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Recent Decisions

CLASS ACTIONS; SETTLEMENTS; ADEQUATE REPRESENTATION

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, No. 12-4671 (2nd Cir. June 30, 2016)

Second Circuit Rejects Credit Card Antitrust Litigation Settlement

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Yesterday,[1] the U.S. Court of Appeals for the Second Circuit reversed the district court's approval of a settlement of antitrust class actions brought a decade ago by millions of merchants against Visa and MasterCard. In the original actions in the district court, plaintiffs alleged that the networks' interchange fee and other rules were illegal restraints in violation of the Sherman Act. After years of litigation, the parties reached a settlement that would have released all claims in exchange for monetary relief of up to $7.25 billion—the largest antitrust cash settlement in history—and injunctive relief relating to future conduct. The reopening of the settlement will result in further delay in resolution of a litigation involving the disparate interests of millions of retailers.

The settlement divided the plaintiffs into two classes, merchants that accepted Visa and/or MasterCard before the settlement date, and merchants that accepted, or will in the future accept, the cards after that date. The first class would have shared in the billions of monetary relief, while the other would have received solely injunctive relief in the form of changes to the networks' rules. In return, the settlement released any claims members of either class have or would have in the future against the defendants for all conduct challenged in the complaint, including practices that were not modified by the settlement. While the injunctive relief would have terminated in 2021, the release was to continue per-

[1] This memo was originally released July 1, 2016.

petually. The court read the release as precluding future merchants from ever challenging any of the network rules unaffected by the settlement.

The court took issue with the unitary representation of the two classes by the same class representatives and counsel, noting the divergent interests impacting the "essential allocation decisions" of plaintiffs' compensation. While one class had an interest in maximizing compensation for *past* harm, the other would want to maximize restraints on network rules to prevent harm in the *future*. Partial, but not perfect overlap between the two classes did not cure the problem. According to the court, unitary representation also created incentives for counsel to trade benefits to one class for benefits to the other in order to reach a settlement, particularly since counsel's compensation was based solely on the size of the monetary relief that benefitted only one of the classes. As a result, the court concluded that the injunctive-relief class was inadequately represented.

The court found confirmation of these concerns in the substance of the settlement. In particular, the court noted that the most consequential relief afforded the forward-looking class—the ability to surcharge defendants' credit cards—would be of limited or no value to many members of the class, including merchants in states that prohibit surcharging as a matter of law and merchants that will not begin business until after 2021, when the injunctive relief ends. The court viewed such treatment of the class members as indicative of inadequate representation that rendered the settlement unreasonable.

The Second Circuit's decision vacating the settlement is significant not only for the millions of merchants and financial institutions with a direct interest in the credit card industry, but it also makes clear that appellate courts are willing to closely scrutinize even settlements that provide massive monetary relief. The somewhat unique facts of this settlement, however, may narrow its application to future cases. In particular, the perceived lack of *any* benefit for some class members, along with their inability to opt out, played a critical role in the court's conclusion that the settlement was unreasonable even under a demanding "abuse of discretion" standard.

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