, Visa, and MasterCard used contract provisions that prohibited merchants from incentivizing customers to use other competing credit cards with lower merchant fees.[13] After Visa and MasterCard settled, the District Court for the Eastern District of New York held in favor of the DOJ against American Express and found such provisions to be non-price vertical restraints that imposed actual harms on competition. On Appeal, the Second Circuit reversed the decision, upholding the anti-steering contract provisions as not inherently anticompetitive.[14]

A. Market Definition in "Two-Sided" Market

1. Atrium Argument: Market Was Too Narrowly Defined to Evaluate Anticompetitive Effect

In *Amex*, the Second Circuit found that because the credit card market is "two-sided," the lower court had defined the relevant market too narrowly to focus on only one side of the market in evaluating harm. Specifically, the Second Circuit opined that the upstream market, between card networks and merchants, is highly dependent on the downstream market, between merchants and cardholders, as "cardholders benefit

from holding a card only if that card is accepted by a wide range of merchants, and merchants benefit from accepting a card only if a sufficient number of cardholders use it."[15] In other words, the court faulted the DOJ for focusing only on the anticompetitive harm to merchants (upstream market) while ignoring the interests of cardholders (downstream market). As the DOJ had failed to account for effects in the downstream market, it was insufficient to show anticompetitive effect to the market as a whole.

Atrium applied the same reasoning to the healthcare market, arguing that the upstream merchant market in *Amex* is analogous to the relationship between hospitals and insurers, while the downstream cardholder market is analogous to the relationship between insurers and subscribing patients. As it did in *Amex*, the DOJ argued the relevant market should be limited to the upstream market, here between hospitals and insurers, disregarding the downstream side of insurers and patients.

2. DOJ Argument: Two-Sided Market in Amex is Inapplicable

The DOJ argued that the healthcare market is distinguishable from the credit card industry. Specifically, in Atrium, "the relevant market is the sale of general acute care inpatient hospital services to insurers," in which Atrium acts as a one-sided market provider of hospitals services.[16] As stated in the complaint and reemphasized in DOJ's reply brief to Atrium's motion to dismiss, "CHS is the vendor of hospital services, and insurers and their insured customers are purchasers of CHS' services." As such, it is not a two-sided platform like *Amex* and therefore the Second Circuit ruling does not apply in this case.

The question of when so-called "two-sided markets" call for analysis of combined effect of transactions involving two markets and the standards for analyzing antitrust harm in such markets remained contentious throughout the litigation process

in Atrium and sparked many concerns among industry groups and antitrust experts. Following the Supreme Court decision in *Amex*, multiple expert analyses attacked its underlying reasoning as well as distinguished it in the healthcare context (see discussion in section IV below).

B. Indirect Anticompetitive Harm from Market Power

1. Atrium Argument: Market Share and Customer Loyalty is Insufficient to Show Market Power

In its motion to dismiss, Atrium also challenged DOJ's method of proving anticompetitive harm indirectly based on a showing of market power by relying on the Second Circuit decision in *Amex*, which found no indirect anticompetitive harm from market power. That decision held that to prove violation of Section 1 of the Sherman Act indirectly from an allegation of market power, the plaintiff must show that the restrictions are either inherently anticompetitive or that they could harm competition in some way. In other words, an allegation of market power solely on the basis of market share, barriers to entry and consumer loyalty is not enough. The opinion reasoned that because "cardholder insistence," or customer loyalty to American Express is a result of more attractive rewards offered to cardholders, it is not evidence of market power from market share. Atrium used the same line of reasoning in its argument, claiming that its premium pricing does not show competitive harm because, like American Express, its market power derives from customer loyalty based on the quality of the services it provides.

2. DOJ Argument: Atrium Had Sufficient Market Power as Dominant Provider to Harm Competition

While the DOJ did not dispute the 2-prong legal standard for asserting indirect competitive harm as used in *Amex*, it did take issue with the Second Circuit finding that customer insistence refuted the existence of market power. Following

the 2-prong approach, DOJ asserted that it has adequately pleaded that (a) Atrium has market power sufficient to harm competition and (b) grounds for believing that the anti-steering restrictions could harm competition.[17] In *Amex*, however, the court turned on the analysis of "cardholder insistence," which was used to infer additional market power because American Express had only 26% market share. The DOJ attacked the Second Circuit ruling that customer insistence supports a *lack* of market power as erroneous. The DOJ argued that it doesn't matter *how* or *why* the market power came into existence, only that it exists and can affect prices in the relevant market. In other words, "if a defendant possesses the ability 'to raise prices above those that would be charged in a competitive market,' it has market power."[18] In this case, the DOJ was quick to point out that Atrium is a dominant provider with approximately 50% market share in a market with high entry barrier. This high market share alone sufficiently establishes market power and resulting market leverage, without an analysis of customer insistence.

C. Balance of Procompetitive Interest vs. Actual Anticompetitive Harm

1. Atrium Argument: Anti-steering Provisions Serve Legitimate Interest

Under the antitrust rule of reason analysis, a claim of unreasonable restraint of trade can be shown only when anticompetitive harm outweighs the procompetitive interest upon a balancing of harm and benefits of the challenged conduct. In other words, defendants can rebut inferences of anticompetitive effects with evidence of procompetitive effects or efficiency benefits to the market. In *Amex*, the Second Circuit focused on how American Express as a credit card company has a legitimate interest in preventing steering to protect the benefit of its bargain with merchants. The opinion reasoned that merchants get the benefit of attracting American Express cardholders, in exchange for agreeing not to

encourage customers to use competing credit cards.

Atrium analogized the alleged benefits to American Express cardholders to similar benefits accruing to policyholders who use Atrium's services. Atrium asserted that its anti-steering provisions protect the benefit of its bargain with insurers such that they allow for favorable rates to the insurers in exchange for their agreement to not steer patients to other competing providers. As such, enjoining such provisions "would reduce, rather than enhance, [Atrium's] ability to discount its pricing."[19]

Additionally, on the other side of balancing scale, Atrium argued the Second Circuit decision shows that direct competitive harm must be proven using facts showing that the provisions have caused increased prices, reduced output, and reduced quality, which it claimed the DOJ has not shown.

2. DOJ Argument: Anticompetitive Harm Requires Fact-Specific Analysis

The DOJ contended whether the procompetitive interest outweighs the anticompetitive harm turns on a fact-specific analysis. Additionally, in response to Atrium's assertion that the government must plead actual competitive harm, the DOJ said it had done so, pointing to its allegations that Charlotte area patients incurred higher premiums and out-of-pocket costs for their health care. Specifically, "individuals and employers in the Charlotte area pay higher prices for health insurance coverage, have fewer insurance plans from which to choose, and are denied access to consumer comparison shopping and other cost-saving innovative and more efficient health plans that would be possible if insurers could steer freely."[20] Whether these facts are true, and can outweigh any procompetitive interests, the DOJ contended, is not a contest for the pleading stage, but requires extensive discovery and trial.

III. District Court Agrees with DOJ and Distinguishes *Amex* Decision in Motion for Summary Judgment

The motion for summary judgment to dismiss the action was heard in March 2017. Taken together, Atrium argued that the Second Circuit decision demonstrated that the court must fully analyze effects of the anti-steering provisions on the market as a whole, taking into consideration all the competitive dynamics in the market. The DOJ, in its reply brief, argued that not only was *Amex* wrongly decided by the Second Circuit, it is simply inapplicable to the issues before the court in Atrium's motion for summary judgment. Additionally, the DOJ brief pointed out that Atrium incorrectly argued that "*Amex* gave a blanket endorsement to steering restrictions, thereby allowing a district court to reject a Section 1 steering restriction case as a matter of law."[21] At the same time, Atrium also wrongly asserted that the DOJ has alleged that all restrictions on steering are inherently anticompetitive. Consequently, the court's decision must turn on the facts of the case which calls for a substantive analysis and trial of the facts, particularly as Atrium's steering restrictions "involve different contractual language in a different industry that presents different competitive considerations."

The District Court for the Western District of North Carolina agreed with the DOJ and denied Atrium's motion to dismiss, allowing the case to proceed. To begin with, the court agreed that the standards for review in the two cases are entirely different. In Atrium, the court was asked to determine whether the pleadings are sufficient to state a claim (a Rule 12(c) motion[22]), while Second Circuit in *Amex* considered facts of the case on the merits after a lengthy evidentiary discovery and seven-week bench trial. More importantly, the federal court rejected Atrium's argument for blanket application of the Second Circuit decision to the instant case, distinguishing *Amex* as involving credit cards that are an

entirely "different product and a different market" from health care. Specifically, the court noted the *Amex* opinion does not speak to whether customer insistence in the context of health care is evidence of market power. Similarly, the procompetitive analysis of *Amex*'s anti-steering provisions is "deeply rooted in the details and dynamics of the credit-card industry, using specific hypothetical examples from that industry."[23]

Noting that in the healthcare context, the court must consider "facts peculiar to the health care industry, the effect of the activities on health providers, and the impact of the activities on costs to the ultimate consumer,"[24] the court agreed with the DOJ's argument that "CHS overreaches when it attempts to use *Amex*'s resolution of fully-litigated issues pertaining to the credit-card industry as a template for this Court to review the adequacy of Plaintiffs' allegations."[25]

IV. Supreme Court *Amex* Decision and Analysis Widely Debated

Despite the lower court's refusal to toss out the case on summary judgment based on the *Amex* analysis, it also acknowledged that Atrium "has raised serious and robust questions about the purposes, effects, and legality of its contractual steering restrictions and steering restrictions generally, but those questions are best resolved after the benefit of discovery."[26] As such, the case still hung by a thread, with the potential application of the Second Circuit *Amex* decision, though not legally binding, looming in the background. Then came the Supreme Court decision in June 2018, which upheld the Second Circuit in a 5-4 ruling, threatening to throw a significant wrench in the Atrium case as binding authority.

The crux of the Supreme Court opinion affirming the Second Circuit decision is the holding that requires detailed

analysis of markets and competitive effects for transactions in a two-sided market. In certain circumstances, the Court held, the relevant market includes both sides of a platform as a single unit, and that courts must analyze the anticompetitive effect on both sides of the platform. Applying this new standard, the Supreme Court found there was insufficient evidence that American Express' anti-steering provisions had a substantial anticompetitive effect on the credit card market as a whole. As summarized in the opinion: "[The plaintiffs] have not carried their burden of proving that Amex's antisteering provisions have anticompetitive effects… Their argument—that Amex's antisteering provisions increase merchant fees—wrongly focuses on just one side of the market. Evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power. Instead, 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 two-sided credit-card market. They failed to do so."[27]

This ruling leaves the standard of market analysis in healthcare steering cases up for debate. However, the applicability of *Amex* falters in terms of both its underlying rationale and potential analogy to the health insurance context.

A. Divided Court and Antitrust Experts Say the Ruling Is Wrongly Decided

The *Amex* decision spawned an outpouring of criticism from antitrust experts arguing that the case was wrongly decided. They expressed concern that this new analysis standard essentially makes it more difficult to prove an antitrust violation in any industry with a similar platform setup, as companies engaged in anticompetitive behavior can escape antitrust enforcement as long as they can prove some benefit

to parties on either side of the transaction. The divided court expressed similar misgivings, as Justice Breyer pointed out in a strong dissenting opinion joined by Justices Ginsburg, Sotomayor, and Kagan, that under the majority's erroneous reasoning, virtually any market could be identified as two-sided, potentially allowing unchecked monopoly power in a range of industries.

More specifically, antitrust experts attacked the core economics of the Supreme Court's logic. In a recently published article, antitrust scholar Herbert Hovenkamp contended that the court "lost sight of the fact that coherent economic analysis of any antitrust issue requires assessment of marginal rather than total effects,"[28] and erroneously assumed that harm on one side of the platform could be offset by benefits on the other side of the market, which does not hold true in every situation.[29] Moreover, even if the market were defined as including both sides in *Amex*, the anti-steering provision actually harmed both merchants and cardholders, who were affected because they would have switched to competing credit cards absent the restriction.

Additionally, regarding the finding of market power, Hovenkamp points to Justice Breyer's dissent that the majority's opinion erroneously rested on the market definition requirement.[30] According to the majority opinion, the definition of the relevant market must be established in a vertical restraint case to determine the existence of market power, even under the direct method approach of proving anticompetitive harm. The dissent argued, however, the need to define a relevant market to determine market power and demonstrate anticompetitive impact only exists as an alternative, indirect mechanism when the anticompetitive effect is not already clearly present.[31] In the case of American Express, direct measures of its conduct indicated significant market power, eliminating the need for indirect measurement of power from market share, and thus rendering the dispute regarding the

proper market definition of a two-sided platform moot. Applied similarly to Atrium, direct measures of Atrium's conduct indicated significant market power and anticompetitive harm in the form of higher premiums and out-of-pocket costs for Charlotte area patients. These findings should satisfy the direct approach and effectively eliminate the need for indirect measurement of market power from market share and relevant market definition.

B. *Amex* Analysis Is Inapplicable to Atrium and the Healthcare Context

The controversial two-sided market analysis also spurred a wave of speculation that the landmark decision could adversely impact healthcare price and competition when applied to the healthcare industry, which at first blush, could also be seen as a two-sided market, in which the relationship between hospitals and insurers is analogous to the upstream merchant market in *Amex*, while the relationship between insurers and subscribing patients is analogous to the downstream cardholder market.[32] The American Medical Association (AMA) expressed concern that the new antitrust analysis that assesses benefit and harm to the entire market instead of the effect on the individual patient could result in unjust denial of insurance referrals.[33]

However, not only is the two-sided market rationale of *Amex* widely disputed, it is distinguishable and inapplicable to the healthcare context. Specifically, the Supreme Court in *Amex* limited the scope of its ruling to platforms involving a simultaneous one-on-one transactions, such as credit card networks. According to Hovenkamp, this effectively excludes markets where the relationship between the transactions is actuarial, "where the buyer and seller do not engage in simultaneous transactions on a per-service basis," which would include health insurance networks.[34]

As such, even under the market definition analysis required by

Amex, Atrium is not subject to an analysis of the combined effect of transactions involving two markets, as its relevant market is not two-sided. Instead, the usual antitrust standard applies in Atrium, under which the use of anti-steering and anti-tiering clauses should be evaluated only for their effect on the relevant one-sided market of the sale of general acute care inpatient hospital services to insurers.[35]

V. Atrium Agrees to Settlement that Prohibits Anti-steering/Anti-tiering Clauses

Perhaps aware of all this critique and taking into consideration the uncertainty of whether *Amex* could be applied in the healthcare setting, the case settled out of court in November 2018, a mere five months after the Supreme Court decision in *Amex*. The terms of the settlement agreement were favorable to the DOJ and prohibited Atrium from using or enforcing anti-steering or anti-tiering provisions in its contracts with insurers. The ultimate settlement in this case is particularly important in light of the *Amex* decision. It signals that the analysis of anti-steering provisions in *Amex*, regardless of its questionable rationale, is sufficiently distinguishable from the analysis necessary to evaluate the use of anti-steering provisions in healthcare markets. The fact that the parties settled after the Supreme Court decision indicates that *Amex* does not spell a free pass for steering in healthcare cases and should not be a barrier to future antitrust challenges to anti-tiering or ant-steering provisions involving dominant health systems.

As the use of anti-tiering and anti-steering practices in healthcare becomes more widely known, resulting from both the Atrium case and the recent case against Sutter Health in California, there is a push for more antitrust enforcement against anticompetitive contracting practices both at the federal and state level. Senate Judiciary Committee Chairman

Chuck Grassley sent a letter in 2018 urging the Federal Trade Commission to investigate secret contracts between hospital systems and insurers to block competition. In 2019, Congress introduced the Lower Health Care Costs Act of 2019 (S.1895), which would ban anticompetitive contracting practices including anti-tiering or anti-steering provisions, except within value-based arrangements. Regardless, the outcome in this case serves as encouragement for state and federal antitrust regulators to more carefully scrutinize provider and insurer contracts that may limit competition and drive up healthcare costs.

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[1] *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).

[2] *United States v. The Charlotte-Mecklenburg Hospital Auth.*, No. 3:16-cv-00311 (W.D.N.C. 2016).

[3] Department of Justice Complaint at 2, *United States v. Charlotte-Mecklenburg Hosp. Auth.*, No. 3:16-cv-00311 (W.D.N.C. 2016) [hereinafter DOJ Complaint].

[4] Id. at 7.

[5] Id. at 4.

[6] Id.

[7] 15 U.S.C. § 1.

[8] Plaintiffs' Opposition to Defendant's Rule 12(c) Motion for Judgment on the Pleadings at 8, *United States v. Charlotte-Mecklenburg Hosp. Auth.*, 248 F. Supp. 3d 720, 724 (W.D.N.C. 2017).

[9] Plaintiffs' Response to Defendant's Supplemental Briefing on *United States v. American Express* at 8, *United States v.*

The Charlotte-Mecklenburg Hospital Auth., W.D.N.C., No. 3:16-cv-00311 (October 25, 2016).

[10] *Id.* at 9.

[11] *United States et al. v. American Express Co.*, 838 F.3d 179 (2d Cir. 2016) [hereinafter *Amex* Second Circuit Opinion].

[12] *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) [hereinafter *Amex* Supreme Court Opinion].

[13] *Amex* Second Circuit Opinion.

[14] Id.

[15] Id. at 185-86.

[16] Plaintiffs' Response to Defendant's Supplemental Briefing on *United States v. American Express* at 5, *United States v. The Charlotte-Mecklenburg Hospital Auth.*, W.D.N.C., No. 3:16-cv-00311 (October 25, 2016).

[17] *Id.* at 8.

[18] *Id.* at 9.

[19] Answer to Complaint, *United States v. The Charlotte-Mecklenburg Hospital Auth.*, W.D.N.C., No. 3:16-cv-00311 (August 8, 2016).

[20] Order Re Defendant's Motion for Judgment on the Pleadings at 11, *United States v. The Charlotte-Mecklenburg Hospital Auth.*, W.D.N.C., No. 3:16-cv-00311 (March 30, 2017).

[21] Plaintiffs' Response to Defendant's Supplemental Briefing on *United States v. American Express* at 5, *United States v. The Charlotte-Mecklenburg Hospital Auth.*, W.D.N.C., No. 3:16-cv-00311 (October 25, 2016).

[22] Federal Rule of Civil Procedure 12(c).

[23] *Id.* at 18.

[24] *Id.* at 13.

[25] Plaintiffs' Response to Defendant's Supplemental Briefing on *United States v. American Express* at 4.

[26] Order Re Defendant's Motion for Judgment on the Pleadings at 14, *United States v. The Charlotte-Mecklenburg Hospital Auth.*, W.D.N.C., No. 3:16-cv-00311 (March 30, 2017).

[27] *Amex* Supreme Court Opinion at 2-3.

[28] Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, U of Penn, Inst for Law & Econ Research Paper No. 20-15 (January 30, 2020), Available at SSRN: https://ssrn.com/abstract=3508832.

[29] Id.

[30] Id. at 29.

[31] *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) (Breyer, J., dissenting).

[32] Marcia Boumil et al., *Will Insurance Companies Be Able to "Steer" Patients To And From Providers?*, Health Affairs Blog (July 31, 2018). Available at: https://www.healthaffairs.org/do/10.1377/hblog20180727.397022/full/.

[33] Brief of Amici Curiae The American Medical Association and Ohio State Medical Association in Support of Petitioners, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

[34] Hovenkamp, Herbert J., Platforms and the Rule of Reason: The *American Express* Case, 2019 Colum. Bus. L. Rev.. 35 (2019).

[35] Plaintiffs' Response to Defendant's Supplemental Briefing on *United States v. American Express* at 5, *United States v.*

The Charlotte-Mecklenburg Hospital Auth., W.D.N.C., No. 3:16-cv-00311 (October 25, 2016).