

products litigation bulletin

Class Action Lawsuits Based on Alleged Violation of Gift Certificate Statutes on the Increase

Several states have specific statutes governing the use and appearance of gift certificates, and similar legislation is pending in several other states. Under these gift certificate statutes, any violation, regardless of how minor, can give rise to a claim by the purchaser or holder of the gift certificate. Moreover, a violation of the gift certificate statute will in many cases also constitute a violation of the state's consumer protection law.

The associated consumer protection statutes contain provisions for class action law suits, doubling and trebling of any damage awards and awards of costs and reasonable attorneys' fees to a prevailing party. We have noted an increase in the number of class action suits based on alleged violation of gift certificate statutes. For this reason, it is particularly important for companies who issue or offer gift certificates to be aware of the various laws governing gift certificates.

The following states currently have statutes that address the requirements for gift certificates: California, Hawaii, Massachusetts, New Hampshire, New Jersey, New York, Oklahoma and Rhode Island. Kansas, Michigan, Nebraska, Pennsylvania and Tennessee have pending legislation.

Below is a brief discussion of some of the relevant provisions of the existing gift certificate statutes, as well as information on pending legislation.

Existing Gift Certificate Statutes

California

California's current gift certificate statute is as follows:

Requirements: As of January 1, 1997, it has been unlawful for any person or entity to sell a gift certificate containing an expiration date. *CAL. CIV. CODE § 1749.5(a) (West 2002)*. Any gift certificate sold after January 1, 1997, is redeemable in cash for its full cash value or must be replaced by the issuer at no cost to the purchaser or holder of the gift certificate. A gift certificate sold without an expiration date is valid until redeemed. The above requirements do not apply to gift certificates issued after January 1, 1998, if the gift certificate was issued for consumer loyalty or promotion purposes, or for food products, or was sold to employers or non-profit organizations at below face value for a volume discount, provided the expiration date appears in capital letters in at least ten point font on the face of the gift certificate.

Remedy: Any violation of the statutory gift certificate requirements is also a violation of the consumer protection statute. A plaintiff may seek actual damages, an injunction against the practice, restitution of property, punitive damages or any other relief the court deems appropriate. The statute permits class action lawsuits and further provides that the minimum recoverable damage award for a class action lawsuit is \$1,000. A prevailing plaintiff may also seek reasonable costs and attorneys' fees.

Under various gift certificate statutes, any violation, however minor, can give rise to a claim by the purchaser or holder.

Hawaii

Hawaii's current statutory gift certificate requirements are as follows:

Requirements: Any restaurant or retail seller that issues gift certificates must honor the gift certificate for at least two years from the date of issuance. *Haw. Rev. Stat. Ann. § 481B-13(a) (Mitchie 2001)*. An issuer must also include the expiration date on the face of any gift certificate with an expiration date.

Remedy: Any violation of the gift certificate statute is an unfair and deceptive trade practice and gives rise to a claim under Hawaii's consumer protection laws. The consumer protection statute provides that any person who is injured by a violation of the consumer protection laws may sue for damages or an injunction. The court must award a prevailing party the greater of \$1,000 or treble the award of actual damages sustained. The court may also award costs and reasonable attorneys' fees. The Hawaii consumer protection laws also provide for class action lawsuits. The \$1,000 limit imposed for individual suits does not, however, apply to class action lawsuits. Treble damages, costs and attorneys' fees are also available in class action suits.

Massachusetts

Although there is pending legislation, to be discussed below, the current Massachusetts gift certificate statute is as follows:

Requirements: Anyone who sells a gift certificate with a redemption limit of less than two years, or who sells a gift certificate with a redemption limit of greater than two years and does not include the expiration date on the gift certificate, is subject to a fine not to exceed \$300. *MASS. GEN. LAWS. ANN. Ch. 266 § 75C (2002)*. If the issuer fails to honor a valid gift certificate, the issuer may also be fined not more than \$300.

Pending Legislation: A bill introduced to the Massachusetts Senate on July 17, 2002, would require that all gift certificates be valid for seven years. It would also mandate that any gift certificate

not clearly marked on its face with an expiration date is valid in perpetuity. Finally, the proposed legislation would change the current expiration date limit from two years to seven years. *Sen. 2413, 182nd Gen. Ct., Reg. Sess. (Mass. 2001)*.

New Hampshire

New Hampshire's current gift certificate statute is as follows:

Requirements: If an issuer sells a gift certificate with a face value of less than \$100, the gift certificate may not contain an expiration date. *N.H. REV. STAT. § 358-A:2 (2002)*. Gift certificates with a face value greater than \$100 are valid until the certificate escheats to the state under New Hampshire's abandoned property laws. This statute does not apply to gift certificates where no monetary consideration was given, or to those certificates distributed for promotional purposes.

Remedy: A violation of the gift certificate statute is a violation of New Hampshire's consumer protection laws. Any person injured by a violation of the statute may bring an action for damages or equitable relief. The court will award the greater of actual damages or \$1,000. If the court finds that the violation was willful or knowing, the court may award as much as three times the damages award, but no less than double the damages award. Finally, a prevailing party may also seek reasonable costs and attorneys' fees. The attorney general may also bring an action for violation of the consumer protection laws. If the attorney general files suit and the court finds a violation of the statute, the court may award state civil penalties of up to \$10,000 for each violation.

New Jersey

Although there is pending legislation, to be discussed below, New Jersey's current gift certificate statute is as follows:

Requirements: A gift certificate issued by a retail merchant is valid until presented to the issuer in exchange for the merchandise. *N.J. STAT. ANN. § 56:8-110 (West 2002)*. Any

conditions or limitations on the certificate must be disclosed to the purchaser at the time of the purchase and must also be conspicuously printed on the gift certificate.

Remedy: A violation of the gift certificate statute is also a violation of New Jersey's consumer protection statute. Any person who suffers a loss because of a violation of the consumer protection statute may bring a claim for damages or an injunction. The court may also award treble damages to the prevailing party, as well as costs and reasonable attorneys' fees. Finally, the attorney general can bring a summary action and obtain an injunction prohibiting the practice that violates the consumer protection statute.

Pending Legislation: A bill enacted on April 9, 2002, will require retail merchandise and service establishments that issue gift certificates to maintain a record of all gift certificate transactions for at least 12 months following the date of purchase of the certificate. *Assemb. 555, 210th Leg. (N.J. 2002).*

New York

Although there is pending legislation, to be discussed below, New York's current statute is as follows:

Requirements: If a retail seller issues merchandise gift certificates to a retail buyer to be paid for in installments (1) in good faith and (2) in reliance on the buyer's statement that the buyer intends to transfer the certificate as a gift, the certificate need not contain the legends required for a merchandise certificate (discussed below). *N.Y. PERS. PROP. LAW § 402A (McKinney 2002).* The certificate must, however, bear a legend stating "gift certificate," and the seller must give the buyer notice of the merchandise certificate legends.

If, however, the issuer sells a merchandise certificate to be paid for in installments, the certificate must include a legend, in at least eight point bold type, stating that the buyer may return any unused merchandise certificate

for full face value credit. Additionally, the legend must state that a buyer who wishes to purchase an item of greater value than the face value of the certificate may return the merchandise certificate and purchase a new merchandise certificate of greater value and save credit service charges.

Remedy: Any person who willfully violates New York's merchandise and gift certificate statute may be guilty of a misdemeanor and, if convicted, subject to a fine not to exceed \$500 dollars. If an issuer fails to comply with the requirements of the statute, the buyer has the right to recover an amount equal to any credit service charges imposed, as well as the amount of any delinquency or refinancing charge imposed. If, however, the issuer corrects any defect in the certificate within 10 days of notifying the certificate holder of a potential defect, neither the seller nor the holder is subject to any penalty under this statute.

Pending Legislation: A bill amended by New York Assembly Committee on Consumer Affairs and Protection on June 7, 2002, would make a gift certificate issued by any party valid until presented in exchange for merchandise or service. The issuer must disclose any conditions to the purchaser of the certificate and must conspicuously print all conditions on the certificate or on the certificate envelope or receipt. The issuer may also satisfy the disclosure condition by providing a toll free number to the consumer, where the consumer can obtain information relating to the conditions of the certificate. *Assemb. 11241, 225th Ann. Legis. Sess. (N.Y. 2001).*

On February 22, 2001, New York also introduced pending legislation that would alter a buyer's available remedy for a violation of the merchandise certificate statute. If any person does not comply with the certificate requirements, the buyer would have the right to recover compensatory and punitive damages, the combination of which may not exceed three times the amount paid, as well as credit service charges and any delinquency or

refinancing charges. Additionally, the buyer may recover reasonable attorneys' fees. *Sen. 2859, 224th Ann. Legis. Sess. (N.Y. 2001).*

Oklahoma

Oklahoma's current statute is as follows:

Requirements: Gift certificates must carry an expiration date of no greater than one year from the date of issue. *OKLA. ADMIN. CODE § 725:15-25-4 (2000).*

Rhode Island

Although there is pending legislation, to be discussed below, Rhode Island's current statute is as follows:

Requirements: Any person, firm or corporation that sells a gift certificate must record the sale and keep an accurate and complete record for each certificate for two years from the date of the sale. *R.I. GEN. LAWS. § 6-13-12 (2001).* The record must include the date of sale, the full value of the certificate, the identification number of the certificate, the issuer's identification number and the state where the sale occurred. If the certificate is for an amount greater than \$50, the issuer must provide the purchaser with a written and numbered receipt. Restaurants are prohibited from limiting the time for redemption of a gift certificate.

Remedy: Any person who violates the statute is subject to a fine not to exceed \$200.

Pending Legislation: There are two bills currently pending that relate to the gift certificate statute. A bill introduced in the Rhode Island House on January 22, 2002, would prohibit any person, firm, or corporation who sells gift certificates from placing an expiration date on the gift certificate. The bill was sent to the Senate Committee on Corporations on April 11, 2002. *H.R. 6836, 2001-2002 Legis. Sess. (R.I. 2001).*

The second bill, which was introduced to the Rhode Island House on February 7, 2002, would allow restaurants issuing gift certificates to place

expiration dates on the certificates, provided the expiration date is not less than two years from the date of purchase. The bill was sent to the Senate Committee on Corporations on March 14, 2002, which recommended that the measures be held for further study. *Sen. 2702, 2001-2002 Legis. Sess. (R.I. 2001).*

Pending Legislation

Although Kansas, Michigan, Nebraska, Pennsylvania and Tennessee have not yet enacted gift certificate statutes, they have gift certificate statutes pending before their state legislatures. A brief discussion of the proposed legislation has been included for your information.

Kansas

A bill was introduced on January 23, 2002, that would require that any gift certificate sold on or after January 23, 2002, to contain an expiration date. Any gift certificate sold after that date would be redeemable in cash for its full cash value or must be replaced by the issuer at no cost to the purchaser or holder. Additionally, any gift certificate sold without an expiration date would be valid until redeemed or replaced. The above requirements would not apply to gift certificates issued after January 1, 2003, if the gift certificate is issued for consumer loyalty or promotion purposes or is sold to employers or non-profit organizations at below face value for a volume discount, provided the expiration date appears in capital letters in at least ten point font on the front of the gift certificate. The bill is currently in the Kansas House Committee on Commerce and Labor. *H. R. 2674, 79th Leg., Reg. Sess. (Kan. 2001).*

Michigan

On June 5, 2002, a bill was introduced that would amend Michigan's unfair and deceptive trade practices act to include restrictions on gift certificates. The proposed amendment would make it a violation for any retail seller to issue a gift certificate to a consumer with an expiration

date of less than one year. It would also be a violation to refuse to honor a gift certificate that was issued within one year of the date of presentment or to refuse to honor a gift certificate that was within the time period specified by the certificate, whichever is greater. It would also be a violation of the statute to issue a gift certificate on or after the date of filing for bankruptcy. Similarly, it would be a violation to issue a gift certificate after the issuer has decided to go out of business or if it is likely the issuer will go out of business within one year of the issuance date of the gift certificate. The bill is presently in the House Committee on Commerce. *H.R. 6173, 91st Leg., Reg. Sess. (MI. 2001)*.

Nebraska

A bill was introduced on January 14, 2002, that would make it unlawful for any person to sell a gift certificate containing an expiration date. Any gift certificate sold after the effective date of the proposed legislation that contains an expiration date would be redeemable for its full cash value or would have to be replaced by the issuer at no cost to the holder or bearer. A gift certificate sold without an expiration date would be valid until redeemed or replaced. The above requirements would not apply to gift certificates issued after the effective date of the statute if the gift certificate is issued for consumer loyalty or promotion purposes, or for food products, or is sold to employers or non-profit organizations at below face value for a volume discount, provided the expiration date appears in capital letters in at least ten point font on the front of the gift certificate. The proposed legislation states that a violation of the statute is a Class V misdemeanor. On February 25, 2002, the bill was postponed indefinitely by the judiciary committee. *H.R. 1065, 97th Leg., Second Reg. Sess. (NE. 2001)*.

Pennsylvania

On February 9, 2001, proposed legislation was introduced, providing that anyone who sells or offers to sell any gift certificate for goods or services that contains an expiration date commits a

summary offense. On February 12, 2001, the Bill went to the House Committee on Consumer Affairs. No further action has occurred on this bill. *H.R. 642, 185th Gen. Assemb., Reg. Sess. (PA. 2001)*.

Tennessee

Legislation was introduced on January 17, 2002, providing that on or after July 1, 2002, no person or entity shall sell a gift certificate containing an expiration date. Any gift certificate sold on or after the effective date of the statute shall be redeemable for its full cash value or must be replaced by the issuer at no cost to the purchaser or holder. Additionally, a gift certificate sold without an expiration date would be valid until redeemed or replaced. The above requirements would not apply to gift certificates issued after July 1, 2002, if the gift certificate is issued for consumer loyalty or promotion purposes, or for food products, or is sold to employers or non-profit organizations at below face value for a volume discount, provided the expiration date appears in capital letters in at least ten point font on the face of the gift certificate. On March 5, 2002, the bill went to the House Committee on Consumer Affairs, which recommended passage with amendments. *Sen. 2366, 102nd Gen. Assemb. (TN. 2001)*.

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