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Federal Appellate Court Holds That Federal Law Preempts State's Attempt To Regulate Gift Cards Issued By National Banks And Federal Thrifts

June 2007

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In a major victory for the banking industry, a federal appellate court has rejected New Hampshire's efforts to regulate the terms of stored value gift cards issued by a national bank and federal savings association, but marketed and sold by a non-bank third party. 2007 U.S. App. LEXIS 12447 (1st Cir. May 30, 2007). The Court held that "the New Hampshire [Consumer Protection Act] was preempted as applied to products sold by national banks and thrifts."

Simon, a major operator of shopping malls nationwide, sells at those malls stored value gift cards issued by U.S. Bank National Association, a national bank, and MetaBank, a federal savings association. In November 2004, the State of New Hampshire notified Simon that its sale of the gift cards violated provisions of New Hampshire's Consumer Protection Act relating to "gift certificates," including the prohibitions on expiration dates and the imposition of certain administrative fees. When the State threatened enforcement action, Simon filed suit in federal court seeking declaratory and injunctive relief. The State thereafter filed suit in state court. Simon moved for summary judgment in the federal action, and U.S. Bank and MetaBank sought, and were granted, leave to intervene as plaintiffs. On August 1, 2006, the district court granted the plaintiffs' motion for summary judgment, finding that the State could not permissibly regulate the gift card products at issue. *SPGCC, LLC; MetaBank; and U.S. Bank, N.A. v. Ayotte*, 443 F. Supp. 2d 197 (D.N.H. 2006).

On May 30, 2007, the First Circuit affirmed the judgment of the district court. The Court determined that U.S. Bank and MetaBank acted well within their federally authorized power to issue and sell stored value cards that carry expiration dates and administrative fees.

Turning first to the powers of national banks, the Court noted that there is "little dispute" that a national bank is authorized to issue stored value cards that carry expiration dates and administrative fees. It then held that, as to the State's core argument, "the National Bank Act confers on national banks the power to issue stored value gift cards like those at issue here and to market and sell them through third part[ies]." 2007 U.S. App. LEXIS 12447, at *17. Finally, the Court concluded that application of New Hampshire's Consumer Protection Act would frustrate the exercise of that power, and soundly rejected the State's argument that such regulation does not conflict with the National Bank Act or OCC regulations because it regulates only Simon, and not the national bank.

Citing the Supreme Court's recent decision in *Watters v. Wachovia Bank, N.A.*, the Court noted that "the question here is not *whom* the New Hampshire statute regulates, but rather, against *what activity* it regulates." 2007 U.S. App. LEXIS 12447, at *18. The Court concluded that "the New Hampshire CPA is not concerned with Simon's activity, which is limited to how and where the giftcards are marketed, but rather with the sale of certain giftcards through a third party agent, which is the activity of [U.S. Bank], a national bank." *Id.*, at *19-20. The statute thus indirectly prohibits U.S. Bank from engaging in such activity by precluding it from using Simon to assist it in the activity. The Court explained that "[i]t would be contrary to the language and intent of the National Bank Act to allow states to avoid preemption of their statutes simply by enacting laws that prohibited non-bank firms from providing national banks with the resources to carry out their banking activities. As such, the New Hampshire CPA regulates the activities of a national bank." *Id.*, at *20.

The Court rejected the State's contention that there is no conflict between federal and state law because federal law does not require giftcards to have expiration dates or administrative fees. The Court explained that the Supreme Court has rejected this argument and held that "the preemptive scope of the National Bank Act is broader because it says that national banks 'may' engage in certain activities and the word 'may' does not condition federal permission upon that of the State." *Id.*, at *21.

The Court separately addressed the powers of national thrifts. The Court held that OTS regulations "permit national thrifts to issue stored value giftcards with expiration dates and administrative fees," *id.*, at *27, and that the Home Owners Loan Act and OTS regulations "also allow national thrifts to engage third party agents to assist in the exercise of national thrift powers." *Id.*, at *28. As it did with the National Bank Act and OCC regulations, the Court held that the Home Owners Loan Act and OTS regulations permit national thrifts "to use third party agents," and that the New Hampshire statute "indirectly prohibits a national thrift from exercising powers granted to it under the HOLA and OTS regulations." *Id.*, at *29-30.

The Court concluded by explaining that "the OCC and OTS are entitled to regulate the terms and conditions of giftcards sold by national banks and national thrifts and that their regulations preempt the New Hampshire CPA inasmuch as it prohibits Simon from selling bank- and national thrift-issued giftcards with expiration dates and administrative fees." *Id.*, at *30-31.

The opinion is available at <http://www.ca1.uscourts.gov/pdf/opinions/06-2326-01A.pdf>.