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Legal and Policy Issues Related to Proposed Montana Legislation on the Escheat of Unused Gift Cards

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We have examined the bill presented to us amending the Montana Unclaimed Property Law with respect to gift cards, gift certificates, and stored value cards.[1] Our analysis is provided below. In the first part, we survey the content of the bill and identify some problems of interpretation. In the second part, we evaluate the possible benefits and costs of the legislation to consumers and merchants. In the final section, we identify the very serious questions about the validity of this bill in light of controlling federal law on states' jurisdiction to take custody of ("escheat") unclaimed intangible property.

I. The Proposed Amendments

The bill makes several changes to Montana's existing law on abandoned property. These changes concern gift cards that have not been used for three years and that still have some value left on them. That unused value is treated as unclaimed property and is presumed to be "held" by the issuer of the gift card (i.e., the retailer). The gift card is thus treated like an inactive savings account or an uncashed payroll check.

In general, abandoned property, including intangible property, reverts or "escheats" to the State. Thereafter, the Montana Department of Revenue is under a duty to return the property to the true owner. In the case of gift cards, the merchant-issuer would pay over to the State the amount left on the unused cards. In recognition of the fact that merchants redeeming such cards would generally make a profit when the cards are used, Montana law requires them to transfer only 60% of the remaining value. Although for convenience we generally refer to the abandonment of "gift cards" (or their equivalents), the property at issue is, more precisely, the financial equivalent of 60% of the unused value.

The bill makes several changes in the law. It imposes on merchants issuing gift cards the obligation to "obtain the name and address of the apparent owner of the [card] and maintain a record of the owner's name and address." The bill creates a new category of property subject to the law: "stored value cards." It provides definitions for "stored values cards" as well as for "gift certificates," each of which turns out to be simply a different kind of gift card. The bill adds a three-year rule for when the unused amount of a stored value cards is presumed to be abandoned.

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[1] We base this memorandum on a draft bill dated November 15, 2006, indicating it is to be introduced at the request of the Department of Revenue.

(This duplicates the existing gift certificate abandonment period of three years.) Finally, the bill declares that when the issuer of an unredeemed stored value card has *not* kept the name and address of the owner, that address "is considered to be" that of the Secretary of the State in Helena, Montana.

The bill raises many questions about its meaning and the practical effect of its application. First, the definitions of "gift certificate" and "stored value card" are overlapping but each explicitly excludes records falling under the other definition.[2] Because many gift cards would qualify as both a gift certificate and a stored value card, the double exclusion could lead to their being defined as neither. (The reasons for this confusing double definition are unclear because both categories are, with one minor exception, treated identically.[3]) We treat this aspect of the bill as a drafting error that can be corrected and assume that what is intended is that gift cards that employ electronic means to keep track of the value left on a card are to be classified as stored value cards, whereas all others are to be treated as gift certificates.

A more serious problem is presented by the confusing use of the term "apparent owner." For reasons explained below, the proposed legislation attributes a Montana address to this "apparent owner." The bill attempts to accomplish this by adding a new paragraph to MCA Sec. 70-9-802, the definition of "apparent owner." The addition does not, however, actually address who is an apparent owner. Rather, it provides a "deemed" address for the apparent owner of a gift card in certain cases. Specifically, the bill provides that if:

> 1) the existence and location of the "owner" of the card are unknown to the holder and;
> 2) the issuer of the card:
>
> a) did not obtain the name and address of the "apparent owner" and
> b) did not maintain a record of the "owner's name and address as required by [Section 1]"

then the address of the apparent owner is "considered to be" in Helena, Montana.

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[2] The authors shared an earlier version of this memorandum with the Department of Revenue so that it is possible that the drafting weaknesses identified in the text will have been cured in the version of the bill actually introduced.

[3] The amendment to MCA Sec. 70-9-810, concerning the publication of notice of escheated property, declares the address of an unrecorded "apparent owner" of a stored value card, but not a gift certificate, to be that of the Secretary of State in Helena. Presumably this only affects the place where the notice of escheat is to be published. For the reasons discussed in the text, publication is a futile exercise in any event.

This new language refers to both "owners" and "apparent owners." According to the Unclaimed Property Law, an "owner" is a person "who has a legal or equitable interest in property." MCA Sec. 70-9-802(11). An "apparent owner" is a person "*whose name appears on the records of the holder as the person entitled to property held, issued or owing by the holder.*" MCA Sec. 70-9-802(2). Because "apparent owner" only refers to someone inscribed on the holder's records, and because the new "deemed address" rule is only triggered when the holder *does not have such a record*, there would appear to be no occasions when the deemed Montana address would be used.

Even more striking is the fact that abandonment can only occur when the property is unclaimed by "the apparent owner." MCA Sec. 70-9-803. In cases where the "deemed address" is to be applied, the holder's records do not identify an apparent owner. Therefore, there can be no "apparent owner" and there can be no abandonment.[4]

The bill as written, therefore, is confusing and contradictory. Imposing any liability based on provisions of this degree of obscurity fails to provide adequate notice of its requirements. It would raise grave constitutional doubts under the Due Process Clauses of the United States and Montana constitutions.

II. The Ill-Conceived Policy of Treating Gift Certificates and Stored Value Cards as Unclaimed Property

As shown above, the bill creates a morass of interpretive problems. Assuming, however, that an adequate statute could be written, the question raised is whether Montana *ought to* establish a policy escheating abandoned gift cards. While unused gift cards may meet the broad definition of abandoned intangible property in the law, see MCA Sec. 70-9-802(13)(a), we understand that the State has made little attempt to apply it in such cases. If so, this bill represents a proposed change in that administrative policy.

A vigorous application of the Unclaimed Property Law to unused gift cards cannot be justified under the principal rationale for such laws: reuniting owners with lost property. The Montana Department of Revenue's website, for example, provides

[4] A similar confusion arises in the amendment to MCA Sec. 70-9-810 on the requirements of publicizing escheated property but nothing of significance appears to turn on it.

that under the Unclaimed Property Law, the State "holds such property on behalf of the owners of lost or abandoned property" and the Department's duty is "finding owners of unclaimed intangible personal property."

But in almost all other cases not involving gift certificates, the State has the name of an owner of the unclaimed property. For example, the State knows the name of the holder of an unclaimed bank account or the payee of an uncashed check. The Department publishes that name in the newspapers and on its website, announcing that the State holds that person's property. Should the owner read the newspaper or the website, he or she would contact the Department and start the process of obtaining the money.

In sharp contrast, in the case of gift cards the missing property owner is almost always unknown. This is a fundamental difference between gift cards and other types of unclaimed property. Gift cards are typically bought to be given away and no one but the person who gives them can know where they end up. Only the person in possession of the card has the right to the services or merchandise.[5] Electronic "stored value cards" usually do not provide a way to inscribe a name and address on the card.

The bill's proposed requirement that merchants obtain the name and address of the "apparent owner" and maintain a record of the "owner's" name and address cannot change this reality. Putting aside the bill's convoluted terminology, the State must attempt to return the gift card's unused value to the person who has the right to use it. That right, both by contract and by statute (see for example section 4 of this bill), belongs to the person in possession of it when it was lost or last used. There is no way the retailer will be able to identify that person when he sells the card or for the State to know that identity, should the card be escheated.

Consequently, unlike almost all other types of unclaimed property, the Department has no way of reuniting the owner with the gift card. All it can do is publicize the fact that people might have lost or forgotten a gift card. It could, of course, also list the names of the retailers that have turned over unclaimed gift cards to the State. Such a list, however, would just be a "who's who" of Montana retailers and would

[5] MCA Sec. 30-14-102(5)(a). While the proposed definition of "stored value card" does not use the word "possessor," the agreement associated with the issuance of such cards invariably obliges the merchant to provide the goods or services to the possessor

not provide consumers with any valuable information to help them find their unused cards.

In fact, the escheat of unused gift cards may make it *more* difficult for the consumer-owners. Should they find their card after it has been turned over to the Revenue Department, the merchant is no longer obliged to honor it. MCA Sec. 70-9-811(2). The consumer will now have to deal with the Department of Revenue to whom he or she will have to prove ownership of the newly discovered card. On the other hand, if the card were not escheated, the consumer would simply deal with the merchant. Because gift cards do not expire, the merchant would be required to honor the card. Presumably, most consumers would prefer dealing with the merchant rather than the Revenue Department. Indeed, how many consumers would even think of going to the Revenue Department rather than the merchant?

Escheating gift cards is also in serious tension with recent Montana legislation prohibiting the expiration of gift certificates. MCA Sec. 30-14-102. Although an unused card never expires, after three years of non-use the merchant would have the duty to escheat 60% of the unused value to the State. After that, the merchant no longer has to honor the abandoned card. The bill thus imposes a de facto expiration after three years of inactivity, nullifying the recent consumer protection measure and forcing consumers to deal with the Revenue Department.

A refund by the State of escheated funds is predicated on the card being in the possession of the claimant. That is, the only cases where the State can do something for the owners of unused cards are where they have no need of the State's help, having found the non-expiring gift cards. The process of Montana appropriating the cards, and later returning the unused amount is nothing but an inconvenient delay in the consumers getting to use the cards they already hold in their hands.

This situation is entirely different from the normal case of escheated property where the State knows it holds property owed the claimant but the claimant is unaware of this fact. In the case of escheated cards, the State has no idea who the claimant is but the claimant has the card.

It is possible to hypothesize one case in which a Montana consumer might benefit from the State's escheating an unused gift card. That would be when Montana would claim the unused gift card rather than some other state. This case is

hypothetical in the extreme. As will be discussed further below, in the case of gift cards, federal law generally mandates that the state of incorporation of the retailer has the first claim on the value of abandoned gift cards if that state provides for escheat of this kind of property. As we will also explain, nothing that Montana does with its law can change that federal rule. If, however, Montana did somehow have a right to escheat that pre-empted the right of the state of incorporation, the consumer would then have the advantage of being able to seek restitution from the Montana Department of Revenue rather than from, say, the Delaware State Escheator.

How significant a consumer protection measure would this be? Montana's escheat of a gift card over that of another state would affect 1) Montana residents who possessed gift cards 2) who failed to use their gift cards for three years 3) who purchased the cards in Montana 4) from out-of-state retailers 5) who then found the card and attempted to use it and 6) the gift card was dishonored by the merchant who would have escheated the card to its state of incorporation. Only this category of card owners would secure the benefit of being able to apply to Montana rather than some other state for the return of the value they have lost.

The benefit to Montana consumers assumes that they will find it easier to deal with the Department of Revenue and that they will have an easier time receiving the unused value of their cards than if they had to deal with another state. Given the size of Montana, however, many such persons would communicate with the Revenue Department in writing, the same way they would communicate with another state. Nor is there any reason to think the Revenue Department would have any more generous rules for giving back property than would some other state.

In any event, the bill sweeps in a far larger category of gift cards than that identified above. The bill penalizes consumers who have gift cards from retailers incorporated in states that do not escheat gift cards (e.g., Arizona, Connecticut, Indiana, Maryland, Minnesota, Ohio, Rhode Island, Virginia, Washington, among others). Those consumers would never have to apply to another state. But the bill would nonetheless force them to deal with the Revenue Department and not the store. In this case, the bill provides no consumer benefit and imposes a major disadvantage. Nor is this penalized group small. Many of the largest retail gift card issuers in Montana, including Sears, J.C. Penny, Macy's and Target are domiciled in states that do not escheat gift cards. In addition, many large retailers outsource

their gift card functions to third parties incorporated in states that do not escheat gift cards.

To be sure, some large retailers might honor gift cards no matter when presented, and whether or not the unused value may have been transferred to the State as abandoned property. In that case, the bill would confer no benefit to consumers but its impact on retailers would be significant. Retailers will have the added expense of seeking restitution from Montana. A refund to the retailer without a fee or other charge is provided by MCA 70-9-811(3), but the very process of application is an added expense, not to mention the statutory need to present "proof of payment and proof that the payee was entitled to payment." Id.

Consequently, the bill will impose a serious administrative burden on the merchant issuers in every case. If they refuse to honor escheated cards, they will have the burden and expense of tracking, reporting, and transferring the unused value of cards to the State. If they honor an escheated card, they will have the added trouble of seeking reimbursement from the State. These burdens will have to be borne without regard to the presence or absence of a competing claim from another state. As the material presented below demonstrates, however, for retailers incorporated in another state that does escheat gift cards, there will very likely be such a claim–a better claim, in fact, than Montana's. The result will be the nightmare of dealing with conflicting demands from two jurisdictions each backed up by an array of enforcement actions, civil penalties, and possible awards of interest and attorney's fees (see, e.g., MCA 70-9-822,824), amounting in some cases to thousands of dollars.

The dilemma and difficulty of competing state demands is not solved by MCA 70-9-811(6), which entitles the issuer to have the Montana unclaimed property administrator "defend the holder against the [out-of-state] claim and indemnify the holder against any liability on the claim." This safeguard is only available *after* the merchant has paid Montana. It is of no help when the out-of-state claim is made before Montana is paid. In that case the retailer may resist payment, pay Montana, and trust in Montana's indemnification when enforcement of the out-of-state claim is commenced. By so doing, it will, of course, probably forfeit any aid from the other state in challenging the Montana escheat. Alternatively, it could pay the other state and wait for Montana to pursue it. There is no obvious way to decide and, in either case, the ensuing legal proceedings will be at best distracting and at worst

engulfing, no matter who ultimately has to pay after the legal arguments are sorted out.

Consequently, the bill would, even in the best of circumstances, lead to additional trouble and expense for Montana retailers. In addition, in the case of merchants who chose not to honor escheated cards, the bill would aggravate the costs of losing and finding a gift card by forcing residents to deal with the Department of Revenue. It will expose Montana to legal claims and possibly lawsuits by other states with better claims to the property under federal law. In return for these costs and exposure, the bill holds out one advantage--to improve the lot of some unspecified number cardholders by allowing them apply to Montana, instead of to some other state for their refunds. Even if this were a large group, and even if it is assumed that Montana will make it easier to recover escheated gift cards than some other state, that benefit is illusory because the bill cannot, in any way, enlarge Montana's legal right to escheat unused gift cards.

Before addressing those legal issues, some other problems with escheating unused gift cards should be noted. Even if a true owner were to turn up after a gift card were escheated, the special character of those cards raises a unique problem in administering the return of the card's value to that owner. Recall that under Montana law a merchant is required to escheat only 60% of the unused value of a gift card. If the Department of Revenue returns only the 60% it collected from the merchant, the consumer will not be made whole. If it returns all of the unused face value, the difference will come from the State Treasury. The State could return the unused face value of the card and seek reimbursement from the seller. But there is no existing procedure for doing this, requiring an amendment to the existing statutes and presumably new regulations.

Escheating gift cards can also frustrate the purpose of the person who gave the card. A consumer reclaiming a lost gift card from the State would receive cash for the unused value of the gift card. However, had the person giving the gift card wanted to give cash, he or she would have done so. Gift cards are often used instead of cash in order to introduce someone to a new experience or product, perhaps something for which they would not have spent their own money. When the value of the unused card is escheated, the State changes the nature of the gift and frustrates the intent of the donor.

It is sometimes suggested that escheating unused gift cards protects consumers should the seller become insolvent. Retail bankruptcy, however, affects customers in different ways. Some customers will have paid in part or in full for a good and are awaiting delivery when the retailer declares bankruptcy; others will have layaways; and still others will have outstanding warranty and service contracts issued by the retailer. All are adversely affected by the vendor's bankruptcy.

The protection of customers in the case of retailer bankruptcies is an important issue. If Montana were going to address this problem seriously and in a systematic manner, it would hardly start with the issue of customers who find their gift cards three years after last using them.

III. Montana's Right to Unclaimed Gift Cards under Federal Law

The foregoing makes clear that an attempt by Montana to escheat the value of unused gift cards would do practically nothing to assist those to whom such cards were given, the real owners of those cards. Indeed, by forcing some consumers to deal with the Department of Revenue rather than the local merchant, the bill subverts the prohibition on gift cards expiring. The only advantage would be to the State Treasury, which is likely the real intended beneficiary of the bill. The Fiscal Note supposes new net revenue of five and a half million dollars in 2011. Traditionally, the escheating of property has been viewed as facilitating the restitution of lost property and not as a way to maximize state revenue. In any case, the revenue estimates are problematic because Montana's escheat powers are drastically limited by binding federal law governing which states are entitled to abandoned intangible property and the bill's provisions are inconsistent with that law.

Montana has adopted the Uniform Unclaimed Property Act. (MCA Sec. 79-9-805 et seq.) In general, that law authorizes the State's taking of intangible unclaimed property in three cases:

> (1) When the address of the "apparent owner" of or "person entitled to" the property is established to be in Montana [MCA Sec. 79-9-805(1)-(3)(a)]; or

(2) Where no such address can be established—or the state where that address is located doesn't escheat the property—when the domicile of the person holding the property is in Montana [MCA Sec. 79-9-805(3)-(5)]; or

(3) In cases where neither rules (1) or (2) apply, when the transaction that gave rise to the property occurred in Montana [MCA Sec. 79-9-805(6)].

With respect to gift cards, rule (1) would almost always be inapplicable. As already noted, the nature of gift cards is that they are bought to be given away. The "owner" of the gift card, the person who has the right to demand the goods or services, is the person who physically possesses it. That person will almost always be unknown to the merchant at the time of sale and, of course, so will his or her address.

Merchants rarely record any name or address when selling a gift card. For the reasons discussed above, the duty on sellers to take down the name and address of the apparent owner and maintain a record of the owner's name and address that the bill proposes cannot really change that. The only person the seller will deal with is the immediate purchaser of the gift card. There is no reason to believe that such purchaser will be the "apparent owner," the person "entitled to the property . . . owing" under MCA Sec. 70-9-802(2); or the "owner," a person ending up with a legal or equitable interest in the property under MCA Sec. 70-9-802(12). In fact, neither person may be known even to the buyer of the card at the time of purchase. The buyer may not have yet decided to whom the card will be given as a gift, or the person receiving the card may choose to re-gift it. Therefore, taking the *buyer's* name will not be recording the name of an "apparent owner" or an "owner" as those terms are defined in the law.

If the first rule under the Unclaimed Property law is not applicable, the statute's second rule allows Montana to escheat gift certificates issued by retailers domiciled (incorporated) in Montana. The statute does not permit Montana to escheat cards issued by retailers incorporated in other states, provided those states escheat gift certificates.

It is against this background that the bill's amendment to the definition of "apparent owner" in MCA Sec. 70-9-802 becomes relevant. That amendment attributes a Helena, Montana address to the apparent owner when there is no other record of the owner's or apparent owner's address. Through this drafting

gimmickry, the bill tries to make the first rule apply after all. Sellers of gift cards will typically not have actual records of apparent owners or of owners. Consequently, the address of the apparent owners of all gift cards sold in Montana will, by legislative fiat, be in Helena. The State thus purports to acquire the right to escheat under the first rule of the Unclaimed Property Act.

Such legislative legerdemain might work if the only controlling law were that of Montana. Montana law, however, must conform to federal law. The United States Supreme Court has already established the principles that govern state entitlement to escheat. Those principles have been formulated under the Court's power to establish "federal common law." Because escheat disputes are usually between two states, no state can settle that issue through the unilateral application of its own law—federal common law must control. Like federal statutes, federal common law is the supreme law of the land and no state law may contradict it.

The Supreme Court has established two rules that govern states' relative rights to escheat intangible property. Because the intangible property involved is almost always some kind of legal obligation, the Supreme Court talks about the private parties associated with that obligation as "debtor" and "creditor." The debtor is the person who has to pay or perform on the obligation. The creditor is the person who is to be paid or receive the performance (the "owner" of the intangible property). In the case of gift cards, the debtor is the retailer and the creditor is the person in possession of the card at the time of abandonment.

In *Texas v. New Jersey*, the Supreme Court decided that the first claim on abandoned property (the "primary rule") belongs to the state of the last known address (as shown by the debtor's books and records) of the creditor (the gift card owner). If there is no record of that address, or if the state where that address was located does not escheat the property, the state of domicile of the *debtor* (the retailer) has the right to escheat (the "secondary" rule).[6] In the case of corporate debtors, the Court has made it clear that the state of domicile means the state of incorporation.

The Supreme Court has repeatedly said that these rules were devised in order to create a clear and relatively simple way to determine a state's jurisdiction to escheat. In cases where more than one state might assert a claim, everyone benefits

[6] 379 U.S. 674, 680-82 (1965).

from a uniform system of allocation. The Court has tried to prevent "permanent turmoil [on a] question that should be settled once and for all by a clear rule which will govern all kinds of intangible obligations and to which all States may refer with confidence."[7]

The Uniform Unclaimed Property Act on which Montana law is modeled, conforms to the federal law priorities in its first two categories of escheat powers discussed. These are the fullest powers the State can assert. The bill, however, attempts to redefine cases that actually fall into the second category (state of incorporation) by making them appear as if they fall into the first category (address of the creditor) through the fiction of a local address where no address exists.

The Supreme Court has made it clear, however, that when it speaks of "debtors" and "creditors" in this context, it means real "debtors" and real "creditors" and not fictional ones, such as that created by the bill. In its most recent case on the subject it said "[w]e have not relied on legal definitions of "creditor" and "debtor" merely for descriptive convenience. Rather we have founded the concepts of "debtor" and "creditor" in the positive law that gives rise to the property at issue."[8] The property at issue in the case of gift cards is created by the original contract arising when the card is purchased and that contract specifies that the performance is to be to be rendered *to the possessor* of the card. The rights of the possessor are also explicitly stated in MCA Sec. 30-14-102(5)(a) (repeated in Sec. 4 of the bill). If the recording of an address is not a plausible good faith attempt to describe *that possessor's* address it cannot qualify to trigger the Supreme Court's rule. Regardless of what Montana calls the parties, under binding federal law the secondary rule applies and the right to escheat is controlled by the state of the retailer's incorporation.

It is not sufficient to justify the bill's fictional address as a reasonable presumption as to the residence of the real owner (possessor) of the gift card. No doubt some of these missing owners will reside in Montana but many will not. Gift cards are, as their name implies, ideally suited to be given away. Some will be given to other Montana residents, many will not. They are easy to mail anywhere in the country, or beyond. National retailers often market the cards by stressing their acceptance at any of the sellers' locations. It is increasingly common, moreover, for gift cards themselves to be the object of interstate commerce. Retailers offer gift cards on their websites and the donees can be notified by e mail. The online auction site,

[7] Texas v. New Jersey, 379 U.S. 674, 687 (1965).
[8] Delaware v. New York, 507 U.S. 490, 501 (1993).

EBay, recently had 2993 gift cards for sale. The percentage of instate and out-of-state owners, moreover, will change from year-to year, from state-to-state, and from product-to-product. It is exactly this type of uncertainty caused by a rule based on such "ever-developing new categories of facts" that the Supreme Court acted to eliminate in *Texas v. New Jersey*.[9] The teachings of the Court have special force in the context of gift cards where their function continues to evolve and the need for stability in the law is paramount.

Even if it were thought that the place of transaction (i.e., sale in Montana) did serve as a reasonable surrogate for the address of the owner, the bill applies it in a way flatly at odds with the Supreme Court's decisions. The proposed Montana law would supply a Montana address to *every* unused gift card for which the actual owner-possessor is unknown–that is, effectively, for every unused gift card sold by a Montana retailer. *This is exactly identical to a rule explicitly claiming a Montana right to escheat based on the state in which the transaction creating the property arose—a rule that the Supreme Court has already rejected.* In Pennsylvania v. New York, the Supreme Court was directly presented with the argument that the state where the transaction giving rise to the property occurred should have the power of escheat. "Pennsylvania proposed that the State where the money order was purchased be permitted to take the funds. It claimed that the State where the money orders are bought should be presumed to be the state of the sender's residence."[10]

While agreeing that this position had "some surface appeal," it declined to adopt it worrying that courts would then be presented with demands to "devise new rules of law to apply to ever-developing new categories of facts." It decided it should not "carve out this exception to the *Texas* rule."[11]

Furthermore, the Supreme Court has also rejected the idea that Montana may escheat under the primary rule because it is "fair" to presume that the owner will be in Montana. In *Delaware v. New York*, the Supreme Court adopted the proposition that "[n]othing in the Court's jurisprudence . . . suggests[s] that New

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[9] 379 U.S. at 679

[10] 407 U.S. 212

[11] 407 U.S. at 214-215. The Court was unconvinced by the argument that a place of transaction was necessary to avoid a windfall to some states. It was equally unconvinced that the place of transaction rule reflected a reasonable presumption of the creditor's place of residence. Id.

York can prevail by making a statistical showing that 'most' [creditor-brokers] addresses are in New York."[12] It went on to say:

> The plaintiff States urged us [in *Pennsylvania v. New York*] to define the creditor's residence according to a "presumption based on the place of purchase." Like New York's proposal [in *Delaware v. New York]*, the rule advocated in *Pennsylvania* would use a statistical surrogate instead of the debtor's records to locate the last known address of the creditors.[13]

This, the Court expressly declined to do.

The Supreme Court has thus clearly rejected the rule that the proposed bill seeks to establish. It is an axiom of constitutional law that a state may not do indirectly what it may not do directly. See, e.g., Guy v. Baltimore, 100 U.S. 434, 443 (1879) (condemning "a mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax . . . "); Williams v. Illinois, 399 U.S. 235, 243 (1970) ("A statue permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly.") That is exactly what this bill proposes.

As federal common law, the Supreme Court's rules are binding on every state. Should those rules appear unsatisfactory the proper forum for correcting them is Congress, which has legislative authority to regulate interstate economic activity and where all the States are represented.[14] It is exactly contrary to that grant of power for each state to legislate only with its own interests in mind.

* * *

More and more states seem to be recognizing the inappropriateness of treating unused gift cards as intangible property that can be escheated like unused bank accounts and uncashed checks. A recent survey[15] identified eight states that flatly exempted all gift cards from the unclaimed property law and another five that

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[12] 507 U.S. 490, 508 (adopting conclusion of the Special Master). The ellipses and interpolations are the Court's. Transposed to this case, "gift card owners" could be substituted for "creditor-brokers."

[13] Id. At 508-09

[14] See *Delaware v. New York, supra* at 510.

[15] National Council of State Legislatures, Gift Cards and Gift Certificates Statutes and Recent Legislation, http://www.ncsl.org/programs/banking/giftcardsand certs.html (updated October 3, 2006).

exempted cards issued by ordinary retail sellers. In 2003, Connecticut enacted a provision almost identical to that proposed for Montana but, after some of the practical and legal problems associated with that law were examined, repealed it two years later and now entirely exempts gift cards.

Perhaps more interesting are the five additional states that have eliminated escheat of gift cards that do not have expiration dates or dormancy fees or which clearly disclose such dates and fees. These states appear to recognize the tension between making such cards indefinitely valuable and setting a time limit after which they are transferred to state custody. In 2005,Texas adopted the kind of fictional address device proposed in the Montana bill. But significantly it only did so with cards that retained expiration dates or dormancy fees.[16] In Montana, cards with expiration dates or dormancy fees are no longer permitted. Thus, the Texas statute if adopted in Montana, would never apply.

In summary, gift cards are particularly ill suited for treatment as abandoned property. As noted, the central goal of unclaimed property–the reuniting of owners with their lost property–cannot be accomplished with this kind of property. What escheating does do is undercut, for many consumers, the benefit of the no-expiration rule after three years, leaving them with an uncertain application to the Department of Revenue. It also imposes costly administrative requirements on retailers. Finally, the federal law cited refutes the idea that Montana can expect to secure any significant revenue from such a policy. Gift cards should be expressly excluded from the Unclaimed Property Law. Such a change would cost little and would do much to simplify and clarify the law.

[16] Texas Code 72.1016, 35.42(b). In our opinion, even so limited, the Texas statute is invalid under federal law.