

## U.S. Supreme Court's Pending Review of American Express Merchant Fees By Sirijitt Choosak, LL.M. Candidate 2018 | March 9, 2018

Eleven states including Ohio, Connecticut, Idaho, Illinois, Iowa, Maryland, Michigan, Montana, Rhode Island, Utah, and Vermont, are involved in a [lawsuit](#) against American Express. These states argue that American Express' unfair practice of prohibiting retail merchants from advising customers to use a credit card with lower transaction costs violates federal antitrust laws.

In the credit card industry where there are a small number of market players, as in an oligopoly, anti-competitive practices may result. In 2010, American Express, Visa, and MasterCard were accused of unfair practices. Subsequently, Visa and MasterCard voluntarily reached a settlement and agreed to give up their anti-steering provisions, which left American Express to proceed with a trial.

A policy known as an "[anti-steering](#)" clause was imposed on merchants and retailers in American Express' merchant agreement. This provision contractually forbids merchants from suggesting to customers that they should use competitors' credit cards, such as Discover, which has lower swipe fees. This was seen as stifling price competition. Merchants usually pass this hidden cost to customers in the price of goods or services. Therefore, the court has to determine whether businesses can encourage or discourage customers from using lower cost credit cards for their transaction payments.

The United States District Court for the Eastern District of New York, applying the rule of reason, [found](#) that American Express had violated antitrust laws because the anti-steering requirement in question caused harm to both merchants and credit card holders, who are the participants in American Express' credit card network. The court further held that the restrictions on steering the customer's free choice at the point of sale unreasonably restrains a competitive price, raises the cost of merchant fees, and inflates retail prices, which is in violation of Section 1 of the Sherman Act (15 U.S.C. 1). Notwithstanding the previous decision, the United States Court of Appeals for the Second Circuit conversely employed the [two-sided market](#) concept and reversed the District Court's judgment by holding in favor of American Express. The Second Circuit [held](#) that the State of Ohio et al. had not shown that the anti-steering rules unreasonably restrain trade and cause harm to cardholders as well as merchants.

The credit card network is the cornerstone of a two-sided market, in which the credit card company is an intermediary linking two different user groups – customers and merchants. Merchants benefit from accepting a customer's credit card only when there is an adequate volume of cardholders using that particular credit card, thereby covering the cost of the transaction fees charged by the credit card



company. Meanwhile, using a credit card would be pointless for customers if the card could not be widely accepted by a full range of various merchants.

Even though the case has been pending in the United States Supreme Court, it is worth noting the possible vast impact if the Supreme Court upholds the Second Circuit's judgment. This is because it may become the precedent case not only for credit card companies but also several large companies in other industries as well. It would enable numerous [platform companies](#) which have two-sides of users like Google, Amazon, Apple, Facebook, and Uber, among others, to be more powerful by taking advantage of such a ruling. Overall, the Supreme Court's determination will carry great weight.