



Supreme Court Raises The Bar For Antitrust Plaintiffs Challenging Two-Sided Platforms

Ohio v. American Express Co., No. 16-1454

Decided June 25, 2018

The Supreme Court held 5-4 that plaintiffs challenging American Express (“Amex”) credit-card rules for merchants did not prove an antitrust violation because their evidence focused on only one side of the relevant market (the effect of Amex’s rules on merchants) while ignoring the other side (the effect on cardholders).

Background:

To compete in the market, credit-card companies need a critical mass of both consumers holding their card and merchants who are willing to accept it for payment. Amex offers cardholder reward programs to encourage cardholders to use its cards. To fund those programs, Amex charges merchants higher fees than other credit-card companies. To sustain this business model, Amex’s merchant agreements contain “anti-steering” provisions that prohibit merchants from encouraging cardholders to use other, lower-fee cards at the point of sale. The federal government and 17 states brought an antitrust suit under the Sherman Act, 15 U.S.C. § 1, arguing that these provisions unreasonably restrain trade.

Issue:

Whether plaintiffs could prove an antitrust violation by showing that Amex’s anti-steering provisions caused merchants to pay higher prices.

“[C]ourts must include both sides of the platform—merchants and cardholders—when defining the credit-market.”

Justice Thomas,
writing for the 5-4 Court

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Court's Holding:

No; because both merchants and cardholders participate in the same “credit-card transaction market,” plaintiffs could not prove an antitrust violation based solely on evidence that Amex’s anti-steering provisions increased the price to merchants without considering the net effects on the market as a whole.

What It Means:

- The Court explained that the credit-card industry represents what economists refer to as a “two-sided” market in which credit-card companies provide services to two different groups: cardholders and merchants. The Court stated that two-sided markets are often different from other markets because the value of the product to both sides of the market depends on the level of participation by those on the other side of the market.
- The Court held that in a two-sided market, antitrust violations often—but not always—must be analyzed by looking at the effects of a practice on the market as a whole, rather than looking at just one side of the market. The Court thus held that plaintiffs could not prove an antitrust violation by showing that Amex’s anti-steering provisions increased the prices paid by merchants, without considering the effect of those provisions on cardholders.
- The Court noted that it might not be necessary to consider both sides of a two-sided market when participation on one side of the market does not significantly impact participation on the other side of the market. The Court gave the example of the newspaper advertisement market, where readers are largely indifferent to the number of advertisements that the newspaper contains. By contrast, the court explained that two-sided “*transaction*” platforms like the credit-card industry—where companies compete for transactions between merchants and cardholders—usually should be analyzed as a single market.
- This decision raises the threshold for antitrust plaintiffs, whether private or governmental, in challenging potentially two-sided platforms. These platforms have recently become substantial parts of the economy.

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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