



Third Circuit Strikes Down New Jersey Gift Card Statute, in Part

The U.S. Court of Appeals for the Third Circuit, in *New Jersey Retail Merchants Association v. Sidamon-Eristoff*, has issued a significant decision that effectively strikes down New Jersey's attempt to assert unclaimed property claims over all unredeemed gift card balances for gift cards sold in New Jersey.

The Third Circuit affirmed the district court's injunction barring the enforcement of two parts of New Jersey's new gift card law: the provision for retroactive application with respect to existing cards redeemable for merchandise or services and, critically, the place-of-purchase presumption. The latter provision purported to make all unredeemed gift card balances for gift cards purchased in New Jersey subject to reporting and remittance to New Jersey under that state's unclaimed property law, regardless of the U.S. Supreme Court's priority rules for unclaimed property. The Third Circuit also affirmed the district court's order upholding the data collection provision of the New Jersey statute. That means that the law's requirement that name and address information be collected from gift card purchasers in New Jersey can be required under the statute. The decision is subject to potential *en banc* review by the entire Third Circuit. The court set February 9, 2012, as the deadline to file a request for such review.

This ruling, if *en banc* review is denied or if it is affirmed *en banc*, is significant for issuers and sellers of gift cards and other stored value cards because it is the first court decision on the enforceability of so-called "third priority" rules that seek to impose unclaimed property obligations based on place of purchase. Three dozen states have these rules. The decision also provides some clarification for issuers and sellers of gift cards and other stored value cards in New Jersey, but leaves other questions about the application of New Jersey's law unresolved.

Background

In an effort to collect unredeemed balances on stored value cards sold in New Jersey, New Jersey amended its unclaimed property law (N.J. Stat. Ann. § 46:30B) to require card issuers to collect the purchaser's name and address and to maintain, at a minimum, the purchaser's zip code. The amendment also provided that if a card is sold in New Jersey, and the card issuer does not have the name and address of the purchaser, then the location of the purchaser is presumed to be New Jersey, which the law provided would allow the state to collect the unused amount on such cards as unclaimed property. The law also purported to apply to all outstanding cards as of July 1, 2010, even those issued before July 1, 2010. It only applied, however, to sellers of more than \$250,000 worth of gift cards annually.

New Jersey retailers and trade groups filed several lawsuits to enjoin enforcement of the law. The plaintiffs asserted, among other things, that the law as amended was preempted by federal law, which establishes a priority scheme to determine which state can claim unclaimed property when more than one state may have an interest in it (see *Texas v. New Jersey*, 379 U.S. 674 (1965)). In addition, the plaintiffs argued the law was unconstitutional under the Due Process, Contract, and Takings Clauses of the U.S. Constitution and the New Jersey Constitution.

The federal district court in New Jersey, in separate orders, enjoined enforcement of the provision presuming New Jersey as the state of the owner of unredeemed balances for gift cards purchased in the state. The district court did not preliminarily enjoin the provision requiring issuers to collect the purchaser's zip code, though it entered a temporary restraining order in that regard and, to date, this data has not been collected.

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Federal Preemption and Place-of-Purchase Presumption

In affirming the district court, the Third Circuit held that the place-of-purchase presumption was unconstitutional and preempted by federal common law because the priority rules established by the Supreme Court require that: (a) property first be reported and remitted to the state of the owner's last known address; and (b) if the address is unknown, then the disposition of the property is governed by the law of the state of incorporation of the holder. The court further held that if the state of incorporation of the holder has exempted a class of property from its unclaimed property law, then it would violate that state's sovereignty to allow a third state to make claims to that class of property.

This holding is the first of its kind and is important not just for the New Jersey law, but because as noted three dozen states have "third priority" rules in their unclaimed property laws that purport to include in their ambit property not otherwise escheatable pursuant to one of the first two priority rules. While the Third Circuit is just one court with limited jurisdiction, it is a U.S. Court of Appeals and, as long as this decision stands, it calls into question the enforceability of "third priority" rules more generally.

Retroactive Application of the Law

The court also held that the Contracts Clause of the U.S. Constitution precludes unclaimed property laws from retroactively requiring reporting and remittance of money to the state based on obligations to provide merchandise or services to the property owner – at least not without allowing the seller to keep some amount that it anticipated as profit. This is significant for issuers of gift cards that are not redeemable for cash in New Jersey and in other states that have attempted to change, or who might attempt to change in the future, their unclaimed property laws in a similar fashion.

Data Collection Requirement

The court upheld the obligation to collect card buyer name and address information (or else zip code of sales location) for gift cards sold in New Jersey for sellers of \$250,000 or more in gift cards. The plaintiffs argued that such information does not necessarily provide the name and address of the card beneficiary, since gift cards are generally intended to be given to someone other than the buyer. However, the court 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 v. New Jersey*.

The court's ruling does not resolve how on-line sales would or should be treated in New Jersey (*i.e.*, are those sales in New Jersey) and it does not resolve whether the \$250,000 threshold applies to nationwide sales or only New Jersey-only sales.

If you have questions about this decision or the New Jersey law, or other matters relating to gift cards, please contact Robert Andalman at 312.464.3168 or randalman@loeb.com.

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