

THE PERSISTENCE OF ANTITRUST CONTROVERSY AND LITIGATION IN CREDIT CARD NETWORKS

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I. INTRODUCTION

Antitrust issues relating to credit card networks long have been of interest to economists and lawyers. Visa and MasterCard have been embroiled in antitrust litigation repeatedly since the early 1970s—and there is no sign of this litigation abating any time soon. In fact, antitrust litigation now afflicts these networks nearly continuously.¹ Yet the Visa and MasterCard networks continue to be able to exercise market power in large part because prior cases have failed to focus on the leading cause of Visa's and MasterCard's market power, i.e., the ability of banks to act collectively to fix interchange fees they collect from retail merchants throughout the United States.

II. HISTORICAL BACKGROUND

A. THE EARLY DEVELOPMENT OF VISA AND MASTERCARD

The emergence of the Visa and MasterCard credit card networks was largely an artifact of the pre-1970 bank regulatory regime in the United States, which was constructed to preserve a decentralized banking system.² The combination of state and federal banking regulations assured

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¹ For background on the basic mechanics and economics of credit card networks, see, e.g., William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & ECON. 541, 574–75 (1983); Dennis W. Carlton & Alan S. Frankel, *The Antitrust Economics of Credit Card Networks*, 63 ANTITRUST L.J. 643, 645–48 (1995).

² See generally Baxter, *supra* note 1.

that there would be a very large number of small banks and very few large banks.³ This system, in turn, spurred the development of joint ventures so that banks could participate effectively in the emergence of credit and charge cards in the 1950s and 1960s. Joint ventures were desirable because it was difficult in the fragmented banking system for an individual bank to assemble a comprehensive, nationwide network of issued cards and merchant acceptors.⁴

Visa and MasterCard arose out of initial efforts to develop a national credit card network by Bank of America and major Chicago-area banks, respectively.⁵ By the early 1970s, the networks that would become Visa and MasterCard had been formed as open-membership joint ventures owned by their member banks. Each network grew rapidly as a result of the demand by consumers and merchants for credit cards and network services. By the late 1970s, each network had several thousand bank members that issued credit cards and/or “acquired” merchant transactions.⁶

B. EARLY ANTITRUST RULINGS AFFECTING THE DEVELOPMENT OF VISA AND MASTERCARD

The evolution of the Visa and MasterCard credit card networks has been substantially affected by the decisions in three early antitrust challenges to Visa rules: *Worthen*;⁷ *National Bankcard Corporation (NaBanco)*;⁸ and *MountainWest*.⁹ The early development of the networks also was influenced by an October 1975 business review letter issued by the U.S. Department of Justice (DOJ) in response to an inquiry by Visa.

1. Worthen

Initially, the members of both card associations issued only the cards of that association, largely because both associations began as regional

³ See, e.g., DAVID S. EVANS & RICHARD SCHMALENSEE, *PAYING WITH PLASTIC* 41 et seq. (1999).

⁴ For an interesting and helpful summary of the historical development of the exchange of money, see Alan S. Frankel, *Monopoly and Competition in the Supply and Exchange of Money*, 66 ANTITRUST L.J. 315, 319–39 (1998).

⁵ See Baxter, *supra* note 1.

⁶ To “acquire” in this context is a bank’s act of signing up a merchant to accept Visa or MasterCard cards and agreeing to process the merchant’s card transactions.

⁷ *Worthen Bank & Trust Co. v. Nat’l BankAmericard, Inc.*, 345 F. Supp. 1309 (E.D. Ark. 1972), *rev’d*, 485 F.2d 119 (8th Cir. 1973).

⁸ *Nat’l Bancard Corp. v. Visa U.S.A., Inc.*, 596 F. Supp. 1231 (S.D. Fla. 1984), *aff’d*, 779 F.2d 592 (11th Cir. 1986) (*NaBanco*).

⁹ *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 819 F. Supp. 956 (D. Utah 1993), *rev’d in part and aff’d in part*, 36 F.3d 958 (10th Cir. 1994) (*Mountain West*).

networks. That began to change as a result of the geographic expansion of the networks. In 1970, Worthen Bank and Trust Company, a member of National BankAmericard, Inc. (NBI) (now Visa), sought to issue Interbank (now MasterCard) credit cards in addition to its NBI cards. In response, in 1971 NBI adopted a rule that limited its members' ability to participate in MasterCard or other networks. NBI rule 2.16 essentially created two classes of member banks. Class "A" banks were authorized to issue cards and acquire merchant credit card transactions but they were prohibited from either issuing other cards or acquiring merchant credit card transactions for non-NBI cards. Class "B" banks (also called "agent" banks) could not issue cards—they were authorized only to acquire merchant credit card transactions—but they were permitted to be both a Visa Class B bank and the MasterCard equivalent of a Class B bank. Thus, Class B or agent banks were permitted to be "dual" in a limited sense; they could participate in both the Visa and MasterCard networks, but only as an acquiring bank. NBI was otherwise an open-membership association, i.e., any bank could become a member.

Worthen objected to this "exclusivity" rule and brought suit against NBI seeking to have the rule declared a violation of Section 1 of the Sherman Act.¹⁰ Worthen argued that the exclusivity rule amounted to a per se unlawful group boycott. On a motion for summary judgment by Worthen, the federal district court agreed, holding that the exclusivity rule was, in fact, a per se violation of the Sherman Act and enjoining NBI from enforcing the rule.¹¹

On appeal, the Eighth Circuit reversed and remanded for a full trial under the rule of reason, rejecting the application of the per se rule and distinguishing cases relied upon by Worthen and the district court. The court emphasized a factual finding that the challenged NBI by-laws "do not . . . [a]ttempt to fix the charges made for interest to the cardholders, the discounts charged the merchants *or the interchange fee charged between issuing and agent banks.*"¹² The court also was persuaded by an amicus brief from the DOJ Antitrust Division which it quoted at great length:

"In this case the district court was faced with a novel and difficult issue of antitrust law. Its opinion reflects thoughtful and responsible consideration of that issue. Nevertheless, the very novelty and complexity of the questions indicate that they should have been resolved only after a full trial. Such a trial may establish that the result reached by

¹⁰ *Worthen*, 345 F. Supp. at 1311, 1315.

¹¹ *Id.* at 1322.

¹² *Worthen*, 485 F.2d at 125 (emphasis added).

the district court is correct, and that the restraints imposed by By-law 2.16 are not only more restrictive than necessary to achieve any legitimate purpose, but are, in addition, so harmful as to be illegal *per se*. On the other hand, a full record may show that the by-law is not only reasonable, but that it preserves competition between the several bank credit card systems.”¹³

In remanding for a full trial, the court articulated its vision for the district court’s rule of reason inquiry:

There is an additional reason that this case should be tried on its merits. If it is shown during the trial that some restriction on dual membership is permissible, the trial court must determine in its decree whether or not the bylaw as drafted goes too far. Possibly the ban against an agent bank of NBI acting as an issuing bank of any other group, (and *visa versa*) [sic] goes further than it needs to go to accomplish its legitimate purposes; and possibly the extension of this ban to membership in new national credit card systems is neither necessary nor proper.¹⁴

In a footnote, the Eighth Circuit also made clear that, once the plaintiff had demonstrated anticompetitive effects of the exclusivity rule, the burden would shift to NBI to demonstrate that, on balance, the rule was procompetitive. The court noted that while the plaintiff has the initial burden of demonstrating an adverse effect on competition, once that is shown, the burden shifts to the defendant to show that, on balance, there are greater procompetitive benefits and that there are no less restrictive alternatives.¹⁵

2. *The DOJ Business Review Letter*

After the Eighth Circuit’s decision, Visa chose to amend By-Law 2.16 to fully prohibit duality, including on the agent bank side.¹⁶ Visa then “wrote the Department of Justice and asked the Government to endorse amended By-law 2.16 as ‘a reasonable method of preserving that competition against the anticompetitive effects of dual membership.’”¹⁷ In an October 1975 response, the DOJ declined to approve the full scope of the amended rule.¹⁸ The DOJ took the view that the revised rule “was too stringent and that certain of its restrictions on the acquiring side ‘might well handicap efforts to create new bank credit card systems and

¹³ *Id.* at 126 (quoting DOJ amicus brief).

¹⁴ *Id.* at 130.

¹⁵ *Id.* at 130 n.11.

¹⁶ See *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 346 (S.D.N.Y. 2001), *aff’d*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004).

¹⁷ *Id.* (quoting materials in the trial record).

¹⁸ U.S. Dep’t of Justice Antitrust Division, Business Review Letter No. 75-15 from Thomas E. Kauper, Assistant Attorney General, to Francis R. Kirkham and Allan N. Littman, Counsel for NBI (Oct. 7, 1975) (DOJ Business Review Letter).

may also diminish competition among the banks in various markets.’”¹⁹ Although the DOJ did not express the same view with regard to dual issuance, it reserved its right later to conclude that prohibiting dual issuance also might pose competitive risks.

Following the DOJ response, Visa attempted to permit duality on the acquiring side only, but ultimately abandoned that effort, claiming it was impractical.²⁰ Thus, by 1976 the barriers to duality on both the issuing side and the acquiring side were gone. Very quickly thereafter, dual issuance became the norm. Although Visa again raised with the DOJ its concerns that duality was anticompetitive, the government indicated that it was not concerned about this trend.²¹

3. NaBanco

In *NaBanco*, the plaintiff was a third-party processor of credit card transactions. In that capacity, acting as the agent for acquiring bank members of Visa and MasterCard, NaBanco processed transactions and signed up new merchants for its client acquiring banks.²² NaBanco also remitted all interchange fees collected on behalf of its client acquiring banks to card issuing banks and kept some or all of the remaining merchant discount fees deducted from amounts its client banks owed merchants.²³ NaBanco brought suit against Visa, claiming that the collective setting of credit card interchange fees by Visa member banks amounted to unlawful price fixing. NaBanco asserted that it was harmed by this conduct because some banks often were both the issuing bank and the acquiring bank on the same transaction (known as “on us” transactions) and, under Visa rules, such transactions incurred no interchange fee. According to NaBanco, banks with large volumes of “on us” transactions could offer lower merchant discounts than could NaBanco, thus harming NaBanco’s business.

NaBanco offered evidence that the relevant product market was a relatively narrow one: credit card interchange services. NaBanco further argued that Visa had market power in this relevant market, as evidenced by its ability to impose uniform interchange fees. Visa countered that the relevant product market included all methods of payment, including cash, checks, credit cards, charge cards, and anything else a merchant

¹⁹ *U.S. v. Visa U.S.A.*, 163 F. Supp. 2d at 346 (quoting DOJ Business Review Letter).

²⁰ *Id.*

²¹ *Id.*

²² *Nat’l Bancard Corp. v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1239–40 (S.D. Fla. 1984), *aff’d*, 779 F.2d 592 (11th Cir. 1986).

²³ *Id.* at 1240.

might accept as payment for goods and services. Visa also argued that even if the product market were limited to credit cards, collectively set uniform interchange fees were necessary to the functioning of its credit card network.

The trial court in *NaBanco* sided with Visa. First, the court found that the relevant product market included all forms of payment, including checks and cash, which compelled a conclusion that Visa lacked market power. Second, the court found that “even if NaBanco had established that Visa had power in a relevant market and that [the interchange fee] had substantial anticompetitive effects, Visa established that [the interchange fee] is necessary to offer the Visa card—a pro-competitive benefit which offsets any anti-competitive effects.”²⁴ On appeal, the trial court’s findings were affirmed by the Eleventh Circuit, which applied the “clearly erroneous” standard of review.²⁵

Several factors were crucial to the district court’s determination. As a threshold matter, the court held that the horizontal setting of uniform interchange fees by Visa was not per se illegal under Section 1 of the Sherman Act. Noting that the credit card market was still in its infancy, and citing the Eighth Circuit’s *Worthen* decision (among other cases), the court held that an in-depth analysis of the competitive effects of the interchange fee would be necessary before condemning the restraint as unlawful.²⁶

Once a rule of reason framework was established, several of the court’s other findings became particularly influential. For example, the court’s determination that the relevant market consisted of all forms of payment was outcome-determinative because Visa credit cards accounted for less than 5 percent of all transactions at that time.²⁷ The court therefore found only a minimal impact on competition. The court apparently believed that if interchange fees were set at an anticompetitive level, then merchants could, and would, stop accepting credit cards. Indeed, the court found that if the credit card interchange fee were set too high, competition from debit cards, which had much smaller interchange fees, would drive credit card fees down.²⁸ Similarly, the court noted that the Visa interchange fees and Visa processing were voluntary, meaning that

²⁴ *Id.* at 1265.

²⁵ *Nabanco*, 779 F.2d at 596, 605–06.

²⁶ *NaBanco*, 596 F. Supp. at 1252–56.

²⁷ *Id.* at 1259.

²⁸ *Id.* at 1258.

banks could, at least theoretically, opt-out or bypass the Visa network and fees.²⁹

The *NaBanco* court apparently was swayed, as well, by Visa's proffered procompetitive justifications. The court held that, in an emerging market for credit card services, a collective setting of interchange fees was necessary to encourage issuing banks to issue cards and acquiring banks to acquire merchant accounts.³⁰ The court also relied on Visa's representations that the level of interchange fee was "reasonably cost-related" and was supported by the analysis of a prominent accounting firm.³¹ The court implicitly found that no less restrictive alternative to interchange was available. At the time, state usury laws and banking regulations limited the ability of banks to recover costs directly from consumers,³² which seemed to strengthen Visa's argument for collecting fees instead from merchants.³³ Finally, the *NaBanco* court appeared to characterize the interchange fee as simply a "transfer payment" that equilibrated costs and benefits between the merchant and the card-issuing sides of the business. Most banks, including almost all of the Visa board members, participated in both card-issuing and merchant-signing aspects of the business. Thus, the court concluded that Visa had every incentive to set interchange fees at a level that would establish an equilibrium between the issuer and merchant sides of the business.³⁴

4. MountainWest

Sears Roebuck & Co. entered the general-purpose credit card market in the mid-1980s with the introduction of the Discover card. At that time, Sears had the largest proprietary store credit card operation in the United States. Sears already owned a small bank that issued Visa cards, but rather than expanding that business, Sears decided to introduce the new proprietary Discover brand. For that purpose, Sears acquired another financial institution, Greenwood Trust, which was not a member of Visa, and allowed its existing Visa membership to lapse.

Towards the end of the 1980s, Sears decided that it also would like to issue Visa cards. Greenwood Trust applied for Visa membership. Visa

²⁹ *Id.* at 1264.

³⁰ *Id.* at 1260–61.

³¹ *Id.* at 1261–62.

³² The rationale for such rules is unclear, but may have been related to rules limiting interstate banking and intrastate branch banking, which conferred a measure of market power on many local banks. *See supra* note 4.

³³ *NaBanco*, 596 F. Supp. at 1261–62.

³⁴ *Id.* at 1262. Many of the factual bases for the *NaBanco* decision have changed dramatically. *See infra* Part V.B.3.

responded by asking Sears to consider converting Discover to a Visa card, but Sears declined. Visa then adopted a new rule that prohibited membership in Visa to any financial institution that issued or was affiliated with an institution that issued Discover cards or American Express cards or any other card “deemed competitive” by the Visa board of directors. The Visa board did not “deem competitive” MasterCard or the Diners Club or Carte Blanche card brands operated by Citibank, at the time the largest issuer of Visa cards.

Sears responded by purchasing MountainWest Financial, which already was a Visa member. Sears planned to launch a new, aggressive Visa card program named “Prime Option.” This new Visa card would have had no annual fee and would have offered other attractive features, but Visa refused to permit MountainWest to issue those Visa cards.

Sears brought suit,³⁵ alleging that Visa’s exclusion of affiliates of companies that issued cards “deemed competitive” was anticompetitive in purpose and effect. Sears claimed the rule was designed to, and did, exclude an aggressive price-discounting new entrant, which would have benefited consumers. Sears also claimed the rule created a very significant barrier to entry to new card programs because a potential proprietary card entrant essentially would be forced to build an entire new distribution network from scratch, as well as convince banks to switch from Visa and MasterCard to this new network.

In *MountainWest*, Visa did not pursue its position in *NaBanco* that the relevant product market included all forms of payment and instead stipulated that the product market was limited to general-purpose credit cards. Visa maintained, however, that even in this narrower market it could not have market power because prices to consumers allegedly were set independently by Visa’s 6,000 member banks. Sears prevailed at trial, but the jury’s verdict was reversed on appeal by the Tenth Circuit.³⁶

The appellate court’s opinion has been criticized as resting upon a misunderstanding of the relevant economic issues, as an uncritical acceptance of Visa’s justifications for its exclusionary rule.³⁷ For example, the court held that, as a matter of law, Visa could not have market

³⁵ *MountainWest*, 819 F. Supp. 956 (D. Utah 1993). The Dean Witter division of Sears owned Discover, and Sears later divested Dean Witter. The litigation was prosecuted by Dean Witter, but for the sake of clarity, this article will refer to the plaintiff as Sears.

³⁶ SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958 (10th Cir. 1994).

³⁷ See Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 56–59, 103–06 (1995); Dennis W. Carlton & Alan S. Frankel, *The Antitrust Economics of Credit Card Joint Ventures: A Reply to Evans and Schmalensee Comment*, 63 ANTITRUST L. J. 903, 914–15 (1995).

power in the stipulated relevant market—the market for general-purpose charge cards in the United States—because “[a]t the issuer level . . . the market is remarkably unconcentrated.”³⁸ Similarly, the court accepted at face value Visa’s proffered justification for its exclusionary rule: that it was necessary to prevent “free riding” on Visa’s investments in its networks, notwithstanding the fact that this proffered justification was inconsistent with Visa’s policy, since 1975, of permitting its member banks also to issue MasterCard credit cards.³⁹

III. RECENT CHALLENGES TO VISA AND MASTERCARD

Visa and MasterCard enjoyed a respite from antitrust litigation after *MountainWest*, but it was short-lived. The use of credit and debit cards grew phenomenally from the 1970s through the 1980s and by 1995 Visa and MasterCard dominated the credit card market, which was becoming an essential part of the American economy. Because of this dominance, they soon were subjected to a series of antitrust challenges that continue to this day, based on allegations that their practices of imposing a system of interchange fees, enforcing vertical restrictions on merchants, and restricting participation by their members in competing card programs all represented anticompetitive exercises of substantial market power.⁴⁰

At about the time that the Tenth Circuit’s opinion in *MountainWest* was issued, the DOJ revived a long-dormant investigation into the exclusionary rules of Visa and MasterCard.⁴¹ This investigation ultimately led to litigation and the seminal *U.S. v. Visa* decision. Meanwhile, in October 1996, Visa and MasterCard were sued by Wal-Mart Stores and other merchants challenging as an illegal tying arrangement “the contractual requirement that [merchants] accept Visa and MasterCard debit cards

³⁸ *MountainWest*, 36 F.3d at 968.

³⁹ *Id.* at 969–70. As discussed in Part III.A below, the district court’s decision in *United States v. Visa U.S.A., Inc. (U.S. v. Visa)*, as affirmed by the court of appeals, is inconsistent with the result in *MountainWest*. In *U.S. v. Visa*, the courts determined that Visa and MasterCard, both individually and collectively, have market power in a relevant market for general-purpose payment card network services, a result contrary to the conclusion of the Tenth Circuit a decade earlier in *MountainWest*. *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 340–42 (S.D.N.Y. 2001), *aff’d*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004).

⁴⁰ Visa’s and MasterCard’s ability to increase interchange fees is cited in support of the contention that they have obtained and exercised market power. In the late 1990s, Visa and MasterCard initiated a series of interchange rate increases that resulted, by January 2004, in an effective Visa interchange rate of 1.53% on a \$100 transaction at all but the largest non-supermarkets. MasterCard roughly matched these increases. *See, e.g., Visa Strikes First in Looming Debit Interchange War*, *CARDLINE*, Dec. 12, 2003; *Visa Boosts Some Interchange Fees*, *CARDLINE*, June 27, 2003.

⁴¹ Paul Beckett, *Who Sparked the Probe of Visa? Unlikely Figure Comes to Light*, *WALL ST. J.*, July 24, 2000, at C1.

along with [Visa and MasterCard] credit cards. . . .”⁴² The results in these two cases have further illuminated and framed the remaining antitrust issues raised in the continuing legal challenges to the conduct of Visa and MasterCard.

A. *U.S. v. VISA*

In the mid-1990s, the DOJ revived an investigation into the effects of duality, the effects of the modified exclusivity rules at issue in the *MountainWest* case, and related conduct of Visa and MasterCard. In 1996, MasterCard announced that it was adopting a “Competitive Programs Policy” to mirror the longstanding Visa rule that prohibited Visa member banks from issuing Discover or American Express cards. This was the proverbial straw that broke the camel’s back,⁴³ and the DOJ brought suit in 1998 against Visa and MasterCard. The DOJ challenged two particular aspects of Visa’s and MasterCard’s operations. First, it challenged “governance duality,” i.e., the fact that the Visa and MasterCard boards and committees were dominated by many of the same banks. The government’s theory was that this reduced inter-system competition. Second, the government challenged the exclusivity rules, asserting that the rules reduced output, innovation, and consumer choice by preventing networks, such as Discover and American Express, from becoming partners with banks.

After a multi-week bench trial, the district court rejected the government’s first claim but, on the second claim, found that the exclusivity rule did unlawfully restrain competition. The court found that both Visa and MasterCard had market power in a relevant product market for general-purpose credit card network services.⁴⁴ Among other evidence indicating the associations’ market power, the court noted that both parties had the ability to price discriminate: “Both Visa and MasterCard charge differing interchange fees based, in part, on the degree to which a given merchant category needs to accept general purpose cards.”⁴⁵ The court also noted that “both Visa and MasterCard have recently raised interchange rates charged to merchants a number of times, without losing a single merchant customer as a result.”⁴⁶

⁴² *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 73 (E.D.N.Y. 2000), *aff’d*, 280 F.3d 124 (2d Cir. 2001). See also *In re Visa Check/MasterMoney Antitrust Litig.*, 2003-1 Trade Cas. (CCH) ¶ 73,995 (E.D.N.Y. 2003) (district court’s subsequent opinion on motions for summary judgment).

⁴³ Beckett, *supra* note 41.

⁴⁴ *U.S. v. Visa*, 163 F. Supp. 2d at 341.

⁴⁵ *Id.* at 340.

⁴⁶ *Id.*

Applying a standard rule of reason analysis of joint ventures, the court rejected as pretextual Visa and MasterCard's proffered justifications for the exclusivity rules:

The antitrust laws permit horizontal entities to combine their skills to create a product that could not be created separately, and such ventures may employ reasonable restraints to make the joint venture more efficient. . . . However, the rule of reason still requires an analysis of whether the injury to competition effected by the restraint outweighs its purported benefits. . . . While the plaintiff bears the initial burden of demonstrating that the challenged restraint in fact harms competition, once a plaintiff succeeds in establishing the actual adverse effects of an alleged restraint, the burden shifts to the defendant to establish its pro-competitive redeeming virtues. . . .⁴⁷

Using this framework, the court concluded that the exclusivity rules substantially restrained competition in the relevant market and the rules were not necessary to the efficient functioning of the associations.

On appeal, the Second Circuit affirmed all of the findings and conclusions of the district court. In particular, the Second Circuit deemed "reasonable" the district court's findings "that the exclusionary rules are not necessary to accomplish [the goal of promoting "cohesion" within the Visa and MasterCard networks], and that in any event the anticompetitive effects outweigh the procompetitive."⁴⁸

B. VISA CHECK/MASTERMONEY

Wal-Mart's 1996 class action challenged the "Honor-All-Cards" rules of the two associations, which required merchants who accepted any Visa- and MasterCard-branded cards to accept all such cards, including debit cards.⁴⁹ The plaintiffs alleged that this constituted an illegal tying arrangement. Judge John Gleeson of the U.S. District Court for the Eastern District of New York certified a class of all merchants who accepted either Visa or MasterCard products.⁵⁰ This class certification decision was upheld on appeal to the Second Circuit.⁵¹

After the case returned to the district court, substantial discovery was undertaken, followed by cross-motions for summary judgment. About a

⁴⁷ *Id.* at 399 (citations omitted). Only after the defendants meet this burden do the plaintiffs reassume the ultimate burden of proving that the arrangements harm competition.

⁴⁸ *U.S. v. Visa*, 344 F.3d at 243.

⁴⁹ Unlike credit cards, debit cards do not permit the cardholder to defer payment of the amount of the transaction. That amount is immediately debited from the cardholder's demand account at her bank.

⁵⁰ *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000).

⁵¹ *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001).

month before the scheduled beginning of the trial, the court issued an order partly granting the class plaintiffs' summary judgment motion, finding that there were no material disputed issues of fact on many important issues. In addressing the Section 1 claims, the court set forth the elements that the merchants had to prove to show that the tying arrangement of the Honor-All-Cards rule was *per se* illegal: "(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 market power in the tying market."⁵² The court held that "[t]here is no real dispute with respect to the first and third elements of the *per se* test."⁵³ The court rejected defendants' contention that the first element required a showing of "foreclosure" or "anticompetitive effect" in the tied market.⁵⁴

The court held that the second *per se* element—distinct products—was satisfied as well:

Overwhelming evidence establishes that merchant demand for credit card services is distinct from merchant demand for debit card services: those services are sold separately; many merchants would refuse to use off-line debit services if given the choice to do so; and the defendants themselves have repeatedly acknowledged in their business strategy and marketing activities the distinctive attributes of their off-line debit services compared to their credit card services.⁵⁵

The defendants had argued that plaintiffs must show that "it would have been efficient for Visa and MasterCard to have created a separate brand and a separate acceptance network for their off-line debit cards,"⁵⁶ but the court rejected that argument: "The proper question is not whether it was more efficient for the defendants to offer debit card services and credit card services together, but whether the nature of the demand is such that those services could be offered separately."⁵⁷ The court went on to hold that "no rational juror could fail to conclude that the products are distinct."⁵⁸ The court therefore granted summary judgment on the first three elements of plaintiffs' *per se* tying claim.

The court then considered the fourth element of the *per se* claim—appreciable market power—finding it had been satisfied with respect

⁵² *In re Visa Check/MasterMoney Antitrust Litig.*, 2003-1 Trade Cas. (CCH) ¶ 73,995, at 96,062 (E.D.N.Y. 2003) (citing *In re Visa Check*, 280 F.3d at 133 n.5).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 96,062–63.

⁵⁶ *Id.* at 96,063.

⁵⁷ *Id.*

⁵⁸ *Id.*

to Visa, but not MasterCard.⁵⁹ Visa, according to the court, “possesses appreciable economic power in the tying product market.”⁶⁰ The court added that “the relevant market, at its broadest, is the provision of general purpose credit and charge card services.”⁶¹ Because the evidence established that merchants had not switched to other payment devices despite significant increases in interchange fees on defendants’ credit cards, the court further noted that an even narrower product market might exist: general-purpose credit card services alone.⁶²

The court rejected the merchants’ argument that, as a matter of law, the two defendants should be considered collectively for the purpose of evaluating their degree of market power. The court acknowledged evidence of concerted activity with regard to their debit card strategies, but cited evidence that the defendants competed with one another as well. Therefore, the court declined to find, as a matter of law, a conspiracy or other concerted activity that would justify treating the defendants as a single entity.⁶³

The court next considered whether the *per se* test was even appropriate in this case. Noting that *per se* analysis had fallen into disuse, the court explained that “[a]s a threshold matter, there must be a substantial potential for impact on competition in order to justify *per se* condemnation. . . . Once this threshold is surmounted, *per se* prohibition is appropriate if anticompetitive forcing is likely.”⁶⁴ The defendants argued that because merchants were not foreclosed from accepting other on-line debit cards, the merchants had failed to show any threat to competition in the tied market.⁶⁵ The defendants cited Second Circuit decisions “that appear to engraft an ‘anticompetitive effect’ element onto the test for illegal tying arrangements.”⁶⁶

The court found the defendants’ citations inapposite.⁶⁷ Instead, the court held that “*per se* analysis may be appropriate when a defendant with sufficient economic power in one product market uses that power to force downstream consumers to accept another product on the defendant’s own economic terms and where this arrangement has a significant

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 96,064.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

probability of anticompetitive effect on competition in the tied product market.”⁶⁸

Nevertheless, the court ultimately decided against invoking the *per se* rule at that point in the proceedings, for three reasons. First, factual questions remained with respect to MasterCard’s market power.⁶⁹ Second, the court had not yet resolved “whether the Second Circuit’s *per se* standard in fact requires proof of a fifth element, i.e., foreclosure of competition or anticompetitive effect in the tied product market.”⁷⁰ Third, the court noted the “unique features of this case,” including the relationship between the merchants and the defendants, the relationship between the defendants and their member banks, and the effects of the tying arrangements on consumers.⁷¹

The court also denied defendants’ motion for summary judgment on plaintiffs’ conspiracy claims, finding that “[t]here is evidence, direct and circumstantial, from which a jury could find a conspiracy.”⁷²

In summary, the court denied the plaintiffs’ motion for summary judgment on their *per se* claims, leaving for trial those issues “that lie at the heart of the merchants’ § 1 claims: whether Visa and MasterCard’s Honor All Cards rules harmed competition in the debit card services market, and whether the defendants acted together to produce that result.”⁷³

On the Section 2 monopolization claims, the court held that plaintiffs must show the following elements to prevail: “(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.”⁷⁴ To prevail on the conspiracy to monopolize claim, plaintiffs would be required to show: “(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy.”⁷⁵

The court held that the merchants had standing to bring Section 2 claims because they “are direct consumers of the defendants’ debit cards

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 96,065.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)).

⁷⁵ *Id.* (quoting *Int’l Distrib. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 795 (2d Cir. 1987)).

services and are directly injured by their allegedly anticompetitive conduct.”⁷⁶ The court further held that “the evidence of common ownership, a lack of competition, and incidents of concerted activity by the two defendants could permit a jury to conclude that MasterCard, along with Visa, is attempting to monopolize the relevant market.”⁷⁷ The court determined—finding “no genuine issue of material fact”—that the relevant product market was “the debit card services market.”⁷⁸

The court also found that, despite the absence of a “precise test for the ‘predatory or anticompetitive conduct’ element of an attempt to monopolize claim,”⁷⁹ and despite the Supreme Court’s admonition not to apply Section 2 too broadly, “[g]iven the nature of their tying claims and the merchants’ factually-supported allegations of predatory and anticompetitive conduct by both Visa and MasterCard, . . . the merchants have presented sufficient evidence on this element to proceed to trial.”⁸⁰ The question of intent to monopolize was reserved for the jury.

Finally, the court held that “Visa’s individual market share satisfies any ‘threshold showing’”⁸¹ of a dangerous probability of achieving market power; that “if Visa and MasterCard are proved to have acted in concert, this element could be satisfied as a matter of law”;⁸² that the merchants had presented direct and circumstantial evidence of a conspiracy;⁸³ and that “the merchants have presented a sufficiently compelling (and factually-supported) theory of damages to warrant a trial of the issue.”⁸⁴

Shortly after the court entered its summary judgment order, Visa and MasterCard settled for a collective \$3 billion, to be paid over ten years. Some class members objected to the settlement’s broad release of all claims (even those not asserted in the litigation), but the court rejected those objections. Class counsel sought fees of \$560 million and were awarded fees of \$220 million. Class counsel appealed that award, and certain class objectors appealed on the scope of release issues as well. The Second Circuit affirmed the trial court on all issues.⁸⁵

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 96,066.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir.), *cert. denied*, 125 S. Ct. 2277 (2005).

C. THE AFTERMATH

From a litigation standpoint, the results in *U.S. v. Visa* and *Visa Check/MasterMoney* represented clear defeats for Visa and MasterCard. Yet, the relief granted in those cases is likely to be insufficient to constrain further increases in interchange fees. In fact, although the settlements with the Wal-Mart class required Visa and MasterCard to reduce debit card interchange fees as of August 1, 2003, on that same day Visa and MasterCard each *raised* their credit card interchange fees.⁸⁶ Since then, Visa has announced at least three credit card interchange fee increases⁸⁷ and has stated in meetings with retailers that it intends to increase credit card interchange fees every six months in the future. For most merchants, total interchange fees have probably increased since the Wal-Mart settlement.⁸⁸ Thus, the Wal-Mart settlement, although nominally large, appears to be a Pyrrhic victory from the perspective of merchants seeking relief from increasing interchange fees.

Since the *Wal-Mart* case, Visa and MasterCard have continued to face antitrust claims. The networks are defendants in antitrust litigation challenging their collection of billions of dollars in “currency conversion fees” from cardholders who make international transactions in currencies other than the U.S. dollar.⁸⁹ And Visa sued First Data Corporation, the industry’s largest credit card transaction processor, challenging that company’s attempt to offer processing services that bypass Visa’s proprietary VisaNet computer network, prompting an antitrust counterclaim by First Data.⁹⁰

⁸⁶ See *Visa Boosts Some Interchange Fees*, CARDLINE, June 27, 2003, available at <http://www.cardline.com>.

⁸⁷ See *Visa Unveils New Interchange Reimbursement*, CARDLINE, Nov. 4, 2004; *Visa Strikes First in Looming Debit-Interchange War*, CARDLINE, Dec. 12, 2003.

⁸⁸ Visa and MasterCard member banks have begun to impose surcharges on PIN-debit transactions and also have engaged in aggressive promotion of offline debit, by which consumers use the more expensive offline debit systems and incur higher costs from interchange fees. Additionally, in order to meet the challenge of American Express and Discover competition for issuing banks, Visa also aggressively has promoted its “Signature Visa” card, which carries a higher interchange rate. Similarly, Visa banks have been switching cardholders with consumer credit cards to corporate cards, which also carry higher interchange rates.

⁸⁹ *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555 (S.D.N.Y. 2004) (granting in part, denying in part plaintiffs’ motion to certify class challenging price fixing of currency conversion fees), *modified by* 361 F. Supp. 2d 237 (S.D.N.Y. 2005), *motion for interlocutory appeal granted*, 2005 WL 1871012 (Aug. 9, 2005).

⁹⁰ Counterclaim, *Visa U.S.A. Inc. v. First Data Corp.*, No. 02-CV-1786-JSW (N.D. Cal. Nov. 7, 2002).

IV. RENEWED CHALLENGES TO THE LEGALITY OF INTERCHANGE FEES

Challenges to the collective imposition of interchange fees remain the most contentious antitrust issue facing the networks in the United States and, indeed, in the world. In the United States, almost four dozen domestic actions that challenge Visa and MasterCard's credit card interchange fees are currently pending, and more challenges are certain to follow.⁹¹ Although economic analyses of interchange fees are sometimes quite complicated, the legal issues are likely to be far simpler and can be analyzed by reference to the decisions in *U.S. v. Visa* and the U.S. Department of Justice and Federal Trade Commission Antitrust Guidelines for Collaborations Among Competitors.⁹²

A. INTERCHANGE FEES AS HORIZONTAL PRICE FIXING

Interchange fees are the largest component of the price paid by merchants to process Visa and MasterCard payment card transactions.⁹³ It is not in dispute that the member banks of Visa and MasterCard, respectively, agree upon, and thereby "fix," the interchange fees.⁹⁴ Indeed, Visa and MasterCard historically have defended such fee fixing as critically necessary to the functioning of their networks. In order to challenge the collective setting of uniform interchange fees, merchants must, by definition, show that the banks' fee-setting practices constitute horizontal agreements on price. This first element is not generally disputed. Visa

⁹¹ See MDL 1720, Orders dated Oct. 19, 2005, Nov. 2, 2005, and Nov. 30, 2005. Over the last several years, there have been repeated challenges to the setting of credit card interchange fees by foreign antitrust or regulatory authorities. See, e.g., RESERVE BANK OF AUSTRALIA PAYMENT SYSTEMS BOARD, 2005 ANNUAL REPORT, <http://www.rba.gov.au/PublicationsAndResearch/PSBAnnualReports/2005/Html/index.html>; MasterCard Inc., Class A Common Stock (Form 424(B)(4)), at 13-14 (May 24, 2006). Foreign actions have led to the development of a substantial record, which will be relevant to challenges brought in the United States.

⁹² U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> [hereinafter Competitor Collaboration Guidelines]. Some of the merchant interchange cases also allege that Visa and MasterCard, and their member banks, have colluded on the levels of interchange fees set by Visa and by MasterCard. If proven, this claim would be assessed under the per se rule, which normally applies to horizontal price fixing.

⁹³ *U.S. v. Visa*, 163 F. Supp. 2d at 332. The total price paid by merchants for such transaction processing is known as the "Merchant Discount," which includes the interchange fee and other processing charges. The interchange fee is deducted by the card-issuing bank from the funds otherwise due the merchant for the sale of the goods.

⁹⁴ EVANS & SCHMALENSSEE, *supra* note 3, at 276 ("Visa could not deny that it had engaged in price fixing, but despite the general per se rule against such behavior, Visa had a possible defense.").

and MasterCard are consortia of member banks, which compete with each other both for the issuance of payment cards to consumers and the acquisition of merchant transactions.⁹⁵ At the same time as these banks compete with each other, they also exercise the majority of control over major competitive decisions, such as the level of interchange fees and merchant discount fees charged to merchants.⁹⁶ Not surprisingly, this peculiar structure of Visa and MasterCard formed the basis for the recent challenges to the Networks' Exclusivity and Honor-All-Cards Rules as violations of Section 1 of the Sherman Act.⁹⁷

The more significant dispute in these cases does not turn upon whether the defendants conspired to set uniform fees, but instead whether that price setting is "price fixing only in a literal sense"⁹⁸ and therefore not an agreement that should properly be the concern of Section 1. This argument may resemble the defense in *NaBanco*, in which Visa argued that the interchange fee was merely a "default," which any two member banks could bypass if they so chose. One of the principal reasons the *NaBanco* court chose not to find liability was that Visa allowed banks to bypass the Visa system and avoid payment of Visa's interchange fees.⁹⁹ The significance of the ability to bypass could have been doubted in the *NaBanco* era and it is even more suspect today. While Visa and MasterCard claim to allow bypass, both networks require the payment of an interchange fee even if the same bank or processor is on both the issuing and acquiring sides of the transaction.¹⁰⁰ Even to the extent that bypass is possible, the fact that the collectively set interchange fee is a "guaranteed" revenue for the issuing bank would seriously undermine any incentive that the issuer would have to accept a lower fee. The reality of the member banks' incentive structures, combined with previous judicial precedent adverse to the networks, make a strong argument for conclud-

⁹⁵ *U.S. v. Visa*, 163 F. Supp. 2d at 332.

⁹⁶ *See id.* (holding that joint venture nature of credit card networks did not justify the horizontal restraints among member banks).

⁹⁷ *U.S. v. Visa*, 163 F. Supp. 2d at 405; *Visa Check*, 2003-1 Trade Cas. (CCH) ¶ 73,995, at 96,065 (denying summary judgment on the networks' assertion that Honor-All-Cards Rule that tied offline-debit cards to credit cards was legal as a matter of law).

⁹⁸ *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8-9 (1979).

⁹⁹ *Nat'l Bancard Corp. v. Visa U.S.A.*, 596 F. Supp. 1231, 1264 (S.D. Fla. 1984) (*NaBanco*).

¹⁰⁰ Indeed, Visa and MasterCard relied on a *NaBanco*-style bypass argument in a recent challenge to the legality of collectively set interchange fees. *Kendall v. Visa U.S.A.*, No. C 04-04276 JSW (N.D. Cal. June 3, 2005) (Memorandum of Points and Authorities in Support of Defendant VISA U.S.A. Inc.'s Motion for Summary Judgment) (on file with authors). (The court granted the defendants' motion to dismiss based in part on the possibility of bypass). The factual defense to Visa's argument may not have been fully developed in that case, however. Because of the incentive structure described above, card-

ing that the collective setting of interchange fees constitutes a horizontal agreement among competitors.¹⁰¹

B. PER SE OR RULE OF REASON?

Determining that collectively set interchange fees constitute horizontal price fixing is not the end of the inquiry. Even a horizontal price agreement among competitors might be addressed under the rule of reason. While this argument is rarely made—and even more rarely accepted—in the typical horizontal price-fixing case, it may receive serious consideration in the interchange fee cases because of the large stakes in the litigation and the complexity of the economic relationships among the parties.¹⁰²

In the cases challenging interchange fees as horizontal price fixing, the defendants are likely to argue, based on *Broadcast Music, Inc. v. CBS (BMI)*, that even if interchange fees are set by horizontal competitors, they constitute “price fixing only in a literal sense” and cannot be condemned under a rule of per se illegality. In *BMI*, the Supreme Court addressed whether horizontal agreements among authors, composers, and publishing companies to set prices for blanket, non-exclusive licenses to perform music compositions were per se illegal price fixing. While the Court acknowledged that the pricing of the blanket license was literally “price fixing,” it held that it was not a per se violation of Section 1.¹⁰³ The Court was particularly persuaded by the fact that tens of thousands of individual negotiations between artists and purchasers of music was a “virtual impossibility” so that blanket licensing was “an obvious necessity.”¹⁰⁴ In other words, BMI had created a “new product,” for which the participating composers could rightfully set a price. Based on this market reality, the Court held that joint-venture pricing arrangements are “not usually unlawful, at least not as price-fixing schemes, where the agreement on pricing is necessary to market the product at all.”¹⁰⁵

Assessing the antitrust challenges to interchange fees may also involve the relevance of the Supreme Court’s most recent pronouncement in

issuing banks rarely vary from the “maximum” or “default” interchange fees, so those fees act as de facto minimum prices.

¹⁰¹ EVANS & SCHMALENSEE, *supra* note 3, at 276.

¹⁰² See *BMI*, 441 U.S. at 7–8 (1979); *Visa Check*, 2003-1 Trade Cas. (CCH) ¶ 73,995, at 96,064–65; Competitor Collaboration Guidelines, *supra* note 92, § 1.2 at 3–4.

¹⁰³ *BMI*, 441 U.S. at 8–10.

¹⁰⁴ *Id.* at 20–21.

¹⁰⁵ *Id.* at 22–23.

the application of Section 1 to joint ventures, in *Texaco v. Dagher*.¹⁰⁶ In *Dagher*, Shell and Texaco formed a joint venture to which each company contributed nearly all of its gasoline production and marketing assets in the United States. One feature of this arrangement was that the individual companies ceased to compete in the U.S. gasoline market and sold gasoline only through the venture.¹⁰⁷ After the venture was formed, a class of independent gas station owners sued Shell and Texaco over the decision to charge the same price for the Shell and Texaco brands of gasoline. In a narrow opinion, the Court reversed the Ninth Circuit's holding that this agreement to set the same price for both brands was per se illegal, reasoning that Shell and Texaco were no longer competitors in the relevant market and therefore could not conspire within the meaning of Section 1.¹⁰⁸

The usefulness of *Dagher* and *BMI* as analogies to the merchants' suit is limited, however. *BMI*, for one, relied heavily on the assumption that bilateral negotiations between individual composers and purchasers of music would be virtually impossible, so that a blanket license could not exist without common fees.¹⁰⁹ With respect to the setting of interchange fees, however, technological developments and the explosion of interstate banking cast doubt on the *NaBanco*-era assumption that collectively set interchange fees are necessary for a nationwide payment-card network to exist at all.

Dagher is equally distinguishable. Unlike the joint venture between Shell and Texaco,¹¹⁰ the member banks of Visa and MasterCard have not contributed substantial assets to the networks and continue to compete vigorously with each other in both the card-issuing and merchant-acquiring markets. This competition has been noted by each of the courts that have assessed Visa's and MasterCard's practices in recent years.¹¹¹ Because neither *BMI* nor *Dagher* controls the result in the merchants' case, the merchants may well be able to demonstrate per se liability without engaging in an extensive market inquiry.

¹⁰⁶ *Texaco Inc. v. Dagher*, 126 S. Ct. 1276 (2006). While *Dagher* involved an entity that was labeled a joint venture between Shell and Texaco, the Court's description of the venture indicates that it is more analogous to a partnership than a traditional, open joint venture. See, e.g., Uniform Partnership Act (1997) (U.L.A.) § 202(c)(3) (stating that "[a] person who receives a share of the profits of a business is presumed to be a partner in the business").

¹⁰⁷ *Dagher*, 126 S. Ct. at 1278.

¹⁰⁸ *Id.* at 1281.

¹⁰⁹ *BMI*, 441 U.S. at 20–21.

¹¹⁰ *Dagher*, 126 S. Ct. at 1279.

¹¹¹ *U.S. v. Visa*, 163 F. Supp. 2d at 332; *Visa Check*, 2003-1 Trade Cas. (CCH) ¶ 73,995, at 96,063.

If a court conducts a more extensive analysis, Judge Jones's burden-shifting analysis in *U.S. v. Visa* lays out the framework for a challenge to the fee-setting practices of the Visa and MasterCard member banks.¹¹² Under that burden-shifting analysis, the plaintiff has the initial burden of proof to define a relevant market and demonstrate that the restraint on trade harms competition in that market. Once the plaintiff meets that burden, the burden shifts to the defendant to demonstrate that the restraint also has procompetitive effects.¹¹³ If the defendant satisfies that burden, the court must engage in a balancing test to gauge whether the purported efficiencies outweigh the harms to competition.¹¹⁴

C. VISA'S AND MASTERCARD'S MARKET POWER IN THE RELEVANT MARKET

The merchants' first step in a rule of reason analysis is to show that the defendants have market power in a properly defined relevant market. This task may be simplified as a result of judicial decisions that have narrowed the scope of the relevant market. Judge Jones's decision in the DOJ's case is illustrative. In that case, the government's expert, Michael Katz, used a price-sensitivity test to conclude that general purpose cards and general purpose card network services constituted relevant product markets and that Visa and MasterCard had market power in those markets.¹¹⁵ Under this test, the court adopted Dr. Katz's findings that merchants could not discontinue accepting Visa and MasterCard credit cards, even in the face of frequent, significant increases in interchange fees.¹¹⁶ The court noted that even merchants with extremely low margins could not discontinue accepting credit cards because they would risk losing too many customers.¹¹⁷ In support of its conclusion that Visa and MasterCard had market power, the court also relied on the fact that both networks were able to price discriminate in the level of interchange

¹¹² *U.S. v. Visa*, 163 F. Supp. 2d at 345. This analysis is similar to the analysis that the antitrust agencies employ in the Competitor Collaboration Guidelines. See Competitor Collaboration Guidelines, *supra* note 92, § 3.2 at 8 ("The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding *per se* condemnation.").

¹¹³ This analysis also mimics a six-step burden-shifting analysis proposed by Herbert Hovenkamp. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 259–60 (3d ed. 2005).

¹¹⁴ While the plaintiff bears the burden of proof at this stage, Professor Hovenkamp indicates that few cases should require this final step of analysis. *Id.* at 260. Thus, the defendant's burden at the justification stage is crucial to the final resolution of the case.

¹¹⁵ *U.S. v. Visa*, 163 F. Supp. 2d at 335–36.

¹¹⁶ *Id.* at 340.

¹¹⁷ *Id.*

fees they charged to particular classes of merchants, based on those merchants' perceived demand for network services.

In *Visa Check*, Judge Gleeson also cited merchants' inability to resist interchange-fee increases to support his conclusion that, as a matter of law, Visa possessed market power in the market for general purpose card network services. Because of MasterCard's smaller market share, however, Judge Gleeson concluded that fact issues remained with respect to whether MasterCard has market power.¹¹⁸ And the court also held out the possibility that a market could be defined that was even narrower than the *U.S. v. Visa* general purpose card network services market.¹¹⁹

It may be argued that the relevant market definitions in the previous cases should not apply to the merchants' current case. The definition in the DOJ case could be distinguishable because it focused partly on the networks' relationships with their member banks and with consumers, as opposed to the merchant interchange cases, which concentrate on the networks' practices vis-à-vis merchants. Similarly, the payment card market is evolving rapidly, which may support an attempt to revisit the market definitions in both of the previous cases.

These potential distinctions, however, ignore the central conclusion of both Judge Jones and Judge Gleeson—that merchants are unable to drop Visa and MasterCard even as interchange fees continue to escalate.¹²⁰ This feature remains unchanged from the previous cases and, if anything, is even more relevant to a challenge to interchange fees. Interchange fees, moreover, have continued to increase. Visa has increased credit card interchange fees at least three times since 2002, with MasterCard following every increase and adding a fourth in 2005.¹²¹ An especially noteworthy demonstration of Visa's and MasterCard's market power occurred in August 2003, when both networks increased credit card interchange fees, which the merchants in the interchange fee price-

¹¹⁸ *Visa Check*, 2003-1 Trade Cas. (CCH) ¶ 73,995, at 96,063. The facts and circumstances of this market, however, are likely to lead to a conclusion that MasterCard also has market power notwithstanding its lower market share. See, e.g., Timothy J. Muris, *Payment Card Regulation and the (Mis)application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 522 ("Most merchants . . . cannot accept just one major card because they are likely to lose profitable incremental sales if they do not take the major payment cards. Because most consumers do not carry all of the major payment cards, refusing to accept a major card may cost the merchant substantial sales.").

¹¹⁹ *Visa Check*, 2003-1 Trade Cas. (CCH) ¶ 73,995, at 96,063 ("[T]he relevant market, at its broadest, is the provision of general-purpose credit and charge card services.").

¹²⁰ See, e.g., *Visa Strikes First in Looming Debit Interchange War*, CARDLINE, Dec. 12, 2003; *Visa Boosts Some Interchange Fees*, CARDLINE, June 27, 2003, available at <http://www.cardline.com>.

¹²¹ Fumiko Hayashi, *A Puzzle of Card Payment Pricing: Why Are Merchants Still Accepting Card Payments?*, 5 REV. NETWORK ECON. 144, 146 (2006).

fixing litigation claim took back nearly all of the monetary relief that merchants had won in the *Visa Check* case.¹²²

In addition to increasing interchange fees, the networks have expanded their price-discrimination practices by introducing new tiers of merchants and assigning those merchants new price levels.¹²³ The networks, along with the member banks, have also demonstrated their market power by introducing a new class of credit cards, known as “Signature” cards, that are advertised as offering consumers premium services but which do so by imposing further interchange fee increases on merchants.¹²⁴ Thus, far from being weakened by the wake of the recent antitrust challenges, Visa, MasterCard, and their member banks’ market power appears to remain intact, as they have continued to increase interchange fee rates charged to merchants.

D. POTENTIAL EFFICIENCY JUSTIFICATIONS

Following Judge Jones’s burden-shifting framework, once the merchants have shown injury to competition in a relevant market, the burden will shift to the defendants to proffer procompetitive justifications for their conduct.¹²⁵ The defendants must show that these justifications are indeed valid. For example, it is not enough for the defendants to show that a collectively established interchange fee once was necessary in the past. Instead, the defendants must show that those fees are still necessary to the functioning of their payment card networks.¹²⁶ In the end, it is not easy for the defendants to satisfy their burden of production that their proffered justifications are valid.¹²⁷

¹²² Class Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss or Alternatively to Strike Plaintiffs’ Pre-2004 Damages Claims at 17, *In re Payment Card and Merchant Discount Fee Antitrust Litigation*, MDL No. 1720 (E.D.N.Y. July 21, 2006). See *Visa Boosts Some Interchange Fees*, CARDLINE, June 27, 2003, available at <http://www.cardline.com>.

¹²³ See *Visa Tinkers with Credit Interchange*, AM. BANKER, Aug. 1, 2003.

¹²⁴ See Morgan Stanley Equity Research, *The Empire Strikes Back* (Mar. 8, 2005).

¹²⁵ *U.S. v. Visa*, 163 F. Supp. 2d at 345.

¹²⁶ See *U.S. v. Visa*, 163 F. Supp. 2d at 399 (holding that defendants’ justifications were not valid); *U.S. vs. Visa*, 344 F.3d at 243 (“defendants have failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits”); See Competitor Collaboration Guidelines, *supra* note 92, § 2.4.

¹²⁷ Even the experts for Visa concede that how a court enforces this burden on the defendants may drive the outcome of the case. See David S. Evans & Richard Schmalensee, *The Economics of Interchange Fees and Their Regulation: An Overview*, in FEDERAL RESERVE BANK OF KANSAS CITY, INTERCHANGE FEES IN CREDIT AND DEBIT CARD INDUSTRIES: WHAT ROLE FOR PUBLIC AUTHORITIES? 73, 77 (2005) (“if antitrust or other regulators had to show that . . . intervention would improve welfare, they could not do so. . . . By the same token, there is no basis in economics for concluding that the privately set interchange fee is just right. Thus, if card associations had to bear the burden of proof—for example, to obtain a comfort or clearance letter from authorities for engaging in presumptively

Because the many antitrust challenges to the defendants' practices have made public the debate over the effects of those practices, the justifications the networks will likely put forth are relatively apparent even at this early stage. The first likely justification is that interchange fees are necessary to provide a dependable revenue stream to issuing banks, without which those banks would not find it in their interests to issue cards. If issuers did not place enough cards in circulation, the theory follows, some merchants would stop accepting cards, which would lead to an even further decrease in card issuance. This claim that a "death-spiral" could result was suggested by MasterCard in the Reserve Bank of Australia's recent challenge to Visa's and MasterCard's interchange fees.¹²⁸

The merchants may also face an argument that collectively set interchange fees are necessary to combat what the networks have labeled the "hold-up" problem. This purported problem occurs as a result of the networks' Honor-All-Cards Rules, which require Visa and MasterCard merchants to accept all Visa- and MasterCard-branded payment cards, regardless of the issuing bank. Because the merchant must accept any Visa or MasterCard payment card presented to it, the defendants argue that in the absence of a standard fee, the issuing bank would be able to demand whatever interchange fee it wanted, knowing that the acquiring bank and merchant would be powerless to reject its offer. According to proponents of the hold-up theory, the issuing bank is a monopolist in any individual payment card transaction, and a collectively established interchange fee is necessary to remedy this market imperfection.¹²⁹ This argument, however, presumes that some interchange fee must be paid for the network to function.

Interchange fees have been reduced in several jurisdictions, most notably Australia. In Australia, card issuance, consumer usage, and merchant acceptance continue to expand even as interchange fees have been drastically cut. Merchant fees have fallen dramatically, and all consumers are likely to benefit from the resulting lower retail prices, while fee increases and benefit reductions to cardholders have been modest.¹³⁰ The experience in Australia and other jurisdictions in which

illegal coordinated behavior—it would be difficult for them to demonstrate that they set socially optimal fees.”).

¹²⁸ See MasterCard Int'l, Inc., *Submission to the Reserve Bank of Australia* 11 (June 8, 2001, as revised July 20, 2001).

¹²⁹ See, e.g., Baxter, *supra* note 1, at 576–77; John Small & Julian Wright, *The Bilateral Negotiation of Interchange Fees in Payment Schemes 4* (National University of Singapore, Jan. 2002) (mimeo), http://profile.nus.edu.sg/fass/ecsjkdw/setting_interchange_2002.pdf.

¹³⁰ RESERVE BANK OF AUSTRALIA, 2005 ANNUAL REPORT, *supra* note 91.

interchange fees have been reduced may provide important evidence regarding the effects of interchange fees.

In addition to these early experiences with other jurisdictions, merchants can point to several examples of four-party networks that function effectively without collectively set interchange fees, such as debit card networks in Canada, The Netherlands, Finland, Denmark, and Luxembourg.¹³¹ The fact that a decrease in interchange fees (or even the absence thereof) does not appear to prevent these networks from operating and inducing consumers and merchants to participate, seems to undercut the defendants' argument that tinkering with the banks' choice of interchange fees will send payment card networks spiraling to their death.

The networks and banks will also face the difficult task of proving that the supposed hold-up problem justifies the banks' collective setting of uniform interchange fees. The primary weakness in the hold-up justification is that it arises *only if* one assumes the necessity of both the Honor-All-Cards Rule and the mandatory transfer of a fee between issuer and acquirer. If, for example, the networks did not require that the merchant and the acquirer transfer a fee to the issuer, the hold-up problem would not arise. Hold-up would not be possible in that situation because the issuer of a consumer's card would have no particular leverage to demand that the acquirer and the merchant pay it a fee. The so-called hold-up problem, therefore, is a problem of the defendants' own creation. For the hold-up problem to justify the collective setting of a fee, it is first necessary to conclude that the transfer of some fee is necessary in the first place. The success of four-party networks that function effectively without interchange fees is inconsistent with such a conclusion.

E. THE ANTITRUST INJURY FLOWING FROM THE COLLECTIVE SETTING OF INTERCHANGE FEES

In order to prevail in these cases merchants must demonstrate "anti-trust injury," which is "injury of the type the antitrust laws were intended to prevent."¹³² This should not be difficult for the merchants once the underlying violation is established: Judge Jones in *U.S. v. Visa* explicitly found harm to competition flowing from the Visa and MasterCard exclu-

¹³¹ European Commission, Competition DG Financial Services, *Sector Inquiry Under Article 17 Regulation 1/2003 on Retail Banking, Interim Report I: Payment Cards* 26 (Apr. 12, 2006); Stuart E. Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, 4 REV. NETWORK ECON. 290, 303 (2005).

¹³² *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

sivity rules.¹³³ Presumably, once the merchants have proven the other elements described above, demonstrating that the collective setting of interchange fees (arguably a substantially greater anticompetitive restraint than the exclusivity rules) harms competition should not be a significant problem for the merchants. Courts routinely find that purchasers of products that have been subjected to horizontal price fixing presumptively suffer antitrust injury.

F. LESS RESTRICTIVE ALTERNATIVES

Once the merchants in these cases demonstrate harm to competition flowing from the collectively set interchange fees, the burden then shifts to Visa and MasterCard to establish both the procompetitive redeeming value, if any, of this conduct.¹³⁴

The Competitor Collaboration Guidelines explain that, in order to avoid condemnation as an unreasonable restraint, the conduct of the joint venture participants must be “reasonably necessary,” that is, “if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement.”¹³⁵ Moreover, the assessment of “reasonable necessity” and “competitive effects” may change over time.¹³⁶ “The reasonable necessity of an agreement may depend upon the market context and upon the duration of the agreement. An agreement that may be justified by the needs of a new entrant, for example, may not be reasonably necessary to achieve cognizable efficiencies in different market circumstances.”¹³⁷

Finally, the Competitor Collaboration Guidelines focus on the expected anticompetitive harm and compare that to the expected procompetitive benefits. “As the expected anti-competitive harm of the agreement increases, the Agencies require evidence establishing a greater level of expected cognizable efficiencies in order to avoid the conclusion that the agreement will have an anti-competitive effect over-

¹³³ *U.S. v. Visa*, 163 F. Supp. 2d at 379 (“[T]he record demonstrates that the exclusionary rules could have had an adverse effect on both the issuing and the network markets.”).

¹³⁴ *Id.* at 399; Competitor Collaboration Guidelines, *supra* note 92, § 3.36.

¹³⁵ Competitor Collaboration Guidelines, *supra* note 92, § 3.36.

¹³⁶ *Id.* §§ 2.4, 3.36(b).

¹³⁷ *Id.* § 3.36(b). By “cognizable efficiencies” the agencies mean “efficiencies that have been verified by the Agencies, that do not arise from anticompetitive reductions in output or service, and that cannot be achieved through practical, significantly less restrictive means. . . . Cognizable efficiencies are assessed net of costs produced by the competitor collaboration or incurred in achieving those efficiencies.” *Id.* § 3.36.

all. When the anticompetitive harm of the agreement is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the agreement from having an anticompetitive effect overall.”¹³⁸

As discussed above, in prior challenges Visa and MasterCard have relied upon arguments based upon the Supreme Court’s decision in *BMI* that “[j]oint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on pricing is necessary to market the product at all.”¹³⁹ After *BMI*, however, the Court made clear in *NCAA v. Board of Regents*¹⁴⁰ that even where the rule of reason is used to analyze horizontal agreements that are part of a legitimate joint venture, this is not a license for the joint venture to harm competition by raising prices or restricting output. In *NCAA*, the conduct at issue was a plan adopted by the NCAA controlling the rights to broadcast NCAA member colleges’ football games. After a trial, the district court held that the controls exercised by the NCAA over the televising of college football violated the Sherman Act, rejecting the NCAA’s proffered justifications for the restraints.¹⁴¹ On appeal, the Tenth Circuit went further, holding that the NCAA’s restraints constituted per se violations of the Sherman Act.¹⁴² Alternatively, the appellate court held that, even if the conduct was not per se illegal, its anticompetitive limitations on price and output were not offset by any valid procompetitive justifications.¹⁴³

The Supreme Court affirmed the Tenth Circuit. The Court declined to apply the per se rule because the conduct of the NCAA “involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”¹⁴⁴ While acknowledging that its decision in *BMI* “squarely holds that a joint selling arrangement may be so efficient that it will increase sellers’ aggregate output and thus be procompetitive,”¹⁴⁵ the Court stated:

Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both *per se* rules and the Rule

¹³⁸ *Id.* § 3.37.

¹³⁹ 441 U.S. 1, 23 (1979).

¹⁴⁰ 468 U.S. 85, 103–06 (1984).

¹⁴¹ 546 F. Supp. 1276, 1314–15, 1319 (W.D. Okla. 1982).

¹⁴² 707 F. 2d 1147 (10th Cir. 1983).

¹⁴³ *Id.* at 1152–54, 1153, 1155–56.

¹⁴⁴ *NCAA*, 468 U.S. at 101.

¹⁴⁵ *Id.* at 103.

of Reason are employed “to form a judgment about the competitive significance of the restraint. . . Under the Sherman Act the criteria to be used in judging the validity of a restraint on trade is its impact on competition.”¹⁴⁶

Applying this time-honored standard, the Court, in a long passage that is particularly instructive for any challenge to interchange price fixing, explained why the NCAA’s restrictions were unlawful:

[B]y fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.

...

The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preferences. This latter point is perhaps the most significant, since “Congress designed the Sherman Act, as a consumer welfare prescription” . . . *A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.*¹⁴⁷

The Court noted that the NCAA had not disputed the district court’s finding that price and output were not responsive to demand; the Court thus held that “the plan is inconsistent with the Sherman Act’s command that price and supply be responsive to consumer preference.”¹⁴⁸ The district court’s opinion in *U.S. v. Visa*, finding that Visa and MasterCard each have market power relied upon merchant testimony that, even in the face of very substantial increases in interchange fees they could not decline Visa and MasterCard credit card transactions,¹⁴⁹ will be quite helpful to merchants in establishing that the horizontal setting of credit card interchange fees by Visa’s and MasterCard’s member banks is, as the Supreme Court stated in *NCAA*, “inconsistent with the Sherman Act’s command that price and supply be responsive to consumer preference.”

The burden, then, will be on Visa and MasterCard to prove that there are no less restrictive alternatives available to the networks to achieve the efficiencies they claim arise from the fixing of uniform interchange

¹⁴⁶ *Id.* at 103–04 (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)).

¹⁴⁷ *Id.* at 106–07 (citations omitted and emphasis added) (quoting *Reiter v. Sunotone Corp.*, 442 U.S. 330, 343 (1979)).

¹⁴⁸ *Id.* at 110.

¹⁴⁹ *U.S. v. Visa*, 163 F. Supp. 2d at 340.

fees and to prove that the system of private regulation of their payment card networks result in the system being responsive to consumer preference.

V. OTHER CHALLENGES TO VISA AND MASTERCARD

In addition to the merchant interchange litigation, Visa and MasterCard are faced with other serious antitrust litigation by competitors, which also threatens the four-party networks.

A. AMERICAN EXPRESS AND DISCOVER

Shortly after the denial of certiorari in *U.S. v. Visa*, Discover and American Express commenced their long-awaited follow-on actions against Visa and MasterCard.¹⁵⁰ Because the district court's judgment and injunction in the government's case effectuated a repeal of the exclusivity rules, these private actions have been aimed principally at extracting damages from Visa, MasterCard, and their member banks.¹⁵¹ Because Visa and MasterCard member banks would likely be liable to American Express and Discover for any anticompetitive harm from the associations' exclusivity rules,¹⁵² it is also possible that American Express and Discover will use the litigation as leverage to obtain favorable business deals with issuing banks, which are now free to reach such agreements, in return for releases of liability. Whether such agreements will be favorable to the interests of merchants and consumers remains to be seen. Visa has predicted that competition for bank issuers will lead to even higher interchange fees imposed on merchants,¹⁵³ which would not be a desirable outcome for either merchants or consumers. Although the commencement of the American Express and Discover actions has provoked speculation among analysts regarding the potential threat to Visa's and MasterCard's continued existence,¹⁵⁴ it is far too early to tell whether

¹⁵⁰ *Discover Fin. Servs., Inc. v. Visa U.S.A. Inc.*, No. 04-CV-7844 (S.D.N.Y. Jan. 7, 2005); *American Express Travel Related Services Co. v. Visa U.S.A. Inc.*, No. 04-CV-08967 (S.D.N.Y. Nov. 15, 2004).

¹⁵¹ American Express also named some of the larger Visa and MasterCard issuing banks as defendants.

¹⁵² One theory is that the banks that adopted the exclusivity rules of Visa and MasterCard are liable under Sherman Act Section 1 as co-conspirators in the agreement to adopt those rules by Visa and MasterCard members.

¹⁵³ *See, e.g.*, Petition for Certiorari of Visa U.S.A., *United States v. Visa U.S.A. Inc.*, No. 03-1521, at 30 (May 10, 2004), *cert. denied*, 543 U.S. 811 (2004).

¹⁵⁴ *See, e.g.*, Morgan Stanley Equity Research, *Attacking the Death Star* (Apr. 15, 2004 (on file with authors)).

these cases will have any significant effect on competition in the relevant markets.

B. FIRST DATA LITIGATION

As noted above,¹⁵⁵ in 2002 Visa sued First Data Corporation, a processing service provider to acquiring and issuing banks, to prevent First Data from expanding the use of its own network to process transactions, thereby bypassing Visa's VisaNet system. First Data asserted antitrust counterclaims under both Sections 1 and 2 of the Sherman Act. Specifically, First Data has claimed that Visa's conduct in prohibiting it from processing Visa transactions over its own network constituted an unlawful refusal to deal under Section 1, as well as monopolization and attempted monopolization of the U.S. markets for Visa network processing services and general-purpose credit card network processing services, and the corresponding debit card processing services markets.¹⁵⁶

If First Data were to prevail on its antitrust claims, this could benefit the market by enabling a lower-cost competitor to take transactions away from Visa.¹⁵⁷ If bypass were still prohibited after this litigation, a major pillar of the *NaBanco* decision—the ability to bypass—would fall.¹⁵⁸ By seeking to prevent bypass, Visa could undermine the applicability of the legal analysis in *NaBanco* to Visa's recent setting of interchange fees.

V. CONCLUSION

The new antitrust challenges described above could erode what continues to be the persistent domination of the credit and debit card markets

¹⁵⁵ See *supra* at 690.

¹⁵⁶ Defendants' Second Amended Counterclaims, *Visa U.S.A. Inc. v. First Data Corp.*, No. C 02-1786-JSW (N.D. Cal. Oct. 6, 2005) (on file with authors).

¹⁵⁷ First Data recently won an important victory on a significant issue. Visa asserted as an affirmative defense to First Data's Sherman Section 1 claim that it is a "single entity," and thus could not violate Section 1. The court rejected that argument and granted summary judgment to First Data on the affirmative defense. In doing so, the Court rejected Visa's argument that the Supreme Court's decision in *Texaco, Inc. v. Dagher*, 126 S. Ct. 1276, 1279 (2006) (which held that the *per se* rule against price fixing did not apply to the pricing decisions of a fully integrated joint venture) supported its "single entity" defense. The *First Data* court noted the narrow issue addressed by the Supreme Court in *Dagher* and stated, "The *Dagher* Court held only that the *per se* rule does not apply to a joint venture's pricing of its own product. The pricing policy challenged in *Dagher* concerned price setting by a single entity, albeit in the context of a joint venture, and not a pricing agreement between competing entities with respect to their competing products. [citation omitted] The single entity issue at play in this case concerns whether the restraint in question limits venture members' ability to compete for services outside of the venture." *Visa U.S.A. Inc. v. First Data Corp.*, No. C 02-01786-JSW, slip op. at 11 n.4 (N.D. Cal. Mar. 2, 2006) (not for publication; on file with authors).

¹⁵⁸ *Nat'l Bancard Corp. v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1264 (S.D. Fla. 1984).

by Visa and MasterCard. Yet, with years of antitrust litigation still ahead, scholarship on the relevant economic issues accelerating, and foreign jurisdictions providing live experiments by acting to curb the market power of the networks in various ways, it is premature to outline the perfect remedy for the networks' market power.

But even at this early stage, certain remedies seem self-evident. First, given the obvious ability of four-party networks to operate without mandated interchange fees,¹⁵⁹ a court might consider prohibiting those networks from setting interchange fees that are not the product of agreement by all parties to the transaction. Under such a system, the default interchange fee would be no fee, if the four parties could not agree on the level of the fee. The networks have long argued that merchants benefit substantially from interchange fees by enabling banks to issue more cards and inducing greater card usage by cardholders.¹⁶⁰ If this is true, then presumably merchants could be persuaded to agree to at least some level of interchange fees. Such a remedy would limit the networks to the more competitively benign status of a standard-setting organization. Thus, Visa and MasterCard could adopt rules and standards to facilitate the processing of transactions on their networks but could not mandate payments among the parties to the transactions.

There is no reason to believe that such a remedy would lead to the demise of the four-party payment card networks. The existence of successful four-party payment networks also belies the suggestion, sometimes made by Visa and MasterCard, that the elimination of uniform interchange fees would lead to a "death spiral."¹⁶¹ The recent experience in Australia, where credit card interchange fees were reduced by one-half by order of the Reserve Bank of Australia,¹⁶² suggests that even dramatic reductions in interchange fees do not adversely affect the efficiency of the networks.

Another helpful remedy might be to require the unbundling of the various components of the interchange fee. Although Visa denies that

¹⁵⁹ Examples of four-party networks that function effectively without interchange fees are the Interac debit card network in Canada, debit card networks in Germany, Denmark, and Sweden, and the U.S. checking system.

¹⁶⁰ See, e.g., Timothy J. Muris, *What's in Your Wallet?*, WALL ST. J., June 24, 2005, at A12 ("Merchants throughout the world recognize the benefits of credit and debit cards.").

¹⁶¹ See, e.g., MasterCard International, Inc., *supra* note 128, at 11 (setting forth "death spiral" argument).

¹⁶² RESERVE BANK OF AUSTRALIA, 2005 ANNUAL REPORT, *supra* note 91; see also European Commission, *Interim Report I Payment Cards*, *supra* note 131, at 25 (noting domestic debit card networks that function effectively without collectively set interchange fees).

an interchange fee can be based on any specific costs, MasterCard contends that the interchange fee is used by banks to cover the issuing bank's costs of the payment guarantee, the "float,"¹⁶³ promotional costs, and transaction processing costs, among other things.¹⁶⁴ To the extent this characterization were accepted by a court, with respect to each of these cost elements (with the possible exception of promotional costs, which arguably are of little value to merchants), competition or potential competition could discipline Visa, MasterCard, and issuing banks.

For example, to cover the cost of the payment guarantee, merchants either could purchase insurance or they could self-insure. In addition to potential competition for the payment guarantee, there already is actual competition for the transaction processing portion of the interchange fee, as evidenced by the *First Data* case. If First Data or other processors can process transactions more efficiently or at lower cost, and if interchange fees were unbundled, merchants and banks likely would turn to these alternative processors to provide those services, rather than Visa and MasterCard. Even the "float" theoretically could be provided to merchants by an entity other than the issuing bank.

Other suggested remedies include prohibiting many of the rules of Visa and MasterCard that constrain the ability of merchants to provide incentives to consumers to induce them to use less costly payment methods. These rules, such as the rule prohibiting merchants from surcharging consumers who use costly Visa and MasterCard credit cards, and the rules limiting the ability of merchants to steer customers to other payment media, serve no procompetitive purpose and limit the ability of low-cost payment options to constrain the market power of Visa and MasterCard.

While it might take some time for competition to evolve in markets for the various components of interchange, unbundling and prohibiting rules restraining merchants offer the promise of reducing the total cost

¹⁶³ The "float," also known as the "interest-free period," is the term used to describe the period of time between when a credit cardholder makes a purchase using the card and the time when interest begins accruing on the amount of the transaction.

¹⁶⁴ While detailed cost information related to these components is not available for the United States, Visa Europe has published such information on its Web site, <http://www.visaeu.com>. In Europe, the payment guarantee is 50% of the cost of interchange, the "float" is 22%, and the cost of processing (which presumably includes promotional costs) is 28%. See <http://www.visaeurope.com/aboutvisa/overview/fees/interchange/interchangelevels.jsp>. This data has been published by Visa Europe in connection with the resolution of the investigation by the European Union Competition authority into Visa's credit card interchange rates for cross-border transactions. See <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/1138&format=HTML&aged=0&language=EN&guiLanguage=en>.

of interchange to merchants. In the meantime, it might be necessary, as suggested above, for courts to prohibit Visa and MasterCard from requiring their members to pay interchange fees, or even impose restrictions on Visa and MasterCard's now-unrestricted ability to set interchange fees. Courts are understandably reluctant to play the role of regulator. Under the Clayton Act,¹⁶⁵ however, courts have an obligation to act to restore competitive conditions where markets are plagued by serious and longstanding anticompetitive conduct. As demonstrated by the Department of Justice's lengthy and landmark case against AT&T,¹⁶⁶ a judicial remedy to the problem of persistent market power can be extremely beneficial to consumers.¹⁶⁷ There is every reason to believe that courts could similarly act to make the markets for credit card network services more competitive, and thereby promote consumer welfare, by prohibiting the anticompetitive conduct of Visa and MasterCard.

¹⁶⁵ 15 U.S.C. § 26 ([A]ny person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . .). Courts are directed to issue "such orders and decrees as are necessary or appropriate" to accomplish the objectives of the antitrust laws." *Northern Sec. Co. v. United States*, 193 U.S. 197, 344 (1904); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 171 (1948) (the court's "function includes undoing what the conspiracy achieved").

¹⁶⁶ See *United States v. AT&T Corp.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. United States v. Maryland*, 460 U.S. 1001 (1983).

¹⁶⁷ In *AT&T* the government's obtaining of a consent decree prohibiting AT&T from continuing the use of a variety of monopolistic practices and opening up markets for local and long-distance telephone services is widely credited with expanding consumer choices, lowering prices, and spurring innovation. See James B. Speta, *Antitrust and Local Competition Under the Telecommunications Act*, 71 ANTITRUST L.J. 99, 113 (2003).