

State and Local Tax ADVISORY

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Third Circuit Decision Addresses New Jersey Gift Card Questions

John L. Coalson Jr., Kendall L. Houghton, Ethan D. Millar, Maryann H. Luongo, and Michael M. Giovannini

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On January 5 the U.S. Court of Appeals for the Third Circuit issued its opinion in *N.J. Retail Merchants Association v. Sidamon-Eristoff*, a case involving the constitutionality of 2010 N.J. Laws Chapter 25 (the New Jersey Act), New Jersey's recently enacted unclaimed property legislation affecting the treatment of stored value cards (SVCs). The court's decision answers several important legal questions concerning New Jersey's treatment of SVCs but leaves many others unanswered.

This article describes the New Jersey law and related litigation; analyzes the issues presented to and decided by the Third Circuit; and identifies open questions for SVC issuers and other parties that handle SVCs.

Background on New Jersey's Treatment of SVCs

Before the New Jersey Act, the state didn't consider gift cards and gift certificates to be unclaimed property subject to escheat. Section 5 of the New Jersey Act changed that by providing for the escheat of SVCs. Under subsection 5a, a "stored value card for which there has been no stored value card activity for two years is presumed abandoned." Subsection 5c requires issuers of SVCs to obtain the name and address of the purchaser or owner of each stored value card issued or sold and, at a minimum, to maintain a record of the ZIP code of the owner or purchaser (referred to as the data collection requirement). If the issuer "does not have the name and address of the purchaser or owner of the stored value card, the address of the owner, or purchaser of the stored value card shall assume the address of the place where the stored value card was purchased or issued and shall be reported to New Jersey if the place of business where the stored value card was sold or issued is located in New Jersey" (referred to as the "place-of-purchase presumption").

The effective date of the New Jersey Act was July 1, 2010.¹ It applied to SVCs issued on and after that date and also retroactively to those outstanding instruments issued before July 1, 2010.

In Treasury Announcement 2011-03 (TA 2011-03), the state treasurer explained that subsection 5c's place-of-purchase presumption would apply when the issuer does not have the name and address of the owner or purchaser of an SVC, the issuer is not domiciled in New Jersey, and the state of the issuer's domicile exempts SVCs from its unclaimed property statute. This rule, which permits the state in which the SVC is

¹ The enforcement date was later extended to November 15, 2010, then to January 3, 2011, and finally to February 1, 2011, through announcements issued by the New Jersey treasurer. Enforcement of the data collection requirement was then stayed by the Third Circuit pending its consideration of the issues on appeal.

sold to claim the SVC if the issuer's state of domicile does not provide for the escheat of the SVC, has been referred to as the third-priority rule.² In TA 2011-03, the treasurer also provided that issuers and holders of SVCs are generally exempted from the data collection requirement if they collect and maintain the ZIP code of the purchaser of the card. See also Treasury Announcement 2011-05 (Nov. 23, 2010).

Litigation Challenging New Jersey Act Is Partially Successful

In September 2010 several plaintiffs—including the New Jersey Retail Merchants Association, the New Jersey Food Council, and American Express Prepaid Card Management Corp. (collectively referred to by the court as the SVC Issuers)—brought suit in the U.S. District Court for the District of New Jersey against the state treasurer and the unclaimed property administrator, seeking declaratory and injunctive relief regarding specific components of the New Jersey Act. The plaintiffs later filed motions for preliminary injunction to enjoin enforcement of the New Jersey Act on the grounds that it violated the contract clause, the takings clause, the supremacy clause, the substantive due process clause, and the commerce clause of the U.S. Constitution.

On November 13, 2010, the district court judge issued a consolidated opinion and order granting the plaintiffs' motion in part and denying it in part. The district court granted the plaintiffs' motion for a preliminary injunction, thereby enjoining enforcement of (1) the retroactive application of the New Jersey Act to SVCs that are redeemable only for merchandise or services, under the contract clause; and (2) the place-of-purchase presumption contained in subsection 5c and the third-priority rule as articulated in TA 2011-03, under the supremacy clause based on a conflict with the priority rules established by the U.S. Supreme Court in *Texas v. New Jersey*.³ However, the district court denied the plaintiffs' motion for a preliminary injunction of the data collection requirement contained in subsection 5c of the New Jersey Act,⁴ and it also rejected the plaintiffs' commerce clause claim and their substantive due process and federal preemption claims (the Credit CARD Act of 2009) under the Credit Card Accountability Responsibility and Disclosure Act of 2009.

The Third Circuit affirmed the district court's order in its entirety. We will detail below the court of appeal's holdings on each of the plaintiffs' claims.

Contract Clause

The court held that the plaintiffs had shown a reasonable likelihood of success on the merits of their contract clause claim, and thus upheld the district court's preliminary injunction prohibiting the retroactive application of the New Jersey Act to SVCs issued before the Act's effective date, if the SVCs were redeemable only for merchandise or services. The court reasoned that: (1) the New Jersey Act operates [as] a substantial impairment on the contractual relationships of the SVC issuers by imposing the "unexpected obligation" of turning over the entire value of SVCs in cash to the state; and (2) although the New Jersey Act furthers a significant and

² The third-priority rule was previously codified at N.J. Rev. Stat. section 46:30B-10(f). However, the court analyzed TA 2011-03 as if it were a modification of the place-of-purchase presumption rather than an application of this statute. Nonetheless, the court's analysis and holding apply equally to any transaction-based custody rule, whether adopted by statute, regulation, or other guidance, as in this case.

³ 379 U.S. 674 (1965). See also *Delaware v. New York*, 507 U.S. 490 (1993), and *Pennsylvania v. New York*, 407 U.S. 206 (1972).

⁴ This ruling was not part of the court's original November 13, 2010, order, but was issued as part of a clarifying ruling made by the court on January 14, 2011. In that ruling, the court explained that its prior injunction of subsection 5c was not intended to enjoin subsection 5c in its entirety, but only the place-of-purchase presumption.

legitimate public purpose, it “does not reasonably accommodate the rights of the contracting parties . . . because it fails to allow SVC issuers to collect their bargained-for profits or merchant fees.” Furthermore, the court held that the plaintiffs had shown that “they will be irreparably injured by a denial of the preliminary injunction,” that “granting the preliminary injunction will not result in even greater harm to the nonmoving party,” and that “granting the preliminary injunction will be in the public interest.”⁵

Express and Implied Federal Preemption by the Federal Credit CARD Act

The court held that the plaintiffs failed to show a reasonable likelihood of success on the merits of their claims that the New Jersey Act was expressly and impliedly preempted by the Credit CARD Act of 2009. The plaintiffs had argued that the Credit CARD Act of 2009, which generally requires SVCs to have expiration dates of not less than five years, conflicts with a requirement to escheat the cards after two years. The court noted that the Act’s language regarding preemption of state laws was clear: a “state law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.” The court then upheld the district court’s determination that the New Jersey Act provides greater protection to consumers than the Credit CARD Act of 2009 because it allows an SVC’s owner to redeem the card for cash from the state after the issuer has escheated it despite the two-year abandonment period. That right did not exist before the New Jersey Act was enacted.

Federal Common Law Preemption of the Place-of-Purchase Presumption

The court held that the plaintiffs demonstrated a reasonable likelihood of success on their claim that the New Jersey Act’s place-of-purchase presumption and the third-priority rule as set forth in TA 2011-03 were both preempted under the U.S. Supreme Court’s escheat priority rules established in *Texas v. New Jersey*. The court concluded that the place-of-purchase presumption directly contradicts the second priority rule announced in Texas, which would allow the holder’s state of domicile to take custody of unclaimed property when the holder has no record of the owner’s last known address. According to the court, when the SVC issuer is not incorporated in New Jersey, the place-of-purchase presumption makes it impossible for the issuer to comply with both the New Jersey Act and federal common law under Texas because two states cannot both escheat the same abandoned property.

Furthermore, assuming that TA 2011-03’s interpretation of the place-of-purchase presumption to include a third-priority rule was a valid exercise of power by the state treasurer, the Third Circuit held that it is also preempted under *Texas*. The court cited *Pennsylvania v. New York*, 407 U.S. 206 (1972), for the notion that New Jersey, as the state in which the SVC was sold and issued, lacked a sufficient connection with any of the parties to the transaction to claim a right to escheat the abandoned property. The court further reasoned that enforcement of the third-priority rule, as articulated in TA 2011-03, represented a departure from the *Texas* priority rules and would require the court “to do precisely what [the Supreme Court] said should be avoided—that is, to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing

⁵ However, the court found that SVCs that are redeemable for cash could be escheated retroactively because the issuer had no expectation of a profit for those cards. The court also noted that the district court held that the New Jersey Act “could conceivably effect a taking of the gift card sale and redemption,” but that the district court stated that it “did not need to ‘rest its decision to grant a preliminary injunction on the Takings claim in light of the . . . Contract Clause analysis’ in favor of SVC Issuers.” For the same reason, the Third Circuit declined to address the plaintiffs’ takings clause claim.

new categories of facts.” Finally, the court rejected the state’s argument that holders would receive unjustifiable windfalls if a third-priority rule could not be enforced, saying that enforcement of the rule would allow New Jersey to infringe on the sovereign authority of other states that have decided not to escheat SVCs.

Data Collection Requirement

The plaintiffs had argued that if the place-of-purchase presumption under subsection 5c of the New Jersey Act is unconstitutional, the data collection requirement should also be stricken on the basis that it is not severable from the place-of-purchase presumption. However, the Third Circuit upheld the district court’s determination that subsection 5c’s data collection requirement was severable from the place-of-purchase presumption. The court stated:

the consumer protection purpose of Chapter 25 evinces that the State Legislature intended the data collection provision to stand alone in case a related provision were struck down. Chapter 25 was enacted to ensure that SVC owners’ rights to the funds would not be forfeited by the passage of time and to reunite customers with their property. The data collection provision requiring issuers to maintain records of the purchaser or owner furthers this purpose by making it more likely that the State will be able to reunite the owner with the abandoned SVC funds.

The SVC issuers had also argued that the data collection requirement was preempted because it does not further the *Texas* priority scheme, arguing that forcing a card issuer to retain the ZIP code of the purchaser does nothing to reunite the abandoned property with the actual owner, often the recipient, of the gift card. The Third Circuit rejected that argument as well, saying that the Supreme Court “has consistently permitted states to escheat based on the last known address of the purchaser.” The court also pointed out that the purchaser of a gift card has the right to redeem the card while it is in the purchaser’s possession, and thus the purchaser is a creditor. Accordingly, the plaintiffs did not meet their burden of showing that the data collection requirement was on its own likely preempted by federal common law.

Substantive Due Process

The plaintiffs had argued that the New Jersey Act violated substantive due process because its primary purpose was to raise revenue for the state, which is not a legitimate state interest. Further, the plaintiffs argued that even if the Act was enacted to further a legitimate state interest, the two-year abandonment period, the two exemptions to Chapter 25, and the data collection provision do not rationally relate to that goal. However, the court held that the plaintiffs did not establish a reasonable likelihood of success on their substantive due process claim, finding that the New Jersey Act furthered a legitimate state interest, which consisted of protecting New Jersey customers and modernizing its unclaimed property laws. Also, the court found that the two-year abandonment period was rationally related to the goal of protecting consumers, and that the exemptions were rationally related to other possible goals of protecting small businesses or encouraging businesses to issue promotional cards. Finally, the plaintiffs had argued that the data collection requirement did not rationally relate to the legitimate state interest of protecting consumers because retaining the purchaser’s ZIP code does not help the state reunite the property with the owner of the gift card, who is usually the recipient. However, the Third Circuit stated that “retaining the ZIP code of the purchaser or owner rationally furthers the State’s legitimate interest in determining which state has the right to escheat the abandoned property under the first priority rule in *Texas*.” Moreover, the court stated that even when the property cannot be returned to the

owner, the state's unclaimed property law rationally relates to the goal of protecting the abandoned property by safeguarding it in a trust account and making it available for consumers to reclaim in perpetuity.⁶

Unresolved Issues

The Third Circuit's decision leaves unresolved a number of issues regarding New Jersey's treatment of SVCs and the data collection requirement. Some of them are noted below.

Treatment of SVCs in New Jersey

Is a ZIP code considered an address for purposes of the first-priority rule?

If it isn't, an issuer that collects a purchaser's ZIP code will not be required to escheat the unredeemed balance even if the ZIP code is in New Jersey. New Jersey's own regulation defines a last known address to mean "a description of the location of the apparent owner sufficient for the purpose of the delivery of mail," which would not include a ZIP code. New York and Delaware also administratively take the position that a ZIP code does not constitute a last known address for this purpose.

What types of cards are escheatable as SVCs? Merchandise return cards? Telephone calling cards? Open-loop cards? Online accounts?

An SVC is broadly defined in the New Jersey Act to mean "a record that evidences a promise, made for monetary or other consideration, by the issuer or seller of the record that the owner of the record will be provided, solely or a combination of, merchandise, services, or cash in the value shown in the record, which is pre-funded and the value of which is reduced on each redemption. The term 'stored value card' includes, but is not limited to the following items: paper gift certificates, records that contain a microprocessor chip, magnetic stripe or other means for the storage of information, gift cards, electronic gift cards, rebate cards, stored-value cards or certificates, store cards, and similar records or cards." Accordingly, it appears that merchandise return cards, telephone calling cards, and open-loop cards are covered, though there is more uncertainty regarding online accounts.

May New Jersey claim SVCs from an unincorporated issuer with a principal place of business in New Jersey?

The Third Circuit's decision strongly suggests that that claim would be unconstitutional because it would also conflict with *Texas*, which rejected a principal place of business rule in favor of the easier-to-apply state of formation test under the second-priority rule. However, the court did not directly address that sort of claim.

How broad is the exemption for promotional cards?

The New Jersey Act exempts SVCs that are "distributed by the issuer to a person under a promotional or customer loyalty program or a charitable program for which no monetary or other consideration has been tendered by the owner." The language of that exemption leaves open questions regarding what sorts of promotional card programs may qualify for it, including those in which consumers do not pay any direct monetary consideration for a "promotional" stored value card but receive the card "free" if they make some other qualifying purchase (or engage in an activity, such as taking a test drive in an automobile). Are those

⁶ The district court also held that the SVC issuers failed to show a likelihood of success on their commerce clause claim. The Third Circuit declined to address that claim, however, because only an amicus curiae brief had raised the issue on appeal.

required purchases or activities “other consideration” provided by the owner that disqualifies these cards from the exemption for “promotional” cards under the New Jersey Act?

Will an issuer be obligated to escheat if the ZIP codes are collected manually rather than electronically?

It would appear from the U.S. Supreme Court’s decision in *Pennsylvania v. New York* that it would be too burdensome to require an issuer to escheat under those conditions, though the state would presumably have the option of incurring the necessary costs to try to match ZIP codes with unredeemed card balances.

Enforcement of the Data Collection Requirement

When will it become effective, if at all?

We have been advised by the New Jersey attorney general’s office that the treasurer and other New Jersey officials will take time to consider the Third Circuit’s decision and hold discussions with the plaintiffs and perhaps other interested stakeholders before issuing guidance on the data collection requirement. New Jersey has also said it will provide card issuers with at least some notice before making the data collection requirement effective. Assuming, however, that the data collection requirement ultimately becomes effective, sellers of SVCs will have to determine what measures (including changes to point-of-sale systems and card databases) will be required to comply with the requirement, and they will have to coordinate with other parties that may be involved in the card sale and data collection process (for example, franchisees, third-party distributors, and card processors). Those sellers should consider the possibility that the treasurer may begin enforcing the data collection requirement fairly soon.

Does the requirement apply to online or telephone sales of SVCs by out-of-state issuers?

As enacted, subsection 5c contemplated that the place-of-purchase presumption would apply only “if the place of business where the stored value card was sold or issued is located in New Jersey.” However, with the place-of-purchase presumption held unconstitutional, it is unclear whether issuers may be required to collect ZIP codes for those sales. (Many, of course, do so already, while obtaining “ship to” addresses to deliver the cards, though if the issuer does not itself sell the cards online or by telephone, it may not.)

Does the requirement apply to reloads of SVCs?

The New Jersey Act imposes the requirement on cards “issued or sold,” so presumably it does not apply to reloads, but New Jersey could take a broader interpretation of the Act.

How does the requirement apply to registered card programs?

The New Jersey treasurer previously released guidance that the full name and address of the cardholder must be collected, rather than merely the ZIP code, for any card that is registered.⁷ Typically, though, the card is not registered at the time of sale, and thus the seller has no way of knowing if the card will ultimately be registered by the cardholder. That raises the question whether a ZIP code must be collected at the time of sale, in addition to the information collected at registration. The wording of the guidance suggests not, but New Jersey could potentially take a broader view of the data collection requirement.

⁷ However, it is possible that the treasurer may agree to relax this requirement for certain registered card programs (e.g., if the program is not set up to collect address information). The treasurer also has stated that the full name and address of the cardholder must be collected by an issuer that is currently collecting such information. See TA 2011-03.

If an issuer voluntarily escheats to New Jersey based on where SVCs are sold, does the issuer still need to comply with the data collection requirement?

The place-of-purchase presumption suggested that issuers that chose not to comply with the data collection requirement would be required to escheat based on where the card was sold. However, the Third Circuit found that the place-of-purchase presumption was likely unconstitutional and the data collection requirement was severable from the place-of-purchase presumption. Thus, an issuer that does not satisfy the data collection requirement now (assuming it goes into effect) may potentially be subject to penalties in New Jersey even if the issuer voluntarily escheats the unredeemed SVCs sold in New Jersey. As a practical matter, however, New Jersey may be less inclined to impose penalties on such issuers, on the basis that such issuers would be escheating an amount to New Jersey that would likely approximate the amount that would potentially be escheatable if the issuer had complied with the data collection requirement.

Does the requirement apply to entities that sell or issue SVCs but do not accept them for redemption?

The New Jersey Act defines an issuer that is subject to the data collection requirement to mean “an issuer or seller of a stored value card that is a person, retailer, merchant, vendor, provider or business association with the obligations of a holder to accept the stored value card as redeemable for, solely or a combination of, merchandise, services, or cash, and to report and deliver proceeds of the stored value card if abandoned.” That definition appears to contemplate a traditional closed-loop issuer in which the same entity that issues the card also redeems it. However, that definition does not appear to include many common types of gift card sales. For example, third-party distributors such as InComm and Blackhawk distribute cards that are issued by entirely unrelated parties from the merchants that sell the cards through kiosks located in their stores. It seems fairly clear that merchants that merely sell cards issued by others are not issuers of the cards under the Act’s definition and have no obligation to collect purchaser information. Neither the issuers of these cards nor InComm and Blackhawk are able to require the merchants selling the cards to collect ZIP code or other purchaser information. Likewise, when issuers of SVCs do not themselves accept the cards they issue in redemption for merchandise or services but have arranged by contract for others to accept their cards in redemption for merchandise or services provided by the parties accepting the cards for redemption, it is unclear whether any of the parties meet the definition of issuer contained in the New Jersey Act. The application of the New Jersey Act and the data collection requirements to those and other common types of stored value card sales is highly problematic.

Can the requirement be satisfied even if the ZIP code collected is not associated with the card that is sold?

It is clearly the treasurer’s intent that the ZIP code be associated with the card sold (otherwise, no escheat claim could be made), though the New Jersey Act does not actually require that. The treasurer has acknowledged as much in guidance issued last year, though the guidance indicated that the treasurer was attempting to impose that requirement “in addition to the legal requirements” explicitly imposed by the law. It is questionable whether the treasurer has the authority to impose that requirement with no statutory basis.

Does the ZIP code collection requirement violate state privacy laws?

The California Supreme Court held last year that, based on credit card privacy rules, a retailer could not require a customer to provide a ZIP code to make a purchase with a credit card. New Jersey has adopted similar rules, though there are significant questions about whether they would apply in the unclaimed property context.

Does the ZIP code collection requirement violate the commerce clause?

As noted above, the Third Circuit did not address this question, and the issue has not been briefed extensively at the district court level.⁸ Substantial arguments remain that a ZIP code collection requirement, if applied to card issuers engaged in interstate commerce, may be sufficiently burdensome to violate the commerce clause. We have discussed this issue with counsel for all the plaintiffs in the litigation, and each has said that if New Jersey seeks to implement the data collection requirement, it would likely pursue that argument and introduce evidence of the significant burdens the requirement places on interstate commerce.

What are the penalties for noncompliance with the data collection requirement?

New Jersey law provides that a holder that fails to perform a duty required by the New Jersey Unclaimed Property Act is subject to a civil penalty of \$200 for each day the duty is not performed, up to a maximum of \$100,000. Accordingly, an issuer may reasonably argue that the maximum penalty for failure to collect ZIP codes is \$100,000. However, New Jersey could attempt to construe the penalty so that a failure to collect ZIP codes triggers multiple penalties (for example, on a per-store or per-card basis), each with a cap of \$100,000.

Next Steps for Plaintiffs and SVC Issuers?

The next step for the plaintiffs and New Jersey is to decide whether to file a motion for reconsideration of the Third Circuit's decision. That motion, which is probably unlikely, would have to be filed by January 20. Either party could also seek to appeal the Third Circuit's decision to the U.S. Supreme Court. We believe that such an appeal is also unlikely to be made and that if it were, it is unlikely to be granted certiorari by the Supreme Court. Accordingly, the decision will likely now be remanded to the district court to proceed on the merits of the parties' various claims (as noted above, the litigation thus far has focused only on the relatively narrow issue of whether a preliminary injunction should be granted for various aspects of the New Jersey Act).

As noted above, New Jersey will also be expected to produce guidance on the data collection requirement, primarily regarding whether it will become effective at all, and if so, when and under what circumstances.

Finally, we also understand that various industry groups and other parties are considering whether to support legislation to repeal the New Jersey Act or sharply limit the ZIP code collection requirement.

* * * * *

In light of the significant uncertainties still surrounding the New Jersey Act and its application in various situations, we would advise that SVC sellers and issuers with operations or customers in New Jersey seek the advice of counsel regarding the potential effect of the Act and the Third Circuit's decision on their card programs.

⁸ The district court did not reject the plaintiffs' commerce clause challenge outright, but it held that the plaintiffs had not submitted sufficient evidence with their motions for preliminary injunctions to meet their burden of establishing a likelihood of prevailing on the merits at trial. The plaintiffs are free to present additional evidence of the burden that collecting purchaser information imposes on national programs and to renew those arguments if the case proceeds on remand from the Third Circuit.

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Please direct any questions to the following members of Alston & Bird's unclaimed property practice group:

John L. Coalson, Jr.
john.coalson@alston.com
404.881.7482

Kendall L. Houghton
kendall.houghton@alston.com
202.239.3673

Ethan D. Millar
ethan.millar@alston.com
213.576.1025

Maryann H. Luongo
maryann.luongo@alston.com
202.239.3675

Michael Giovannini
michael.giovannini@alston.com
404.881.7957

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

BRUSSELS

Level 20 Bastion Tower
Place du Champ de Mars
B-1050 Brussels, BE
Phone: +32 2 550 3700

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

2828 N. Harwood St.
Suite 1800
Dallas, TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

4721 Emperor Boulevard
Suite 400
Durham, NC 27703-8580
919.862.2200

SILICON VALLEY

275 Middlefield Road
Suite 150
Menlo Park, CA 94025-4004
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.239.3300

www.alston.com

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