

SUPREME COURT TO REVIEW ANTITRUST SUIT OVER AMEX MERCHANT RULES

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The retail industry should have great interest in a case set to be decided the Supreme Court this term, the outcome of which will affect the terms and conditions of credit card acceptance for all merchants.

The Supreme Court has granted *certiorari* to review the Second Circuit's decision in *Ohio v. American Express*, an antitrust case in which a group of states have challenged American Express Co.'s rules preventing merchants from steering customers to other credit cards as being anti-competitive.

The case is based on the American Express ("AmEx") "anti-steering" rules, also known as "non-discriminatory provisions" or "NDPs." AmEx's NDPs are provisions in the contracts between AmEx and merchants that prohibit merchants from showing a preference for credit cards other than Amex (like Visa or MasterCard) or otherwise offering customers discounts for using non-Amex credit cards.

In 2010, the federal government and several states filed suit against AmEx, arguing that its anti-steering rules violate Section 1 of the Sherman Act as an unreasonable restraint on trade. After trial, the district court applied the rule of reason to find that AmEx's NDPs violate the antitrust laws.

On appeal, the Second Circuit reversed the district court and held that plaintiffs failed to show that AmEx's NDPs were anti-competitive under the rule of reason. Under the rule of reason, the plaintiff has the initial burden to show that the defendant's conduct has anti-competitive effects in the relevant market.

The Second Circuit held that plaintiffs did not meet their burden of showing anti-competitive effects from the NDPs. The Second Circuit found that the district court improperly defined the relevant market to include only the acquirer-merchant market and exclude the issuer-cardholder market. In other words, the district court failed to take into account the impact and effect of AmEx's NDPs on both merchants *and* consumers. The Second Circuit's recognition of this two-sided market acknowledges the realities that AmEx faces in determining price: AmEx has to consider the impact of its price on both the merchants and the consumers, while also evaluating

how the merchants and consumers will deal with one another. Separating the relevant market into just the merchants or just the consumers ignores their economic interdependence.

The Supreme Court's decision to grant certiorari suggests that the Justices may be ready to shed further light on how courts should apply the rule of reason, particularly in cases involving separate but interdependent markets, like the two-sided market in which AmEx participates.

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