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Alert | Class Action Litigation

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Despite Claim of Circuit Split, U.S. Supreme Court Declines to Review ATM Class Certification in Antitrust Case

The Supreme Court has denied Visa Inc. and Mastercard Inc.'s Jan. 25, 2024, petition for certiorari in *Visa Inc., et al. v. National ATM Council, Inc., et al.*, rejecting the request that the Court overturn the D.C. Circuit's July 25, 2023, decision in *National ATM Council Inc. et al. v. Visa Inc. et al.*, in which it affirmed the lower court's certification of three classes of plaintiffs. The question presented in this petition for certiorari was "whether a district court validly certifies a class under Federal Rule of Civil Procedure 23(b)(3) where it deems the proposed method through which plaintiffs intend to prove classwide antitrust impact to be 'colorable' and where it defers 'material factual dispute[s]' on classwide impact to the merits." The Supreme Court's declination to take on this issue may maintain the perceived division among circuit courts with respect to their understanding of evaluating predominance at the most critical phase in a putative class action.

In this case, plaintiffs alleged a purported violation of antitrust laws based on their claim that Visa and Mastercard work together to keep ATM access fees high and limit the competition, thereby causing classwide harm. In seeking class certification, plaintiffs sought to certify three "classes" of individuals: (1) the ATM operator plaintiffs; (2) cardholder plaintiffs who allege that they were charged unreimbursed access fees at independent ATMs; and (3) cardholder plaintiffs who were charged unreimbursed access fees at bank-operated ATMs. The District Court for the District of Columbia granted class certification as to each proposed class, holding that each of them satisfied the predominance requirement under Rule 23(b)(3), that is, that common questions of law or fact predominate over individual ones. *See Nat'l ATM Council, Inc. v. Visa Inc.*, No. 11-cv-1803, 2021 WL 4099451, at *5-7 (D.D.C. Aug. 4, 2021). On appeal, the

D.C. Circuit noted that the "district court's comment that 'plaintiffs, at this stage in the proceedings, need only demonstrate a colorable method by which they intend to prove class-wide impact,' does not undercut the soundness of the court's reasoning," notwithstanding appellants' argument that the use of the word "colorable" suggested the use of a more "lenient standard," which is "contrary to more recent rulings demanding that district courts take a 'hard look' at models purporting to show class-wide injury."

In Visa and Mastercard's petition to the U.S. Supreme Court for review, they argued that certiorari was appropriate to resolve division amongst the circuit courts as to evaluating predominance, noting that the D.C. Circuit, alongside "the Eighth and Ninth Circuits, hold[s] that the Rule 23 requirements are satisfied as long as plaintiffs' proposed method appears to be valid, even if there are unresolved material disputes among the parties relevant to those requirements." In other Circuits, such as the Second, Third, Fifth, and Eleventh Circuits, "a stricter approach" is employed, whereby "a class cannot be certified if the district court fails to resolve material disputes among the parties that bear on the Rule 23 requirements, or if it merely finds that the plaintiffs' proposed method for proving classwide injury is plausible or well-established." Visa and Mastercard further argued that "[u]nder that stricter approach, the outcome of this case would have been different," and that the "D.C. Circuit's approach relaxes the predominance inquiry beyond recognition," whereby it "reduces the rigorous [Rule 23(b)(3)] analysis" to a "prima facie showing" and "seemingly allows a court to punt serious concerns that 'b[ear] on the propriety of class certification' to the merits stage, in contravention of th[e Supreme] Court's precedent." Notwithstanding these arguments, however, the Supreme Court declined to resolve the perceived circuit split. Future class action plaintiffs may rely on the "colorable" language in the D.C. District Court opinion in this case to attempt to reduce their burden in establishing predominance when seeking class certification.

Authors

This GT Alert was prepared by:

- Jonathan H. Claydon | +1 312.456.1022 | claydonj@gtlaw.com
- Sylvia E. Simson | +1 212.801.9275 | Sylvia.Simson@gtlaw.com
- Andrea N. Chidyllo | +1 212.801.9207 | chidylloa@gtlaw.com