

On August 28, 2025, a federal jury ordered American Express (AmEx) to pay over US\$12 million in damages under the Illinois unfair acts law. These damages were awarded in spite of the jury's rejection of liability under a wide range of other state and federal antitrust claims.

Filed on January 29, 2019, the class-action lawsuit brought by David Moskowitz (and others) against American Express Company and its subsidiary, AmEx TravelRelated Services Company, alleged violations of the Sherman and Clayton Antitrust Acts, as well as various state antitrust and consumer protection laws.¹ Moskowitz challenged American Express's imposition of NonDiscrimination Provisions (NDPs), commonly known as antisteering rules, on merchants who accept AmEx cards. These provisions were alleged to have unlawfully restricted merchants from steering customers toward lower-cost payment methods. This case harkens back to a previously litigated case against AmEx related to these provisions, *Ohio v. American Express*. In 2010, several states and the DOJ sued American Express alleging that their anti-steering rules unlawfully restrained trade in violation of the Sherman Act. In a landmark decision, the Supreme Court upheld AmEx's anti-steering rules. In particular, the Supreme Court found credit card platforms are "two-sided transaction platforms," that serve both cardholders and merchants simultaneously. The antitrust analysis must consider effects on the entire platform, not just one side.²

The split outcome illustrates how plaintiffs may be able to bypass some of the difficulties in proving an antitrust violation in a two-sided market³ after *Ohio v. AmEx*.⁴ The jury here was not persuaded on market definition, market power or competitive harm, all necessary for the finding of antitrust liability. However, the Illinois "unfair acts" claim succeeded because it required only proof of substantial consumer injury and unfairness, not market dominance or foreclosure of competition, which can be difficult to prove at trial. The Illinois unfair acts claim likely succeeded because it was consumer-centric and avoided the technical burdens of proof under the antitrust laws.

Many US states have statutes similar to Illinois's Consumer Fraud and Deceptive Business Practices Act, often called "UDAP laws" (Unfair and Deceptive Acts and Practices). These statutes allow challenges to business practices that may not meet the threshold for antitrust violations but are still considered unfair or harmful to consumers. Many state statutes are modeled after Section 5 of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices."⁵ Courts often use FTC guidance (the three-factor "unfairness" test: public policy, ethics, and substantial consumer injury) to interpret these unfair acts state laws.

While antitrust laws require a showing of harm to competition (e.g., market foreclosure, price fixing, or reduced output), the unfair acts laws only require only proof of consumer harm, unfairness or deception, which is a much lower bar. Almost every state has a UDAP statute, but not all state statutes provide for a private right of action. Some states only allow for government enforcement. However, some states allow for varying remedies under their UDAP statutes, including double or treble damages, punitive damages and attorney's fees. These state law claims can serve as powerful alternatives or complements to federal antitrust claims.

The US\$12.5 million award underscores that jurors found AmEx's conduct harmful to consumers even if it did not rise to an antitrust violation. While AmEx avoided treble damages and broader injunctive relief that could have been imposed under federal antitrust laws, it still faces significant financial liability. Post-trial motions and appeals are expected, with AmEx likely challenging the scope of Illinois law and plaintiffs possibly seeking expanded relief.

In the meantime, the Illinois verdict shows that it is not enough for companies to consider their antitrust compliance exclusively with respect to federal laws. This is increasingly an issue because more states are adopting antitrust and consumer protection laws that are explicitly intended to provide protection beyond federal law thresholds. As a result, antitrust compliance programs and in-house lawyers, as well as their advisors must increasingly be experts in both state and federal antitrust requirements to steer their clients away from potentially costly liability.

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¹ *Moskowitz v. American Express Company*, No. 1:19-cv-00566 (E.D.N.Y. filed Jan. 29, 2019).

² *Ohio v. American Express Co.*, 585 U.S. 529 (2018).

³ A two-sided market is an economic platform or intermediary that brings together two distinct groups of users, where the value of the platform to each group increases with the number of users in the other group. In essence, one group (e.g., buyers) needs the presence of the other group (e.g., sellers) to find value, and vice versa, creating a mutually beneficial relationship.

⁴ *Ohio v. American Express Co.*, 585 U.S. 529 (2018).

⁵ 15 U.S.C. § 45.