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ATM Plaintiffs May Proceed to Uncertain Results

SCOTUS returned to lower courts a case alleging Visa and MasterCard blocked ATM competition.

By David C. Kully

The payments card networks have been embroiled in nearly constant antitrust litigation for decades. Visa Inc. and MasterCard Inc. thought they might avoid another lengthy litigation battle when the U.S. Supreme Court in June agreed to hear *Visa v. Osborn*, a case alleging that Visa and MasterCard blocked competition from rival ATM networks and forced consumers to pay higher ATM access fees.

On Nov. 17, however, the Supreme Court reversed course and dismissed its writ of certiorari as "improvidently granted," returning the case to the lower courts for continued litigation.

"OF Dubious Benefit?"

The plaintiffs' good fortune in the Supreme Court might prove to be of dubious benefit, however, as they have achieved only the opportunity to pursue lengthy and expensive discovery in an industry in which their ultimate litigation success is far from assured.

This case concerns rules that apply when an ATM operator uses the Visa or MasterCard networks to link its ATM to the bank where a customer seeking to withdraw cash maintains a checking account.

ATMs are operated by large, well-known banks like Bank of America, Citibank and Wells Fargo that maintain ATMs in their branches, as well as by independent companies that place ATMs in other locations.

ATM operators generate revenues not only from the $2 or $3 (or more) access fees they charge consumers withdrawing cash, but also in what are known as interchange fees that are paid by the bank where the cardholder maintains his or her checking account.

The ATM operator, however, does not receive the entire interchange fee; it shares the fee with the ATM network that connects the ATM to the cardholder's bank.

Because some ATM networks demand a greater share of the interchange fee than others, the size of the fee actually received by the ATM operator can vary significantly depending on the network over which an ATM transaction is processed.

According to the plaintiffs, Visa and MasterCard keep a relatively high share of the interchange fee. Rival networks such as NYCE and Star collect less and leave more for the ATM operator.

These fee differences create incentives for ATM operators to use ATM networks such as NYCE and Star as much as possible and to use Visa's and MasterCard's ATM networks as little as possible.

When a cardholder's bank is a member of more than one ATM network – as indicated by the logos or "bugs" of different networks on the back of his or her ATM card—the ATM operator will automatically pick the ATM network that provides it the highest interchange fee. (Some ATM cards have only a Visa or MasterCard bug, leaving the ATM operator no alternative network option.)

But, according to the plaintiffs, ATM operators would like to do more to increase the use of networks other than Visa or MasterCard.

If allowed, ATM operators would charge lower ATM access fees to consumers with ATM cards with the bugs of the NYCE, Star or other networks.

If ATM operators were able to do so, plaintiffs assert, consumers would pay lower ATM access fees and ATM operators would keep a greater share of the interchange fees.

More importantly, according to plaintiffs, Visa and MasterCard would be forced to respond competitively to the promotion of other ATM networks and begin sharing more of the interchange fees with ATM operators.

Visa's and MasterCard's rules, however, prohibit ATM operators that use their networks from charging lower ATM access fees for transactions run over other ATM networks, and plaintiffs brought lawsuits challenging the rules in 2011.

The Questions at issue

The litigation has to date focused almost entirely on the threshold question of whether the Visa and MasterCard rules are the products of agreements among their member banks that are actionable under Section 1 of the Sherman Act.

The district court did not think so and dismissed the case, but the U.S. Court of Appeals for the D.C. Circuit disagreed. The Supreme Court agreed to hear the case when Visa and MasterCard's petition for certiorari characterized the relevant question as whether mere membership by banks in Visa and MasterCard satisfied the agreement element, but dismissed the writ of certiorari as "improvidently granted" when Visa and MasterCard relied on different arguments in their merits briefs.

The Supreme Court's action moves the case past these narrow issues and on to more difficult questions, on which expansive discovery will be necessary, including whether Visa's and MasterCard's rules are pro-competitive or anti-competitive.

Another recent case, with some similarities to this one, provides a preview of what is to come.

In 2010, the U.S. Department of Justice sued the credit card networks over rules that blocked merchants from favoring other credit cards.

The case reached trial against American Express Co. only after a massive, four-year discovery effort, involving the exchange of millions of documents, scores of depositions and multiple rounds of expert reports.

The DOJ thought its efforts paid off when the district court found in its favor in 2015, but its victory was short lived as the Second Circuit overturned the decision in September. (A petition for rehearing en banc is currently pending.)

The Osborn plaintiffs, likely buoyed by the Supreme Court's decision not to consider the case at this point, now stand where the DOJ stood in 2010. A long road lies before them.

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