

## Winner's Playbook: Behind The Scenes Of The AmEx Case

By **Evan Chesler, Peter Barbur and Kevin Orsini** (September 14, 2018, 1:01 PM EDT)

*This article is part of an Expert Analysis series featuring reflections from attorneys who recently won high-profile cases — an inside look at the challenges they faced and the decisions they made that led to victory.*

In *Ohio v. American Express*, the U.S. Supreme Court issued a pivotal antitrust decision that explores how courts analyze competition when defendants operate two-sided platforms. Three Cravath Swaine & Moore LLP partners who represented American Express from the filing of the complaint to the Supreme Court explain how one of the most significant antitrust enforcement actions in recent history led to a landmark precedent for two-sided platforms — an increasingly important business model in today's economy.

**Evan Chesler:** In October 2010, former U.S. Attorney General Eric Holder announced that the U.S. Department of Justice was suing Visa, MasterCard and American Express based on provisions in the networks' contracts with merchants. The government alleged that these provisions harmed competition by preventing merchants from steering customers to other forms of payment at the point of sale.

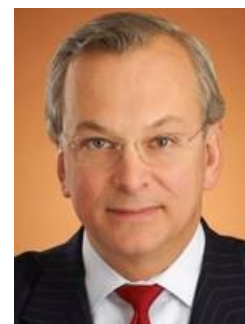
Notably, whereas Visa and MasterCard settled immediately and signed a consent decree, agreeing to change their rules, AmEx was different. From day one, AmEx's CEO, Ken Chenault, told all AmEx employees that the government's case was seriously flawed and that the company would stay the course to prove it in court.

**Peter Barbur:** Working with our client, we realized early on that the key to the case was understanding the importance of the cardholder. The goal of antitrust law is to protect competition for the benefit of consumers but the government's theory focused only on the merchant. The government argued that AmEx's rules violated the antitrust laws because they prevented price competition for merchants, who were unable to steer to credit card networks that offered lower merchant rates.

But the government's story missed the way credit card networks compete. AmEx and other networks are two-sided platforms that connect one merchant and one cardholder in a simultaneous transaction. Demand between the two sides is interconnected: If a network struggles to gain acceptance on one side of the platform, it will have a tough time keeping consumers on the other side. But if a network expands on one side, it becomes more attractive to the other. AmEx's business model transformed the



Evan Chesler



Peter Barbur



Kevin Orsini

industry by providing generous rewards and benefits to cardholders, which were paid for with merchant fees. You can't understand how competition works in the industry without looking at both sides of the platform. This concept of two-sided platforms is well-established in the academic literature, but it had not been commonly used in the courtroom. So our goal was to take the extensive, Nobel Prize-winning economic scholarship and translate it for courts and legal doctrine. In antitrust terms, that meant the relevant market should be defined to include the merchants and cardholders on both sides of AmEx's platform.

**Kevin Orsini:** This was a complex case with a lot on the line. It took more than three years of preparation to get to trial. In coordination with private litigation brought by certain merchants, the parties produced millions of documents, took hundreds of depositions and served dozens of expert reports. Because the government only asked for injunctive relief, a bench trial was held in the U.S. District Court for the Eastern District of New York. Trial required massive effort and investment by the court and the parties. After 24 trial days featuring 38 witnesses, the court issued a 150-page opinion ruling for the government, and ultimately entered an injunction requiring AmEx to change its merchant rules.

**Chesler:** Because this was a complicated case, we had tough decisions to make about which issues to prioritize on appeal. In our briefs and at argument in the Second Circuit, we came back to the core issue of two-sided competition in the industry: AmEx merchant fees fund card member rewards, so price evidence on the merchant side alone was incomplete. For the same reason, the government's theory of market power — that merchants have no choice but to accept AmEx because cardholders insist on using it — was wrong because AmEx constantly must compete for those "insistent" cardholders. We felt good about the oral argument, and the following day the Second Circuit stayed the injunction. In September 2016, the panel issued its decision, reversing the judgment below. The government asked for rehearing by the panel and the full Second Circuit; both requests were denied. The Second Circuit had vindicated our client's business and issued an important antitrust precedent.

**Barbur:** We were pleased when the United States, which had led the case from the start, decided not to seek certiorari. But several states also had joined the government suit, and some (but not all) of those states, led by Ohio, struck out on their own to file a petition for Supreme Court review.

Although the case had significant ramifications for the payment card industry and the application of antitrust law for two-sided platforms, we thought there was a good chance that the Supreme Court would decline to hear the case. The Second Circuit's unanimous panel decision was the first appellate ruling to analyze a vertical restraint in a two-sided market, as such. And the United States filed a brief opposing cert — although the United States disagreed with the Second Circuit's decision, it asked the Supreme Court to allow more percolation in the lower courts. The case was originally up for discussion at the court's "long conference," the justices' first conference after the summer break when petitions submitted over a several-month period are discussed. But the states' petition was relisted for later conferences until, on Oct. 16, 2017, cert was granted.

**Chesler:** I've been trying antitrust cases for 40 years, and have argued countless times in nearly every federal court of appeals, but I had never argued a case before the Supreme Court. With the rise of the specialized Supreme Court bar, a client with a high-profile, bet-the-company case faces tremendous pressure to select an oral advocate who focuses on Supreme Court practice. I feel very fortunate that AmEx didn't do that — they trusted our team, which knew the factually complex case inside-out from the trial and the appeal. And they trusted me to explain the nature of the credit card market and the disastrous effects that the rule advocated by the government would have for antitrust cases in the lower courts. All along the way, we had extraordinary help from AmEx's in-house team and other outside appellate counsel. The collaboration between the client and the counsel team was critical to our success.

**Orsini:** Argument day was memorable. Another high-profile case, *Janus v. AFSCME*, also was on the calendar, so the Supreme Court building was packed with lawyers and observers for both cases. Meanwhile, some members of our team also were in the middle of final trial preparations for another client, Time Warner, in the suit brought by the DOJ attempting to block the merger with AT&T. As it later turned out, the decision rejecting the antitrust claims in that case came out just two weeks before the Supreme Court's decision in *AmEx*, which made for an exciting summer.

Argument in *Janus* came first; the bench was very active and very divided. The justices remained vocal when Evan and Ohio's counsel stepped to the lectern. Justice Neil Gorsuch asked incisive questions challenging the government's theories, while Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan jostled with Evan.

The courtroom at the Supreme Court can be an intimidating place. The justices are painstakingly prepared. Our team went through lengthy preparations and many rounds of moots with skilled and experienced Supreme Court advocates. But it was remarkable how quickly the substance and flow of the oral argument came to resemble many other arguments I've seen Evan deliver.

**Chesler:** We knew it would be a close case and suspected it could turn on Justice Anthony Kennedy, who had written the majority decision for a divided court in *Leegin*, the last landmark antitrust decision about the rule of reason. Justice Kennedy only spoke a few times at argument, but when he did, he challenged the states' advocate about the need to focus on output when assessing competition. Output was a key point for us because the number of credit card transactions has exploded while *AmEx*'s provisions have been in place. Justice Kennedy also asked counsel for the United States — which supported the states on the merits — why “the value to the cardholders shouldn't be part of the analysis,” which he suggested would be “a very dangerous step for this Court to take.” Although other justices asked more questions, these were critical points, and throughout the argument I was able to steer back to output and the two-sided nature of payment platforms. The message was the same as it had been throughout the case: You cannot have a credit card transaction unless a consumer and merchant come together.

Waiting for a decision from the Supreme Court in your case as the end of the term approaches is a unique experience. The number of days and remaining opinions shrinks and the anticipation mounts. Our case was argued in February and was one of the last decisions issued, decided in the final week of the term.

But it was worth the wait. Justice Clarence Thomas' majority opinion adopted our rule, explaining that the relevant market must be defined to include both sides of the platform because cardholders and merchants are inextricably linked. As Justice Breyer noted in his dissent, this decision will have a major impact on antitrust cases involving two-sided platforms. Beyond the doctrine, though, the majority endorsed our client's contribution to competition, concluding that “*Amex*'s business model has stimulated competitive innovations in the credit-card market, increasing the volume of transactions and improving the quality of the services.” For *AmEx*, this was a long and difficult journey. In the end, the court's decision was a major victory for consumers and for American Express.

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