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### **Court Rules Against AmEx Anti-Steering Regs**

A federal court ruled that it's a violation of antitrust law for American Express to continue to prohibit merchants from telling cardholders about discounts they could get if they use a different company's credit card. American Express stated it would appeal the decision.

The case against American Express Co. and American Express Travel Related Services Co. was brought by the Justice Department and 17 states in 2010 as part of an antitrust lawsuit that also targeted Visa and MasterCard. Visa and MasterCard settled, but AmEx continued to litigate.

Federal District Judge Nicholas Garaufis' 150-page decision asserted that merchants and their customers are hurt by AmEx's restrictions, called Non-Discrimination Provisions (NDPs). The judge also noted that the swipe fees merchants pay American Express generally are higher than the fees for Visa and MasterCard.

The judge wrote that AmEx, "possesses sufficient market power in the network services market to harm competition...."

"The record demonstrates, in fact, that Defendants have the power to repeatedly and profitably raise their merchant prices without worrying about significant merchant attrition," he continued.

"In addition, Plaintiffs have proven that American Express's NDPs have caused actual anticompetitive effects on interbrand competition. By preventing merchants from steering additional charge volume to their least expensive network, for example, the NDPs short-circuit the ordinary price-setting mechanism in the network services market by removing the competitive 'reward' for networks offering merchants a lower price for acceptance services."

The judge stated that as a general matter, steering customers to discounts is "pro-competitive and ubiquitous" and that dynamic is missing in the credit card industry.

"Merchants routinely attempt to influence customers' purchasing decisions, whether by placing a particular brand of cereal at eye level rather than on a bottom shelf, discounting last year's fashion inventory, or offering promotions such as 'buy one, get one free.' This dynamic, however, is absent in the credit card industry," the judge wrote.

"Under American Express's NDPs, a merchant may not attempt to induce or 'steer' a customer to use the merchant's preferred card network by, for example, offering a 10% discount for using a Visa card, free shipping for using a Discover card, or a free night at a hotel for using an American Express card," the decision stated.

The judge wrote that he repeatedly urged the parties to negotiate a settlement that balances American Express' legitimate business interests with "the public's interest in robust inter-brand competition" but the parties failed to reach a settlement.

American Express might not have to abandon all of its Non-Discrimination Provisions to comply with the law, according to the Feb. 19 decision. The judge ordered the parties to submit a joint, Proposed Remedial Order on how American Express' regulations might be rewritten to satisfy the company's interests while complying with antitrust law.

"Fashioning appropriate relief in this case will require certain of the provisions in the NDPs to be excised entirely. It may be possible, however, for other challenged clauses to be revised, amended, or re-characterized in such a way that considers the interests of both Plaintiffs and Defendants," the judge wrote.

American Express, however, stated it is "disappointed in the court's ruling, which we believe will harm competition to the detriment of consumers and merchants." The company stated it would appeal "at the appropriate time."

It added that, "American Express' Non-Discrimination Provisions protect Card Members from anti-consumer practices, including at the checkout counter, such as being told to pay with another card. Eliminating these protections would inhibit consumers' choice to pay with their preferred payment method and allow merchants who have agreed to honor our cards to then discriminate against them when our Card Members choose to pay with American Express."

It asserted that the court's decision would hurt competition by "further entrenching the two dominant payment networks, Visa and MasterCard." Only a small percentage of Visa and MasterCard holders also have American Express, but most American Express cardholders also carry a competing card, American Express stated.

The Merchants Payment Coalition -- a group of gas stations, convenience stores and other retailers that fights for a more competitive and transparent card system -- applauded the court's decision.

It also stated that it hopes "other steps will be taken to stop similar unfair practices of the other card companies that set outrageous fees behind closed doors for their real customers, the banks issuing the cards."

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