

AmEx Loss In DOJ Anti-Steering Suit Reversed By 2nd Circ.

By Eric Kroh

Law360, New York (September 26, 2016, 4:22 PM EDT) -- The Second Circuit on Monday reversed a win by the U.S. Department of Justice in a suit accusing American Express of violating antitrust laws by imposing rules barring merchants from steering consumers to other credit card brands, saying the lower court ruling considered only one side of the market.



The appeals court remanded the case with instructions to find in favor of AmEx. (AP)

The appeals court remanded the case with instructions to find in favor of AmEx, saying U.S. District Judge Nicholas G. Garaufis made an error in his 2015 decision when he concluded the anti-steering rules were anti-competitive by focusing on the interests of merchants to the detriment of cardholders.

"This approach does not advance overall consumer satisfaction," Judge Richard C. Wesley said in the court's unanimous opinion. "Though merchants may desire lower fees, those fees are necessary to maintaining cardholder satisfaction — and if a particular merchant finds that the cost of AmEx fees outweighs the benefit it gains by accepting AmEx cards, then the merchant can choose to not accept AmEx cards."

At issue in the case were so-called nondiscriminatory provisions, or NDPs, that AmEx entered into with retailers prohibiting them from encouraging customers to use other credit cards. The DOJ and 17 states sued AmEx in a New York federal court over the agreements in 2010, saying the provisions stifled competition. The district court agreed, finding the NDPs create an incentive for AmEx and other credit card networks to charge higher prices to merchants with no counterbalancing benefits.

The Second Circuit, however, found that the lower court got it wrong on several accounts, including its market definition, its analysis of AmEx's market power and its finding of an adverse effect on competition.

The district court was wrong to conclude that the relevant market in the case consisted of network

services between credit card companies and merchants, while excluding cardholders from the equation, the appeals court said. The lower court patterned its market definition after the Second Circuit's analysis in a case concerning exclusionary rules imposed by Visa and MasterCard, but that case involved a horizontal restraint of trade among competitors, not a vertical restraint, as is at issue in the AmEx case, the panel said.

The district court also made an error when it found that AmEx possessed significant market power, the Second Circuit said. The lower court's analysis found that the company was able to unilaterally impose price increases on merchants, but it did not recognize that AmEx's fees are necessary to provide benefits to cardholders, which amounts to an overall price cut, the opinion said.

By attracting cardholders through its incentives program, AmEx provides a benefit to merchants, namely by attracting more-affluent buyers, the appeals court said. The company has a legitimate interest in seeing that merchants do not attract those cardholders by advertising acceptance of AmEx cards and then steer them toward using another card with a lower fee, which the NDPs are designed to prevent, the panel said.

"We conclude that, so long as AmEx's market share is derived from cardholder satisfaction, there is no reason to intervene and disturb the present functioning of the payment-card industry," Judge Wesley said. "Whatever market power AmEx has appears, on this record, to be based on its rewards programs and perceived prestige, i.e., AmEx cardholders regard the card as cheaper than competing Visa and MasterCard cards. The NDPs protect that program and that prestige."

AmEx said in a statement that it was pleased with the Second Circuit's decision.

"This means consumers will be able to choose how they pay and our Card Members will not be discriminated against at the point of sale," the company said. "Our Non-Discrimination Provisions in our merchant contracts remain in effect, just as they did before the trial court issued its injunction in February 2015."

The DOJ originally sued Visa Inc. and MasterCard Inc. along with AmEx, claiming their policies blocking the merchants who accept their credit cards from steering customers toward cheaper payment methods violated federal antitrust law. While the other two credit card giants agreed to change their policies in settlements inked before the suit was filed, AmEx opted to fight the agency.

The DOJ declined to comment on the Second Circuit's decision.

Judges Ralph K. Winter, Richard C. Wesley and Christopher F. Droney sat on the panel.

The Department of Justice is represented by Nikolai G. Levin, Craig W. Conrath, Mark H. Hamer, Joseph P. Vardner, Kristen C. Limarzi, Robert B. Nicholson, James J. Fredricks and Shana M. Wallace.

American Express is represented by Evan R. Chesler, Peter T. Barbur and Kevin J. Orsini of Cravath Swaine & Moore LLP and Donald L. Flexner, Philip C. Korologos and Eric J. Brenner of Boies Schiller & Flexner LLP.

The case is U.S. et al. v. American Express Co. et al., case number 15-1672, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Patricia K. Cole.