

AmEx Ruling May Have Big Impact On Health Insurance

By **David Garcia and Nadezhda Nikonova** (July 17, 2018, 1:01 PM EDT)

The U.S. Supreme Court has decided its first antitrust case in almost three years, establishing a new rule that in the two-sided credit card network market, a plaintiff must analyze both the merchant services side and the consumer cardholder side for anti-competitive effects, even if the alleged anti-competitive conduct lies squarely on one side of the market. This article discusses the potential application of the Supreme Court decision in *Ohio v. American Express Co.* to antitrust analysis in cases and transactions in the American health care sector.

The parallels between two-sided credit card markets and two-sided insurance markets are clear, as noticed by the amici in *American Express*. Given the recent appeal of vertical transactions, and several ongoing antitrust cases involving health insurance networks, the applicability of a two-sided market analysis in the health insurance space will inevitably be in front of courts in due course.

This article provides an overview of the *American Express* case and explains what makes two-sided markets so unique. It then discusses the potential applicability of the Supreme Court's holding beyond the payment card industry, and focuses on possibly the biggest two-sided market of all — health insurance. The article concludes by discussing certain types of health insurance antitrust cases that may implicate the *American Express* analysis.

The American Express Case

Last month, the Supreme Court decided *Ohio v. American Express*,^[1] holding that both sides of the two-sided credit card market must be analyzed in a rule of reason antitrust case as part of the plaintiff's prima facie case.

The case concerned American Express's contractual restriction preventing merchants from steering cardholder customers to alternative credit cards, like Visa or Discover, that charged lower merchant fees. The U.S. Department of Justice and 17 states challenged the restriction as an unreasonable restraint of trade. The district court ruled that the anti-steering rules violated Section 1 of the Sherman Act in the card network services market (the market in which Visa, MasterCard, AmEx and Discover compete to sell acceptance services to merchants), but was overturned by the Second Circuit for failing



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to also consider the effects on the card issuance services market (the related market for issuing credit cards to the cardholders/customers).

Credit card networks are “two-sided markets” because they link two sets of users (merchants and cardholders) and typically get more attractive as the network grows — cardholders benefit the more merchants accept the card, while merchants benefit the more business they get from cardholders. The question presented to the Supreme Court was whether the district court should have considered the effect of the anti-steering rules on both card network services (the merchant side of the market) and card issuance services (the cardholder side of the market) in the first step of the rule of reason analysis. The DOJ and the states contended that they only had to show anti-competitive effects on the merchant side, while American Express argued that both sides of the market must be analyzed in the plaintiffs’ prima facie case.

The Supreme Court sided with American Express, holding that the unique aspects of a two-sided market in the credit card industry require a net analysis of both sides of the platform in step one of the rule of reason analysis. The majority reasoned that evidence of “price increases on one side of the platform” cannot alone “suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform’s services.” Grounding their decision in the economic literature, the majority noted that customers and the merchants “jointly consume” the payment card transaction as a “single product,” and that every transaction requires one merchant and one cardholder, meaning the credit card network is “directly proportional.” Accordingly, the only way to “accurately assess competition” is to evaluate “both sides of a two-sided transaction platform.” Failing to define both sides of the platform as “one market” could lead to “mistaken inferences” of the kind that could “chill the very conduct the antitrust laws are designed to protect.”

The Supreme Court found that the plaintiffs did not meet their burden because they only submitted evidence of price increases for the merchant side of the market, leaving the cardholder side unanalyzed.

Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anti-competitive exercise of market power. To demonstrate anti-competitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that AmEx’s anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.

The dissent argued that this test increases the burden on plaintiffs in an already arduous rule of reason analysis, and the burden of showing net effects — i.e., that anti-competitive effects on one side of the platform are counteracted by benefits to the other side of the platform — should be on the defendant.

The Economic Perspective on Two-Sided Markets

The amicus briefs filed by three different sets of economists all supported respondent American Express.

Two-sided markets are unique because they link two distinct sets of users together — in the case of credit cards, the merchants and the cardholder customers — and enjoy scale increases, called “network effects.” As more people use the network, each side’s experience improves, and the value of the network increases. Network effects work in the opposite direction as well: as participants from one side

of the network leave, the value of the network decreases for all participants, possibly creating a negative feedback loop. An important feature of “transaction platforms,” like credit cards, is that “they cannot make a sale to one side of the platform without simultaneously making a sale to the other.”

When these conditions are met, “modern economics provides no basis for assuming that a demonstration of price effects on only one side of a two-sided market accurately represents the market-wide effects of a course of conduct. Rather, economics predicts that market-wide welfare might increase, decrease, or remain neutral given price effects on a single side. Only an analysis of the market as a whole can illuminate the true competitive implications.”[2]

As the Supreme Court noted, payment networks are simply “a special type of two-sided platform known as a ‘transaction’ platform.” There are many other types of multi-sided platforms, including newspapers, stock exchanges, ridesharing services, dating sites, social networking sites, and platforms like AirBnB, Etsy and Ebay.[3] The applicability of the American Express decision will depend, in part, on the structure of the two-sided market at issue. For example, the newspaper market is different because readers and advertisers do not “jointly consume” the product (instead they make unrelated transactions) and the platform is not “directly proportional” (there can be multiple readers per ad, or vice versa). There is no compelling reason to analyze both sides of the newspaper market, as compared to the payment card market.[4]

Application of the Supreme Court’s Decision to Health Insurance Markets

There are potentially many two-sided markets in the health care space, but this article focuses on insurance networks. Health insurance is a two-sided platform that, at its most basic level, links patients to health care providers. The health insurance industry also engages in various vertical transactions to help drive down cost and provide better service. The payors thus enable one of the largest and most complex two-sided markets in the United States.

The parallels between two-sided credit card markets and two-sided insurance markets were noticed by several of the amici in American Express. The amici’s positions are understandable given the potential applications to which a reversal would likely be put in the health care industry.

The American Medical Association and the Ohio State Medical Association filed an amicus brief in support of petitioners (the states) raising concerns over the application of the rule requiring a two-sided market analysis in the health care space. The AMA and OSMA are professional associations that represent physicians, residents and medical students in the United States.

First, the AMA and OSMA agreed that “[h]ealthcare services operate on networks or ‘platforms’ with two sets of distinct users transacting in different markets.” Specifically, health insurer networks “compete on two sides, inasmuch as they supply services to (i) a market for medical services provided to patients that are purchased by health insurance plans on one side of the platform and (ii) an inter-related, but distinct, market of commercial health insurance policy sales to subscribers on the other side of the platform.” The amici further explained how two-sided health insurance markets operate:

Physicians contract with health insurers to supply medical services to the health-insurer members as part of healthcare provider networks that health insurers assemble. Health insurance plans, in turn, contract with physicians and other healthcare providers to form provider networks that will assure that the health insurers' members can access necessary and quality medical services at certain negotiated rates.

Health insurers also provide network services to employers and individuals that purchase health insurance policies from them—policies that cover certain of the medical expenses that these employers or individuals would otherwise incur. Health insurers compete to sell insurance products to employers and individuals: such competition is predicated on the premiums charged, benefits offered, and medical networks assembled by the health insurers.

The AMA/OSMA expressed concern with “anti-referral provisions or barriers” by dominant health insurance networks or their agent benefit managers, which they analogized to the anti-steering provisions at issue in *American Express*. They contended that the two-sided market analysis requirement “will make it more likely that anti-referral rules that are imposed upon physicians by dominant entities” and that conduct “will be immunized from antitrust scrutiny.” For example, if a dominant health insurer imposes “anti-referral rules prohibiting physicians from referring patients to out-of-network specialists for innovative or medically-necessary tests,” the plaintiffs would have to “show competitive harm in healthcare by netting out harm to one group of consumers with potential benefits to another group.”

By contrast, the Pharmaceutical Research and Manufacturers of America, an industry organization representing pharmaceutical and biotechnology companies, supported the two-sided market rule, drawing clear parallels between *American Express*' anti-steering provisions with “common vertical agreements PhRMA's member companies employ to efficiently structure their business activities in a procompetitive manner.”

Current Health Insurance Cases That May Call for a Two-Sided Market Analysis

There are a number of ongoing antitrust cases involving health insurance networks that may be susceptible to the type of two-sided market analysis described in *American Express*. And we can expect the parties in those cases to attempt to employ the two-sided market analysis to their advantage.

In the massive antitrust multidistrict litigation *In re Blue Cross Blue Shield Antitrust Litigation*,^[5] the district court noted the potential applicability of *American Express* to the case, and left open the possibility of a two-sided market analysis. As Judge David Proctor explained:

Recently, the Supreme Court granted certiorari to review the application of the Sherman Act to two-sided platforms that unite distinct yet interrelated groups of customers. [citation omitted]. The *American Express* case concerns the credit card market, not the health insurance market. ... The court does not address here whether any market at issue in this case can be characterized as a two-sided market, nor does the court discuss whether that characterization would affect a determination of whether to apply a per se or rule of reason standard. But it will be worth seeing what the Supreme Court has to say in its *American Express* decision.”

It did not take long for a payor-defendant to attempt to apply *American Express* to its own litigation. *Blue Cross Blue Shield of Rhode Island* recently filed a motion for reconsideration asking the district

court to reverse its denial of summary judgment or certify an immediate appeal to the First Circuit.[6] BCBS argued, in part, that the district court wrongly focused on only one side of the two-sided “healthcare-financing market,” whereas the recent Supreme Court decision mandates a two-sided analysis.

This case implicates the Supreme Court’s two-sided market analysis in *American Express*. Although Steward’s amended complaint alleges separate subscriber and provider markets, there is only one relevant market: the healthcare-financing market. This market clearly satisfies the Court’s criteria for a transaction-platform market. Health plans intermediate transactions between subscribers and providers, and both sides of the market are characterized by network effects; subscriber demand is a function of provider breadth, and provider demand is in turn a function of subscriber volume.

Every time there is a vertical arrangement with preclusive effect in an arguably two-sided market, the parties — whether defending or attacking the arrangement, whether government or private plaintiff — will now have to grapple with the applicability of the *American Express* analysis. It will be fascinating to see how courts determine which platforms require a two-sided analysis, and how such an analysis is adapted to the particular economics and business realities of the healthcare sector.

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[1] *Ohio v. American Express*, 138 S. Ct. 2274 (2018).

[2] Brief for Amici Curiae Antitrust Law & Economics Scholars in support of Respondents.

[3] See Brief for Amici Curiae Sidack and Willig in Support of Respondents.

[4] See Brief for Amici Curiae Evans and Schmalensee.

[5] The case is *In re Blue Cross Blue Shield Antitrust Litig.*, Case No. 13-CV-20000-RDP, 2018 U.S. Dist. LEXIS 58107, 2018 WL 1640023 (N.D. Ala. April 5, 2018) (Proctor, J.).

[6] The case is *Steward Health Care System LLC et al v. Blue Cross & Blue Shield of Rhode Island*, Case No. 13-cv-405 (D.R.I.).