

Prepaid Discount Vouchers: The Not-So-Final Frontier

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The biggest challenge for unclaimed property practitioners is determining how new forms of property fit into unclaimed property laws. Recent technological and entrepreneurial innovations continue to challenge historic concepts of what constitutes unclaimed property.

In the July 2010 UPwords, we explored the scope of property subject to escheat laws in the context of digital goods, such as digital downloads of video games, music and videos, promotional codes, and online stored value accounts.¹ Since then, retailers of another new form of digital property — the online prepaid discount voucher — including companies such as Groupon and LivingSocial, have expanded their businesses rapidly. A recent string of class action lawsuits against these companies for alleged violations of federal and state consumer protection laws, including state restrictions on gift card expiration dates, highlights the unclaimed property implications of this new form of property as well as raising interesting issues regarding conflicting federal and state laws. In this installment of UPwords, we evaluate the unclaimed property issues raised by this new form of property, explore the intersection between federal consumer protection laws and state unclaimed property laws, and suggest that states should carefully and fully consider the legal and policy implications of continuing to expand the scope of property subject to unclaimed property laws.

¹“What’s UP in the Digital World?” *State Tax Notes*, July 12, 2010, p. 107, *Doc 2010-14511*, or *2010 STT 132-5*.

What Is a Groupon, Anyway?

Groupon, for those who live in the Stone Age or still own a first-generation iPad, is a daily deal website that offers heavily discounted vouchers (or Groupons) on behalf of local vendors.² The site has been hailed by *Fortune* magazine as the fastest growing company ever, with as many as 40 million subscribers worldwide.³ Groupon’s twist on the classic coupon site is that most discount offers last only for a 24-hour period, and the deal does not become “live” until a specified minimum number of other consumers purchase the same deal the same day. A variety of products and services are offered through Groupon, including everything from food to dance and scuba lessons to Lasik surgery. Once a deal becomes live, customers are charged the discounted price of the product or service and receive a confirmation e-mail containing a link to their Groupon, which is printed and then redeemed with the local merchant. The consumer gets 50 to 80 percent off, the merchant gets exposure and a guaranteed number of new customers, and Groupon collects 50 percent of the money earned.

LivingSocial, Groupon’s largest competitor, operates under the same basic business model as Groupon, with the most notable distinction being that LivingSocial does not require a minimum number of buyers to render a deal “live,” although buyers receive a unique link that makes their purchase free if they convince three or more friends to purchase the same deal.⁴

²See <http://www.groupon.com>.

³“Meet the Fastest Growing Company Ever,” *Fortune Magazine* (Aug. 30, 2010), available at <http://www.forbes.com/forbes/2010/0830/entrepreneurs-groupon-facebook-twitter-next-web-phenom.html>.

⁴See <http://www.livingsocial.com>.

Class Action Lawsuits Against Daily Deal Sites

On March 1 a consumer filed a class action lawsuit against Groupon in the U.S. District Court for the Northern District of Illinois alleging that Groupon's imposition of "unconscionably short" expiration periods, generally six months, is illegal under federal and state consumer protection laws.⁵ The complaint also asserts claims for breach of contract, quasi-contract/restitution, and declaratory and injunctive relief.⁶ The putative class representative purchased a \$55 Groupon voucher to play a game of Whirlyball, described in the complaint as an amusement facility "that feature[s] bumper cars and alcoholic beverages," but failed to use the Groupon before it expired six months after the date of purchase.⁷ Similar class action complaints alleging the same violations of federal and state laws have recently been filed against Groupon in federal district courts in California, the District of Columbia, Florida, Minnesota, and Ohio,⁸ and against LivingSocial in Florida and Washington.⁹

Are Groupons Gift Certificates Covered Under Federal Consumer Protection Law?

The central issue in each of the above described class action lawsuits is whether discounted vouchers such as those provided by Groupon and LivingSocial constitute gift certificates under federal and state consumer protection laws, as the plaintiffs allege. The federal Credit Card Accountability Responsibility and Disclosure Act (the CARD Act) and the Electronic Funds Transfer Act (EFTA)¹⁰ specifically prohibit the sale and issuance of gift certificates with expiration dates of less than five years from the date of issuance.¹¹ Under the CARD Act, which expanded the EFTA in 2009 to include general use prepaid cards, gift certificates, and store gift cards,¹² a gift certificate is defined as "an electronic promise that is":

- (i) redeemable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo;
- (ii) issued in a specified amount that may not be increased or reloaded;
- (iii) purchased on a prepaid basis in exchange for payment; and
- (iv) honored upon presentation by such single merchant or affiliated group of merchants for goods or services.¹³

The plaintiffs in the class action suits allege that each of the above described elements is met by the prepaid discounted vouchers, and therefore the expiration of the vouchers earlier than five years is a violation of federal law. Indeed, based on the plain language of the federal statute, it seems that Groupons and other similar prepaid discount vouchers could meet the definition of a gift certificate. All are redeemable at a single merchant; issued in fixed, specified amounts; purchased on a prepaid basis; and honored on presentation for designated goods or services. On the other hand, these prepaid discounted vouchers arguably are at least sometimes not "issued in a specified amount" because they are often not redeemable for a fixed dollar value of items but rather for a designated good or service. For example, a Groupon may be redeemable for a dance lesson that has a specific retail value rather than for \$50 worth of dance lessons, however many lessons that may be. Given the number of pending lawsuits across a variety of jurisdictions, it is likely that one or more courts will decide this issue. Because the law was just enacted in 2009, there is little guidance about what "specified amount" means.

Are Groupons Unclaimed Property Under State Escheat Laws?

Although the outcome of the pending class action consumer protection litigation may inform the issue of whether Groupons and similar property should be considered unclaimed property under state law, the outcomes of the cases are not determinative.¹⁴ State escheat laws serve different purposes than federal and state consumer protection laws. Also, the litigation outcome will turn on a specific statutory definition of gift certificate that is generally not present in state unclaimed property laws. However, states administering unclaimed property laws may look to

⁵*Johnson v. Groupon, Inc.*, Case No. 1:11-CV-1426 (N.D. Ill. filed Mar. 1, 2011).

⁶*Id.*

⁷*Id.* at p. 6.

⁸*Ferreira v. Groupon, Inc.*, Case No. 3:11-CV-132 (S.D. Cal. filed Jan. 21, 2011); *Vazquez v. Groupon, Inc.*, Case No. 1:11-CV-495 (D. D.C. filed Mar. 8, 2011); *Cohen v. Groupon, Inc.*, Case No. 9:11-CV-80149 (S.D. Fla. filed Feb. 4, 2011); *Zard v. Groupon, Inc.*, Case No. 0:11-CV-605 (D. Minn. filed Mar. 8, 2011); *Kimel v. Groupon, Inc.*, Case No. 5:11-CV-488 (N.D. Ohio filed Mar. 9, 2011).

⁹*Miller v. LivingSocial, Inc.*, Case No. 0:11-CV-60519 (S.D. Fla. filed Mar. 11, 2011); *Abbott v. LivingSocial, Inc.*, Case No. 2:11-CV-253 (W.D. Wash. filed Feb. 14, 2011).

¹⁰15 U.S.C. sections 1693, *et seq.*

¹¹15 U.S.C. section 1693l-1(c).

¹²Credit Card Accountability Responsibility and Disclosure Act, Title X, sections 1084(1), 1100H, Pub. L. No. 111-203 (July 21, 2010).

¹³15 U.S.C. section 1693l-1(a)(2)(B).

¹⁴*See Benson v. Simon Property Group, Inc.*, 642 S.E.2d 687, 689-690 (Ga. 2007) (holding that the purpose of state unclaimed property laws was not to affect the substantive rights of the parties regarding gift card expiration dates or dormancy fees while noting that the state legislature was free to modify those rights through consumer protection laws).

the courts' characterization of these types of property. Also, as will be further explored below, the outcome of these cases could create unusual conflicts between state and federal laws.

States define unclaimed property in a variety of ways, but most states generally follow one of the versions of the Uniform Unclaimed Property Acts. States ordinarily define unclaimed property broadly to include all types of intangible property, and most contain a catchall provision that mirrors the language in section 1(13) of the 1995 act.¹⁵ Although unclaimed property holders have most frequently pursued exclusions from the scope of property subject to reporting and payment through the legislative process, the limited judicial guidance available has generally interpreted the scope of intangible unclaimed property broadly.¹⁶ However, a number of legal arguments can be made that prepaid discount vouchers, such as Groupons, are not unclaimed property subject to reporting and payment. Also, from a public policy perspective, states should and have determined that some types of new property are simply not those intended to fall within the scope of state unclaimed property laws. For example, some states have elected not to treat gambling chips and gaming award points as unclaimed property.¹⁷

Intersection of Federal Consumer Protection Law and State Unclaimed Property Laws

To the extent that prepaid discount vouchers constitute gift certificates subject to both the federal CARD Act and state unclaimed property laws, property holders may find themselves in an unfortunate Catch-22. For example, New Jersey recently enacted a new law making the balance of stored value cards subject to remittance to the state once the cards

have been abandoned.¹⁸ The New Jersey definition of stored value card is sufficiently broad that prepaid discount vouchers such as Groupons could constitute unclaimed property. Specifically, stored value card is defined as:

a record that evidences a promise, made for monetary or other consideration, by the issuer or seller of the record that the owner of the record will be provided, solely or a combination of, merchandise, services, or cash in the value shown in the record, which is pre-funded and the value of which is reduced upon each redemption. The term "stored value card" includes, but is not limited to the following items: paper gift certificates, records that contain a microprocessor chip, magnetic stripe or other means for the storage of information, gift cards, electronic gift cards, rebate cards, stored-value cards or certificates, store cards, and similar records or cards.¹⁹

The New Jersey abandonment period is generally three years, but it can be as short as two years if there has been no card activity.²⁰ As a result, unless the federal CARD Act preempts New Jersey law, the holder may be faced with a situation in which federal law requires that a prepaid discount voucher remain valid for five years while New Jersey law demands that the value of the voucher be remitted as soon as two years after issuance. The federal CARD Act explicitly preempts any state laws "to the extent that those laws are inconsistent with the provisions of this subchapter."²¹ However, "State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter."²²

In *American Express Travel Related Services Co., Inc. v. Sidamon-Eristoff*,²³ decided November 13, 2010, the New Jersey District Court held that despite the clear conflict between federal and state law, the CARD Act did *not* preempt the new stored value card provisions of the New Jersey unclaimed property law. American Express and other plaintiffs brought suit against New Jersey, seeking to enjoin the state from enforcing the new unclaimed property law. Regarding the plaintiff's claim that that federal

¹⁵The 1981 Act, sections 1(10) and 2, provide a broad definition of intangible property. Section 1(13) of the 1995 Act defines property to include both "a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business," as well as "money, a check, draft, deposit, interest, or dividend."

¹⁶See, e.g., *Presley v. City of Memphis*, 769 S.W.2d 221 (Tenn. App. 1988) (holding that unredeemed Elvis Presley concert tickets constituted property subject to reporting and payment under the state's unclaimed property statutes); *Presley v. County of Nassau and State of New York*, 188 A.D.2d 594 (N.Y. App. Div. 1992) (same).

¹⁷See, e.g., Colo. Rev. Stat. section 38-13-108.7 (excluding "gaming award points and gaming chips or tokens" from unclaimed property laws); Nev. Rev. Stat. section 120A.135 (excluding "gaming chips or tokens") (note that a bill, AB 219, pending before the Nevada Legislature, would include "wagering instruments" as unclaimed property. Wagering instruments are defined by Nev. Rev. Stat. section 463.01967 as "a representative of value, other than a chip or token, that is issued by a licensee and approved . . . for use in a cashless wagering system").

¹⁸N.J. Laws 2010, ch. 25, section 1 (eff. July 1, 2010). Note that a bill is already pending before the New Jersey State Legislature to repeal the recently enacted stored value card provisions of N.J. Rev. Stat. section 46:30B-42.1. 2010 NJ S.B. 2681 (introduced Jan. 31, 2011, transferred to Senate Budget and Appropriations Committee Mar. 3, 2011).

¹⁹N.J. Rev. Stat. section 46:30B-6(t).

²⁰N.J. Rev. Stat. sections 46:30B-7 (generally a three-year period), 46:30B-42.1(a) (a two-year period if there is no card activity).

²¹15 U.S.C. section 1693q.

²²*Id.*

²³2010 WL 4722209.

CARD Act preempted the stored value card provisions of the state law, the court found that the New Jersey unclaimed property law “affords customers greater protection than that provided by the CARD Act’s expiration provision” and therefore is not preempted, because under the state law, (a) consumers could recover their unclaimed property from the state in perpetuity rather than just five years, and (b) while stored value cards are often redeemable only for goods or services, the state unclaimed property law effectively converted the value of those cards to cash.²⁴ As a result, the plaintiffs had not demonstrated a likelihood of success on the merits of the CARD Act preemption claim, and the court declined to grant a preliminary injunction on this issue.²⁵

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If the *American Express* decision stands and the vendor or Groupon is forced to remit the value of unclaimed Groupons after two years, the vendor may theoretically comply with both federal and state law, but doing so would be an extremely cumbersome process. The holder would be forced to remit the value to the state after two years, honor the Groupon if presented by the customer within five years, and then seek reimbursement from the state.²⁶ It does not take a seasoned unclaimed property professional to realize the difficulties and compliance burdens associated with that procedure.

Thorny Issues Raised

The Groupon/LivingSocial litigation and the potential intersection with state escheat laws raise a number of additional issues for unclaimed property purposes, including what is the value to be escheated, and who is the holder for purposes of unclaimed liability?

²⁴*Id.* at *27-29.

²⁵*Id.*

²⁶N.J. Rev. Stat. section 46:30B-42.1d. (“Nothing in this section shall be construed to prevent an issuer from honoring a stored value card, the unredeemed value of which has been reported to the State Treasurer pursuant to R.S. 46:30B-1 et seq., and thereafter seeking reimbursement from the State Treasurer pursuant to R.S. 46:30B-62.”)

What Is the Escheatable Value?

If prepaid discount vouchers are unclaimed property, what is their escheatable value? Should the holder have to escheat to the state the price paid by the consumer or the actual face amount for which the voucher can be redeemed? If the voucher is redeemable only for property or services with no fixed price promised to the purchaser, what should the escheatable value be? In such a situation, may holders take advantage of the provisions in the model acts and in many states that provide that if a gift certificate is redeemable solely for merchandise, only a percentage (generally 60 percent of the face value) is subject to remittance to the state? Further, if this rule applies, would the face value be considered the amount paid or some estimated value of the product or service to which the purchaser was entitled?

The pricing of many prepaid discount vouchers is, obviously, discounted and is partially based on the merchant’s expectation that some of the vouchers will go unused. Particularly for a company like Groupon, the approach can be analyzed as a merchant giving a bulk purchasing discount, but instead of the discount going to one large purchaser, it is provided to individual purchasers that join together on a website as a purchasing group. Part of this bulk discount is a result of estimating what the group as a whole is likely to purchase and pricing the vouchers accordingly. Therefore, if a merchant is required to escheat the total prepaid balance of the vouchers that were issued but not used, either the price of the vouchers would increase or the state would be requiring the holder to remit an amount greater than the actual value of the unclaimed property — the value being measured by the value to the purchasing group, not to each individual purchaser.

Who Is the Holder?

To the extent that Groupons are unclaimed property, who is the holder responsible for remitting the value of unused prepaid vouchers to the state, Groupon as the seller/broker or the local merchant? In the similar context of uncashed rebates involving third-party fulfillment centers, states have asserted that either the retailers *or* the fulfillment centers are responsible for the unclaimed property.²⁷ The issue of which party constitutes the holder ultimately turns on whether Groupon or similar brokers retain an interest in the property or vouchers being sold, or whether Groupon is simply receiving a service fee in the transaction. To the extent that Groupon merely receives a fee for its services, it should not be the holder and should not have an obligation to remit the value of unused

²⁷See, e.g., *Fitzgerald v. Young America Corp. et al.*, Case No. CV 6030 (D. Iowa filed Jan. 5, 2009) (settled Feb. 2010).

prepaid vouchers to the state. Also, a purchaser who buys prepaid discount vouchers may not be aware of who the actual “merchant” is in the transaction, Groupon or the local merchant. Under these circumstances, an issue arises regarding whether contracts between parties not including the purchaser (that is, a contract between Groupon and the local merchant) can alter which party constitutes the holder and thereby shift liability for state unclaimed property purposes.

Resell Market

As is to be expected in today’s world of e-commerce, a secondary market has rapidly developed for prepaid discount vouchers. What is the effect of other websites, such as CoupRecoup and DealsGoRound, that permit consumers to resell Groupons before a voucher’s expiration?²⁸ If the original purchaser of a Groupon resells the Groupon for a further discounted price but the second purchaser never uses the Groupon, should the amount escheated to the state represent the value of the originally issued Groupon (that is, value in the hands of the original customer) or the price of the Groupon on its resale (that is, value in the hands of the second purchaser)? Also, does the fact that the Groupon is resold by a third party render the third party the holder of the voucher?

Alternative Business Models

Could some of the unclaimed property issues and risks associated with discount and reward programs be mitigated by a third-party vendor that allows vendors to redeem and track those programs through a customer’s ordinary credit card rather

²⁸See <http://www.couprecoup.com> and <http://www.dealsgoround.com>.

than a separate coupon or card? At least one new company, vPromos, is offering that service.²⁹

What would happen if the consumer paid using an online digital points system rather than cash?

What would happen if the consumer paid using an online digital points system rather than cash, such as is the case with a new Groupon-inspired discount offer service currently being tested by Facebook?³⁰

Conclusion

As state unclaimed property laws continue to evolve in the face of rapidly evolving technological innovations and rapidly expanding state budget deficits, states, holders, and owners should fully consider the implications of expanding the scope of unclaimed property subject to escheat laws. All stakeholders in the unclaimed property community should continue to consider that adding new types of property to the list of unclaimed property is not always in the best interests of the state, the holders, or the owners. We expect to see the law continue to develop in this area through the litigation and legislative processes, but we would suggest to states that it would serve the interests of all parties to prospectively provide guidance on this and other developing areas. ☆

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²⁹See <http://www.vpromos.com>.

³⁰See “Facebook to Offer Groupon-Inspired Discount Service,” *Bloomberg News* (Mar. 15, 2011).