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American Express Anti-Steering Litigation: Implications for "Umbrella" Plaintiffs' Standing in Antitrust Suits

On Monday, November 22, 2021, the United States Court of Appeals for the Second Circuit affirmed a district court ruling that "umbrella" plaintiffs—*i.e.*, antitrust class action claimants who purchase from a non-conspirator a product affected by a price-fixing conspiracy—lacked antitrust standing.[1] The "umbrella" plaintiffs were commercial merchants who, despite not accepting American Express ("Amex") credit cards, alleged that Amex policies inflated fees that the merchants paid to other card providers. The Second Circuit determined that these plaintiffs failed the four-factor efficient enforcer test, which considers the relationship between an antitrust violation and injury, and therefore could not establish standing.[2] The ruling effectively limits the class of potential plaintiffs in price-fixing cases to those who purchase affected products directly from a conspirator.[3]

THE CENTRALITY OF PROXIMATE CAUSE TO THE EFFICIENT ENFORCER ANALYSIS

In *In re American Express*, plaintiffs sued Amex on behalf of a class of merchants who have no contractual relationship with Amex, and thus do not accept Amex cards, alleging that Amex's Anti-Steering Rules (*i.e.*, provisions in Amex's contracts with merchants that prevent those merchants from communicating to customers a preference for other payment methods that may carry lower processing fees) unreasonably restrain interbrand price competition with other major credit card networks.[4] According to plaintiffs, Amex's Anti-Steering Rules, when combined with Amex's higher transaction fees charged to merchants, inflated transaction fees charged by Visa, MasterCard, and Discover to "supracompetitive levels."[5]

Applying the four efficient enforcer factors, the Second Circuit affirmed the district court's ruling that plaintiffs lacked antitrust standing.[6] The Second Circuit held that the first factor—whether the violation was a direct or remote cause of the injury—weighed against antitrust standing because plaintiffs' alleged injuries did not occur at the "first step" following Amex's conduct and

therefore were not proximately caused by Amex.[7] Specifically, at the first step, Amex allegedly raised the fees for Amex-accepting merchants (and not for appellants, who do not accept Amex cards) through its Anti-Steering Rules. Because plaintiffs were allegedly injured at a later point in time (*i.e.*, when Amex's competitors raised their own prices), the alleged antitrust violation was a remote cause of the injuries.[8]

The Second Circuit also found that the second factor—the existence of more direct victims—counseled against antitrust standing because the merchants who have a relationship with Amex and were allegedly harmed at the first step by Amex's Anti-Steering Rules have already sued Amex.[9] As to the third factor—the extent to which the claim is "highly speculative"—the Second Circuit noted that plaintiffs presented a compelling prima facie case of foreseeable damages, but it determined that the damages calculation would rely on some speculation and that proximate cause requires more than foreseeability.[10] In analyzing the fourth factor, the Second Circuit held that, although no risk of duplicate recoveries or complex reapportionment of damages existed, plaintiffs' success on this factor did not establish antitrust standing.[11]

IMPLICATIONS FOR "UMBRELLA" LIABILITY AND EFFICIENT ENFORCER CASES

Significantly, the *In re American Express* panel stated that the efficient enforcer inquiry "remains, fundamentally, one into proximate cause," clarifying that it is not plaintiffs' status as umbrella plaintiffs or otherwise that resolves the antitrust standing inquiry but "the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff."[12] Though it stops short of holding that an umbrella plaintiff can never have standing where it sues for market-wide price increases caused by anticompetitive behavior, *In re American Express* places proximate cause at the forefront of the antitrust standing analysis and requires that plaintiffs show a direct relation between the alleged misconduct and the injury asserted.

In re American Express is particularly relevant with respect to antitrust cases in which plaintiffs allege price-fixing of financial benchmarks. Investors in financial instruments have brought various lawsuits against financial institutions that allegedly conspired to depress interest rates indexed to certain benchmarks. A number of district courts have relied on the efficient enforcer test to deny standing in these cases to umbrella plaintiffs who sought to recover trading losses on financial instruments entered into with non-conspiring financial institutions.[13] To date, the Second Circuit's decisions in benchmarking antitrust cases, such as its opinion in *Gelboim v. Bank of America Corporation*,[14] have not addressed the standing of such umbrella plaintiffs. *In re American Express* suggests that the Second Circuit is likely to agree with the majority of district courts that have denied standing to such plaintiffs in benchmark cases, which should significantly reduce the exposure of financial institutions to outsized damages in those cases.

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[1] *In re American Express Anti-Steering Rules Antitrust Litigation*, No. 20-1766 (2d Cir. Nov. 22, 2021).
[2] *Id.* at 22.
[3] The holding in *In re American Express* does not alter the "umbrella" theory of liability as it relates to cartel cases. *See, e.g.*, *U.S. Gypsum Co. v. Indiana Gas Co., Inc.*, 350 F.3d 623 (7th Cir. 2003).
[4] *In re American Express*, at 8. Credit card companies charge merchants a fee for every transaction processed. *Id.* at 7. Plaintiffs allege that Amex charges higher fees than its competitors (Visa, MasterCard, and Discover). *Id.* Therefore, to discourage merchants from "steering" their customers towards using another form of payment, Amex inserted the Anti-Steering Rules into its contracts with merchants. *Id.* at 7-8.
[5] *Id.* at 4, 9.
[6] *Id.* at 5.
[7] *Id.* at 13, 16-17.
[8] *Id.* at 16-17.
[9] *Id.* at 17-18.
[10] *Id.* at 18-20.
[11] *Id.* at 20-21.
[12] *Id.* at 21-22 ("The key principle underlying that test is proximate cause, and here the appellants fail to show the required direct connection between the harm and the alleged antitrust violation.").
[13] *See*, *e.g.*, *In re Aluminum Warehousing Antitrust Litigation*, 520 F. Supp. 3d 455, 479-82 (S.D.N.Y. 2021) (collecting cases), appeal pending (2d Cir. No. 21-954).
[14] *Gelboim v. Bank of America Corp.*, 823 F.3d 759 (2d Cir. 2016).