

Litigator of the Week: A Stunning Reversal by the Second Circuit? Priceless.

By Mark Hamblett
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Just one day after Evan Chesler argued to the U.S. Court of Appeals for the Second Circuit in 2015 that a judge was wrong to block American Express from using anti-steering rules to prevent merchants from favoring other credit cards, the veteran litigator got word the court had vacated the injunction.

It wasn't the end the case, but it was good news, delivered fast, and a clear sign to the Cravath, Swaine & Moore chairman that Amex would prevail in its 10-year fight against the Justice Department's Antitrust Division.

"It certainly suggested they were looking favorably on Amex's position, but it didn't tell you what they would ultimately decide, or what the opinion would say or whether they would remand for further proceedings," Chesler said Thursday. "And it didn't say whether they would remand with instructions to dismiss the case, which they did in the end."

The win became official on Monday, when Judges Ralph Winter, Richard Wesley and Christopher Droney delivered a stinging reversal of a lower court's finding that Amex's anti-steering rules violated the Sherman Act.



Evan Chesler

Photo: Rick Kopstein/ALM

The circuit said the lower court got it wrong by focusing on the merchant side of a two-sided market, without giving credence to the customer side—and cruised over the critical fact that customers may opt for Amex based on its prestige and popular rewards program.

For Chesler, it was the vindication he and fellow partners Peter Barbur and Kevin Orsini had been waiting for since the seven-week trial before U.S. District Judge Nicholas Garaufis of the Eastern District of New York that ended with a finding of liability and the

injunction that stayed in place until Dec. 18, 2015, the day after oral arguments.

Donald Flexner, Phil Korologos and Eric Brenner of Boies, Schiller & Flexner were co-counsel.

Chesler had argued first before the circuit, and he said he felt he was communicating his points well enough, but the important moment came when the government stood to argue.

“Judge Winter asked the government pretty pointedly why Amex couldn’t make the unilateral decision not to deal with a merchant who steered customers away to other credit cards,” he said. “He was making the point—by asking if Amex could make that unilateral decision, then why could it not enter into a contract with a merchant that gave Amex the same right as MasterCard or Visa?”

Chesler said the exchange showed an understanding of “one of the fundamental flaws in the government’s case”—an understanding reflected in the opinion Monday “that takes account of the real world, which is not true of all judicial opinions.”

“It does an excellent job of explaining and taking into account the marketplace as it actually existed,” he said, first because it recognizes that “Amex is dwarfed by the combined presence of Visa and MasterCard in the marketplace” and second because “the consumers for credit services, they’re not just merchants, they’re also the ultimate consumers like you and I who use the cards to buy things.”

Chesler, 67, was born and raised in the northeast section of Bronx, where he attended Christopher Columbus High School. After graduating from NYU and earning a masters in Russian Area studies at Hunter College, he earned his law degree at NYU,

clerked for Southern District Judge Inzer B. Wyatt and joined Cravath as a litigation associate in 1976.

Chesler rose to partner in 1982 and then head of the firm’s litigation department in 1996. He became the first chairman in the history of the firm in 2013.

Over his career, Chesler has taken more than 50 cases to trial and argued in excess of 70 appeals, accumulating a slew of honors along the way and being recognized as one of the country’s top litigators.

The Amex case wasn’t the lengthiest or most trying pieces of litigation he’s been involved in, but it’s up there, especially in terms of its significance. Chesler said he believed the injunction, if allowed to stand, would have set a bad precedent and had “a negative effect on the economy.”

The government had, along with Amex, also sued Visa and MasterCard in the case, but the credit card giants reached consent judgments in 2012.

Amex, however, chose to fight. With a major victory now in his pocket, Chesler was asked his opinion on the wisdom of the government bringing the case in the first place.

“Look, I respect the government and I believe they thought they were doing the right thing,” he said. “But I respectfully disagree with them—and that’s the reason we have a system to resolve these kind of disputes.”

He added, “And the system worked here.”

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