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DOJ Loss In AmEx Case Could Imperil Hospital Steering Suit

By **Eric Kroh**

Law360, New York (September 27, 2016, 9:04 PM EDT) -- The U.S. Department of Justice has touted the similarities between its antitrust cases against American Express and a North Carolina hospital system, but that comparison could come back to haunt it now that the Second Circuit has found that AmEx's anti-steering rules are not anti-competitive.

The appeals court **found Monday** that AmEx had a valid reason to institute the so-called nondiscriminatory provisions, or NDPs, in agreements with merchants prohibiting them from steering customers toward using other credit cards. It said the district court was wrong to conclude that they were anti-competitive and that the company used its market power to exert leverage over consumers.

While the Second Circuit's decision was itself a blow to the DOJ, it could also undermine a **novel lawsuit** the agency filed 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 suit is the government's first assault on anti-steering rules in the context of health care, and although there are differences between the two cases, the Second Circuit's ruling will likely be an impediment to the DOJ, which has cited the district court's AmEx opinion in its contest with CHS, said Bruce D. Sokler, the antitrust chairman at Mintz Levin Cohn Ferris Glovsky & Popeo PC.

"It's clearly in the health care area where this opinion will have, I think, significant reverberations and implications, because the government has been warning against anti-steering provisions for a number of years," he said.

The DOJ sued CHS in June, 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.

More recently, in a response last month to CHS' motion for judgment on the proceedings, the DOJ **played up** the similarities to the AmEx suit, saying the district court in that case held that steering restrictions impaired competition because they suppressed competitors' incentives to offer lower prices.

CHS has called the DOJ's suit baseless and **defended its imposition** of the anti-steering measures, saying they facilitate its ability to extend lower prices by helping to assure access to a larger patient population. The health care provider has also maintained that the government's complaint is inadequate, failing to sufficiently allege that its agreements with insurers have resulted in actual competitive harm in the marketplace.

CHS' arguments may be bolstered by the Second Circuit, which said that the AmEx NDPs had a legitimate purpose, namely in ensuring that merchants do not attract AmEx cardholders by advertising acceptance of the company's cards and then steer them toward using another card with a lower fee. Evidence at trial even supported the conclusion that AmEx's model, supported by the NDPs, actually increased competition in the credit card industry when the entire market is

taken into account, the Second Circuit said.

A loss in the CHS case would be a significant defeat for the government, as it represents a strategic DOJ litigation effort in response to shifts in the health care and health insurance markets. Last year, William J. Baer, then the acting assistant attorney general for the DOJ's Antitrust Division, said providers were **taking advantage** of contracting provisions to tamp down competition in their markets and the rationale the DOJ used against AmEx's anti-steering rules would hold in the health arena.

Even as far back as 2011 the DOJ issued a policy statement giving guidance to accountable care organizations that said anti-steering provisions may raise competitive concerns and that providers with a large market share should steer clear of them, but the Second Circuit appears to have now taken the wind out of the government's sails, Sokler said.

"One could argue that those markets are different, but in some ways they're also two-sided markets," said Sokler, referring to separate markets for merchants and cardholders in the AmEx case. "So I think [the health care market is] one place where this could have clear ramifications."

More immediately, the Second Circuit's decision was a vindication for AmEx, which chose to litigate the case against the government rather than acquiesce to its demands to halt the practice of including the NDPs in agreements with retailers.

The DOJ originally sued Visa Inc. and MasterCard Inc. along with AmEx over their anti-steering arrangements. 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 and 17 states sued AmEx in a New York federal court over the agreements in 2010.

By choosing to fight the DOJ in court over the anti-steering rules, AmEx has not only secured a win for itself, it has obtained precedent that could make it more difficult for the government to bring future actions, according to Mark J. Botti, a partner with Squire Patton Boggs LLP.

In the AmEx case, the DOJ took a narrow view of the market that considered only the immediate effects of the NDPs on merchants, Botti said. The Second Circuit rejected that approach and instead embraced a more real-world evaluation of whether a particular constraint is anti-competitive, he said.

"What the court has said in so many words is you have to fully and directly analyze whether the anti-competitive effect is likely to happen and whether it is on net an anti-competitive effect considering all of the implications of the conduct," Botti said. "The court is, I would say, taking a more open-minded approach to understanding the full effects of commercial conduct."

That approach can apply in other settings, and lends strength to the position that courts should look at the entire marketplace when determining if a company's actions have stifled competition rather than taking the DOJ's more narrow, enforcement-minded view, he said. It will be interesting to see whether the decision is taken that way by other courts or if it is construed more narrowly to hold only in certain instances, Botti said.

Of course, the government could also try to limit the impact of the Second Circuit's decision by asking a full panel to rehear the case or by appealing it to the U.S. Supreme Court. In that instance, AmEx will continue its defense of the NDPs, CEO Kenneth I. Chenault told company employees in an internal note Monday.

But in the meantime, the decision is likely come into play in the CHS case.

"It knocks at least some, if not many, of the legs out from under DOJ," Sokler said. "I'm sure [CHS] will be laying this opinion down on the record very shortly."

The AmEx 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.

The hospital case is U.S. et al. v. The Charlotte-Mecklenburg Hospital Authority, case number

3:16-cv-00311, in the U.S. District Court for the Western District of North Carolina.

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