

## NEWSLETTERS

### Opposing Counsel's Conflicts: The Cost Could Be In A Class Of Its Own

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#### **Barnes & Thornburg Commercial Litigation Update, July 2017**

The U.S. Supreme Court declined to put an end to long-running antitrust litigation concerning Visa and MasterCard swipe fees. Instead, it left in place a ruling from the U.S. Court of Appeals for the Second Circuit that overturned the credit card companies' \$7.25 billion settlement with millions of retailers. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 827 F.3d 223 (2d Cir. 2016), cert. denied sub. nom., *Photos Etc. Corp. v. Home Depot U.S.A., Inc.*, 137 S.Ct. 1374 (2017) (mem.).

The outcome not only delivers a hit to the credit card industry and raises questions for businesses relying upon credit card payments, but it will also have far-reaching implications for class action counsel. Why? Because the Second Circuit did not look favorably on the same lawyers representing the two subclasses.

Here's some background. Retailers and trade associations filed a consolidated complaint against Visa, MasterCard, and several large banks in 2006. The underlying class action concerned allegations that the credit card companies developed rules allowing them to charge higher interchange fees than what would otherwise be tolerated in a competitive market. While the case was pending, however, several legislative developments across the country altered the industry in favor of merchants, somewhat minimizing the imposition of the high fees.

After years of negotiating, in November of 2012 the district court overseeing the case preliminarily approved the landmark settlement agreement involving two distinct subclasses of plaintiffs: The Rule 23(b)(3) subclass that consisted of merchants that accepted the cards from January 2004 to November 2012 who would share the largest cash payment in United States antitrust history, and the Rule 23(b)(2) subclass that consisted of merchants accepting the cards from then on, who would receive only injunctive relief in the form of rule changes. The difference between the two subclasses was quite consequential: members of a (b)(3) subclass can opt out and pursue litigation on their own – indeed, thousands of retailers did – while members of a (b)(2) subclass are bound by the result.

The problem? Both subclasses were represented by the same lawyers, which the Second Circuit determined posed a “fundamental conflict” that created “unacceptable incentives” for those negotiating the settlement. The Second Circuit observed, “[t]he fault lines are glaring.” That is, the

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(b)(3) merchants had an interest in maximizing cash compensation for past harm, while the (b)(2) merchants had an interest in maximizing restraints to prevent future harm.

What's more, the court appeared to suspect the resulting tension had a significant effect; the relief between the two subclasses was disparate. For example, the most significant relief afforded to the (b)(2) subclass – the ability to pass the surcharge on – was limited, because some states prohibit the practice. Plus, the injunctive relief lasted only until July 20, 2021, but the litigation release was much broader, “bind[ing] in perpetuity, without opportunity to reject the settlement, all merchants who in the future will accept Visa and MasterCard, including those not yet in existence.” The release lasted so long as the credit card companies’ rules remained substantially similar to those in place in November 2012.

The lesson for commercial litigants is to take a closer look at potential conflicts of interest on all sides of a lawsuit. This is particularly so when dealing with parties with divergent interests and lawyers who stand to gain – perhaps even, as here, “enormously” so – by getting the deal done. Time spent considering whether class counsel have adequate “incentive to zealously represent” the entire class could save the deal and avoid considerable headache.

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