

What's At Stake In The AmEx Merchant Rules Case

By **Matthew Perlman**

Law360, New York (October 16, 2017, 10:45 PM EDT) -- The U.S. Supreme Court's decision Monday to take up a case over American Express Co.'s policy of prohibiting merchants from steering customers to other credit cards gives the high court a rare opportunity to provide clarity on the rule-of-reason.

The justices **granted a petition** from a group of 11 states alleging these anti-steering provisions in AmEx's merchant agreements are anti-competitive. A Second Circuit panel handed AmEx a win in the case last year, after using a rule-of-reason analysis to determine that the lower court failed to properly consider the nature of the credit card market.

Under this doctrine, the court scrutinizes behaviors on a case-by-case basis to determine if they unreasonably restrain trade, as opposed to assuming the behaviors are illegal.

Applying it, the appeals court found that while retailers who accept AmEx cards may have been charged higher rates by AmEx and other payment companies as a result of the provisions, the fees were passed on to consumers through better benefits.

Experts tell Law360 that while most antitrust cases taken up by the justices deal with what kind of analysis needs to be made, in this case the justices could touch on how that analysis should be performed.

"Both sides in the case seem to recognize that the Supreme Court usually grants cert in antitrust cases to decide which mode of analysis to apply, whether it be per se, quick look, or rule-of-reason," Day Pitney LLP partner Erick M. Sandler said. "Here all of the parties seem to agree that rule-of-reason analysis should be applied, and the issue is how to apply that analysis."

The doctrine traces back to the late 1800s, but experts said the high court has provided little clarity about how to actually perform the test. Sandler noted that while the states used the lack of clarity on the issue as an argument in favor of the Supreme Court taking the case, AmEx argued that this was a reason not to.

"Interestingly, the states argued that the court needed to provide guidance on the contours of the rule-of-reason standard in light of that, where American Express argued that the issue should be allowed to percolate in the lower courts before the Supreme Court takes it," Sandler said.

Hugh M. Hollman of Baker Botts LLP said the AmEx suit is an opportunity for the court to shed some light on the analysis by explaining how some of the various market factors should be considered in relation to each other. He said this would benefit lower courts in making the assessments, and would also help antitrust attorneys provide their clients better guidance.

"They have never really got into applying the balancing of rule-of-reason factors themselves," Hollman said of the justices. "This is a good case and a good opportunity for them to do just that."

Hollman added that it's not clear yet if a ruling in the AmEx case will reach beyond the credit card industry and that it will depend on how any opinion is ultimately written.

"It is possible for us to extrapolate what's happening here, under these circumstances, to other areas

and other industries, but it's very much going to depend upon on the court itself and how they write it," he said.

Bruce D. Sokler of Mintz Levin Cohn Ferris Glovsky and Popeo PC said parties supporting both sides will likely file amici briefs calling for broad interpretations.

"The Supreme Court, while it is supposed to and often limits itself to the question before it, if it does so here, we will not get a generally applicable ruling on anti-steering provisions," Sokler said. "But by the same token, there will be people on both sides pushing the court for broader rulings."

Meanwhile, others have an interest in a narrower ruling.

Although the U.S. Department of Justice was involved in bringing the case along with a group of states in 2010, the agency is not pursuing the appeal and actually asked the justices to **turn down the petition**. In its brief, the agency said that it disagreed with the Second Circuit's decision and criticized it at length, but urged the high court to reject the petition nonetheless.

Sokler predicted the DOJ will likely advocate for the narrowest possible ruling in the AmEx suit, considering it's pursuing a case in North Carolina involving anti-steering rules in the health care industry.

The DOJ **sued** Carolinas HealthCare System last year, saying the health care provider violated the Sherman Act by using its market share in the region to prohibit insurers from encouraging patients to use other providers. Sokler noted that President Donald Trump's executive order last week loosening certain insurance rules connected to the Affordable Care Act included language about injecting competition into the health care markets, which suggests the administration would not be willing to jeopardize the Carolina case.

"I surmise they are not going to walk away from Carolina HealthCare, so they'll probably suggest that this is a narrow case presenting a narrow question," Sokler said.

He added that the states are also looking for a narrow ruling, and are mainly just interested in resurrecting their win.

Sandler said that while any ruling in the AmEx case will likely be tied closely to the specific industry, he said any clarity on how to apply the rule-of-reason is welcome.

"I would expect any decision is likely to be an important one and to provide guidance in an area where there is not well developed guidance at this point," Sandler said. "But with this court, and with antitrust cases generally, it's likely that the ultimate decision turns on facts and circumstances that are unique to the credit card industry."

--Editing by Kat Laskowski and Jill Coffey.