Big credit card issuers defeat collusion lawsuit in U.S.

BY JONATHAN STEMPEL

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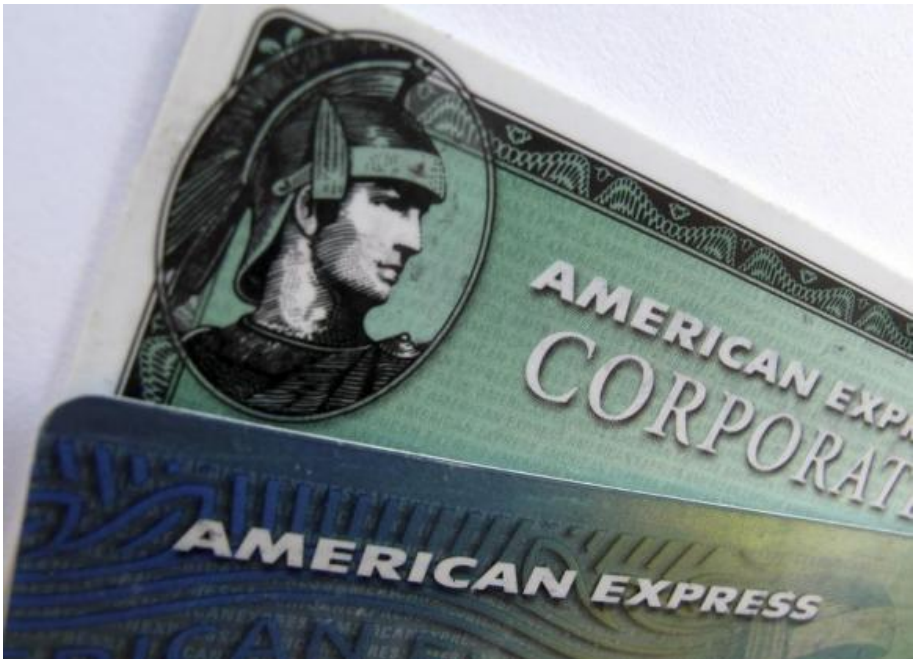

American Express and American Express corporate cards are pictured in Encinitas, California October 17, 2011. American Express Co will report its quarterly earnings on October 19.

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(Reuters) - Consumers suffered a setback on Thursday as three big credit card issuers won the dismissal of U.S. lawsuits accusing them of colluding to require that disputes be settled in arbitration rather than class action lawsuits.

U.S. District Judge William Pauley in Manhattan said cardholders failed to show that American Express Co, Citigroup Inc and Discover Financial Services conspired to violate the Sherman antitrust law.

The plaintiffs had argued that the conspiracy ran from May 1999 to October 2003, when 10 card-issuing banks and their lawyers held 28 meetings to discuss how to impose mandatory arbitration clauses in cardholder agreements.

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Pauley said his decision in the decade-old case was a close call, given the "conscious parallel action" among the biggest card issuers to include the clauses.

"It was only by a slender reed that plaintiffs failed to demonstrate that the lawyers who organized these meetings had spawned a Sherman Act conspiracy among their clients," Pauley wrote in a 92-page decision, following a 2013 non-jury trial.

Class action litigation can allow consumers to pool resources and obtain greater recoveries at lower cost than individual arbitrations.

"This is a big dent for consumer rights," said Curtis Arnold, a consumer advocate and founder of CardRatings.com in Little Rock, Arkansas. "Class action lawsuits have over the years kept this industry in check. Individuals don't have much recourse taking on card giants by themselves."

Cardholders had sought to force American Express, Citigroup and Discover to remove arbitration clauses from their cardholder agreements for eight years.

Merrill Davidoff, a partner at Berger & Montague representing the plaintiffs, said his clients were "obviously disappointed" and strongly disagreed with Pauley's decision. He said it is premature to address whether there will be an appeal.

Robert Sperling, a partner at Winston & Strawn representing Discover, said the cardholders "never came close to proving collusion." Citigroup spokeswoman Emily Collins said that the bank is pleased with the decision. Spokeswomen for American Express did not respond to requests for comment.

American Express, Citigroup and Discover collectively held about 31.1 percent of U.S. outstanding credit card balances in 2013, according to the Nilson Report.

AVOIDING A BACKLASH

In April 2010, Bank of America Corp, Capital One Financial Corp, HSBC Holdings Plc and JPMorgan Chase & Co settled with the plaintiff cardholders by agreeing to remove their arbitration clauses for 3-1/2 years.

The U.S. Consumer Financial Protection Bureau estimated in December that just over 50 percent of outstanding credit card loans remain subject to the clauses. It said the percentage would have been 94 percent absent the earlier settlements.

Other industries also use arbitration clauses. The U.S. Supreme Court in 2011 upheld contracts used by AT&T Inc requiring consumers to arbitrate disputes individually.

In his decision, Pauley noted that of the 10 banks that had been part of the litigation, just two had mandatory arbitration clauses at the start of the alleged collusion.

He found "compelling evidence" that cardholders would have little economic incentive to fight alleged abuses absent class actions, and said that the banks' "need to parry consumer backlash and temper any 'rogue' players" established a motive to conspire.

"A motive to conspire, however, does not mean that a conspiracy existed," he said. "This court is convinced that the evidence is just as consistent with legitimate activity in furtherance of the issuing banks' independent self interests."

Pauley said the case also offered a "cautionary lesson" to lawyers, given that the banks' cost to defend against the lawsuits offset potential savings from the arbitration clauses.

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"In retrospect, the issuing banks' short-term goal of lowering litigation costs eluded them," he wrote.

The cases are in the U.S. District Court, Southern District of New York. They are Ross et al v. American Express Co et al, No. 04-05723; and Ross et al v. Bank of America NA et al, No. 05-07116.

(Reporting by Jonathan Stempel in New York; Editing by Lisa Von Ahn, Jonathan Oatis and Bernard Orr)

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