Class Potential for Interchange Lawsuit

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Will the merchants currently suing Visa U.S.A. Inc. and MasterCard Inc. for antitrust violations be successful? That depends on whether these consolidated interchange suits can achieve class-action certification.

My law firm successfully represented a class of merchants that accepted Visa and MasterCard transactions for payment in an antitrust case concerning the card associations' former "honor all cards" rules. That case — also known as the Visa Check or "Wal-Mart" litigation — resulted in a historic multibillion-dollar settlement.

Because of the success of that case — particularly as the class representatives including Wal-Mart, Sears, Circuit City, The Limited, Safeway, and three major retail federations were authorized to sue on behalf of all merchants that accepted Visa and MasterCard transactions — about 40 new suits have been filed against the card associations and some banks claiming price fixing in the setting of Visa and MasterCard interchange fees.

The plaintiffs in these cases allege that, absent such interchange fee setting, the prices that merchants pay for accepting Visa and MasterCard transactions would have been substantially lower. In this regard, they seek billions of dollars in damages (to be trebled per antitrust law). All of these suits have been consolidated into a single proceeding before Judge Thomas Gleeson of the U.S. District Court for the Eastern District of New York — the federal judge who presided over the Visa Check litigation.

To determine whether these plaintiffs will succeed, one must understand the key issues and arguments that will be raised in the consolidated interchange litigation, including those raised by the plaintiffs' anticipated motion for class certification. That motion will be granted if common issues related to the proposed class outweigh issues relevant only to individual members.

Visa Check demonstrated why class certification is an important hurdle for these new plaintiffs. Without class certification in that case, the potential damages exposure faced by the associations would have been substantially lower.

It was this greater potential exposure that caused the associations in that suit to grant substantial relief for plaintiffs' alleged injuries — over $3 billion payable over a 10-year period and an end to the alleged tying arrangements.

Here are the likely arguments that the parties will make for and against class certification in the interchange litigation.

THE PLAINTIFFS' CASE

The merchant plaintiffs will rely heavily on Judge Gleeson's class-certification decision to support their arguments. They will likely claim that the class-certification analysis in the interchange proceedings should be even more straightforward than the analysis in the Visa Check litigation. That's because the interchange cases focus on horizontal price-fixing claims, which are more amenable to class certification than the illegal-tying claims pursued in Visa Check.

Moreover, the merchants will point out that the associations' primary defense to class certification in the Visa Check proceeding revolved around inapplicable tying standards that focused on the stand-alone prices of both credit and debit.

Visa and MasterCard claimed that the prices for both products needed to be considered to determine whether all class members were harmed by the alleged anticompetitive conduct. They argued that, absent the "honor all cards" rules, credit card interchange would have been higher than what had previously existed in order to compensate banks for reduced debit card interchange, causing individual class member issues by making some merchants (those that accept a great amount of credit card transactions) worse off in a world where debit and credit pricing were delinked.

In the interchange proceedings, merchants will rightly argue that package prices are not considered: the effect that a movement in price on one product will have on another product in price-fixing cases is irrelevant.

Moreover, these merchants will argue that, absent interchange setting, the prices for all types of Visa and MasterCard payment transactions would have been lower. So there is no chance, these merchants will say, that individual issues can be raised by this theory of antitrust injury.

THE DEFENDANTS' CASE

Visa and MasterCard will likely make class-certification arguments in this proceeding that they did not make in Visa Check. This stems from the fact that the federal appellate court in New York has, since the settlement in Visa Check, commented on its decision affirming Judge Gleeson's class-certification order.

Given this decision, Visa and MasterCard will likely posit that any economist expert utilized by the plaintiffs for class certification must show that class certification is supported by a preponderance of the evidence.

Plaintiffs will likely reply by contending (correctly, in my view) that Judge Gleeson's former analysis in Visa Check met these claimed standards. They will contend, notwithstanding the new appellate case, that Judge Gleeson's detailed class decision in Visa Check should continue to be regarded as on-point precedent.

What does seem likely is that, in order to be assured that class standards are satisfied, Judge Gleeson will require an evidentiary hearing at the class stage — something which he did not mandate (nor did the defendants insist upon) in Visa Check.

Such evidentiary hearings are becoming more of the norm and offer the judge a much more detailed and nuanced view of the parties' class positions. Moreover, such a hearing is generally open to the public and generally calls for public exposure of the key evidence that the parties will rely upon.

Mr. Cantor is a partner at Constantine Cannon LLP of New York, specializing in antitrust counseling and litigation. Neither he nor his firm represents parties in the current lawsuits that are the focus of this article.