Why Merchants' Legal Assault on Acceptance Costs Is Anti-Consumer

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While merchants, like consumers, love credit and debit cards, they don't like having to pay to accept them. It's human nature to want to pay less for products and services, no matter how good they are.

To reduce payment-acceptance fees, merchants have brought a battery of antitrust lawsuits against Mastercard and Visa. If successful, it would diminish the value America's leading payment networks provide. In plain English, it's anti-consumer.

The suits were consolidated, and then ultimately divided into a class-action suit for damages and one seeking changes in Mastercard's and Visa's interchange fees and acceptance rules. The Damages Class settled in 2019.

The Equitable Relief Class attacking interchange and acceptance rules is more troubling. That's because it threatens features that create value for cardholders, banks, and merchants.

A settlement was **announced** March 26, 2024. However, on June 28, Judge Margo Brodie, who was appointed by President Obama, **rejected** the proposed landmark $30-billion settlement. Brodie declared it “inadequate,” arguing the defendants could bear a greater reduction in credit interchange. She noted that permitted surcharging’s benefit would be limited because some states ban it and because American Express prohibits it unless all credit and debit cards are comparably surcharged, and Mastercard and Visa don’t allow surcharging debit cards.

Brodie also was troubled that the settlement would have strengthened, rather than eliminated, the honor-all-cards doctrine by mandating merchants accept digital wallets owned by Mastercard and Visa.

Mastercard and Visa preferred a settlement seeking outright victory and vindication in court. Much as management may believe in the righteousness of their business practices, an outright win would have removed uncertainty for investors, customers, and the entire system. Moreover, as with Russian roulette, at trial the networks risk a catastrophic outcome.

The settlement would have given plaintiff merchants certain benefits, albeit not everything they wanted, but that’s the nature of settlements.

Now, the chances have increased that suits consolidated in the Eastern District of New York before Judge Brodie will be sent back for trial to the courts from which they originated. There, the question whether there's an antitrust problem with America's largest "card" networks, Mastercard and Visa, would be argued and determined.

Consumer welfare matters. Under traditional U.S. antitrust doctrine, market power alone is not sufficient to establish an antitrust violation. It must be shown that that power is abused. You'd be hard-pressed to find cardholders who think they've been abused by Mastercard or Visa.

Antitrust suits against America's payment networks are nothing new. The first significant antitrust salvo, Nabanco's suit against Visa, challenged credit-card interchange fees. In 1984, Judge Hoeveler **held** that the relevant market consisted of all retail-payment services including cash, checks, and travelers' checks, ATM cards, check-guarantee cards, and private-label and general-purpose credit cards; that Visa did not have market power; that interchange was necessary; and that the pro-competitive benefit of interchange offset any noncompetitive effect.

Antitrust suits brought by the Department of Justice in 1998, and by merchants in 1996, were more successful and put Mastercard and Visa in enterprising trial lawyers' crosshairs.

In 1998, the DoJ challenged Mastercard's and Visa's membership "duality," that is, banks participating in the governance of both bankcard associations. The action also cited the networks' bans on member banks participating in competitors American Express and Discover.

Judge Barbara Jones's watershed **2001 decision** narrowed the relevant antitrust market to branded general-purpose payment networks, and ruled Mastercard and Visa had market power. While Justice lost on duality, Jones ruled that Mastercard's and Visa's prohibitions on member banks participating in American Express and Discover were anti-competitive and violated the Sherman Antitrust Act.

Then, in 2003, the Visa Check/MasterMoney class-action antitrust case—also known as "the Walmart case,"— **settled.** Mastercard and Visa paid $1 billion and $2 billion, respectively, and agreed not to tie debit and credit card acceptance; to mark debit cards; and to reduce debit interchange by a third for five months.

That case put blood in the water for trial attorneys.

Merchants want lower interchange. In their Shangri-la, interchange would be negative, meaning merchants would be paid to accept credit and debit cards. This is not unknown in the real world. For example, Australia's national debit network for many years had negative interchange.

Merchants want to be able to freely surcharge credit and debit cards. And large merchants, in particular, oppose Mastercard's and Visa's honor-all-cards rules.

But moves to eliminate interchange, permit surcharging, and end the honor-all-cards doctrine would each decrease the value of Mastercard's and Visa's two-sided platforms.

Merchants focus on their payment-acceptance costs. That's one point in the value chain. They assume everything else is a given and feel aggrieved. But payment platforms must be considered holistically. There would be no credit and debit card payments for merchants without card issuance and motivated cardholders. The relevant market is the entire two-sided payment platform.

The Supreme Court's epic 2018 ruling in Ohio et al versus American Express et al, penned by Justice Clarence Thomas, recognized that card networks are two-sided platforms. Thomas wrote that "evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power."

Thomas concluded that "[p]laintiff's argument about merchant fees wrongly focuses on only one side of the two-sided credit-card market….the credit-card market must be defined to include both merchants and cardholders."

Mastercard and Visa, too, are two-sided payment platforms. Thomas observed “[American Express] uses its higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants.”

Mastercard and Visa also employ asymmetric pricing. They charge merchants more to fund value for cardholders, spurring spend, encouraging financial institutions to issue their payment products, and delivering value to merchants—and thereby maximizing total platform value.

Understandably, consumers resist paying to pay. Merchants, however, are willing to pay to be paid. When consumer payment preferences are more important than those of merchants, interchange flows to issuers and then on to consumers in rewards and benefits, grace periods, and fee-free products. Interchange fees dynamically balance participation on both sides of the payment network and are best set in the market, rather than by the settlement of lawsuits, legislation, or regulatory diktat.

Most consumers don’t think giving up rewards and paying fees for credit cards so that merchants pay less is pro-consumer— even if, over time, most merchants’ savings would be passed on in lower retail prices.

No consumer likes being surcharged for using her credit card. Rules limiting or banning surcharging are pro-consumer. Several states ban credit-card surcharging for just that reason.

Also, the honor-all-cards rule is vital for a general-purpose payment network. There are 4,000 U.S. credit card issuers. If cardholders couldn't rely on a Mastercard or Visa acceptance mark to know that their cards will be accepted, they'd use them much less.

Further, a payment market where thousands of issuers individually negotiated acceptance with millions of merchants would be impractical and nightmarish for all parties. It would dramatically weaken, if not destroy, Mastercard's and Visa's payment networks.

What merchants seek from Mastercard and Visa in their antitrust litigation would devastate the networks and harm consumers. Mastercard and Visa should vigorously defend their freedom to compete, to price as they see fit, to innovate, and enhance the value their two-sided payment platforms deliver.

And, they should gird their loins and pillory plaintiff merchants' demands as anti-consumer—in the public square and in court.