COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

BEIJING
BRUSSELS
LONDON
NEW YORK
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
WASHINGTON

ANDREW SOUKUP
TEL 202.662.5066
ASOUKUP @ COV.COM

April 17, 2012

BY EMAIL

L. Lee Javins, II
Bucci Bailey & Javins LC
213 Hale Street
Charleston, WV 25301

Re: *State of West Virginia* ex rel. *McGraw v. JPMorgan Chase & Co.*, No. 11-C-094-N (Mason County Cir. Ct.)

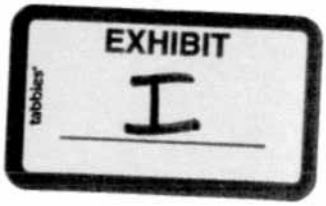
Dear Lee:

As you know, Chase entered into a nationwide class action settlement of claims related to its payment protection products in an action called *Kardonick v. JPMorgan Chase & Co. et al.*, No 1:10-cv-23235-WMH (S.D. Fla.). The federal court order approving that settlement includes an injunction barring class members or anyone acting on their behalf from litigating claims released by the settlement. We write to ask the Attorney General to enter into an appropriate stipulation confirming that he will comply with the *Kardonick* injunction along the lines of the attached. We describe the injunction and the settlement below.

A. Chase's Settlement with West Virginia Subscribers to Chase Payment Protection Products.

In 2010, certain individuals brought putative class action lawsuits against Chase challenging the marketing and sale of Chase payment protection products. *See Kardonick v. JPMorgan Chase & Co. et al.*, No 1:10-cv-23235-WMH (S.D. Fla.), *David v. JPMorgan Chase & Co. et al.*, No 4-10-cv-1415 (E.D. Ark.), and *Clemins v. JPMorgan Chase & Co. et al.*, No 2:10-cv-00949-PJG (E.D. Wis.). The plaintiffs in those cases sought relief on behalf of themselves and a class of all other Chase credit card holders who were enrolled in or billed for a payment protection product at any time between September 1, 2004 and November 11, 2010. (Exhibit A, Stipulation & Agreement of Class Action Settlement, at 11-12.)

On December 20, 2010, the parties entered into a global settlement. As a part of the settlement, settlement class members agreed to "not take any step whatsoever to commence, institute, continue, pursue, maintain, prosecute, or enforce any Released Claim, directly or indirectly, against" Chase. (*Id.* at 28.) The "Released Claims" include any present or future claims "arising out of or in any way relating to (i) any act, omission, event, incident, matter,



dispute, or injury regarding a Payment Protection Product, including, without limitation, the development, sale, pricing, marketing, claims handling, enrollment procedures, disenrollment procedures, or administration of such a product, that took place on or before the date of execution of the Memorandum of Settlement; [or] (ii) any acts or omissions that were raised or could have been raised within the scope of the facts asserted in the Amended Consolidated Class Action Complaint or the Litigation . . . ." (*Id.* at 10.)

Pursuant to the notice requirements of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715, Chase notified the Attorney General of the proposed settlement agreement. The Attorney General did not object. We understand, moreover, that the Attorney General was on notice of the settlement from the outset. Among other things, Richard M. Golomb, formerly counsel to the Attorney General in this action, also was counsel to the *Kardonick* settlement class.

On September 16, 2011, the United States District Court for the Southern District of Florida approved the settlement. (*See* Exhibit B, Final Judgment & Order of Dismissal.) In its approval order, the court issued an injunction barring any assertion of claims released by the settlement:

> Each and every Settlement Class Member, and *any person actually or purportedly acting on behalf of any Settlement Class Member(s)*, is hereby permanently barred and enjoined from commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without limitation, in any individual, class or putative class, representative or action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum, against the Released Parties.

(*Id.* ¶ 17; emphasis added.)

The court concluded that the "permanent bar and injunction is necessary to protect and effectuate the Settlement Agreement, this Final Judgment and Order of Dismissal, and this Court's authority to effectuate the Settlement Agreement, and is ordered in aid of this Court's jurisdiction and to protect its judgments." (*Id.*)

Pursuant to the settlement, individual notice was mailed to approximately 15 million individuals who appeared in Chase's records as subscribers to a Chase payment protection product during the period in question. This individual notice was supplemented by publication notice. The *Kardonick* court's final approval order found that the notice procedures "fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all

members of the Settlement Class who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Settlement and this Order." (*See* Exhibit B, Final Judgment & Order of Dismissal, ¶ 10.)

B. The Settlement At A Minimum Bars the Attorney General's Claims on Behalf of West Virginia Consumers.

Under the terms of the court's order, the Attorney General and his counsel are barred from pursuing relief relating to Chase payment protection products on behalf of settlement class members. This includes, at a minimum, all claims that the Attorney General is asserting under Section 46A-7-111(1) of the West Virginia Code because such claims, by definition, seek restitution to consumers. *See* W. Va. Code § 46A-7-111(1) ("If it is found that an excess charge has been made, the court shall order the respondent to refund to the consumer the amount of the excess charge."); *State* ex rel. *McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 524 (W. Va. 1995) (noting that the Attorney General is "act[ing] on behalf of a consumer when [seeking] an 'excess charge'").

Case law confirms that this injunction applies to the Attorney General and his counsel to the extent that they seek relief on behalf of West Virginia consumers. For example, in *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985), the parties entered into a global settlement of several multidistrict class actions against broker-dealers who sold securities in bankrupt corporations. Prior to the entry of final judgment approving the settlement, the attorneys general of several states publicly announced their intent "to enforce state laws authorizing them in their representative capacities to seek restitution and monetary recovery from the defendants to be paid over to those of the state's citizens who are plaintiffs in the consolidated class actions . . . ." *Id.* at 332-33. The court upheld a nationwide injunction against the attorneys general:

> Because, as a condition of the settlement, the plaintiffs agreed to release all claims arising under federal and state law on account of the purchase of the Baldwin SPDAs from the settling defendants, such a post-settlement injunction would have barred the states from bringing state law claims derivative of the plaintiffs' rights. Were this not the case, the finality of virtually any class action involving pendent state claims could be defeated by subsequent suits brought by the states asserting rights derivative of those released by the class members. For instance, as a practical matter no defendant in the consolidated federal actions in the present case could reasonably be expected to consummate a settlement of those claims if their claims could be reasserted under state laws, whether by states on behalf of the plaintiffs or by anyone else, seeking recovery of money to be paid to the plaintiffs. Whether a state represented itself to be acting as a "sovereign" in such a suit or

> described its prayer as one for "restitution" or a "penalty" would make no difference if the recovery sought by the state was to be paid over to the plaintiffs. The effect would be to threaten to reopen the settlement unless and until it had been reduced to a judgment that would have res judicata consequences.

Id. at 336-37 (citations omitted). Likewise here, the federal court's injunction bars the Attorney General from seeking relief on behalf of West Virginia consumers who were members of the class.[1]

* * * *

Chase would like to enter into an appropriate stipulation to avoid motion practice concerning the *Kardonick* settlement and injunction. We look forward to your response.

Sincerely,

Andrew Soukup

Attachments

---

[1] *See also In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 365 (3d Cir. 2001) ("It is now settled that a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action. This is true even though the precluded claim was not presented, and could not have been presented, in the class action itself."); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 204 (3d Cir. 1993) (upholding an injunction against a West Virginia state court action because it "would be disruptive to the district court's ongoing settlement management and would jeopardize the settlement's fruition"); *Commonwealth of Pennsylvania v. BASF Corp.*, No. 3127, 2001 WL 1807788, at *8 (Pa. Ct. Cmn. Pls. Mar. 15, 2001) ("In order to assure the finality of the Class Action settlement and to adhere to the District Court's exclusive jurisdiction over the settlement, this court cannot now allow the Commonwealth to assert *parens patriae* claims on behalf of Pennsylvania citizens who released the Defendants for the same conduct alleged in this action.").

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. DARRELL V. MCGRAW, JR., ATTORNEY GENERAL, **Plaintiff,** **v.** **JPMORGAN CHASE & CO. and CHASE BANK USA, N.A.,** **Defendants.**	**Case No. 11-C-094-N** **Hon. David Nibert**

STIPULATION REGARDING PLAINTIFFS' CLAIMS

Whereas, Defendants JPMorgan Chase & Co. ("JPMorgan") and Chase Bank USA, N.A. ("Chase") entered into a class action settlement in *Kardonick v. JPMorgan Chase*, No. 10-cv-23235 (U.S. District Court, S.D. Fla.) ("*Kardonick*"); and

Whereas, Paragraph 17 of the final approval order approving the *Kardonick* settlement enjoins "[e]ach and every Settlement class Member and any person actually or purportedly acting on behalf of any Settlement Class Member(s)" from "commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum" against JPMorgan and Chase (the "*Kardonick* injunction");

Now, therefore, JPMorgan, Chase, and the State of West Virginia ("State"), acting through its Attorney General, Darrell V. McGraw, Jr. (the "Attorney General") hereby AGREE and STIPULATE as follows:

1. The State will not seek in this action to recover any monetary relief (whether denominated as money damages, equitable relief, or otherwise) on behalf of or payable to West Virginia consumers who were members of the settlement class in *Kardonick v. JPMorgan Chase*, No. 10-cv-23235 (S.D. Fla.) ("*Kardonick*"), except as permitted in Paragraph 2.

2. The stipulation in Paragraph 1 does not bar or limit the State from seeking to recover monetary relief (a) to be kept by the State rather than refunded or paid over to consumers, (b) payable to or on behalf of West Virginia consumers who were not members of the *Kardonick* settlement class, (c) payable to or on behalf of West Virginia consumers who were members of the *Kardonick* settlement class solely to the extent that such monetary relief is recoverable pursuant to a claim that a consumer would not be barred by the *Kardonick* settlement from asserting on his or her own behalf.

3. In consideration for the foregoing stipulation, Chase agrees (a) not to seek enforcement of the *Kardonick* injunction against the State or its counsel in connection with any claim asserted in this action, and (b) not to undertake any action of any kind against the State or its counsel in the *Kardonick* court in connection with the claims asserted in this action. Chase reserves all other rights and defenses it may have to the claims asserted in the action, including but not limited to any rights and defenses that Chase may have under W. Va. Code § 46A-7-111(1).

DATED: April 17, 2012

STIPULATED AND AGREED TO BY:

Lee Javins (WVSB No. 6613)
Special Assistant Attorney General
BUCCI BAILEY & JAVINS LC
213 Hale Street
Charleston, WV 25301

Attorneys for Plaintiff

William W. Booker (WVSB #401)
Thomas H. Ewing (WVSB #9655)
KAY CASTO & CHANEY PLLC
1500 Chase Tower
707 Virginia Street, East
Charleston, WV 25301
Tel: (304) 345-8900

Attorneys for Defendant