UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION (II)	No. 11-md-2221 (NGG) (RER)

SUPPLEMENTAL MEMORANDUM OF THE BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS

Adam E. Schulman (*pro hac vice*)
CENTER FOR CLASS ACTION FAIRNESS
1718 M Street NW, No. 236
Washington, DC 20036
Phone: (610) 457-0856
Email: shuyande24@gmail.com

Attorney for Objector The Buckeye Institute for Public Policy Solutions

INTRODUCTION

Under the Court's request for supplemental briefing of April 30, 2015, objector The Buckeye Institute for Public Policy Solutions ("Buckeye") submits the following memorandum solely on the first issue of how the decision in *United States v. American Express Company*, No. 10-cv-4496 (NGG) (RER) affects the proposed settlement in this MDL. Previously, Buckeye submitted an objection to the proposed settlement (Dkt. 414) ("Obj."); a response to the report of Professor Scott Hemphill (Dkt. 520) ("Response"); and appeared through counsel at the fairness hearing in September 2014. *See* Dkt. 543 (draft "Transcript").

SUMMARY OF ARGUMENT

The judgment in *United States v. American Express Company* nullifies any value to class members—however speculative that value was to begin with—from the instant settlement. Under the terms of the Court's order in the government enforcement action, class members have obtained a broader range of remedies that this settlement would have explicitly negotiated away. Because the settlement is effectively valueless to class members, an attorneys' fee of $75 million is unfair because "the class receives no monetary distribution but class counsel are amply rewarded." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011); *accord* Obj. at 19-25. Furthermore, the government's successful prosecution of the enforcement action demonstrates the inappropriateness, in the first place, of the future-looking changes to Amex's non-discrimination policies ("NDPs") effected by this settlement. It is always dangerous for the self-interested negotiations of class counsel and defendants to result in binding social policy in space generally occupied by regulators. But even if it were true that class counsel's preferred policy-making role as "private attorney general" can be justified in cases of regulatory default, it is downright inappropriate in cases, such as this one, vigorously pursued by *actual* attorneys general.

ARGUMENT

In an antitrust enforcement action brought parallel to this litigation by the United States Department of Justice and the attorneys general of seventeen states against the Defendants (collectively "Amex"), this Court held that the government had proved by a preponderance of the evidence that the Amex's NDPs violate federal antitrust laws. *United States v. American Express Co.*, No. 10-cv-4496, Dkt. 619 (E.D.N.Y. Feb. 19, 2015) ("DoJ Decision"). Accordingly, the Court issued an injunction requiring that Amex "shall not adopt, maintain, or enforce any rule, or enter into or enforce any agreement, that directly or indirectly prohibits, prevents, or restrains" a merchant from offering a customer incentives or discounts in exchange for using "a particular Brand or Type of General Purpose or brand of debit card" different from the card initially proffered. *Id.*, Dkt. 638, at 4-5 ("DoJ Injunction"). This injunction restricts Amex's anti-steering attempts far more broadly than does the instant settlement, which stipulates that under its terms Amex NDPs "shall continue to prohibit discrimination against the use of American Express-Branded Cards, except as expressly set forth in this Class Settlement Agreement." Settlement, Dkt. 306-2, at ¶ 8a. The main injunctive component of the settlement at bar requires that Amex change its NDPs such that a merchant may now impose a surcharge on all credit card transactions without imposing any on debit cards (*i.e.* parity surcharging). *Id.* at ¶ 8. Parity surcharging is an inferior version of the broader injunction obtained by the government in the enforcement action. The injunction obtained in the enforcement action prohibits Amex from adopting, maintaining or enforcing any rule that prevents merchants from expressing a preference for, promoting or incentivizing a particular "brand of debit card." DoJ Injunction at 5-6. Although the settlement's release will not, nor could it, prevent class members from enjoying the benefits of the DoJ's victory (Settlement ¶35), the underpinnings of the enforcement action's decision and injunction order entail that the relief provided by this settlement is of no value.

This Court's findings in the DoJ action undercut the foundational premise that class counsel and their expert rely upon in attributing value to the parity surcharging permitted under this settlement: the substitutability of debit and credit cards. As Professor Hemphill explained, the "enormous credit-debit gap…only presents a large opportunity if a low enough level of customer defections makes parity surcharges profitable." Report of Professor C. Scott Hemphill, Dkt. 519 at 17. Buckeye has consistently maintained that debit and credit payment modes are not interchangeable, and so a merchant imposing parity surcharging would not seamlessly capture the credit-debit gap as increased profit. Obj. 22; Resp. 4 (discussing Professor Hemphill's consonant findings); *contrast with* Final Approval Mem., Dkt. 362, at 3 ("by driving consumers to debit U.S. Merchants stand to gain 1.57% of literally trillions of dollars over time."). The DoJ decision resolves this key controversy in Buckeye's favor. At length this Court concluded that debit card services are not reasonably interchangeable with credit card services. DoJ Decision at 45-61; *see also id.* at 43 n.13 (siding with *United States v. Visa U.S.A., Inc.*'s holding that "neither consumers nor the defendants view debit, cash, and checks as reasonably interchangeable with credit cards."). The non-substitutability of credit and debit at the merchant level "is derived from cardholders' desire to pay with credit and charge products." *Id.* at 50. "Debit cards are 'pay now' products… Credit cards, by contrast, are 'pay later' products…GPCC cards also offer an array of ancillary benefits to cardholders that typically are not offered on debit cards, including robust rewards programs." *Id.* at 56.

Beyond the general finding of non-substitutability, the Court specifically agreed with Dr. Katz's determination that untargeted methods of parity steering (albeit debit discounting rather than credit surcharging) are "unlikely to serve as a meaningful constraint on a monopolist's prices." *Id.* at 50. The Court found merchants would eschew debit steering because "the foregone profits lost to a competitor because the merchant no longer accepts credit will significantly exceed the per transaction savings realized from successfully shifting a customer to a less expensive payment method." *Id.* Even under the *status quo ante*, the Amex NDPs did not, and

could not consistent with the Durbin Amendment, restrict merchants from steering their customers to debit cards to an extent. *Id.* at 30-31. But the Court found that such untargeted parity methods are insufficient and thus the permanent injunction order strikes the provision of the NDPs that allow for parity discounting. DoJ Injunction at 10-11. There is no significant functional or economic difference between allowing the tool of parity discounting and the tool of parity surcharging. *See* Transcript at 88-89 (explaining how discounting and surcharging are economically equivalent forms of unbundled pricing).

The judgment and findings in the enforcement action thus determine that this settlement's relief is valueless. As Buckeye argued in its objection, a class action settlement is unfair "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded." Obj. 20 (quoting *Bluetooth*, 654 F.3d 935, 947 (9th Cir. 2011)). Previously, class counsel and the defendants had failed to discharge their burden of proving the quantum of benefit to a settlement class. *See In re Dry Max Pampers Litig.*, 724 F.3d 713, 719 (6th Cir. 2013); *see also In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) (proponents must demonstrably show that the settlement "secures some adequate advantage for the class."). But now, it has been proven by a preponderance of evidence in the DoJ action that the objectors are correct; the only pillar of class value (steering consumers from credit to debit) is structurally unsound.

Even before the resolution of the government's antitrust enforcement action, the benefits to the merchant class members from this settlement were dubious. Obj. at 20-24. The settlement can hardly be said to provide an adequate advantage for the class when the class members receive nothing more than an economically meaningless benefit and class counsel receive $75 million.

And now the government's successful prosecution of its enforcement action eliminates even the faintest sliver of possibility that class members would receive a valuable benefit should this Settlement be approved. Quite simply, they now *have* the ability, guaranteed by court

injunction, to discriminate against Amex credit cards in favor of all other brands of credit or debit cards. This Settlement gets them no realistic incremental gain. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (It is "the *incremental* benefits" that matter, "not the total benefits.") (emphasis in original). Indeed, the government has obtained broader injunctive remedies, which class counsel admit they were unable to obtain and admit are important (Final Approval Mem., Dkt. 362, at 3-4), but which they would have nonetheless negotiated away, forever, from future merchants who might have sought them.[1] In their briefing, class counsel kindly "issued a vote of confidence" to their "colleagues at the Department of Justice" who successfully prosecuted these broader anti-discrimination rules that class counsel "recognize" as "anticompetitive, and important." *Id*.[2] Apart from the fact that its resolution renders this settlement valueless to class members and thus unfair as a functional matter, the existence of the parallel DOJ enforcement action further illuminates the inappropriateness of this prospective injunctive settlement at the systemic level.

Rule 23(b)(2) states that certification is appropriate for the purposes of an injunctive settlement where the defendant "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). The language of the rule assumes the basic features of tort law that distinguish it from criminal proceedings. Namely, it provides a forum for plaintiffs to be personally, civilly vindicated for wrongs *done to them*, as opposed to the public at large. *See* Jonathan Goldberg and Benjamin Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 949 (2010) (explaining that where "a criminal prohibition states 'For all x, x shall not A,' a tort occurs when

[1] Had the government failed in the particular enforcement action considered here, the instant settlement would have precluded all future plaintiffs' unripe claims with respect to the very honor-all-cards and non-discrimination rules the E.D.N.Y. just held to have violated the Sherman Act! Obj. at 25-28. Arguably, class members are still bound by the NDPs as they relate to differential surcharging, because the DoJ Injunction does not reach prohibitions against imposing surcharges. *See* DoJ Injunction ¶ III.C.2.

[2] It's unclear whether class counsel still view DoJ attorneys as "colleagues" now that they have objected to the settlement here.

someone violates the directive 'For all x and for all y, x shall not do A to y.'"). Yet prospective injunctive remedies, such as the changes to Amex's future business practices sought here, are in a fundamental sense unmoored from this basic relational nature of a tort claim. A prospective injunctive remedy takes the criminal/enforcement form "x shall not A"—in this case, "Amex shall not have certain types of clauses in its contracts with merchants--and if it does not it cannot be sued in the future for related clauses it may retain." Some of these merchants may have had standing to bring claims based on past dealings but, due to the class definition's open-endedness and the prospective nature of the relief, others will be affected by it who had no such standing at the time of the settlement but are nonetheless bound by it.

Perhaps because prospective injunctive relief often runs, in this way, counter to the basic foundations of tort, plaintiffs' lawyers have come to style themselves "private attorneys general." *See* William B. Rubenstein, *On What a "Private Attorney General" is—and Why it Matters*, 57 VAND. L. REV. 2129 (2004) ("According to this account, private attorneys general might be better at either discerning or pursuing private wrongdoing, or they may simply supplement public enforcement."). This label suggests that class action plaintiffs' lawyers benefit society as a whole in the same way as prosecutors, by getting judges to implement social policy as a public servant would, through such forward-looking settlement terms as the ones at issue here. That they, in some sense, "know best" what the social good requires, even if it compromises the individual claims of their clients present and future.

Yet the purpose of Rule 23 is not to create a private attorney general model of litigation. S. Rep. No. 109-14, at 58-59 ("the concept of class actions serving a ''private attorney general'' or other enforcement purpose is illegal."); *see also* Victor E. Schwartz & Christopher E. Appel, *Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War*, 23 B.U. PUB. INT. L.J. 185, 198-99 (2014) ("The civil judicial system is designed to compensate people who have been wrongfully injured by another's conduct; its purpose is not to supplant the administrative and legislative branches of government through regulation. Those branches have

the opportunity to see beyond the merits of an individual case, and assess the impact of a rule on society itself. These impacts may be profound and affect the national economy, the health of American citizens, and people's freedom to choose what goods and services they wish to purchase.") (internal footnotes omitted).

Specifically, the purpose of antitrust litigation is to remedy past violations, not to create social policy. "[T]he antitrust private action was created primarily as a remedy for the victims of antitrust violations." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 434 (2d Cir. 2007). Beyond that, even if public policy should be a goal of the class action, that function will always be compromised by the fact that class counsel lack the same incentives as their colleagues in the Department of Justice. As Buckeye argued in its objection, class counsel have an inherent conflict of interest stemming from their personal financial stake in the outcome of a settlement and the defendants' lack of interest in policing the allocation of the settlement value as between class counsel and the class. *See, e.g., Redman v. Radioshack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) ("The judge asked to approve the settlement of a class action is not to assume the passive role that is appropriate when there is genuine adverseness between the parties rather than the conflict of interest recognized and discussed in many previous class action cases, and present in this case."); *Staton v. Boeing*, 327 F.3d 938, 964 (9th Cir. 2003) (stating "a defendant is interested only in disposing of the total claim asserted against it" and "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense") (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995)). It is in both parties' interest to achieve a settlement where the defendant can get away with illusory injunctive relief and can obtain an overbroad prospective release in exchange for acquiescence to class counsel's fee request.

Such problems are amplified in antitrust cases such as this one due to the factually complex economic framework on which the body of law depends. As the district court itself noted in deciding the enforcement action, "[t]he court recognizes that it does not possess the

experience or expertise necessary to advise, much less dictate to, the firms in this industry how they must conduct their affairs as going concerns. For that reason, the court has repeatedly urged the parties in this case to negotiate a mutually agreeable settlement that appropriately balances American Express's legitimate business interests with the public's interest in robust interbrand competition." DoJ Decision at 4; *see also* Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984) ("In most cases even a perfectly informed court will have trouble deciding what the optimal long-run structure of the industry is, because there is no "right" balance between cooperation and competition. The judge has no benchmark."). The preference for prospective settlement embodied in the DoJ Decision correctly apprehends the incentives of the parties to a *government* enforcement action. In a case where one side, the Antitrust Division of the Department of Justice—unmotivated by personal economic gain—legitimately represents "the public's interest" in a genuine arms-length negotiation, it is reasonable to hope that a "mutually agreeable settlement" will in fact appropriately balance interests to approximate the public good.

In the class action context, however, without the same assurance of public-mindedness, the court must apply the requisite heightened level of scrutiny to the wide-ranging effects of what is essentially whole scale economic policy enacted via prospective injunctive settlement terms. *See S.E.C. v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 294 (2d Cir. 2014) (distinguishing between deferential review of government consent decrees and less-deferential review of proposed class action settlements that compromise private rights). Relying on the recommendations of public servants is one thing; relying on the recommendations of private attorneys that stand to obtain $75 million upon settlement approval is quite another.

This is not to say that "policy-making" and litigation should occupy wholly separate functional spheres.[3] Nor is it even to say that a prospective injunction itself is not valuable in

[3] *See, e.g.*, Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL. POL'Y & L. 769, 769 (1999) (finding

certain cases. Indeed, the consent decree has been an important judicial tool for resolving civil rights violations by the government ever since *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) (discussing a "period of transition" during which district courts should maintain jurisdiction over desegregation cases to "consider the adequacy of any plans the defendants may propose . . . and to effectuate a transition to a racially nondiscriminatory school system").

Context, however, is important. Regulation through litigation has been most effective at attaining the "public good" in cases where there is a lack of regulatory enforcement effort. *See, e.g.*, Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making*, 86 TEX. L. REV. 1837, 1866 (2008) (showing that, in contrast to gun control litigation, litigation over sex abuse in the Catholic Church was more successful as it "complemented, rather than competed with, other policy-making institutions by enhancing their understanding of the problem and their motivation to address it."). Even in the context of civil rights cases, discretionary use of injunctive authority is most appropriate "when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default. In that event, and for so long as those political bodies remain in default, judicial discretion may be a necessary and therefore legitimate substitute for political discretion." William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L. J. 635, 637 (1982); s*ee also* MACLOM FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 388 (1998) (observing, in the context of prison injunctions "[i]t is the state that makes prisons possible as mechanisms for the punishment of offenders, and it is that same state that generates the conceptual possibilities that enable us to solve the problems that these prisons present").

The instant case represents the opposite end of the spectrum from one in which a "private attorney general" is necessary to obtain injunctive relief for the public well-being. This is

---

"a distinct role for litigation as a complement to a broader, comprehensive approach to ... policy making"); Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 897-99 (1998) (exploring how tobacco litigation changed government tobacco policy).

because there were *actual* attorneys general on the job. This settlement would not obtain relief that regulatory authorities were unable to obtain. Instead, it would operate to interfere with the regulatory prerogatives of agencies such as the Consumer Financial Protection Bureau and the enforcement prerogatives of the antitrust experts in the Department of Justice and the Federal Trade Commission by purporting to bind all merchants who will accept Amex cards in perpetuity (in addition to purporting to bind the Department of Justice itself (Transcript 163)). Had the United States' enforcement action been unsuccessful, the defendants would have had carte blanche with respect to these violations (*acknowledged as such* by Class Counsel), because the proposed Settlement exempts them from any anti-steering antitrust suit prosecuted by any private plaintiff for at least the next ten years. In short, this Settlement turns the entire concept of "supplemental" private enforcement on its head by directly undermining existing public enforcement.

CONCLUSION

The existence of the parallel government enforcement action against the Defendants indicates that this is a case in which prospective injunctive remedies might interfere with a functional regulatory regime and thus should be rejected. Moreover, the tenets underlying the successful prosecution of the action negate any potential value—already dubious—to class members arising from the instant settlement. As such it renders this settlement unfair, as little more than a $75 million payday for class counsel.

Dated: June 1, 2015.

Adam E. Schulman (*pro hac vice*)
DC Bar No. 1001606
1718 M Street NW, No. 236
Washington, DC 20036
Phone: (610) 457-0856
Email: shuyande24@gmail.com

Attorney for The Buckeye Institute for Public Policy Solutions

Certificate of Service

The undersigned certifies he electronically filed the foregoing Memorandum via the ECF system for the Eastern District of New York, thus sending the Memorandum in writing to the Clerk of the Court and also effecting service on all attorneys registered for electronic filing. Additionally he caused to be served via first class mail a copy of this Memorandum upon the following attorneys:

Elizabeth L. Grayer **Tamara Rubb** Cravath, Swaine & Moore LLP 825 Eighth Avenue New York, NY 10019	**Jason L. Reimer** **Steve D. Shadowen** Hangley Aronchick Segal & Pudlin 30 N Third Street, Ste 700 Harrisburg, PA 17101
Daniel Ryan Hinshaw & Culbertson Llp 222 North Lasalle Street, #300 Chicago, IL 60601	**John F. LaSalle** **Eric Brenner** Boies, Schiller & Flexner LLP 575 Lexington Avenue New York, NY 10022
Read K. McCaffrey Patton Boggs LLP 2550 M Street NW Washington, DC 20037	**David Alan Scupp** Constantine Cannon LLP 335 Madison Avenue, 9th Floor New York, NY 10017
Mark Reinhardt Reinhardt, Wendorf & Blanchfield E-1250 First National Bank Bldg. 332 Minnesota St. St. Paul, MN 55101	

Dated: June 1, 2015.

Adam E. Schulman