

AntitrustConnect Blog

Swipe Fee Settlement Yields More Litigation

John McGuinness (Manatt, Phelps & Phillips) · Friday, February 14th, 2014

Although the parties reached a \$7.25 billion class action settlement of the antitrust suit brought by merchants against Visa and MasterCard over swipe fees, the case is far from over.

The protracted legal battle centers on allegations by merchants that Visa and MasterCard engaged in a price-fixing conspiracy to set interchange fees and then imposed restrictions upon retailers not to disclose the charges to consumers or offer cheaper, alternative forms of payment. The settlement agreement – reduced to \$5.7 billion after a large faction of class member merchants opted out of the deal – was meant to be the end of the road.

Instead, U.S. District Court Judge John Gleeson’s approval only triggered another round of litigation, including the following:

- Dozens of class members have filed a notice of appeal of the federal court’s settlement approval – the largest antitrust settlement in U.S. history – to the Second Circuit Court of Appeals. The National Retail Federation, for example, characterized the settlement as “deeply flawed,” arguing that it “does nothing to reform the price-fixing payments system.” Opponents of the settlement have expressed concern that the deal failed to provide a permanent solution for merchants, many of whom are unwilling to pass swipe fees directly on to customers via surcharges or will be unable to take advantage of the new ability to pass these fees on to consumers because some states prohibit it, as it does not stop swipe fees from increasing in the future. In addition, opponents are concerned that the agreement includes an overly broad waiver of legal rights that may limit the ability of merchants to litigate future issues against Visa or MasterCard relating to fees and card network rules.
- American Express waded into the dispute, filing its own notice of appeal. A spokeswoman for the company said Amex is focused upon the class definition. “In our case, we are objecting to being included in the settlement because, in our primary business, we are not a merchant, but a card network, card issuer and merchant acquirer in which we are a competitor to Visa, MasterCard and their issuing and acquiring banks,” Sanette Chao told *Law360*. “The language of the release that Visa and MasterCard required in their settlement is so broad that defendants in that case could argue that it applies to claims of competitors, not just merchants.”
- After opting out of the settlement, a group of approximately 30 major retailers – including Hewlett-Packard and Toys-R-Us – filed a new complaint against Visa and MasterCard. The suit alleges that the payment processors colluded with banks to manipulate swipe fees and impose illegal prohibitions on the merchants that ensured the card companies would not compete against

each other for customers. The alleged conspiracy “has unreasonably restricted competition . . . and has allowed Visa and MasterCard to extract supracompetitive, artificially inflated interchange fees from each plaintiff,” the complaint alleged.

- Visa filed a declaratory relief action seeking an order that, among other things, any claims national retailer The Home Depot might assert against it have been released in earlier litigation. Beginning with a lawsuit filed by Home Depot against Visa and MasterCard in 2002, Visa said the parties have battled over interchange fees for more than a decade. Home Depot has “publicly opposed and denigrated” the merchant settlement, opting out of the deal to file its own antitrust suit, Visa claimed. “A declaration in Visa’s favor and against The Home Depot is necessary to prevent the continuation of endless, wasteful litigation between the parties,” according to the complaint. “Put simply, Visa seeks finality in its dispute with The Home Depot.”
- In another order, Judge Gleeson approved attorney’s fees to the tune of \$544.8 million for class counsel as well as an additional \$27 million in costs. Noting that the case “stands out in size, duration, complexity, and in the nature of the relief afforded to both the injunctive relief and damages classes,” Judge Gleeson emphasized the “enormous” risk taken by the plaintiffs in pursuing the “enormously complex” case. Using a multifactor analysis checked by a lodestar calculation, the court concluded that “the settlement must be labeled a significant success” and approved the “generous but well-deserved fee.”

To read the National Retail Federation’s notice of appeal, click [here](#).

To read American Express’s notice of appeal, click [here](#).

To read the complaint in *Progressive Casualty v. Visa*, click [here](#).

To read the complaint in *Visa v. Home Depot*, click [here](#).

To read the order on attorney’s fees, click [here](#).

Why it matters: Despite judicial approval of the settlement of *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, the battle over swipe fees appears likely to continue for quite some time, from the multiple appeals to the Second Circuit for review of the deal to outgrowths like Visa’s suit against Home Depot, American Express’s foray into the case, and the new complaint filed against Visa and MasterCard by class members that opted out of the original case. These litigations ensure a long delay of any refund checks that are to be paid out to affected retailers.

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