

## **THIRD CIRCUIT AFFIRMS DISTRICT COURT**

### **REJECTS NEW JERSEY'S "PLACE-OF-PURCHASE PRESUMPTION" AS CONTRARY TO ESTABLISHED PRIORITY RULES**

On January 5, 2012, the United States Court of Appeals for the Third Circuit issued an opinion in *New Jersey Retail Merchants Association v. Sidamon-Eristoff* (the "Opinion"), the ongoing litigation challenging certain 2010 amendments to New Jersey's unclaimed property statute concerning gift or "stored-value" cards. The Court affirmed the November 13, 2010 decision of the District Court, which enjoined retroactive application of the legislation to gift cards issued before its enactment, enjoined prospective enforcement of the legislation's "place-of-purchase presumption," but declined to enjoin the legislation's data collection requirements or the two-year dormancy period applicable to stored-value cards. The full Opinion is available [here](#).

This consolidated appeal involves multiple lawsuits filed by the New Jersey Retail Merchants Association, the New Jersey Food Council, and American Express Prepaid Card Management Corporation against New Jersey State Treasurer Andrew P. Sidamon-Eristoff and Unclaimed Property Administrator Steven R. Harris, challenging aspects of 2010 N.J. Laws Chapter 25, which amended New Jersey's unclaimed property statute, N.J. Stat. Ann. § 46:30B. The Third Circuit accepted amicus briefs filed by Limited Brands, Inc., the Chamber of Commerce of the United States, and the Unclaimed Property Professionals Organization, which is represented by Morris Nichols in this proceeding. Oral arguments were held September 12, 2011.

The Third Circuit upheld the District Court's injunction of retroactive application of Chapter 25 to gift cards issued before enactment of the legislation. Prior to the Chapter 25 amendments applying New Jersey's unclaimed property laws to this property type, New Jersey law – unlike the 1981 and 1995 Uniform Unclaimed Property Acts and many other states – did not apply its escheat laws to gift certificates, the paper predecessor to gift and stored-value cards. As such, the Third Circuit agreed that the retroactive application of Chapter 25 "operates a substantial impairment on the contractual relationships" of the plaintiff issuers of closed-loop stored value cards, who expected to realize a profit when redeeming such cards for goods and services and would not have, had they escheated the entire remaining cash value to the state, as contemplated by Chapter 25 and subsequent Guidelines issued by the New Jersey Treasury.<sup>1</sup>

Furthermore, although the Third Circuit rejected plaintiffs' arguments regarding express and implied preemption of Chapter 25 by the federal Credit CARD Act of 2009, 15 U.S.C. § 16931-1(c), the Court agreed that the "place-of-purchase presumption" imposed by Chapter 25 would likely violate the "priority rules" established as federal common law by *Texas v. New Jersey*, 379 U.S. 674 (1965), and subsequent cases. As such, the Third Circuit upheld the District Court's injunction of New Jersey's enforcement of the "place-of-purchase presumption," which would have substituted the address of the place of purchase for the gift card purchaser's address when the purchaser's address is unknown. Because the secondary priority rule established by *Texas v. New Jersey* provides for property to escheat to the state of the holder's domicile

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<sup>1</sup> Opinion at 16-17.

when the owner's address is unknown, the Third Circuit noted that "it would be impossible for the [non-New Jersey-domiciled gift card] Issuer to comply with both Chapter 25's place-of-purchase presumption and federal common law under *Texas* because two states cannot both escheat the same abandoned property" under the Due Process Clause of the Fourteenth Amendment.<sup>2</sup>

With this decision, the Third Circuit also reaffirmed the "priority rules" and their rationale as established by *Texas* and its progeny. The Court noted that New Jersey's attempt to establish a "place-of-purchase presumption" for gift card property without purchaser address information was similar to Pennsylvania's attempt to capture unclaimed, unaddressed money orders purchased in Pennsylvania. The United States Supreme Court rejected this position in *Pennsylvania v. New York*, 407 U.S. 206 (1972), as inconsistent with the *Texas* "priority rules" which sought to "settle escheat disputes 'once and for all by a clear rule,'" in which the creditor's state of domicile would have the secondary right to escheat the unaddressed property. Similarly, the Third Circuit, in this Opinion, rejected New Jersey's position that Chapter 25's "place-of-purchase presumption" would prevent a potential windfall of unclaimed, unaddressed gift card property to holders domiciled in states which decline to escheat this property, noting:

Our analysis is consistent with the Supreme Court's recognition that a state's power to escheat is derived from the principle of sovereignty. . . . The ability to escheat necessarily entails the ability not to escheat. To say otherwise could force a state to escheat against its will, leading to a result inconsistent with the basic principle of sovereignty. Various considerations might motivate states not to exercise custodial escheat. For example, because companies might find the absence of state custodial

escheat attractive, states may want to incentivize companies to incorporate in their jurisdiction by choosing not to escheat abandoned property.<sup>4</sup>

Chapter 25's "place-of-purchase presumption" would have allowed New Jersey to infringe upon the sovereign authority of other states to escheat or decline to escheat unaddressed gift card property purchased in New Jersey. The Third Circuit declined to sanction this attempt, finding it contrary to the "priority rules" and supporting rationale established by *Texas*. One possible implication for holders is increased certainty that lower priority states will not be able to claim abandoned property – under a "transactional rule" or similar location-based claim – exempted from escheat by a higher priority state, particularly for gift card property but also for property excluded by some states' "business-to-business" exemptions.

Despite siding with the plaintiffs with respect to retroactive application and the "place-of-purchase presumption" of Chapter 25, the Third Circuit declined to do so regarding the data collection requirement, which it upheld as severable from "place-of-purchase presumption." The Court further noted that requiring collection of – at minimum – zip code information from gift card purchasers is consistent with the Supreme Court, which "has consistently permitted states to escheat based on the last known address of the purchaser," and not necessarily the ultimate recipient of the gift card property, because either is properly considered the creditor.<sup>5</sup> It is unclear whether the Third Circuit considered or simply assumed that a zip code is sufficient as an address to remit property under the first priority rule of *Texas*.

Finally, the Third Circuit rejected the plaintiffs' arguments and upheld the District Court's decision regarding application of a prospective two-year dormancy period to gift cards. The Court specifically noted that Chapter 25 had promoted a "legitimate state interest"

<sup>2</sup> Opinion at 29-30.

<sup>3</sup> Opinion at 31, quoting *Texas*, 379 U.S. at 678.

<sup>4</sup> Opinion at 34.

<sup>5</sup> Opinion at 39, quoting *Am. Express Travel Related Servs. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 621 (D. N.J. 2010).

in protecting consumers and modernizing New Jersey's escheat laws and that "as long as revenue-raising was not the only legitimate purpose underlying the legislation, Chapter 25 will pass rational basis analysis."<sup>6</sup>

The Third Circuit's Opinion affirming the District Court's prior decision should provide holders additional guidance with respect to recent developments in unclaimed property laws applicable to gift cards and other stored-value systems, particularly with respect to New Jersey's recent amendments and the viability of future attempts by states to impose "place-of-purchase presumptions."

Questions remain, however, regarding the practical implications of data collection for holders operating and issuing gift cards on a multistate basis. The Third Circuit will address issues related to travelers' checks stemming from challenges to Chapter 25 in a separate opinion. We will continue to monitor and provide information regarding future developments in this rapidly evolving area of law. Please contact Morris Nichols attorneys in the Unclaimed Property Counseling Group if you would like to discuss the implications of the Third Circuit's Opinion.

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<sup>6</sup> Opinion at 41.

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