

THE LEGAL LANDSCAPE FOR GIFT CARDS

Since their commercial introduction by Blockbuster and Wal-Mart, “stored-value-cards” (SVCs), popularly known as “gift cards,” have become a familiar part of our daily lives. Sales of gift cards are expected to exceed \$72.8 billion this year, with close to \$25 billion of those purchases made during the holiday season.¹ Technological improvements have reduced the costs of administering an SVC program, allowing even small merchants to offer a private brand SVC. SVCs offer customers convenience and flexibility, while simultaneously providing issuing merchants with an additional avenue for marketing and a tool for collecting marketing data. The exploding popularity of SVCs has drawn the attention of state legislatures, federal regulators, and class-action lawyers, creating a complex regulatory landscape for companies that seek to exploit the public appetite for these cards.

SVCs can be divided into several categories, each subject to different types of regulation. Branded merchant-issued SVCs are generally usable for purchases only from that merchant, or a group of affiliated merchants. These cards are regulated by state law, including “money transmitter” laws that require them to be licensed by state banking departments. Some larger merchants offer SVCs that are co-branded with a bank network, such as MasterCard or Visa, which may be usable at other locations that accept the bank’s SVCs as well the branding merchant’s locations. The “issuer” of such cards is the bank, which establishes the terms for the SVC and is responsible for fulfilling the obligations to the “consumer.” There are also SVCs issued for and usable at multiple *unaffiliated* merchants, which are also typically issued by banks. Many states expressly exempt these cards from their gift card regulations, without regard to whether the issuer is a bank. Finally, some SVCs are issued by banking institutions such as nationally chartered banks and national savings associations, and are usually branded with the names of both the issuing bank and a bank network such as MasterCard and Visa. Because these cards are issued by nationally-chartered financial institutions, they are extensively and almost exclusively regulated by federal law, though marketing and advertising practices may be subject to both federal and state law.²

As of October 2006, more than 35 states had enacted legislation to regulate SVC terms, advertising disclosures, expiration dates, fees, and *escheatment*, i.e. the forfeiture of unused card value to the state. While these laws address similar issues, there is wide variation in the approaches adopted by the various states. Some prohibit any expiration date or account maintenance fees for SVCs that fall within the ambit of the statute.³ Others exempt unused card value up to a certain amount from escheatment when there is no expiration date and no fees are assessed.⁴ Other states codified an expiration date or maximum dormancy period.⁵

Regulation is driven by recognition that current laws do not usefully apply to SVCs because the holder of a card typically has no contractual relationship with either the SVC seller or its issuer. The effects of a lack of a relationship are dramatically illustrated by *Dawson v. Blockbuster, Inc.*⁶, in which the Ohio Court of Appeals affirmed the dismissal of challenges to Blockbuster’s expiration date and inactive card fee policies brought by a consumer who misplaced several Blockbuster cards received as gifts, locating them again only after the cards had either expired or had lost value because of inactivity fees. Because the cards were gifts, the *Dawson* court held that there was no “consumer transaction” within the meaning of

the Ohio Consumer Sales Practices Act, no underlying commercial transaction to support the plaintiff’s misrepresentation or deceptive sales practices claims, or his claim for breach of the covenant of good faith and fair dealing, and no benefit conferred on Blockbuster that would support a claim of unjust enrichment.

State and federal bank regulatory approaches to this third-party situation differ significantly. States tend to favor regulating the permissible terms, requiring disclosures, and relying on enforcement of consumer protection laws by the respective attorney generals. For example, the New York Office of the Attorney General initiated an enforcement action against Home Depot for falsely denying it could cancel and reissue two SVCs with over \$10,000 unused value. Home Depot eventually settled by agreeing to cancel and replace unused card value whenever it could.⁷ To demonstrate the state’s interest in enforcing consumers’ rights in SVCs, the Attorney General’s office served copies of the settlement on a number of businesses with significant SVC programs to obtain their agreement to follow the same policy.⁸

The Office of the Comptroller of Currency (OCC) focuses on disclosure to the recipient as the solution to the problems posed by the lack of a direct relationship between the issuer and recipient of SVCs. In August 2006, the OCC issued its Guidelines for Gift Card Disclosures, which required the expiration date to be printed or affixed to the front of the gift card, as well as information about the amount or existence of any fees and how to obtain additional information.⁹ The OCC also required that information about where and how the card can be used, how to obtain a replacement card, how to monitor the balance, additional fees for special services, and contact information for additional questions and information accompany the card in a form that lends itself to passing on with the card if it is provided to a third-party.” The OCC guidelines only apply to the national banks governed by OCC regulations, and therefore would not extend to private-label SVCs that are unaffiliated with a major bank.

Maximizing your benefits requires understanding the schemes, your options and the features of a particular card. The regulatory penalties and the potential personal inconvenience or loss also make understanding and heeding the various terms critical to a smooth gift card experience.

– Diana Bixler

1. Ron Lieber, *The Gift that Keeps on Taking*, THE WALL STREET JOURNAL, November 25, 2006 at B1; Philip Ewing, Ewing, Philip, *More States Sold on Reforming Gift Cards* <http://www.stateline.org/live/details/story?contentId=149457>
2. *SPGGC, LLC v. Ayotte*, 443 F. Supp. 2d 197 (D.N.H. 2006) (holding that states were pre-empted from enforcing consumer protection laws against SVCs issued by federally-chartered banks). This decision has been appealed.
3. See, e.g., Conn. Gen. Stat. §§3-65(c), 3-73a and 42-460.
4. See, e.g., Neb. Rev. Stat. §69-1305.03
5. See, e.g., N.J. Rev. Stat. §56:8-110(a)
6. *Dawson v. Blockbuster, Inc.*, 2006 Ohio App. LEXIS 1138 (Ohio Ct. App. March 16, 2006).
7. *Home Depot Reforms Gift Card Policy*, Press Release, Office of the New York State Attorney General, June 27, 2002 http://www.oag.state.ny.us/press/2002/jun/jun27b_02.html
8. *National Retailers Agree to Improve Gift Card Policy*, Press Release, Office of the New York State Attorney General, February 25, 2003 http://www.oag.state.ny.us/press/2003/feb/feb25a_03.html
9. OCC Bulletin 2006-34, Aug. 14, 2006. <http://www.occ.treas.gov/ftp/bulletin/2006-34.txt>

Firm Update/Announcements

Appointments

Phillip Barendolts was appointed Vice Chair of the Copyright Committee of the Intellectual Property Law Association of Chicago (IPLAC).

Jonathan S. Jennings was elected to a four-year term on the Leadership Council for the ABA Section of Intellectual Property Law.

Joseph N. Welch II was elected to be a member of the Fellows of the American Intellectual Property Law Association. The qualifications for election include "outstanding service to the association, prominence within the intellectual property profession, learned contributions to the profession through teaching and writing, and observance of the highest standards of ethical conduct." No more than one percent of the active members of the Association may hold the designation. **Robert M. Newbury** and **Mark V.B. Partridge** are also members of the Fellows.

Presentations

Diana Bixler will be a presenter at the 18th National Advanced Corporate Counsel Forum on Advertising Law in New York, New York on December 5-6, 2006. The title of her presentation is "Maximizing the Attorney/Client Relationship on Advertising and Promotions Matters." She will also co-lead the Post-Conference Workshop, "Using Consumer Surveys and Clinical Studies for Substantiation Purposes." At the Promotion Marketing Association's Annual Law Conference in Chicago, Illinois, on December 12-13, 2006, **Diana** will be a Roundtable Expert on "Intellectual Property/Related Issues: Protect Your Trademark Internationally"

Jonathan S. Jennings gave a presentation entitled "Gray Market Goods Trademark Law In The United States" at the 73rd Conference of the Pharmaceutical Trademark Group in Boston, Massachusetts, on October 4, 2006, and on December 4, 2006, **Jonathan** gave a presentation entitled "Overview of the Trademark Dilution Revision Act of 2006" at the Intellectual Property Organization's PTO Day conference in Washington, D.C. He will also be speaking at the Northwestern University School of Law's Intellectual Property Law Society (IPLS) annual IP Week series of presentations and panel discussions during the second week of January 2007.

Mark V.B. Partridge spoke on ICANN UDRP proceedings and cybersquatting at the Chicago Bar Association, Young Lawyers

Section, Intellectual Property, on October 4, 2006. On October 20, 2006, **Mark** gave a presentation on "Guiding Rights: What Construction Writers Need to Know About Copyright, Book Contracts and the Internet" at the Construction Writers Association meeting in Chicago, Illinois. On November 3, 2006, **Mark** spoke on Alternate Dispute Resolution in domain name cases at the Annual Meeting of the International Association for the Protection of Intellectual Property, AIPPI United States (Association Internationale pour la Protection de la Propriété Intellectuelle) held in Chicago, Illinois.

Belinda J. Scrimenti gave a workshop presentation on "Worldwide Registration to Protect Brands" at the IQPC/ Legal IQ Conference on Anti-Counterfeiting and Brand Protection held in New York from October 25-27, 2006. The workshop covered the adoption by a hypothetical U.S. company of a mark to be used internationally, and explored clearance and registration issues worldwide, including the relative pros and cons of filings in national country offices, the European Union's CTM system, and under the Madrid Protocol.

Joseph N. Welch II will be giving a talk on "Trademark Clearance and Investigations" on January 25, 2007, at the AIPLA Mid-Winter Meeting in New Orleans, Louisiana.

Uli Widmaier gave a presentation entitled "The Quest for Coherence in United States Trademark Dilution Law" on November 28, 2006, to the Chicago Bar Association.

Noteworthy

Michelle Ybarra, a summer associate this year at our Firm, received the Northside Independent School District 2006 Pillar of Responsibility Award in San Antonio, Texas. This award recognized **Michelle's**

accomplishments as a graduate of NISD schools. The Six Pillars of Character are chosen from over 100,000 graduates of Northside schools. The Pillar of Responsibility is known for being "diligent, conscientious, and stalwart."

Publications

Diana Bixler contributed an article entitled, "Gift Card Developments in 2006," to the PMA Conference CD-ROM Supplement.

Belinda J. Scrimenti was interviewed and quoted by the *Akron Beacon Journal* in an article concerning blogs for small businesses.

**Pattishall McAuliffe
attorneys have
successfully handled
over 400 ICANN UDRP
domain name disputes.**

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