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Drama in New Jersey: Retailers Breathe a Temporary(?) Sigh of Relief

With less than 24 hours remaining before retailers would have been required to obtain and maintain zip codes for all gift cards purchased within New Jersey, the U.S. Court of Appeals for the Third Circuit granted a temporary injunction. *Am. Express Travel Related Services Co., Inc. v. Sidamon-Eristoff, et al.*, Civil Case No. D.N.J. 10-cv-05059 --- F.Supp.2d ----, 2010 U.S. Dist. LEXIS 120153 (D.N.J. Nov. 13, 2010), on appeal, as *Am. Express Prepaid Card v. Andrew Sidamon-Eristoff, et al.*, No. 11-1141, Temporary Stay granted (3rd Cir. Jan. 31, 2011).

The news gets even better for retailers. The order simply states that injunctive relief is granted until a full panel of the Third Circuit has the opportunity to review the Appellants' motion. The order provides no date by which the court will consider the matter. So, until further notice, retailers with stores in New Jersey or sales to New Jersey residents will NOT be required to collect zip codes for gift card purchasers.

This is the latest twist in an unfolding drama which pits the retailers against the state and places the consumer squarely in the middle. In April 2010 New Jersey, feeling the strains of the economic crisis, proposed a new law subjecting gift cards to the unclaimed property statutes. Under the law, a gift card is considered abandoned and its unredeemed balance remitted to the state if there has been no activity on the card for two years and the owner's last known address was in New Jersey. In an unprecedented move that put New Jersey at odds with other states, the law stated that if a retailer has not maintained a gift card owner's address, New Jersey presumes the address is in New Jersey if the gift card was "purchased" in New Jersey.

Retailers and other gift card issuers filed separate lawsuits in the Federal District Court for the District of New Jersey. On November 13, 2010, in a 93-page opinion the judge enjoined New Jersey from enforcing its novel place of presumption approach by citing the priority rules in *Texas v. New Jersey*, 379 U.S. 674 (1965) and upheld in *Delaware v. New York*, 507 U.S. 490 (1993). These rules state:

- (1) where the last known address of the creditor (i.e., owner of the intangible personal property) is known, the state in which that address is located has the right to escheat (primary rule) *Id.* at 499 and
- (2) where the last known address of the owner is unknown, or in a state that "does not provide for escheat of the property owned," the state in which the debtor is incorporated is awarded the right to escheat subject to the "superior" right of the creditor's state should the creditor's state submit proof of the owner's address (secondary rule) *Id.*

The court held that New Jersey's proposed "place of presumption" priority rule would permit New Jersey to fabricate an interest where it otherwise does not have one by presuming that the creditor's last known address is the place of purchase. *Am. Express Travel Related Services Co., Inc. v. Sidamon-Eristoff, et al.*, 2010 U.S. Dist. LEXIS 120153 (D.N.J. Nov. 13, 2010).

New Jersey plunged forward, and the State Treasurer issued a Treasury Statement reaffirming a portion of the law requiring all retailers to obtain and maintain purchaser zip code information and issued a deadline of January 3, 2011 for compliance. On December 8, 2010, the New Jersey Retail Merchants

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Association moved for the District Court to clarify if the zip code maintenance mandate was included within the scope of the injunction. The deadline for compliance was extended until February 1, 2011.

On January 13, 2011, the District Court held that the zip code requirement was not included within the injunction. The plaintiffs appealed to the Third Circuit asking the court to issue a preliminary injunction and review the underlying substantive questions regarding the use of zip codes to assert a first-priority claim.

Now that the Third Circuit has temporarily enjoined the zip code requirement, what is next? The documents submitted to date by each party give us an idea of the issues which the court will consider. The Appellants submit that the cost and time required in reconfiguring point of sale systems and other technology is too burdensome. There is also some mention of violations of the takings and commerce clauses but these are almost secondary. The state submits that under the primary rule mere zip code information is adequate to suffice as the "owner's address."

This drama will continue to unfold. There is too much at stake.



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