



# WEEKLY STATE TAX REPORT



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## Unclaimed Property

Under recently enacted legislation, New Jersey has adopted an aggressive posture towards the reportability of stored value cards (also known as gift cards). New Jersey law now requires reporting of SVCs if they remain unclaimed and without activity for two years and imposes the new reporting requirement retroactively. In contrast, most other states use a three-to-five-year dormancy if they claim SVCs at all. In this article, the authors discuss the progress of court challenges seeking to overturn the law on constitutional grounds and certain arguments that remain to be fully briefed and considered.

## Holders Fight New Jersey's New Stored Value Card Law, Finding That Not All Arguments Have Been Fully Redeemed

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### INTRODUCTION

**O**n June 30, 2010, the New Jersey Legislature passed A.B. 3002, making significant changes to New Jersey's unclaimed property laws.<sup>1</sup> Estimated to bring in \$80 million for the state for fiscal year 2011, the new law provides shorter dormancy periods

for certain property types, removes a long-standing exemption from unclaimed property reporting for stored value cards (SVCs)<sup>2</sup> and reaches back to claim cards issued prior to the effective date of the law, institutes a new requirement for holders to maintain name and address data on all gift cards issued or sold in New Jersey, and includes a "place of purchase presumption" for reporting SVCs with no related address on the issuer's

<sup>2</sup> The New Jersey law provides a broad definition of SVCs, which would include gift cards as well as gift certificates. The definition states:

"Stored value card" means 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 upon 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

<sup>1</sup> 2010 N.J. Laws Ch. 25 (effective, July 1, 2010).

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books and records.

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**Companies holding unclaimed property launched an organized and effective campaign to push back on these widespread changes.**

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Companies holding unclaimed property (known in the unclaimed property realm as “holders”) launched an organized and effective campaign to push back on these widespread changes in the New Jersey unclaimed property law, citing their unconstitutionality and unfairness. While New Jersey would not back down on the place of purchase presumption, the state Department of the Treasury extended the deadlines for compliance with other aspects of the law and provided limited exemptions from the rules in a series of administrative bulletins called Treasury Announcements.

On Sept. 30, 2010, and Oct. 5, 2010, the New Jersey Retail Merchants Association (NJRMA) and the New Jersey Food Council<sup>3</sup> (collectively “plaintiffs”) respectively filed suit in the U.S. District Court for the District of New Jersey, raising several constitutional challenges to the SVC provisions of the law under the U.S. Supremacy Clause (federal preemption), the Contracts Clause, the Takings Clause, the Due Process Clause (substantive due process), the Commerce Clause, and the Full Faith and Credit Clause. Plaintiffs also moved to preliminarily enjoin the state from implementing Chapter 25 during the pendency of these cases. The federal district court enjoined enforcement of the place of purchase presumption<sup>4</sup> as violating the established jurisdictional priority rules set forth in *Texas v. New Jersey*,<sup>5</sup> as well as the retroactive application of the law to SVCs issued prior to the date of enactment, to the extent such SVCs were redeemable solely for merchandise or services. The state immediately appealed the injunctions to the U.S. Court of Appeals for the Third Circuit.<sup>6</sup> However, this article describes and explores three arguments presented to the district court that have not, to date, received as much attention nor had as much traction in this litigation:

- First, U.S. District Court Judge Freda L. Wolfson ruled against the claim that the federal Credit Card Accountability, Responsibility and Disclosure Act of 2009 (CARD Act) preempts New Jersey from establishing a two-year dormancy period for SVCs. The court believes it is possible to comply with both the federal CARD Act and the New Jersey law, thus defeating the plaintiffs’

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<sup>3</sup> American Express also filed suit challenging the shortening of the dormancy period applied to traveler’s checks, and American Express Prepaid Cards similarly challenged provisions of the law that pertained to SVCs. *American Exp. Travel Related Svcs. Co. Inc. v. Sidamon-Eristoff*, —F. Supp.2d —, 2010 WL 4722209 (D.N.J. Nov. 13, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> 379 U.S. 674 (1965).

<sup>6</sup> *New Jersey Retail Merchants Assn. v. Sidamon-Eristoff*, No. 10-cv-05059 (D.N.J. Jan. 30, 2010), order (3rd Cir. Feb. 8, 2011) and *New Jersey Food Council v. Sidamon-Eristoff*, No. 10-cv-05123 (D.N.J. Oct. 5, 2010), order, (3rd Cir. Feb. 8, 2011); *New Jersey Retail Merchants Assn. v. Sidamon-Eristoff*, No. 10-cv-05059 (D.N.J., brief for appellants filed March 17, 2011).

preemption argument. We think that there are additional possible arguments that may be made under the doctrine of obstacle preemption that support preventing New Jersey from instituting its aggressive dormancy period for SVCs.

- Second, the derivative rights doctrine, an argument that was noted, but not reached, by the judge in her decision, provides a strong basis for an argument that issuers of unredeemed SVCs that are redeemable only for merchandise and services, and not for cash, do not hold a property interest to which New Jersey may assert a derivative claim, by stepping into the shoes of an SVC owner.

- Third, in light of the state’s continued assertion that it may enforce a ZIP Code collection and maintenance requirement, the question remains as to whether ZIP Code data constitutes a sufficient basis for a state to require reporting of SVCs under the first priority jurisdictional rule established in *Texas v. New Jersey*, or whether a “mailing-sufficient” address is needed.

After setting forth the background to this multi-pronged dispute, we will address each of these arguments in turn.

## SUMMARY OF CHANGES

New Jersey’s SVC law made sweeping changes to New Jersey’s unclaimed property laws. This article focuses on the changes relevant to SVCs, although changes were also made to the unclaimed property laws applying to holders of travelers’ checks and money orders.<sup>7</sup> These changes represent a sea change, in that New Jersey previously treated gift cards as exempt from its unclaimed property laws, and New Jersey’s aggressive posture toward the reportability of SVCs extends beyond the position of most other states. First, New Jersey eliminated its long-standing exemption from unclaimed property reporting for SVCs. New Jersey law as enacted requires reporting of SVCs if they remained unclaimed and without activity for two years (most states use a three-to-five year dormancy period, if they claim SVCs at all), and imposes the new reporting requirement retroactively.

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**New Jersey requires reporting of the full value of the SVC on the date the SVC is presumed abandoned.**

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Further, New Jersey requires reporting of the full value of the SVC on the date the SVC is presumed abandoned and does not allow the holder to retain its profit margin (e.g., if a holder in its business generally makes a profit of 40 percent on the sale of merchandise, many states permit the holder to retain this profit margin when it reports SVCs on the basis that the holder would have realized the profit margin on the goods/services

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<sup>7</sup> Additional provisions include: §3 (reduction in dormancy period for money orders to three years); §4 (limitations on imposition of dormancy fees on travelers’ checks and money orders); §6 (reimbursement of holder making claim for property); §8 (reimbursement of holder paying claim).

purchased with the SVC). The New Jersey law also requires issuers of SVCs to obtain the name and address of the purchaser or owner of SVCs issued or sold and to maintain at least the ZIP Code of the owner or purchaser. However, subsequent Treasury Announcements have reduced this requirement to collection and maintenance of only ZIP Codes.<sup>8</sup> If such data is not maintained, the address of the owner or purchaser of the SVC shall be deemed to be where the SVC is purchased or issued and shall be reported to New Jersey if the place of business where the SVC was sold or issued is located in New Jersey.<sup>9</sup> This new priority regime is referred to as a “place of purchase presumption.” Finally, New Jersey law as enacted prohibits the imposition of dormancy fees on such SVCs.

In response to these dramatic changes, holders reached out to the Department of Treasury to discuss these provisions. The conversations with the department resulted in issuance of administrative Treasury Announcements making the following changes:

- the department would delay its enforcement of the provision requiring collection and maintenance of ZIP Codes;<sup>10</sup>
- the department interpreted the retroactive effect of the new law to be limited to a set look-back period, rather than open-ended;<sup>11</sup> and
- the department indicated that it interpreted the law to afford certain limited exemptions to certain types of SVC issuers, as described in Announcement FY 2011-03.<sup>12</sup>

## CASE BEFORE DISTRICT AND APPEALS COURTS

As noted above, the plaintiffs challenged the constitutionality of the New Jersey law on multiple grounds. The relief requested was injunctive and declaratory in nature; Judge Wolfson’s decision on Jan. 14, 2011, therefore focused on whether an injunction should be issued. Critical to this determination was Judge Wolfson’s assessment of the likelihood of plaintiffs’ success upon full adjudication of their substantive claims.<sup>13</sup> The

<sup>8</sup> New Jersey Treasury Announcement FY 2011-03 (Sept. 23, 2010).

<sup>9</sup> This section does not apply to a stored value card that is 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 and this section does not apply to a stored value card issued by any issuer that in the past year sold SVCs with a face value of \$250,000 or less. For purposes of this subsection, sales of SVCs by businesses that operate either (1) under the same trade name as or under common ownership or control with another business or businesses in the state, or (2) as franchised outlets of a parent business, shall be considered sales by a single issuer.

<sup>10</sup> New Jersey Treasury Announcement FY 2011-01 (July 1, 2010).

<sup>11</sup> New Jersey Treasury Announcement FY 2011-02 (Aug. 26, 2010).

<sup>12</sup> New Jersey Treasury Announcement FY 2011-03 (Sept. 23, 2010); New Jersey Treasury Announcement FY 2011-04 (Oct. 26, 2010).

<sup>13</sup> The judge’s analysis turned on whether the movant “has shown a reasonable probability of success on the merits.” Furthermore, as noted in the judge’s decision, in addition to whether the movant has shown a reasonable probability of

state opposed plaintiffs’ motions for injunctive relief, and moved to dismiss the complaints on immunity and/or abstention grounds.

On Nov. 13, 2010, the district court granted a preliminary injunction to the plaintiffs preventing the state from enforcing the place-of-purchase presumption found in Chapter 25, §5c, and related guidance. The district court further enjoined the state from enforcing Chapter 25 retroactively against issuers of SVCs with existing SVC contracts that obligated the issuers to redeem the cards solely for merchandise or services. On Dec. 21, 2010, the plaintiffs appealed the district court’s Nov. 13, 2010, denial of certain requests for preliminary injunction.

### The plaintiffs challenged the constitutionality of the New Jersey law on multiple grounds.

#### The relief requested was injunctive and declaratory in nature.

The language in the judge’s original order enjoined enforcement of §5c, which includes both the place-of-purchase presumption and the ZIP Code collection and maintenance requirements. Holders asked the judge to clarify whether she had enjoined the ZIP Code collection requirement as well as the place of purchase presumption, and in her order dated Jan. 14, 2011, the judge confirmed that only the place of purchase presumption was enjoined from enforcement; the ZIP Code collection and maintenance requirement could be enforced.

On Jan. 20, 2011, the plaintiffs moved for injunctive relief of such requirement to the Third Circuit Court of Appeals, and on Feb. 8, 2011, the full panel issued an injunction preventing enforcement of the ZIP Code requirement as well.<sup>14</sup> On Feb. 17, 2011, the court of appeals set a briefing schedule for the remaining outstanding issues.

## ARGUMENTS NOT FULLY REDEEMED

There are three issues we believe warrant closer review. First, we believe the district court’s conclusion that preemption did not occur was made absent an understanding of how the new law, along with New Jersey’s administrative practice, does serve as an obstacle to the realization of the objectives of Congress in enactment of the CARD Act.

Second, the derivative rights doctrine should preempt state requirements for holders to report dormant

success on the merits, the remaining preliminary injunction factors are: (1) whether the movant will be irreparably injured by denial of the relief; (2) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (3) whether granting the preliminary relief will be in the public interest. *See Crissman v. Dover Downs Entertainment Inc.*, 239 F.3d at 364 (3rd Cir. 2001).

<sup>14</sup> *New Jersey Retail Merchants Assn. v. Sidamon-Eristoff*, No. 10-cv-05059 (D.N.J.), (3rd Cir. Jan. 31, 2011) (order granting temporary injunction).

SVCs redeemable only for merchandise and services. The district court did not reach this argument in its decision, based on its determination that the Contracts Clause rendered the retroactive application of the law to SVCs that were redeemable solely for goods and services to be unconstitutional.

Third, there was no discussion of what New Jersey plans to do with the ZIP Code data maintained by holders. Hence, the question of whether ZIP Codes may be utilized as a basis to assert a first-priority claim to SVCs has not yet been developed. Many SVC users, in addition to certain states, have understood that a mailing-sufficient address is required in order to effectuate first-priority reporting of unclaimed SVCs.

### **New Jersey Law May Provide Obstacles to the Federal CARD Act**

New Jersey unclaimed property law now requires issuers of gift cards to escheat the funds from those cards after a dormancy period of two years.<sup>15</sup> However, the CARD Act requires owners of SVCs to be able to redeem such SVCs for five years; or said a different way, requires issuers of SVCs to honor their SVCs for five years.<sup>16</sup> Thus, the plaintiffs have argued that the New Jersey statute requiring reporting after two years should be preempted by this federal law requiring issuers to give owners at least five years to redeem their SVCs. We believe that this argument has more facets to it than acknowledged by the district court in its opinion, because the plain language of the federal statute, the relevant legislative history, and the administrative process New Jersey requires for claimants to use to claim their SVCs reported to the state may support the conclusion that the New Jersey law is an “obstacle to the accomplishment and execution of the objectives and purposes of Congress.”<sup>17</sup>

### **Background**

Federal preemption doctrine is grounded in the Supremacy Clause of the U.S. Constitution, which states, “This Constitution and the Laws of the United States . . . shall be the supreme law of the land.”<sup>18</sup> Therefore, if state law conflicts with federal law, it is invalid. The courts recognize two types of federal preemption—the first type is “express preemption,” which occurs when a federal statute expressly invalidates state law in a specific area; the second type is “implied preemption.”<sup>19</sup> Implied preemption is divided into two sub-types: impossibility preemption and obstacle preemption.<sup>20</sup> Impossibility preemption occurs when it is impossible for an actor to comply with both the federal and state statutes at the same time.<sup>21</sup> Obstacle preemption occurs when the state statute acts as an “obstacle to the accomplishment and execution of the objectives and pur-

poses of Congress.”<sup>22</sup> Identifying an instance of obstacle preemption entails a factual analysis which requires courts to weigh all the relevant factors. The U.S. Supreme Court has stated that determining whether a state law poses a sufficient obstacle to congressional purpose is “a matter of judgment and a court must examine the federal statute as a whole and identify its purpose and intended effect.”<sup>23</sup>

### **Requirements of Federal CARD Act And New Jersey Provision**

The CARD Act states in relevant part that a gift card/SVC must not contain an expiration date “earlier than 5 years after the date on which the gift certificate was issued, or the date on which card funds were last loaded to a store gift card or general-use prepaid card.”<sup>24</sup>

New Jersey legislation states that “a stored value card for which there has been no stored value card activity for two years is presumed abandoned.”<sup>25</sup> Thus, an issuer who has sold a SVC within the state of New Jersey is required to escheat that revenue to the state after two years if there has been no activity on the card.

Once property has been reported to the New Jersey Treasurer, the New Jersey Treasurer’s website states that for an owner to file a claim for unclaimed property, the owner/claimant must conduct a search for the claimant’s name in the New Jersey database, complete a claim inquiry form (available online), print out the form and mail it to the New Jersey Office of Unclaimed Property.<sup>26</sup> Once this form has been completed and received, a claim will be processed and a claim packet will be mailed to the claimant.<sup>27</sup> It is not clear from the website the steps to be taken after the claim packet is received by the claimant. However, it appears that retrieving unclaimed property from New Jersey is rather involved and requires several steps.

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### **An issuer who has sold a SVC within New Jersey is required to escheat that revenue to the state after two years if there has been no activity on the card.**

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The two-year dormancy period imposed by the new state law may be seen as a substantial obstacle to the congressional intent of the CARD Act based on the plain language of the CARD Act, the legislative record, and the administrative obstacles to making a successful owner claim to an abandoned SVC in New Jersey. As a result, we think there are two points that could be further developed by holders challenging the New Jersey

<sup>15</sup> N.J. Stat. Ann. §46:30B-42.1.

<sup>16</sup> Federal CARD Act, 15 U.S.C. § 16931-1(c)(2)(A) (2009).

<sup>17</sup> *Gade v. National Solid Waste Management Assn.*, 505 U.S. 88, 98 (1992).

<sup>18</sup> U.S. Const. art. VI, §2, cl. 2.

<sup>19</sup> *English v. General Electric*, 496 U.S. 72, 78-79 (1990).

<sup>20</sup> *Id.*

<sup>21</sup> *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 143-144 (1963).

<sup>22</sup> *Gade*, 505 U.S. at 98.

<sup>23</sup> *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000).

<sup>24</sup> 15 U.S.C. § 16931-1(c)(2)(A).

<sup>25</sup> N.J. Rev. Stat. §46:30B-42.1.

<sup>26</sup> New Jersey Office of Unclaimed Property, Claimant Information, <http://www.unclaimedproperty.nj.gov/file.shtml> (last visited March 21, 2011).

<sup>27</sup> *Id.*

statute. First, New Jersey unclaimed property law is not more protective than the CARD Act due to the difficult administrative burdens placed on owners trying to claim funds from the state and aggregate reporting; and second, the purpose of the law as set forth in the legislative history is frustrated by the difficult administrative process required of owners and aggregate reporting.

### **New Jersey UP Law Not More Protective Than the CARD Act**

The district court concluded that the New Jersey law is more protective of consumers than the CARD Act because it allows holders to redeem the gift cards indefinitely, much longer than the five years required by the federal act. We are concerned that the court was not aware of, and therefore did not consider the difficult administrative requirements for owners to claim their funds if the issuer refuses to redeem the card because the issuer reported it to the state.

After two years of inactivity, issuers are required to escheat the value of the unredeemed SVC to the state and, in turn, will be relieved of the liability on the SVC. If, after this two-year period has elapsed, the owner of the SVC attempts to redeem the SVC from the issuer, the issuer may refuse to redeem the SVC because the issuer has been relieved of the liability related to the SVC by virtue of escheating the value of the SVC to the state. Based on the language of the federal statute, congressional intent was to allow holders to redeem their gift cards for five years; however, the New Jersey statute requires holders to report unclaimed SVCs after only two years and thereafter relieves the holder of liability to the owner of the SVC. The reporting requirements, as a result, act as an obstacle to the congressional purpose of allowing owners of gift cards to redeem their cards without interference for a full five years.

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**Holders could argue that the New Jersey law runs afoul of congressional intent and the purpose of the federal CARD Act and, hence, the state law may be invalidated under the doctrine of federal preemption.**

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The district court stated that the specific congressional purpose of the five-year expiration date on gift cards is to grant consumers access to their funds; however, the court cites no legislative history to support this specific conclusion.<sup>28</sup> The relevant legislative history states that congressional intent in enacting this portion of the statute is to allow consumers to *redeem* their gift cards for five years and does not mention consumer “access to funds.”<sup>29</sup> Thus, the requirement that issuers must turn over the funds from an unredeemed SVC to the state after two years seems to run contrary to the in-

tent of the federal CARD Act that the cards remain outstanding for five years. Because the issuer is relieved of liability related to the SVC upon reporting, owners may be forced to go to the state to obtain the value of their SVCs. The owner can theoretically obtain the cash value of the card from New Jersey, but she is not able to simply walk into the store and redeem the card.

In addition, we believe that the district court assumed in its discussion of this issue that owners of SVCs could simply go to the state and retrieve their funds that were reported to the state after the two-year dormancy period expired.<sup>30</sup> It appears that while owners of SVCs that have escheated to the state can file a claim with the state with respect to the funds attached to reported SVCs, this administrative claims process is quite complicated and may involve a considerable amount of time. Congress did not envision, and it certainly did not approve, of such obstacles being placed in the path of a SVC owner who wants to redeem his or her card for services or merchandise within the five-year expiration period established by the federal CARD Act.<sup>31</sup>

For example, between years two and five that a SVC remains outstanding, a SVC owner would have to go to New Jersey and file at least two forms and in all likelihood wait a considerable amount of time to receive the funds attached to the escheated card.<sup>32</sup>

Based on the foregoing, holders could argue that the New Jersey law runs afoul of congressional intent and the purpose of the federal CARD Act and, hence, the state law may be invalidated under the doctrine of federal preemption. Plaintiffs may wish to revisit this argument and to stress that the conflict that arises between the New Jersey SVC reporting regime, as it would actually be implemented, and federal legislative intent, does support the application of the federal preemption doctrine in this instance.

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<sup>30</sup> *American Express Travel Related Services Co. Inc.*, 2010 WL 4722209 at \*28.

<sup>31</sup> There is uncertainty regarding reporting of SVCs in the aggregate. N.J. Rev. Stat. §46:30B-47 allows reporting of property valued at \$50 or less to be reported to New Jersey in the aggregate (all property reported as one lump sum rather than individual property items, and without owner name and address data). Note that there is no statutory exception with respect to SVCs. Yet, guidance published by New Jersey in October 2010 specific to the reporting of SVCs states that holders may report SVCs valued at less than \$5 in the aggregate. In contrast to this guidance, the 2010 New Jersey Holder Packet (updated Dec. 2, 2010) states that SVCs may not be reported in the aggregate. Although there is no statutory exception for SVCs in the aggregate reporting provisions, the state seems to have adopted a policy that either SVCs may not be reported in the aggregate, or only SVCs valued at less than \$5 may be reported in the aggregate. Nevertheless, reporting SVCs in the aggregate presents an additional obstacle for owners attempting to claim property from the state, because there would be no record with the state identifying the owner of an SVC that is reported in the aggregate. This renders it even more difficult to claim such property from the state.

<sup>32</sup> New Jersey Office of Unclaimed Property, Claimant Information, <http://www.unclaimedproperty.nj.gov/pdf/SVCsandPaycar%20ReportingGuidelines-2010.pdf> (last visited March 22, 2011); New Jersey Office of Unclaimed Property, Claimant Information, <http://www.unclaimedproperty.nj.gov/file.shtml> (last visited March 21, 2011).

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<sup>28</sup> *American Express Travel Related Services Co. v. Sidamon-Eristoff*, 2010 WL 4722209 at \*28 (D.N.J. 2010).

<sup>29</sup> 155 Cong. Rec. S. 5468-02; H.R. REP. 111-314

## Derivative Rights Doctrine

While Judge Wolfson referred to the “derivative rights doctrine” in her opinion, this basis for challenging the validity of the New Jersey law has not yet been fully argued or considered in the New Jersey litigation. The derivative rights doctrine recognizes that no state has greater or additional rights to abandoned or unclaimed property than the owner on whose behalf the state takes custody of such property. This is because unclaimed property laws are designed (and supported by public policy) to provide a procedural mechanism to return missing property to its rightful owner. Therefore, when a state claims unclaimed property from a holder, it does so as custodian for the owner, who may reclaim it from the state at any time.<sup>33</sup> As custodian, the state acts on behalf of the true owner of the property and derives its rights to claim the property from that owner. The supreme court itself has recognized this fundamental principle as the “derivative rights doctrine” and affirmed the decision in *New Jersey v. Standard Oil Co.*,<sup>34</sup> holding that “The State’s right is purely derivative: it takes only the interest of the unknown or absentee owner.” This principle, which assumes the form of federal common law in both *Standard Oil* and later in *Delaware v. New York*,<sup>35</sup> should preempt New Jersey from requiring issuers of SVCs redeemable only for merchandise and/or services to be reported to the states as cash after a dormancy period and later redeemed for cash by owners.

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When this doctrine is considered in the context of a SVC, its relevance to the New Jersey litigation becomes clear. A stored value card represents an obligation to provide merchandise or services to the owner of the card. An SVC owner typically does not have the right to demand cash from the SVC issuer, either in the form of a refund or in the form of payment of the remaining balance after a SVC has been partially redeemed. Under these circumstances, since the state “steps into the shoes” of the owner for purposes of claiming unclaimed property, the state should likewise not be entitled to demand cash from the card issuer. If the state were entitled to demand cash, the state would have an interest in the unclaimed property that is greater than that of the SVC owner. Furthermore, were a state permitted to

<sup>33</sup> Modern unclaimed property laws, which are custodial in nature, may be distinguished from true “escheat” laws, which effectuated a transfer in title to the property from the rightful owner to the state.

<sup>34</sup> *New Jersey v. Standard Oil Co.*, 74 A.2d 565, 573 (1950), *aff’d.*, 341 U.S. 428 (1951).

<sup>35</sup> *Delaware v. New York*, 507 U.S. 490 (1993).

claim cash for an unredeemed SVC, there would be nothing to stop the SVC owner, on whose behalf the state acted, from claiming that cash back from the state, thereby accomplishing indirectly (that is, through the unclaimed property provisions) what he could not do directly based on his rights under the gift card contract. Despite the public policy informing unclaimed property laws, to return property to its rightful owner, such laws were never intended to *enlarge* the rights of property owners vis-à-vis holders in this manner.<sup>36</sup>

The district court cites to a recent article that explicates the “conundrum posed by the escheatment of merchandise and service based SVCs”:

“The question then arises as to whether there is property to escheat. If the originator of an electronic instrument or stored value card has an obligation to the owner to redeem unused value, the originator would be deemed a “holder” of unclaimed property and should fall under a state escheat statute’s general provision. For example, if a stored value card represents cash that can be converted back into cash upon demand, the unused funds should be deemed reportable and subject to escheatment. A stored value card that does not require an obligation to redeem the unused value into cash, however, would not be abandoned property. Although there may be value on the card, there is no ‘property’ to escheat.”

[Citation omitted.] Of course, as Texas directs, state law determines the contours and terms of the debtor credit relationship in the SVC context. So, the question posed by the author in this passage—whether there is any “property” to escheat—must be resolved in this case by turning to New Jersey state law.<sup>37</sup>

While the district court granted injunctive relief to issuers of SVCs that are redeemable solely for merchandise and services based on its Contracts Clause analysis,<sup>38</sup> the state has appealed this ruling to the Third Cir-

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<sup>36</sup> A conceptually related, but legally different basis for challenging the New Jersey law, lies in the fact that when the holder of a SVC is required to escheat the full face value, it is deprived of its expected profit margin on the sales of goods and services for which the SVC would be redeemed. New Jersey’s escheat of SVCs arguably violates this distinct public policy, because the escheat deprives the card issuer of its profit from the sale of the card. To the extent that a SVC is redeemable solely for merchandise and services, and not for cash, the issuer has made a profit on the sale of the card equal to the profit margin of the merchandise or services for which the card will ultimately be redeemed. Thus, although the card issuer may not know the exact amount of profit that it will make on the sale of the card, it knows it will make some profit. *See, e.g., Service Merchandise Co. v. Adams*, 2001 WL 34384462 (Tenn. Ch. Ct.), holding, “Plaintiff, upon the sale of a gift certificate, retains a contractually created property right in its anticipated gross profit.” However, if New Jersey were allowed to escheat the amount paid or the face value of the SVC, the State would be depriving the issuer of the expected profit from the sale of the gift card, *thus making the issuer worse off than it would have been had the gift card actually been redeemed by the owner*. The district court rejected this basis for challenge, but we expect it may be re-argued to the Third Circuit.

<sup>37</sup> *American Exp. Travel Related Svcs.*, 2010 @L 4722209 at 30.

<sup>38</sup> The decision states in this regard: “. . . here, the card issuers are obligated to provide only merchandise or services. The gift card issuers have, thus, demonstrated that their right

cuit. Therefore, the alternative ground for challenging New Jersey's claim to noncash-refundable SVCs that inheres in the derivative rights doctrine may well be an important argument that plaintiffs present to the Third Circuit. Moreover, this argument applies to SVCs that are issued *subsequent* to the effective date of the law, whereas the district court relied upon the Contracts Clause to invalidate the law only on a retroactive basis.

### **ZIP Code Is Not Mailing-Sufficient Address**

One question left unanswered is what New Jersey plans to do with the ZIP Code data maintained under the new law. Section 5c of New Jersey's SVC law also requires holders to collect name and address data of owners or purchasers of SVCs, and to maintain, "at a minimum," a record of the ZIP Code of the owner or purchaser.<sup>39</sup> This provision initially had an effective date of July 1, 2010, but holders/issuers worked to get an extension from the New Jersey Treasurer due to the extensive resources and changes that would need to be made to holder/issuer point of sale systems in order to collect and maintain the required data.<sup>40</sup> Many issuers of SVCs do not maintain name and address or ZIP Code data of the purchasers of SVCs. There are a few reasons for this including (1) owners/purchasers do not want to provide the information, and (2) the point of sale system does not have the capability to collect and maintain such data.

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#### **One question left unanswered is what New Jersey plans to do with the ZIP Code data maintained under the new law.**

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Because New Jersey currently takes the position, pursuant to Treasury Announcement 2011-3, that holders need only collect and maintain ZIP Codes of SVC

to earn and retain their profit is substantially impaired by the statute. Accordingly, I conclude that the gift card issuing SVC Plaintiffs have demonstrated a likelihood of success on their Contract Clause claim, and hereby enter a preliminary injunction enjoying the application of Chapter 25 to issuers of gift cards, retroactively, to the extent that the legislation affects existing contracts between gift card issuers and purchasers/owners." In a footnote to this passage, the decision states that "Plaintiff Food Council argues that the escheat of its profit violates the derivative rights rule under the New Jersey state constitution, contending that a state may not escheat greater rights than those held by the rightful owner. In light of my Contracts Clause ruling in Food Council's favor, I need not reach this state constitutional issue."

<sup>39</sup> Chapter 25, §5c states: "An issuer of a stored value card shall obtain the name and address of the purchaser or owner of each stored value card issued or sold and shall, at a minimum, maintain a record of the ZIP Code of the owner or purchaser. If the issuer of a stored value card 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."

<sup>40</sup> See Treasury Announcements 2011-1 through 2011-6.

purchasers, the question arises as to how the state intends to utilize this data—New Jersey must have a reason for imposing this onerous ZIP Code collection requirement that runs contrary to the practices of many issuers. No other states have enacted a similar law requiring collection and maintenance of name and address or ZIP Code information from owners or purchasers. We assume that New Jersey will utilize ZIP Code data maintained by SVC issuers to require such issuers to report unclaimed SVCs with a New Jersey ZIP Code under the first priority rule (discussed below) to New Jersey, even if the remainder of the SVC's purchaser address is missing.

*Texas v. New Jersey*<sup>41</sup> established two jurisdictional priority rules for reporting property that has been deemed abandoned. First, property is reported to the state of the "last known address of the creditor, as shown by the debtor's books and records." Second, if there is no address on the debtor/holder's books and records, the property is reported to the state of incorporation of the holder. In its decision, the U.S. Supreme Court in setting the first priority rule, stated that the first priority rule left a question in only two contexts: (1) where there is no address at all on the debtor/holder's books and records; and (2) where the last known address of an owner is in a state which does not provide for the escheat of the property. The decision did not discuss what constitutes an "address," nor did it discuss a situation where the holder's books and records evidence only a partial address or simply a ZIP Code.

Many states have adopted either the 1981 Uniform Unclaimed Property Act or the 1995 Uniform Unclaimed Property Act. Both acts follow *Texas v. New Jersey* to establish the priority rules for reporting presumed abandoned property to the state. However, the 1981 act defines the term "last known address" as "a description of the location of the apparent owner sufficient for the purpose of the delivery of mail." The 1995 act did not include the term "last known address" in its definitions section. The comment to the definitions section notes the omission of this definition and states that "the [1981] Act indicated some uncertainty over whether this was an accurate interpretation of *Texas v. New Jersey*, since this definition was accompanied by a Commissioners' comment that 'where a holder originally had the address of the owner and it has been subsequently destroyed, a computer code may be one way of establishing an address within the state.'"

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#### **The court's focus on the "place of purchase presumption" in its decision is correct—that requirement certainly contradicts the two-prong priority rules laid out by the U.S. Supreme Court.**

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New Jersey had adopted the 1981 Model Act, but has since made many changes to its unclaimed property provisions. New Jersey had adopted the definition of

<sup>41</sup> 379 U.S. 674 (1965). See also *Pennsylvania v. New York*, 407 U.S. 206 (1972); affirmed by *Delaware v. New York*, 507 U.S. 490 (1993).

“last known address,” but amended its unclaimed property law to delete such definition (along with a few other definitions) in 2002.<sup>42</sup> Note that while the New Jersey statute was amended to repeal the definition of “last known address,” New Jersey regulations still defines that term consistent with the 1981 Act.

The court’s focus on the “place of purchase presumption” in its decision is correct—that requirement certainly contradicts the two-prong priority rules laid out by the U.S. Supreme Court. However, that is not the only issue related to jurisdictional priority. The term “address” must be interpreted to determine whether a ZIP Code is sufficient for first priority jurisdiction. The term “address” used by the Supreme Court generally implies more than a ZIP Code—if an owner or purchaser is asked for his or her “address,” the owner or purchaser is likely to: (1) provide a street number, street address, city, state and ZIP Code; or (2) refuse to give any information to the seller/issuer. In addition, *Texas v. New Jersey* also noted that the rules needed to address situations where there was “no address” which seems to imply that a full address is the only acceptable address for first priority jurisdiction. In instances where there is no address or a partial address, the second priority claim is implicated.

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**If the ZIP Code is found to be insufficient for reporting property under the first priority rule, will the Treasurer repeal the Treasury Announcement requiring holders to maintain only ZIP Codes rather than complete address data?**

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<sup>42</sup> Pub. L. No. 2002, c. 35. The deletion of the “last known address” definition occurred in 2002, separate from the revision to the unclaimed property law in 2010.

plete address data? The statutory language actually requires that only the ZIP Code be maintained, stating: holders must “maintain at a minimum the ZIP Code.” Repealing the Treasury Announcement does not change the statutory provision authorizing holders to maintain only ZIP Codes. If the ZIP Code is invalidated as a basis for first priority jurisdiction, and holders collect only ZIP Codes pursuant to the statutory language, holders would report such property under the second priority rule because they had address data insufficient for first priority reporting.

As the parties filed their briefs with the Third Circuit, we wait to see if this argument is raised to the court, in which case the court’s views on what constitutes an “address” for purposes of determining jurisdictional priority rules would certainly be precedential.

## CONCLUSION

The discussions addressed in this article are those not focused on in the district court’s decision to grant injunctive relief, and that have not yet been presented to the Third Circuit Court of Appeals. We believe that the concept of obstacle preemption should be considered due to the inability of owners to redeem their SVCs for five years in New Jersey due to difficult administrative provisions for claiming property. Second, the derivative rights doctrine may serve as a basis for nonreporting by holders of SVCs redeemable for merchandise and services. Finally, we along with holders, wait to see if the question of what New Jersey plans to do with the ZIP Code data is further explored, and if New Jersey uses such data to require holders to report under the first priority rule with only ZIP Code data, is that sufficient under *Texas v. New Jersey*?

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