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The Second Circuit's recent *Visa/MasterCard* decision, throwing out the largest ever antitrust class action settlement, doesn't change the law for class settlements, attorneys Matthew L. McGinnis and Elizabeth J. Smith say. The authors urge litigators to pay careful attention to a few fundamental precepts of class actions settlements, which will ''help ensure that fair, reasonable, and adequate settlements continue to be approved.''

The Overturned Visa/MasterCard Settlement: What Does It Mean (If Anything) for the Future?

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The Second Circuit threw out the largest antitrust class action settlement ever on June 30, and sent millions of retailers back to the negotiating table over their claims against Visa and MasterCard.

The deal would have paid up to $7.25 billion in damages to merchants who accepted Visa or MasterCard prior to November 28, 2012, but provided only temporary changes to the card companies' rules for merchants accepting the cards after that date, and with no cash payments.

In what one member of the Second Circuit panel described as a ''confiscation,'' the defendants received a broad release for their past and future conduct, including from merchants not yet in existence.

In its decision, the Second Circuit held that a single set of lawyers and named plaintiffs could not adequately represent the two separate settlement classes, in violation of Federal Rule of Civil Procedure 23(a)(4) and the Due Process Clause. As the panel explained, the representatives were incentivized to trade the claims of the post-2012 merchants for a large monetary payment (and correspondingly hefty fees for class counsel) in favor of the pre-2012 merchants. And in return, Visa and MasterCard would have received potentially perpetual immunity for claims based on their current merchant rules.

The decision itself adds nothing new to the legal framework for class action settlements, and the settlement – one of the largest in history – was characterized

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by *sui generis* circumstances unlikely to be repeated elsewhere. As a result, professional objectors are unlikely to succeed in using the Second Circuit's decision as a springboard to challenge class action settlements in the future. That said, the decision underscores the importance of a few key precepts of class action settlements to keep in mind going forward.

What the Second Circuit Said

The Second Circuit's June 30th opinion overturned the multi-billion dollar class settlement of an estimated 12 million retailers' antitrust claims against Visa and MasterCard. *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig*, No. 12-4671, 2016 BL 210542 (2d Cir. June 30, 2016) (''*Visa/Mastercard*''). The litigation challenged certain of Visa's and MasterCard's network rules that were alleged to inflate the interchange fees paid by merchants to accept the cards. The deal, approved by Judge Gleeson of the U.S. District Court for the Eastern District of New York in 2013, would have paid up to $7.25 billion in monetary damages and enjoined the credit card companies from imposing certain rules on merchants through 2021. *Id*. at *2-3, *5.

The proposed settlement divided merchants into two classes. Those that accepted Visa or MasterCard from 2004 through November 28, 2012 (the damages class) would receive monetary damages but have the right to opt out of the settlement under Rule 23(b)(3). *Id*. Those that accepted either card after November 28, 2012, or that even *would* accept the card in the future (the injunction class) would receive an injunction changing network rules through 2021, but would have no right to opt out since this class would be certified under Rule 23(b)(2). *Id*. at *5, *17. Merchants accepting either card before and after November 28, 2012 would be members of both classes. *Id*. at *11. Both classes agreed to release a broad swath of past and future claims, including ones unrelated to the underlying claims in the litigation and others based upon the defendants' future conduct. *Id*. at *5-6.

In December 2013, a group of objectors – including several large retailers, such as Macy's and Amazon.com – appealed Judge Gleeson's approval of the settlement. In June 2016, the Second Circuit reversed, holding that the certification of the settlement classes violated Rule 23(a)(4)'s adequacy requirement and the Due Process Clause because the divided classes' representation by a single group of named plaintiffs and attorneys was inadequate in light of the perceived disparity in the value of the available relief. *Id*. at *7. In particular, the billions of dollars awarded to the damages class was more valuable than the temporary injunction favoring any merchant that accepted the cards after 2012, including those not yet in existence. *Id*. at *9-10. This was because the injunction only changed certain of the challenged rules, and only one aspect of those changes – the lifting of the prohibition against surcharging Visa or MasterCard transactions – was found to have any value at all. *Id*. at *14-15. Furthermore, even this change was legally unavailable to large subsets of the class because, among other things, several states have outlawed surcharging credit card transactions. *Id*.

In addition, the broad, forward-looking release would even bind merchants that do not begin accepting Visa or MasterCard until after the expiration of the injunctive relief, when the option to again prohibit surcharges would be left to the card companies. Such merchants may receive no benefits under the settlement, but would nevertheless immunize the defendants from any claims based upon their current network rules. *Id*. at *15-16. Exacerbating this issue was the fact that the members of the injunction class could not opt out of the settlement. *Id*. at *10-11. The injunctive relief was thus ''virtually worthless'' for large portions of the 23(b)(2) class who were stuck with it. *Id*. at *15.

According to the Second Circuit, the named plaintiffs and class counsel inadequately represented the interests of the injunction class because they exchanged meaningful relief for those merchants for a large payout to members of the damages class to reach a global resolution of the case and extract attorneys' fees. *Id*. at *10-11. The court reasoned that because the two classes had divergent interests that impacted the ''essential allocation decisions of plaintiffs' compensation and defendants' liability,'' there needed to be ''structural assurance of fair and adequate representation'' of the class. *Id*. at *9 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997)). Because the non-overlapping classes were divided between ''holders of present and future claims,'' and the same counsel negotiated the settlement on behalf of all class members, the representatives were positioned to trade relief for the injunction class in favor of relief for the damages class. *Id*. at *10 (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999)). Accordingly, separately represented homogenous subclasses were necessary to adequately protect the interests of each subclass in accordance with Rule 23(a)(4) and the Due Process Clause. *Id*. at *7, *16-17.

The Second Circuit panel remanded the case to the district court. The Appellees did not seek rehearing.

Why the Second Circuit May Have Said It

The Second Circuit's decision was undoubtedly newsworthy, though perhaps largely for reasons extraneous to the court's reasoning. Indeed, the circumstances surrounding the decision strongly suggest that the case is, in some respects, highly unique and unlikely to be repeated. First, over 3,500 merchants in the injunction class – more than 19% of the class based on transaction volume – objected to the settlement. Brief for Objectors-Appellants National Retail Federation & Retail Industry Leaders Ass'n (The Merchant Trade Groups' Brief) at 24, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 12-4671 (2d Cir. June 16, 2014) ECF No. 307. Over 6,000 merchants in the damages class – more than 25% of that class – and a majority of the named plaintiffs opted out. *Id*. Appellants argued that these levels are ''far above what is typical in settlements of this sort'' and were sufficiently high enough to allow the defendants to exercise their rights to terminate the Settlement Agreement. *Id*.

Second, the specter of collusion overshadowed the settlement. In February 2015, counsel for MasterCard admitted that one of MasterCard's former attorneys, Keila Ravelo, had engaged in ''inappropriate communications'' with class counsel Gary Friedman. Objectors' Memorandum of Law in Support of Motion to Vacate Judgment or, in the Alternative, to Grant Further Discovery, at 16, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 1:05-md-01720

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(E.D.N.Y. Sept. 1, 2015) ECF No. 6546. Mr. Friedman purportedly had ''primary responsibility for prosecuting the class's injunctive claims against Visa's and MasterCard's surcharging rules, and played a key role—if not the leading role—in negotiating the surcharging-rules relief'' of the settlement. *Id*. at 1. He allegedly shared privileged and confidential information with Ms. Ravelo, who was criminally charged for defrauding her client, ''including about the class's negotiating positions with respect to the surcharging-rules relief'' and ''information that was critical to the resolution of the (b)(2) class's claims, which he did ***not*** provide to the. . .class representatives or, apparently, even his co-counsel for his class'' *Id*. at 2. Ms. Ravelo's trial is scheduled to begin on February 7, 2017. *United States v. Ravelo,* No. 15-576 (D.N.J.) ECF No. 89.

In moving the lower court to vacate the settlement – a motion that was never decided and has since been mooted by the Second Circuit's decision – the objectors argued that Mr. Friedman's conduct compromised the adequacy of representation of the 23(b)(2) class. *Id*. The objectors informed the Second Circuit of the communications and the motion to vacate, as well as the fact that the Eastern District of New York had rejected a proposed settlement in a similar case against American Express because communications between the same two lawyers had rendered class counsel inadequate and that settlement unfair. Letter from Thomas C. Goldstein, Counsel for Merchant-Appellants, to Catherine O'Hagan Wolfe, Clerk of Court, United States Court of Appeals for the Second Circuit, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 12-4671 (2d Cir. Aug. 20, 2015) ECF No. 1434. The media also widely reported the communications between Ms. Ravelo and Mr. Friedman. This alleged untoward conduct may have factored into the Second Circuit's decision, or otherwise doomed the settlement at the district court down the line.

Does It Matter?

Although the Second Circuit's decision may provide objectors fodder to challenge the adequacy of class settlements that suffer from the same defects as the *Visa/MasterCard* settlement, it has not altered the class action settlement framework. The decision relies on long-established Supreme Court precedent (*Amchem Prods, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999)), as well as the Second Circuit's own decision in *In re Literary Works in Elec. Databases Copyright Litig*., 654 F.3d 242 (2d Cir. 2011). It makes clear that ''some difference'' between class members is acceptable when certifying a settlement class, and only ''fundamental conflicts that go[] to the very heart of the litigation'' require ''structural assurance of fair and adequate representation.'' *Visa/MasterCard*, 2016 BL 210542, at *7 (quoting *Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013)).

So not all differences among class members are fatal to settlement class certification. In fact, damages and injunction classes can be combined into a single class and do not always require separate representation. *Id*. at *11. Problems only arise when Rule 23(b)(3) and Rule 23(b)(2) classes ''do not have independent counsel, seek distinct relief, have non-overlapping membership, ***and*** (importantly) are certified as settlement only.'' *Id*. (emphasis added).

Avoiding Similar Pitfalls in the Future

The Second Circuit's *Visa/MasterCard* decision may prompt professional objectors to challenge perceived differences among settlement class members and the relief available to subsets of the class, as well as forward-looking releases. Such challenges are unlikely to succeed, though, unless a settlement suffers from the same flaws that doomed the *Visa/MasterCard* deal. If implemented, the following safeguards will help distinguish relief and releases from those in *Visa/MasterCard*:

■ **Ensure there are unifying characteristics in the relief available to different categories of class members**. The lightning rod in the *Visa/MasterCard* settlement was the perceived disparity in the value of ***type*** of relief available to the subclasses: billions of dollars of monetary damages versus a temporary (and potentially illusory) injunction. Proponents of class action settlements that resolve claims of different categories of class members (for example, former, current, and future customers) should consider structures where the relief available to all class members has some common underlying feature(s). For example, a settlement might entitle all class members to monetary damages or an equivalent, even if the amount of damages varies between subsets of the class. Likewise, a settlement's injunctive relief might have articulable, actual value to all class members, rather than to only a portion of the class. A structure with a common underlying framework may help to avoid objections based upon a perceived tradeoff that favors one subset of the class over another.

■ **Articulate clear reasons why one category of class members will receive less value than another category of class members.** The Second Circuit's opinion contemplates that it may be appropriate to compensate categories of class members with less value so long as the settlement's proponents can identify a ''credible justification'' for the difference. *Visa/MasterCard*, 2016 BL 210542, at *13 (quoting *In re Literary Works*, 654 F.3d at 254). The court suggested that settlement proponents could not articulate why merchants accepting Visa or MasterCard after November 28, 2012 were entitled to no damages, but merchants accepting the cards before then could receive their share of $7.25 billion of damages. After all, if the post-2012 class' claims were weaker, why were some merchants able to obtain a ''potentially substantial benefit'' by surcharging Visa and MasterCard transactions? *Id*. at *15. Moreover, certain 23(b)(2) class members could not legally surcharge, but their claims were identical to those of class members that could, and the settlement's proponents failed to explain the disparate intraclass relief. *Id*. The court thus suggested that providing less value to certain class members might be appropriate if their claims are relatively weak on the merits compared to other class members' claims. The relative severity of class members' injuries could also justify dissimilar relief. For example, in a case where class members are allegedly damaged on a per-transaction basis, it may make sense for the value of each class member's benefits to be roughly proportional to the magnitude of alleged harm. Thus, a customer who made several purchases from a defendant may in some circumstances justifiably receive a different benefit than a customer who made a single purchase.

■ **Minimize the potential for intraclass conflicts by avoiding relief that is illusory for a portion of the class.** Objectors argued – and the Second Circuit agreed – that the injunctive relief in the *Visa/MasterCard* settlement was ''virtually worthless'' for certain broad categories of the 23(b)(2) class members, including those in states outlawing surcharging and those that will not begin accepting Visa and MasterCard until after the injunctive relief expires. *Id*. at *14-15. Had the injunction altered other rules that were also challenged in the litigation, the Second Circuit suggested that the relief might have offered real benefits and been more valuable. *Id*. at *15. Proponents of class action settlements should thus ensure that the relief available under the settlement is not legally, commercially, or otherwise unavailable to large swaths of the class. One practical way to implement this is to structure the settlement to include alternative forms of relief. If, for instance, a settlement includes in-kind benefits available only in certain circumstances, consider offering an alternative cash (or cash equivalent) payment.

■ **Consider allowing class members the right to opt out of injunctive relief.** The Second Circuit declined to decide whether the *Visa/MasterCard* settlement would have met the requirements of Rule 23 and the Due Process Clause if members of the 23(b)(2) class had the right to opt out of the settlement. *Id*. at *10. Regardless, those class members' inability to opt out of the injunction class ''exacerbated'' the inadequacy of representation in the case. *Id*. at *10-11. If a settlement divides class members into damages and injunction classes, and members of the classes do not completely overlap, affording the members of the injunction class the opportunity to opt out (coupled with notice of the settlement) may help to overcome an objector's challenge in the aftermath of the *Visa/MasterCard* decision. Taking this approach does, of course, require that the injunction class be certified under Rule 23(b)(3) – a standard that may be more difficult to meet than Rule 23(b)(2), even in the context of a settlement. And opting out of injunctive relief may have little effect on the defendant's conduct, since it will presumably still be bound by the settlement agreement that requires that conduct. But providing such an ''escape valve'' may help ease any concerns that a class member is receiving minimal benefit in exchange for a broad release.

■ **Make certain that forward-looking releases are limited to claims arising from the same factual predicate at issue in the suit.** The Second Circuit distinguished the broad forward-looking release in *Visa/MasterCard* from cases where forward-looking releases were approved on the grounds that it released claims beyond those arising from the same ''factual predicate'' as the settled litigation. *Id*. at *13, *17. Though it was not the primary reason for the court's holding that the settlement violated the Due Process Clause, it certainly factored into the analysis. Limiting a forward-looking release to claims that arise from the same or materially similar courses of conduct may help to defend against objectors' attacks on a settlement.

Conclusion

Despite the headlines, the Second Circuit's recent *Visa/MasterCard* decision does not change the law for class action settlements. But careful attention to a few fundamental precepts of class actions settlements will help ensure that fair, reasonable, and adequate settlements continue to be approved.

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