AmEx Ruling Proves A Double-Edged Sword In Labor Antitrust

By **Lauren Weinstein and Robert Chen** (April 13, 2023)

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In 2018, the U.S. Supreme Court decided Ohio v. American Express, a case best known for its holding that in antitrust cases involving two-sided transaction platforms, plaintiffs must show harm to both sides of the platform.[1]

In the past five years, just that one holding — one of several from that case — has spawned no end of existential questions.

What, exactly, is a two-sided platform market? How can plaintiffs show harm to both sides? How much harm has to be shown to each side? Does the rule apply only to transaction platforms, or does it apply more broadly?

Further complicating matters are two additional holdings from AmEx: (1) that two-sided transaction platforms compete only with other such platforms, and (2) that two-sided platforms characteristically exhibit indirect network effects, i.e., changes on one side of the platform can have effects on the other side of the platform.

While the headline holding that plaintiffs must show harm on both sides of two-sided platforms has been used to great effect by defendants, plaintiffs have managed to use the latter two to defeat motions to dismiss. AmEx thus has not proven to be the gift to the defense bar that many thought it would be.

As the plaintiff and defense bars have learned to use AmEx to their respective advantages, courts have grappled with how to apply AmEx and, specifically, how it applies beyond the transaction platform context. This article focuses on AmEx's relevance to labor-side antitrust cases.

What does AmEx teach?

AmEx concerned two kinds of customers served by the credit card company: merchants, such as retail stores and restaurants, and the cardholders who buy from them using their AmEx cards.

AmEx charges a price to both sides for processing payments. The merchants pay AmEx to process transactions with cardholders. Using what it collects from merchants, AmEx then pays cardholders when they use their cards with rewards such as airline miles — charging them, in economics speak, a negative price per transaction.[2]

State attorneys general offices challenged AmEx practices on the merchant side of its business. They alleged that AmEx was violating antitrust law by prohibiting merchants from steering AmEx cardholders toward AmEx's competitors, who charged merchants lower payment processing prices. The result, according to the states, was less competition, and higher prices for merchants.[3]

AmEx, in response, argued that the states ignored the cardholder side of its two-sided business. According to AmEx, the states' case failed to consider whether increases in prices

charged to the merchant side increased rather than decreased competition — by helping AmEx's cardholder-side rewards offerings and encouraging rivals to compete on rewards, too.[4]

The Supreme Court agreed that the states needed — but had failed — to show harm to both sides. According to the court, the states needed to make that showing because AmEx's credit card network is a two-sided transaction platform. Two-sided transaction platforms "suppl[y] only one product": "simultaneous transaction[s] between participants."

Because transactions on the platform are simultaneous, economic effects on each side of the transaction platform are interconnected, and they must be analyzed together. In AmEx's case, that meant prices charged to the merchant side could not be assessed without also looking to prices charged on the cardholder side.[5]

AmEx makes clear that credit card networks are two-sided transaction platforms. Since the AmEx decision, courts have grappled with the question of whether other markets, e.g., flight-booking platforms that facilitate transactions between travel agents and airlines, are two-sided.[6]

Are labor markets two-sided?

It is clear that AmEx's "both sides of the platform" rule applies only to two-sided platform markets, but it is not always clear if a market is two-sided. That is an issue that has been fiercely litigated in labor antitrust cases, where defendants have invoked AmEx to combat claims of harms to labor by pointing to alleged pro-competitive benefits in markets for goods or services produced by labor.

Some defendants have thus argued that labor markets should be thought of as two-sided platforms: End consumers of goods or services provided by labor are on one side, and the laborers are on the other side. Under such a theory, plaintiffs must show harm to both sides of the market, i.e., to consumers and laborers. So far, courts have rejected that theory.

The Delta Dental Antitrust Litigation, from the U.S. District Court for the Northern District of Illinois in 2020, is one example.[7] There, a proposed class of dental service providers claimed that dental insurance companies were agreeing not to compete in purchasing dental services from the class members. The insurance companies were allegedly harming labor market competition in several ways.

The companies, according to the plaintiffs, were allocating geographic territories among themselves and agreeing not to compete outside their own allocated territories. They were also alleged to be fixing at artificially low levels the rates the companies would pay for class members' services.

The insurance companies moved to dismiss under AmEx. The companies argued that they were two-sided platforms that matched the plaintiff dental service providers on one side of the platform with dental service customers on the other.

According to the insurance companies, AmEx required dismissal because the actions the plaintiffs were complaining about on their side of the platform resulted in "lower premiums for employers, groups, and individuals, and lower copayments and out-of-pocket costs for consumers" on the other side.[8] Plaintiffs, by the insurance companies' lights, had not alleged sufficient harms to both sides of the platform.

The court rejected the insurance companies' AmEx defense. It concluded that "dental insurance operates decidedly differently from the 'two-sided transaction platform' in AmEx."[9] Fatally, according to the court, "dental insurance lacks the 'key feature' of a transaction platform: simultaneity of the exchange."[10]

Whereas a credit card transaction requires simultaneous exchanges between the retail customer on the one hand and the retail merchant on the other, transactions on the consumer side of dental insurance — premium payments — are not connected in timing or cost with transactions on the service provider side, reimbursements of dental service provider fees.

The two sides were too untethered from each other, so there was no two-sided platform that needed to be analyzed as one whole. Thus, the court held, AmEx did not apply, and plaintiffs had adequately alleged anti-competitive harm.

In the NCAA Athletic Grant-In-Aid Cap Antitrust Litigation in 2021, the U.S. District Court for the Northern District of California rejected an AmEx defense for similar reasons.[11]

There, college athletes challenged compensation caps set by the National Collegiate Athletic Association and the collegiate athletic conferences as unreasonable restraints on competition to pay for their labor.

The defendants, in response, offered economic expert testimony that the labor market was a multisided market and that, while the compensation caps may harm trade on the athlete side of the platform, they promoted competition on the other sides.

The other sides included "non-athlete students, alumni, coaches and athletic staff, faculty, other staff, the community in which the school is located, and, if they are public institutions, the state."

Although the expert did not make clear how competition on the other sides benefited from compensation caps on the athlete side, the defendants claimed nevertheless that effects on the other sides made the caps reasonable.

The court rejected the defendants' appeals to AmEx and excluded the expert's proposed testimony. The setting of athlete compensation, the court explained, was not one side of a "simultaneous interaction or proportional consumption through a platform by different market participants of what essentially constitutes 'only one product.'"[12]

Thus, like the court in Delta Dental, the NCAA court concluded that the market for college athletes' labor "is not analogous to the relevant market that the Supreme Court recognized as two-sided in American Express."

Are other holdings in AmEx pro-plaintiff?

Delta Dental and NCAA indicate that an AmEx defense cannot be sustained where transactions between labor suppliers and labor purchasers are neither simultaneous nor interconnected.

Courts agreeing with the reasoning in those cases could limit AmEx defenses to gig economy platforms and similar products that do facilitate simultaneous and interconnected labor market transactions.

Even when a labor market platform can show that its transactions are simultaneous and interconnected, there may be reason for it to avoid AmEx. The AmEx decision contains more than its well-known rule requiring plaintiffs to show harm to both sides of a two-sided platform.

Although the Supreme Court ruled in favor of the defendant in AmEx, two other aspects of the decision have helped plaintiffs maintain their Sherman Act Section 1 and Section 2 cases.

One aspect is AmEx's holding that "only other two-sided platforms can compete with a two-sided platform for transactions."[13]

The plaintiffs in one recent Section 1 case, Davitashvili v. Grubhub Inc. in the U.S. District Court for the Southern District of New York in 2022, used this part of AmEx to defeat a motion to dismiss.[14]

They ran toward rather than away from AmEx, arguing that Grubhub Inc., Uber Eats, and Postmates Inc. were "two sided platforms, acting as intermediaries to connect restaurants and customers."[15]

The plaintiffs claimed that the platforms were violating antitrust law by prohibiting restaurants using the platforms from charging lower prices off-platform — i.e., to customers who dined in person or ordered takeout directly from the restaurant.

According to the plaintiffs, this prohibition suppressed competition in the relevant, two-sided platform market, raising restaurant prices to supracompetitive levels.

The defendants moved to dismiss. They argued that the plaintiffs could not exclude one-sided direct-delivery products such as the Domino's Pizza app from the relevant market.

By excluding one-sided products from their market definition, the defendants argued, the plaintiffs had failed to allege a plausible relevant market. According to the defendants, that meant the plaintiffs failed to state a prima facie antitrust claim.[16]

The court rejected the defendants' argument — remarkably, without having to engage in any complicated market definition analysis. AmEx's statement that "'[o]nly other two-sided platforms can compete with a two-sided platform for transactions'" was enough to settle the matter.[17]

Although the plaintiffs in the Grubhub case were not alleging a labor market harm, nothing in that court's decision would prevent a labor plaintiff from relying on the Grubhub plaintiffs' AmEx argument in suing the same or similar companies. A labor plaintiff could sufficiently allege harm to the relevant market simply by alleging a plausible two-sided platform market.

In the Surescripts Antitrust Litigation in the Northern District of Illinois in 2022, the plaintiffs used another aspect of AmEx to defeat a motion to dismiss.[18]

There, a proposed class of pharmacy service providers alleged that Surescripts LLC had illegally monopolized the market for e-prescribing services — in violation of Section 2 of the Sherman Act — by forcing potential competitors to sign noncompete agreements and by punishing participating doctors for using competitor platforms.[19]

Section 2 plaintiffs like the pharmacy service providers must allege plausible barriers to entry that prevent would-be competitors from threatening the monopolist's market dominance.[20] Network effects can be one such entry barrier.[21]

To satisfy the barriers-to-entry element, the pharmacy service providers alleged that Surescripts was a two-sided platform — a type of platform that the Supreme Court in AmEx said characteristically "exhibit[s] more pronounced indirect network effects."[22]

The pharmacy service providers made several allegations in support of their argument that indirect network effects on Surescripts' two-sided e-prescribing platform created a barrier to entry that protected Surescripts' monopoly.

First, they characterized the service as two-sided by describing it as an intermediary between pharmacies on one side and prescribing doctors on the other.

Second, they alleged that the e-prescribing service exhibited indirect network effects because "each side's decision to use a particular [e-prescribing] network is affected in part by how many on the other side have chosen to do the same."[23]

Third, and finally, the pharmacy service providers claimed that indirect network effects required potential competitors to achieve a critical mass of participation on both the pharmacy and doctor sides before they could become a viable alternative to Surescripts.

The court credited each of these allegations in concluding that the pharmacy service providers had adequately alleged barriers to entry. Citing AmEx's discussion of indirect network effects, the court observed: "Achieving critical mass is, to be sure, a barrier to entry for start-ups in many two-sided markets."[24]

This reasoning, although not in a case involving labor market harms, could help labor market plaintiffs clear the formidable motion-to-dismiss bar in Section 2 cases.

Conclusion

The law on platform antitrust after AmEx is still in its early stages of development. AmEx remains a complicated decision with varying and uncertain implications for labor antitrust cases. Still, a few patterns have emerged.

Although AmEx was a defense victory, AmEx defenses have proved difficult to maintain. By contrast, the decision has been used to great effect by plaintiffs. Plaintiffs and defendants alike should keep these early developments in mind before invoking AmEx, which may well prove to be a double-edged sword.

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[1] Ohio v. Am. Express Co. , 138 S. Ct. 2274, 2286 (2018).

[2] Id. at 2280-81.

[3] Id. at 2282-83.

[4] Id. at 2287-89.

[5] Id. at 2286-88.

[6] U.S. Airways v. Sabre Holdings Corp. , 938 F.3d 43, 57-58 (2d Cir. 2019).

[7] In re Delta Dental Antitrust Litigation , 484 F. Supp. 3d 627 (N.D. Ill. 2020).

[8] Id. at 637.

[9] Id.

[10] Id.

[11] In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation , No. 14-md-02541 CW, 2018 WL 4241981 (N.D. Cal. Sept. 3, 2018).

[12] Id. at *4

[13] AmEx, 138 S. Ct. at 2287.

[14] Davitashvili v. Grubhub Inc. , 20-cv-3000 (LAK), 2022 WL 958051 (S.D.N.Y. March 30, 2022).

[15] Id. at *1 (alterations omitted).

[16] Id. at *8-*9.

[17] Id. at *8-*9 (quoting AmEx, 138 S. Ct. at 2287).

[18] In re Surescripts Antitrust Litig. , 608 F. Supp. 3d 629 (N.D. Ill. 2022).

[19] Id. at 636-37.

[20] See, e.g., United States v. Microsoft Corp. , 253 F.3d 34, 82 (D.C. Cir. 2001).

[21] See, e.g., FTC v. Facebook Inc. , 581 F. Supp. 3d 34, 51 (D.D.C. 2022).

[22] AmEx,138 S. Ct. at 2286.

[23] Surescripts, 608 F. Supp. 3d at 636.

[24] Id. at 645.