

**BEWARE OF NEW JERSEYANS BEARING GIFT CARDS:
NEW JERSEY GIFT CARD LEGISLATION AND THE
CORPORATE EFFECT**

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I. INTRODUCTION

The act of giving a gift is a complex aspect of human interaction that various experts agree is vitally important to the relationships we develop with friends and family.¹ The communal benefit of generosity is not a new concept.² “For thousands of years, some native cultures have engaged in the potlatch, a complex ceremony that celebrates extreme giving. . . . [O]ften the status of a given family in a clan or village was dictated not by who had the most possessions, but instead by who gave away the most.”³ In this tradition, a gift was meant to be a reflection on the status of the gift giver.⁴ The more extravagant the gift, the more prestigious the gift giver was deemed.⁵ In a society based on class, it is easy to see why individuals went to great lengths to give grand gifts. Some researchers even link gifts with the evolution of people, finding that “[m]en who were the most generous may have had the most reproductive success with women. . . . Women who were skilled at giving— be it extra food or a well-fitted pelt— helped sustain the family provider as well as her children.”⁶ But as the pace of society has quickened, there has been a pronounced transition from lavish gift giving to gifts of convenience and gifts of currency.

As cash became a more common gift form, retailers decided to “cash in” on the shift by preserving a method whereby a cash equivalent could be given with limited flexibility, i.e. the gift certificate.⁷ Consumers appeared to enjoy the fact that this type of gift seemed more personal than giving cash. Major department stores were the first creators of the gift certificate in the 1930s, but these stores utilized gift cards sparingly.⁸ “In 1995, Mobile [*sic*] introduced a plastic card that could be used for gas fill-ups and phone calls.

¹ Tara Parker-Pope, *A Gift That Gives Right Back? The Giving Itself*, N.Y. TIMES, Dec. 11, 2007, http://www.nytimes.com/2007/12/11/health/11well.html?_r=0.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *The Evolution of Gifting and Gift Cards*, GIFT CARD GRANNY, April 25, 2013, <http://www.giftcardgranny.com/blog/the-evolution-of-gifting-and-gift-cards/>.

⁸ *Id.*

Borrowing technology from prepaid phone cards, a customer's balance was stored in a database and reflected on a number in the card's magnetic strip.⁹ Starbucks was the next company to create a major innovation in the gift card industry.¹⁰ In 2001, the company created a gift card that could be used more than once by allowing customers to add value.¹¹

By 2000, the American Express Retail Index recorded that gift certificates were the second most popular holiday gift.¹² The index noted that shoppers had spent approximately twenty two billion dollars on gift certificates that year.¹³ A little over a decade later, in 2011, individuals more than tripled their gift card purchases by spending nearly one hundred billion dollars.¹⁴ A significant number of gift cards and certificates, such as the ones described above, go unredeemed each year.¹⁵ Consumer advocate groups estimate that between two and five percent of gift cards, a value of at least three billion dollars, go unredeemed annually.¹⁶ Stored value cards¹⁷ are one of the largest grossing products that many major retailers sell.¹⁸ Following the success of gift card sales, states have attempted to devise plans whereby they profit from the sales as well.¹⁹

New Jersey is one of many states to implement legislation in

⁹ *Id.*

¹⁰ Matt Buchanan, *The Vile History of Gift Cards and How They Came to Destroy Christmas*, GIZMODO, Dec. 27, 2009, <http://gizmodo.com/5434783/the-vile-history-of-gift-cards-and-how-they-came-to-destroy-christmas>.

¹¹ *Id.*

¹² Todd G. Friedland, *Gift Certificates in California: The Gift that Keeps on Giving*, 45 ORANGE COUNTY LAWYER 32, (2003).

¹³ *Id.*

¹⁴ David Louie, *Consumer Experts Warn Many Gift Cards Go Unused*, ABC NEWS, Dec. 26, 2011, <http://abclocal.go.com/kgo/story?section=news/business&id=8480466>.

¹⁵ See Erica Alini, *Governments Grab Unused Gift Cards*, WALL ST. J. (June 30, 2009, 11:59 AM), <http://online.wsj.com/news/articles/SB124605742408663533>.

¹⁶ Louie, *supra* note 14.

¹⁷ The term "stored value card" refers to a card that stores monetary value such as a gift card, prepaid card. Within this Note the terms "stored value card" and "gift card" can be used interchangeably.

¹⁸ Friedland, *supra* note 12.

¹⁹ See N.J. STAT. ANN. § 46:30B-1 (West 2002).

order to regulate and benefit from the sale and expiration of stored value cards.²⁰ While New Jersey is a state known for its strict stance on consumer protection, it appears that the State has gone too far this time.²¹ As the new legislation continues to favor the State itself, corporations have been left to fend for themselves.²² In order to protect the interest of the majority, New Jersey must shift its stance on consumer protection to create a more corporate-friendly approach to gift card legislation. New Jersey's legislation has transferred the benefits of corporate labor away from businesses and consumers towards the State, resulting in many unintended and unforeseeable consequences.²³

This Note argues against the implementation of New Jersey's gift card legislation. Part II of this Note discusses the current federal and state laws regulating gift cards and examines the decision from the United States Court of Appeals for the Third Circuit in *New Jersey Retail Merchants Association v. Sidamon-Eristoff* to determine how future legislation will be affected. Part III analyzes New Jersey's new gift card laws under the scrutiny of traditional contract law, as well as policies relating to the freedom to contract.²⁴ Finally, Part IV examines the unintended consequences this legislation precipitates and how other states have regulated similar concerns. New Jersey's gift card legislation casts a wide net of potential harm. The State continues to modify laws to appease its own needs while actively isolating corporations and doing nothing to increase consumer protection. While this legislation is still in its infancy, the law must be modified to obtain a more corporate-friendly approach.

II. THE STATE AND FEDERAL STANCE ON STORED VALUE

²⁰ *Id.*

²¹ See N.J. STAT. ANN. § 56:8-2 (West 1976).

²² Y. Angela Lam, *The Gift That Keeps on Taking: How Federal Banking Laws Prevent States from Enforcing Gift Card Laws*, 93 MINN. L. REV. 311, 312 (2008).

²³ Retail Industry Group, Morgan, Lewis & Bockius LLP, *New Jersey Revised Gift Card Law*, THE NAT'L L. REV., Aug. 9, 2009, <http://www.natlawreview.com/article/new-jersey-revised-gift-card-law>.

²⁴ *New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir.), *cert. denied*, 133 S. Ct. 528 (2012).

CARDS

In 2010, New Jersey created an amendment to its unclaimed property law.²⁵ This amendment included a number of provisions affecting stored value cards.²⁶ Specifically, the law classified gift cards as abandoned property after they went unused for a period of two or more years.²⁷ This change shortened the length of time for classification and made it easier to transfer ownership of property to the State.²⁸ Additionally, the 2010 law mandated that if there were insufficient records relating to the gift card owner's last known address, the value of the card was to escheat to the owner's place of purchase— this was referred to as the “place of purchase requirement.”²⁹ This Previously, the value of the card escheated to the holder's domicile, which had traditionally been the rule.³⁰ All of these aforementioned provisions were to be applied retroactively.³¹ New Jersey also created a system whereby the State coached retailers to inquire about the name and zip code of the owner or purchaser of these cards, requiring retailers to maintain in-house records of such information.³² This amendment marks a notable shift for a State whose initial stance was to exclude all gift and stored value cards from escheat.³³ In the retail industry, many saw this move by the New Jersey Legislature as a selfish ploy to increase the State's ability to claim access to these unused funds.³⁴ This new unclaimed property law sparked legal upheaval and several retailers and other corporate groups brought claims against the State.³⁵ “The New Jersey Retail Merchants Association, the New Jersey Food Council and American Express Prepaid Card Management Corporation filed a motion for

²⁵ Retail Industry Group, *supra* note 23.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Retail Industry Group, *supra* note 23.

³² *Id.*

³³ Keane Unclaimed Property Team, *New Jersey Amending Gift Card Escheatment Laws*, KEANOTES, June 27, 2012, <http://unclaimed-property.keaneco.com/new-jersey-amending-gift-card-escheatment-laws>.

³⁴ Retail Industry Group, *supra* note 23.

³⁵ *Id.*

preliminary injunction in the United States District Court against the New Jersey Treasurer and the New Jersey Unclaimed Property Administrator.”³⁶ These groups filed this motion “on the basis that enforcement of certain provisions of the 2010 changes (‘Chapter 25’) violated various constitutional provisions.”³⁷ This injunction barred many of the more onerous provisions of the unclaimed property law from taking immediate effect.³⁸

Ultimately, on January 5, 2012, in the case of *Sidamon-Eristoff*, the United States Court of Appeals for the Third Circuit affirmed the preliminary injunction, finding that the retroactive application of New Jersey’s unclaimed property law, as well as the “place of purchase” requirement, was likely a violation of federal law.³⁹ On their motion for a preliminary injunction, gift card issuers showed a likelihood of success on their contract clause claim.⁴⁰ In that claim, the gift card issuers alleged that the New Jersey statute, which provided for a custodial escheat of gift card balances, substantially interfered with issuers’ contractual relationships with card purchasers.⁴¹ The statute required card issuers to turn the entire cash balance of a gift card over to the State at the end of the proscribed abandonment period, even though cardholders themselves would not have been permitted to redeem the gift cards for cash under the issuers’ original contracts.⁴² This statutory requirement transfers the expected benefit of gift cards to the State and imposes unexpected obligations on retailers in an area where reliance and predictability are vital.⁴³

This case was not a complete victory for consumerism, however. The court found that the data-collection requirement was

³⁶ McNees Wallace & Nurick LLC, *Court Affirms Injunction Against NJ Unclaimed Property Law*, JD SUPRA LAW NEWS, Feb. 23, 2012, <http://www.jdsupra.com/legalnews/court-affirms-injunction-against-nj-uncl-02730/>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* See also Retail Industry Group, *supra* note 23.

⁴⁰ McNees Wallace & Nurick LLC, *supra* note 36.

⁴¹ *Sidamon-Eristoff*, 669 F.3d at 387.

⁴² *Id.* at 387.

⁴³ *Id.*

permissible, and therefore the injunction was lifted.⁴⁴ Both parties appealed the decision to the United States Supreme Court, but certiorari was denied.⁴⁵ Following *Sidamon-Eristoff*, the data-collection requirement of New Jersey's unclaimed property law was set to take effect in 2012. As a result, there was a corporate exodus out of the State. "In spring 2012, three of the largest gift card sellers in New Jersey decided to stop selling gift cards in the state rather than comply with the data-collection requirement."⁴⁶ Seemingly frightened by this unintended consequence, New Jersey agreed to defer the data collection requirement's implementation for at least four years.⁴⁷

On July 29, 2012, New Jersey Governor Chris Christie signed Senate Bill No. 1928 (S.1928), which again attempted to regulate gift cards in New Jersey, into law.⁴⁸ The creation of title 46, chapter 30B of the Uniform Unclaimed Property Act was "aimed at revising New Jersey escheat law (N.J. STAT. ANN. § 2A: 37-1 et seq.) to conform to the 'Uniform Unclaimed Property Act (1981),' promulgated by the National Conference of Commissioners on Uniform State Laws."⁴⁹ The Uniform Unclaimed Property Act's primary purpose is "consumer protection and public interest legislation."⁵⁰ The Act sought to protect "the interests of the true owner of property against confiscation by the holder while giving the state the benefit of its use until the owner claims it."⁵¹ In accordance with New Jersey's new property law, stored value cards will presumably be abandoned after a five-year dormancy period.⁵² Sixty percent of the remaining balance

⁴⁴ *Id.* at 388-89, 396-98, 400.

⁴⁵ *Id.* at 387.

⁴⁶ Retail Industry Group, *supra* note 23.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ N.J. STAT. ANN. § 46:30B (West 2002).

⁵⁰ *Clymer v. Summit Bancorp.*, 726 A.2d 983, 110 (N.J. Ch. Div. 1998), *rev'd*, 758 A.2d 652 (N.J. App. Div. 2000), *rev'd*, 792 A.2d 396 (N.J. 2002).

⁵¹ *Id.* at 10.

⁵² Grant Thornton's Washington National Tax Office, *United States: New Jersey Amends Treatment of Stored Value Cards*, MONDAQ, Sept. 19, 2012, <http://www.mondaq.com/unitedstates/x/197082/tax+authorities/New+Jersey+Amends+Treatment+Of+Stored+Value+Cards>.

on these abandoned cards will now escheat directly to the State.⁵³

Because the State agreed to initially defer data collection, “beginning on July 1, 2016, an issuer of a stored value card must obtain the name and address of the purchaser or owner of the card issued or sold and must maintain, at a minimum, the zip code of the owner or purchaser.”⁵⁴ In a move that has been called a “compromise” between retailers and the State, the new law provides for the deferment of the data collection policy, while requiring retailers to provide a cash redemption for gift cards that have been used at least once and have a remaining balance of less than a five dollars.⁵⁵ Retailers are required to provide this type of refund upon request by a customer.⁵⁶ This new requirement became effective on September 1, 2012, but does not apply to cards for which the initial value is five dollars or less. Additionally, the new law provides that the funds associated with a stored value card will never expire.⁵⁷ The cards may still contain an expiration date to the extent permitted by federal law, but the expiration date will apply only to the card or other tangible mediums.⁵⁸ Stored value cards may not generally have any fees or charges associated with them “except that the issuer may charge (1) an activation fee when the stored value card is purchased and when reloading an existing stored value card; and (2) a replacement card fee if the fees are disclosed in writing prior to issuance.”⁵⁹ There are strict penalties for violating this new law, including a fine of up to \$500 per violation.⁶⁰ There appears to be a disconnect between this law’s intended purpose and its practical effects. Consumer protection seems to be the championing theme behind this new law, yet retailers have no obligation to inform consumers of the new policies.⁶¹ Specifically, retailers are not

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Retail Industry Group, *supra* note 23.

⁵⁶ *Id.*

⁵⁷ Grant Thorton’s Washington National Tax Office, *supra* note 52.

⁵⁸ Keane Unclaimed Property Team, *supra* note 33.

⁵⁹ *Id.*

⁶⁰ Retail Industry Group, *supra* note 23.

⁶¹ *Id.*

required to disclose that consumers are entitled to a cash refund if their card has less than five dollars remaining on it.⁶² Pursuant to the law, retailers are even permitted to continue to include a statement on their gift card to the effect that “[t]his card is not redeemable for cash except as required by law.”⁶³ Federal law also regulates gift cards. In fact, gift cards are regulated through a number of federal laws, including the Credit Card Accountability, Responsibility, and Disclosure (“CARD”) Act of 2009, the Electronic Fund Transfer Act (“EFTA”), and the Consumer Financial Protection Bureau.⁶⁴ On May 22, 2009, President Barack Obama signed the CARD Act of 2009, which took effect on August 22, 2010, as part of his goal to regulate financial matters and institutions.⁶⁵ The CARD Act contains a provision that amends the EFTA, placing gift cards under federal regulations that govern fees and expiration dates.⁶⁶ This law “spells out in great detail that pre-paid cards, gift certificates, and gift cards publicly marketed as such products are covered by the new federal law.”⁶⁷ Gift cards sold on or after the effective date of this law may maintain the use of expiration dates; however, the date of expiration must be at least five years from the date the card was issued or the date when value was last added to the card.⁶⁸ The sale of gift cards, pre-paid cards, and gift certificates with expiration dates of less than five years is specifically prohibited.⁶⁹

States without their own gift card legislation are automatically opted into this law, while states that afford greater consumer protection through their own legislation are able to maintain those

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 10-175 Banking Law § 175.05.

⁶⁵ Professor Jennifer S. Martin on the Proposed Rules on Gift Cards, 2010 EMERGING ISSUES 4908 (Lexis Mar. 2010); *Federal Gift Card Law Explained in Simple Terms*, ALL THINGS GIFT CARD, June 14, 2010, <http://www.allthingsgiftcard.com/2010/06/federal-gift-card-law-explained-in-simple-terms/>.

⁶⁶ *Federal Gift Card Law Explained in Simple Terms*, *supra* note 65.

⁶⁷ *Id.*

⁶⁸ *Id.*; *see also* 15 U.S.C. § 1693l-1(c) (West 2009); *see also* 12 C.F.R. 205.20(e) (West 2013).

⁶⁹ *Federal Gift Card Law Explained in Simple Terms*, *supra* note 65.

individual standards.⁷⁰ The EFTA clearly prevents state laws “relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter . . . and then only to the extent of the inconsistency.”⁷¹ However, the Fair Credit Reporting Act further clarifies that “[a] 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.”⁷² Federal regulation contains no discussion of what happens to stored value cards once they have been deemed abandoned in accordance with an escheat statute.⁷³

In dicta, the court in *Sidamon-Eristoff* engaged in a limited discussion of the difference between New Jersey laws and the Federal laws regulating gift cards.⁷⁴ The court noted that Chapter 25⁷⁵ provides greater protection for consumers than the CARD Act’s expiration provision offers.⁷⁶ The CARD Act requires an expiration date of greater than five years, while Chapter 25 provides an indefinite right for consumers to recover funds.⁷⁷ Furthermore, Chapter 25 acts to convert stored value cards that are meant to be redeemable purely for goods or services into a cash value.⁷⁸ Thus, a consumer who possesses a stored value card for goods and services may be entitled to receive cash back following the abandonment period, a right which that individual did not, and would not, possess under the original agreement with the card issuer.⁷⁹ “The right to receive cash back is a form of protection afforded by Chapter 25 that

⁷⁰ *Id.*

⁷¹ 15 U.S.C. § 1693q (West 2010).

⁷² *Id.*

⁷³ *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 589 (D.N.J. 2010), *clarified by, injunction denied by, motion denied sub nom.*, N.J. Ret. Merch. Ass’n v. Sidamon-Eristoff, 755 F. Supp. 2d 556 (D.N.J. 2011), *aff’d*, 669 F.3d 374 (3d Cir.), *cert. denied*, 133 S. Ct. 528, *aff’d sub nom*, 669 F.3d 359 (3d Cir.), *cert. denied*, 133 S. Ct. 345 (2012), *aff’d*, 669 F.3d 374 (3d Cir.).

⁷⁴ *Sidamon-Eristoff*, 755 F. Supp. 2d at 618.

⁷⁵ “Chapter 25” refers to a section of the New Jersey Unclaimed Property law.

⁷⁶ *Sidamon-Eristoff*, 755 F. Supp. 2d at 618.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 592.

is not afforded, or even addressed, by the CARD Act.”⁸⁰ Providing an individual with a greater benefit than they bargained for significantly impedes traditional contract policy. Individuals should be on equal footing in their dealings, without unnecessary interference by the government.

III. CONTRACTUAL FREEDOM AND STATE PROTECTION

New Jersey currently holds fourth place in a ranking of states by indebtedness.⁸¹ In an attempt to raise state funds, New Jersey has reduced corporate and contractual rights.⁸² The ability to freely contract is one of the founding principles of our legal system. “States may not deprive businesses and consumers in other States of ‘whatever competitive advantages they may possess’ based on the conditions of the local market.”⁸³ The United States government has consistently recognized this ideal present in the Constitution, stating, “no state shall pass any law impairing the Obligation of Contracts.”⁸⁴ Thus, corporations should have the ability to freely contract with their consumers.

When attempting to preserve the freedom to contract while still promoting greater consumer protection, public policy is often split. The theory of unconscionability is frequently endorsed in contract settings where the bargaining power between individuals is so fragrantly uneven, and the terms of the deal are so blatantly one-sided, that the court will not allow the contract to be enforced. Courts recognize that the unconscionability doctrine promotes vital public policy objectives because it is “a potent tool for shielding disadvantaged and uneducated consumers from overreaching

⁸⁰ *Id.*

⁸¹ Jared Kaltwasser, *N.J. has fourth-highest debt among states*, NJ BIZ (Aug. 28, 2012, 1:53 PM), <http://www.njbiz.com/article/20120828/NJBIZ01/120829835/NJ-has-fourth-highest-debt-among-states>.

⁸² See N.J. STAT. ANN. § 46:30B (West 2002).

⁸³ SPGGC, LLC v. Blumenthal, 505 F.3d 183, 193 (2d Cir. 2007); *see also* Healy v. Beer Inst., Inc., 491 U.S. 324, 333 (1989) (quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 580 (1986)).

⁸⁴ U.S. CONST. art. I, § 10, cl. 1.

merchants.”⁸⁵ But courts recognize the short fallings of this doctrine as well.⁸⁶ Instead of instantly reverting to the bold usage of unconscionability to protect consumers, courts will restrain themselves in favor of corporate protection because they believe they have an obligation to apply law that “protects the freedom of parties to contract.”⁸⁷ Courts often decline to be overly paternalistic in protecting consumers from “bad bargains” and instead rely on the principles of *caveat emptor*.⁸⁸ Courts will likely decline to find that a deal’s terms are unconscionable, unless they think that a “decent, fair-minded person would view the ensuing result of enforcing the challenged term with . . . a profound sense of injustice.”⁸⁹ Previous gift card policies were never found to be unconscionable, yet the State insists on modifying these policies. In the case of stored value cards, there should be no such excuse or finding of unconscionability. There is no monopoly on gift cards, nor is there some great lack of bargaining power on the side of consumers. Arguably, consumers have the upper hand in dealings involving the sale of gift cards and retailers are held at the whim of the consumer. The choice to buy a gift card is one of convenience for shoppers. The individual who buys a gift card chooses to trade currency in exchange for the pigeonholed bartering equivalent. Corporations spend billions of dollars advertising specific goods; gift cards in turn are rarely advertised or forcefully peddled to the buyer. With a lack of unfair bargaining or unconscionability, regulatory legislation has no place modifying the right to contract. Contracts are central to our current day economy and supply the vehicle through which individuals can negotiate for their own advantages; as such, they should be left unencumbered when at all possible.⁹⁰ People must be able to freely contract without government intrusion.

⁸⁵ NEC Techs, Inc. v. Nelson, 478 S.E.2d 769, 774 (1996).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (quoting Fotomat Corp. of Fla. v. Chanda, 464 So. 2d 626, 630 (Fla. Dist. Ct. App. 1985)).

⁸⁹ *Id.*

⁹⁰ See generally Lawrence M. Friedman, *Contract Law in America, a Social and Economic Case Study*, 79 HARV. L. REV. 876 (1966).

When a contract's terms are clear and unambiguous, the court must enforce the terms as written.⁹¹ "Courts are generally obligated to enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances, and the underlying purpose of the contract."⁹² A court does not have the authority to erase the words of contracting parties and alter what is plainly articulated in the instrument.⁹³ The foundation of contract represents "the legal expression of free market principles, and every interference with the contract system . . . was treated as an attack on the very idea of the market as a natural and neutral institution for distributing rewards."⁹⁴ In the case *Barnitz v. Beverly*, Justice George Shiras stated: "No provision of the Constitution of the United States has received more frequent consideration by this [C]ourt than that which provides that no [s]tate shall pass any law impairing the obligation of contracts."⁹⁵ Traditionally, American jurisprudence has recognized the importance of allowing private individuals the freedom to contract and will not interfere with everyday bargains. *Caveat emptor* provides a guiding principle for consumers in this regard.⁹⁶

Consumers have an interest in thoroughly investigating all deals before entering into them and, in turn, they have an interest in making informed decisions and investments. When legislation is created that interferes with a corporation's freedom to contract, it often provides an unfair advantage to one party. Historically, individuals have not objected to these interferences when the party

⁹¹ *Morris County v. Fauver*, 153 N.J. 80, 103 (1998) (citing *Koshliek v. Passaic County Bd. of Chosen Freeholders*, 144 N.J. Super. 336, 344 (Law Div. 1976)).

⁹² *Caruso v. Ravenswood Developers, Inc.*, 337 N.J. Super. 499, 506 (App. Div. 2001) (citing *Marchak v. Claridge Commons, Inc.*, 134 N.J. 275, 281 (1993)); *Jacobs v. Great Pac. Century Corp.*, 104 N.J. 580, 586 (1986); *Vasquez v. Glassboro Serv. Ass'n, Inc.*, 83 N.J. 86, 101 (1980).

⁹³ *See Schenck v. HJI Assocs.*, 295 N.J. Super. 445, 450 (App. Div. 1996), certif. denied, 149 N.J. 35 (1997); *Tomaiuolo v. U.S. Fid. & Guar. Co.*, 75 N.J. Super. 192, 201 (App. Div. 1962).

⁹⁴ Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*, 33 (1992).

⁹⁵ *Barnitz v. Veverly*, 163 U.S. 118, 121 (1896).

⁹⁶ Latin phrase meaning buyers beware.

negatively affected is a corporation. In the United States, corporations generate more than half of the gross domestic product.⁹⁷ A corporation is recognized under the law as a separate person. For all intents and purposes, the law recognizes corporations as having the same rights as individuals, who are able to sue and be sued just like their living, breathing counterparts. Thus, corporations should be given the same protections and advantages as individuals to contract freely.

New Jersey consistently favors consumers over corporations in the context of most transactions. In an attempt to protect consumers, New Jersey enacted greater restrictions and requirements on corporations in contracting with consumers. These policies strictly contrast traditional contract policies, which seek to enhance the abilities of parties to freely contract with each other.⁹⁸ To ascertain whether a contract clause has been violated, a court must determine whether the change in state law has “operated as a substantial impairment of a contractual relationship.”⁹⁹ The amendments to New Jersey’s Unclaimed Property Law have substantially impaired the contractual relationship between buyers and sellers. The current law provides cardholders greater protection than they bargained for. “The State of New Jersey’s stated goal of protecting the unclaimed property interests of gift card purchasers is illusory because such purchasers have no expectation of a refund that requires protection.”¹⁰⁰ In *Sidamon-Eristoff*, the plaintiff’s brief argued that New Jersey’s true goal was to ensure “the biggest revenue ‘haul’ through conspicuously absent audit trails and no reclamation procedure.”¹⁰¹ The plaintiff further argued that the majority of gift cards are

⁹⁷ BUREAU OF ECONOMIC ANALYSIS, U.S. Dept. of Com., *Surv. Current Bus.* (Jan. 1994).

⁹⁸ Phillip W. Bohl, Kathryn J. Bergstrom & Kevin J. Moran, *Prepaid Cards and State Unclaimed Property Laws*, 27 *FRANCHISE L.J.* 23 (2007).

⁹⁹ *Gen. Motors v. Romein*, 503 U.S. 181, 186 (1992); *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987); *Energy Reserves Grp. v. Kan. Power Light Co.*, 459 U.S. 400, 411 (1983).

¹⁰⁰ Brief of Plaintiff-Appellee-Cross-Appellant at 12-13, *N.J. Retail Merchs. Ass’n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 528 (2012) (No. 12-108), 2011 WL 1653401 (C.A.3), at *12-13.

¹⁰¹ *Id.*

purchased and given to third parties.¹⁰² As such, purchasers are not warranted high levels of protection because they never have an expectation of a personal refund that needs to be protected by New Jersey.¹⁰³ The State continues to put forth consumer protection as a guise to collect state funds and infringe on the right to contract. There is no presumption of bad dealings between retailers and consumers in terms of gift cards, and thus, the State cannot usurp benefits for itself and remove citizen's rights to recover their property, abandoned or not.

The new gift card legislation has even dissuaded some bank issuers from continuing to issue these cards because they are no longer profitable.¹⁰⁴ Banks, as well as retailers, earn income through stored-value-card fees.¹⁰⁵ Bankers have estimated significant financial setbacks resulting from the legislation, noting for example "the inability to charge dormancy fees on gift cards will cause a significant drop in revenue during the coming year." This led to the decision to stop issuing the cards.¹⁰⁶ Banks have endured substantial hardship over the past few years. The legislation now in place in New Jersey further handicaps banks and prevents them from receiving profits through a means they have come to rely on.¹⁰⁷ The banks' choice to halt the issuance of gift cards will also affect consumers, as shoppers will no longer be given the more convenient option of purchasing gift cards from as many sources. Further, New Jersey's gift card laws will dissuade corporations from transacting business in the state of New Jersey.¹⁰⁸ The laws will create a loophole whereby big businesses will utilize federal banks in order to avoid state mandates.¹⁰⁹ Already this is true for American Express, as the company has stopped selling

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Stuart Hoberman & Susan Storch, *Look Into the Crystal Ball*, 266 NEW JERSEY LAWYER MAGAZINE, Oct. 2010, at 65, 68.

¹⁰⁶ *Id.*

¹⁰⁷ Brief of Plaintiff, *supra* note 100.

¹⁰⁸ Retail Industry Group, *supra* note 23.

¹⁰⁹ Arent Fox, *New Jersey Gift Card Law Forces Gift Card Retailers to Leave the State*, ARENT FOX, (Apr. 13, 2012) <http://www.arentfox.com/newsroom/alerts/new-jersey-gift-card-law-forces-gift-card-retailers-leave-state#.UzyUSnlpE3Y>.

gift cards in New Jersey stores. Currently, the only way for New Jersey consumers to purchase American Express gift cards is online, direct from the company.¹¹⁰ A spokeswoman for American Express said that this is necessary “because American Express sells its gift cards through third-party independent retailers,” and they are thus unable to ensure compliance with New Jersey’s new law.¹¹¹ If large companies like American Express refuse to do business in New Jersey, the State’s economy will be negatively impacted.¹¹² The law’s requirement that businesses collect data regarding gift cardholders’ personal information under State law is also potentially harmful to consumers and further interferes with the consumers’ freedom to contract. Retailers sell gift cards anonymously as a method of protecting consumer privacy.¹¹³ Asking consumers to provide personal information such as their address and other information regarding the gift card’s recipient would create privacy concerns.¹¹⁴ This requirement would also increase transaction costs because of the time spent collecting and maintaining the consumer data. Neither the consumer nor the purchaser will benefit from these efforts.¹¹⁵ If a business was to maintain the data for its own personal use and notified card owners when their cards were due to expire or when they had remaining balances, the time incurred in data collection and maintenance would be rewarding for both the owner of the card and the retailer. The owner of the card would be able to redeem his or her gift card value, and the retailer would be able to lure their customer back into the store for subsequent sales.¹¹⁶

Companies exert labor and marketing forces in order to funnel economic gain from consumers.¹¹⁷ Gift card laws should protect

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Grant Thornton’s Washington National Tax Office, *supra* note 52.

¹¹³ See Erica Alini, *supra* note 15.

¹¹⁴ Sean M. Diamond, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*,

60 EMORY L.J. 971, 983 (2011).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Mark Furletti, PREPAID CARD MARKETS & REGULATION 2 (Fed. Reserve Bank of Phila., Payment Cards Center Discussion Paper No. 04-01, 2004), available at <http://www.phil.frb.org/consumer-credit-and-payments/payment-cards->

consumers, yet in the case of New Jersey's laws, the State is the beneficiary and the consumer is left with nothing.¹¹⁸ Consumers lose their rights to products and services offered through gift cards because of the length of time of inactivity. The company owes a duty for a limited period of time and after that time has passed, the benefit of the property should move to the retailer, who unswervingly upheld its end of the bargain.

IV. PROPERTY RIGHTS AND THE HISTORICAL CONTEXT

New Jersey derives its claim to abandoned property under the principles of escheat. Escheat is defined as "the reverting of property to the state or some agency of the state, or, as in England, to the lord of the fee or to the crown, when there is a failure of persons legally qualified to inherit or to claim."¹¹⁹ Under the doctrine of escheat, there is a long-standing tradition for states to claim custody rights of abandoned property in order to create a bailment for the true owner.¹²⁰ Escheat law traces its history back to feudal tenure under William the Conqueror.¹²¹ "While in its traditional usage 'escheat' was a term which signified the reversion of real property to the state where no individuals exist who are entitled to inherit the property, the term has come to be used in a broader sense, including the situation where a government acquires title to abandoned personal property."¹²²

As budgets have declined in the last few decades, states have turned to property law and expanded their escheat statutes to increase collection efforts, encapsulating additional unclaimed property as an unconventional source of profits.¹²³ A prime

center/publications/discussion-papers/2004/Prepaid_022004.pdf.

¹¹⁸ See generally *Sidamon-Eristoff*, 755 F. Supp. 2d 556 (D.N.J. 2010).

¹¹⁹ Escheat Definition, DICTIONARY.COM, <http://dictionary.reference.com/browse/escheat?s=t> (last visited Nov. 28, 2012).

¹²⁰ Teagan J. Gregory, *Unclaimed Property and Due Process: Justifying "Revenue-Raising" Modern Escheat*, 110 MICH. L. REV. 319, 321 (2011).

¹²¹ John V. Orth, *Escheat: Is the State the Last Heir?*, 13 GREEN BAG 2d 73, 74 (2009).

¹²² 27A Am. Jur. 2d Escheat § 1.

¹²³ See Diann L. Smith & Matthew P. Hedstrom, *Will Unclaimed Property Prove an Irresistible Well?*, SUTHERLAND, (June 4, 2009),

illustration of this inclination is the state movement toward controlling gift cards by imposing legislation to claim the remaining value on unused gift cards. The money remaining on these cards can range from pennies to dollars, often unsubstantial amounts but, in the aggregate, this small change can amount to a sizeable sum. The traditional theory of unclaimed property law is to reunite the lost property with the original owner by reverting the property back to the state in trust for the rightful owners and in the process, to protect consumerism by preventing an undue windfall to sellers.¹²⁴ This justification is not applicable here, where the State does not know who the real owner of the property is.¹²⁵

In *Texas v. New Jersey*, the United States Supreme Court established the “primary rule” for escheat. There, the Court held that “each item of property . . . is subject to escheat only by the State of the last known address of the creditor. . . .”¹²⁶ In explaining the primary rule, the Supreme Court stated that

[b]y using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified. It may well be that some addresses left by vanished creditors will be in states other than those in which they lived at the time the obligation arose or at the time of the escheat. . . .¹²⁷

It is evident that the Supreme Court looks to the address requirement of the escheat rule in order to substantiate where the creditor resided when the contractual obligation between retailer and consumer was created, or alternatively, at the time the property is to

<http://www.sutherland.com/files/News/9508e3c1-a85a-433c-b0cb-0bfd8d13f054/Presentation/NewsAttachment/ded2153e-872a-4b88-9101-11dd0925870a/Article6.4.09.pdf> (“The reality, however, is that if states change unclaimed property laws with the purpose of obtaining more property or obtaining the property faster, the *raison d’être* of those laws also becomes abandoned.”).

¹²⁴ See *Clymer*, *supra* note 50.

¹²⁵ See Philip Keitel, *The Laws, Regulations, Guidelines, and Industry Practices That Protect Consumers Who Use Gift Cards*, 63 CONSUMER FIN. L.Q. REP. 163 (2009).

¹²⁶ *Texas v. New Jersey*, 379 U.S. 674, 681-2 (1965).

¹²⁷ *Id.* at 681.

escheat.¹²⁸

The Uniform Unclaimed Property Act of 1981 defines “last known address” as “a description of the location of the apparent owner sufficient for the purpose of the delivery as mail.”¹²⁹ In order to allow gift cards to escheat to the state, New Jersey’s property statute now requires retailers to maintain a list of gift card purchaser’s zip codes.¹³⁰ A zip code unaccompanied by additional information is inadequate under the Uniform Unclaimed Property Act’s definition to operate as a last known address. Holders of unclaimed property have certain procedural duties to locate and notify owners.¹³¹ Alone, a person’s zip code does not provide retailers with sufficient information for the purposes of reunification. Therefore, New Jersey should have no superior right to the unclaimed property, as they are not holding that property in bailment for the true owner. New Jersey openly acknowledges this fact in its Appellate Brief to the Third Circuit, stating that the Property Act “will require issuers to obtain and retain sufficient information to identify the *State* of the creditor’s last known address” but will not require issuers to maintain information relevant to actually finding the creditor himself.¹³² Maintaining a list of gift card purchasers’ zip codes is arduous and does virtually nothing to aid the State in tracking down the true owner of abandoned property. Ultimately, an individual cannot be located by their zip code alone.

Certainly, New Jersey’s policy imperative rooted in reuniting consumers with their lost gift card money is laudable. Hence, the traditional justifications for escheatment to the state tend to fail miserably in the presence of that imperative. The Unclaimed Property Act regulates the State’s treatment of unclaimed property. “The Uniform Unclaimed Property Act is consumer protection and

¹²⁸ Brief for Appellant at 8, *New Jersey Retail Merchant’s Ass’n v. Sidamon-Eristoff*, 669 F.3d 374 (2011) (3:10-cv-05059), 2011 WL 1230250.

¹²⁹ Uniform Unclaimed Property Act, 8B U.L.A. 567 (1981).

¹³⁰ N.J. Stat. Ann. § 46:30B-42.1 (West 2012).

¹³¹ *Benson v. Simon Prop. Group, Inc.*, 642 S.E.2d 687 (2007).

¹³² Brief for Appellants at 10, *N. J. Retail Merch. Ass’n v. Sidamon-Eristoff*, 2011 WL 1230250 (C.A.3 2011).

public interest legislation, protecting the interests of the true owner of property against confiscation by the holder while giving the state the benefit of its use until the owner claims it.”¹³³ The Act provides protection, convenience, accessibility, equality, and public benefit as its avowed goals.¹³⁴ Since it is virtually impossible for the State to locate card owners, none of the goals of the Act can be satisfied.

In order to provide a better scheme for reunification, retailers would have to be obligated to follow a more stringent regiment, such as inquiring about additional personal information including the purchaser’s name, physical address, and the personal information for the intended ultimate holder of the card.¹³⁵ This retention of additional personal information could cause an array of problems as discussed above. Consequently, New Jersey’s statutory requirement for retailers to maintain a list of zip codes is purely self-serving, in that the State will be able to maintain a rebuttable presumption that the property can properly escheat to the State. There is no form of consumer protection taking place in this scenario. In fact, by maintaining only zip code information, New Jersey harms consumers by creating a policy whereby no true owner will ever “appear to be entitled to payment” as mandated by New Jersey’s unclaimed property law.¹³⁶

There is no evidence that retailers, as opposed to the State, would not be in the optimal position to reunite gift card holders with their abandoned property. The proposition that the State is in an inferior position to protect the consumer is further supported by the fact that the Unclaimed Property Act does not provide any provisions or procedures for a consumer to follow in order to make a claim for compensation for their forfeited gift card.¹³⁷ Moreover, as the funds

¹³³ See Clymer, *supra* note 50.

¹³⁴ Diamond, *supra* note 114 at 980 (citing Network Branded Prepaid Card Ass’n, NBPCA White Paper—Abandoned Property Laws and Network Branded Prepaid Cards: Questions and Concerns Raised When Trying to Fit Cards into the Existing Abandoned Property Legal Framework 3 (2009)).

¹³⁵ Brief for Appellants, *supra* note 132.

¹³⁶ *Id.*

¹³⁷ *Id.*; See also N.J. STAT. ANN. § 46:30B (West 2002).

from unclaimed gift cards are pooled into the State of New Jersey's "general fund," the State cannot assure that the monies would be available to "the rightful owner" should he or she make a claim.¹³⁸ "New Jersey is not seeking 'custody' of unclaimed gift card proceeds as is required by unclaimed property law; New Jersey is seeking to use unclaimed gift card proceeds as a tool to balance its state budget."¹³⁹ It would seem to be more convenient and comprehensive to have a system where gift cardholders returned to the original source, the retailer, in order to request relief, as opposed to petitioning the state. There cannot be a claim for inconvenience or burden because the consumer has already proven an ability to get to the retailer through their original purchase. Gift card legislation should focus on the reunification of consumers with their goods, not on promoting greater consumer protection.¹⁴⁰

The other stated objective of escheat, to prevent a windfall, is also inefficient when applied to gift cards.¹⁴¹ With respect to abandoned property, a windfall occurs when someone is entitled to undeservedly collect to the detriment of the true owner.¹⁴² There would be no claim of windfall as applied to the escheat of gift cards if the money reverted to the retailers, because unclaimed value remaining on a gift card could be returned to a more carefully tailored group, specifically those who exerted the initial efforts.¹⁴³ There are no unfair winnings when remaining balances escheat back to retailers because those businesses have invested considerably in the development of that gift card.¹⁴⁴ The existence of an unused remaining balance is due back to retailers, instead of to the state, because the retailers have engaged in productive business activities, such as extending the costs for the development of the gift cards. The

¹³⁸ Brief for Appellant, *supra* note 128, at 8.

¹³⁹ *Id.*

¹⁴⁰ *Benson v. Simon Prop. Group, Inc.*, 642 S.E.2d 687 (Ga. 2007).

¹⁴¹ *Diamond*, *supra* note 114 at 985.

¹⁴² Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1491 (1999).

¹⁴³ *Id.* at 1554.

¹⁴⁴ Mark Furletti, PREPAID CARD MARKETS & REGULATION 2 (2004), *available at* http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2004/Prepaid_022004.pdf.

state, on the other hand, has exerted no effort up until that point. Therefore, the current process, which allows gift card balances to escheat to the state, creates the very harm that escheat seeks to prevent, an undue windfall.¹⁴⁵

Legal theorists also argue that allowing unused balances to escheat back to retailers is more likely to result in an economic gain back to the gift card owner.¹⁴⁶ “In a competitive market, businesses that retain breakage¹⁴⁷ are likely to pass on the savings to consumers, who are a smaller population than the general public, and this subgroup is more likely to encompass gift card owners and purchasers.”¹⁴⁸ Reverting unused gift cards back to retailers could reduce costs, encourage additional spending, and benefit society as a whole.¹⁴⁹ Preventing cards from escheating to the state would provide an incentive for retailers to honor gift cards for longer periods of time and would lead to a greater influx of cash into the economy.

A further disparagement exists when the state is entitled to unclaimed property as applied to gift cards because there is a violation of the derivative rights doctrine. Under the derivative rights doctrine, the right of the state to maintain unclaimed property is supposed to derive from a custodial right to maintain that property in anticipation for the true owner.¹⁵⁰ The derivative rights doctrine limits the rights of the state, placing the state on equal footing with the true owner.¹⁵¹ When buying a gift card, purchasers acknowledge that they are exchanging currency for the ability to purchase future merchandise. The owners of gift cards have a limited right to exchange their prepaid cards for products. Gift cards are not a form of bailment for currency that can be retrieved upon request. The

¹⁴⁵ Kades, *supra* note 142.

¹⁴⁶ Diamond, *supra* note 114.

¹⁴⁷ This term is used to refer to the circumstance when a portion of a gift card remains unused.

¹⁴⁸ Diamond, *supra* note 114, (citing Kades, *supra* note 140, at 1554).

¹⁴⁹ Kades, *supra* note 142, at 1554.

¹⁵⁰ Ethan D. Millar & John L. Coalson, Jr., *The Pot of Gold at the End of the Class Action Lawsuit: Can States Claim It As Unclaimed Property?*, 70 U. PITT. L. REV. 511, 515 (2009).

¹⁵¹ *Id.*

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standard terms of gift cards provide that once purchased, a card can never be returned for cash.¹⁵²

New Jersey's escheat law essentially transforms unused gift cards to cash by requiring retailers to turn over sixty percent of remaining gift card balances to the State after the cards have been deemed abandoned.¹⁵³ For practical purposes, this requirement provides the State a greater right than the owner of the gift card was ever entitled.¹⁵⁴ Courts have recognized this inconsistency but disagree as to its permissibility.¹⁵⁵ For example, in *Connecticut Mutual Life Insurance Co. v. Moore*, the Supreme Court allowed the State to step into the role of an individual "owner," but did not require other procedural requirements that the owner would typically need to satisfy, thus effectively expanding the state's power.¹⁵⁶ If the state is given additional powers in contravention of the derivative rights doctrine, the subsequent restrictions on the retailer's right to performance must be appropriate.¹⁵⁷ The derivative rights doctrine should be upheld in the circumstance of gift cards, since acting otherwise will create an unfair cost to retailers. When an individual utilizes a gift card for the purchase of goods, the value of the card is put towards the goods' retail value. "[T]he business retains the profit from the difference between the wholesale and retail prices. Therefore, a State claiming the full value of the breakage violates the [derivative rights] doctrine by obtaining a right to the merchandise's wholesale value instead of its lesser retail value."¹⁵⁸

The new requirement of returning remaining balances of less than five dollars to consumers would also create a greater property

¹⁵² See Diane Green-Kelly, *Gift Certificate and Gift Card Programs: The State Law Quagmire*, 23 FRANCHISE L.J. 211, 213 (2004).

¹⁵³ N.J. STAT. ANN. § 46:30B (West 2002).

¹⁵⁴ Millar, *supra* note 150 at 530.

¹⁵⁵ *Conn. Mutual Life Ins. Co. v. Moore*, 333 U.S. 541 (1948); *see also* State ex rel. Callahan v. Marshall Field & Co., 404 N.E.2d 368 (Ill. App. Ct. 1980); *Murdock v. John B. Stetson Co.*, 1963 WL 6456 (Ct. Com. Pl. 1963).

¹⁵⁶ *Moore*, 333 U.S. 541.

¹⁵⁷ David J. Epstein, *Unclaimed Property Law and Reporting Forms* §1.04 (Matthew Bender rev. ed. 2010).

¹⁵⁸ Diamond, *supra* note 114 at 985-87.

right for those consumers. Since it is understood that gift cards are non-refundable, providing a monetary refund, no matter how minimal, creates an additional obligation on behalf of retailers. This obligation should be optional and voluntarily entered into. “The ‘voluntary payment doctrine’ bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law.”¹⁵⁹ Thus, New Jersey should have no power to regulate de minimis returns because the original transactions were voluntarily entered into.¹⁶⁰ Cards with small remaining balances encourage future sales. Originally, consumers had to use every penny of their gift cards or risk waste. Many purchasers thus chose to put their remaining balances toward another purchase in order to make a small contribution toward the new price. With the option to cash out cards with little value on them, the incentive to purchase additional items from the retailer is void. Buyers will likely choose to cash out rather than spend more.

Pursuant to the United States Constitution, private property must not be taken for public use without proper compensation.¹⁶¹ New Jersey interferes with individual’s rights in terms of the takings clause when it takes economic benefit away from the consumer.¹⁶² Under the Unclaimed Property Act, the State is able to take private property without just compensation, thus depriving the true owner of any economically viable use. Since the state has no means of reuniting gift card owners with their abandoned property, this is a taking with no intention of compensation. The state cannot justify their takings under property law when the historical purpose of that law is at odds with current practice. Current law allows for an uncompensated taking of private goods for public use, converting those goods into state spending. The State is not retaining this money in order to return it to the consumer, nor is it properly compensating the owner for his or her loss. Thus, New Jersey’s gift card legislation is clearly at odds with traditional property law.

¹⁵⁹ *Lonner v. Simon Prop. Grp., Inc.*, 57 A.D.3d 100 (2008).

¹⁶⁰ *Id.*

¹⁶¹ U.S. CONST. amend. V.

¹⁶² *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1012 (1992).

V. CONCLUSION

There are many unintended consequences of New Jersey's gift card laws. This legislation will have a negative effect on banks, retailers, consumers, and the State. New Jersey should utilize lessons learned from other states and develop a more corporate-friendly approach. Delaware's current gift card policies provide no limits on expiration dates.¹⁶³ There are also no regulations guiding when monthly fees may begin.¹⁶⁴ Unlike New Jersey, there is no requirement for merchants to offer cash back.¹⁶⁵ New York's current policies also provide for no limits on expiration dates.¹⁶⁶ New York may impose post-sale fees of any amount after one year of inactivity.¹⁶⁷ Again, that State does not require merchants to offer cash back.¹⁶⁸ Finally, the District of Columbia's current gift card policy provides no limits on expiration dates.¹⁶⁹ There is currently no maximum post-sale fee or minimum time frame before charging monthly fees.¹⁷⁰ Again, merchants are not required to give cash back to consumers upon request.¹⁷¹ The District of Columbia also does not maintain a consumer-centric web page dedicated to gift card laws.¹⁷² This brief summary demonstrates how other states treat gift cards and reflects how New Jersey's policies could shift in favor of corporations.

Remaining funds determined to be "abandoned," should escheat to the original company, who will best be able to utilize those monies for the benefit of the consumer and the economy as a whole.¹⁷³ There should also be no requirement of record keeping,

¹⁶³ *Delaware Gift Card Law*, SCRIP SMART (Mar. 18, 2011), <http://www.scripsmart.com/states/5-delaware-gift-card-law>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *New York Gift Card Law*, SCRIP SMART (Jan. 3, 2011), <http://www.scripsmart.com/states/9-new-york-gift-card-law>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *District of Columbia Gift Card Law*, SCRIP SMART (Mar. 11, 2011), <http://www.scripsmart.com/states/35-district-of-columbia-gift-card-law>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Robert S. Peters & Matthew J. Beintum, *Going Fishing: State Budget Deficits Drive*

unless such activity is voluntarily entered into for the mutual benefit of the consumer and the retailer. There should be no return of nominal funds, as those funds were fairly traded for the right to collect merchandise.

As consumers have become increasingly savvy, they require less protection from big corporations. Alternatively, corporations must not be vilified purely based on their size or apparent wealth. These companies should be fairly compensated for services rendered, such as the sale of gift cards. To satisfy these imperatives, the State must reevaluate current gift card legislation, especially if it hopes to attract and retain big business. In sum, New Jersey should modify its laws in favor of gift card issuers because such a shift would benefit the State, retailers, and consumers alike. By spurning the initial right to quickly bolster the budget in the short term, the State can ensure a long-term benefit by incentivizing large companies to invest in the State and consequently guarantee that flourishing gift card sales remain local.