



AUTHORS

Thomas E. Gilbertsen

Partner

Commercial Litigation
tegilbertsen@Venable.com
202.344.4598

Ari N. Rothman

Of Counsel

Commercial Litigation
anrothman@Venable.com
202.344.4220

Molly T. Cusson

Associate

Commercial Litigation
mtcusson@Venable.com
202.344.4215

White v. Hollister Co. Illustrates Importance of Individual Questions in Class Certification

The California Court of Appeals January 3, 2013 decision in *White v. Hollister Co.* reversed and remanded the trial court's opinion denying class certification to a class of consumers who claimed that defendant Hollister Co. ("Hollister") refused to honor gift cards that failed to include an expiration date on the face of the card. While the court's decision confirms that a uniform misrepresentation leads to inference of reliance as to an entire class and can therefore make certification appropriate, the appellate court declined to order the trial court to certify the class. Instead, the appellate court remanded to the trial court to determine whether a class of 21,000 customers could be identified without individual questions predominating over common questions, thereby presenting a significant hurdle to certifying the class.

White v. Hollister Co.

In December 2009, Hollister ran a holiday promotion in which it issued a \$25 gift card to each customer who made a purchase of \$75 or more, and the plaintiff received a \$25 gift card after making such a purchase. The gift card did not include an expiration date on its face. The plaintiff gifted the card to his daughter, who then attempted to redeem the card. After a Hollister cashier refused to honor the card, stating that it had expired six days earlier, the plaintiff filed a putative class action against Hollister alleging that Hollister's failure to include the expiration date of the gift cards on the face of the cards violated California Business and Professions Code Section 1749.5 and the Consumers Legal Remedies Act Section 1770.

The plaintiff moved for class certification and argued that common questions of law and fact predominated over issues affecting individual class members because, *inter alia*, none of the Hollister gift cards contained an expiration date. In opposition, Hollister contended that individual factual issues predominated over issues common to the class because, during the 2009 holiday promotion, putative class members learned about the promotion – including its expiration date – via various methods, including in-store signs, card

sleeves in which the gift cards were delivered, e-mails, or conversations with in-store Hollister personnel.

The trial court denied the motion for class certification. The trial court found that Hollister demonstrated that the representations made to putative class members were not uniform and were made through a variety of mediums, and that given this lack of uniformity, the court could not infer on a classwide basis that class members relied on the lack of expiration date on the face of the gift cards themselves. The court stated that each class member would have to be questioned about the information he or she saw regarding the expiration date, and to what extent the failure to include the expiration date on the face of the card influenced the consumer's decision not to use the card.

The appellate court disagreed. The three-judge panel concluded that, "at least as to the subset of the proposed class made up of people who attempted to redeem their gift cards after [the expiration date], . . . the trial court abused its discretion in concluding that it could not infer a common misrepresentation, and thus, common reliance on the lack of an expiration date on the gift card themselves." The court "assume[d] that a reasonable person would prefer to redeem a gift card *before* it expires, rather than to allow the gift card to expire and lose all value." Therefore, it was reasonable to assume that the consumers who tried to redeem the gift cards after the expiration date were not aware of the expiration date from Hollister's signage, card sleeves, or other promotional materials. The appellate court remanded the case to the trial court for a determination of whether the 21,000 gift card holders who neither fully redeemed the gift cards before expiration, nor attempted to redeem the gift cards before expiration, could be identified without individual questions predominating over common questions.

Notably, the appellate court declined "to order the trial court to certify a class made up of all holders of defendant's promotional gift cards who were unaware that the cards." Instead, the court remanded the matter to the trial court to determine whether "the class of such persons can be identified without individual questions predominating over common questions—or whether, instead, the class should be limited to the 9,500 or so persons who attempted to redeem defendant's gift cards after they expired on January 30, 2010."

Impact of *White v. Hollister Co.*

Advertisers and marketers should take note of the *White* decision. The *White* court found that the misrepresentations alleged stemmed from the same source: each of the gift cards failed to identify the expiration date of the promotion. Because each gift card lacked an expiration date, each of the proposed class members was exposed to the same misrepresentation. Where the misrepresentation is uniform, an inference of reliance arises as to the entire class, thereby deeming class certification appropriate. However, plaintiffs will still need to identify class members without individual questions predominating over common questions, thereby presenting significant hurdles to certifying any class.

In contrast, however, a lack of uniformity in the representations does not give rise to an inference of reliance. For example, the *White* court noted that other California decisions have affirmed denial of class certification where the source of the misrepresentation varies – e.g., where representations are made via various different channels (such as print advertisements in newspapers, television and radio advertisements, direct mailings, in-person representations, or online) – or where a product contains multiple representations, some accurate and some misleading, and the plaintiff cannot demonstrate that all class members relied on the misleading representation.

Venable office locations

BALTIMORE, MD

750 E. PRATT STREET
SUITE 900
BALTIMORE, MD 21201
t 410.244.7400
f 410.244.7742

LOS ANGELES, CA

2049 CENTURY PARK EAST
SUITE 2100
LOS ANGELES, CA 90067
t 310.229.9900
f 310.229.9901

NEW YORK, NY

ROCKEFELLER CENTER
1270 AVENUE OF THE
AMERICAS
25TH FLOOR
NEW YORK, NY 10020
t 212.307.5500
f 212.307.5598

ROCKVILLE, MD

ONE CHURCH STREET
FIFTH FLOOR
ROCKVILLE, MD 20850
t 301.217.5600
f 301.217.5617

TOWSON, MD

210 W. PENNSYLVANIA AVE.
SUITE 500
TOWSON, MD 21204
t 410.494.6200
f 410.821.0147

TYSONS CORNER, VA

8010 TOWERS CRESCENT DRIVE
SUITE 300
VIENNA, VA 22182
t 703.760.1600
f 703.821.8949

WASHINGTON, DC

575 7TH STREET NW
WASHINGTON, DC 20004
t 202.344.4000
f 202.344.8300