Litigation Alert: Important Class-Action Implications of Supreme Court's Recent Denial of Certiorari Review of 2nd Circuit's Rejection of Largest Antitrust Class-Action Settlement in U.S. Jurisprudence

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On Monday, March 27, the United States Supreme Court declined to hear the final appeal of a class of millions of merchants, leaving intact the Second Circuit's June 2016 rejection of their $7.25 billion antitrust settlement with Visa and MasterCard. The Supreme Court's denial of certiorari comes after more than a decade of hard-fought litigation. For the merchant class members and the credit card defendants—who are accused of imposing supra-competitive interchange fees—the Supreme Court's decision will likely mean many more years of litigation and negotiation.

But for litigants hoping to settle *other* class actions, the high court's refusal to hear the interchange antitrust petition is also significant because it means that the questions raised by last summer's Second Circuit's opinion have continuing vitality.

In June 2016 the Second Circuit rejected what was believed to be the largest cash antitrust settlement ever because it found the class was inadequately represented in violation of Fed. R. Civ. P. 23(a)(4) and the Due Process Clause. [i] The court's strongly-worded 41-page opinion raises the question of whether it is ever possible for one set of lawyers and class representatives to represent a 23(b)(3) class seeking past damages and a 23(b)(2) class seeking only future relief.

The interchange class-action litigation was brought in 2005 on behalf of 12 million merchants against Visa and MasterCard alleging that the credit card companies' network rules, working in tandem, allowed the issuing banks to impose an artificially inflated interchange fee that merchants were essentially required to accept. The case was granted preliminary settlement approval in November 2012, after eight years of hard-fought litigation by then-district Judge Gleeson for the Eastern District of New York.

Like the litigation, the settlement, too, was hard-fought: The 2012 agreement was the culmination of more than 45 mediation sessions over a four-year period. The final agreement provided certain injunctive relief for a non-opt-out 23(b)(2) class and up to $7.25 billion for a 23(b)(3) opt-out class. In turn, it gave Visa and MasterCard a broad release that waived any claims plaintiffs would have against the credit card companies,

not only for the conduct described in the complaint, but also for all policies and practices regarding credit card transactions in place as of the date of the preliminary approval, as well as any substantially similar practices adopted in the future (with certain limited exceptions). The release operated in perpetuity and had no expiration date.

The $7.25 billion award was believed to be the largest antitrust class action settlement in history. Nonetheless, the settlement drew immediate criticism and objections from a wide variety of retailers and merchants who claimed the settlement didn't address all the issues that led to the litigation, such as making the interchange fees more transparent or competitive. After final approval was granted, approximately 8,000 companies that take Visa and MasterCard—representing more than one-quarter of the transaction volume—opted out of the settlement, reducing the settlement amount from $7.25 billion to $5.7 billion. Twelve sets of Appellant groups filed briefs before the Second Circuit appealing Judge Gleeson's approval of the settlement.

On June 30, 2016, the Second Circuit reversed. Although the different Appellant groups had made a variety of arguments, the Second Circuit focused on one issue that was not even raised by many of the Appellants and that was buried in the briefs of others: the Second Circuit held the class plaintiffs had been inadequately represented. The opinion focused on what the court found to be the clear conflict between the (b)(3) class seeking monetary relief for past harm and the (b)(2) class seeking injunctive relief. The Second Circuit noted that the class counsel and class representatives were in the position to trade the reduction in injunctive relief for one class for increases in monetary relief for the other class—a very definite conflict in the court's view. Although explicitly impugning neither the motives nor actions of class counsel, the Second Circuit said the settlement agreement demonstrated the kind of conflict resulting in divergent interests that the Supreme Court has held requires separate representation.

For those who are settling a class action with separate classes or subclasses (even though the different groups' interests may have been perfectly aligned in the litigation), the obvious point reinforced by the Second Circuit is that if those interests now might be at odds, then the safest course of action is for the different groups to have separate representation at the bargaining table. An interesting question that arises, however, is whether this is a *per se* rule, or whether it is ever possible for one set of lawyers and class representatives to represent divergent interests, such as those found in a class seeking past damages and one seeking only future relief.

The Second Circuit appeared to answer this latter question "no"—or at least "no" with a possible exception.

In its analysis, the Second Circuit relied heavily on a landmark Supreme Court asbestos decision, *Amchem Prods, Inc. v. Windsor.* [ii] In *Amchem,* the Supreme Court held that where there are conflicts between different classes of plaintiffs, class settlements must provide "structural assurance of fair and adequate

representation for the diverse groups and individuals affected." [iii] The Class Plaintiff Appellees had argued that these structural assurances were met, noting that the negotiations came after years of protracted litigation, were adversarial in nature and conducted at arm's length. Moreover, two well-respected independent mediators as well as both the Judge and Magistrate were included in the process.

The Second Circuit, however, said none of this created the structural assurances of fairness required by the Supreme Court, noting that it was *not* the mission of judges and mediators to advance the strongest arguments of each subset of class members, or to voice the interests of a group for which no one else is speaking. [iv]

Instead, the Second Circuit looked to the actual agreement itself to determine whether there were the requisite structural assurances of fairness. And it didn't like what it saw.

The court was concerned that the injunctive relief provided to the (b)(2) class was in many cases illusory, since it offered an injunctive relief package that many merchants could not use. Moreover, in exchange for what the court viewed as inadequate relief, the (b)(2) class gave a broad release, forever giving up any claims for monetary damages or injunctive relief for the same or substantially similar practices adopted by Visa and MasterCard in the future.

As bluntly summarized by Judge Leval in his concurring opinion, "This is not a settlement; it is a confiscation." [v]

So could the parties have done anything to save this settlement—short of providing what the court considered to be separate, independent representation for the damages and injunction classes? The lack of an opt-out right for the (b)(2) class was of particular concern to the Second Circuit—so much so that the court implied that an opt-out right *possibly* could have been a sufficient "structural assurance" of fair representation. [vi]

At the conclusion of the Second Circuit's interchange decision one is left to wonder if the court would have necessarily required separate representation if the court had not viewed the settlement terms for the two classes as so lopsided. Would the Second Circuit had been willing to find that *Amchem's* requirement of a "structural assurance of fair and adequate representation" was met if the (b)(2) class had received stronger injunctive relief provisions, a narrower release, and/or the right to opt out? (Of course, this also raises the question as to whether the case could ever have settled on such terms. The Class Plaintiff Appellees certainly imply that it could not.)

For those who represent parties to potential class-action settlements, the Second Circuit's opinion may have added additional aspects of settlement-approval analysis to be heeded: first, as a reminder that a court may well expect separate representation in a situation where there are separate classes or subclasses with

potentially divergent interests; and second, to expect that if there is an overlap of counsel and/or class representatives, a court (or appellate court) may apply an exacting examination of the settlement terms—under the *adequacy of representation* standard, prior to even analyzing the settlement terms under Rule 23 (e)'s fairness standards.

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[i] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 12-4671-cv(L) (2d Cir.) (June 30, 2016).

[ii] 521 U.S. 591 (1997).

[iii] 521 U.S. at 627.

[iv] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* at 26.

[v] *Id.,* Leval, concurring at 3.

[vi] *Id.* at 25-26. (citations omitted).