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Second Circuit Casts Doubt on Named Plaintiff Service Awards And Leaves Enforceability of Future Release For Another Day

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Last week the Second Circuit issued a new decision affirming, with one exception, the approval of a $5.6 billion revised class action settlement in the long-running Visa/Mastercard antitrust litigation. (See blog post on the Second Circuit's reversal of a prior settlement in 2016.) The opinion and two concurrences in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, — F.4th –, 2023 WL 2506455 (2d Cir. Mar. 15, 2023) addressed various issues, two of which I'll discuss here.

First, objectors to the settlement challenged service awards to the named plaintiffs totaling $900,000, including two awards of $200,000 each, approximately 100 times the amount they would get as part of the settlement. I don't think I've seen a case with service awards anywhere near that high, but this settlement was obviously of extraordinary size. The majority opinion concluded that named plaintiff awards were "likely impermissible" under a Supreme Court decision from 1881. In that case, which long predates the creation of the modern class action, the Supreme Court concluded that a creditor bringing suit on behalf of others could not be compensated for services and expenses in bringing suit. In 2020, the Eleventh Circuit held that the Supreme Court decision precluded the use of named plaintiff service awards in class actions (see blog post) but other circuits have disagreed (see, for example, my summary of a Ninth Circuit decision on this issue). In *Fikes Wholesale*, the Second Circuit panel concluded that, while it agreed with the Eleventh Circuit, it was bound by two prior Second Circuit decisions upholding named plaintiff awards, although without analyzing the old Supreme Court case in any detail. We might well see a petition for rehearing en banc (but those are *very* rarely granted in the Second Circuit) or a petition for certiorari to the Supreme Court on that issue. The Second Circuit did find the service awards to be excessive in one respect—to the extent the amount awarded was based on work performed by the plaintiffs lobbying for legislative reform, the district court was instructed to reduce the award accordingly.

From the defense perspective, I'm not sure there is much that can be done here other than to negotiate the best deal you can, and have a provision in the settlement agreement that the amount of the award is solely in the district court's discretion and if a lower amount (or even nothing) is awarded, the settlement remains fully enforceable.

Second, in *Fikes Wholesale*, objectors challenged the fairness of the settlement for newer merchants, who would get minimal monetary payments but release their claims going forward for five years into

the future. The Second Circuit declined to reach this issue because the settlement agreement had a severability provision stating that the release “extend[s] to, but only to, the fullest extent permissible by federal law.” So even if part of the release was not enforceable, the settlement remained fully enforceable. The question of whether the release of future claims is enforceable will have to be decided in a future case, when a new suit is filed and then one or more defendants seek to enforce the release.

The release language here is an interesting technique that might be worth considering in some class action settlements. It prevented a possible (and it appears serious) concern about the scope of the release from derailing the enforceability of this settlement. But the defendants will likely have to deal with that in future litigation, and Judge Jacobs’s concurrence casts doubt on whether the release of future claims will be enforceable as to the newer merchants. Defendants trying to buy complete peace in entering into a class settlement may not want to agree to this type of severability clause and leave an issue like that for another day.

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