



Ohio v. American Express, 2018 U.S. LEXIS 3845 (2018)

Topics Covered: Antitrust

Outcome: Very Unfavorable

Issue

The issue in this case was whether a credit card network agreement with anti-steering provisions violated § 1 of the Sherman Act.

AMA interest

Anti-steering requirements of health insurance networks and of large hospitals may impact physician practices and interfere with physicians' ethical obligation to regard patient responsibility as paramount. Although the factual context (a credit card network) is far removed from the practice of medicine, this Supreme Court case could have far-reaching precedential value.

Case summary

American Express (Amex) maintains a credit card network which, in antitrust parlance, is considered a type of "two-sided platform." On one side of the platform, Amex induces consumers to use its cards through such benefits as general convenience, cash discounts or rebates, and/or frequent flyer miles. On the other side of the platform, Amex recruits merchants to accept purchases through use of its credit cards by promising those merchants a broad and affluent customer base; merchants accept discounted payments from Amex in order to qualify for network status.

Amex imposes anti-steering requirements in its merchant contracts. Namely, the merchants are prohibited from encouraging customers to use another credit card (or even from paying by cash or check) if the customers express an initial preference for their Amex card. The rationale is that customers may have been drawn to the merchant by Amex promotional advertising, but the merchant may desire an alternative payment mechanism that imposes a lesser discount than does Amex. Amex needs to justify its advertising expense and preserve its consumer base; the anti-steering restrictions are mechanisms for accomplishing this.

The United States and 17 states sued Amex in the United States District Court for the Eastern District of New York. The charge was that the anti-steering provisions in the Amex merchant contracts violated Sherman Act § 1, which prohibits "contract[s] ... in restraint of trade." Following an extensive trial, the district court found that the anti-steering provisions of the Amex merchant contracts did, indeed, violate the Sherman Act. These provisions "created an environment in which there is nothing to offset credit card networks' incentives ... to charge merchants inflated prices for their services." They rendered it "nearly impossible for [a

potentially competing credit card company] to enter the relevant market by offering merchants a low-cost alternative to the existing networks.” The court enjoined Amex from imposing anti-steering provisions in its merchant contracts.

Amex appealed to the United States Court of Appeals for the Second Circuit, which found that the trial court erred by focusing solely on the economic effects of the merchant contracts, without considering the consumer benefits of the cardholder contracts. The Second Circuit observed that “merchant pricing is only one half of the equation.” In its view, the plaintiffs were required to show that both merchants and cardholders were worse off overall from the anti-steering requirements. Because the plaintiffs provided evidence only of the anticompetitive effects of the anti-steering provisions, without consideration of how cardholders benefited from the Amex network, they failed to meet their burden of proof. The Second Circuit reversed the injunction and remanded the case with directions to the district court to enter a judgment for Amex.

The case was then appealed to the United States Supreme Court.

On June 25, 2018, the Supreme Court affirmed the Second Circuit by a 5 to 4 decision. It found the usual 2-sided platform analysis inapplicable, because credit card sales are a single transaction between the cardholders and the merchants. It would therefore be anomalous to disaggregate the different aspects of the transaction for antitrust purposes.

Litigation Center involvement

The Litigation Center, along with the Ohio State Medical Association, filed an *amicus* brief in the Supreme Court. The brief explained the problems posed to medical practice on account of large insurance companies’ and hospital networks’ imposition of anti-steering provisions against physicians. It further explained that, if the courts were required to consider the effects of these provisions on both sides of the network platforms, it would be almost impossible to prove that these provisions violate the anti-trust laws. This would degrade the ethical practice of medicine. The brief urged reversal of the Second Circuit and reinstatement of the trial court decision.

United States Supreme Court brief