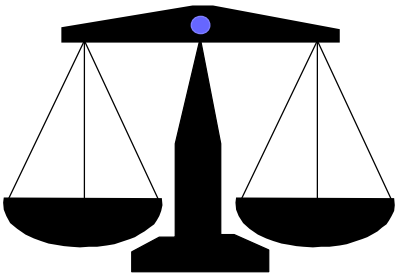

GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

THE VISA/MASTERCARD CLASS ACTION LITIGATION ? "A CLASH OF COMMERCIAL TITANS"

Because there has been so much interest in the claims procedure arising from the settlement of the nationwide class action suit brought against Visa and MasterCard, it seemed worthwhile to explore what it is all about.

In approving the Visa/MasterCard class action settlement in a lengthy opinion styled *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2nd Cir. 2005), the Second Circuit Court of Appeals aptly described the case as involving "a clash of commercial titans."

A class of five million merchants, spearheaded by retailing giants like Wal-Mart, Sears and Nordstrom charged the Visa and MasterCard associations, consisting of the nation's banks, with violating federal antitrust law by forcing them to accede to the associations' "Honor All Cards" policy, which forced merchants who accepted Visa and MasterCard credit cards to accept Visa and MasterCard debit cards as well.

The merchants complained that the associations' requirement constituted an illegal "tying arrangement," which resulted in vastly increasing the fees that merchants were required to pay the associations' member banks for debit card transactions.

According to the Second Amended Consolidated Class Action Complaint that the merchants filed in 1999, as a result of the tying arrangement class members were required to pay in the year 1996 alone fees amounting to $580,000,000 for services which, in a free market, would have cost them less than $90,000,000.

After almost seven years of intense litigation, which entailed the production of over 5,000,000 documents and the conduct of over 400 depositions, settlement was reached on the eve of trial, shortly after the trial judge had granted summary judgment in favor of the class on some, but not all, of the critical legal issues presented by the parties.

The settlement was the largest in antitrust history. Its principal terms were:

1. Requiring the associations to retract their "Honor All Cards" rules;

2. Requiring the associations to pay over three billion dollars into a settlement fund over the course of 10 years;

3. Requiring the associations to place clear identifiers on their cards so that merchants and consumers could distinguish between debit cards and credit cards; and

4. Lowering by approximately one-third the fees charged by the associations on debit

transactions for the period from August 1, 2003 through December 31, 2003.

In approving the settlement through its 2005 opinion, the Second Circuit Court of Appeals estimated that, besides obtaining in excess of $3 billion of compensatory relief, the class had succeeded in negotiating injunctive relief that would ultimately result in savings to class members of $25 billion to $87 billion or more.

So who falls within the class and is entitled to share in the settlement fund? The class consists of "all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefor have been required to accept [Visa and/or MasterCard debit cards]" during the period from October 25, 1992 through June 21, 2003.

Concern has arisen that, in the petroleum industry, some suppliers may attempt to assert a claim against the settlement fund, even where the fees at issue were actually paid by the independent dealers whom they supplied. In an effort to resolve this concern, SSDA has contacted both the claims administrator and class counsel to support the claims of independent dealers.

As momentous as this litigation is, it does not appear to be the last word in the dispute between merchants and credit card associations. Subsequent legal actions have been filed against Visa and MasterCard this year, including a lawsuit brought by retailing giants such as Kroger, Albertson's and Safeway in federal court in Manhattan, charging the associations with price-fixing in setting the fees that merchants are required to pay to member banks.

We will continue to follow this truly "titanic" litigation.

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