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Advertising and Promotions Law

ALERT

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Appeals Court Holds That On-Pack Proofs of Purchase Are Not "Gift Certificates" Under California Law

In a closely-watched case in the promotions industry, the U.S. Court of Appeals for the Ninth Circuit held that on-pack proofs of purchase on Marlboro and Marlboro Light cigarettes that were part of the "Marlboro Miles" loyalty program are not promotional gift certificates under California law and thus are not required to state an expiration date in a statutorily-proscribed manner.

Defendant Philip Morris sold Marlboro cigarettes and promoted them through its "Marlboro Miles" loyalty program. Marlboro Miles consisted of the proof of purchase on the cigarette packaging plus the words "5 Miles" or "Five Miles." Customers could collect Miles and exchange them for merchandise from a Marlboro catalog. The Miles did not contain any wording, terms of use or expiration dates. After several years of conducting this program, Philip Morris announced that Miles containing the words "5 Miles" would not be accepted after a certain date, and subsequently indicated that Miles containing the words "Five Miles" would expire.

Class action plaintiff Cortney Reynolds filed suit against Philip Morris, claiming that Miles were gift certificates issued pursuant to an awards, loyalty, or promotional program, and thus violated California law by not having expiration dates printed on them in a certain font size and as otherwise required by the statute.

The trial court denied Philip Morris's motion to dismiss and later denied Philip Morris's motion for summary judgment, finding that the Miles did fall within the definition of promotional gift certificates under California law.

Philip Morris appealed to the Ninth Circuit and the Ninth Circuit reversed, stating that "the little design on the cigarette pack that was to be cut out, saved, and eventually mailed in, is a proof of purchase, just like a cereal box top or an Ovaltine label.... The ordinary meaning of 'gift certificate' does not cover Marlboro Miles because Marlboro Miles are not typically given as gifts, are not certificates, and state no cash value." According to the court, California's gift certificate law requires that gift certificates have a "cash value" or "face value" and the Miles do not. "Because these proofs of purchase are just that - proofs of purchase - and not gift certificates, Cal. Civ. Code. § 1749.5 does not apply." Finally, the court also reasoned that the California statute does not define what is a "gift certificate" - it "merely identifies one way a true gift certificate may be distributed, but it does not suggest that any item distributed in such a manner is in fact a gift certificate."

The court concluded by stating that it was expressing no opinion on whether the plaintiff has any other cause of action on account of the discontinuation of the Marlboro Miles promotion. One justice dissented.

This case was closely monitored by the promotions industry because it had the potential to dramatically affect how incentive programs are designed and marketed. Had the district court opinion been upheld by the Ninth Circuit, any number of incentive devices, along with proofs of purchase, could potentially be considered "gift certificates" under California (and possibly other states') law, mandating specific

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disclosure and other requirements. While the Ninth Circuit decision does not mean that proofs of purchase or other loyalty and incentive programs are unregulated, it does mean that the particular strictures of California's gift certificate statute will not apply to proof of purchase programs.

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