



# CLASS ACTION LITIGATION



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**REPORT**

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## Consumer

### Toys R Us Wins Class Action Verdict In California Gift Card Redemption Case

In the first class action trial based on California's gift card law, Toys R Us won a verdict Feb. 18 against a class of consumers alleging that the toy store chain's disclosure on its gift cards was misleading (*Maxwell v. Toys R Us*, Cal. Super. Ct., No. BC 401425, 2/18/11).

This lawsuit—and at least 24 others in the state—arise from a 2007 California law requiring that any gift card with a balance of less than 10 dollars be redeemable for its cash value, Civil Code § 1749.5(b)(2).

After the law was enacted, Toys R Us changed the language on the back of its gift cards to say, "Not redeemable for cash, except as required by law." The plaintiffs brought claims under California consumer and common laws alleging that Toys R Us used misleading language on the back of their gift cards, and did not offer refunds upon request.

The trial court certified a class of individuals in California with Toys R Us or Babies R Us gift cards that were not redeemable for their cash value when the balance on the card fell below 10 dollars.

In a proposed statement of decision following a bench trial last September, Judge Kenneth R. Freeman of the Superior Court of California, County of Los Angeles, said that the language on the back of Toys R Us and Babies R Us gift cards was not misleading and complies with the statute.

In another finding, the court concluded that Toys R Us redeemed cards for cash when requested.

**Broad Impact?** Greg Parks, counsel for Toys R Us and co-leader of the Retail Industry group at Morgan Lewis & Bockius LLP, told BNA that he hopes this verdict will make plaintiffs' lawyers be more careful about bringing these lawsuits against companies who have the right policies in place.

A lot of retailers have the same language on the back of their gift cards, he said. "These plaintiffs challenged that language as inadequate and the court found it acceptable. That is a fairly typical disclosure for retailers to make."

But Craig Nicholas, counsel for plaintiffs and partner at Nicholas & Butler LLP, told BNA that he did not think that the court's findings would have a "broad impact" on gift card class actions. First, he said, other gift

cards have different language on them, such as express prohibitions on cash redemption. Also, the findings may be limited to the facts of this case based on the discussion of the survey evidence used here.

Nicholas also cautioned that the judge's findings were preliminary. Both parties submitted comments and objections on March 7 and then the court will issue a final statement of decision.

Nicholas said that the proposed statement did not address the "old" gift cards that were still in circulation after the law was enacted. The language on those cards said they were only redeemable for merchandise. The court had indicated in tentative findings during the trial that those cards required corrective action.

**Misleading Language?** During trial, the plaintiffs offered evidence of survey results showing that 90 percent of respondents thought that their only option was to buy something after reading the "except as required by law" language on the back of Toys R Us gift cards. But the court said that Toys R Us is not under an obligation to inform the gift card holder of their rights under the new law.

The plaintiffs also didn't prove that Toys R Us failed to redeem gift cards for cash when customers requested, the court said. Although class representative Cindy Maxwell said she was refused a cash refund, the court found that, "by itself, this testimony leaves open the question of whether the refusal was based upon an intentional company-wide policy or merely the ad hoc refusal of two uninformed clerks."

**Problems With Plaintiffs' Survey.** Parks said that this is one of the first times that survey evidence has been used in consumer class actions. The judge's findings show that plaintiffs cannot use a survey of just any set of consumers and have that substitute for classwide proof, he said. "In order to use a survey, it has to be the right set of people and ask them the right questions."

The survey evidence showed, among other things, that:

- Based on the language on the back of the gift card, 83 percent of respondents said that they did not think the store would give them cash if there were less than 10 dollars remaining on the gift card;

- Eighty-five percent of respondents said it would be important to them to know about the California law in deciding what to do with the remaining amount on the gift card; and

■ after being informed of their rights under the California law, 66 percent of respondents said they would ask for the balance in cash.

The court, relying on the “deeply compelling” opinion of the defendant’s expert, said that the survey should have polled Toys R Us shoppers. Instead, the polling occurred at three shopping malls where Toys R Us stores are located, but did not ask whether the respondents shopped at Toys R Us or had ever used a gift card from Toys R Us.

And, no consumers from northern or central California were surveyed even though shopping habits are known to differ from region to region, the court said.

Finally, the questions referred to a fictional “XYZ Department Store” instead of Toys R Us. The defendant’s expert testified that, “By stripping away Toys R Us’s identity, respondents’ actual feelings and experience with Toys R Us and its products were not reflected.”

Without knowing the store’s identity, consumers cannot decide whether the store would have items of interest to them for under 10 dollars. The plaintiffs’ expert said they avoided the store name to avoid any biases, but the court said this approach does not approximate actual market conditions.

The plaintiffs were represented by Nicholas and Alex Tomasevic of Nicholas & Butler in San Diego; and Derrick Coleman and Bruce Armstrong of Coleman Frost in Santa Monica, Calif.

Toys R Us was represented by Parks, Joe Duffy, Ezra Church, Jodi Stanfield and Viola Vetter of Morgan Lewis & Bockius LLP in Philadelphia.

BY JESSIE KOKRDA KAMENS

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*The court’s findings are available at: <http://op.bna.com/class.nsf/r?Open=jkas-8ejqg7>.*