

\$7B MasterCard, Visa MDL Settlement Wins Initial OK

By **Brian Mahoney**

Law360, New York (November 09, 2012, 5:13 PM ET) -- A New York federal judge on Friday gave preliminary approval to Visa Inc. and MasterCard Inc.'s proposed \$7.25 billion multidistrict litigation settlement over the companies' alleged collusion on interchange fees, paving the way for arguably the largest antitrust settlement in U.S. history.

In a packed Brooklyn courtroom, U.S. District Judge John Gleeson said the deal passed the relatively low threshold for preliminary approval, ruling objections from some plaintiffs were "overstated" and insufficient to deny the settlement at this stage.

"I don't mean to suggest that there aren't a number of issues that would require more scrutiny," said Judge Gleeson, adding that he would likely appoint an expert to gauge the value of a central proposal of the settlement, which would allow merchants to pass along some of the swipe fees to consumers.

"There's an obvious difference of opinion as to the value to the class of the rule change that would allow surcharges," Judge Gleeson said. "You can't all be right about the value of that proposed rule change."

Friday's decision means the deal is one step away from final approval. But future proceedings will likely be heated, given the volume of objectors, who claim the high cash settlement belies its potential to harm merchants by giving Visa and MasterCard free rein to increase or impose new fees.

Visa and MasterCard both applauded the preliminary approval ruling Friday.

"As we have said from the beginning, this settlement is a fair and reasonable compromise for all parties," Visa general counsel Josh Floum said in a statement. "It is the result of two years of negotiation between retailers, their legal counsel, the networks, financial institutions and two highly regarded mediators under the supervision of the court."

The National Retail Federation, a nonparty that filed a brief opposing the settlement, said Friday the deal would mostly benefit attorneys, while promoting future anti-competitive behavior by Visa and MasterCard. The financial services titans charge more than \$30 billion a year in swipe fees, it says.

“This proposal benefits no one but lawyers and credit card companies, and should not be forced on the retail industry or retailers’ customers,” NRF general counsel Mallory Duncan said in a statement. “It’s a morass of legal flaws, and rather than bringing about reform it would only entrench the anti-competitive behavior of the card companies while putting them beyond the reach of the law.”

Judge Gleeson allowed oral arguments on the preliminary approval after objections from representatives of more than 1,000 merchants and trade groups.

Those objections included 10 of the 19 named plaintiffs, who have vowed to fight for a better solution. The current settlement, they say, offers a low payout compared with what the credit card companies bring in through the fees and doesn't fix the underlying problem.

Protests against the settlement have even reached Congress, where Sen. Richard Durbin, D-Ill., called the proposed deal a “stunning giveaway.” Merchants have also questioned a provision that could prevent them from taking future legal actions against the credit card companies.

Lead plaintiffs' counsel H. Laddie Montague Jr. tried to allay some of those fears at Friday's hearing, when he told Judge Gleeson that objector fears over MasterCard's and Visa's immunity from future antitrust lawsuits misconstrued the settlement agreement. But opposing plaintiffs' attorneys asked Judge Gleeson to demand that the proposed settlement clarify purported ambiguities over the card giants' future immunity.

If approved, the deal — believed to be the largest private antitrust settlement ever reached — would provide a payment of \$6.05 billion to a proposed class of about 7 million merchants that accept Visa and MasterCard, and the card companies agreed to reduce swipe fees for eight months, a discount expected to be worth an additional \$1.2 billion or so.

The class plaintiffs are represented by Berger & Montague PC, Robins Kaplan Miller & Ciresi LLP and Robbins Geller Rudman & Dowd LLP.

Visa is represented by Arnold & Porter LLP. MasterCard is represented by Willkie Farr & Gallagher LLP and Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, case number 1:05-md-01720, in the U.S. District Court for the Eastern District of New York.

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