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## EVAN CHESLER

Partner, Cravath, Swaine & Moore

BY CHRISTINE SIMMONS

**E**VAN CHESLER, chairman at Cravath Swaine Moore, was lead outside counsel for American Express in litigation brought by the U.S. government alleging its mandatory terms for participating retailers violated antitrust law.

This was no ordinary antitrust litigation. The stakes were incredibly high: American Express' entire business model, and more broadly, the continuation of fierce competition in the credit card industry, where only four networks share transaction volume, would be transformed.

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The U.S. government, along with 17 states that sued alongside the government, had argued that Amex's anti-steering rules for merchants—which prohibited retailers from recommending to consumers that they use other cards with lower merchant fees—resulted in absence of price competition among the credit card networks.

Although the U.S. government sued Amex in 2010, it signaled its probe years earlier, prompting Chesler to head a defense team to investigate the company's pricing structure with merchants.

That work ultimately led Chesler, in consultation with the client and other defense lawyers, to devise American Express' winning argument: Competition existed on both sides of the platforms, including from merchants and cardholders, who may prefer to use their Amex cards to reap customer rewards.

"I concluded along with my colleagues that there was a fundamental disconnect with how the government was looking at American Express's business," he said.

Still, the Justice Department and ultimately a federal judge were not persuaded. Eastern District Judge Nicholas Garaufis ruled for the government in 2015.

If that decision stood, "it would have been very difficult to survive in any meaningful way," said Mark Califano, senior vice president and managing counsel of litigation at American Express. "We knew we had a literal bet-the-house case."

The case was also important for the credit card industry, as "Amex is the principal competitor counterweight to Visa and MasterCard," Chesler said.

Chesler said he spent hundreds of hours on the appeal, including taking a lead role on its appellate brief, poring over the record and arguing before the Second Circuit in December 2015.

The day after oral argument, the Second Circuit entered a stay of Garaufis' injunction and about nine months later, in September 2016, it entirely reversed the district court and ruled that the case be entered in American Express' favor, citing the two-sided platform of competition. "So long as Amex's market share is derived from cardholder satisfaction, there is no reason to intervene and disturb the present functioning of the payment card industry," the court wrote.

Overall, the litigation team Chesler oversaw included about 20 lawyers between Cravath and its co-counsel at Boies Schiller & Flexner. Chesler estimated he spent thousands of hours defending the case at the trial level. That included leading a team that conducted more than 100 depositions, preparing witnesses and reading thousands of pages of testimony in preparation for a 2014 trial lasting nearly seven weeks.

**A**S LEAD COUNSEL, Chesler decided core legal decisions during the case, and at trial made opening and closing arguments, examined the government's sole

expert witness and questioned the company's CEO, Kenneth Chenault, on the stand. "Every army has a general," he said, but adding, "Lawsuits of this type and size are obviously very complicated and it takes a village."

While the federal government has dropped its case, Chesler, who has counted Amex as a client for more than 12 years, continues to represent the company in fighting a possible appeal of the decision to the U.S. Supreme Court by some states. He is also representing Amex in civil antitrust litigation brought by retailers.

Based on the American Express win, Chesler was retained last year by two new clients for Cravath in pending antitrust litigation, including BlueCross BlueShield of Tennessee and Sabre.

Califano, the Amex in-house counsel, said lawyers who become nationally renowned for their trial skills ultimately "farm a lot more of their work to their partners," leading them to skip out on regular client meetings.

But Califano said what sets Chesler apart is his constant client contact. "He was present both mentally and physically," Califano said, adding that Chesler "invested the time and effort into being fully prepared" every step of the way, leading to a superior argument before the appeals court. "Evan did the best argument I've seen before the Second Circuit," he said.

**Cravath, Swaine & Moore LLP**