



## Unclaimed Property ADVISORY ■

**FEBRUARY 10, 2015**

### Zip, Zilch, Nada – New Jersey Repeals Its Requirement to Collect ZIP Codes from Gift Card Purchasers

Is the loss of major gift card distributors worth \$17.5 million? Governor Chris Christie of New Jersey says no. On February 5, 2015, Governor Christie signed into law legislation amending New Jersey's unclaimed property law to eliminate consumer data collection requirements imposed on retailers issuing stored value cards. That legislation is Senate Bill No. 2235 (S.2235/A.3480) modifying Senate Bill No. 1928 (see our prior advisory<sup>1</sup>), which imposed a requirement that issuers of stored value cards (SVCs) collect the name and address (and at a minimum, maintain the ZIP Code) of the purchaser or owner of the card starting on July 1, 2016.

According to the Office of Legislative Services (OLS), New Jersey's decision to eliminate this consumer data collection requirement will lower its Unclaimed Personal Property Trust Fund collections by \$17.5 million in FY 2023. Thereafter, the OLS expects the revenue loss to grow by 7.6 percent per year. Despite the predicted revenue loss, this legislation apparently recognizes that the consumer data collection requirements would be burdensome and costly for retailers and ultimately drive business out of New Jersey.

#### **New Jersey's Prior Attempts to Create First-Priority Property and Related Litigation**

In 2010, New Jersey enacted P.L. 2010, c. 25, to amend its Unclaimed Property Act to require the escheat of "stored value cards" after two years of inactivity, subject to certain exemptions. P.L. 2010 also instituted a "place-of-purchase" presumption that a stored value card sold or issued in New Jersey is sold to a New Jersey resident if the issuer does not have a record of the owner's or purchaser's name and address. The New Jersey Department of the Treasury interpreted such place-of-purchase presumption to effectively be a "third priority" rule.<sup>2</sup> Further, P.L. 2010 imposed the consumer

<sup>1</sup> <http://www.alston.com/Files/Publication/b2efbd0a-9037-47cf-b2f3-d6dc37f4d98f/Presentation/PublicationAttachment/c67d0bb3-a1e7-4d4b-b040-550c6805f09f/New%20Jersey%20Stored%20Value%20Card.pdf>

<sup>2</sup> Office of the State Treasurer, State of New Jersey, Treasury Announcement FY 2011-03, Guidance on Implementation and Notice of Exemption from Certain Provisions of L.2010, c.25, at 3 (Sept. 23, 2010).

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data collection requirements—i.e., issuers of SVCs must collect the name and address (and at a minimum, maintain the ZIP Code) of the purchaser or owner of the card.

The place-of-purchase presumption would have conflicted with the U.S. Supreme Court's priority rules and shifted a share of second-priority property to first-priority property in New Jersey's favor. More specifically, the presumption created by New Jersey's P.L. 2010 would have allowed New Jersey to step in front of the second-priority state by presuming the address of the owner to be in New Jersey if the card was purchased in New Jersey and no owner information were available. Under the second-priority rule, the state of an SVC issuer's domicile should have the right to escheat such property. Effectively, P.L. 2010 would have created a new first-priority rule such that New Jersey would have the first opportunity to escheat all SVCs that were sold or issued in New Jersey to the extent there was no last-known address information associated with such cards.

Accordingly, in *New Jersey Retail Merchants Association (NJRMA) v. Sidamon-Eristoff*, the U.S. Court of Appeals for the Third Circuit affirmed the U.S. District Court of New Jersey's granting of a preliminary injunction against the place-of-purchase presumption created by P.L. 2010 because the Supreme Court's escheat priority rules established in *Texas v. New Jersey* likely preempted the place-of-purchase presumption.<sup>3</sup> The Third Circuit stated that the "place-of-purchase presumption directly contradicts the second priority rule announced in *Texas*."<sup>4</sup> The court explained that under *Texas's* secondary priority rule, the holder's state of incorporation would have a valid claim to escheat the property. Accordingly, the court reasoned that "when the [holder] is not incorporated in New Jersey, it would be impossible for the Issuer to comply with both [the] place-of-purchase presumption and federal common law under Texas because two states cannot both escheat the same abandoned property."<sup>5</sup> The court similarly held that the New Jersey Treasury Department's interpretation of the presumption to be the equivalent of a third-priority rule "would stand as an obstacle to executing the purposes of the federal law."<sup>6</sup> Specifically, the third-priority rule would allow the third-priority state to infringe on the sovereign authority of the corporation's state of domicile, forcing a holder that is incorporated in a state that does not escheat the property at issue to turn over such property to the third-priority state, thereby "giv[ing] states the right to override other states' sovereign decisions regarding the exercise of custodial escheat."<sup>7</sup> The "ability to escheat necessarily entails the ability not to escheat," and "[t]o say otherwise could force a state to escheat against its will, leading to a result inconsistent with the basic principle of sovereignty."<sup>8</sup>

However, the Third Circuit held that the data collection requirement was likely not preempted, determining that such requirement is severable from the place-of-purchase presumption. The Third Circuit stated that "the consumer protection purpose of [P.L. 2010] evinces that the State Legislature intended the data collection provision to stand alone in case a related provision were struck down. [P.L. 2010] was enacted to ensure that SVC owners' rights to

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<sup>3</sup> *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3rd Cir. 2012). See also Alston & Bird's previous advisory for additional analysis: <http://www.alston.com/Files/Publication/4312b0aa-8d56-4ed4-94c3-019e13d3490f/Presentation/PublicationAttachment/93839b98-8c5e-4b03-9076-1e34d587e3de/12-045%20New%20Jersey%20Giftcards.pdf>.

<sup>4</sup> *N.J. Retail Merchants Ass'n*, 669 F.3d at 392.

<sup>5</sup> *Id.* at 393.

<sup>6</sup> *Id.* at 396.

<sup>7</sup> *Id.* at 395.

<sup>8</sup> *Id.* The Third Circuit also found that P.L. 2010 could not operate retroactively to require the escheat of SVCs issued prior to the July 1, 2010, effective date of the legislation, at least if the cards were redeemable only for merchandise/services and not cash. The court held that such retroactive application would violate the Contracts Clause of the U.S. Constitution.

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.”<sup>9</sup> Further, the Third Circuit rejected the argument that the data collection requirement is preempted because “Texas and its progeny ‘authorize [s]tates to require issuers of intangible property to collect the last known address of the purchaser and to rely on that address in reuniting the “owner” with the abandoned property.’”<sup>10</sup> Prior to the enactment of S. 2235, S. 1928 eliminated the place-of-purchase presumption but retained the data collection requirement with a delayed effective date of July 1, 2016.<sup>11</sup>

## Conclusion

New Jersey’s amendment to remove data collection requirements provides relief not only for SVC issuers but for all players in the SVC industry, including retailers, restaurants (including franchisees), brick and mortar stores, issuers and sellers of electronic or online gift cards and SVC distributors such as InComm and Blackhawk. Indeed, the *NJRMA* litigation was a reaction to what the industry perceived to be very burdensome new requirements for doing business in New Jersey, which if unchecked may have led to some of these players exiting the state entirely or ceasing to sell SVCs in New Jersey.

In light of this development, SVC issuers should review their current terms and conditions for gift cards and other agreements established in response to the data collection requirement. SVC issuers that have implemented or were planning to implement data collection requirements in anticipation of S. 1928 going into effect on July 1, 2016, may expose themselves to increased unclaimed property obligations in New Jersey if they do not revise such agreements.

In addition, SVC issuers should review the laws of other states, which may still have a place-of-purchase rule or data collection requirement in effect. For example, Nevada’s unclaimed property law currently provides that “[i]f a gift certificate is issued or sold in this State and the seller or issuer does not obtain and maintain in his or her records the name and address of the owner of the gift certificate, the address of the owner of the gift certificate shall be deemed to be the address of the Office of the State Treasurer in Carson City.”<sup>12</sup> Although such laws are very likely unconstitutional for the reasons articulated by the Third Circuit in *NJRMA*, issuers of SVCs should survey all applicable state laws and tailor their agreements for each state accordingly.

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<sup>9</sup> *Id.* at 397.

<sup>10</sup> *Id.*

<sup>11</sup> Senate Bill 1928 also lengthened the dormancy period for SVCs from two years to five years, made clear that the law only applied to SVCs issued on and after July 1, 2010, and required the escheat of 60 percent of the face value rather than the entire value.

<sup>12</sup> Nev. Rev. Stat. Ann. § 120A.520(2). It should be noted, however, that Nevada’s escheat provisions apply only to gift certificates that bear expiration dates. A gift certificate without an expiration date is exempt from escheat.

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