

## For Cravath's Chesler, A Crowning Achievement

Cravath Chairman Evan Chesler led American Express to victory last week in his first Supreme Court argument. It's a long way from selling hot dogs in Yankee Stadium as a kid.

By Jenna Greene  
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That American Express chose Cravath, Swaine & Moore as counsel in its epic antitrust fight seems fitting. The credit card's famous slogan, "Membership has its privileges" evokes an exclusivity mirrored by what many consider to be the **most prestigious law firm** in the country.

But the lawyer who led AmEx to **victory** last week—the chairman of Cravath, no less—was not born with the proverbial silver spoon.

Evan Chesler was the first in his family to go to college. Raised in the Bronx, he sold hot dogs in Yankee Stadium as a kid and scraped by on scholarships through law school at NYU.

But those early experiences helped make him a lethally effective trial lawyer. "My job is to make very complicated things understandable. Not to talk down to people or patronize them, but to find the sweet spot... to level the playing field with your audience," he said.

"It's not to say a child of privilege couldn't become a great trial lawyer, but most people I'm litigating in front of are much more like me than children of privilege," he continued. "It helps if you don't have to do a nose dive from 100,000 feet."

During his 42-year career at Cravath, including six years as presiding partner, Chesler has tried about 50 cases across practice areas—securities, shareholder derivatives, contracts, IP, environmental, ERISA, antitrust—and handled multiple appellate arguments. But until AmEx, he'd never argued before the U.S. Supreme Court.



Evan R. Chesler, a partner and the Chairman of Cravath, Swaine & Moore, is a recipient of the New York Law Journal's 2018 Lifetime Achievement Award. (Photo by David Handschuh/NYLJ)

It took a decade to get there. Chesler represented AmEx from the beginning of the Justice Department's investigation into credit card company "antisteering" rules that barred merchants from offering discounts, incentives and information to consumers to encourage the use of alternate credit cards.

In 2010, DOJ and 17 states sued. "These restrictive rules restrain competition among credit card networks for merchant acceptance and distort the competitive process," said then-Antitrust Division head Christine Varney in a **press release**.

Varney is now the chair of Cravath's antitrust practice—she joined the firm in 2011—but Chesler said they've been "very careful. She's stayed completely out of it. We've never talked about the case." (Well,

at least not as law partners. Chesler said they discussed it at length as adversaries.)

Visa and MasterCard immediately settled, but AmEx, which earns most of its revenue from the so-called swipe fees it charges merchants, vowed to fight.

Chesler lost the first round, a seven-week trial in U.S. District Court for the Eastern District of New York, when U.S. District Judge Nicholas Garaufis in February 2015 **sided with the government** and ruled the antisteering rules violate Section 1 of the Sherman Act.

But vindication followed. Chesler argued for AmEx before the U.S. Court of Appeals for the Second Circuit in December 2015—and had an immediate sign that it went well. The day after oral argument, the appeals court on its own accord stayed the district court’s permanent injunction barring AmEx from enforcing its merchant acceptance rules.

Sure enough, the Second Circuit in September 2016 sided squarely with AmEx, holding that Garaufis “erroneously elevated the interests of merchants above cardholders.”

At that point, DOJ was ready to throw in the towel, but 11 states successfully petitioned the Supreme Court to hear the case, now captioned *Ohio et al v. American Express*.

To handle the argument, AmEx stuck with Chesler—who freely admits he was nervous making his debut appearance before the high court. Still, he said he didn’t get any questions he wasn’t prepared to answer. “Nothing was really surprising.”

On June 25, the court in a **5-4 decision** ruled that AmEx’s antisteering provisions do not violate federal antitrust law.

“The plaintiffs stake their entire case on proving that AmEx’s agreements increase merchant fees. We find this argument unpersuasive,” wrote Justice Clarence Thomas for the majority. “AmEx’s business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions.”

While Chesler said it was “gratifying to see the Supreme Court take this position,” he also pointed to the decision’s wider implication for law and economics: That is, “Two-sided markets need to be looked at differently,” he said.

Cravath has a mandatory retirement age of 65 and Chesler will turn 69 later this month.

The firm occasionally makes exceptions to its policy, he explained. “I certainly don’t have any present intention” of retiring, he said. “It’s the best way to go through life, doing something you love.”

“This is probably the best time in my lifetime, or maybe longer than that, to be a lawyer or to become a lawyer,” he continued. “I believe there is nothing better you could do with your life, that there is no higher purpose, than to ensure the endurance of the rule of law.”

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## CRAVATH, SWAINE & MOORE LLP