

Litigators of the Week: Evan Chesler, Peter Barbur and Kevin Orsini

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Evan Chesler, Peter Barbur and Kevin Orsini (Credit: Cravath Swaine & Moore)

There may be no better exponents of how difficult it was to win reversal of a lower court's ruling against American Express than those who oppose the appellate court's decision.

The US Court of Appeals for Second Circuit last Monday unanimously reversed the Department of Justice's trial victory, holding that the credit card company's restrictions on merchants could not be found to have violated anti-trust law without the lower court first weighing their benefits to consumers, and ordered the US District Court for the Eastern District of New York to enter judgment in favour of Amex.

The DoJ is presumably unhappy about losing the injunction that would have stopped American Express from enforcing contractual provisions that forced merchants who accept its cards not to encourage customers to use a different means of payment. The antitrust division thus far has declined to comment.

On Friday, Cleveland State University law professor Chris Sagers took to the *New York Times* to criticise the Second Circuit for overturning the lower court "on the rare grounds that the panel just disagreed on the facts."

Sagers accused the Second Circuit of "a wholesale rejection and rewriting of the facts found at the trial concerning market definition, based on nothing more than the appeals court's own finding of facts." He said those findings seemed to be substantially wrong, and that the opinion was based on intuition, impulses and instincts, rather than the facts.

However, American Express evidently thought it would need law and not just whim on its side, and brought Cravath Swaine & Moore partners Evan Chesler, Peter Barbur and Kevin Orsini, with the assistance of attorneys from Boies Schiller & Flexner, for that purpose.

Chesler told *GCR* that the crucial moments in oral argument mostly came during the government's part. He noted Judge Ralph Winter's opening question to the DoJ attorney, which was along the lines of "shouldn't American Express be permitted to do by contracts what it could have done unilaterally?" – that is, refuse to do business with merchants that would steer payments to Amex's rivals.

When the DoJ said it would be anticompetitive for American Express to increase its merchant rates by a certain amount and simultaneously increase the value of cardholder rewards by the same amount, Judge Richard Wesley seemed surprised, Chesler said.

"The questions were consistent with the themes we addressed in our brief," Chesler said. "These were issues we highlighted at trial and they are real-world issues for the marketplace for credit cards."

While Judges Winter and Wesley had sounded supportive of his arguments and he "walked out feeling good about the argument", Chesler said, "My view is you never take judges for granted. It's not a prudent thing to conclude that a court will come out in a particular way based on the questions they ask at oral argument."

He received a stronger prediction of eventual success the next day, when the panel on its own initiative issued an order suspending the injunction. American Express had moved for a stay immediately after the injunction, and had appealed against the lower court's denial to the Second Circuit, but a different panel of the appellate court had refused it.

"Surely consumers are better off with the competition in the marketplace that Amex represents, than if Visa had succeeded driving it out of business," Chesler said.

From a common-sense consumer perspective, there are many rewards obtained and family vacations taken that wouldn't exist without Amex's business model of merchant fees that provide the revenue for cardholder benefits, he added.

"It required conviction on the client's part to continue to fight for this many years to preserve the business model," Orsini said. "It required conviction in the lawyers and in the case even after all that time, with the setback of the district court opinion, to stay the course and have confidence in the economics and the facts" to show that the restrictions were not anticompetitive.

For the arguments – or the instincts – that beat the DoJ's claim of a Sherman Act section 1 violation, Chesler, Barbur and Orsini are our Litigators of the Week.