

# State & Local Tax **Alert**

Breaking state and local tax developments from Grant Thornton LLP

## Third Circuit Court of Appeals Allows New Jersey to Require Stored Value Card Issuers to Collect Purchasers' Zip Codes; Preliminarily Enjoins "Place-of-Purchase" Provision

The Third Circuit Court of Appeals has affirmed a U.S. District Court of New Jersey decision to preliminarily enjoin provisions of New Jersey's recently amended unclaimed property statute (Chapter 25). Importantly, one of the enjoined provisions would have created an assumption that, if the issuer sold the card in New Jersey and did not have the address of the owner or purchaser, the address of the owner or purchaser of the card would be the New Jersey place of purchase. The injunction prevents both the retroactive enforcement of Chapter 25 and the prospective enforcement of a place-of-purchase presumption provision and corresponding guidance from the New Jersey Treasury. In contrast, the decision denies the request for preliminary injunction with respect to a data collection provision, which requires issuers to collect at least the zip code of the owner or purchaser of the card, and the two-year abandonment period provided in Chapter 25.

### Background

Stored value cards (SVCs), often referred to as gift cards, come in either closed loop or open loop form. Closed loop cards can only be redeemed for merchandise or services from the retailer that issued the card, while open loop cards can be redeemed at stores or internet sites not affiliated with the issuer of the card. Some open loop cards are redeemable for cash, though most are only redeemable for merchandise and services.

All fifty states and the District of Columbia have a set of unclaimed property laws, or escheat laws, most of which are based on the Uniform Unclaimed Property Act ("UUPA"). Under the UUPA, property deemed to be abandoned is required to be transferred by the "holder" of the property to the state, which will act as a custodian of the property until it can be returned to the original property owner (which maintains actual ownership of the abandoned property).

In a series of cases, notably *Texas v. New Jersey*,<sup>1</sup> the U.S. Supreme Court established two priority rules to resolve conflicts over competing state claims to unclaimed property:

- The jurisdiction of the **owner's last known address** is entitled to custody of the unclaimed property; and

#### Release date

February 1, 2012

#### States

New Jersey

#### Issue/Topic

Unclaimed Property

#### Contact details

##### Kevin Herzberg

Tampa  
T 813.204.5101  
E [kevin.herzberg@us.gt.com](mailto:kevin.herzberg@us.gt.com)

##### David Glad

Philadelphia  
T 215.814.4039  
E [david.glad@us.gt.com](mailto:david.glad@us.gt.com)

##### Frank Schaefer

Edison  
T 732-516-7658  
E [frank.schaefer@us.gt.com](mailto:frank.schaefer@us.gt.com)

##### Giles Sutton

Dallas  
T 704.632.6885  
E [giles.sutton@us.gt.com](mailto:giles.sutton@us.gt.com)

##### Jamie C. Yesnowitz

Washington, DC  
T 202.521.1504  
E [jamie.yesnowitz@us.gt.com](mailto:jamie.yesnowitz@us.gt.com)

##### Shaya Rubenstein

Washington, DC  
T 202.861.4146  
E [shaya.rubenstein@us.gt.com](mailto:shaya.rubenstein@us.gt.com)

[www.GrantThornton.com/SALT](http://www.GrantThornton.com/SALT)

<sup>1</sup> 379 U.S. 674 (1965).

- The jurisdiction in which the **holder is domiciled (incorporated)** presides as custodian when the owner's address is unknown.

In New Jersey, legislation governing SVCs and their potential treatment as unclaimed property was adopted in 2010 as Chapter 25 of the New Jersey Unclaimed Property Code.<sup>2</sup> In the case of abandoned SVCs, the “holder” is the issuer of the SVCs, which must remit the remaining balance on the abandoned SVCs redeemable for merchandise or services to the state, in cash, after two years of inactivity.<sup>3</sup> Issuers are required to obtain the name and address, and at a minimum maintain a record of the zip code, of persons that purchase SVCs (the “data collection provision”).<sup>4</sup> To the extent this information is not obtained, the location where the SVC was purchased or issued is used instead (the “place-of-purchase presumption”).<sup>5</sup>

The New Jersey Treasurer issued additional guidance with respect to the place-of-purchase presumption soon after the statutory provision was adopted. Pursuant to this guidance, issuers of SVCs that are domiciled in New Jersey must report to New Jersey unredeemed SVC balances for owners whose data was not collected. Prior to the date of the guidance, issuers of SVCs that are not domiciled in New Jersey must report unredeemed SVC balances for owners whose data was not collected to the state in which the issuer is domiciled in accordance with that state’s unclaimed property laws. If the state in which an issuer is domiciled exempts SVCs from the unclaimed property statute, then the issuer must report to New Jersey unredeemed SVC balances for owners whose data was not collected if such SVCs were issued or sold in New Jersey.<sup>6</sup>

In the case at hand, several issuers of SVCs challenged the constitutionality of Chapter 25 on several grounds, including that the New Jersey law violated the priority rules created by the Supreme Court. They sought a preliminary injunction against the New Jersey Treasurer and Unclaimed Property Administrator, both retroactively and prospectively, to disallow New Jersey from imposing Chapter 25 while the case was pending.

### **Issuers Could Not Be Required to Remit Entire Remaining SVC Balance**

The Third Circuit affirmed the District Court’s decision to grant a preliminary injunction with respect to certain aspects of Chapter 25.<sup>7</sup> With respect to SVCs redeemable for merchandise or services, the Third Circuit agreed that issuers of closed loop SVCs expected to realize a profit when the bearer redeems the card for merchandise and

---

<sup>2</sup> 2010 N.J. Laws Chapter 25, adopting changes to N.J. STAT. ANN. § 46:30B.

<sup>3</sup> N.J. STAT. ANN. § 46:30B-42.1(a).

<sup>4</sup> N.J. STAT. ANN. § 46:30B-42.1(c).

<sup>5</sup> *Id.*

<sup>6</sup> Office of the State Treasurer, State of New Jersey, Treasury Announcement FY 2011-03, Guidance on Implementation and Notice of Exemption from Certain Provisions of L.2010, c.25, at 3 (September 23, 2010).

<sup>7</sup> In doing so, the Third Circuit considered a four-factor test for each constitutional challenge when ruling on the preliminary injunction motion: “(i) whether the movant has shown a reasonable probability of success on the merits; (ii) whether the movant will be irreparably injured by denial of the relief; (iii) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (iv) whether granting preliminary relief will be in the public interest.” *Crissman v. Dover Downs Entm’t Inc.*, 239 F.3d 357, 364 (3d Cir. 2001).

services, and issuers of open loop SVCs expected to realize a merchant fee on those transactions. By requiring SVC issuers to remit the entire remaining value of the card in cash to the state after the abandonment period had expired, even though the SVCs could not be redeemed for cash, there was a reasonable probability that Chapter 25 was in violation of the Contract Clause of the U.S. Constitution. The Third Circuit noted that New Jersey could have accommodated the SVC issuers by requiring them to turn over a percentage of the value of the abandoned card, reflecting a discount based on the expected profit or merchant fee, rather than the card's entire remaining value. Because the Contract Clause only applies to existing contractual relationships,<sup>8</sup> the preliminary injunction motion at issue here only applied retroactively to SVCs issued prior to the enactment of Chapter 25.

### **New Jersey's Two-Year Abandonment Period is Upheld**

Under the federal Credit CARD Act of 2009 ("CARD Act"),<sup>9</sup> a state law is not inconsistent with CARD Act provisions if the state law affords greater protections to the consumer.<sup>10</sup> The District Court had previously concluded that Chapter 25 afforded the consumer greater protections than that provided for in the CARD Act because Chapter 25 imposed no time restriction on the consumer's right to recover his or her funds and allowed the consumer to receive cash after the abandonment period had ended despite an agreement stating otherwise.

The SVC issuers argued on appeal that this analysis effectively allowed a judicial rewrite of the CARD Act by weighing the relative benefits of different types of protections. Additionally, the SVC issuers argued that the two-year abandonment period created a disincentive to adopt longer expiration periods, which would benefit the consumers and create an obstacle to the protections provided for in the CARD Act. Still, because after two years from the date of purchase or use of the SVC, the customers could access the cash in perpetuity as abandoned property from the state, the Third Circuit agreed with the District Court in denying the enjoinder with respect to the two-year abandonment period in Chapter 25.<sup>11</sup>

### **New Jersey Can Require Issuers to Collect Purchasers' Data**

The Third Circuit affirmed the lower court in not prospectively enjoining the data collection provision in Chapter 25. The SVC issuers argued that merely obtaining a zip code from a purchaser would be insufficient to reunite the owner with the escheated SVC funds. The Court, however, recognized that the provision primarily required that issuers maintain a record of the name and address of the purchaser or owner of each SVC. Most importantly, the Court found that retaining the zip code of the purchaser of the SVC aids New Jersey in determining what state is entitled to escheat of the SVC under the *Texas v. New Jersey* priority rules.

---

<sup>8</sup> See *Troy Ltd. v. Renna*, 727 F.2d 287, 296-299 (3d Cir. 1984).

<sup>9</sup> 15 U.S.C. § 16931-1(c).

<sup>10</sup> 15 U.S.C. § 1693q.

<sup>11</sup> The Court also confirmed that Chapter 25's two-year abandonment period rationally related to the legitimate state interest of protecting consumers, defeating the SVC issuers' substantive due process argument.

### **“Place-of-Purchase” Presumption Rejected**

Again, under Chapter 25’s place-of-purchase presumption, if the issuer did not have the name and address of the purchaser or owner of the SVC, the address of the owner or purchaser is assumed to be the place where the card was purchased.<sup>12</sup> The Court found that the place-of-purchase presumption directly contradicted the second priority rule of *Texas v. New Jersey*.

As noted above, the Treasury guidance also provided that if the issuer is not domiciled in New Jersey and the issuer’s state of domicile exempts SVCs from escheat, any unredeemed balances without a name and address must be reported to New Jersey if the cards were issued or sold in New Jersey. New Jersey argued that without this provision, SVC issuers that are incorporated in states that exempt such property would unfairly have the right to retain the abandoned property. The Court held, however, that another state has both the power to escheat and, if it wishes, to exempt unclaimed property.

The Court affirmed that the data collection provision was severable from the place-of-purchase provision despite the SVC issuers’ argument that the former was never meant to be a stand-alone provision, but rather a safe harbor to the latter.

### **Commentary**

By recognizing as unconstitutional New Jersey’s place-of-purchase presumption and respecting other states’ exemption of unredeemed balances of SVCs, the Third Circuit provides relief to holders of such unclaimed property. The decision also provides significant, if not untrammelled, deference to the states’ authority to legislate abandoned property.

The Third Circuit has therefore attempted to strike a balance of recognizing New Jersey’s sovereign authority with not allowing that right to infringe upon the sovereignty of other states. The Court exemplified that ideal by concluding that the data collection provision was severable from the place-of-purchase provision, which overstepped the bounds of federal common law. Assuming that this motion is not subject to U.S. Supreme Court review, it remains to be seen how the District Court ultimately will decide the substantive merits of the case following the endorsement of the preliminary injunction. One would think that the place-of-purchase provision is likely to be stricken from the books. If that is the ultimate result, it will be interesting to see how New Jersey will revise its SVC priority rules in response.

---

*The information contained herein is general in nature and based on authorities that are subject to change. It is not intended and should not be construed as legal, accounting or tax advice or opinion provided by Grant Thornton LLP to the reader. This material may not be applicable to or suitable for specific circumstances or needs and may require consideration of nontax and other tax factors. Contact Grant Thornton LLP or other tax professionals prior to taking any action based upon this information. Grant*

---

<sup>12</sup> N.J. STAT. ANN. § 46:30B-42.1(c).

*Thornton LLP assumes no obligation to inform the reader of any changes in tax laws or other factors that could affect information contained herein. No part of this document may be reproduced, retransmitted or otherwise redistributed in any form or by any means, electronic or mechanical, including by photocopying, facsimile transmission, recording, re-keying or using any information storage and retrieval system without written permission from Grant Thornton LLP.*

**Tax professional standards statement**

This document supports the marketing of professional services by Grant Thornton LLP. It is not written tax advice directed at the particular facts and circumstances of any person. Persons interested in the subject of this document should contact Grant Thornton or their tax advisor to discuss the potential application of this subject matter to their particular facts and circumstances. Nothing herein shall be construed as imposing a limitation on any person from disclosing the tax treatment or tax structure of any matter addressed. To the extent this document may be considered written tax advice, in accordance with applicable professional regulations, unless expressly stated otherwise, any written advice contained in, forwarded with, or attached to this document is not intended or written by Grant Thornton LLP to be used, and cannot be used, by any person for the purpose of avoiding any penalties that may be imposed under the Internal Revenue Code.

*Grant Thornton does not engage in the practice of law. Because unclaimed property is not a tax, Grant Thornton cannot give advice that involves the interpretation of unclaimed property laws. Accordingly, in most cases, Grant Thornton practitioners work with a client's legal counsel in providing unclaimed property services. Additional limitations apply to Grant Thornton attest clients subject to SEC reporting.*