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Gift-Card Contract Breach, Deception Claims Proceed

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A class action against a leading gift-card distributor will go forward following a Brooklyn-based appellate panel's finding that the company's imposition of improperly disclosed "dormancy" fees may constitute breach of contract and deceptive business practices.

A unanimous Appellate Division, 2nd Department, panel cited the Simon Property Group's use of inconspicuous provisions and "impermissibly small" print.

"The amended complaint alleges that the terms of the fee disclosure are not clear and conspicuous, but rather, unclear and hidden, which is sufficient to maintain a claim based upon a breach of the implied covenant of good faith and fair dealing," Justice Thomas A. Dickerson wrote in *Lonner v. Simon Property Group*, 2007-03430.

The complaint also "alleges, inter alia, that the type size used by the defendant is impermissibly small, that the defendant failed to clearly and conspicuously disclose the existence of the dormancy fees and the circumstance under which they are imposed, and that the plaintiff was injured by this conduct," Dickerson added. "These allegations were sufficient to state a cause of action under General Business Law §349."


Justices Robert A. Spolzino, Peter B. Skelos and Anita R. Florio joined the opinion.

Plaintiff Christopher R. Lonner commenced the present action in February 2004, challenging the \$2.50 "dormancy" fee imposed on Simon Gift Cards, as well as the manner in which the fees were disclosed.

The gift card -- issued by Bank of America in conjunction with Visa -- is a prepaid card that functions like and resembles a traditional debit card and which may be used any place that accepts Visa.



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Lonner's central contention is that the unreadability of the provisions detailing the card's administrative fees, such as the dormancy fee that automatically kicks in seven months after purchase, renders the provisions unenforceable. The font size is smaller than the minimum proscribed under the CPLR, Lonner argued, and the terms are tucked away on the final page of the 10-page pamphlet accompanying the card.

The proposed class, which is still pending certification, would consist primarily of New York residents who have held Simon Gift Cards that were issued prior to April 2005, when state regulations instituted a 13-month minimum for dormancy fees.

The fees have resulted in similar actions in numerous states, including Connecticut, Massachusetts and New Hampshire, as well as the settlement with New York that resulted in the 13-month regulation.

Lonner's attorney, William R. Weinstein of Sanford Wittels & Heisler in Manhattan, said that total damages in the present case could "exceed several million dollars."

Simon Property Group contested the action on several grounds, including federal pre-emption -- in which the 2nd Department ruled in Lonner's favor in 2006 in *Lonner v. Simon Prop. Group Inc.*, 31 AD3d 398 -- and failure to assert a private right of action.

In February 2007, Supreme Court Justice Kenneth W. Rudolph of Westchester County denied the defense's motion to dismiss the breach-of-contract and General Business Law claims. Simon Property appealed, and the Second Department heard arguments in December 2007.

Last week, the 2nd Department affirmed.

The panel relied on, among other precedent, the 1st Department decision in *Sims v. First Consumers Natl. Bank*, 303 AD2d 289, which held that whether the size of the typeface and the location of the fee disclosures are deceptive or misleading is a question of fact.

Weinstein said in an interview that the decision will likely affect the class-certification proceedings as well, as it "squarely rejects certain arguments that Simon has continued to make," such as that Lonner was not an adequate class representative because he brought the action before any charges were imposed.

Jeffrey J. Greenbaum and James M. Hirschhorn of Sills Cummis Epstein & Gross in Newark, N.J., represented Simon Property Group. Neither Greenbaum nor Hirschhorn could be reached for comment.