

The Four-Step Rule of Reason

BY MICHAEL A. CARRIER

PITY THE RULE OF REASON. The framework employed in the majority of antitrust cases is frequently discussed but continually misunderstood. It is associated with balancing, but its burden-shifting framework almost never reaches that stage. It is called indeterminate, but its analysis is not. And now—thanks to the Ninth Circuit, with an assist from the Supreme Court—it is kneecapped, with balancing extricated from its framework.

Courts employ the rule of reason to assess a restraint's effects on competition. Commentators have recently debated the predictability and appropriate structure of the analysis. But as these nuances have been fleshed out in the literature, courts appear to have lost sight of first principles—the jurisprudence, purpose, and analytical basis of the rule of reason. This oversight was most recently illustrated by the Ninth Circuit in *NCAA v. O'Bannon*¹ and the Supreme Court in *Ohio v. American Express*.² These detours threaten potential consequences of reduced clarity, unreasonable burdens on plaintiffs, and outcomes that lack the critical weighing of competitive effects at the heart of the rule of reason.

The rule of reason has four steps, not three. This article confirms this basic, but important, point. Faithful application of the fourth step in a disciplined manner is consistent with antitrust history and necessary to effectuate the principles underlying standard antitrust analysis. It does not make sense to ask courts to assess a restraint's effects on competition while taking away the option of balancing anticompetitive and procompetitive effects.

Background and Analytical Framework of the Rule of Reason

Courts analyzing agreements under antitrust law typically apply one of two modes of scrutiny: “per se” illegality or the rule of reason.³ Some offenses (like price fixing, bid rigging,

and market division) are considered inherently anticompetitive and deemed automatically illegal without any scrutiny of actual competitive effects. In contrast, the vast majority of agreements are considered under the rule of reason.

The rule of reason is famously traced to *Chicago Board of Trade v. United States*, in which the Supreme Court called for a comprehensive analysis that considers

the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable[, as well as] [t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained.⁴

As discussed below, although courts applying the rule of reason often cite this recitation, the analysis they apply is far different than such a “kitchen sink” approach.

For much of the mid-20th century, antitrust courts applied per se rules. That changed in the 1970s with the introduction of economic analysis. In particular, application of the rule of reason began in earnest in 1977 when the Supreme Court decided *Continental T.V. v. GTE Sylvania*.⁵ In that case, the Court overturned previous courts' emphasis on whether a manufacturer had passed title to a product to the dealer—holding vertical restraints (occurring at different levels of the distribution chain) per se illegal if title had passed, but analyzed under the rule of reason if it had not.⁶ The *Sylvania* Court recognized the complex effect of vertical restraints on competition, focusing on the competitive effect between brands, in other words, “interbrand” competition.⁷

Two decades ago, I showed that the rule of reason is far less amorphous—and less reliant on balancing—than commonly believed. Based on a review of all 495 rule of reason cases decided between 1977 and 1999, I showed that courts typically followed a burden-shifting approach. First, the plaintiff must show a significant anticompetitive effect, typically in the form of a price increase, output reduction, or market power.⁸ The plaintiff's failure to establish this element led to dismissal of 84 percent of the cases.⁹ Second, the burden shifts to the defendant to demonstrate a legitimate procompetitive justification. Defendants' failure to satisfy this burden led to invalidation of the restraint in 3 percent of the cases.¹⁰ Third, if the defendant successfully makes this showing, the burden shifts back to the plaintiff to demonstrate that the restraint is not reasonably necessary to achieve the restraint's objectives

Michael A. Carrier is Distinguished Professor at Rutgers Law School. He would like to thank Claire Newsome for excellent research assistance. Parts of this article are adapted from Michael A. Carrier, How Not to Apply the Rule of Reason: The O'Bannon Case, 114 MICH. L. REV. FIRST IMPRESSIONS 73 (2015), and Michael A. Carrier & Christopher L. Sagers, O'Bannon v. National Collegiate Athletic Ass'n: Why the Ninth Circuit Should Not Block the Floodgates of Change in College Athletics, 71 WASH. & LEE L. REV. ONLINE 299, 305-06 (2015).

or that the defendant's objectives could be achieved by less restrictive means. At most, 1 percent of the cases were dismissed at this stage.¹¹ Fourth, the court balances the restraint's anticompetitive and procompetitive effects, which occurred in 4 percent of the cases.¹²

I updated my 1999 study in 2009, finding that the burden-shifting trend that resulted in the quick disposal of cases continued and, in fact, accelerated. Between 1999 and 2009, courts dismissed 97 percent of cases at the first stage, reaching the balancing stage in only 2 percent of cases.¹³

Courts confront a challenging task when assessing a restraint's anticompetitive and procompetitive effects. They typically are required to define markets, quantify competitive effects, and balance different types of competitive harm and procompetitive synergies. In this regard, the four-part framework provides a practical approach that can simplify the antitrust analysis, enabling courts to dispose of many cases without needing to address some of the complexities implicated by the complete four-step analysis. Courts should balance the apples of anticompetitive effects against the oranges of procompetitive justifications only when absolutely necessary to reach the correct outcome. If the plaintiff cannot show an anticompetitive effect, the court need not proceed further since there cannot be an antitrust violation. And after the plaintiff shows such an effect, a defendant unable to show a legitimate justification should not emerge victorious.

Some commentators have claimed that the rule of reason is amorphous, "embrac[ing] antitrust's most vague and open-ended principles [and] making prospective compliance with its requirements exceedingly difficult."¹⁴ But careful analysis of courts' application of burden-shifting and decision-making in rule of reason cases demonstrates that this is not true. In fact, the courts dispose of the vast majority of cases at the first stage because the plaintiff cannot show an anticompetitive effect.

A Four-Stage Analysis in Principle and Practice

The majority of courts to apply the rule of reason have described the analysis as involving balancing, most typically through the four-step framework described above.¹⁵ Some courts, in contrast, have articulated a three-step analysis that does not include balancing. They have described a third stage in which the "plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective."¹⁶ Or they have stated that the plaintiff "must prove that any legitimate competitive effects could have been achieved through less restrictive alternatives."¹⁷ Many of the courts describing a three-stage framework have nonetheless also articulated an additional—unnumbered—stage in which the factfinder engages in the "ultimate" test of whether the restraint is anticompetitive or procompetitive.¹⁸

More important than courts' characterization of the analytical framework are the analyses they actually apply. On this issue, the critical cases are those that survive the first two stages. If there is no anticompetitive effect or procompetitive

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justification, the court's recitation of the framework (as an indicator of analysis in later stages) is only dicta. But where the analysis proceeds beyond the first two stages, the framework has the most direct effect.

In the modern era (since 1977), 28 cases that involved application of the burden-shifting framework have made it past the second stage.¹⁹ These cases could potentially take one of three forms. In the first, the court finds, in the third stage, that the plaintiff shows that there is a less restrictive alternative or lack of reasonable necessity and therefore concludes that the plaintiff wins. This happened in one recent case.²⁰ In the second scenario, the court, reaching the final stage, balances anticompetitive and procompetitive effects. This happened in 25 cases.²¹ In the third setting, the plaintiff fails to show a less restrictive alternative or lack of reasonable necessity, and the court finds that the plaintiff loses. This variation (2 cases²²) is the most concerning because the plaintiff—on penalty of losing its case—is saddled with the burden of making a showing that should be sufficient but not necessary. In other words, satisfying the requirements of the third stage is *sufficient* for the plaintiff to win outright since it can show that the defendant can achieve its goals in a manner less restrictive of competition. But such a showing is not *necessary* since a plaintiff, even without showing a less restrictive alternative, could still show that a restraint's anticompetitive effects outweigh its procompetitive justifications.

In particular, courts in this third setting have not recognized that the effect of a failure to make the showings required at the different stages varies. If the plaintiff cannot show an anticompetitive effect, it loses because there is no harm to competition, and if the defendant cannot show a procompetitive justification, it loses because it cannot offer a competitive reason for the restraint. In contrast, if the plaintiff does not show that the restraint is not reasonably necessary or that there are less restrictive alternatives, it should not lose, but the case should proceed to balancing.²³ A plaintiff's showing at this stage should allow it to win the case outright, avoiding a balancing analysis. After all, if the plaintiff could show that the restraint is not reasonably necessary to attain the defendant's objective, it should be struck down. And if there is an alternative that is less restrictive of competition but that would still allow a defendant to achieve its objective, then that alternative should be used. Until recently, there was only one case that punished the plaintiff for not satisfying the third stage.²⁴

The antitrust detour prompted by *O'Bannon* and Amex raises at least three concerns. First, it is not consistent with the analytical underpinnings of antitrust law.

In *Hairston v. Pacific 10 Conference*, the Ninth Circuit reviewed the application of the rule of reason to assess an athletic association's imposition of sanctions on a university that had committed violations in recruiting football players.²⁵ Under the first prong, the court found that the university's inability to participate in bowl games cleared the threshold of anticompetitive effect. Applying the second prong, the court found that the punishment of football programs that violated the conference's amateurism rules had procompetitive benefits. Next, the court concluded that the plaintiffs failed to show that "the [association's] procompetitive objectives could be achieved in a substantially less restrictive manner."²⁶

Although the plaintiff lost because it failed to satisfy the third stage, it is questionable whether there even was an anticompetitive effect given the court's failure to define the scope of the market and to find any adverse effect on competition, as opposed to one competitor.²⁷ In addition, the court's discussion of less restrictive alternatives raises red flags in not examining whether a less restrictive alternative would have promoted the defendant's goals and in focusing on the plaintiffs' failure to provide evidence supporting their claim of disproportionate penalties (which did not address other alternatives).²⁸

In the more than two decades since the decision, the *Hairston* court's dismissal on the grounds that the plaintiff could not prove a less restrictive alternative has not been followed. Even though the case offered an example of a court erroneously applying the third stage, such a mistake has not been followed by other courts. In contrast, in *NCAA v. O'Bannon*,²⁹ the Ninth Circuit recently offered a more concerning ruling that most likely affected the case's outcome and—not least because of the pending *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation (Alston)* case brought by former student athletes in the Northern District of California³⁰—could have more significant coattails.³¹

O'Bannon Omission

The *O'Bannon* case involved former UCLA basketball star Ed O'Bannon's challenge to NCAA rules preventing student-athletes from receiving compensation when their name, image, or likeness (NIL) was used in videogames or live game telecasts.³² The NCAA claimed that these restrictions were essential to amateurism.

Affirming the lower court, the Ninth Circuit found an anticompetitive effect, as the NCAA's compensation rules

"fix the price of one component of the exchange between school and recruit," which "preclud[es] competition among schools with respect to that component."³³ The court found that "[t]he athletes accept grants-in-aid, and no more, in exchange for their athletic performance, because the NCAA schools have agreed to value the athletes' NILs at zero, 'an anticompetitive effect.'"³⁴ Such an anticompetitive effect "satisfied the plaintiffs' initial burden under the Rule of Reason."³⁵

The burden then shifted to the NCAA to offer procompetitive justifications. The Ninth Circuit upheld the district court's rejection of two proffered justifications (promoting competitive balance among NCAA schools and increasing output in the college education market) and found that the association's rules "play a limited role" in integrating student-athletes into their schools' academic community.³⁶ The court then turned to the NCAA's final defense, concluding that "the district court probably underestimated the NCAA's commitment to amateurism."³⁷ But the lower court had conducted the most exhaustive trial examining the defense, which resulted in its conclusion that the amateurism rules were "malleable" and had changed "numerous times."³⁸

In reviewing the amateurism defense, the Ninth Circuit observed the presence of anticompetitive and procompetitive effects and then "turn[ed] to the *final inquiry*—whether there are reasonable alternatives to the NCAA's current compensation restrictions."³⁹ The court upheld one alternative proffered by the plaintiffs: the increased compensation student-athletes could receive by allowing payment not just of a "grant-in-aid" (tuition and fees, room and board, and required books) but of the "cost of attendance" (additionally including nonrequired books, transportation, and other attendance-related expenses).⁴⁰

The court, however, vacated the district court's judgment and injunction relating to the second alternative: a \$5,000 payment paid to student-athletes after leaving college because "the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market."⁴¹ In doing so, the Ninth Circuit refused to defer to the district court, which had found—based on testimony from multiple experts, including three offered by the NCAA, and with "no evidence to the contrary"⁴²—that "limited payments to student-athletes above the cost of attendance would not harm consumer demand for the NCAA's product."⁴³ In disregard of this finding, the Ninth Circuit asserted that it is not "equally effective in promoting amateurism and preserving consumer demand" to have a rule allowing schools to "pay students pure cash compensation" as one "forbidding them from paying NIL compensation."⁴⁴ The Ninth Circuit therefore vacated the portion of the district court's decision (and injunction) requiring the NCAA to allow its schools to pay this compensation.

After dismissing this less restrictive alternative, the Ninth Circuit short-circuited the analysis by rejecting the challenge to the NIL rules instead of balancing the anticompetitive and

procompetitive effects. This neglect of balancing was not consistent with case law in the jurisdiction.⁴⁵ In fact, the court ignored controlling precedent in the same rule of reason posture. In *County of Tuolumne v. Sonora Community Hospital*,⁴⁶ the plaintiff showed an anticompetitive effect, the defendant followed with a justification, the plaintiff then “failed to meet [its] burden of advancing viable less restrictive alternatives,” and (relying for support on the authoritative antitrust treatise) the court then “reach[ed] the balancing stage.”⁴⁷

In short, the court punished the plaintiff for not showing a less restrictive alternative and ignored the balancing stage of the analysis. If it had proceeded that far, the plaintiff likely would have won. A full analysis would have found potent anticompetitive effects and flimsy procompetitive justifications. Supporting this conclusion, the district court found that “consumer demand . . . is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography.”⁴⁸ In fact, amateurism “play[s] a limited role in driving consumer demand” for college sports that “[could] not justify the rigid prohibition on compensating student-athletes . . . with any share of licensing revenue.”⁴⁹

Amex Exacerbation

More recently, the Supreme Court continued down the path of erasing balancing in *Ohio v. American Express*.⁵⁰ In that case, the Court addressed American Express’s “antisteering” rules, which “prohibit[ed] merchants from discouraging customers from using their Amex card after they . . . entered the store and [we]re about to buy something, thereby avoiding Amex’s fee.”⁵¹ The plaintiffs alleged that these agreements prevented merchants from using steering to “encourag[e] customers to use less expensive” or otherwise preferred cards and removed networks’ incentives to reduce fees.⁵² The Court found that the plaintiffs failed to show an anticompetitive effect, as any effect on merchant fees “focuses on only one side of the two-sided credit card market,” and plaintiffs failed to show that Amex’s 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.”⁵³

Because the case was decided at the first stage, the Court’s discussion technically was dicta. But as Supreme Court dicta, it could be influential. And the three-part analysis it articulated omitted balancing. The Court stated that “the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market.”⁵⁴ Second, “[i]f the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint.”⁵⁵ And finally, “[i]f 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.”⁵⁶

The court cited three sources for its rule of reason framework. Of concern to its recitation, each of these three sources *explicitly includes balancing* in the analysis. In the first, *Capital Imaging Associates v. Mohawk Valley Medical Associates*, the Second Circuit followed the three-step framework with an unnumbered—but still critical—discussion of a fourth step: “Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior.”⁵⁷ The second source, the von Kalinowski treatise, articulated a final stage of analysis in which courts “determine[] whether the anticompetitive effects of the agreement actually outweigh those procompetitive effects for which the restraint is reasonably necessary.”⁵⁸ And third, the Areeda-Hovenkamp treatise makes clear that if the plaintiff cannot show a less restrictive alternative, “the harms and benefits must be compared to reach a net judgment whether the challenged behavior is, on balance, reasonable.”⁵⁹

The Court may have veered off course by following the parties, both of which had described a three-stage analysis with no final balancing of overall competitive effects.⁶⁰ But in its brief supporting petitioners, the Solicitor General, citing the leading treatise, correctly explained that “the plaintiff may prevail if it establishes that the restraint’s objective ‘can be achieved by a substantially less restrictive alternative’” and that the plaintiff’s “fail[ure] to make that showing” is followed by “the court . . . determin[ing] whether ‘the challenged behavior is, on balance, unreasonable.’”⁶¹ In any event, the parties’ misstatements of the law do not offer a reasonable basis on which to overturn decades of precedent and fundamentally change antitrust law.

Showing the difficulty of the three-step framework, Justice Breyer in dissent offered a different version. The first two steps mirrored those of the majority in asking whether the restraint “has had, or is likely to have, anticompetitive effects” and whether the defendant can show that “the restraint in fact serves a legitimate objective.”⁶² But the third step included balancing as part of the analysis, with Justice Breyer stating that the plaintiff could win by “showing that it is possible to meet the legitimate objective in less restrictive ways, or, perhaps by showing that the legitimate objective does not outweigh the harm that competition will suffer, i.e., that the agreement ‘on balance’ remains unreasonable.”⁶³

The two approaches offered by the Supreme Court raise significant concerns. The majority ignored balancing, even though that was an essential element of the rule of reason framework and was a central aspect of the cited opinion and treatises. And the dissent offered a third step that included disparate analyses of less restrictive alternatives and balancing.

Why It Matters

The antitrust detour prompted by *O’Bannon* and *Amex* raises at least three concerns. First, it is not consistent with the analytical underpinnings of antitrust law. With the exception of per se offenses, antitrust analysis of a range of conduct under Sections 1 and 2 of the Sherman Act and Section 7 of

the Clayton Act involves a consideration of anticompetitive and procompetitive effects. In merger review, the agencies consider anticompetitive effects (in the form of “enhance[d] market power” resulting from unilateral or coordinated effects) and procompetitive effects (in the form of efficiencies, which “may result in lower prices, improved quality, enhanced service, or new products).”⁶⁴ And in monopolization law, the D.C. Circuit’s influential burden-shifting framework in *United States v. Microsoft* explained that (1) a plaintiff must demonstrate an anticompetitive effect, (2) a defendant may respond with a procompetitive justification, and (3) the plaintiff (assuming it did not rebut the justification) “must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.”⁶⁵

Second, the omission of balancing is not consistent with courts’ application of the rule of reason. Since the dawn of the modern rule of reason in 1977 in *Sylvania*, courts have uniformly explained that the final step of the antitrust analysis involves balancing anticompetitive and procompetitive effects. Even the courts that describe a three-stage analysis often follow that with a discussion of the “ultimate” balancing stage. To simply remove the balancing step is not justified based on history.

Third, removal is not consistent with the policies underlying the rule of reason. Central to this framework is a court’s consideration of a restraint’s anticompetitive and procompetitive effects. It is hard to see how this can be done without, at some point, having the chance to directly consider the two. Of course, my empirical analyses showed that courts have disposed of the vast majority of cases at the first stage because the plaintiff failed to prove an anticompetitive effect. But for the cases with anticompetitive effects and procompetitive justifications, a nuanced consideration is required.

The shortcut presented in the third stage of the analysis allows courts to have their cake and eat it too. In other words, if the defendant could achieve its objectives through a restraint less restrictive of competition, there is no reason it should not do so. Nor in such a case would it be necessary to balance since the defendant should simply use the less-restrictive restraint. Similarly, if a plaintiff shows that a restraint is not reasonably necessary to achieve the defendant’s justification, then the restriction should not be employed.

But even if the plaintiff cannot show that the restraint is not reasonably necessary or that there is a less restrictive alter-

native, it still could show that the anticompetitive effects outweigh the procompetitive justifications. The defendant should not be exempt from antitrust liability just because the plaintiff is not able to show a less restrictive alternative.

One example of the dispositive effects that could result from omitting balancing was presented by *O’Banion*. In that case, the district court concluded that the NCAA’s “malleable” amateurism defense “[could] not justify the rigid prohibition on compensating student-athletes . . . with any share of licensing revenue.”⁶⁶ An exhaustive trial revealed significant anticompetitive effects and questionable procompetitive justifications, which should have resulted in the restraint being struck down. Truncating the analysis at the third stage just because the plaintiff did not hit a walk-off home run does not doom its case. It instead just requires courts to weigh the two sides.

A Modest Proposal

Several courts that have contemplated balancing specifically note three steps before the fact-finder “weigh[s] . . . the evidence at th[e] final stage.”⁶⁷ Such a formulation creates the possibility that the “ultimate” step is forgotten when the next court sees an analysis with “three” steps. That is exactly what the Supreme Court did in *Amex*, citing a Second Circuit decision that had articulated a three-stage framework followed by an “ultimate” fourth stage. Though this omission did not affect the case’s outcome, the extrication of balancing threatens to be detrimental in other cases. Treating this as a four-step framework solves these problems, ensuring that the ultimate balancing of anticompetitive and procompetitive effects is enshrined in the analysis and is not overlooked in a three-step inquiry.

Conclusion

The rule of reason has four steps. Perhaps because the analysis so rarely makes it to the fourth stage, the balancing part of the framework is sometimes forgotten. But it is an essential element of the rule of reason—in history, policy, and necessity. Just because a plaintiff cannot show a less restrictive alternative or lack of reasonable necessity does not mean it cannot show that a restraint’s anticompetitive effects outweigh its procompetitive justifications. Courts and commentators would be wise to remember the fourth step of the rule of reason. ■

¹ 802 F.3d 1049 (9th Cir. 2015).

² 138 S. Ct. 2274 (2018).

³ A third, limited category consists of a “quick look” rule of reason, in which the court presumes harm to competition in the absence of an anticompetitive effect. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 109–10 (1984).

⁴ 246 U.S. 231, 238 (1918).

⁵ 433 U.S. 36 (1977).

⁶ *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). See *Sylvania*, 433 U.S. at 52, 58–59.

⁷ 433 U.S. at 52 n.19.

⁸ See, e.g., *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993).

⁹ Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. REV. 1265, 1268 (1999).

¹⁰ *Id.*

¹¹ *Id.* at 1268–69.

¹² *Id.* at 1269.

- ¹³ Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827–28 (2009).
- ¹⁴ Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1379 (2009).
- ¹⁵ See *supra* notes 8–12 and accompanying text; see, e.g., *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).
- ¹⁶ *United States v. Brown Univ.*, 5 F.3d 658, 668–69 (3d Cir. 1993); see, e.g., *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 580 (E.D. Pa. 2004) (citing *Brown*).
- ¹⁷ *Ark. Carpenters Health & Welfare Fund v. Bayer AG (Cipro)*, 604 F.3d 98, 104 (2d Cir. 2010), as corrected (June 17, 2010); see, e.g., *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 245 (D. Conn. 2015) (citing *Cipro*).
- ¹⁸ See, e.g., *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018); *Metro. Intercollegiate Basketball Ass’n v. NCAA*, 337 F. Supp. 2d 563, 571 (S.D.N.Y. 2004).
- ¹⁹ In four cases, courts (without applying a burden-shifting framework) found for the defendant after it showed that the restraint was reasonably necessary to obtain its objectives. See, e.g., *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 767–72 (D. Del. 1981), *aff’d*, 691 F.2d 400 (3d Cir. 1982); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 971–72 (10th Cir. 1994); *Justice v. NCAA*, 577 F. Supp. 356, 382–83 (D. Ariz. 1983); *Gunter Harz Sports, Inc. v. United States Tennis Ass’n*, 511 F. Supp. 1103, 1117–21, 1124 (D. Neb.), *aff’d*, 665 F.2d 222 (8th Cir. 1981).
- ²⁰ *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 CW, slip op. at 90–98 (N.D. Cal. Mar. 8, 2019).
- ²¹ See *Carrier, supra* note 9, at 1276–79, 1281, 1283, 1284–87, 1289–92; *Carrier, supra* note 13, at 831–33.
- ²² See *infra* notes 25–49 and accompanying text.
- ²³ E.g., PHILLIP E. AREEDA & HERBERT HOVENKAMP, 7 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1507(c), at 385–86 (2d ed. 2003) (“If the plaintiff satisfies the burden of persuasion” on “showing that the restraint does not substantially serve the claimed legitimate objective or that the objective can be achieved (nearly?) as well by a significantly less restrictive alternative,” then “it prevails,” whereas if the plaintiff does not make this showing, the court must “weigh and balance the harm against the benefit”); see also *id.* ¶ 1507(a), at 382 (same); 1 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 12.02[1] (2d ed. 2017) (“Where the plaintiff does not demonstrate that an alternative, less harmful to competition, could achieve the same procompetitive effects, then the court will balance the procompetitive effects against the anticompetitive effects.”).
- ²⁴ In an opinion in which the court focused more on harm to consumers than applying a burden-shifting analysis, the Second Circuit found that there could have been anticompetitive effects from incentive agreements that awarded commissions or discounts to travel agencies and corporate customers for reaching certain sales thresholds but that the plaintiff failed to introduce an alternative restraint “that would achieve the same procompetitive effect.” *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 265 (2d Cir. 2001).
- ²⁵ 101 F.3d 1315, 1317 (9th Cir. 1996).
- ²⁶ *Id.* at 1319.
- ²⁷ *Id.*; see also *id.* at 1318 (stating that plaintiffs failed to show an anticompetitive effect).
- ²⁸ See *Carrier, supra* note 9, at 1338–39.
- ²⁹ 802 F.3d at 1049.
- ³⁰ Nos. 14-md-02541-CW, 14-cv-02758-CW, 2018 WL 1524005 (N.D. Cal. Mar. 28, 2018); see *NCAA Grain-in-Aid Cap Antitrust Litigation*, slip op. at 92, 101 (finding that plaintiffs demonstrated less restrictive alternatives to NCAA restrictions on non-cash, education-related benefits and correctly stating that “if no balancing were required at any point in the analysis, an egregious restraint with a minor procompetitive effect would have to be allowed to continue, merely because a qualifying less restrictive alternative was not shown”).
- ³¹ See Defendants’ Closing Brief at 56, *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-02541-CW (N.D. Cal. Nov. 10, 2018), ECF No. 1128 (in *Alston* briefing, defendants, relying on *O’Bannon* ruling, asserted that “[p]laintiffs’ failure to prove the availability of a less restrictive alternative should end the Court’s inquiry, as there is no fourth ‘balancing’ step”).
- ³² 802 F.3d at 1052, 1057.
- ³³ *Id.* at 1071.
- ³⁴ *Id.*
- ³⁵ *Id.*
- ³⁶ *Id.* at 1072.
- ³⁷ *Id.* at 1073.
- ³⁸ *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 986, 1000 (N.D. Cal. 2014).
- ³⁹ 802 F.3d at 1074 (emphasis added).
- ⁴⁰ *Id.* at 1054 n.3.
- ⁴¹ *Id.* at 1079.
- ⁴² *Id.* at 1083 (Thomas, C.J., concurring in part and dissenting in part).
- ⁴³ 7 F. Supp. 3d at 983.
- ⁴⁴ 802 F.3d at 1076. For a critique of the Ninth Circuit’s lack of deference to the lower court, see Michael A. Carrier, *How Not to Apply the Rule of Reason: The O’Bannon Case*, 114 MICH. L. REV. FIRST IMPRESSIONS 73, 80 (2015).
- ⁴⁵ See *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (“A restraint violates the rule of reason if [its] harm to competition outweighs its procompetitive effects.”); *Hairston v. Pac. 10 Conf.*, 101 F.3d 1315, 1319 (9th Cir. 1996) (factfinder “determines whether the restraint’s harm to competition outweighs [its] procompetitive effects”); *Bhan*, 929 F.2d at 1413 (final stage of analysis involves court’s “weigh[ing of] harms and benefits to determine if the behavior is reasonable on balance”).
- ⁴⁶ 236 F.3d 1148, 1160 (9th Cir. 2001).
- ⁴⁷ *Id.* (emphasis added).
- ⁴⁸ *O’Bannon*, 7 F. Supp. 3d at 1001.
- ⁴⁹ *Id.*
- ⁵⁰ 138 S. Ct. 2274 (2018).
- ⁵¹ *Id.* at 2280.
- ⁵² *Id.* at 2293.
- ⁵³ *Id.* at 2287–88.
- ⁵⁴ *Id.* at 2284.
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*
- ⁵⁷ 996 F.2d 537, 543 (2d Cir. 1993).
- ⁵⁸ 1 VON KALINOWSKI, *supra* note 23, § 12.02[1].
- ⁵⁹ 7 AREEDA & HOVENKAMP, *supra* note 23, ¶ 1502, at 398–99 (4th ed. 2017).
- ⁶⁰ Brief for the Petitioners and Respondents Nebraska, Tennessee, and Texas, *State of Ohio v. American Express Co.*, No. 16-1454, 2017 WL 6205796, at *27 (U.S. Dec. 7, 2017); Brief for Respondents American Express Co. & American Express Travel Related Services Co., *State of Ohio v. American Express Co.*, No. 16-1454, 2018 WL 481636, at *15 (U.S. Jan. 16, 2018).
- ⁶¹ Brief for the United States as Respondent Supporting Petitioners, *State of Ohio v. American Express Co.*, No. 16-1454, 2017 WL 6205804, at *22 (U.S. Dec. 7, 2017) (citation omitted).
- ⁶² 138 S. Ct. at 2291 (citation omitted).
- ⁶³ *Id.*
- ⁶⁴ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* ¶¶ 1, 10 (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.
- ⁶⁵ 253 F.3d 34, 59 (D.C. Cir. 2001).
- ⁶⁶ *O’Bannon*, 7 F. Supp. 3d at 1001.
- ⁶⁷ E.g., *U.S. Airways, Inc. v. Sabre Holdings Corp.*, No. 11 Civ. 2725 (LGS), 2017 WL 1064709, at *16 (S.D.N.Y. Mar. 21, 2017); *Geneva Pharm. Tech. Corp. v. Barr Labs, Inc.*, 386 F.3d 485, 507 (2d Cir. 2004).