

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 7, 2009**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2008AP590**

**Cir. Ct. No. 2007CV283**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**PRIME FINANCIAL CREDIT UNION F/K/A MILWAUKEE METROPOLITAN  
CREDIT UNION,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DIGITAL WORLD CARD MANAGEMENT SERVICES OF GEORGIA, LLC,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 BRIDGE, J. Digital World Card Management Services of Georgia, LLC, appeals an order of the circuit court entering summary judgment dismissing

its counterclaim against Prime Financial Credit Union<sup>1</sup> for breach of contract and a judgment in favor of Prime Financial. The parties entered into a contract to administer and market a “stored value” Visa card program (“Program”). Following significant overdrafts by cardholders, the Program sustained losses and was halted. The contractual dispute relates to which of the two parties was responsible for monitoring the activity in the individual cardholder accounts, and thus detecting the overdrafts. Digital World contends that the contract is ambiguous as to which party bore this responsibility, and that even if the contract is not ambiguous, the parties’ obligations were modified by their conduct.

¶2 We conclude that the contract unambiguously assigned responsibility for the cardholder accounts to Digital World. We also conclude that the contract was not modified by the parties’ conduct. We therefore affirm the circuit court’s order entering summary judgment dismissing Digital World’s counterclaim.

## BACKGROUND

¶3 The following facts are taken from the parties’ summary judgment submissions, and are largely undisputed. Prime Financial is a credit union located in Wisconsin. Digital World is a Georgia limited liability company, with principal offices in Florida. In 2004, Prime Financial entered into a “Sponsorship and Card Services Agreement” (“Agreement”) with Digital World, whereby Prime Financial agreed to rent its Visa bank identification number (“BIN”) to Digital World for the

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<sup>1</sup> Prime Financial Credit Union was formerly known as Milwaukee Metropolitan Credit Union.

“stored value” Visa card program, which was to be administered by Digital World and offered to members of the Church of God in Christ (“COGIC”).

¶4 A “stored value” card uses magnetic stripe technology to store information about funds that have been prepaid to the card. Stored value cards may be used for a variety of purposes, ranging from prepaid phone cards to retail gift cards to ATM withdrawals. Some, such as the cards at issue in this case, are branded by Visa or Mastercard and can be used wherever Visa or Mastercard are accepted.

¶5 The stored value cards offered to COGIC members allowed cardholders to upload money onto their cards by depositing money through various depository accounts that in turn deposited the money onto the card. When the Program was working as intended, the cardholder needed money in his or her account in order to use the card. If the cardholder did not have money in his or her account, or if the account contained insufficient funds, the purchase would be rejected in order to avoid an overdraft. Each cardholder’s account was capable of being tracked to identify its current balance.

¶6 The contractual Agreement between Digital World and Prime Financial set out each party’s role, and also separately set out the duties of each. As to its role, the Agreement provided that Digital World would have “total responsibility and liability for all costs and expenses of the Program, including those arising from fraud.” Its duties were to market and administer the Program.

¶7 Prime Financial’s role under the Agreement was to issue cards on behalf of Digital World through Prime Financial’s BIN. Prime Financial’s duty was to maintain and service five program accounts. The program accounts were general ledger accounts which were receptacles for funds from the Program in

which the daily activities of the program were settled. The five program accounts were:

1. the “Settlement Account,” into which the data processor settled each day’s Program deposits and Cardholder fees and transactions;
2. the “Pooled Account,” which held the outstanding balance of the Program deposits;
3. the “Operating Account,” which held all Program fee income;
4. the “[Digital World] Account,” which held amounts due to Digital World under the Program; and
5. the “Reserve Account,” which held the greater of \$100,000.00 or 10% of the amount in the Pooled Account in order to protect Prime Financial from losses due to insufficient funds or fraud.

Other than its BIN rental role and its duty to maintain and service the five program accounts, Prime Financial had “no responsibility or liability for the operations of the Program.” It did, however, have the ability to monitor the Program for compliance with state and federal regulatory requirements.

¶8 On January 4, 2005, Prime Financial noticed that the pooled account had a negative balance. Upon review, it was discovered that some cardholders had negative balances totaling over \$70,000. Prime Financial informed Digital World of the negative balances and requested that it resolve the issue. Digital World advised Prime Financial that steps were being taken to address the matter, and on January 12, it notified Prime Financial that it would begin crediting those accounts with negative balances. However, on January 14, Prime Financial notified Digital World that a negative balance in the amount of \$59,026.68 remained.

¶9 On February 11, 2005, credit adjustments were posted to all negative account balances, bringing the balances to zero. Within a couple of weeks, however, cardholder accounts again reflected negative balances. After losses exceeded the balance of the reserve account, Prime Financial advised Digital World that the Program could not continue without a proper amount in the reserve account. Prime Financial also advised Digital World that it would not process further deposits for funding cards through the Program in order to stop mounting losses due to fraud. When Digital World failed to deposit proper reserve amounts, Prime Financial halted the Program.

¶10 After the Program ceased, Digital World continued to maintain negative balances on the business account. Pursuant to the parties' agreement, Prime Financial then debited the reserve account \$100,000 to make up for losses it sustained. Prime Financial maintained, however, that a balance of approximately \$28,000 was still owed to it, and brought suit for breach of contract. Digital World counterclaimed, seeking damages for its costs and lost profits. It alleged that Prime Financial breached the Agreement by intentionally failing to maintain the program accounts and service the accounts as set forth in the Agreement.

¶11 Prime Financial moved for summary judgment dismissing Digital World's counterclaim. In an opposing brief, Digital World argued that the Agreement was ambiguous with respect to which party was responsible for monitoring the activity in the individual cardholder accounts and therefore responsible for failing to prevent the losses. Digital World also argued in the alternative that even if the Agreement was unambiguous in providing that it was responsible for monitoring the cardholder accounts, Prime Financial's conduct modified the Agreement in this regard. It contended that Prime Financial assumed

a greater role than was stated in the Agreement, and that the responsibility for monitoring the cardholder accounts shifted to Prime Financial.

¶12 The circuit court ruled as a matter of law that the Agreement was unambiguous and that it was Digital World's responsibility to manage the cardholder accounts. The court declined to specifically address Digital World's contract modification argument, stating its ruling was "complete." It then entered an order granting Prime Financial's motion for summary judgment and dismissing Digital World's counterclaim. Thereafter, the court entered judgment in favor of Prime Financial in the amount of \$27,916.27. Digital World appeals.

#### STANDARD OF REVIEW

¶13 We review summary judgments de novo, using the same methodology as the circuit court. *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08).<sup>2</sup>

#### DISCUSSION

¶14 As it did before the circuit court, Digital World contends that the Agreement was ambiguous with respect to which party was responsible for managing the cardholder accounts, and therefore summary judgment dismissing Digital World's counterclaim was improper. Whether a contract is ambiguous presents a question of law which we review de novo. *Kernz v. J.L. French Corp.*,

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

2003 WI App 140, ¶8, 266 Wis. 2d 124, 667 N.W.2d 751. In interpreting a contract, our objective is to ascertain the parties' intent, giving the terms of the contract their plain and ordinary meaning. *Goldstein v. Lindner*, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. Language in a contract is ambiguous if it is susceptible to more than one reasonable interpretation. *Kernz*, 266 Wis. 2d 124, ¶10.

¶15 The disputed portions of the Agreement provide as follows:<sup>3</sup>

### SECTION 1 – DEFINITIONS

1.1 Definitions. Except as otherwise specifically indicated, the following terms shall have the following meanings in this Agreement ....

....

(d) Cardholder Account. A Cardholder's book entry account governed by the terms of his or her Cardholder Agreement and this Agreement and consisting of the balance of the Cardholder's Program Deposits less withdrawals and fees charged to such account.

....

(i) Program. The solicitation, marketing, evaluation, administration, supervision and processing of stored value Cards, Cardholder Accounts and applications pursuant to this Agreement.

(j) Program Accounts. The accounts held at [Prime Financial] in connection with the Program, including but not limited to the Settlement Account, the Pooled Account, the Operating Account, the [Digital World] Account, and the Reserve Account, each defined in Section 2.1(c) below.

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<sup>3</sup> For purposes of clarity, we refer to the parties as "Prime Financial" and "Digital World" even though the parties used different acronyms in their Agreement.

## SECTION 2 – PROGRAM DESCRIPTION

2.1 Party Acknowledgments. The parties acknowledge and agree that, as further described in and subject to the remainder of this Agreement, the Program will operate according to the following understandings:

(a) [Digital World’s] Role. [Digital World] will have primary responsibility for compliance of the Program with all Rules and Regulations and total responsibility and liability for all costs and expenses of the Program, including those arising from fraud or from noncompliance with any Rules or Regulations.

(b) [Prime Financial’s] Role. [Prime Financial] will issue Cards on behalf of [Digital World] through [Prime Financial’s] VISA Bank Identification Number (“BIN Rental”). Other than this BIN Rental role, and except for its ability to monitor for regulatory compliance as described in this Agreement, [Prime Financial] has no responsibility or liability for the operations of the Program. Any regulatory monitoring that [Prime Financial] does is solely for its own benefit and not for the benefit of [Digital World] or any other person or entity.

....

## SECTION 3 – IMPLEMENTATION AND DUTIES

3.1 [Digital World’s] Duties.

....

(d) Program Administration and Customer Service. [Digital World] will be responsible for the administration of the Program and the handling of all customer service-related questions from any Cardholder.

....

(i) Program Expenses. [Digital World] shall at all times be solely responsible for all costs associated with the Program, the marketing and solicitation of new applicants, the processing of applications, and the operation of the Program, which costs shall include, but not be limited to the following: costs of Card manufacturing; costs of printing Cardholder Agreements; costs for background checks, identity verification, credit reports and the like; Card mailing; processor fees and processor pass-through fees and expenses; warning bulletin expenses; direct mail

marketing costs; radio (if any), television (if any), and print media costs; and all other costs associated with the normal operation of the Program....

....

### 3.2 Duties of [Prime Financial]

....

(c) Program Accounts. [Prime Financial] will maintain and service the Program Accounts in accordance with this Agreement, the Program Account agreements, and [Prime Financial's] bylaws.

....

## **SECTION 6 – [PRIME FINANCIAL'S] COMPENSATION AND EXPENSES**

....

6.2 Expense Reimbursement. [Digital World] will reimburse [Prime Financial] for the following expenses:

(a) Internal costs and expenses incurred in connection with [Prime Financial's] internal monitoring of the Program ....

¶16 At the heart of Digital World's contention that the Agreement is ambiguous are the terms "administer," "maintain," "service," and "monitor." Digital World argues that the terms, as they are used in Sections 3.1(d), 3.2(c) and 6.2(a) of the Agreement, respectively, are ambiguous because the terms are not defined and are susceptible to conflicting definitions.

¶17 A term is not ambiguous merely because it is not defined in the contract. *See United States Fire Ins. Co. v. Ace Baking Co.*, 164 Wis. 2d 499, 503, 476 N.W.2d 280 (Ct. App. 1991). Nor is a term ambiguous merely because it has more than one meaning. If only one meaning of the term comports with the parties' objectively reasonable expectations, the term is not ambiguous. *Id.* We

therefore examine the various terms in context in order to ascertain whether they are susceptible to more than one reasonable interpretation.

¶18 Digital World acknowledges that pursuant to Section 3.1(d), it was responsible for the “administration” of the Program and that Section 1.1(i) in turn defines “Program” to include the “administration” of cardholder accounts. Digital World claims, however, that “*administration*,” as it is used in Section 3.1(d), conflicts with Section 3.2(c), which states that Prime Financial will “*maintain and service* the Program Accounts” (emphasis added). In addition, Digital World claims that “*administration*,” as it is used in Section 3.1(d), also conflicts with Section 6.2(a), which states that Prime Financial will reimburse Digital World for expenses incurred in connection with Prime Financial’s “*monitoring* of the Program” (emphasis added).

¶19 We first address Digital World’s contention that its administrative responsibility under 3.1(d) conflicts with Section 3.2(c), which provides that Prime Financial will “maintain and service” the “Program Accounts.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 27 (1993) defines “Administer” as “to manage the affairs of.” It defines “maintain” as “to keep in a state of repair, efficiency, or validity: preserve from failure or decline.” *Id.* at 1362. It defines “service” as “to perform any of the business functions auxiliary to production or distribution of ... to provide information or other assistance to.” *Id.* at 2075. “Program Accounts” is defined in Section 1.1(j) as including, without limitation, the five accounts discussed in paragraph 8 above.

¶20 Therefore, under the plain meaning of the Agreement, as the party responsible for administering the Program, Digital World was responsible for managing the Program, including the individual cardholder accounts, whereas

Prime Financial was responsible for keeping in a state of repair, preserving from failure, and providing information and assistance with respect to the program accounts. These responsibilities are separate and distinct, and are not in conflict with each other.

¶21 Nor, as Digital World argues, does Section 3.1(d) conflict with Section 6.2(a). Section 6.2(a) provided that Digital World would reimburse Prime Financial for internal costs and expenses incurred in connection with Prime Financial’s “internal monitoring of the Program.” Digital World apparently interprets the reference to monitoring the Program to be the equivalent of monitoring the cardholder accounts. We disagree.

¶22 “Monitor” is defined as “to keep track of, regulate, or control.” *Id.* at 1460. “Administer[ing],” i.e., managing, can include “monitor[ing],” i.e., keeping track of, regulating and controlling. Digital World’s responsibility under Section 3.1(d) is drawn broadly enough to include responsibility for keeping track of the individual cardholder accounts. In addition, Digital World’s argument ignores Section 2.1(b), which provides that “[a]ny regulatory monitoring that [Prime Financial] does is solely for its own benefit and not for the benefit of [Digital World] or any other person or entity.” Thus, any monitoring Prime Financial performed was performed for its own benefit, not on behalf of the Program. Furthermore, § 2.1(b) also makes clear that, with limited exceptions not applicable here, Prime Financial had “no responsibility or liability for the operations of the Program” (separately defined to mean the cardholder accounts).

¶23 In sum, the Agreement provided that Digital World was responsible for the Program, including tracking the activity in the cardholder accounts, and Prime Financial was responsible for the program accounts and for regulatory

monitoring. Prime Financial bore no responsibility for the operations of the Program, and thus bore no responsibility for monitoring individual cardholder activity. We conclude that, when viewed in the context of the Agreement as a whole, the terms “administer,” “maintain,” “service,” and “monitor” are neither conflicting nor subject to more than one reasonable interpretation. We therefore conclude that the language in the Agreement is not ambiguous.

¶24 Digital World next contends that, even if the language of the Agreement is not ambiguous, there is a genuine issue of material fact as to whether the parties modified the Agreement by their conduct so as to reassign the responsibility of monitoring the cardholder accounts to Prime Financial. At the hearing on the motion for summary judgment, the circuit court declined to specifically address Digital World’s argument that the parties’ actions modified the Agreement, stating that its decision was “complete.” We infer from the court’s decision that it determined that there was no genuine issue of material fact as to whether the Agreement had been modified and concluded as a matter of law that it had not.

¶25 A written contract may be modified by subsequent conduct of the parties. *See Nelsen v. Farmers Mut. Auto. Ins. Co.*, 4 Wis. 2d 36, 56, 90 N.W.2d 123 (1958). There must be a meeting of the minds as to the proposed modification, however; one party to a contract cannot alter its terms without the assent of the other party. *Id.* at 55. The acts which are relied upon to establish a modification of a prior contract must be unequivocal in their character. *Id.* at 56. ““Acts which are ambiguous in their character, and which are consistent either with the continued existence of the original contract, or with a modification thereof, are not sufficient to establish a modification.”” *Id.* at 56.

¶26 We thus consider whether there is evidence that through their conduct, *both* parties evidenced an *unambiguous* intent to modify the Agreement so as to transfer the responsibility of monitoring the individual cardholder accounts from Digital World to Prime Financial. It is undisputed that Prime Financial examined and generated its own reports regarding the cardholder accounts. There is, however, no evidence that Prime Financial's actions with respect to the cardholder accounts constituted a complete undertaking of Digital World's monitoring responsibilities that existed as a result of Digital World's overall responsibility for administration of the Program. Any monitoring undertaken by Prime Financial was entirely consistent with the terms of the Agreement, which anticipated that Prime Financial may undertake such activities for its own benefit, but nevertheless made Digital World responsible for doing so. Further, there is no evidence of conduct by Digital World which would indicate that it surrendered its monitoring responsibilities to Prime Financial. In short, there is no evidence which creates a genuine issue of material fact as to whether the parties' conduct unambiguously indicated their intent to modify the Agreement. Accordingly, summary judgment was proper.

#### CONCLUSION

¶27 For the reasons discussed above, we affirm the order of the circuit court entering summary judgment dismissing Digital World's counterclaim and the judgment entered by the court in Prime Financial's favor.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

