



Bailey Cavalieri LLC  
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# CLIENT ALERT

January 2012

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## Third Circuit Court of Appeals Decision in *New Jersey Retail Merchant's Association v. Sidamon-Eristoff*

January 2012

On January 5, 2012, the Third Circuit Court of Appeals issued its decision in the above-referenced litigation regarding the constitutionality of Chapter 25 of New Jersey's Unclaimed Property Law ("Chapter 25").

### Summary of Third Circuit Opinion

The Third Circuit issued its opinion (the "Opinion") affirming the District Court's decision (the "Decision") in its entirety. The Opinion first affirmed the Decision to enjoin the place-of-purchase presumption of Chapter 25, which permitted New Jersey to escheat gift cards after two years of inactivity if the gift card was purchased in New Jersey and the address of the purchaser was not known. The Opinion then concurred with the Decision not to enjoin the data collection requirements of Chapter 25, which requires gift card issuers to collect certain address information from gift card purchasers.

The Opinion first discusses the retroactive application of the place-of-purchase presumption portion of Chapter 25 to gift cards that had been purchased before the enactment of Chapter 25. The Court agreed with the District Court that such a rule likely violates the federal Contract Clause and should be preliminarily enjoined. Essentially, the Court adopted the Decision's reasoning and the Plaintiffs' arguments that the contract between the gift card issuer and gift card purchaser, which precludes the purchaser from redeeming the gift card for cash, is premised on an expectation that the gift card issuer will realize a profit when the bearer redeems the card for merchandise or services.

Next, the Court determined that the place-of-purchase presumption portion of Chapter 25 and related Treasury Guidance implementing Chapter 25 were both in direct conflict with the Supreme Court's decisions in *Texas v. New Jersey* and its progeny that created the Primary and Secondary Rules of Escheat. The Primary and Secondary Rules govern the priority of State claims to unclaimed property—first priority to the state of the address provided by the purchaser, and second, if there is no such address, to the state of incorporation of the seller.

Further, the Opinion also held that New Jersey's Treasury Guidance, which had interpreted Chapter 25 to create a "Third Rule of Escheat" (permitting the state in which the purchase occurred to escheat unclaimed property), was also preempted by the Supreme Court's priority rules. The Court opined that the fact that the State was the place of purchase did not give the State a sufficient connection with any of the parties to the transaction to escheat any unclaimed property resulting from the transaction. The Opinion later noted that under the principal of sovereignty, Chapter 25 would conflict with the decisions of some states not to escheat gift cards. Finally, the

Court ruled that Chapter 25's proposed Third Rule of Escheat would also create the potential for conflicting escheat claims among different states, which is precisely the ill that the Supreme Court wanted to avoid in its decisions in Texas v. New Jersey and its progeny.

Alternatively, the Opinion affirmed the Decision's position that the data collection provision of Chapter 25 was "severable" from the place-of-purchase presumption and therefore did not need to be enjoined. The Court stated that New Jersey's legislative purpose of preserving a consumer's right to the unredeemed balances of gift cards meant that the data collection provision could stand separately from the place-of-purchase presumption. According to the Court, the data collection provision would aid the State in reuniting unclaimed property with its owner.

Therefore, because the Third Circuit failed to preliminarily enjoin the effectiveness of the data collection provisions, retailers should begin engaging in internal dialogue regarding procedures that can be implemented to demonstrate good faith compliance with the data collection provision of Chapter 25, despite the fact that the State of New Jersey's Treasurer's Office has agreed to delay the enforcement of the data collection provision for a matter of weeks in order to engage in dialogue with interested parties about the efficacy of the data collection provision without the place-of-purchase presumption. The Treasurer's Office has indicated that it will provide additional guidance for compliance to interested parties prior to implementing the data collection provision. If you would like to discuss your company's alternatives for compliance with the data collection provision, please do not hesitate to contact us.

### Analysis

The Third Circuit Court of Appeals' Opinion was in line with our expectations. While it is comforting that the Third Circuit upheld the federal common law issues surrounding Chapter 25's conflict with the Primary and Secondary Rules of Escheat, we were disappointed that the Third Circuit failed to grasp the merit of the Plaintiffs' arguments regarding the inability of the data collection provision of Chapter 25 to further any legitimate unclaimed property purpose. Moreover, we also believe that the Third Circuit failed to adequately analyze Chapter 25's two-year dormancy period as it applies to gift cards in light of the federal Credit Card Accountability and Responsibility Act of 2009's requirement that gift cards cannot expire for five years.

Also troubling in the Opinion is the apparent rejection of the "recipient defense" as it applies to purchasers and recipients of gift cards. In the Third Circuit's view, because gift cards are bearer instruments that can be used by either the purchaser or the recipient, it is irrelevant that Chapter 25 only seeks to collect the name and address of the purchaser. Our view differs from that of the Third Circuit in that we do not believe that the address of the purchaser should be relevant in the gift card setting. The Third Circuit's indirect dismissal of the recipient defense could provide precedent for state unclaimed property administrators to attack gift card purchases made through internet websites and by mail, where the gift card issuer maintains the billing address of the purchaser and a "ship to" address of a recipient.

We will continue to monitor discussion in the retail industry about the ultimate impact of the decision in the case. At this point, it is unclear whether the State of New Jersey will seek to appeal the Third Circuit's decision to the United States' Supreme Court or be content with taking legislative measures to rewrite Chapter 25 to comply with the Third Circuit's Opinion.

If you have any questions or would like to discuss the Third Circuit's Opinion in more detail, please do not hesitate to contact us.

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