

AntitrustConnect Blog

Visa, MasterCard Settle U.S./State Antitrust Suit, While American Express Vows to Fight

Jeffrey May (Wolters Kluwer) · Thursday, October 7th, 2010

The Department of Justice and seven states have filed a civil antitrust suit against the three largest credit and charge card transaction networks in the United States, challenging rules that allegedly restrict price competition at the point of sale.

MasterCard and Visa have agreed to settle the charges; however, American Express announced that it had no intention of settling the case.

“We want to put more money in consumers’ pockets, and by eliminating credit card companies’ anticompetitive rules, we will accomplish that,” Attorney General Eric Holder said announcing the action on October 4. “We need to ensure that every consumer has access to more choices and lower prices. And that simply will not happen unless, and until, American Express’s restrictive rules are changed.”

The Department of Justice alleges that the credit card companies bar merchants from offering consumer discounts, rewards and information about card costs, which results in consumers paying more for their purchases.

According to the Justice Department, U.S. merchants paid around \$35 billion last year in credit card acceptance costs, with American Express charging the highest fees and implementing the most restrictive merchant rules.

The government alleges that the challenged merchant restraints harmed competition in two relevant markets:

- (1) The market for general purpose card network services to merchants, and
- (2) The market for general purpose card network services to travel and entertainment merchants, where fees are even higher than those charged to general merchants.

MasterCard, Visa, and American Express are alleged to have market power in both markets. “Each Defendant’s vertical Merchant Restraints are directly aimed at restraining horizontal interbrand competition,” according to the complaint. The restraints purportedly prohibit merchants from fostering competition among credit card networks at the point of sale.

Under the proposed settlement with MasterCard and Visa, which is awaiting approval in the federal district court in Brooklyn, New York, the two companies would allow their merchants to offer consumers discounts or rebates for using a cheaper form of payment. Merchants could inform customers as to which cards would result in lower business costs, thereby enabling cost savings to be passed on to the consumer.

Merchants that currently accept only Visa or MasterCard, or both, would benefit as soon as the final judgment became final. However, merchants that accept American Express cards will remain bound by restrictions imposed by American Express pending the outcome of the litigation. With the highest merchant fees of any network, American Express has the greatest incentive to maintain its rules and to prevent merchants from encouraging customers to use lower-cost methods of payment.

State Enforcement

Ohio Attorney General Richard Cordray took the lead on behalf of the seven state attorneys general in the case. The attorneys general of Connecticut, Iowa, Maryland, Michigan, Missouri, and Texas also signed onto the litigation. The states brought the action under federal antitrust law in their respective sovereign capacities and as *parens patriae* on behalf of their citizens.

American Express Statement

The Justice Department's actions represent "an extraordinary retreat by the antitrust division," said American Express chairman and CEO Kenneth Chenault. "Instead of promoting competition, it now seeks to promote regulation that would ultimately limit competition. We will defend the rights of our cardmembers at the point of sale and our own ability to negotiate freely with merchants."

He added that American Express is "confident" the courts will recognize the "perverse anticompetitive nature of the government's case, noting that the government's new approach would give an unfair advantage to Visa and MasterCard.

American Express rejects the government's contentions that its contracts with merchants are illegal and that it has market power. The company argues that antitrust law is on its side. The Justice Department's inability to establish market power will doom, the government's case, according to American Express. The antitrust enforcers have their work cut out for them.

Asked at a news conference about the possibility of a settlement with American Express, Assistant Attorney General for Antitrust Christine Varney replied, "we remain open at any point in time whenever a party wants to address our concerns . . . there is a settlement that is filed with MasterCard and Visa, so the terms upon which we would be willing to settle will be very clear to everyone."

Details of the [complaint](#) and [proposed consent decree](#), *U.S. v. American Express Co., et al.*, No. CV-10-4496, will appear in **CCH Trade Regulation Reporter**.

Sarah Borchersen-Keto, CCH Washington Correspondent, contributed to this posting.

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