

Antitrust World Eyes Justices On AmEx Steering Case

By **Matthew Perlman**

Law360 (February 23, 2018, 7:19 PM EST) -- The U.S. Supreme Court is set to hear oral arguments Monday in a case challenging anti-steering rules that American Express Co. imposes on merchants, and the antitrust bar will be keeping a close watch on how the justices approach the rule of reason, an important but underdeveloped tool for weighing competitive effects in antitrust cases.

Here, Law360 takes a look at how the case got to the high court and what's on the line.

Why They're Watching

The big question is how courts should conduct a so-called rule-of-reason analysis of a market with separate groups of distinct customers, like the bifurcated market for credit cards, with card holders on one side and merchants on the other. Such an analysis scrutinizes behavior on a case-by-case basis to determine if it unreasonably restrains trade.

It's an approach judges must take in antitrust cases where the action being challenged isn't necessarily illegal on its face, or per se illegal. But it's not always clear where the burden of proof lies, or which markets are relevant for the analysis at which stages.

Depending on how the court decides the AmEx case, its opinion could have broad repercussions for how the rule of reason is applied across a number of industries. The case has been attracting a lot of attention as a result.

Bruce D. Sokler of Mintz Levin Cohn Ferris Glovsky and Popeo PC, said it's also because the case gives the justices an opportunity to weigh in on a substantive issue, which isn't normally true with an antitrust case at the high court.

"When you have an antitrust case that's going to reach a merits issue, as opposed to a standing issue, or an exemption issue, those cases are looked at with great interest by practitioners and economists," Sokler said. "There just aren't that many merits Supreme Court opinions. It's like getting some of the Dead Sea scrolls — you spend a lot of time dissecting."

How We Got Here

At issue are the so-called anti-steering provisions in AmEx's merchant agreements, which prohibit merchants from steering customers to other credit cards.

A district court **ruled in favor** of the U.S. Department of Justice and a group of states in 2015, finding that the provisions are anti-competitive because they caused merchants to pay higher credit card fees. But after AmEx appealed, a Second Circuit panel **remanded the case**, saying that the lower court failed to properly consider the nature of the credit card market and the fact that the higher merchant fees were passed on to cardholders through better benefits.

Both courts applied a rule-of-reason analysis after determining the rules weren't per se illegal, and considered anti-competitive effects of the behavior alongside pro-competitive justifications — but their approaches and conclusions differed.

The DOJ initially pushed for a rehearing, but later decided **not to pursue** an appeal to the Supreme Court, while Ohio and 10 other states filed a certiorari petition. The DOJ then filed an opposition brief urging the justices **not to take up** the case, arguing that the issue is not yet ripe for review, but also taking several knocks at the circuit court decision.

The justices **granted certiorari** in October, and the DOJ has since thrown its support **behind the states**, and will be given time to speak at oral argument on Feb. 26.

Who Weighed In

Since the justices agreed to take the case, a total of 22 amicus briefs have been filed, with industry groups, legal scholars and others hoping to influence the outcome.

Fourteen briefs favor the states, seven support AmEx and one supports neither side. Some filers, including groups of merchants and retailers supporting the states, attacked the anti-steering rules as clearly anti-competitive, providing anecdotal and economic justifications for their positions. Others argued that the Second Circuit applied the rule of reason properly, and urged the justices to leave the ruling in place.

The case even drew attention from overseas. The Australian Retailers Association filed a brief supporting the states, discussing Australia's elimination of anti-steering rules. Meanwhile, Australian Taxpayers' Alliance filed a rebuttal supporting AmEx, arguing that eliminating the rules has been devastating for Australian consumers.

The Open Markets Institute also filed a brief, arguing that the Second Circuit ruling could make it easier for large technology companies like Amazon.com and Google Inc. to escape antitrust scrutiny because they operate as multisided platforms.

The filers look at the specific question being presented to the court in different ways, but the arguments generally involve the mechanics of the rule-of-reason analysis, looking for clarity in a process with a complex framework for determining which party has the burden of showing competitive harm or pro-competitive effects.

Stephen Calkins, a professor at Wayne State University Law School who was among a group of more than two dozen legal scholars to file an amicus brief supporting the states, said that while the concept is understood, the Supreme Court has never detailed exactly how it should be performed.

"They've had opinions that talk about it a little bit, but not really a good thorough 'here's what a rule-of-reason review should entail,'" Calkins said. "This is an opportunity for the court to do that, and it raises a host of issues that come up all of the time in antitrust cases."

What Are the Positions?

The states said in their petition that the question is whether a showing that the anti-steering rules hurt merchants was enough to shift the burden to AmEx to prove the rules have a pro-competitive effect.

AmEx, on the other hand, sees a different question. In a January brief, the company said the issue is whether the Sherman Act condemns vertical restraints when a defendant like itself lacks market power, and when there's no evidence of reduced output or supracompetitive prices.

This argument turns on AmEx's relatively small share of the credit card market and its theory that the rules are good for competition on the whole, when both sides of its two-sided market are examined.

"It's not like there's one important issue that is raised here, it's almost like every important issue in the rule of reason is being raised here," Calkins said.

Calkins' group, which also includes Herbert Hovenkamp of the University of Pennsylvania Law School, argued that the Second Circuit got it wrong when it found that the states had to prove the rules had a net-negative effect across both sides of the two-sided platform before the burden shifts to AmEx to provide its counterargument.

Calkins said the result sets the bar too high for plaintiffs — requiring them to quantify the benefits to consumers and subtract the harm done to merchants — at the first stage of a rule-of-reason review.

A separate group of about a dozen antitrust law and economic scholars weighed in on the other side of the case, including former FTC commissioner and George Mason University Law School professor Joshua D. Wright. That group argued that the rule-of-reason analysis was performed correctly by the Second Circuit, properly weighing the impacts on both sides of the market and requiring a showing of market power before shifting the burden to AmEx.

The states, they said, are pushing for an “amorphous” standard that could confuse the lower courts and make the rule-of-reason analysis even murkier than it was before.

William Lavery of Baker Botts LLP, who worked on an amicus brief filed by the Pharmaceutical Research and Manufacturers of America supporting the Second Circuit’s findings, said that vertical agreements like the one at issue — which are not among competitors and don’t involve collusion — are traditionally treated as presumptively lawful under the rule of reason.

The pharmaceutical and biotechnology companies that are part of the industry group use such agreements frequently, including through exclusivity agreements and most-favored-nations provisions, according to the brief. Lavery said any of these arrangements could be called into question if the states get their way, which could have a chilling effect.

“If businesses can't rely on some level of comfort for certain types of business arrangements, not only would it open the floodgates for a bunch of litigation, if businesses can't have some comfort in these agreements, I think it could put a damper on their businesses in general,” he said.

No matter how the decision comes down, the justices will have an opportunity to expand on an important area of underdeveloped law. Calkins said the rule of reason continues to be a work in progress and the case could help move the issue further along.

“There's the potential for this be one of the most important antitrust cases in decades, depending on how the court wants to write an opinion,” he said.

The case is *Ohio et al. v. American Express Co. et al.*, case number 16-1454, in the Supreme Court of the United States.

--Additional reporting by Darcy Reddan, Eric Kroh and Melissa Lipman. Editing by Mark Lebetkin and Kelly Duncan.