CAFA Law Blog
INFORMATION, CASES & INSIGHTS REGARDING
THE CLASS ACTION FAIRNESS ACT
McGLINCHEY STAFFORD

I Won't Play "Ping-Pong" For Gift Cards

By McGlinchey Stafford on April 4, 2012

Boundas v. Abercrombie & Fitch Stores, Inc., No. 10 C 4866, 2011 WL 5903495 (N.D. Ill. Nov. 21, 2011).

Clothier who paid The Situation not to wear its clothes gets to stay in federal court for voiding its own gift cards.

In this case, although the amount in controversy fell below CAFA's jurisdictional minimum after a District Court in California dismissed the complaint in part, it still retained the jurisdiction holding that a federal district court may not dispose of some claims on the merits, then dismiss the suit for lack of jurisdiction as the remaining claims fall short of the minimum amount in controversy.

The plaintiffs, Tiffany Boundas and Dorothy Stojka, brought this putative class action in the Illinois state court, against the defendant, Abercrombie & Fitch Stores, Inc., alleging breach of contract and violation of the Ohio Consumer Sales Practices Act ("OCSPA").

Abercrombie is a clothing retailer with stores across the United States and who is known for using scantily clad young models in its advertisements. In a December 2009 promotion, Abercrombie promised a $25 gift card to customers who bought at least $100 of merchandise in a single transaction. Stojka purchased approximately $300 of merchandise at an Abercrombie store in Oak Brook, Illinois, and received gift cards with a cumulative value of $75.

Stojka gave her cards to Boundas as a gift. When Boundas attempted to redeem the cards at the Oak Brook store in April 2010, the store declined, explaining that Abercrombie had voided the cards on or around January 30, 2010, eliminating all remaining value on them.

Abercrombie removed the case to the federal court pursuant to CAFA. Later, on Abercrombie's motion, the District Court dismissed the OCSPA claims because the transactions at issue involved non-Ohio consumers and otherwise lacked a substantial connection to Ohio.

The plaintiffs then moved to remand the case to state court, arguing that dismissal of the OCSPA claim reduced the matter in controversy below CAFA's jurisdictional minimum of $5 million. The Court, however, denied the motion.

Abercrombie contended that the value of the cards at issue was $5,674,453.44; whereas, the plaintiffs responded that the value of the cards was $4,228,537.35. The Court observed that even if the plaintiffs were

right, punitive damages at a 1:5 ratio would to push the amount in controversy over $5 million. Specifically, the Court stated that the complaint included an OCSPA claim at the time of removal, and as permitted by Ohio law, the complaint sought punitive damages on that claim.

The plaintiffs, however, did not contest the availability of punitive damages under the OCSPA and did not argue that a 1:5 ratio of punitive to compensatory damages would be "legally impossible," which is the governing standard. Rather, they argued that the OCSPA claim should not be considered in calculating the amount in controversy. The Court noted that if OCSPA claim was not considered, then the amount in controversy would not exceed $5 million because punitive damages are not permitted on contract claims under either Illinois or Ohio law.

The Court said, "Plaintiffs are wrong," because the settled law in the Seventh Circuit holds that a federal court's jurisdiction under CAFA is determined at the time of removal. Specifically, subject-matter jurisdiction depends on the state of things when suit is filed; what happens later does not detract from jurisdiction already established, and events after the date of removal do not affect federal jurisdiction.

Thus, the Court stated that the OCSPA claim, despite its dismissal after removal, must be considered in calculating the amount in controversy because the Sixth Circuit has held in Morrisonv. YTB Int'l, Inc., 649 F.3d 533, 535 (7th Cir.2011) that "a district court may not dispose of some claims on the merits, then dismiss the suit for lack of jurisdiction as the remaining claims fall short of the minimum amount in controversy." (Editors' Note: See the CAFA Law Blog analysis of Morrison posted on August 31, 2011).

The Court found that the plaintiffs' attempt to evade this principle by arguing that the OCSPA claim was dismissed not on the merits, but on "standing" grounds was incorrect. Specifically, the Court dismissed the OCSPA claim because the statute does not apply extraterritorially where, as here, the Ohio business did not communicate, from Ohio, directly and individually with the non-Ohio plaintiffs. And that dismissal was on the merits under Fed. R. Civ. P. 12(b)(6), not for lack of standing under Rule 12(b)(1).

The Seventh Circuit addressed a materially identical issue in Morrison, where the district court held that non-Illinois class members could not pursue a claim under the ICFA and characterized its decision as resting on "standing." The Seventh Circuit rejected that characterization, explaining that the dismissal of the non-Illinois class members' ICFA claims was on the merits–If the ICFA does not apply because events were centered outside Illinois, then plaintiffs must rely on some other state's law; this application of choice-of-law principles has nothing to do with standing. The Court concluded that same applied here with respect to the dismissal of the OCSPA claim, and because that claim was dismissed on the merits, it must be considered in calculating the amount in controversy.

For these reasons, the Court held that CAFA's jurisdictional minimum was satisfied, and denied the plaintiffs' motion to remand.

CLASS ACTIONS

Abercrombie Faces Class Action Over Changed Gift Card Terms

May 30, 2013 By: ClassAction.org Staff Tags: Abercrombie Gift Card Class Action

The legal ins and outs of gift cards can be tricky for companies, especially if the cards have anything except the face value actually written on them. In 2009 Apple was sued over its iTunes gift cards, some of which advertised that songs on the music player were priced at $0.99. The twist is that they were – until Apple very publically updated its system and songs began selling for $1.29. Some cards sold by third-party retailers, however, still stated that songs were $0.99, and as the cards remained valid, Apple was forced to settle a lawsuit from consumers holding the original cards.

Now, Abercrombie & Fitch is facing a class action after a nationwide class was certified just last week. The company is accused of failing to honor gift cards given out as part of a winter holiday promotion in 2009. Gift cards valued at $25 were given out in-store with the cards themselves stating they had “No Expiration Date”. A couple of months later, Abercrombie voided the cards, arguing that the cards had been within sleeves explaining that they were to be used by January 30, 2010.

The company faces legal action for breach of contract, and the lawsuit seeks compensation equaling the value of the voided cards.

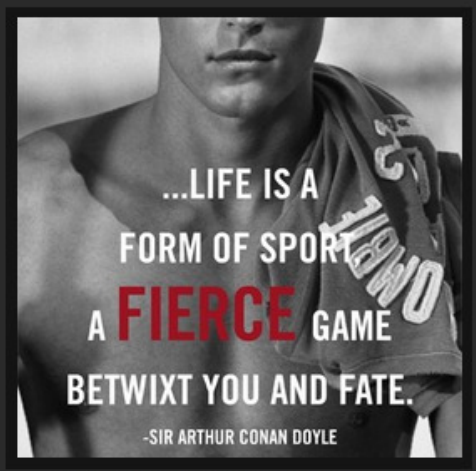
There are a variety of ways companies have fallen foul of gift card and voucher rules. Groupon recently settled a class action about its vouchers’ expiration dates, and whether a special deal voucher which had expired could be redeemed for the amount it was *worth* instead of the amount customers actually *paid* for it. Borders, the now bankrupt bookstore, has been facing consumer claims for years to honor the value of gift cards – thought to be around $200 million at the time of the store’s closure. Only recently did a court decide that the business did not have to honor the cards’ value, and only then because the value was so great that it would effectively cripple the remaining estate. Hardly a victory for a bankrupt company.

For Abercrombie, the issue at hand is thought to be worth about $5 million. The clothes retailer has argued that it would be impossible to locate certain class members, and that cards were given out in-store and online, with consumers informed that an expiration date applied despite the card’s written content. The Northern District Court of Illinois disagreed, and has identified class members as anyone who received a promotional gift card and retained it, or who disposed of it once they had been told it was invalid. Consumers who disposed of the card for different reasons, who gave the card away, or those who lost or received a refund, are not included in membership.

Consumers who wish to be excluded from this class must do so before July 30, 2013. The case is Boundas v. Amercrombie & Fitch Store, Inc, No. 10-C-4866. Information on class membership and exclusions can be found athttp://www.abercrombieclassaction.com.

Tuesday, March 20, 2012

ABERCROMBIE GETS SWIPED INTO LAWSUIT OVER GIFT CARDS...



...And fate sure loves to bring A&F loads of controversy and lawsuits!
Original photography from 'FIERCE' Christmas 2009 featuring model Nick Bateman.

Christmas 2009 was an interesting season. Themed 'FIERCE', it was marked by the opening of A&F Milan and the first Abercrombie & Fitch in Asia – A&F Ginza in Tokyo. Back in the States, sales had been slipping considerably because of the recession and A&F was loosening up in giving customers promotional incentives to shop at the stores...

It was during the month of December of that year that Abercrombie & Fitch dished out promotional gift cards, carrying a value of US$25, to shoppers who spent US$100 or more. One of those shoppers was Dorothy Stojka who ultimately received 3 cards for

a total of US$75 worth. Stojka later gave these cards to her acquaintance Tiffany Boundas. So, months go by and Boundas drops by Abercrombie & Fitch in Oak Brook, Illinois, in April 2010. Up to the cash wrap/tills she goes with her 3 cards only to be told that the cards were voided – that they expired – on 30 January 2010.

What's the problem? The cards themselves are printed with "...no expiration date." As can be imagined, it must have been a little humiliating, but more so infuriating, going up there, expecting your cards to go through, only to be told that they are no longer valued. Boundas and Stojka both proceeded to file a class action lawsuit against Abercrombie in the US District Court for the Northern District of Illinois. They argue that A&F breached contract when the Company voided the cards. A&F then fired back by stating that the cards originally came in a sleeve which stated the January 30 expiration date and that there were customers aware of the date. The cards were meant to be given to customers in that sleeve. The thing is, though, that the cards were nevertheless printed with "no expiration." Also, a store employee could have given the card without the sleeve or customers who did receive the card with sleeve could have passed it on without. As US District Judge Gary Feinerman stated, "[The] only open question [is] whether the cards expired on January 30, 2010, in which case Abercrombie did not breach, or never expired, in which case [A&F did breach]."[source 1]

Thus, the class action suit has gone forward. Stojka was dismissed and Boundas was appointed, by Judge Feinerman, as the class representative as she was the one who was told her cards expired: "The class in this case consists primarily of individuals holding an Abercrombie promotional gift card whose value was voided on or around January 30, 2010. That criterion is as objective as they come. The class also includes individuals who threw away their cards because they were told that the balances had been voided. That criterion is not as objective as actually holding a physical card, but anybody claiming class membership on that basis will be required to submit an appropriate affidavit," furthered Judge Feinerman.[source 1]

Subsidiary issues and defenses:[source 2]

1. "Whether Abercrombie was contractually obligated to honor the promotional gift cards..."
2. "If so, whether the contract's terms are set forth on the gift card alone, the sleeve alone, or the card plus the sleeve; and..."
3. "If the terms are set forth on the card plus the sleeve, whether the card trumps the sleeve or vice versa."

Interesting stuff, wouldn't you say? And you know, that the cards would have been set to expire on January 30 makes complete sense. That would have been by the time that the Christmas 2009 season ended. The cards were likely intended to have been used only until the end of that season. It was a promotional offer for Christmas 2009, after all. Apparently, that wasn't obvious to all and, as a result, now there is legal argument over the matter.

Only gift cards *purchased by customers* are the ones that do not have an expiration date. Cards given out for merchandise credit, when a customer returns merchandise without a receipt, expire one year after they are issued. Cards given as promotional offers are subject to a set period of time for when the offer will be valued and for when it will expire.

You should always check online the A&F brands' sites for details on all ongoing promotional offers as the details are always made available for you there.

Stay FIERCE!

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5/24 2012 When An In-Store Gift Card Promotion Goes Bad

May 24, 2012 8:00 am Andy Goldberg Leave a Comment

Background

Retailers often give away gift cards as an in-store promotion tool. Spend $50.00 and we'll give you a gift card for $10.00 off your next purchase. Well, seems easy enough. But what happens when the retailer doesn't tell the purchaser the gift cards expires? Or, better yet, the gift card states there is no expiration date? Abercrombie & Fitch granted gift cards which explicitly indicted there was no expiration date for their use. However, the sleeves the cards were in, said they expired January 30, 2010. Abercrombie was subsequently sued by a customer who tried to use the gift card after January 30, 2010.

Issue

Although, the court hasn't yet determined whether Abercrombie breached its obligations to the gift card holders, it has already decided a key issue: Anyone holding the Abercrombie gift card or threw their gift card away (and could prove they had it), could be part of the class action lawsuit. Each individual Abercrombie gift card holder does not have to file his/her own lawsuit. Crucial to the judge's ruling is that you could objectively determine who the gift card holders were and because they would have suffered the same injury (early termination of their right to redeem the card), they can a file a lawsuit together.

The court was able to certify the class because they it "had suffered the same injury". This is important because the Supreme Court recently put severe limitation on the rights of plaintiffs to band together and sue as a class. The result is that each individual plaintiff must bear the sole cost of his/her litigation (instead of a group of plaintiffs bearing the cost together). This financial disadvantage results in greater economic and negotiating leverage to the business being sued.

So, why is suing in a class-action lawsuit important, anyway? Because it will likely subject Abercrombie to higher damages than if it were sued by each customer individually.

The main take-away is that Abercrombie now has to spend time and money to defend a case. But their biggest problem may be the bad press and PR.

The judge also outlined what issues will need to be resolved:

- Did Abercrombie breach a contract with its customers when it voided the promotional gift cards? If so, then,

- Was Abercrombie obligated to honor the promotional gift cards? If so, then,

- What terms applied: (i) those on the gift card, (ii) those on the sleeve; or (iii) the card and the sleeve together; and

- If we have to look at the terms on the card and the sleeve together, does the card trump the sleeve or vice versa?

Why This Matters

Evaluate all your gift card promotion to make sure no terms contradict one another. As well, make sure your on-line materials, in-store materials, and mailers all have the same rules and instructions for your customers. Abercrombie could have avoided this issue very easily with a little proof-reading and coordination among the marketers responsible for their in-store, mailing, and on-line promotions.

CLASS CERTIFIED IN ACTION AGAINST ABERCROMBIE FOR GIFT CARDS

By Safia Anand posted in Advertising, Marketing & Promotions News on Wednesday, April 18, 2012

In *Boundas et al. v. Abercrombie & Fitch Stores Inc*, No. 10-04866 (N.D. Ill. March 7, 2012), the Northern District of Illinois certified a class action lawsuit against Abercrombie & Fitch brought by unhappy shoppers who claim that Abercrombie voided holiday gift cards that said they had no expiration date.

In December 2009 Abercrombie issued nearly 200,000 gift cards valued at $25 each as part of a promotion to shoppers who spent at least $100 on a single purchase. Abercrombie voided the cards around Jan. 30, 2010 claiming that the cards were enclosed in sleeves containing that expiration date.

Abercrombie argued that the class should not be certified and that the cardholders should be forced to sue separately because the potential class members were too different from one another to sue as a group. Abercrombie argued that some people got their cards in stores and others online, and some with the sleeve and some without. Abercrombie also argued it would be impossible to find some plaintiffs.

The Court disagreed and found that it was fair to certify a class of plaintiffs who still hold the cards and plaintiffs who discarded the cards after being told they had expired or were void.

The Court held that the claim to be tried is whether Abercrombie committed breach of contract when it voided the gift cards. The subsidiary issues and defenses are (1) whether Abercrombie was contractually obligated to honor the promotional gift cards; (2) if so, whether the terms are set forth on the gift card alone, the sleeve alone, or the card plus the sleeve; and (3) if the terms are set forth on the card plus the sleeve, whether the card trumps the sleeve or vice versa.

Take away: While gift cards that are provided as an inducement (such as for a rebate) can have short expiration dates (as opposed to purchased gift cards), companies must still be sure to clearly disclose the terms of the expiration date. Companies that want to have gift card promotions should ensure that the expiration date of the gift card is clearly set forth on the gift card itself and not rely on a sleeve or some other document with an expiration date which could mislead consumers.