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Second Circuit Rejects Antitrust Standing for Plaintiffs Alleging "Umbrella" Harm

- The Second Circuit held that plaintiffs lacked antitrust standing because their alleged injuries were not directly caused by defendants and better enforcers of the antitrust laws existed.
- The court grounded its analysis in principles of proximate causation, and it determined that the certain and non-duplicative nature of plaintiffs' alleged injuries could not by itself show plaintiffs were efficient enforcers.

In its recent decision in *In re American Express Anti-Steering Rules Antitrust Litigation*, No. 20-1766, the Second Circuit, affirming the district court's order of dismissal, held that a putative class of merchants that did *not* accept American Express (AmEx) payment cards could not maintain antitrust claims against AmEx for damages allegedly arising out of acceptance of non-AmEx payment cards. The plaintiffs argued that they had standing to bring their claims because they allegedly suffered antitrust injury under a so-called "umbrella" theory: they were injured when certain of AmEx's merchant rules suppressed competition and increased transaction fees on the non-AmEx cards they did accept. The Second Circuit, adopting the reasoning of the court below, determined that non-AmEx-accepting merchants alleged injuries that were too remote to establish antitrust standing. Applying the well-established framework set forth in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters* (*AGC*), 459 U.S. 519, 540-45 (1983), the Second Circuit determined that non-AmEx-accepting merchants were not efficient enforcers of the antitrust laws. This decision may limit the number and types of plaintiffs in other cases, including those involving financial institutions and alleging price manipulation.

Background

This opinion is the latest development in a longstanding multidistrict challenge to AmEx's so-called "anti-steering rules," first initiated by merchants in 2006. The challenged rules, set forth in agreements between AmEx and AmEx-accepting merchants, are alleged to prohibit AmEx-accepting merchants from encouraging consumers to use one type of card over another. Merchants allege that these rules are unlawful restraints of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1.

In this case, plaintiffs brought claims against AmEx on behalf of two putative classes: merchants that accept AmEx and those that do not. The non-AmEx-accepting merchants asserted an "umbrella" theory of harm, alleging that certain of AmEx's merchant acceptance rules drove up the costs of accepting payment cards generally, including costs associated with non-AmEx payment networks. This putative class, consisting of merchants who accepted certain non-AmEx payment cards, alleged they paid supra-competitive fees on non-AmEx transactions because of AmEx's rules. The district court granted AmEx's motion to dismiss the claims of the non-AmEx-accepting merchants and the merchants appealed. In the same order, the district court granted the motion by AmEx to compel arbitration against the AmEx accepting merchants based on arbitration clauses in their merchant agreements with AmEx. The plaintiffs did not appeal the decision to compel arbitration.

The Second Circuit's Holding

The court affirmed the part of the district court's order dismissing the claims of the non-AmEx-accepting merchants, holding that those merchants did not have antitrust standing. The Second Circuit considered whether the merchants were "efficient enforcers," using the four factors articulated by the Supreme Court in *AGC*: (1) "the directness or indirectness of the asserted injury"; (2) "the existence of more direct victims" or the "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement"; (3) whether the claim is "highly speculative"; and (4) "the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." The Second Circuit held that the first two efficient-enforcer factors did not support standing and that the latter two, though they may support standing, were not sufficient to overcome the first two.

With respect to the first *AGC* factor, the Second Circuit rejected putative class plaintiffs' "umbrella" theory of harm, holding that their alleged injury was too remote. The court analyzed the plaintiffs' alleged injuries using "familiar principles of proximate causation"—specifically the "first-step" rule. According to the court, this rule requires "some direct relation between the injury asserted and the injurious conduct alleged." Taking the allegations in the complaint as true, the court determined that if any party was directly harmed by the rules, it was only merchants using the AmEx network; the non-AmEx-accepting merchants were not.

As for the second *AGC* factor, the court again noted that AmEx-accepting merchants were more directly harmed by the allegedly anticompetitive rules. According to the court, the existence of a separate AmEx-accepting merchant class "diminish[ed] the justification for allowing a more remote party" to bring suit. This factor, therefore, also counseled against a finding that non-AmEx-accepting merchants had antitrust standing.

The Second Circuit found that the third factor—whether the alleged injuries were speculative—was a "close question." Although the non-AmEx-accepting merchants had, according to the court, presented a "compelling prima facie case of foreseeable damages," any damages calculation "would rely on some speculation" given that any injuries would have been indirect and that the impact of the elimination of the anti-steering rules was uncertain. Nevertheless, the court reasoned that even assuming the non-AmEx-accepting merchants' injuries were "foreseeable, predictable, and even calculable," this factor could not establish that the alleged injuries were proximately caused by AmEx's rules in light of the indirect nature of the injury.

Finally, the court wrote that while the fourth *AGC* factor regarding the workability of damages apportionment counseled in favor of standing, it did not outweigh the first and second factors. According to the court, even though the damages claimed by the non-AmEx-accepting merchants did not overlap with those sought by the other merchants, this factor was primarily designed to keep "the scope of complex antitrust trials within manageable limits." The court held that the "efficient enforcer inquiry remains, fundamentally, one into proximate cause."

Based on this analysis, the court held that the non-AmEx-accepting merchants were not efficient enforcers in this instance and therefore did not have antitrust standing. The court also dismissed the plaintiffs' California state law claims.

Potential Implications

This decision illustrates the importance of proximate causation in the analysis of antitrust standing. Indeed, several lower courts hearing cases brought by plaintiffs who have alleged umbrella theories—including in particular cases where plaintiffs claim they were harmed by purchasing certain commodities at market-wide inflated prices—have recently placed great weight on the directness of the injury alleged under the first *AGC* factor and the existence of other, more directly injured, parties under the plaintiffs' theory of injury. The decision in this case lends further support to the reasoning of those courts and indicates that plaintiffs seeking to pursue claims under the antitrust laws must show a direct injury from the alleged unlawful conduct.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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