CPI's North America Column Presents:

Is Mere Allegiance to a Business Association's Rules Enough to Plead a Sherman Act Conspiracy?

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Introduction

On June 28, 2016, in *Visa Inc. v. Osborn*,[2] the U.S. Supreme Court agreed to review a 2015 decision by the U.S. Court of Appeals for the D.C. Circuit that held that members of a business association could potentially be subject to antitrust liability under Section 1 of the Sherman Act (Section 1),[3] merely based on their participation in the governance of the association and their agreements to adhere to its rules.[4] The Court's decision will resolve a circuit split between the D.C. Circuit and the Third,[5] Fourth,[6] and Ninth[7] Circuits, all three of which have held that such an allegation by itself would be insufficient to plead a Section 1 conspiracy. The Supreme Court's decision hopefully will eliminate a substantial source of uncertainty regarding the ability of thousands of associations to adopt efficient generally applicable membership rules, free from the threat of costly antitrust liability.

Background

The federal courts, antitrust scholars, and federal enforcers have long recognized that collaboration among competing firms in an industry, including collaboration through trade associations, often generates substantial procompetitive effects.[8] As the Supreme Court noted in 1925 in the *Maple Floor*ing case, trade associations are "beneficial to [ ] industry and to consumers."[9] Indeed, "joint innovation often produces significant social benefits in relation to costs."[10] For example, competing banks cooperate through automatic teller machine (ATM) networks (operated by Visa and MasterCard, for example) to allow their customers to withdraw cash from other banks' ATMs all over the world, thereby bestowing substantial efficiency benefits on those customers.[11]

Although trade association members face antitrust scrutiny in connection with their participation in trade association activities, the mere acceptance of association rules is insufficient to support a finding of concerted action that is a prerequisite to Section 1 liability. Rather, to show concerted action, the Supreme Court required in *Monsanto* that a plaintiff allege the existence of a "conscious commitment to a common scheme designed to achieve an unlawful objective."[12] Moreover, in *Twombly*, the Court stressed that, to support a Section 1 claim, a plaintiff must allege "enough factual matter (taken as true) to suggest that an agreement was made."[13] *Twombly* sets a judicial "gatekeeping" standard aimed at discouraging unwarranted litigation, by requiring more than an allegation of "merely parallel conduct that could just as well be independent action," or an allegation of facts that are "merely consistent with" a defendant's liability.[14]

Visa v. Osborn[15]

For decades, Visa and MasterCard were associations comprised of and owned by their U.S. member banks. Visa and MasterCard were transformed into publicly-held corporations through initial public offerings held in 2008 and 2006, respectively. In *Visa v. Osborn*, a putative class of consumers who paid access fees to banks for foreign ATM transactions

sued Visa, MasterCard, and three banks. The plaintiffs objected to "access fee rules" adopted both by Visa's Plus ATM Network and MasterCard's Cirrus ATM network, that bar participating ATM operators from charging a cardholder a higher access fee for processing the cardholder's ATM transaction over its network than over a competing ATM network. Thus, an ATM operator that processes a cardholder's ATM transaction on the Cirrus network (or on the Plus Network) may not charge the cardholder a higher access fee than it would charge for processing the transaction on the Star network, or on any other network.

The plaintiffs alleged that the access fee rules were generated by "horizontal" agreements among (1) Visa and bank members of its Plus ATM network, and (2) among MasterCard and bank members of its Cirrus ATM network, respectively. There were no allegations of agreements between Visa and MasterCard themselves. The plaintiffs' allegations rested solely on the former structure of Visa and MasterCard as bank membership associations. In asserting that the banks agreed to "adhere to [Visa and MasterCard] rules and operating regulations," including the access fee rules (which were approved by the associations' boards and "agreed to by the banks themselves"), the plaintiffs' complaint failed to allege any facts: (1) suggesting any communications among the bank defendants regarding the challenged rules or ATM access fees; (2) indicating what position any bank defendant took regarding the access fee rules; (3) regarding any positions or votes taken by Visa and MasterCard board members employed by the banks; (4) indicating specific access fees charged by the bank defendants or any other ATM operators; or (5) suggesting that the access fee rules prohibit any bank defendant from independently deciding to charge an access fee at any ATM it operates, or from unilaterally deciding what access fee to charge.[16] In short, the plaintiffs noted the existence of particular rules governing access ATM fees adopted separately by single corporations, Visa and MasterCard – rules that facially are the result of unilateral corporate conduct, not joint conduct reached by Section 1. The plaintiffs' claim of a possible Section 1 conspiracy rested on the bare assertion of an agreement among banks and the Visa and MasterCard entities and lacked *any* factual specifics.

A judge on the Federal District Court for the District of Columbia dismissed the plaintiffs' complaint without prejudice, holding that the plaintiffs had inadequately pleaded conspiracy and injury-in-fact. The court relied heavily on the Ninth Circuit's decision in *Kendall v. Visa*,[17] which held (based on very similar facts) that allegations that the defendant banks were owners of Visa and MasterCard, served on their respective boards, and followed their network rules were insufficient to state a Sherman Act Section 1 conspiracy. On appeal, however, the D.C. Circuit vacated the district court's opinion. It stated that allegations "that a group of retail banks fixed an element of access fee pricing through bankcard association rules . . . describe the sort of concerted action necessary to make out a Section 1 claim."[18] Although it acknowledged that membership in associations does not establish a conspiracy, the D.C. Circuit held that the plaintiff's allegation "that the member banks *used* the bankcard associations to adopt and enforce" purportedly anticompetitive access fee rules[19] was "enough to satisfy the plausibility standard" required to avoid dismissal of the complaint.[20]

The D.C. Circuit's decision is problematic on legal and policy grounds.

As a matter of law, the decision ignores the fact that, as the district court pointed out, "plaintiffs did not allege facts to allow the Court to infer an unlawful agreement, such as facts showing that the actions of the participants represented a radical shift from the industry's prior business practices or that they were against the participants' own interests."[21] To the contrary, "other alleged facts indicate that banks have reasons to join or stay in the Visa and MasterCard networks based on their individual interests."[22] In short, the D.C. Circuit's opinion ignores the Supreme Court's holding in *Twombly* that allegations of "merely parallel conduct that could just as well be independent action" are insufficient to support a Section 1 conspiracy claim. Relatedly, given the plausibility of independent, rather than joint, conduct by the banks, the D.C. Circuit fails to come to grips with the Supreme Court's *Monsanto* teaching that "a conscious commitment *to a common scheme* designed to achieve an unlawful objective" (emphasis added) must be shown in a properly pleaded Section 1 complaint.

Furthermore, as a matter of policy, allowing a Section 1 claim to proceed based on bare assertions of joint action devoid of any support – especially when the conduct alleged has a plausible procompetitive explanation based on *individual*, not joint, self-interest – threatens to chill efficient joint conduct. Apart from generating unjustified litigation costs, unwarranted antitrust conspiracy complaints engender bad publicity that incentivizes quick settlements by blameless companies.[23] In addition, the "potential for expanded liability may . . . have a significantly chilling effect on the free flow of information between members and their trade associations, undermining many of the benefits of participation."[24] In short, by disincentivizing efficient joint conduct, the D.C. Circuit's ill-reasoned holding threatens to reduce the flow of social benefits generated by business associations.

Conclusion

Business associations bestow economic benefits on society through association rules that enable efficient cooperative activities. Subjecting association members to potential antitrust liability merely for signing on to such rules and participating in association governance would substantially chill participation in associations and undermine the development of new and efficient forms of collaboration among businesses. Such a development would reduce economic dynamism and harm both producers and consumers. By decisively overruling the D.C. Circuit's flawed decision in *Osborn*, the Supreme Court would preclude a harmful form of antitrust risk and establish an environment in which fruitful business association decision-making is granted greater freedom, to the benefit of the business community, consumers, and the overall economy.

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article are solely attributable to the author and do not necessarily represent the views of the Heritage Foundation.

[2] *Sam Osborn v. Visa Inc.*, 797 F. 3d 1057 (2015), *available at* http://www.scotusblog.com/wp-content/uploads/2016/04/14-7004-1566017.pdf, *cert. granted sub. nom. Visa Inc. v. Sam Osborn*, No. 15-961 (June 28, 2016).

[3] 15 U.S.C. § 1 (declaring illegal "[e]very contract, combination[,] . . . or conspiracy[] in restraint of trade").

[4] The Supreme Court granted certiorari on the question "[w]hether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as the Court of Appeals held below, or are insufficient, as the Third, Fourth, and Ninth Circuits have held." Ballotpedia, *Supreme Court cases, October term 2016-2017*, *available at* https://ballotpedia.org/Supreme_Court_cases,_October_term_2016-2017.

[5] *See In re Ins. Brokerage Antitrust Litig.*, 618 F. 3d 300 (3d Cir. 2010) neither defendants' membership in a trade association of insurance agents and brokers, nor their common adoption of the association's suggestions, were enough to plausibly suggest a Section 1 conspiracy).

[6] *See SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F. 3d 412 (4th Cir. 2015), *petition for cert. filed*, No. 15-942 (Jan. 27, 2016) (allegations of membership in and governance of an association are not sufficient to establish the conspiracy element of a Sherman 1 claim).

[7] *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008) (merely charging, adopting or following the fees set by MasterCard or Visa is insufficient as a matter of law to constitute a Section 1 violation).

[8] *See* Brief for Antitrust Law Professors as Amici Curiae in Support of Petitioners, at 2-3 (Feb. 29, 2016), *Visa Inc. v. Sam Osborn*, No. 15-961, *available at* http://www.scotusblog.com/wp-content/uploads/2016/04/15-961-Visa-v.-Osborn-Antitrust-Law-Professors-cert.-amicus-brief.pdf.

[9] *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 566 (1925). *See also* FTC, *Spotlight on Trade Associations* ("[m]ost trade association activities are procompetitive"), *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade.

[10] 12 Areeda & Hovenkamp, *Antitrust Law* ¶ 2115a, at 112 (3d ed. 2012).

[11] "ATMs can be owned and operated by banks or by independent operators. To process a consumer's ATM transaction, an ATM must access a network that can communicate with the consumer's bank to complete the transaction. Defendants Visa and MasterCard each operate ATM networks that transmit these communications, as do other networks, such as STAR, Pulse, NYCE Payment Network LLC, ACCEL/Exchange Network, Credit Union 24, CO-OP Financial Services, Shazam Inc., Jeanie, and TransFund." *National ATM Council, Inc. v. Visa, Inc.*, 922 F.Supp. 2d 73, 76 (D.D.C. 2013).

[12] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984).

[13] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

[14] *Twombly*, 550 U.S. at 552, 557.

[15] The following case summary draws heavily upon Petition for a Writ of Certiorari, Visa Inc. v. Sam Osborn, No. 15-(Jan. 27, 2016) (Pet. App.), http://www.scotusblog.com/wp-content/uploads/2016/04/Petition-for-Writ-Visa-Inc-et-al-v-Osborn-et-al.pdf.

[16] *See id.* at 7-8.

[17] *See* note 7, *supra*.

[18] Pet. App. at 19a.

[19] *Id.* at 20a (emphasis in the original).

[20] *Id.* at 21a.

[21] *Id.* at 47a.

[22] *Id*. at 50a.

[23] *See generally Twombly*, 550 U.S. at 558-59 (assessing the discovery costs and settlement pressures generated by lax enforcement of motion to dismiss standards).

[24] Am. Bar Ass'n Section of Antitrust Law, *Guilt by Association: Trade Association, Liability, and Protections* 35 (Winter 2001).