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United States Court of Appeals,
Second Circuit.

In re VISA CHECK/MASTERMONEY ANTITRUST
LITIGATION.

Wal-Mart Stores, Inc., Limited, Inc., Sears Roebuck &
Company, Safeway Inc.,
Circuit City Stores, Inc., National Retail Federation and the
Food Marketing
Institute, International Mass Retail Association, and All
Similarly Situated
Persons, Plaintiffs-Appellees,
v.
Visa U.S.A. Inc. and Mastercard International Incorporated,
Defendants-
Appellants.

Docket No. 00-7699.

Argued Feb. 5, 2001.
Decided Oct. 17, 2001.

Large retailers, joined by a number of smaller merchants and three retail associations, brought antitrust action challenging rules issued by credit card associations that required stores accepting their credit cards to also accept their debit cards. The United States District Court for the Eastern District of New York, John Gleeson, J., certified the class. Credit card associations appealed. The Court of Appeals, Sotomayor, Circuit Judge, held that: (1) merchants established that their alleged overcharge theory was amenable to common proof; (2) causation could be proven on class wide basis; (3) individualized issues did not predominate due to associations' defense of mitigation of damages by steering; (4) class would be manageable; (5) district court was not required to determine which of two available techniques for measuring damages would be used before certifying class; and (6) certification was warranted in spite of its possible coercive effect.

Affirmed.

Jacobs, Circuit Judge, filed a dissenting opinion.

West Headnotes

[1] Federal Courts 574
170Bk574 Most Cited Cases

An interlocutory appeal may be taken on a class certification issue if a petitioner can demonstrate either that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or that the certification order implicates a legal question about which there is a

compelling need for immediate resolution. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

[2] Federal Civil Procedure 175
170Ak175 Most Cited Cases

A motion to strike expert evidence under *Daubert* involves an inquiry distinct from that for evaluating expert evidence in support of a motion for class certification; such a motion is typically not made until later stages in litigation, such as in association with a motion for summary judgment, motion in limine, or at trial, and a district court should not postpone consideration of a motion for class certification for the sake of waiting until such an examination is appropriate. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

[3] Federal Courts 577
170Bk577 Most Cited Cases

Exercise of interlocutory jurisdiction by Court of Appeals was warranted in antitrust action challenging rules issued by credit card associations that required stores accepting their credit cards to also accept their debit cards, since Court had to resolve uncertainty regarding proper standard for evaluating expert opinions at class certification stage and to address questions of predominance and manageability in light of individualized damage issues that emerge in tying cases. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

[4] Federal Courts 817
170Bk817 Most Cited Cases

The Court of Appeals reviews a district court's grant or denial of a motion for class certification under a deferential standard; provided that the district court has applied the proper legal standards in deciding whether to certify a class, its decision may only be overturned if it constitutes an abuse of discretion. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

[5] Federal Civil Procedure 174
170Ak174 Most Cited Cases

When determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of the class action rule are met. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

[6] Monopolies 17.5(2)
265k17.5(2) Most Cited Cases

The substantive elements of an illegal per se tying claim in antitrust action are: (1) that the tying arrangement affects a substantial amount of interstate commerce; (2) the two products are distinct; (3) the defendant actually tied the sale of the two products; and (4) the seller has appreciable

(Cite as: 280 F.3d 124)

U.S.C.A. §§ 1, 2; Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[26] Federal Civil Procedure 164
170Ak164 Most Cited Cases

The adequacy of representation portion of the class action rule requires courts to ask whether a putative lead plaintiff's interests are antagonistic to the interest of other members of the class. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[27] Monopolies 28(9)
265k28(9) Most Cited Cases

In the antitrust context, there are two basic methods that courts use to measure damages in tying cases; one method is the "tied product approach," where damages awarded reflect the difference between the price actually paid for the tied product and the price for which the item could have been purchased on the open market, and the second approach is the so-called "package measure," which would award damages only to the extent that the plaintiff overpaid for the combination of the tied and tying products. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[28] Federal Civil Procedure 164
170Ak164 Most Cited Cases

While the adequacy of representation portion of the class action rule is designed to ferret out potential conflicts between representatives and other class members, not every potential disagreement between a representative and the class members will stand in the way of a class suit; the conflict that will prevent a plaintiff from meeting the prerequisite of the rule must be fundamental, and speculative conflict should be disregarded at the class certification stage. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[29] Federal Civil Procedure 181.5
170Ak181.5 Most Cited Cases

Certification was warranted in antitrust action brought by merchants that challenged rules issued by credit card associations that required stores accepting their credit cards to also accept their debit cards; although effect of certification, due to sheer size of class, might provide considerable leverage for merchants to coerce associations into settlement, action was precisely type of situation for which class action device was suited given the strong commonality of the violation and harm among merchants. Sherman Act, § 1, 2, as amended, 15 U.S.C.A. §§ 1, 2; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

*129 *Steven V. Bomse*, Heller Ehrman White & McAuliffe LLP, San Francisco, CA (M. Laurence Popofsky, Marie L. Fiala, Brian P. Brosnahan, Renata M. Sos, Adam Cole,

Heller Ehrman White & McAuliffe and Philip H. Curtis, Robert C. Mason, Arnold & Porter, New York, NY, on the brief), for defendant-appellant Visa U.S.A. Inc.

Kenneth A. Gallo, Clifford Chance Rogers & Wells LLP, New York, N.Y. (James N. Benedict, Mark A. Kirsch, Guy C. Quinlan, Craig M. Walker, Joseph J. Simons, Keila D. Ravelo, on the brief), for defendant-appellant MasterCard International Incorporated.

Lloyd Constantine, Constantine & Partners PC, New York, N.Y. (Robert L. Begleiter, Matthew L. Cantor, Stacey Anne Mahoney, Wendy M. Rogovin, Amy N. Roth, Gordon Schnell, Mitchell C. Shapiro, Jeffrey I. Shinder, Michael Spyropoulos, Constantine & Partners PC and Steve W. Berman, George W. Sampson, Jim Solimano, Hagens Berman LLP, Seattle, WA, on the brief), for plaintiffs-appellees.

Jack C. Auspitz, Debra Freeman, Morrison & Foerster LLP, New York, N.Y. (Geoffrey P. Miller, of counsel) filed a brief Amici Curiae for The American Bankers Association, The Consumer Banks Association, The Financial Services Roundtable, and The New York Bankers Association.

Before JACOBS, SOTOMAYOR, Circuit Judges, and COTE, District Judge. [FN*]

FN* The Honorable Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

Judge JACOBS, dissents in a separate opinion.

SOTOMAYOR, Circuit Judge:

Defendants-appellants Visa U.S.A. Inc. ("Visa") and MasterCard International Incorporated ("MasterCard") appeal from an order of the United States District Court for the Eastern District of New York (Gleeson, J.) granting plaintiffs-appellees' ("plaintiffs") motion for class certification. We hold that the district court did not abuse its discretion by finding that plaintiffs had established that this action is maintainable as a class action under Federal Rule of Civil Procedure 23(b)(3). We therefore affirm.

BACKGROUND

Plaintiffs--a number of large and small merchants and three trade associations--bring this antitrust class action against defendants Visa and MasterCard, alleging that defendants have created a tying arrangement in violation of § 1 of the Sherman *130 Antitrust Act, 15 U.S.C. § 1, by means of their "honor all cards" policy, which requires stores that accept defendants' credit cards to accept their debit cards as

2001-2 Trade Cases P 73,459, 50 Fed.R.Serv.3d 993, 57 Fed. R. Evid. Serv. 583
(Cite as: 280 F.3d 124)

Certification does no service for the absent class members' claims, viewed separately. Already, the difficulty of having to prove injury under the package measure has led plaintiffs' counsel to propose a least-common-denominator analysis that is theoretically capable of bestowing some benefit on all class members, to the detriment of class members who would have a superior claim of recovery under other, competing analyses. Thus, plaintiffs undertake to make the " 'elusive and seldom attempted' " showing that the sum of the two fees would have been lower *and* that the credit card price would not have risen at all. If, as plaintiffs' counsel evidently believes, this analysis is the only way to keep the class together, I take the point as proven that the interests of the class members are fractured and conflicted. As to the analysis itself, I have no view of its merits in this particular case. But for most *absent* members of the class, the analysis is unnecessary and impedes recovery under other theories that offer better prospects of recovery.

In light of the intractable conflict, I would order the district court to decertify the class. But lacking a majority on this Court for that result, I am relieved to think that the certification order is conditional and that nothing inhibits the district court from considering and reconsidering all of these issues over time, as indeed the district court is evidently disposed to do.

***159 III.
Conclusion**

The majority opinion exudes confidence that there is some way to bring this unmanageable and conflict-ridden litigation to an end, and that it will materialize one day in the district court. I think that is probably right, but I intuit that the only case-management tool that will bring about that end will be settlement, and that it will be coerced by abuses that [Rule 23\(f\)](#) was specifically designed to correct.

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