

Emily Westridge Black and Carrington Giammittorio in Texas Bar Journal: 2018 Year in Review: Antitrust and Business Litigation

January 3, 2019 Carrington Giammittorio

PRACTICES Antitrust and Competition, Litigation

This year, the U.S. Supreme Court considered market definition in two-sided markets and issued two rulings with potentially broad implications for commercial disputes. The court also heard arguments in *Apple v. Pepper*, a case that implicates the limits of the Illinois Brick indirect purchaser rule.

Market Definition in Two-Sided Markets

In *Ohio et al. v. American Express*, the court considered how the relevant market should be defined in antitrust cases when the market at issue is two-sided.

The case involved a challenge to American Express's anti-steering rules (which prohibit merchants from incentivizing consumers to use credit cards that charge merchants lower fees). The petitioners argued the rules violated the Sherman Act because they reduced the incentive for card networks to lower merchant fees, injuring merchants.

In a 5-4 opinion, the Supreme Court disagreed, reasoning that a credit card network is a type of two-sided market called a "transaction" platform, where simultaneous sales of products or services are made to two different groups of buyers (here, consumers and merchants). The court held that these platforms must be analyzed as a whole (rather than focusing on one set of buyers), and antitrust harm results only when anticompetitive effects are felt by both sets of buyers.

Because AmEx's rules did not increase the cost of transactions or reduce the total number of transactions, they did not cause harm cognizable under antitrust laws. The court suggested AmEx's higher merchant fees could indicate healthy market competition because they contributed to benefits to consumers, including cash-back rebates. ...

Excerpted from the *Texas Bar Journal*. To read the full article, click [here](#).