

Federal Court Rules Gift Card Terms Disclosed After Purchase are not Enforceable

On March 7, 2008, a federal district court in Chicago held that American Express could not compel arbitration of a gift card purchaser's class action claims for breach of contract, unjust enrichment, and statutory fraud. *Kaufman v. American Express Travel Related Services Co., Inc.*, No. 07-CV-001707 (ND IL, Mar. 7, 2008). The key issue before the Court was whether the contract between American Express and the consumer included the arbitration clause and a choice-of-law provision that was only available to the consumer after purchase.

The consumer had purchased a \$50 gift card whose package stated that the "enclosed American Express Gift Card Cardholder Agreement includes information for the recipient." The Agreement — which was not visible at the time of purchase — contained approximately five pages of six-point type with various terms, including disclosures that (1) value could not be added to the cards, (2) fees could be incurred for card replacement or non-use, (3) retailers may not accept "split-tender" transactions, and (4) any claims would be subject to arbitration.

TERMS OF THE CONTRACT

Both American Express and the consumer agreed that they had entered into an enforceable contract, but they disagreed about the point

at which the contract was finalized and the content of the contract. Kaufman argued that the contract consisted solely of the terms on the outside of the gift card package at the time of purchase. American Express, however, countered that because Kaufman used the card after he had an opportunity to inspect the agreement inside the package, the contract included the terms printed in the agreement.

The Court rejected American Express's arguments and distinguished this case from other cases in which courts have held that agreements inside boxes of software or computers were held to be enforceable. In its decision, the court focused primarily on whether (1) the consumer had adequate notice of the additional terms and (2) the consumer had an opportunity to reject the additional terms.

- *Notice on Packages.* The Court held that in order for the agreement to be considered part of the contract between the parties, American Express had to provide clear notice on the outside of the packaging that additional terms were included inside. The outside packaging referred to additional "information for the recipient" and an insert contained inside the packaging instructed readers to "see Terms and Conditions."

The package, however, contained no document entitled “Terms and Conditions.” Moreover, the Court found that the agreement referred to on the outside of the package was not easy to find among the small print in the booklet.

Although the problems identified might be mere editorial and design oversights on American Express’s part, the Court opined that they were crucial to the issue of notice. Thus, in light of the inconsistency of terms and relative obfuscation of documentation, the Court questioned the effectiveness of the notice.

- *Opportunity to Reject.* The court noted that the opportunity to return a product can be important in cases where a consumer receives additional terms after purchase. In this case, the purchaser argued that he could not return the card without paying a \$10.00 fee and without forfeiting the \$4.95 fee he paid at retail.

Although American Express suggested that consumers might be able return the card under some circumstances, the company did not provide instructions for obtaining a refund, or even disclose that a refund was possible. The Court held that the burden of figuring out how and whether a card can be returned should not be placed on the consumer in absence of any disclosure in the agreement. Therefore, the contract between the parties was formed at the point-

of-sale and did not include the arbitration agreement or the choice-of-law provision.

INCREASED FOCUS ON GIFT CARDS

The Chicago Court is not the only government body that is focusing on disclosures. Over the past few years, a growing number of states have passed laws requiring gift card issuers to disclose material terms prior to purchase. For example, a new law in Illinois provides that certain terms have to be disclosed “on the front or back of the gift certificate [or gift card] in a location where it is visible to any purchaser prior to the purchase.” 815 Ill. Comp. State. 505/2SS (2008). And last year, the Federal Trade Commission entered into settlements with K-Mart and Darden Restaurants over each company’s alleged failure to prominently disclose the terms of their gift cards.

These developments highlight the importance of ensuring that material terms are disclosed to consumers before they purchase a card. If additional terms will be provided to consumers after purchase, issuers should clearly disclose that additional terms will apply and ensure that consumers have an opportunity to reject the terms. In addition to complying with disclosure requirements, gift card issuers should be aware that states are continually updating their gift card laws to impose more requirements on gift cards. It is important for issuers to be aware of changes in the legal landscape and be prepared to adapt quickly.

FOR MORE INFORMATION

Attorneys in Kelley Drye's Advertising and Marketing Practice Group have substantial experience in assisting clients in designing gift card programs and negotiating gift card agreements. For more information, please contact:

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