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Financial Services

Kroger targets Visa’s debit card conduct to challenge broader strategy

- EMV protocol adds levels of complexity that impedes competition—source
- Banking regulators, not courts, should interpret credit card rule—academic
- Implicit warning: Visa can exercise power, but merchants must fight back—source

The Kroger Company is challenging Visa over its EMV security protocol on the debit cards Kroger processes, but sources say that Kroger’s tightly-focused action also aims at Visa’s allegedly broader anti-competitive strategy.

The EMV security chip is the result of an initiative to upgrade and standardize the card networks’ fraud security system by incorporating a microchip into payment cards. EMV stands for Europay, MasterCard and Visa, the companies that created the standard, now managed by EMVCo, a consortium with control split equally among Visa, MasterCard, JCB, American Express, China UnionPay, and Discover.

Kroger claims in a declaratory judgment action filed in US District Court in Cincinnati, Ohio, that the allegedly capricious ways in which Visa has demanded, agreed, and then changed course on and fined Kroger with regard to the implementation of Visa’s debit card EMV security protocol violate the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

The Durbin Amendment and subsequent rule-making by the US Federal Reserve Board (Fed) set caps on interchange fees for debit card transactions and mandated that all debit cards be enabled to function with at least one alternative payment network besides the issuing bank and network. The rule was intended to increase competition among debit card networks.

Each EMV card transaction generates a unique transaction code that only the issuer can read, and that can never be used again. Thus, were someone to obtain transaction information from an EMV card at a point of sale, he would be unable to reuse that information, for instance to make a counterfeit card.

Kroger’s complaint alleges that Visa’s new protocol does not make transactions more secure, rather, adds a level of complexity to an already-complex process that makes it difficult and impractical, if not impossible for that competition to occur.

Visa declined through a spokesperson to discuss pending litigation.
A source familiar with the case told *PaRR* that one of the difficulties in understanding how the payment card market operates is that there are many moving parts. This complexity intentionally creates opaqueness in the system where the networks then can operate to impose anti-competitive restraints, that source said.

“The Kroger case is a good example of that,” the source said. “The EMV chip specification created additional layers in the verification process for routing transactions. Visa—MasterCard is not doing this—is using these additional layers of complexity in the acceptance process, in the payments process to create an opaqueness for consumers and for merchants, and to inhibit merchants’ ability to route,” he said.

The source said that this matters because the ability to route transactions is what promotes competition among the networks for the merchants’ payment card business in the case of debit.

Kroger and other merchants say that an EMV card transaction verified with a signature, as Visa prefers, and not a personal identification number (PIN), is no more secure than magnetic swipe transactions, and also cannot be routed to alternative payment networks.

John Kirkwood, a former official at the Federal Trade Commission’s (FTC) Bureau of Competition who now teaches at Seattle University School of Law, said the complaint makes Visa “look terrible” but added that he is skeptical.

Despite its length and detail which describes numerous encounters between Kroger and Visa over this issue, Kroger never lays out Visa’s argument or the reasons for its disagreement with Kroger, Kirkwood said.

He added that as a matter of administrative law, the Fed has jurisdiction. “The Fed certainly has a heavy presence here and has issued a rule, and Kroger is asking a court to interpret the rule, ignoring the very agency that issued it and whose job it is to interpret and enforce it,” Kirkwood said.

But the source familiar said if Kroger can demonstrate the legal and factual merit of its claim, and meet its proof, and get a judge or jury to agree, then Kroger wins, and that decision is not subject to the politics of Congress or a regulatory body.

He said the message implicit in Visa’s action is that if Visa can do what it is doing to Kroger, it can do it to anybody. The source said that this can cut two ways: the Kroger complaint could serve as a warning to merchants to “toe the Visa line,” but it also puts every merchant on notice that this conduct is just not right.

“For aggrieved companies like Kroger, the federal courts are the best option to try to make something happen,” said the source familiar.

The case is *The Kroger Company v Visa*, no. 16cv693 in the US District Court for the Southern District of Ohio.
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