

BANK ACCOUNTS UNDER PRESSURE

How to Navigate Reduced Dormancy Periods and Manage Inactivity Rules

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In the banking world, unclaimed property compliance can often take a backseat to other critical issues; however, it is no less significant than other compliance considerations when you weigh the potential effects on customer retention, reputation management and the business of banking.

Customer relationships are the bedrock for banking success, but if assets that consumers have entrusted to your bank are escheated to the state (especially to the wrong state), those relationships could be in jeopardy – or worse, terminated altogether.

Every year, millions of dollars in banking assets are escheated, and banks are left to follow up and attempt to resolve issues from irate customers, and consequently, face lost revenue. With compliance laws constantly changing and varying from state to state, it is important to not only understand unclaimed property issues at a fundamental level, but also the steps you can take to reduce the risk of escheatment and increase the retention rate for customer accounts and their assets.

The Challenge of Dormant Bank Accounts

While there are more than 100 types of unclaimed property, the most common examples

of reportable unclaimed property relative to banks include savings accounts, checking accounts, certificates of deposit, property held in escrow or the trust department and the contents of safe deposit boxes.

These accounts become “at risk” of becoming unclaimed property when they are deemed “presumed abandoned” (“dormant”). Dormant status occurs primarily when there has been no “owner-generated” activity on the account for a specified period of time called the dormancy period. A second, but much less common dormancy trigger is if physical mail sent to a customer is returned from the post office as “undeliverable”. A third trigger pertinent specifically to banks is when customers fail to pay the applicable fees for the maintenance of their safe deposit box. In general, most states will consider an active account sufficient for the purposes of linking to the other dormant accounts, making them ineligible for escheatment. Important note: The owner of record should be the same on all accounts.

In all of these circumstances, if the account owner does not take action to remove the dormant status, the account must be reported and remitted to the state of the owner's address once the dormancy period for that type of property has expired. Generally speaking, dormancy periods for banking property range from 3 to 5 years.

Customer Confusion

Despite the pervasive nature of unclaimed property laws, most Americans are unfamiliar with the concept of unclaimed property and the simple reality that banks are legally bound to turn dormant accounts over to the states. Most consumers simply don't keep track of all of their accounts on a regular basis and don't update their personal account information when necessary—for instance with a change of name or mailing address. Quite logically, many customers assume that once their assets have been entrusted to a bank that the money is safe. For many, these accounts are out of sight and out of mind, safely guarded until the time in the future when they decide to make a withdrawal or access the contents of their safe deposit box.

Unfortunately, that proverbial “rainy day” mentality can be costly in today's world. Even

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Kentucky, Maryland, Alabama and New York Become First States to Pass New Insurance Laws

On April 11, 2012 Kentucky passed HB 135, becoming the first state to pass a law modeled after the National Conference of Insurance Legislators (NCOIL) Unclaimed Life Insurance Benefits Act. The new law, effective January 1, 2013, requires companies to perform a comparison between in-force life insurance policies and retained asset accounts against the Social Security Administration's Death Master File (DMF) on at least a quarterly basis. In the event that a decedent is located, the insurer must perform a good-faith effort to confirm the death, locate any beneficiaries, and provide the necessary claim forms and instructions. In the event that the benefits go unclaimed, the model act also provides direction for life insurers to notify state treasury departments to properly escheat the funds.

States have begun the process of enacting laws consistent with the Model Unclaimed Life Insurance Benefits Act. Maryland and New York have passed similar rules.

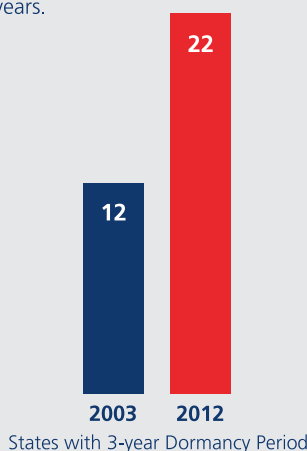
The following is a list of recent legislation decisions:

State	Legislation
Kentucky	Passed NCOIL Model 4/11/12
Tennessee	Failed
Maryland	Passed NCOIL Model 5/2/12
Alabama	Passed NCOIL Model 5/15/12
New York	Passed Special Resolution 5/14/12

It appears that this is the start of a trend. It seems logical that more states will fall in line and seek to enact legislation consistent with the Model Act. We will continue to keep you posted as new proposals arise. •

Shrinking Timeframe to Protect Bank Customers

From 2003 to 2012, ten states reduced the dormancy period for banking property to 3 years.



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comparison between in-force life insurance policies and retained asset accounts against United States Social Security Administration's Death Master File ("Death Master File") or any other database or service that is at least as comprehensive as the Death Master File. The comparison must be performed on at least a quarterly basis using criteria reasonably designed to identify potential matches of its insureds.

2. If there is a match with one of its insureds, the insurer must, within 90 days, complete a good faith, documented effort to confirm the death of the insured and determine whether benefits are due.
3. If benefits are due, the insurer must use good faith efforts to locate the beneficiary or beneficiaries and provide appropriate claim forms or instructions to each beneficiary to make a claim, including the need to provide an official death certificate if applicable under the policy. To the extent permitted by law, the insurer may disclose minimum necessary personal information about the insured or beneficiary to a person who the insurer reasonably believes may be able to assist the insurer in locating the beneficiary or other entitled person. An insurer may not charge insureds, account holders, or beneficiaries for any fees or costs associated with the search or verification.
4. The benefits from a life insurance policy or a retained asset account, plus any applicable accrued interest, shall first be payable to the designated beneficiaries or owners and in the event those beneficiaries or owners cannot be found, shall escheat to the state as unclaimed property.
5. With respect to group life insurance, insurers are required only to confirm the possible death of an insured when the insurers provide full record-keeping services to the group policy holder.
6. Upon expiration of the statutory period for escheat, the insurer shall notify the Treasurer that the beneficiary or retained asset account holder has not submitted a claim and the insurer complied with this Act and was unable to contact the retained asset account holder or any beneficiary. Upon such notice, the insurer must submit the unclaimed life insurance benefits or unclaimed retained asset accounts, plus any interest, to the Treasurer.

WASHINGTON

HB 2169

Introduced 12/8/11, Passed 12/20/11, Effective 12/20/11

Previously, unclaimed securities reported and delivered to the State of Washington were required to be held for at least 3 years by the Department of Revenue (DOR) before they were liquidated. Under this bill, the DOR must liquidate "as soon as practicable" after they are reported. Securities that are worthless, cannot be sold, or are not cost-effective to sell are exempted from the "as soon as practicable" requirement. Owners of stock making a claim to the DOR are entitled to the proceeds received from the sale less administrative costs, or the stock if the DOR has not yet ordered the sale of the stock.

WISCONSIN

WI SB 296, AB 419

Introduced 11/18/11 and 12/7/11, Failed 3/23/12

Under current law, if a holder fails to pay or deliver unclaimed property within the time required by law, the holder is required to pay interest on the property or the value of the property at the annual rate of 18 percent from the date the property should have been paid or delivered. Under this bill, the Treasurer may only require a holder to pay interest on abandoned property if the person has willfully neglected to pay or deliver the property in a timely manner. The bill also changes the interest rate that can be assessed from 18 percent to 12 percent. •

NEW JERSEY: WHICH EXIT WILL HOLDERS TAKE FROM UNCLAIMED PROPERTY REPORTING OF STORED VALUE CARDS?

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- All footnotes are available for review online at www.keaneup.com.

The unclaimed property environment in New Jersey has been anything but certain for issuers of stored value cards ("SVCs") in the past 3 years. Effective July 1, 2010, the State Legislature enacted 2010 N.J. Laws Chapter 25 (the "New Jersey Act"), which reversed a common law exemption that applied to SVCs redeemable solely for merchandise and services, and purported to require issuers of such instruments to report SVC balances that remained unused for two years; the act moreover repealed the longstanding SVC exemption on a retroactive basis. After a brief period of dialogue between SVC issuers and the New Jersey Treasurer's office about how the New Jersey Act would be implemented, litigation was filed in the U.S. District Court for the District of New Jersey, challenging numerous aspects of the law as being unconstitutional. The District Court's partial injunction of the New Jersey Act was affirmed by the U.S. Court of Appeals for the Third Circuit, during which process the Treasurer has refrained from attempts to enforce any portions of the law. However, while the litigation continues unabated, efforts have also been underway to introduce and pass repealer legislation, with support from various trade associations, SVC issuers and distributors, and even consumer groups.

The purposes of this article are 3 fold: (1) to recap the legal issues that are implicated by the New Jersey Act, (2) to identify the questions that remain unresolved, even after the Third Circuit's decision, and (3) to gauge the chances for success of a legislative "fix" in New Jersey as well as the likelihood that New Jersey's efforts to capture SVC balances through data collection requirements will be copied in other states.

The New Jersey Act

Section 5 of the New Jersey Act provides for the escheat of SVCs, including gift certificates and gift cards, which were not previously subject to New Jersey's unclaimed property laws. Subsection 5a of the act imposes a 2 year period of presumed abandonment for SVCs. Subsection 5c requires issuers of SVCs to obtain the name and address of the purchaser or owner of each SVC 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 SVC, such address is assumed to be the place where the SVC was purchased or issued, and the SVC "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 New Jersey Act was effective July 1, 2010.¹ By its terms, it applies to SVCs issued on and after that date and also retroactively to those outstanding cards issued before July 1, 2010.



In Treasury Announcement 2011-03 (TA 2011-03), the Treasurer explained that subsection 5c's place-of-purchase presumption would apply when (i) the issuer does not have the name and address of the owner or purchaser of an SVC, (ii) the issuer is not domiciled in New Jersey, and (iii) the state of the issuer's domicile exempts SVCs from escheat. This rule has been enacted in 37 other states and is referred to as the third-priority rule.² In TA 2011-03, the treasurer also explained 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.

Ensuing District Court Litigation

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 courts as the "SVC Issuers")—brought suit in the U.S. District Court for the District of New Jersey against the Treasurer and the unclaimed property administrator, seeking declaratory and injunctive relief regarding Section 5 of the New Jersey Act.³ The plaintiffs subsequently 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 motion with respect to (1) the retroactive application of the New Jersey Act to SVCs that are redeemable only for merchandise or services (which the court said likely violated the Contract Clause); and (2) the enforcement of the place-of-purchase presumption contained in subsection 5c and the third-priority rule as articulated in TA 2011-03 (under the Supremacy Clause). However, the District Court declined to preliminarily enjoin subsection 5c's data collection requirement,⁴ and it also rejected the plaintiffs' Commerce Clause claim, substantive due process claim, and federal preemption claims under the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act")

Appeal to the Third Circuit

Both the state and the plaintiffs appealed the District Court's order to the U.S. Court of Appeals

for the Third Circuit, which affirmed such order in its entirety.

Contract Clause.

The Third Circuit 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 Third Circuit reasoned that: (1) the New Jersey Act operates as a "substantial impairment on the contractual relationships of SVC Issuers" by imposing the "unexpected obligation" of requiring the "SVC Issuers to turn over the entire value of the SVC in cash"; and (2) although the New Jersey Act furthers a significant and 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."⁵

Federal CARD Act Preemption.

The Third Circuit held that the plaintiffs failed to show a reasonable likelihood of success on the merits of their claim that the New Jersey Act was expressly and impliedly preempted by the CARD Act, which generally requires SVCs to have expiration dates of not less than 5 years. The Third Circuit concluded that the New Jersey Act provides greater protection to consumers than the CARD Act because it allows an SVC's owner to redeem the card for cash from the state after the issuer has escheated it. That right did not exist before the New Jersey Act was enacted.

Federal Common Law Preemption – the Jurisdictional Scheme.

The Third Circuit held that the SVC Issuers 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 TA2011-03 were both preempted under the U.S. Supreme Court's escheat priority rules established in *Texas v. New Jersey*⁶ and its subsequent line of cases. The Third Circuit concluded that the place-of-purchase presumption directly contradicts the second-priority rule announced in *Texas*, which allows 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.

Furthermore, the Third Circuit held that the third-priority rule was also preempted under *Texas*.⁷ In

particular, the Third Circuit concluded that:

- New Jersey lacked a sufficient connection with any of the parties to the transaction to claim a right to escheat SVCs sold in New Jersey under *Pennsylvania v. New York*⁸;
- Enforcement of the third-priority rule represented a departure from the *Texas* priority rules and would require the Third Circuit "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts," which the Supreme Court said should be avoided; and
- Enforcement of the rule would allow New Jersey to infringe on the sovereign authority of other states that have decided not to escheat SVCs.

The Third Circuit, however, upheld the District Court's determination that subsection 5c's data collection requirement was severable and was thus not enjoined, reasoning that the data collection requirement furthers the New Jersey Act's consumer protection purpose and was not inconsistent with the *Texas* priority scheme

Substantive Due Process.

The plaintiffs contended 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 did further a legitimate state interest, the two-year abandonment period and the data collection requirement do not rationally relate to that goal. However, the Third Circuit disagreed, holding that (a) the New Jersey Act furthered the legitimate state interests of protecting New Jersey customers and modernizing its unclaimed property laws, and (b) the 2 year abandonment period was rationally related to the goal of protecting consumers. Further, the Third Circuit held 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 Third Circuit 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."

Commerce Clause.

The District Court held that the plaintiffs 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. Thus, as a result of the Third Circuit's decision, New Jersey is preliminarily enjoined from escheating unredeemed balances on SVCs redeemable solely for merchandise or services issued prior to July 1, 2010. The state is also preliminarily enjoined from enforcing the place-of-purchase presumption and third-priority rule with respect to SVCs issued both before and after the effective date of the New Jersey Act. However, the Third Circuit upheld New Jersey's right to escheat SVC balances on cards issued after July 1, 2010 and to enforce the act's requirements with respect to the data collection requirement at the point of sale.

Current Status of the Act and Lawsuit

Petition for Rehearing Denied

On February 9, 2012, the plaintiffs filed separate petitions for rehearing and for rehearing en banc with the Third Circuit Court of Appeals, seeking a rehearing regarding the Third Circuit's opinion. In their petitions, the plaintiffs asked the Third Circuit to address a Takings Clause argument that was not addressed by the District Court or by the Third Circuit in its initial opinion. More specifically, the plaintiffs contended that the Takings Clause precludes even the prospective application of the New Jersey Act (i.e., the SVCs issued after its effective date), relying primarily on the argument that the derivative rights doctrine precludes the state's claim to SVCs redeemable for merchandise or services only.

However, the Third Circuit denied the plaintiffs' petitions for rehearing on February 24, 2012 without explanation. We understand that one or more of the plaintiffs are considering filing a writ of certiorari with the U.S. Supreme Court, although no such writ has been filed yet.

Pending Repeal Legislation

Meanwhile, during the 2012 legislative session, the New Jersey State Legislature introduced Assembly Bill 1871, which would explicitly exempt from escheat any SVCs issued on or after the effective date of the legislation (which is immediately upon passage), thus reversing the applicability of the New Jersey Act with respect to such cards. Further, the bill relieves the issuers of such cards from complying with subsection

5c's data collection requirement. On March 15, 2012, A1871 was passed by the Assembly and sent to the Senate for consideration. As of March 30, 2012, however, the Senate has not yet acted on the bill, but has indicated it will do so when it reconvenes in May following a budget recess. It is unclear whether the Governor, who has actively supported the new law, will veto the legislation if it passes the Senate.

Remaining Issues For Holders

The Third Circuit's decision leaves unresolved a number of issues regarding New Jersey's treatment of SVCs and the data collection requirement. Obviously, many of these issues will be rendered moot if A1871 is enacted by the State Legislature. Nonetheless, there is still a chance the bill will not pass, and by its terms it only applies to SVCs issued on or after its effective date. Thus, the New Jersey Act may still apply to require the escheat of SVCs issued between July 1, 2010 and the effective date of A1871, as well as to require ZIP code collection with respect to such cards (although the ZIP code collection requirement has yet to go into effect). Accordingly, we have identified several important issues for holders remaining after the Third Circuit's decision.

Treatment of SVCs in New Jersey

- **Is a ZIP code considered an address for purposes of the first-priority rule?** If it is not, 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.
- **Which 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 may fall within the definition of SVCs to which the Act applies, 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 such a 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 Third Circuit 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 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 the data collection requirement 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 SVC Issuers 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. Further, A1871 will certainly impact the analysis. Assuming, however, that the data collection requirement ultimately becomes effective, and assuming A1871 does not pass the State Legislature or is vetoed by the Governor, 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).

- **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 by 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.) We understand that the Treasurer has indicated to at least one trade association, after the Third Circuit decision was issued, that it views online sales of SVCs as being within the scope of the surviving provisions of the New Jersey Act.
- **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.
- **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.⁹ 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.

- **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 suggests that issuers that choose 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 seems 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, such as sales by distributors of cards that are issued by entirely unrelated parties. It seems fairly clear that merchants that merely sell cards issued by others are not issuers of

the cards under the New Jersey Act's definition and have no obligation to collect purchaser information. Neither the issuers of these cards nor the distributors 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 SVC 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. The Treasurer's authority to impose such a requirement through an informal guidance without following the rulemaking process required by the New Jersey Administrative Procedures Act is even more doubtful.
- **Does the ZIP code collection requirement violate state privacy laws?** The California Supreme Court held last year that, based on California 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.¹⁰ 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 separate cap of \$100,000.

Conclusion

In sum, although many requirements of the New Jersey Act have been preliminarily enjoined by the District Court and Third Circuit, there are still several compliance burdens imposed by the act on issuers of SVCs, as well as various unsolved questions and issues. It is possible that many of these issues will be resolved by guidance from the Treasurer or subsequent stages of the litigation, although SVC issuers likely will need to take steps to comply prior to the issuance of any further clarification. In addition, A1871 could render many issues moot if it is passed by the State Legislature. Stay tuned for further developments.

Another eventuality that SVC issuers should anticipate is that other states latch onto the data collection requirement and other features of the New Jersey Act, in their own attempts to broaden the scope of unclaimed property reporting. The Third Circuit decision certainly constitutes compelling legal precedent on several of the legal questions that it addressed (in particular, the invalidity of a place-of-purchase presumption and a third-priority transactional claim). Nevertheless, we expect that some states may force similar litigation to be undertaken, should they fail to review the decision before undertaking their own legislative drafting efforts. •

Update

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As this article goes to press, things continue to evolve rapidly in New Jersey:

- Some issuers and sellers of stored value cards are beginning to take steps to pull their cards out of New Jersey. Effective April 1, American Express removed its cards sold by third-party sellers, such as grocery stores and pharmacies, from the state. InComm and Blackhawk Network, the two major distributors of gift cards through grocery stores, drug stores, convenience stores, big box retailers and other retail locations, announced that they will remove their gift card malls and kiosks from the state in June, or sooner if the zip code requirement of the New Jersey Act is made effective.
- The New Jersey Department of Treasury issued a press release on April 4, 2012 (the day after AMEX publicly announced its pullout from New Jersey), entitled "A Note From the Treasury Press Office: The Real Story on Gift Cards." The release states that gift card issuers' claims that the state is "grabbing" or "taxing" gift cards "is a total fabrication and nothing more than part of a misinformation campaign designed to protect giant card issuers' anti-consumer business practices and unjustifiable profit-grabs from abandoned or forgotten gift cards." This from an Administration that likes to tout itself as "pro-business".
- New Jersey media coverage of the issue has been intense in the aftermath of the announcements by AMEX, InComm and Blackhawk and the Treasury's press release. Most of the coverage is highly critical of the state's efforts.
- We have been in direct discussions with the New Jersey Treasury and Attorney General's Office regarding their intentions with respect to implementation of the ZIP code collection requirement. They have stated a desire to implement the law in a manner that fulfills the consumer protection goals without imposing unreasonable burdens on issuers and sellers of stored value cards. We believe there is a good deal of political pressure on New Jersey to find a way to resolve these issues without further political damage.
- On April 11, however, Governor Christie stated that the issue is "really" about who will get the money associated with unredeemed stored value card balances—"big businesses" or the State. He concluded his remarks by saying he wasn't losing any sleep over card issuers pulling out of New Jersey, stating: "If they want to move out, they move out. It's their call."
- In light of all this, there is great uncertainty regarding where things are really headed. We do not believe that an announcement regarding implementation and enforcement of the ZIP code requirement is imminent; and we have been assured that if such an announcement is made, it will provide at least some reasonable advance notice of any effective date.
- AB 1871, the repeal legislation, has passed the (Democratically controlled) General Assembly and is scheduled to be considered by the (Democratically controlled) Senate in early May. If the legislation passes the Senate, it is uncertain whether the (Republican) Governor will veto it.
- And finally, at least one of the stored value card issuers in the federal court litigation—American Express Prepaid Card Management Corp.—is actively considering petitioning the U.S. Supreme Court for writ of certiorari on whether requiring the issuer of a gift card --that by its terms is redeemable solely for merchandise or services-- to remit the unredeemed balance on such cards to the state in cash violates the Takings Clause of the U.S. Constitution. The Third Circuit previously denied the plaintiffs' petitions for rehearing on that issue. Such a petition would be filed by May 24. Under the Supreme Court's rules, writ of certiorari will be granted only for "compelling reasons." The Court ultimately has judicial discretion regarding whether to grant review on a writ of certiorari.

Stay tuned.

MORE DEVELOPMENTS ARISING OUT OF THE ONGOING INVESTIGATION OF LIFE INSURANCE COMPANY PRACTICES

Recently, the Illinois State Court ordered that a lawsuit filed last year against MetLife and Prudential, two leading life insurers, be made public. In the midst of the ongoing investigation of the life insurance company practices, Total Asset Recovery Services LLC ("TARS"), an heir locating company, filed a lawsuit claiming the 2 life insurers violated the Illinois False Claims Whistleblower Reward and Protection Act. TARS alleges that the insurers have conducted "a pattern of questionable activity with regard to [the] proper escheatment of life insurance proceeds for deceased individuals." TARS further alleges in its complaint that the life insurers failed to pay benefits to over 4700 people whom the life insurers allegedly knew or should have known were deceased. Since those benefits were over 5 years overdue, TARS claims that those benefits should have been escheated to the State of Illinois pursuant to the State's unclaimed property laws. It has been reported that MetLife and Prudential could each face up to \$26 million in penalties to Illinois, as well as damages worth triple the amount of the funds they withheld. This lawsuit follows other private suits asserting unfair claims settlement as well as violations of state unclaimed/abandoned property laws. •

Bank Accounts Under Pressure... continued from page 3

regular customer communications can help. Whether it's on the web or printed on statement inserts, teaching customers about the need to keep their accounts active will pay dividends, especially as the dormancy periods shrink. Beyond customers, banks should ensure that their operations and customer services teams are trained and aware of the risks of unclaimed property. Creating this internal culture of awareness will help employees guide and inform customers appropriately and ultimately contribute to reduced escheat volumes.

Seek Out Beneficiaries and Heirs

It is not uncommon for research efforts conducted on inactive accounts to uncover the fact that many account owners are no longer living. Assisting the heirs, beneficiaries and estate representatives is an important process to consider since it is unlikely that basic due diligence efforts will prevent these accounts from escheating. The challenge is that identifying and assisting the correct legal claimants may require extensive research, time and effort. However, banks that do are able to connect with new customer contacts and learn that they can generate valuable goodwill and potentially preserve the banking relationship with the original owner's family.

As the laws continue to evolve and dormancy periods contract across the country, the operational complexities of compliance and customer retention will continue to grow.

Because of the potential impact on account retention and revenue, optimizing the management of unclaimed property is increasingly critical for banks to embrace. Fortunately for bank executives and operations teams alike, there is a corresponding return on investment (ROI) to help validate the effort. •

KEANE CONGRATULATES THE FOLLOWING STATES AND STATE PERSONNEL ON YOUR UPPO AWARDS

Barbara Rice (SC) was recognized by the Holder Community with the Above and Beyond Award. Barbara has been actively involved in NAUPA and a strong supporter of holder education and outreach since 1991.

Pennsylvania was presented with the award by the UPPO Holder Community for its holder friendly program and statute. Pennsylvania's timely responses to questions along with its efforts to conduct outreach and holder education webinars/seminars have proven to be a great success.

Arkansas was recognized and presented with the best Website Award by the UPPO Holder Community. The website is easy to navigate and contains an impressive amount of information for holders and owners.

Congratulations to all of the UPPO State Recipients on your well-deserved award! •

State Update

Nevada-Kelli Miller, PhD, was recently appointed Deputy Treasurer/Administrator for the Nevada Unclaimed Property program. Kelli succeeds Mary McElhone who accepted a position with the City of Las Vegas in January. Kelli brings a wealth of experience and knowledge to this position as she most recently served as the Unclaimed Property Administrator for the State of Georgia. Kelli is excited to begin her new duties and transition her family to Nevada. Congratulations Kelli! •

This current issue of Keanotes and our Keanotes archive is available on-line: www.keanotes.com

DISCLAIMER:

The content presented in this newsletter represents Keane's understanding of evolving legislation and caselaw governing unclaimed property law up to March 30, 2012. The content is provided for informational purposes only and should not be considered legal advice or legal opinion. For more information, please contact Debbie L. Zumoff, Chief Compliance Officer, at 1.610.232.0700 or via email at dzumoff@KeaneUP.com.

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