

Blog Entry: How Not to Win at the U.S. Supreme Court

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Source: Array

Think ATMs; particularly, those not operated by banks. Several non-bank ATM operators and their customers filed class action complaints against Visa, MasterCard and various affiliated banks in D.C. federal court alleging that defendants violated antitrust laws by requiring the non-bank ATM operators to adhere to certain “Access Fee Rules” that prevented them from offering discounted access fees to their customers, which, in turn, diminished their profitability. The district court dismissed the complaints for lack of standing and failure to state a claim, but the court of appeals vacated and remanded, holding that the lower court “erred in concluding that the Plaintiffs had failed to plead adequate facts to establish standing or the existence of a horizontal conspiracy to restrain trade.” *Osborn v. Visa Inc.*, 797 F. 3d 1057 (D.C. Cir. 2015).

Defendants then petitioned the U.S. Supreme Court for certiorari and their petitions were granted. The merits stage followed. Visa, MasterCard and the banks filed their merits brief, followed by several supporting amicus briefs. Respondents then filed their merits brief; actually two of them: one on behalf of the “consumer respondents,” another on behalf of the “non-consumer respondents.” Then, more amicus briefs. Petitioners followed by filing their reply brief on November 16, 2016, and the Court scheduled oral argument for December 7, 2016. The case was fully teed up.

And then, it cratered. On November 17, 2016, the Supreme Court entered this order:

These cases were granted to resolve [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. ... After “[h]aving persuaded us to grant certiorari on this issue, however, petitioners chose to rely on a different argument in their merits briefing. ... The Court, therefore, orders that the writs in these cases be dismissed as improvidently granted.

How do you say “*Ouch!*” in Latin?

It was the consumer respondents who raised the argument that shut down petitioners’ appeal. They wrote in their brief that

Petitioners’ principal argument that the [allegations in the complaint] are insufficient is that “where the parties to a joint venture cooperate within the context of that venture to pursue the interests of the *venture* as a whole, their conduct counts as unilateral rather than concerted for purposes of Section 1 and cannot form the basis of a claim.” This new, single-entity theory was not raised in the petition for certiorari before this Court [and is] based on an entirely different idea of what is supposedly deficient in the complaints. Accordingly, Petitioners’ new theory should not be considered by this Court.

SCOTUS agreed and threw out the case. A stinging outcome for Visa, MasterCard and the banks. The cases are *Visa Inc. v. Osborn* and *Visa Inc. v. Stoumbos*, United States Supreme Court, case nos. 15-961 and 15-962.