'Tainted' $7.25B Swipe Fee Settlement Overturned

Credit card litigation dates back to 2005. *June 30, 2016*

NEW YORK — It may be back to the starting line for credit card swipe fee litigation that began in 2005.

On Thursday morning, the 2nd U.S. Circuit Court of Appeals in New York threw out the $7.25-billion antitrust settlement among Visa Inc., MasterCard Inc. and millions of retailers over credit card fees. In the move, the federal appeals court said some of the retailers were inadequately represented in the litigation, according to *Reuters*.

It also decertified the case as a class action.

A Visa spokeswoman told the news outlet the company is reviewing the decision and MasterCard had no immediate comment.

The court's decision overturns a July 2012 agreement that settled claims that the credit card companies overcharged merchants on swipe fees — also known as interchange fees, as *CSNews Online* previously reported. U.S. District Judge John Gleeson in Brooklyn, who has since left the bench, had approved the settlement in 2013.

The settlement had been the largest all-cash antitrust accord in U.S. history, according to *Reuters*. One class of merchants that accepted Visa or MasterCard from January 2004 to November 2012 was to share up to $7.25 billion, while a second class accepting the cards from then on was to get injunctive relief in the form of rule changes.

But many retailers objected, saying the settlement, among other things, forced members of the second class to give up their right to sue over various policies and practices, the news outlet reported.

Writing for the appeals court, Circuit Judge Dennis Jacobs said the two classes should not have been represented by the same lawyers, who were awarded $544.8 million in fees. He said the lawyers suffered from a "fundamental conflict," having been in position to negotiate terms that could simultaneously benefit one class and harm the other.

"We have reason to think that that occurred here," and in the end "sapped class counsel of the incentive to zealously represent" the class obtaining injunctive relief, Jacobs said.

Retailers' Reaction

NACS, the Association for Convenience & Fuel Retailing, was one of the leaders opposing the $7.25-billion proposed settlement.

NACS both opted out and objected to the proposed settlement because it offered class members money damages of only about two months' worth of interchange and, among other things, limited modifications to Visa's and MasterCard's surcharging rules.

The proposed settlement also required class members to release Visa and MasterCard from liability for any anticompetitive rules currently in place (including the interchange or swipe fee rules) and/or any "substantially similar rules" instituted at any time in the future, according to the association.

"We are pleased that the Second Circuit Court of Appeals has thoughtfully addressed the problems we have long identified with this proposed settlement. We will work to help ensure that this moves forward in a way that recognizes the best interests of merchants and the consumers they serve," said NACS President and CEO Henry Armour.

The Retail Industry Leaders Association (RILA) was one plaintiff that formally opted out and objected to the settlement.

"RILA enthusiastically welcomes the circuit court's decision to throw out this harmful settlement," said Deborah White, executive vice president and general counsel. "Quite simply, the settlement orchestrated by the card networks and banks would have undermined merchants' legal rights forever and would have allowed Visa and MasterCard to impose higher and higher swipe fees with impunity. Today's decision is a victory for all merchants and consumers."

RILA, along with a majority of the named class plaintiffs and many more within the merchant community, has argued that the settlement fails to address the anti-competitive practices that were the genesis for the lawsuits, and denies merchants their right to challenge these practices ever again in court. Specifically, RILA argued that the terms of the settlement:

- Lock in the Visa/MasterCard duopoly,
- Provide no relief from interchange rate setting or other rules,
- Denies all current and future retailers their right to bring future legal action related to interchange rules and rate setting, among other things, against Visa, MasterCard and the banks, and
- Could limit emerging innovations that can bring meaningful competition to the marketplace, such as mobile payments.

The National Retail Federation (NRF) also applauded the decision.

"This 'settlement' was never a settlement on behalf of the retail industry but rather a backroom deal that failed to represent the interests of retailers," NRF Senior Vice President and General Counsel Mallory Duncan said. "It would have given merchants pennies on the dollar for the price-fixing they have suffered at the hands of the big credit card companies and would have done nothing to end price-fixing or to lower swipe fees going forward. Now it's time to seek real reform of these still-skyrocketing fees whether it be in court or in Congress."

NRF's board of directors gave the go-ahead to oppose the settlement in September 2012, as *CSNews Online* previously reported. In 2014, the organization asked the appeals court to overturn Gleeson's December 2013 approval of the settlement, saying a broad cross section of the retail industry ranging from independent Main Street stores to national chains opposed the deal.

"NRF challenged this settlement because it allowed Visa and MasterCard's anti-competitive practices to continue," Duncan said. "The court recognized this and struck them down accordingly."