

DOJ About-Face In High Court AmEx Case Has Attys Puzzled

By **Eric Kroh**

Law360, New York (August 9, 2017, 10:23 PM EDT) -- The U.S. Department of Justice recently filed a brief asking the U.S. Supreme Court to let stand its Second Circuit loss in a lawsuit against American Express Co. over the company's merchant anti-steering rules, leaving antitrust practitioners searching for an explanation of the government's motives.

The DOJ **asked the justices** to turn down a **petition for certiorari** filed in June by 11 states after the federal government decided not to pursue its own appeal of the Second Circuit's September ruling.

The brief, however, was by no means straightforward. Although the DOJ asked the high court to reject the petition, it also said it disagreed with the Second Circuit's decision and criticized it at length.

The dissonance between the rebuttal of the appeals court's decision on the one hand, and the position taken by the DOJ in the brief on the other, left attorneys wracking their brains trying to figure out why the government would make such a move.

"I don't know what to make of it," Lisl J. Dunlop, a partner with Manatt Phelps & Phillips LLP, said. "It's really quite bizarre."

The DOJ begins its argument in the brief with a methodical dismantling of the Second Circuit's analysis. For starters, the appeals court completely botched its approach to the market definition in the case, the DOJ said.

The Second Circuit's opinion **placed great weight** on the fact that the credit card industry is two-sided, with retailers who accept AmEx cards on the one side, and cardholders on the other, but its conclusions conflict with Supreme Court precedent, the brief said.

The district court had found that AmEx's agreements with merchants prohibiting them from encouraging customers to use less expensive credit cards ran afoul of antitrust law and resulted in merchants paying increased swipe fees to all credit card companies, lower-cost competitors being blocked from the market and all consumers paying inflated retail prices.

The Second Circuit reversed the lower court, saying it failed to take into account the effects of the rules on both sides of the two-sided platform. Seen as a whole, the rules' pro-competitive benefits to AmEx cardholders outweighed their anti-competitive effects, the appeals court said.

But the DOJ pointed to the Supreme Court's 1953 decision in *Times Picayune Publishing Co. v. U.S.*, which holds that when different sides of a two-sided platform involve distinct competition and products that are not substitutes, they should be considered separate markets for the purposes of an antitrust analysis.

"Like the markets for newspaper advertisers and readers, the markets for merchants and cardholders are distinct spheres of competition," the DOJ said in its brief. "By collapsing the two into a single antitrust market, the court of appeals severed market definition from its purpose and 'prevent[ed]"

the relevant market inquiry from accurately answering the questions for which it is asked."

Even accepting the Second Circuit's handling of the two-sided market, the district court's findings established that the AmEx merchant rules were anti-competitive, the DOJ said. The record demonstrates that without any checks on the agreements the company made with retailers, other card networks such as Visa and MasterCard were free to charge higher fees to merchants, lower-cost alternatives such as Discover could not compete and retailers passed on the higher fees to consumers, the brief said. Those effects alone should be enough to deem the merchant rules anti-competitive regardless of whether the market is two-sided, it said.

Up until that point, the DOJ brief reads like an argument in favor of having the high court take up the case to correct the Second Circuit's erroneous ruling, but the document then takes an abrupt about-face and urges the court to turn down the states' petition because the legal questions involved are not ripe for review.

The Second Circuit's decision does not create a circuit split, and the Supreme Court has not squarely considered questions of market definition and proof of anti-competitive effects in cases involving two-sided platforms, according to the DOJ.

"Consistent with its usual practice of awaiting further percolation in the lower courts before taking up such novel legal issues, the court should deny review here," the brief said.

The document seems to have been written by two different authors. It could be viewed as an attempt by the administration of President Donald Trump to force the DOJ's antitrust division to take a position that is being resisted by staff members who have worked on the case for seven years, Dunlop said. However, even that interpretation doesn't make sense, she said, because if it were true, why would the filing even be published in the first place?

"Trying to tease apart their motives for filing this brief is really difficult," Dunlop said. "I can't work out the thought process."

One reason for the nature of the brief may be that the DOJ did not want to jeopardize its lawsuit in a North Carolina federal court asserting that Carolinas HealthCare System used its dominant market position to prevent major health insurers from steering patients to lower-cost hospitals. The DOJ **sued CHS** last year, saying the health care provider violated the Sherman Act by using its 50 percent market share in the region to prohibit insurers from encouraging patients to use other providers.

If the DOJ argued in favor of turning down the cert petition in the AmEx case without a vigorous broadside against the company's anti-steering rules, it could undermine its position in the CHS case, Bruce D. Sokler of Mintz Levin Cohn Ferris Glovsky and Popeo PC said.

"That might be a partial explanation for why they put in all the reasons why the Second Circuit was wrong," Sokler said.

Another interpretation of the brief is that the DOJ is actively trying to oppose states' efforts to ramp up their antitrust enforcement. After Trump won the election, some speculated that his administration would take a relaxed stance toward enforcement and that state attorneys general could step in to fill the void.

When the DOJ declined to seek its own appeal, the states did in fact decide to file their own cert petition in the case, suggesting they were willing to take up some of the federal government's slack. The DOJ brief, though, shows the administration may take action to thwart the states rather than simply take its foot off the gas pedal, Dunlop said.

"Ostensibly it's an obstructive technique," she said.

A simple explanation for the conflicting stances in the brief may be that the office of the U.S. Solicitor General is strategically preserving its finite resources for cases that it considers to be more suitable for high court intervention, according to Jeffrey I. Shinder of Constantine Cannon LLP. It's true that the Supreme Court generally waits for the questions presented to it to be fully fleshed out by lower

courts before taking them up, Shinder said.

If the justices are waiting for more lower court judges to opine on two-sided markets before addressing the issue, it may not have to wait long, he said. For example, travel booking company Sabre Holdings Corp. has **asked the Second Circuit** to overturn a \$15 million jury verdict awarded to US Airways in the airline's antitrust suit over Sabre's contract terms. That case also involves a two-sided platform, and Sabre has made the AmEx ruling central to its argument on appeal.

"The court is very practical in its approach to cases that it takes," Shinder said. "It does prefer to see a lot of factual percolation below, such that very crystallized issues of law come up to it."

--Editing by Pamela Wilkinson and Catherine Sum.