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UNCLAIMED PROPERTY**

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§23.01 Unclaimed Property: Overview

This section explains concepts that are the foundation for later sections. Subsection [1] defines basic concepts and provides examples of how the concepts can be difficult to apply in practice. Subsection [2] explains why unclaimed property is important to business managers. Since unclaimed property is poorly understood by

many people, the professionals reading this chapter will spend time educating their business colleagues about unclaimed property.

[1] Basic Concepts

The basic concept of unclaimed property is that a holder is the custodian of property until the true owner claims it. For some number of years, known as the dormancy period, the holder has an obligation to conduct due diligence to find and notify the true owner of the property. When dormancy expires without reuniting the unclaimed property to the true owner, the holder is required to give the property to a state unclaimed property administrative agency. The state takes over the custodial role until the true owner is located. This chapter covers some of the vast numbers of complex rules covering unclaimed property that vary between states and between property categories.

[a] Types of Unclaimed Property

Unclaimed property can be tangible or intangible. Tangible property includes valuable physical objects, such as jewelry and collectibles in safe deposit boxes, equipment in storage lockers, or tenants' personal articles in short-term rental locations. Intangible property includes uncashed checks, securities, gift cards, customer credit balances, and other business-like items. The total value of intangible unclaimed property is much larger than tangible unclaimed property for most businesses.

[b] True Owner

The true owner is the person who rightfully owns the property. The true owner can be a human being, or legal entity such as a corporation, trust, charitable organization, or governmental entity. The true owner could have an employee, vendor, customer, shareholder, bondholder, or other relationship with the holder. Instead of "true owner," some authors use the terminology actual owner, rightful owner, or "owner" with no preceding adjective.

Most unclaimed property problems arise when true owners have not yet been located or notified of the holder of their property claim. True owners are often difficult to locate because the holder does not have an accurate name and address on file. The true owner does not lose its property rights for failing to notify the holder of the true owner's name change or current address.

Practice Tip

Maintaining accurate name and address databases is a major challenge for many large organizations. Suppose Mega Growth Corporation has acquired many smaller corporations and has thousands of former customers that are no longer active. Mega's marketing managers have purged inactive customers from the customer databases. When Mega is audited for unclaimed property, there is no address information for some of the purged customers. As will be discussed later in this chapter, Mega probably has a large unclaimed property liability to its state of incorporation for former customer credit balances. Suppose Mega is incorporated in Delaware, as many large companies are. Then the unclaimed property for the years with unavailable data will be estimated and remitted to Delaware. If Mega had archived all old customer databases, it could have radically reduced its payment to Delaware using defenses discussed later in this chapter.

Unclaimed property often arises in situations where the original owner is deceased, mentally incompetent, bankrupt, renamed, relocated, or otherwise difficult to locate. Each state has its own property laws that determine the successor owner. Practitioners working on an unclaimed property case often have to consult attorneys with expertise in property law.

Practice Tip

Sometimes the successor owner does not want to assert a claim. Suppose Cain is the executor and heir for the estate of his parents, Adam and Eve. They have been deceased for a while and Cain has closed their estate. Heavenly Garden State Bank contacts Cain and notifies him there is a pair of golden fig leaves due to Adam and Eve. To claim the fig leaves, Cain would have to reopen the estate in probate court. Cain decides the legal fees and hassle are not worth the bother. Without reopening the decedents' estate, the Bank has no legal method to transfer the property to the successor owner. In this situation Heavenly Garden State Bank should transfer the unclaimed property to the appropriate state agency in the state of Cain's last known address. Perhaps some future heir of Adam and Eve will decide to search for the unclaimed property from the Heavenly Garden State Bank.

[c] Holder

The holder is the party that possesses the true owner's property. Holders can be natural persons, corporations, trusts, charitable organizations, or government agencies. Holders may be the original party that created the unclaimed property, such as the employer who is holding an uncashed paycheck for a former employee.

Holders may be successors that assume the liability for property created by prior companies. Corporations that grow through acquisitions often have liability for unclaimed property liability that originated with their acquired businesses. These acquired businesses probably did not file unclaimed property returns for all categories of property. The states assert they should get the unclaimed property from the successor business. The successor may be successful in showing that it acquired only certain assets and not the stock. If the acquisition was by purchase or exchange of stock, then the state will assert the corporation is responsible for all liabilities including the unclaimed property.

Practice Tip

Sorting out successor liability can be difficult. Assume Mega Services Corporation (MSC) acquired numerous small maintenance service companies across the country. MSC's primary business purpose was to obtain the customer relationships. MSC's acquisitions were by either purchasing stock or purchasing assets, depending on the tax planning preferences of the seller. Some sellers sold all of their assets. Other sellers sold some assets to MSC and retained other assets. Due to poor planning by MSC, none of the purchase agreements specifically discuss unclaimed property liability. MSC has merged its accounts receivable, payroll, and cash management systems. MSC staff and outside counsel will need a long time to research the facts and law that apply to each acquisition. These problems could have been reduced if unclaimed property issues were considered during the consolidation phase.

[d] Unclaimed Property

Unclaimed property refers to property that the true owner did not intentionally abandon. If the owner intentionally abandons property, such as by tossing unneeded goods in the trash, that is not unclaimed property. The holder is responsible for safeguarding the unclaimed property for the true owner. Under the unclaimed property laws after a designated period, the property is transferred to the state and the state becomes the custodian.

Escheat is a legal process where title to the property is permanently transferred to the state. Under old English common law, the king granted land to noblemen and if they died without heirs, the property was escheated to the king who became the rightful owner.

Some journalists treat the words abandoned, escheated, and unclaimed synonymously. There are technical distinctions between these concepts. The current consensus among practitioners is to use the term unclaimed property to refer to the broad category that includes abandoned, custodial, and true escheat property.

State unclaimed property statutes generally fall into three basic classifications:¹

- 1) True Escheat - Title passes to the state absolutely and immediately, generally under the state's descent, distribution, and succession laws.
- 2) Pure Custodial - The state takes custody of the abandoned property and remains custodian in perpetuity or until the owner presents a valid claim. The owner never loses his property rights, and the state never becomes an absolute owner.
- 3) Combined Custodial Escheat - Under the combined custodial-escheat statutes the state initially takes custody for a period of time during which the owner can appear and redeem his property. However, after a period of custody when it appears the owner will never assert a claim, the state is authorized to initiate formal escheat proceedings in which the rights of the owner are foreclosed and the property vests absolutely in the state.

Different states have different dormancy periods and exemptions for different property categories. The maze of differences between states makes unclaimed property practice difficult.

Some unclaimed property is remitted to the state and some is not. States have numerous exemptions that are discussed in § 23.04. For example some states exempt gift cards, amounts below \$25, and credits that arise in business-to-business ("B2B") transactions. These exemptions vary from state to state, and may change as the states amend their statutes. If the holder does not remit unclaimed property, the holder has an obligation to the true owner if that owner or successors assert a claim for the property.

If the holder does remit the unclaimed property to the appropriate state with the appropriate reports, then the holder is relieved of liability. When the holder meets all the requirements, the state *indemnifies* the holder against claims by the true owner.

Practice Tip

Always research the current rules for each particular state. There are numerous state-to-state variations in unclaimed property, and they can be amended at any time. Most

¹ Oklahoma Attorney General Opinion, 1984 OK AG 141, (April 16, 1985).

unclaimed property compliance specialists subscribe to one or more unclaimed property regulation databases to keep up to date.

[e] Due Diligence

Due diligence is the process of trying to locate the true owners and reunite the true owners with their property. This due diligence process involves finding valid addresses for true owners, sending them notification letters, and following up to verify claims. The holder is responsible for due diligence before remitting the unclaimed property to the state.

After the state receives the property, it becomes responsible for due diligence. If the holder reports the unclaimed property with true owner names, all of the states have web sites where they post owner names. Some states also publicize owner names by newspaper advertisements, at county fairs, and with other methods. If the holder remits the property without owner names, many states will convert the property to cash and transfer that into the state's general fund.

[f] Dormancy

Dormancy is the period of time from the holder's last contact with the true owner until it becomes reportable under the state's unclaimed property laws. Dormancy is also known as the abandonment period. Depending on the state and property category, most dormancy periods range from one to ten years. Dormancy is discussed in § 23.04[2].

[g] Jurisdiction

Unclaimed property jurisdiction rules determine the state that will receive the unclaimed property from the holder. The primary jurisdiction rule is that if the holder has a last known address for the true owner, the property should go to the state of that address. The secondary jurisdiction rule is that if the holder does not have a last known address for the true owner, then the property goes to the holder's state of incorporation or legal domicile. The legal history and application of the jurisdiction rules are discussed extensively in § 23.02 and § 23.03.

The original concept of jurisdiction was that the true owner would most likely look in the state for the unclaimed property in the state where they had a mailing address. For example, a California customer of a bank incorporated in Delaware would look for unclaimed property in California rather than Delaware. As a practical matter, large multistate businesses often have unclaimed property exposure in all states because they have last known addresses for employees, vendors, customers, and shareholders in all states.

Since property rights are primarily determined by state law, each state sets the rules for unclaimed property in its jurisdiction. Over time the state unclaimed property administrators talk to each other and adopt and policies become similar among states. More powerful web search engines are making it easier for owners to find property in other states. The federal government is very conscious of state rights and intervenes ("federal pre-emption") in only a limited way in unclaimed property issues.

Jurisdiction became much more important as state treasurers saw the large amount of funds that could be used for other state purposes. Although most states say they are the perpetual custodians of unclaimed property, the states make use of those funds until the true owners make their claims. Depending on the property category and the state's due diligence, the states will never return 50 to 95 percent of the unclaimed property they receive.

Delaware is the state that is most dependent on collecting unclaimed property. Unclaimed property is the third largest source of state revenue after individual income tax and business income tax. In fiscal year 2007 Delaware collected \$365 million in unclaimed property, and estimates \$369 million for FY 2008, and \$380 million for FY 2009.³

As the amount of unclaimed property has grown over the past century, the states have become more aggressive in challenging each other for jurisdiction. These jurisdictional issues are discussed in § 23.02

Practice Tip

Unclaimed property jurisdiction has nothing to do with tax nexus. Unclaimed property jurisdiction arises from property rights law and reuniting property with true owners. Income tax practitioners make serious errors when they assume the tax nexus concepts of physical presence or economic activity are relevant to unclaimed property jurisdiction. For example, suppose New York Bakery Corporation is incorporated and all its employees and sales are in New York State, but some retired employees have a last known address in Florida. If the last known address is Florida, the New York Bakery would owe unclaimed retirement benefits to Florida for retirees with a Florida address. For unclaimed property law, it does not matter where the company has nexus for tax purposes.

[h] Derivative Rights Doctrine

The Derivative Rights Doctrine is the concept that the state's right to unclaimed property derives from its fiduciary duty to the true owner.⁴ The state "steps into the shoes" of the true owner and safeguards that property. The Derivative Rights Doctrine implies the state cannot get better rights than the owner would have had. Thus, the state cannot demand the holder remit more value to the state than the holder would have given to the true owner.

Practice Tip

Some unclaimed property auditors have asserted that if a business receives inventory but did not pay for it, then that excess inventory constitutes unclaimed property. For example, suppose Orchard Fresh Distribution Center has a receiving report showing 25 cases of fruit received for Order # 6789, but the payables system shows payment for only 24 cases on Order # 6789. Orchard Fresh's vendor contract specifies that if a

³ Delaware Economic Financial and Advisory Council, *DEFAC Worksheet* dated March 18, 2008, <http://finance.delaware.gov/defac/march08/revenues.pdf>

⁴ See Anthony L. Andreoli and J. Brooke Spotswood, *Unclaimed Property Laws, Compliance, and Enforcement*, (CCH, 2002), ¶ 210; Michael Houghton, Walter Tuthill, Josiah Osibodu, Valerie Jundt, and Mark Paolillo, *Unclaimed Property*, BNA Corporate Practice Series No. 74-2nd (2006), § VI-C.

vendor delivers more than Orchard Fresh ordered, the vendor must take back the excess. The unclaimed property auditor asserts that the one case received but not paid for is unclaimed property. Under the Derivative Rights Doctrine, Orchard Fresh Distribution Center argues that the state cannot obtain more rights than the true owner. If the state can show it has legal rights to one case of fruit, then under the Derivative Rights Doctrine, Orchard Fresh Distribution Center can argue the state is owed no more than the value of one case of fruit.⁵ Should that state's claim be valued at the standard price of fresh fruit or the value of rotten fruit when the vendor should have discovered it was not paid? What happens if the purchaser has no record that it requested that delivery? Answers to those questions depend on state contract law.

[2] Importance to Holders

This section answers the question, "Why should business executives care about unclaimed property?" Since business executives have numerous issues in operating their business and complying with rules, they need justification for having their staff and consultants to invest time and resources on unclaimed property.

Practice Tip

The frequency of unclaimed property is primarily related to transaction volume. For example, the rate of uncashed accounts payable checks might be 1 in 500 (0.2 percent) for checks under \$100, and 1 in 1000 (0.1 percent) for checks over \$100. An organization issuing two million checks per year probably has twice as much unclaimed property as an organization with similar internal controls but only one million checks per year. Thus, unclaimed property is a bigger problem for large multistate corporations than for small businesses.

[a] Financial Reporting

Some unclaimed property problems are associated with overstated assets and net income. Some accounts receivable departments periodically "sweep away" all small accounts receivable credit balances with a journal entry that debits accounts receivable and credits miscellaneous income. The net effect is the customer credit balances are "zeroed out", and net income increases by the increase in the miscellaneous income account. These journal entries are often small and buried among other entries. Sometimes these entries accumulate to such a large amount that the company has to make a material correction in its financial statements.

Practice Tip

Gift cards in paper and electronic form are a significant accounting issue for retailers.⁶ In 2003, the Securities Exchange Commission issued *SEC Staff Accounting Bulletin No. 104* that clarified retailers should not recognize revenue until gift cards are redeemed.⁷

⁵ For a discussion of inventory as unclaimed property, see J. Brooke Spotswood and Will Yancey, "What's In Your Warehouse? Are You Reporting All Your Unclaimed Property?", *Accounts Payable Now & Tomorrow* (September 2007).

⁶ Kile, Charles Owen, Jr., "Accounting for Gift Cards", 204 (11) *Journal of Accountancy* __ (November 2007).

⁷ *SEC Staff Accounting Bulletin No. 104*, www.sec.gov/interps/account/sab104rev.pdf

Some retailers had an accounting procedure known as “breakage” where the value of unused gift cards was swept into income. In June 2006, The Home Depot reported \$43 million in breakage revenue related to gift cards, and this caught the attention of business journalists.⁸ Managers and advisers should be particularly aware of how gift card policies can create problems with unclaimed property compliance, financial accounting, and adverse publicity.

Financial Accounting Standard 5 (“FAS 5”) is the financial accounting standard for recognizing contingent losses.⁹ When companies discover they have exposure for unclaimed property, senior management and external auditors should decide whether the liability is material. The impact on the financial statements could be one of these alternatives:

1. No change, because the amount is immaterial.
2. Material change in assets or net income recorded in financial statements.
3. Disclosure of an unknown amount in the notes to the statements.
4. Some combination of the above alternatives.

Practice Tip

Bedrock Corporation decides to replace ten different legacy divisional accounting systems with one national accounting system. After the conversion, staff accountant Betty tells the chief financial officer Barney that any legacy checks that were outstanding more than twelve months on the system change-over were purged and not entered into the new system. Betty says it will take at least a year to research and estimate the liability. Barney discusses the problem with the president Fred and their auditors. They determine the amount is likely to be material, but the amount cannot be estimated. They decide to disclose the amount in a financial statement footnote for several quarters. When they finally do determine the actual amount, they can record the appropriate liability in the statements and revise the notes.

[b] Internal Controls

All audited companies are concerned about any internal control failures that may result in errors in financial reports. Documentation of internal control weaknesses may be required by Section 404 of the Sarbanes-Oxley Act (“SOX”)¹⁰ or similar federal and state requirements. SOX requires a personal signature from the chief financial officer that the internal controls are functioning adequately and internal control weaknesses are being resolved.

⁸ Schoolcraft, Lisa R., “Unused gift cards deliver \$43 million to Home Depot”, *Atlanta Business Chronicle*, (June 10, 2005), <http://www.bizjournals.com/atlanta/stories/2005/06/13/story3.html>

⁹ Financial Accounting Standards Board, *Statement of Financial Accounting Standards No. 5: Accounting for Contingencies* (March 1975), www.fasb.org/pdf/fas5.pdf

¹⁰ [Pub.L. 107-204](#), 116 [Stat.](#) 745, enacted July 30, 2002.

Practice Tip

The chief executive officer, chief financial officer, chief information officer, general counsel, and other “C-level executives” usually have little interest in unclaimed property. They rely on the corporate controller and internal auditors to maintain adequate internal controls. The controller and other accounting managers will sweat when they have to report to the C-level that the internal controls failed to adequately detect and report unclaimed property liability. If these failures are part of a wider pattern of malfunctions, the controller and other accounting staff may be terminated.

Unclaimed property may also be connected with theft and embezzlement. For example, insider fraud involving cash management may involve depositing small overpayments into the fraudster’s private account.

Practice Tip

Consider some warehouse employees who are stealing valuable materials from the warehouse. When the thieves expect their theft will be discovered, they disappear and do not bother to claim their last paychecks. Investigation of the unclaimed paychecks may be the tip that exposes more serious problems.

[c] Litigation Risk

Unclaimed property can expose companies to more litigation. A whistleblower may alert a plaintiff class action attorney that a company has failed its due diligence responsibilities to the true owners.

Practice Tip

For example, suppose Bubba Oil and Gas (“BOG”) does secondary recovery on a long inactive oil and gas field with many small royalty owners. Many of these royalty owners have changed addresses. When the postal office returns uncashed royalty checks to BOG, the company keeps them in a suspense account indefinitely without doing any due diligence to locate those royalty owners. Dudley Dought, recently fired from BOG’s accounting staff, alerts a plaintiff attorney, and that attorney files a class action on behalf of all royalty owners with uncashed checks. If the suit is successful the class may win compensation and treble damages. Defending this litigation could become very expensive for BOG.

[d] Adverse Publicity

Adverse publicity can have a devastating impact on a company. Chief executives often say their worst nightmare is to appear on the front page of *The Wall Street Journal* or their corporate hometown newspapers. Consider what would happen to a nationwide services company with over a million customers if the press reported it systematically swept customer credit balances without notifying customers.

[e] Holder Education

Securing management support for holder unclaimed property compliance is usually difficult. For many years companies ignored unclaimed property.¹¹

Most managers have numerous demands on their time, and are not eager to volunteer time for projects that do not seem to have much “glory.” Unclaimed property compliance can consume a lot of resources without much obvious benefit to net income. Often, the best that unclaimed property professionals can do is to prevent big unexpected liabilities. Furthermore, most senior level managers prefer to spend time with “big picture” and “revenue enhancement” activities rather than the details of compliance.

So how can a professional who learns the best practices for unclaimed property that are described in this chapter convince other people in the organization to care? One of the most effective motivators is when a senior executive becomes concerned about the financial reporting, internal controls, litigation risk, or adverse publicity problems discussed above. This often occurs after a company is notified of its unclaimed property exposure by a state unclaimed property auditor, financial statement auditor, internal auditor, or acquiring company. Once the senior executive decides to actively support an unclaimed property project, he or she can usually persuade the controllers and accounting managers to take an interest.

Practice Tip

Suppose you are a manager at the Holly Corporation and want to stimulate interest in Holly’s unclaimed property compliance. Show some of Holly Corporation’s accounting and finance staff how they can do a “treasure hunt” on public web sites. Demonstrate how anyone can enter the names of themselves, family members, or businesses and find unclaimed property. This “show me the money” exercise should catch their attention. Then lead into a discussion of how that property became unclaimed. For example, the owner may have moved, or the original holder of the unclaimed property may have gone through a tumultuous reorganization. Ask the audience to speculate on what communication breakdowns could have caused the property to become unclaimed. Turn the discussion back to the question, “How could Holly Corporation have communication breakdowns so that property becomes unclaimed?” Finally, discuss a few of the requirements for unclaimed property that are discussed in this chapter. Be careful about overwhelming your audience with a lot of legal detail unless they ask for it. The goal of this introduction is to get management interested in the topic without scaring them off.

Estimating the time and expense of unclaimed property compliance is difficult when a holder company has not filed its unclaimed property returns for all categories of unclaimed property. After the process becomes a routine annual filing and good internal controls are functioning effectively, the cost is relatively predictable.

¹¹ See Stephanie Cutler, G. Samuel Schaunaman II, and Anthony L. Andreoli, “What Corporate America Needs to Know About Unclaimed Property: A Primer for the Business Holder,” 54 (4) *The Tax Executive* 335 (July – August 2002), and Anthony L. Andreoli and Josiah S. Osibodu, “Unclaimed Property: How to Comply with the Undisclosed Liability and Reporting Requirements”, 194(2) *Journal of Accountancy* 50 (February 2004).

Most companies devote substantial resources to collecting accounts receivable balances that are due to the company from customers and other business partners. They should also think about the credit balances when they owe money to their customers, employees, vendors, and other parties.

Practice Tip

Some retailers have a positive benefit from their unclaimed property process. When these retailers find positive credit balances in customer accounts, they contact their customers and encourage them to use the credit. Often these customers will spend more than their credit balance. For example, if a customer is told she has a \$19.86 credit balance, she may come to the store and spend more on new merchandise exceeding the credit amount.

§23.02 Legal Foundations

This section describes the legal foundations for unclaimed property law in the United States. This section is written for a general audience that may include law and business students. Some seminal cases, statutes, and model acts are summarized. This section does not include an exhaustive list of all citations on unclaimed property statutes and judicial opinions. For further details on the unclaimed property law, consult legal treatises and articles.¹²

[1] States' Authority

This sub-section describes the states' authority to demand that holders turn over unclaimed property to the state. Broadly speaking, the state's authority evolved from two distinct legal concepts. First, the state has an infinite life and is presumed to be a better custodian of true owners' property than private holders. Second, if the true owners cannot be found, then the state rather than private holders should get the benefit of the "windfall" from using the cash associated with unclaimed property. The state statutes and appellate court decisions responded to holder's concerns about Due Process and compliance burden.

[a] English common law

English common law originated with English kings distributing land tenure rights. Since all land was originally granted by the royal sovereign, land tenure reverted to the feudal lord or king when the grantee died without heirs.¹³ The word "escheat" was of French or Norman origin and denotes an obstruction in the land title. In addition to the unclaimed property context, escheat also refers to the resolving property title when a person dies

¹² Andreoli, Anthony L. and J. Brooke Spotswood, *Unclaimed Property: Laws, Compliance, and Enforcement*, (CCH, 2002); Epstein, David J., *Unclaimed Property Law and Reporting Forms*, (LexisNexis Matthew Bender, 1984 with updates); Houghton, Kendall L., and John L. Coalson, *Unclaimed Property*, BNA Tax Management Portfolio No. 1600-1st (1998); Houghton, Michael, Walter Tuthill, Josiah Osibodu, Valerie Jundt, and Mark Paolillo, *Unclaimed Property*, BNA Corporate Practice Series No. 74-2nd (2006); ; Tracey L. Reid, *Unclaimed Property: A Reporting Process and Audit Survival Guide*, (Wiley 2008).

¹³ Blackstone, William, 2 *Commentaries* 53,
www.yale.edu/lawweb/avalon/blackstone/blacksto.htm

without heirs, a corporation dissolves without surviving shareholders, or real property reverts to the state or local government for failure to pay taxes.

Intentionally abandoned property is distinguished from unintentionally abandoned property. If someone deliberately scatters property without any intention of reclaiming it, then that property can be claimed by the first person to find and claim it.¹⁴ Thus, if someone deliberately throws personal property onto a public street with no intention of reclaiming it, the English common law would allow the first finder to obtain legal title.

The English concept of escheat was gradually extended from real to personal property. When a property owner died without an adult heir, the law allowed local government or church authorities to manage the personal property for the benefit of his widow or children.¹⁵ Rather than leaving the property to the benefit of the man who physically controlled it, the common law of escheat provided an orderly way to transfer property rights to benefit the state.¹⁶ Thus, the concept of having the state rather than the private holder manage unclaimed property derived from the old English common law.

[b] American common law

The American common law adopted the English common law by allowing the state government to take the place of the feudal lord. The general principal of American common law is that when land title fails to transfer to an heir, the use of the property reverts to the community.¹⁷ Real property and personal tangible property are always subject to the jurisdiction of the state where they are physically located.¹⁸ Over the past two centuries state and federal case law and statutes have evolved to deal with intangible property. This evolution is likely to continue as the economy evolves and novel issues arise in property law.

[c] US Supreme Court on State Authority over Unclaimed Property

For more than two centuries the federal appellate courts ruled on state property disputes. In 1813 the US Supreme Court recognized that the state could under some situations assert rights to property previously held by private individuals.¹⁹ In 1896 the Supreme Court found that states could escheat land provided their statutes allowed for specific notice to known claimants, public notice to all other possible claimants, and a judicial determination process.²⁰ In 1905 the Supreme Court extended the state rights to unclaimed intangible property.²¹

In the twentieth century the US Supreme Court ruled in a series of cases to establish the state's right to take possession of the proceeds of inactive accounts at financial institutions. In 1923 the Court held a state could take possession of inactive accounts at state banks after public notice to the depositors, thereby relieving banks of their

¹⁴ *Id.* 1 Commentaries 298 – 299.

¹⁵ *Id.*, 2 Commentaries 252 – 269.

¹⁶ *Id.*, 1 Commentaries 298 – 299.

¹⁷ James Kent, 2 Commentaries on American Law, Lecture 52, <http://www.lonang.com/exlibris/kent/index.html>

¹⁸ *Texas v. New Jersey* 379 US 674 at 677.

¹⁹ *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603 (1813).

²⁰ *Hamilton v. Brown*, 161 U. S. 256 (1896).

²¹ *Cunnius v. Reading School District*, 198 U. S. 458 (1905).

obligation to depositors.²² The Court held in 1944 that the state's power extended to depositor accounts at national banks.²³ Then the Court extended the authority to insurance contracts with life insurance companies in 1948 and opined, "The state may more properly be custodian and beneficiary of abandoned property than any person."²⁴ Finally, in 1951 the Court upheld state law on unclaimed dividends on corporate stock, and concluded when states hold unclaimed property, such property "... escapes seizure by would-be possessors and it is used for the general good rather than for the chance enrichment of particular individuals or organizations."²⁵

[2] Jurisdiction Priority Rules

As the amount of financial intangible property in the economy has grown enormously over the past two centuries, the states have become more eager in enhancing their state treasuries with unclaimed property. States disagreed as to which state should have the right to the property. This sub-section defines four alternatives for determining which state should have jurisdiction over the property. The major alternative theories are discussed in this sub-section. There are other variations and names for these theories. These concepts set the foundation for the judicial and statutory history and the exceptions discussed in §23.02 [3].

[a] First Priority: Last Known Address

The courts and the statutes recognize that first priority usually goes to the state of the last known address (LKA). The presumption is that if true owners wants to find their property, they would most likely look to the state of their last address. Exceptions to this LKA first priority rule are discussed later in this chapter.

Generally, all that is necessary is to have a valid postal address capable of receiving U.S. mail. It is not necessary that the holder's records show the name of the last known owner. It is not necessary to prove the true owner is or was at the last known address. In *Texas v. New Jersey*, the U.S. Supreme Court referred only to the last known address as shown in the holder's books, and did not refer to the holder's name.²⁶

Practice Tip

Applying the last known address concept can be difficult in practice. What happens if the last known address is a street address of a multi-unit residential building, but the holder's records do not show a unit number? What happens if the zip codes have changed since the holder's address record was created? If a holder has a bill-to address and a different ship-to address for a customer, which one is the last known address? If the holder attempts to find a better address for a true owner with a common name such as John Brown, what should be done if there is more than one address for a person named John Brown? Talking to the state unclaimed property tax administrator is one way to get answers to these practical compliance questions.

Issuers of gift cards often have trouble retaining last known address. Paper and plastic gift cards are often sold over the counter for cash, and the sales clerks do not record

²² *Security Savings Bank v. California*, 263 U. S. 282 (1923).

²³ *Anderson National Bank v. Lockett*, 321 U. S. 233 (1944).

²⁴ *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U. S. 541 (1948) at 546.

²⁵ *Standard Oil v. New Jersey*, 341 U. S. 428 (1951) at 436.

²⁶ *Texas v New Jersey*, 379 U. S. 674 (1965).

purchaser names and addresses. Retailers of online gift cards (“electronic certificates”) often do require purchasers to enter some name and address information and maintain an online database so that they can solicit more business from the purchaser. Archiving the user-entered contact information is often easier than getting all the retail clerks to record that information and forward it to the central office.

What about online retailers that require only an email address but not a postal mailing address? The courts might hold that an email address alone is not sufficient to establish a last known address for determining state jurisdiction. Many issues with email accounts and online commerce remain to be resolved.

Practice Tip

A practical problem for retailers is that some customers do not want to provide accurate name and address information. Consider a retailer of online pornography. The pornography retailer does not care where the customer is physically located as long as the customer’s credit card or debit card is valid. Some customers do not want to provide accurate names and addresses, so they do not get printed materials delivered to their home or place of business. Some states may argue that jurisdiction goes to the state of the last known address of the credit card or debit card member.

[b] Second Priority: Holder’s Domicile

If the property has no last known address, then as discussed in section [3] the U.S. Supreme Court held that the property goes to the state where the holder has legal domicile. For corporations, limited partnerships, and other limited liability entities, the domiciliary state is the state where the entity filed its entity formation papers with the secretary of state. For proprietorships, the domicile is the state where the proprietor resides.

Delaware is the state with the largest number of large corporations because of Delaware’s laws favoring corporations. Thus, Delaware gets the largest amount of the big unclaimed property filings on property without a last known address. Nevada is another state with laws favorable to corporations, and receives a significant amount of unclaimed property without a last known address.

Practice Tip

Some chief financial officers of large corporations believe their exposure to Delaware’s unclaimed property audits exceed the advantages of Delaware’s favorable treatment of corporations and limited liability entities. Some of them threaten to dissolve their Delaware entity and recharter in some other state.²⁷

[c] Third Priority: Transaction

Another theory advocated by some states is that unclaimed property without a last known address should go to the state where the transaction took place. This is particularly important for large multistate holders that may be incorporated in Delaware,

²⁷ Delaware Department of Finance, *Delaware’s General Fund Revenue Portfolio*, (February 2008), <http://finance.delaware.gov/publications/GP2008.pdf> at page 67.

but have sales and vendors in many states. The advocates of the transaction theory assert that the true owners are unlikely to know where the holder has its legal domicile. If the true owner wants to search for its property, it is most likely to look in the transaction state where the original transaction took place. The states that would most benefit from a transaction rule are states with large populations but relatively large corporations domiciled in their state.

Future litigation using the transaction theory is likely. Many state unclaimed property administrators are jealous of the amount of unclaimed property received by Delaware. If they can find a situation with a good set of facts and a good legal argument, these states may attempt to use judicial or statutory strategies to get the unclaimed property to the transaction state rather than the legal domicile state. Delaware has so much to lose that it would fight to blunt that attempt.

[d] Principal Place of Business

A fourth theory for jurisdiction is the holder's principal place of business (PPB). For example, a multistate business may have a national service center located in one state that sends checks and electronic cash disbursements to vendors, employees, and other business partners all across the United States and the world.

The difficulty with the principal place of business concept is that it is difficult to define in practice. What happens if a company has several states where it has major business operations? What should be done with businesses that change their PPB between states or to a foreign country? Would there be endless litigation and factual disputes between states over what constitutes a company's PPB? Given these difficulties, the US Supreme Court rejected using the holder's PPB to determine the jurisdiction for unclaimed property.²⁸

[3] Jurisdictional Disputes

For many years the states have been disputing which state should have the right to claim intangible unclaimed property. The US Supreme Court has consistently held that, as a first priority, property with a last known address in the holder's records is subject to the unclaimed property law of the state of last known address. The second priority rule is that unclaimed property without a last known address goes to the state of incorporation. These first and second priority rules apply when a federal statute does not pre-empt state law.

[a] *Standard Oil v. New Jersey* (1951)

In *Standard Oil v. New Jersey*²⁹ the US Supreme Court touched on the battle among the states for jurisdiction over unclaimed property. Standard Oil has issued dividend checks to shareholders who could be in many different states, but the records lacked a last known address. Standard Oil was incorporated and had its corporate records in New Jersey, but had no tangible property in the state.³⁰ New Jersey's claim to the uncashed checks depended on Standard Oil's legal domicile in New Jersey. The Court held that

²⁸ *Texas v. New Jersey* 379 US 674 at 681.

²⁹ *Standard Oil v. New Jersey*, 341 U. S. 428 (1951).

³⁰ *Standard Oil v. New Jersey*, 341 US 428 at 438.

where the true owner address is unknown and adequate notice is given, the unclaimed property is due to the state of incorporation.

[b] *Western Union Telegraph Company v. Pennsylvania (1961)*

The Western Union Telegraph Company sold money orders from its Pennsylvania office to customers in other states. The state of Pennsylvania sought to escheat unclaimed property that belonged to customers in other states. Western Union protested on the grounds that remitting the property to Pennsylvania would not protect Western Union from claims by other states. In *Western Union Telegraph Company v. Pennsylvania* the US Supreme Court held that when the holder remits the unclaimed property to one state, the holder is protected against claims from other states.³¹

[c] *Texas v. New Jersey (1965)*

In *Texas v. New Jersey* the US Supreme Court heard directly from four states fighting to control debts of Sun Oil Company to creditors in various states.³² Because the states were directly suing each other, they filed in the US Supreme Court as the original court of jurisdiction rather than filing in a lower court. Texas claimed first-priority on the grounds that it had the most significant contacts with the property (a legal theory also known as the “transactional” test). New Jersey claimed first-priority on the grounds that Sun Oil was incorporated there (a legal theory also known as the “holder’s domicile” test). Pennsylvania claimed first-priority on the grounds that Sun had its principal place of business there (a legal theory also known as the “PPB” test). Florida claimed it should have a right to the unclaimed property for property where the last known address in the holder’s records was Florida (a legal theory known as the “LKA” test).

Justice Black wrote the Supreme Court’s majority opinion and summarized the states’ arguments and the Court’s prior decisions. If the holder’s records contain a last known address, the LKA state has the first priority. If the holder’s records lack a last known address, the holder’s domicile state has priority. The majority justified the decision on the grounds of fairness and ease of application.³³

Justice Stewart dissented. He concurred with the majority that if the holder’s records lack an address, the property should go to the holder’s domiciliary state. He disagreed with the majority on the state that should get the property when there was a last known address in the holder’s records. Justice Stewart relied on the Supreme Court’s precedent in its prior unclaimed property decisions to conclude all the unclaimed property should go to the domiciliary state.

Justice Black’s majority opinion also considered the possibility that the LKA state’s law did not provide for taking a particular property category, but the corporate domiciliary state would take the property. In that situation the court decided that the corporate domiciliary state has a right to get the property from the private holder, and hold it until some other state comes forward with proof of a superior claim.

Practice Tip

³¹ 368 US 71 (1961).

³² 379 US 674 (1965).

³³ *Id.* at 684.

Mega-Mall Retail Corporation is incorporated in Delaware. Mega-Mall issues gift cards to customers in all states. Some of the gift cards are sold to customers in states, such as Virginia, that specifically exempt gift cards. Suppose the facts are clear that a customer is located in a state, but that there is no address sufficient for a postal mailing address. Should Delaware have the right to claim the gift card property attributable to Virginia customers when Virginia would not claim jurisdiction over that property? That issue is mentioned in *Texas v. New Jersey*, but has not yet been clearly resolved.

[d] *Pennsylvania v. New York* (1972)

In *Pennsylvania v. New York*³⁴ the Supreme Court heard a continuation of the issues in *Western Union Telegraph Company v. Pennsylvania* and *Texas v. New Jersey*. Pennsylvania again claimed that it should get the proceeds of the unclaimed Western Union money orders on the grounds that the seller's legal place of business was Pennsylvania. Western Union was domiciled in New York and lacked the LKA on most money orders. New York held that *Texas v. New Jersey* should be sustained. The Supreme Court agreed with New York and held that if the holder's records lack the customer's last known address or if the LKA state has no applicable law to escheat the property, then the property escheats to the domiciliary state.

Pennsylvania had argued that New York would gain a windfall because most money order sales outlets did not keep a record of the customer's address. The Court responded, "... nothing we say here prohibits the States from requiring Western Union (the debtor) to keep adequate address records."³⁵ The states can ask businesses to keep records, but the practical reality is there will always be some small percentage of inadequate records.

[e] Abandoned Money Orders and Traveler's Check Act of 1974

Finally, in 1974 Congress intervened and resolved the interstate battle over money orders. In 1974 Congress passed the Abandoned Money Orders and Traveler's Check Orders Act.³⁶ This Act specifically altered the priority rules set forth in *Texas v. New Jersey* and *Pennsylvania v. New York*. This Act applies only to money orders, traveler's checks, and "similar written instruments." As holders/debtors, financial services companies such as Western Union, that issue/sell instruments to customers/owners are affected under this Act. If the holder's records reveal the place of sale, then the state of sale has the first priority to escheat the property. If the holder's records do not reveal the place of sale, then a second-priority claim goes to the state of the seller's principal place of business (PPB). Finally, if the property escheats to the PPB state and the place of sale state later enacts an escheat law covering that instrument, then the place of sale state can later assert its first-priority claim. Since most holders do not keep the last known address and most states do escheat these instruments, the result is the holder's obligation is to the PPB state.

Practice Tip

The growth of online stored-value cards creates all kinds of new issues for interpretation. The hypothetical Online Financial Services Company ("Online") sells anonymous stored-

³⁴ 407 US 206 (1972). Rehearing denied, 409 US 897.

³⁵ *Id.* at 216.

³⁶ Included in the Fair Credit Billing Act, Pub. L. 93-495. 12 U. S. C. §§ 2501 – 2503.

value accounts. Customers can log in from any state or country and put money into these accounts. Assume that Online somehow avoids the Know Your Customer (KYC) laws.³⁷ Online has servers located in many states. There is no clear guidance on how the Abandoned Money Orders and Traveler's Check Orders Act applies this situation. Situations like this will be subject to litigation and legislation for years to come.

[f] *Delaware v. New York* (1993)

In *Delaware v. New York*³⁸ the U.S. Supreme Court extended the *Texas v. New Jersey* priority rules to unclaimed dividends, interest, and other distributions to corporate shareholders and bondholders. In this case the Supreme Court served as the court of original jurisdiction for a dispute between Delaware and New York and numerous states as interveners. Publicly-traded corporations used New York transfer agents to transmit dividends, interest, and other distributions to corporate shareholders and bondholders. Between 1985 and 1989 the New York State Comptroller's office received about \$360 million worth of unclaimed property from the various banks, brokers, and depositories who served as intermediaries between the corporations and true owners.³⁹ Delaware asserted that it should get the right to escheat the funds of companies incorporated in Delaware where the holder's record lacked a last known address. Texas and 40 other states intervened and argued that the "holder" was the security issuer rather than the transfer agent. The Supreme Court sustained the *Texas v. New Jersey* priority rules and held the holder's state of domicile has priority to escheat the no-address property.

The Court considered a novel argument by New York that the property should be apportioned among the states by estimating the ratio of property held by true owners in each state.⁴⁰ New York suggested that the transfer agents always have records of the last known address of the true owners. New York suggested the records could be tested by statistical sampling to show that virtually all of the creditor brokers and banks recorded on the books of debtor brokers in New York have New York addresses. The Court reviewed the precedent in *Pennsylvania v. New York*, and rejected New York's proposal.

The Court concluded by suggesting the states look to Congress for relief.

"If the States are dissatisfied with the outcome of a particular case, they may air their grievances before Congress. That body may reallocate abandoned property among the States without regard to this Court's interstate escheat rules. Congress overrode *Pennsylvania* by passing a specific statute concerning abandoned money orders and traveler's checks, 601-603, 88 Stat. 1525, 12

³⁷ President George W. Bush signed into law on October 26, 2001 H.R. 3162, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*. As we all know now, the short name of this legislation is the USA PATRIOT Act (the Act). The PATRIOT Act established new and enhanced measures to prevent, detect, and prosecute money laundering and terrorism. One of the more important measures for financial institutions was addressed in section 326—Verification of Identification—more commonly referred to as "Know Your Customer."

³⁸ 507 US 490 (1993).

³⁹ 507 US 490 at 496.

⁴⁰ 507 US 490 at 508.

U.S.C. 2501-2503, and it may ultimately settle this dispute through similar legislation.”⁴¹

[g] Interstate Settlement Agreement of 1994

Several states followed the Supreme Court’s suggestion and in June 1993 the Equitable Escheatment Act was introduced in Congress.⁴² This Act was supported by the majority of the members of the US House, US Senate, and state governors, but strongly opposed by Delaware, New York, and Massachusetts.⁴³ The states negotiated a settlement that resulted in a pay-off of a fixed amount to the other 47 states over a ten-year period. In exchange for the pay-off the other states and their representatives agreed to support the Supreme Court’s holding in *Delaware v. New York* and agreed to no federal legislation would change the domiciliary rule for ten years.

The interstate settlement agreement expired in 2005. Some commentators believe that some type of federal apportionment rule will be proposed to alter the “winner-take-all” policy that benefits the states where many large corporations are domiciled.⁴⁴

Practice Tip

Commentators speculate about what might happen if the seemingly arcane priority rules for unclaimed property catch the attention of Congress. The representatives of Delaware will argue to preserve the right of the domiciliary state to escheat the property. Some representatives of the corporate business community are fed up with aggressive audits by Delaware, and may use this as an opportunity for federal legislation that relieves some of the holder’s compliance burden. If you are interested in unclaimed property law, watch for Congressional bills proposing to modify jurisdiction rules.

[4] Federal Pre-emption

Congress has chosen to pre-exempt state law and exempt holders that are regulated by federal financial laws.⁴⁵ Pension and other employee benefit plans subject to the Employment Retirement and Income Security Act (ERISA) are specifically exempt from state law.⁴⁶ The US Constitution provides Congress the right to enact uniform laws on bankruptcy that pre-empt state law.⁴⁷ Although federally-chartered financial institutions are generally subject to state unclaimed property law, federal law limits some state regulation of federal banks, federal savings associations, and federal credit unions.⁴⁸ Using its authority to regulate interstate commerce, Congress granted the US Surface Transportation Board the authority to regulate freight carriers and forwarders.⁴⁹

⁴¹ 507 US 490 at 510.

⁴² Introduced in the House of Representatives in June 1993 as H. R. 2443, 103d Cong. Introduced in the Senate in September 1993 as S. 1715, 103d Cong.

⁴³ Houghton, Michael, Walter Tuthill, Josiah Osibodu, Valerie Jundt, and Mark Paolillo, *Unclaimed Property*, BNA Corporate Practice Series No. 74-2nd (2006), § V, A. 5. The specific terms of the agreement are secret, but the general outline is not.

⁴⁴ Andreoli, Anthony L. and J. Brooke Spotswood, *Unclaimed Property: Laws, Compliance, and Enforcement*, (CCH, 2002), ¶ 515.01.

⁴⁵ Houghton *et al*, § VI-F.

⁴⁶ 29 U. S. C. S. § 1144(a); ERISA § 514(a).

⁴⁷ U. S. Constitution, art. I, § 8, cl. 4.

⁴⁸ Houghton *et al*, § VI-F (3).

⁴⁹ *Mason and Dixon Lines, Inc. v. Eagerton, Inc.*, 555 F. Supp. 434 (M. D. AL 1982).

Federal pre-emption was challenged by Oklahoma in 1984.⁵⁰ Oklahoma amended its unclaimed property law to provide that proceeds from oil, gas, and other mineral extraction in Oklahoma were reportable to Oklahoma regardless of state of last known address. This “transaction rule” asserted by Oklahoma defied the US Supreme Court’s 1965 decision in *Texas v. New Jersey*. The energy companies appealed and the federal court held Oklahoma could not override federal law.⁵¹

[5] Uniform Acts

The federal judicial and Congressional action discussed above has influenced the evolution of state legislation and policy on unclaimed property. Although the states are eager to get as much unclaimed property into the state treasuries as they can, they are aware that Congress can limit state authority when state laws unduly interfere with interstate commerce. This sub-section provides some background and highlights on the uniform law on unclaimed property.

The primary mechanism for developing state law on unclaimed property is the uniform law commissions. The uniform law movement began in the mid-nineteenth century as state governments and multi-state businesses attempted to untangle problems caused by a thicket of laws that differed between states. The national association was originally called the Conference of State Boards of Commissioners on Promoting Uniformity of Law in the U.S. and was reorganized as the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1982. Over two hundred different uniform laws covering a wide range of topics have been drafted by NCCUSL and its predecessor organizations.⁵² States can choose to adopt all, some, or none of a uniform law draft.

The Uniform Disposition of Unclaimed Property Act was first promulgated in 1954 (“1954 Act”). This uniform act was being drafted as the commission worked on a massive legal drafting project that became the Uniform Commercial Code (UCC). The 1954 Act recognized the wide range of intangible property that states could choose to cover with their state laws.

Subsequent versions of the 1954 uniform act defined more property categories and clarified technical issues in prior versions. The uniform law commissioners released revisions of the Unclaimed Property Act in 1966, 1981, and 1995. If the commissioners follow their prior pattern, then a new uniform law on unclaimed property may be issued around 2010 or later. Newer areas that need more uniformity are the treatment of gift cards, stored-value cards, and online retailers.

Since each state legislature chooses what to adopt, the state laws are not strictly uniform. Twenty-eight states adopted the 1981 Act in whole or in part.⁵³ The 1995 Act

⁵⁰ Houghton *et al*, § VI-F (4).

⁵¹ *American Petrofina Co. of Texas v. Nance*, 697 F. Supp. 1183 (W. D. Okla. 1986), *affirmed*, 859 F. 2d 840 (10th Cir. 1988).

⁵² See <http://www.nccusl.org/>

⁵³ Houghton, Michael, Walter Tuthill, Josiah Osibodu, Valerie Jundt, and Mark Paolillo, *Unclaimed Property*, BNA Corporate Practice Series No. 74-2nd (2006), § IV, footnote 2.

extends the prior acts by adding more careful definitions of intangible property, such as gift cards and customer credits.

[6] Exempt Holders

The unclaimed property laws apply to nearly all entities: business and non-business, large and small, single state and multistate, and for-profit and not-for-profit. There are a few limited exemptions such that certain holders are allowed to manage their own unclaimed property rather than remit it to the states.

[a] Federal Agencies

Federal government agencies, such as the Internal Revenue Service⁵⁴, maintain custody of uncashed checks issued by their agency. Some federal financial institutions, such as the Pension Benefit Guaranty Corporation (PBGC) and Department of Housing and Urban Development (HUD), maintain custody of - uncashed checks issued by their agency and the organizations that they take over.

Practice Tip

The Internal Revenue Service has constant problems with individual and business taxpayers not cashing their income tax refund checks. The most common reasons are that the taxpayer moved to a new mailing address without providing their forwarding address, lost their check, or died. The IRS maintains a *Where's My Refund?* section on its website at <http://www.irs.gov/individuals/article/0,,id=96596,00.html>

[b] State Exempt Holders

Some states specifically exempt certain holders from reporting unclaimed property to the state agency that handles all other unclaimed property. For example, Alaska specifically exempts holders of unused airline tickets, Native American Corporations, and overpaid unemployment compensation funds.⁵⁵ Nevada exempts unredeemed gaming chips and tokens.⁵⁶

[7] State's Custodial Duty

The general concepts of unclaimed property imply the states have two primary duties: due diligence to reunite true owners with their property, and a custodial duty to maintain the value of the property. Many states also look at the secondary opportunity of converting the unclaimed property into cash that the states can use for general operations. The eagerness to fund general operations conflicts with these primary duties.

[a] Due Diligence of Holder and State

Due diligence includes notifying true owners, verifying their identities, and paying the rightful claims. Due diligence is costly whether it is done by the holders or the states. Although the costs of due diligence are not comprehensively surveyed, the total

⁵⁴ Internal Revenue Code § 6408.

⁵⁵ Alaska Stat. § 34.45.720 (10) (B).

⁵⁶ Nevada Rev. Stat. chap. 463.

costs probably average between \$50 to \$200 per property that is successfully re-united with the owner.⁵⁷

The holder has an obligation to perform due diligence before delivering unclaimed property to the state. The holders' primary method of due diligence is to send letters to the true owners' last known address as shown in the holders' records. If there are a relatively small number of addresses, the holders usually have this work done by their own in-house accounting staff. If there are hundreds of addresses, most holders hire outside services to assist with this correspondence. Some holders also use locator services to track down businesses and individuals who have moved to a new address. The holders' due diligence process is discussed in §23.03.

Most states continue the due diligence process after they receive unclaimed property from holders. Nearly all states publish lists of owner names in local newspapers and on websites. Sometimes the published lists show only the owner name and last known city. The websites may show more information, including the amount. The states also sell their owner lists to locator services that track down the owners.

Practice Tip

Exploring state websites for unclaimed property is a great way to get people interested in unclaimed property. If you have a large enough group of interested people, someone will find a name similar to their own or a family member's name. See the website addresses in § 23.02 [8].

The dark side of due diligence is that states have an economic incentive to keep the unclaimed property. If the states can get unclaimed property from the holders, but not distribute that property to the true owners, then the state government can use those funds for state operations. Although the states say they will give the unclaimed property to the true owners, they know that true owners are unlikely to know about the property. Even if a true owner thinks they have unclaimed property, they will have to provide some proof for their claim. The states are particularly eager to receive property with no last known address because of the extremely low probability that true owners will ever file a claim.

[b] California Litigation

The California State Controller's Office (SCO) has been particularly aggressive in getting unclaimed property from holders, but paying out only a small share to true owners. From 1959 to 2002 the SCO accumulated unclaimed property of \$3.4 billion in 5.2 million accounts.⁵⁸ The SCO did not provide timely notice to all owners at their last known address. When true owners submitted claims, they often took longer than 90 days to process.

⁵⁷ Estimate from the author's anecdotal experience. The total costs include both the variable costs for each item, and the fixed costs of operating a due diligence program. These costs include the time of paraprofessionals, accountants, legal counsel, web site administrators, publications, and delivery services.

⁵⁸ California State Auditor, *State Controller's Office: Does Not Always Ensure the Safekeeping, Prompt Distribution, and Collection of Unclaimed Property*, State Audit Report 2002-122 (June 2003).

Over the course of many years the SCO came to see unclaimed property as a significant revenue source for California. In fiscal year ended June 30, 2007, the SCO reported \$205 million in "Revenue from Abandoned Property".⁵⁹ Some practitioners are deeply troubled by the notion that the California SCO is treating this property as state revenue rather than as custodial funds for the true owners.

A series of lawsuits by owners against the SCO began in 1999. These lawsuits are filed in state and federal court against the elected officials serving as SCO including Steve Westly, Kathleen Connell, and John Chiang.⁶⁰ The general theme of the plaintiffs' arguments is that the state has not adequately performed its due diligence. In some situations the state sold the contents of safety deposit boxes at far below their market value or the sentimental value to the owners. The state has responded by saying its procedures are improving, but that it should not be held liable. In June 2007, the federal district court in Sacramento issued an injunction banning the SCO from receiving unclaimed property until it improved its procedures.⁶¹ After the SCO promised to improve its procedures and the California Legislature amended the statutes, the judge lifted the injunction in October 2007.⁶² Some of the SCO initiatives include asking the holders to a better job of due diligence before they submit unclaimed property to the state.⁶³ The California unclaimed property litigation and reforms are likely to continue for several more years.

[8] State Statutes

The vast complexity and variations of unclaimed property cannot be summarized in one chapter. Each jurisdiction has its own peculiar rules. The following table lists the states and other jurisdictions in alphabetical order. After each jurisdiction name, there is the name of the responsible agency, website address, and citation to unclaimed property statutes. The statutory citations are formatted to facilitate searching the statutes by the Table of Contents (TOC) method.

⁵⁹ California State Controller's Office, *State Government Annual Financial Report, Statement of Revenues by Agency and Source, Fiscal Year Ended June 30, 2007*, at page 5, <http://www.sco.ca.gov/ard/budleg/2007/07suppvol1.pdf>

⁶⁰ *Taylor v. Westly*, No. CA 02--6511, (9th Cir., 2005); *Taylor v. Chiang and Westly*, No. CIV-S-01-2407, (E. D. Cal. 2007); *Suever v. Connell and Westly* No. CA 04-15555 (9th Cir. 2006); *Harris, et. al. v. Westly* (2004) 116 Cal. App. 4th 214; *Fong v. Westly* (2004) 117 Cal. App. 4th 841; *Trust Realty Partners (TRP) v. Westly*, Sacramento Superior Court Case No. 04AS02522; *Enerlex, Inc. v. Connell*, (2006), Superior Court of California, Case No. 02CS01106.

⁶¹ *Taylor v. Westly and Chiang*, No. CIV-S-01-2407, (E. D. Cal. 2007). This litigation began in 1999 and generated several district court decisions and three appellate court decisions: *Taylor v. Westly (Taylor I)*, 402 F.3d 924 (9th Cir. 2005); *Taylor v. Westly (Taylor II)*, 488 F.3d 1197 (9th Cir. 2007); and *Taylor v. Chiang and Westly and Chiang*, ___ F.3d ___ (9th Cir. 2008).

⁶² California State Controller's Office, "Chiang Issues Statement on Court Lifting Unclaimed Property Injunction", Press Release No. 07:052, October 18, 2007, <http://www.sco.ca.gov/eo/pressbox/2007/10/pr052ucpinjunction18.pdf>

⁶³ California State Controller's Office, "Controller Unveils Second Round of Reforms to the State's Unclaimed Property Laws", Press Release No. 07:062, December 27, 2007, <http://www.sco.ca.gov/eo/pressbox/2007/12/pr062ucpominbus27.pdf>

Practice Tip

Experienced practitioners know they should read the statute when they are asked to render a professional opinion. Unclaimed property is filled with numerous exceptions and variations between states. Read guides, summaries, and other secondary authorities to help the search process. Your final opinion should cite the statutes.

Practice Tip

In many states unclaimed property is under the direct control of an elected statewide official, such as the State Treasurer or State Comptroller. These elected officials are eager to be associated with programs that “give money to the people.” Thus, their websites may use fun words like “treasure hunt.”

Alabama

Office of State Treasurer, Unclaimed Property Division
www.treasury.state.al.us/up/
ALA. CODE Title 35, chap. 12, §§ 35-12-1 to 35-12-96

Alaska

Department of Revenue, Treasury Division, Unclaimed Property Section
www.tax.alaska.gov/programs/programs/index.aspx?23050
ALASKA STAT. Title 34, chap. 45, §§ 34.45.010 to 34.45.170

Arizona

Department of Revenue, Unclaimed Property Unit
www.azunclaimed.gov
ARIZ. REV. STAT. ANN. Title 44, chap.3 and 3A, §§ 44-301 to 44-356

Arkansas

Auditor of State, Unclaimed Property Division
<http://www.accessarkansas.org/auditor/>
ARK. CODE ANN. Title 18, Chap. 28, §§ 18-28-101 to 18-28-403

California

State Controller's Office, Division of Collections, Bureau of Unclaimed Property
www.sco.ca.gov/col/ucp/
CAL. CIV. PROCEDURE CODE Title 10, §§ 1300 to 1615

Colorado

Department of Treasury, Unclaimed Property Division
www.colorado.gov/treasury/gcp/
COLO. REV. STAT. Title 38, Article 13, §§ 38-13-101 to 38-13-134

Connecticut

Office of State Treasurer, Unclaimed Property Division
www.state.ct.us/ott/aboutucp.htm
CONN. GEN. STAT. Title 3, chap. 32, §§ 3-56 to 3-74a. Title 50, chap. 859, §§ 50-1 to 50-14.

Delaware

Division of Revenue, Bureau of Unclaimed Property
revenue.delaware.gov/information/Escheat.shtml
DEL. CODE ANN. Title 12, chap. 11, §§ 1101 - 1224

District of Columbia
Office of Chief Financial Officer, Unclaimed Property Unit
www.cfo.dc.gov
D. C. CODE ANN. Title 41, chap. 1, §§ 41-101 to 41-142

Florida
Department of Financial Services, Bureau of Unclaimed Property
www.fltreasurehunt.org
FLA. STAT. Title XL, chap. 717, §§ 717.001 to 717.1401

Georgia
Department of Revenue, Unclaimed Property Program
www.dor.ga.gov/PTD/ucp/index.aspx
GA. CODE ANN. Title 44, chap. 12, article 5, §§ 44-12-190 to 44-12-236

Guam
Treasurer of Guam
www.guamtax.com
GUAM CODE ANN. Title 5, chap. 21, § 2116, Title 7, chap. 35, §§ 35101 - 35108. Title 11, chap. 106, § 106019. Title 15, chap. 30, § 3027.

Hawaii
Department of Budget and Finance, Unclaimed Property Program
pahoehoe.ehawaii.gov/lilo/app
HAW. REV. STAT. chap. 523A, §§ 523A-1 to 523A-65

Idaho
State Tax Commission, Unclaimed Property Division
tax.idaho.gov/unclaimed.htm
IDAHO CODE ANN. Title 14, chap. 5, §§ 14-501 to 14-543

Illinois
Office of State Treasurer, Unclaimed Property Division
www.cashdash.net
ILL. COMP. STAT. chap. 765, §§ 1025/0.05 to 1025/30

Indiana
Attorney General's Office, Unclaimed Property Division
www.indianaunclaimed.com
IND. CODE ANN. Title 32, article 34, chap. 1, § 32-34-1-1 to 32-34-1-52

Iowa
State Treasurer's Office, Unclaimed Property Division
www.treasurer.state.ia.us/unclaimed/
IOWA CODE ANN. Title XIV, chap. 556, §§ 556.1 to 556.30

Kansas
Office of State Treasurer, Unclaimed Property Division
www.kansascash.com
KAN. STAT. ANN. Title 58, article 39, §§ 58-3901 to 58-3980

Kentucky
Office of State Treasurer, Unclaimed Property
www.kytreasury.com/html/kyt_uprop.asp
KY. REV. STAT. Title XXXIV, chap. 393, §§ 393.010 to 393.990

Louisiana

Department of Treasury, Unclaimed Property Division

www.treasury.state.la.us/ucpm/

LA. REV. STAT. ANN. Title 9, § 9:151 to 9:181

Maine

Office of State Treasurer, Unclaimed Property Division

www.maine.gov/treasurer/unclaimed_property/

ME. REV. STAT. ANN. Title 33, chap, 41, §§ 1951 to 1980

Maryland

Comptroller of Treasury, Unclaimed Property Unit

interactive.marylandtaxes.com/Individuals/Unclaim/default.aspx

MD. CODE ANN. COMMERCIAL LAW Title 17, § 17-101 to 17-326

Massachusetts

Department of State Treasurer, Abandoned Property Division

abpweb.tre.state.ma.us

MASS. GEN. LAWS chap. 200A, §§ 1 - 17

Michigan

Department of Treasury, Unclaimed Property Division

www.michigan.gov/treasury/0,1607,7-121-44435---,00.html

MICH. COMP. LAWS §§ 567.221 to 567.265

Minnesota

Department of Commerce, Unclaimed Property Unit

www.state.mn.us/portal/mn/jsp/content.do?id=-536881373&agency=Commerce

MINN. STAT. chap. 345, § 345.01 to 345.75

Mississippi

Treasury Department, Unclaimed Property Division

www.treasury.state.ms.us/Unclaimed/

MISS. CODE ANN. Title 89, chap. 012, §§ 89-12-1 to 89-12-57

Missouri

Office of State Treasurer, Division of Unclaimed Property

www.treasurer.mo.gov/mainUCP.asp

MO. REV. STAT. Title XXIX, chap. 447, §§ 447.010 to 447.721

Montana

Department of Revenue, Unclaimed Property

mt.gov/Revenue/programsandservices/unclaimedproperty.asp

MONT. CODE ANN. Title 70, chap. 9, part 8, §§ 70-9-801 to 70-9-829

Nebraska

Office of State Treasurer, Unclaimed Property Division

www.treasurer.state.ne.us/up/upsearchprop.asp

NEB. REV. STAT. chap. 69, §§ 69-1301 to 69-1332

Nevada

Office of State Treasurer, Unclaimed Property Division

nevadatreasurer.gov

NEV. REV. STAT. chap. 120A, § 120A.010 to 120A.750

New Hampshire

Treasury Department, Abandoned Property Division
www.nh.gov/treasury/Divisions/AP/APindex.htm
N. H. REV STAT. ANN. Title XLVI, chap. 471-C, §§ 471-C:1 to 471-C:43

New Jersey
Department of Treasury, Unclaimed Property Division
www.state.nj.us/treasury/taxation/
N. J. REV STAT. Title 46, § 46:30B-1 to 46:30C-5

New Mexico
Taxation & Revenue Department, Unclaimed Property Office
www.tax.state.nm.us/forms/unclaimedprop/unclprop_forms.htm
N. M. REV STAT. ANN. Chap. 7, § 7-8A-1 to 7-8A-31

New York
State Comptroller, Office of Unclaimed Funds
www.osc.state.ny.us/ouf/
N. Y. CONS. LAWS, CHAP. 697, ABAN. PROP. LAW §§ 101 - 1502

North Carolina
State Treasurer, Unclaimed Property Program
ncash.com
N. C. GEN. STAT. chap. 116B, §§ 116B-1 to 116B-80

North Dakota
State Land Department, Unclaimed Property Division
www.land.nd.gov/abp/abphome.htm
N. D. CENT. CODE, Title 47, chap. 47-30.1, § 47-30.1-01 to 47-30.1-38

Ohio
Department of Commerce, Division of Unclaimed Funds
www.com.ohio.gov/unfd/
OHIO REVISED CODE ANN., Title 1, chap. 169, §§ 169.01 to 169.99

Oklahoma
State Treasurer's Office, Unclaimed Property Division
www.ok.gov/treasurer/Unclaimed_Property/
OKLA. STAT. ANN. Title 60, §§ 60-651 to 60-706

Oregon
Division of State Lands, Unclaimed Property
www.oregon.gov/DSL/UP/
OR. REV. STAT. chap. 98, §§ 98.005 to 98.992

Pennsylvania
Office of State Treasurer, Unclaimed Property Bureau
www.patresury.org/search.htm
PA. CONS. STAT. Title 61, chap. 951, §§ 61 PS 951.1 to 61 PS 951.33

Puerto Rico
Office of Commissioner of Financial Institutions, Unclaimed Property Division
www.cif.gov.pr/unclaimedeng/unclaimedmain.aspx
P. R. LAWS ANN. Title 7, chap. 133, §§ 2101 to 2109

Rhode Island
Office of the General Treasurer, Unclaimed Property Division

www.treasury.ri.gov/unclaimedproperty/

R. I. GEN. LAWS Title 33, chap. 33-21 to chap. 33-21A, §§ 33-21-1 to 33-21A-7

South Carolina

State Treasurer's Office, Unclaimed Property Program

treasurer.sc.gov/palm_payb_prog_uncla_prop/

S. C. CODE ANN. Title 27, chap. 18 and 19, § 27-18-10 to 27-19-390

South Dakota

State Treasurer's Office, Unclaimed Property Division

www.sdtreasurer.com/?page=unclaimed_property

S. D. CODIFIED LAWS, Title 43, chapters 30A and 41 to 41C, §§ 43-30A-1 to 43-30A-10 and 43-41-1 to 43-41C-4

Tennessee

Treasury Department, Unclaimed Property Division

www.treasury.state.tn.us/unclaim/

TENN. CODE ANN. Title 66, chap. 29, §§ 66-29-101 to 69-29-153

Texas

Comptroller of Public Accounts, Unclaimed Property Division

www.window.state.tx.us/up/

TEXAS PROP. CODE ANN. Title 6, chap. 71 to 76, §§ 71.001 to 76.704

Utah

State Treasurer's Office, Unclaimed Property Division

www.up.utah.gov/

UTAH CODE ANN. Title 67, chap. 04A, §§ 67-4a-101 to 67-4a-902

Vermont

State Treasurer, Unclaimed Property Office

www.vermonttreasurer.gov/unclaimed/

VT. STAT. ANN. Title 27, chap. 11 to 14, §§ 1101 to 1270

Virgin Islands

Office of Lieutenant Governor, Division of Banking and Insurance

ltg.gov.vi/division-of-banking-and-insurance.html

VIRGIN ISLANDS CODE ANN. Title 28, chap. 29, §§ 651 to 687

Virginia

Department of Treasury, Unclaimed Property Division

www.trs.virginia.gov/ucp/ucp.asp

VA. CODE ANN. Title 55, chap. 10 to 11.2, §§ 55-16 to 55-210.38

Washington

Department of Revenue, Unclaimed Property Section

ucp.dor.wa.gov/

WASH. REV. CODE Title 63, chap. 63.21 to 63.48, §§ 63.21.010 to 63.48.060

West Virginia

State Treasurer's Office, Unclaimed Property Division

www.wvsto.com/Unclaimed+Property/

W. VA. CODE, chap. 36, art. 8, §§ 36-8-1 to 36-8-32

Wisconsin

Office of the State Treasurer, Unclaimed Property Division

www.ost.state.wi.us/home/up.html

WIS. STAT. chap. 177, §§ 177.01 to 177.41

Wyoming

State Treasurer's Office, Unclaimed Property Division

treasurer.state.wy.us/uphome.asp

WYO. STAT. ANN., Title 34, chap. 24, §§ 34-24-101 to 34-24-140

§23.03 Compliance Process

This section summarizes the unclaimed property compliance procedures for holders, states, and true owners. There are numerous variations and exceptions that apply to particular types of properties or particular states.

[1] Holder Due Diligence

The holders must perform some due diligence to contact the true owners at their last known addresses. This holder due diligence must be done before the property is reported to the state unclaimed property administrator. If the holders are able to establish communication with the true owner, they will probably be able to remove the property from the list of reportable unclaimed property.

[a] Tracking Software

Holders need software to manage their due diligence process and track the unclaimed property. This software should have fields describing the property, property category, the dollar amount, and customer last known address. The software also tracks key dates: last known contact, correspondence sent, mail returned, dormancy expiration dates, date reported to state, and date remitted to state. After the property issue is resolved by corresponding with the owner or reporting it the state, the data should be retained by the holder's records to resolve future owner claims, litigation, or state audits.

Most large companies prefer to buy specialized unclaimed property software or hire an outside service to manage their unclaimed property compliance. This is particularly important for companies with unclaimed property exposure in several categories and several states. The specialized software and compliance consultants keep track of the unique rules and reporting dates for each state.

Practice Tip

Links to holder compliance software publishers are at <http://willyancey.com/unclaimed.htm#software> Links to holder compliance consultants are at <http://willyancey.com/unclaimed.htm#advisers>

[b] Last Known Address

The last known address is usually the last known address in the holder's records that is or was capable of receiving US Postal Service mail. There are numerous peculiar situations where applying this definition is difficult. Here are a few examples:

- Post office box in one state, and street address in a different state.
- Bill-to address different than service address.

- Email address with no USPS mailing address.
- Street address is the same as the holder, such as employees or vendors who received payment in person.
- Obtained a newer address for an owner in a different state than when the owner last contacted the holder, such a former employee that moved.
- True owner is a business that has been acquired by a larger company with a mailing address in a different state.

When the last known address is difficult to determine, most states will consider a reasonable effort by the holder. If the holder's representative contacts the state unclaimed property administrator for advice, be certain to document the request and the result. If the address does not appear to be a valid postal address, the conservative position is to treat it as address-unknown and remit it to the domiciliary state. The domiciliary state should be able to accept property with an owner name and no valid address.

Foreign addresses outside the fifty states, territories, and District of Columbia pose other problems. Sending mail to foreign addresses may be more costly to send and track. Holders should attempt to contact owners with foreign addresses. If unclaimed property with a foreign address becomes dormant, it should be remitted to the holder's domiciliary state.

The correspondence should be sent by first-class or certified mail so that the US postal service will return undelivered mail to the sender. Sending by certified mail or with a proof of mailing validates that the holder sent the mail.

Returned mail occurs frequently when holders send mail to the last known address. The true owners may have left no forwarding address or the forwarding address may have expired. Holders should keep a record of all mail returned by the post office.

Practice Tip

If there are hundreds or thousands of letters to track, the holder or its outside service should set up a post office box specifically dedicated for unclaimed property correspondence. As the returned mail is received, the envelopes with the "not at this address" notices can be optically scanned and stored as electronic images. The holder must retain proof of the returned mail.

[c] Search for Alternative Address

If the mail is returned, the holder may choose to cease further efforts to contact the owner or may decide to search for alternative addresses. Even if the state does not mandate searching for an alternative address, the holders may reduce their litigation risk by seeking an alternative address to contact the owner. Some holders set a policy of searching for an alternative address only for property that exceeds some threshold value.

Many locator services are available to search for alternative addresses. Searching with a web search engine is often successful when the target is a business or an individual with a uniquely spelled name. Some holders go to the effort of phone calling

or emailing owners in addition to sending mail to the last known address. Commercial services are available for locating people and businesses.

Practice Tip

Links to locator services are at http://willyancey.com/finding.htm#Public_Records

[d] Privacy issues

Businesses must be concerned about privacy and disclosure of confidential information. Businesses must be sensitive to concerns about disputes and litigation from current and former customers, ex-employees, unhappy vendors, and plaintiff class action attorneys. Before beginning the due diligence process, be certain to contact relevant business units, such as accounts payable, sales, and human resources, to anticipate their concerns and establish company policies on processing inquiries.

There are many privacy protection laws at the state and federal level.⁶⁴ Corporate legal counsel should be consulted before sending letters. The legal counsel might insist on revising the text of the letters to reduce possible disputes.

Practice Tip

Health care providers need to be particularly careful about balancing the due diligence for unclaimed property with privacy rules of the Health Insurance Portability and Accountability Act (HIPAA). Assume American Psychiatric Clinic discovers overpayments in patient accounts (also known as credit balances) that arose when the Clinic received payment from patients that was also paid by the patients' insurer. To perform their due diligence, the Clinic needs to contact its former patients and disclose enough information so that the patients know they might have some unclaimed property. Some of those patients do not want their families or employers to know about confidential psychiatric services. Some of the patients might still be mentally ill and unable to respond rationally. The Clinic must be very careful not to disclose confidential patient information in violation of HIPAA. Before sending the due diligence letters, the Clinic should have the draft letter reviewed by attorneys from two different legal specialties: health care law and unclaimed property.

[e] Format of notice

Formatting the correspondence to the true owner requires careful attention. The letter must be clear enough, but should not cause additional disputes. These are generally one-page form letters. The letter should contain the following information:

1. Name and address of the person. Since the letter will be scanned or photocopied, the name and address should be on the letter as well as on the envelope.
2. Purpose of the letter. Some explanation that the holder is updating its records and has information that property may be due to this person.

⁶⁴ Federal privacy law includes Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191; *Gramm-Leach-Bliley Financial Services Modernization Act*, Pub. L. No. 106-102; Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.), SEC Regulation S-P, 17 C.F.R. Part 248; and others.

3. Description of the property. The holder should disclose enough information that the true owner understands the property. Usually, the letter states the dollar value of the property.
4. Action choices. The letter may give the recipient these choices:
 - a. Acknowledge that no property is due from the holder to the recipient.
 - b. Recipient may request a replacement gift card or other service.
 - c. Recipient requests a new check issued and agrees this will settle the claim.
 - d. Recipient takes no action and the property is reported to the appropriate state when dormancy expires.
5. Due date. The holder may specify a reasonable due date for a response from the recipient. A reasonable date might be thirty to ninety days after the notice is mailed.
6. Holder's contact information. Provide a postal address, email address, fax number, and phone number for replies. Sometimes it is appropriate to include one contact point for the unclaimed property issue, and a different contact point for routine billing issues.

Some states have particular rules about formatting the notice to owners and when the letters must be sent. The California State Controller's Office has regulations specifying the font sizes on the due diligence letter sent by holders to owners.⁶⁵ New York State has specific rules about due diligence letters including a requirement to send a second letter by certified mail when the property value exceeds one thousand dollars.⁶⁶

Sometimes a company's business unit will want to add some other information in the unclaimed property due diligence letters. For example, retailers with customer credits and gift cards may find their marketing departments want to include retail product announcements with the letter. The human resource department may want to include some employee benefits information with due diligence letters to employees about uncashed checks. Inserting the additional information may be acceptable as part of routine annual correspondence with vendors, customers, and employees before the property becomes dormant under the unclaimed property laws. The problem with adding those inserts is that the holders may toss out the correspondence, thinking that the whole envelope is junk mail. The formal unclaimed property due diligence letter sent prior to reporting the property to the state should strictly follow the state guidelines, and should not be accompanied by other inserts.

[2] Dormancy

Unclaimed property dormancy is the period from the last known contact with the owner until the property becomes reportable to the state. The last known contact is a contact initiated by the true owner, such as the date the true owner cashed a check from the holder or the true owner increased or decreased her account balance. The last known contact is not the last date that the holder sent information to the true owner.

⁶⁵ California Code of Civil Procedure §§ 1513.5, 1516(d), and 1520(b). See instructions to holders and a sample letter at <http://www.sco.ca.gov/col/ucp/holder/index.shtml>

⁶⁶ New York Abandoned Property Law § 1422.

The state unclaimed property auditors may look at the holder's records to see how they are recording the date of last known contact.

Practice Tip

Determining the last known address and contact date can be challenging. Suppose Mary Smith orders a gift card from Mega Gifts Company in 2001. Mega's records show that the gift card is in Mary's name. Mary gives the card to Susie Johnson and its last use is in 2002, but Mega's record for the gift card show Mary's address not Susie's. Mega Gifts continues to send catalogues to Mary until 2005 and a phone sales agent talks to Mary in 2006. Mary does not initiate any correspondence to, or purchases from, Mega Gifts after 2001. Mary's last known address is a state with five-year dormancy for gift cards. When does the dormancy period end? Since Mary last initiated contact with Mega in 2001, the dormancy ends in 2006, and the unused balance should be reported to Mary's state by the report due date in 2007. However, if Mega's records show that the card transferred to Susie, then the unused balance should be reported to Susie's state by the report due date in 2008.

Dormancy rules are specific to each state and category type. The dormancy periods are established in each state's statutes and regulations. Dormancy periods range from one to fifteen years. Many states have one-year dormancy for wages, fifteen years for traveler's checks, and three or five years for other property categories. Delaware has five years for most categories, and fifteen years for traveler's checks.

Practice Tip

The dormancy periods and other rules can be displayed in a matrix with one row for each state and a column for each category. Most holders with unclaimed property exposure in multiple states obtain a dormancy period matrix from one or more of the reference services listed at <http://willyancey.com/unclaimed.htm#guides> or from an unclaimed property tracking software publisher listed at <http://willyancey.com/unclaimed.htm#software>

[3] Reporting Requirements

Each state has its own unclaimed property reporting requirements. Through their participation in various interstate associations⁶⁷ and comments from the holders, many of the states have similar reporting requirements.

[a] Reporting Exemptions

State statutes specify which property categories must be reported or may be excluded from reporting. Two of the most important exemptions adopted by some but not all states are gift cards discussed in §23.04[7] and the business-to-business (B2B) exemption discussed in §23.04[8][d]. Some states have a *de minimus* exemption that

⁶⁷ The professional associations that played significant roles in moving towards uniform reporting requirements are the National Association of Unclaimed Property Administrators (NAUPA) and the Unclaimed Property Professionals Organization (UPPO) formerly known as the Unclaimed Property Holders Liaison Council (UPHLC).

exempts holders from reporting small amounts.⁶⁸ Other exemptions are unique to particular states and industries, such as the Florida exemption for theme park and entertainment complex tickets.⁶⁹

Practice Tip

Researching exemptions is a major reason holders hire attorneys or consultants who specialize in unclaimed property. See links at <http://willyancey.com/unclaimed.htm#advisers> and <http://willyancey.com/unclaimed.htm#law-firms>

When holders exempt property from reporting, the holder is not completely free of exposure. It is possible some other state will assert a claim to the property that is exempt by the state of last known address. It is possible the holder could be sued in a plaintiff class action lawsuit, even if the property is exempt from state reporting. Thus, some holders want to voluntarily report unclaimed property to some state rather than keep it indefinitely.

[b] Aggregation

Many states have an aggregation threshold for reporting property-specific information. For example, a state may allow holders to omit the property owner name and address if the amount per property is less than \$50, but require owner name and address if the amount is more than \$50. If the reporting threshold is \$50, then the holder can aggregate all individual properties under \$50 within a particular category and report them as one line on that state's annual report. For example, the holder may have an aggregate line of \$976 that consists of more than twenty individual items, each with less than \$50. Each state sets its own aggregation amount, and the most common aggregation amounts are \$25, \$50, and \$100.

These aggregation rules arose when it was tedious for holders to transcribe information onto the states' report forms. Now most holders are maintaining all their records electronically and it does not require much more effort to report the small dollar amounts.

Practice Tip

Some holders voluntarily report all owner name, address, and amount information, even when the property amount is below the aggregate reporting threshold. By reporting this information with their report, it will be easier to track property that gets into subsequent disputes or litigation. The states sometimes encourage holders to use the aggregate reporting thresholds because that reduces the number of individual properties that the state must track.

[c] Forms – paper and electronic

Most states mandate electronic filing by holders that report more than a specified number of items. Electronic filing is much more convenient for states because they can

⁶⁸ For example, Alaska Stat. § 34.45.280(f) exempts holders with less than \$750 of reportable property. Idaho Code § 14-501 exempts property below \$50.

⁶⁹ Florida Stat. Ann. § 717.1355.

more easily move the electronic data into their database systems and public posting reports. Most of the states use the unclaimed property software from ACS Wagers.⁷⁰ The holder tracking software from the commercial software publishers is designed to produce the computer files in the format required by the states.

[d] Report Due dates

States most often require reports ten months after the year in which dormancy expires. The most common due date is November 1, and covers unclaimed property with dormancy that expired by the prior December 31. Life insurance company reports are most often due on May 1 and cover dormancy that expired the previous June 30. This ten month delay from the end of dormancy to the report date is the period that the holder should perform its mandatory due diligence in the format required by state law. As with all other areas of unclaimed property, check the state-specific statutes to be certain.

Practice Tip

For example, suppose a bank holds a savings bank deposit with a last customer contact of April 15, 2000. That account's last known address is in a state with a five year dormancy period for bank savings deposits. The bank attempts due diligence in 2005, but is unsuccessful in locating the owner. Then the property becomes dormant on December 31, 2005. The report is due by November 1, 2006. Thus, the length of time from last customer contact to state report could be as long as five years and ten months.

[e] Reciprocity

Some states participate in reciprocity programs that allow one state to accept property with a last known address in another state. These agreements are negotiated among states as a convenience for holders and true owners. These reciprocity agreements most often apply to payroll and specified property categories.

Practice Tip

Suppose the Ohio Manufacturing Company (the Company) hires all of its employees in Ohio. The Company has some uncashed employee benefit checks for employees whose last known address is outside of Ohio. The Company can remit all of these checks to Ohio. Ohio's reciprocity process will transfer the information and cash value to the state of last known address.

[4] Remitting Requirements

The unclaimed property report is usually accompanied by remitting cash equal to the total value of intangible reported on the report. Each state has its own rule on the threshold amount of cash that requires remitting cash by electronic funds transfer.

Non-cash property may have special remitting requirements. Safety deposit box contents must generally be sent by an insured shipping service as required by the state unclaimed property administrator. Stock certificates and bonds generally need a new "street name" certificate that allows the state to sell the security.

⁷⁰ ACS Wagers is a business unit of Affiliated Computer Services, Inc. See <http://www.wagers.net/>

Generally, the due date for remitting property is the same as the report due date. However, there are exceptions. A major exception occurred in California in 2007 when the federal district court had an injunction that prevented the State Controller's Office (SCO) from receiving unclaimed property. The SCO required holders to report unclaimed property on the usual report date, but delayed the date for remitting the property pending the outcome of the federal litigation.

[5] State Claims Process

The states have procedures that attempt to return the unclaimed property to the true owners. Each state has its own policy on public notice, true owner claim procedures, and allowable finder fees.

[a] State Notice

States use a variety of methods to notify the public about unclaimed property held by the state. Many states publish in statewide newspapers an annual list with the identifying owner names and their last known city. These newspaper notices usually do not provide a description of the property and may be limited only to the additions to the state's database in the past year. Nearly all states and jurisdictions have public websites that identify the names of true owners and their last known address. Some state websites describe the property and some do not. Some elected officials such as the state treasurer or state comptroller get their photos and press releases into state newspapers when they return property to a true owner.

A public policy question is how diligent the states are in their attempts to notify true owners. If states can hold on to the property, they can convert it to cash and lend that cash to the state's general operating fund. Since up to 90 percent of that property will never be claimed, the state is essentially getting a perpetual loan from the true owners. This issue exploded in California where the federal court held that the State Controller's Office was doing a poor job notifying true owners and issued an injunction suspending the State Controller's Office from receiving more unclaimed property from holders.⁷¹ Particularly egregious situations arose when the State Controller's Office and its agents liquidated the contents of safety deposit boxes by selling valuable jewelry and corporate stock certificates without notifying the true owners. The State Controller's Office blamed the lack of adequate funding to perform effective due diligence. Many people believed California was so eager to get cash that they lost sight of their obligation to notify true owners.⁷²

States can be sued when they do not follow due process in notifying property owners. In *Jones v. Flowers*⁷³ the US Supreme Court required the State of Arkansas to give notice to an owner before selling his property to satisfy his unpaid taxes. In a five-justice opinion delivered by Chief Justice John G. Roberts, the Court reversed the Arkansas Supreme Court and ruled that, under the circumstances, the state's sale of Jones' property violated due process. It held that "when mailed notice of a tax sale is

⁷¹ *Taylor v. Westly and Chiang*, op cit.

⁷² Scott Thurm and Pui-Wing Tam, "States Scooping Up Assets from Millions of Americans", *The Wall Street Journal*, February 4, 2008, page A1.

⁷³ 547 U.S. 220 (2006).

returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." The *Jones v. Flowers* decision can be applied to state notices on unclaimed property.

[b] True Owner Claims

When a true owner finds its property on the state website or newspaper publication, it can submit a claim for that property. The state will ask for some proof of the true owner's identity, such as a copy of the person's driver license for individuals or a corporate officer's affidavit for corporations. The state may ask for some proof that the claimant had the property. For example, if a person claims an employee benefit check issued by Company XYZ, the state may ask for a copy of the person's IRS Form W-2 or other document proving they worked for Company XYZ. Sometimes the true owner is unable to produce documentation to satisfy the state, and the state denies the claim.

Most states do not pay interest or compensate for true owners' expenses in recovering their property. While the state may have earned substantial interest earnings while the true owner's property was in the state's unclaimed property account, the state is not obligated to pay interest unless the state legislature specifically requires it. States may charge penalty and interest to holders for delinquent reports, but do not have to pay interest to true owners. Unclaimed property is not a part of state and local taxation regimens. Nevertheless, it is noteworthy that in most areas of state and local tax, states do pay interest on refunds and charge interest on late payments of tax.

Some states have paid fraudulent claims for unclaimed property. An employee of the Delaware unclaimed property office, for example, participated in a scheme to submit fraudulent unclaimed property claims.⁷⁴ Federal district court convicted a New Jersey man of filing a fraudulent unclaimed property claim in Florida.⁷⁵ The Connecticut State Auditor found that Connecticut's unclaimed property office had such weak controls that unclaimed property claims were paid to identity thieves.⁷⁶

[c] Finder Services

Many consultants offer finder services that find unclaimed property for individuals and businesses. These consultants request data files from state unclaimed property administrators and attempt to locate the true owners. These consultants assist true owners with filing a claim. These finder service consultants are usually compensated by a finder's fee that is a percentage of the value recovered.

Many states attempt to limit the profitability of finder services. They may limit the finder fees by a statute that limits the finder fee to no more than ten percent. Some

⁷⁴ Sean O'Sullivan, "Politician's son admits stealing \$1.2 million from state", *The New Journal*, February 6, 2008, <http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20080206/NEWS/802060351/1006/NEWS>

⁷⁵ "New Jersey Man Gets 30 Months in Prison For Stealing Florida Unclaimed Property Accounts" (August 2007), in http://www.fldfs.com/Pressoffice/Newsletter/2007/081007/August_1007text.htm

⁷⁶ Mary Johnson, "Treasury Botched Payouts", *Hartford Business Journal*, March 17, 2008, <http://www.hartfordbusiness.com/news4862.html>

states do not release their unclaimed property databases to finders for at least a year after the holders report their property.

Practice Tip

True owners can avoid finder service fees by submitting their claims directly to the state. When finder services initially contact the true owners, they only hint at the possible property until the true owner signs a contract to pay the finder services. If you are contacted by a finder service implying some state has your unclaimed property, then you can run a search on missingmoney.com or some other website to determine what state holds your property. Sometimes the finder service has information that is not yet available on a public web site.

§23.04 Categories of Unclaimed Property**[1] NAUPA Property Codes**

The National Association of Unclaimed Property Administrators (NAUPA) developed some standard codes for classifying unclaimed property. NAUPA is the association of administrators from all states. NAUPA is the professional organization for government employees. NAUPA headquarters is in Lexington, Kentucky. See the NAUPA website for more details: <http://www.unclaimed.org/>

NAUPA develops technical standards and most states adopt these standards. Most states and holder's unclaimed property tracking software use these standard codes. Even though the codes are standard, different states may have different rules for exemptions, dormancy period, and filing dates for property codes.

The NAUPA property categories and two-letter acronyms are:

- Account Balances (AC)
- Uncashed Checks (CK)
- Mineral Proceeds & Interests (MI)
- Safe Deposit Box and Safekeeping (SD)
- Miscellaneous Checks & Intangible Personal Property (MS)
- Court Deposits (CT)
- Trust, Investment & Escrow Accounts (TR)
- Utilities (UT)
- Insurance (IN)
- Securities (SC)
- All Other Property Not Identified Above (ZZ)

Each of these categories is further divided into subcategories. For example, CK13 is uncashed vendor checks, MS01 is unclaimed payroll checks, and SC01 is unclaimed dividend checks.

Each state includes the property category list and instructions in its instructions to holders. These instructions are available from the state web sites listed in § 23.02[8].

PRACTICE TIP

One way to educate accounting and legal staff on the scope of unclaimed property is to show them the property category list. Talk about items that are relevant to the audience. This may help the audience become aware of the vast range of areas that can result in unclaimed property exposure. They will realize they have to do a lot more investigation of each area to estimate the exposure.

[2] Third Party Administrators (TPA)

Many companies outsource accounting and finance functions to third party administrators (TPA). Payroll and employee benefit programs are the most common area for TPAs. Some companies use TPAs for managing receivables, inventory, vendor payments, shareholder payments, bondholder payments, and other areas. TPAs prepare the checks or electronic funds transfer orders, notify their client company of the total cash amount needed, and then the company deposits funds into a bank trust account for the TPA.

The holder generally has the unclaimed property liability for its transactions that are handled by the TPA. The TPA may or may not be pro-active in notifying their clients about unclaimed property. The contract with the TPA might or might not be explicit on how unclaimed property will be handled. The TPA may require an additional fee to conduct the due diligence and organize the data that their clients need to file unclaimed property returns.

Third party administration for customer rebate programs. Young America Corporation, located in Young America, Minnesota, is one of the largest processors of customer rebates for manufacturers and retailers. Many of these rebate checks are small and do not get cashed by the consumer. Young America retains the customer's name and address when it issues the check. Young America claims it is not the holder, because it merely processes the rebates on behalf of its clients. Many states have sued Young America, asserting that Young America is indeed the holder and should be remitting the uncashed rebate checks to the state of last known address.⁷⁷

[3] Gift cards and stored value cards

Gift cards, stored value cards, and related products have expanded enormously in the past 50 years. These products do not fit easily into the property law concepts that apply to earlier forms of property. Unclaimed property law and practice has evolved to keep up with the developments.

[a] Range of products

The term "gift cards" is now used generically to cover a wide range of related products. Traditional paper gift certificates are redeemed when the bearer presents the gift certificate to the retailer. Plastic gift cards may be encoded with electronic account information so that the retailer's point of sale terminal can read the card and determine

⁷⁷ See *Cahill v. Young America Corporation*, No. 05-4750-E (Massachusetts Sup. Ct. Nov. 7, 2005); *Young America Corporation v. Lynch*, 2006 Cal. App. Unpub. LEXIS 799 (Cal. App. 2006); *Fitzgerald v. Young America Corporation*, Civ. Action No. 6030 (Iowa Dist. Ct. Feb. 8, 2006), joined by 27 states.

the remaining balance. Most retailers do not maintain records of the gift card purchaser name and address, but some do keep those records. These gift cards could be sold by a retailer for use at a particular store in a particular state, a mall with many stores, a national chain of stores, an online website with no physical presence, or a bank-like financial institution. Some gift cards can be recharged with additional funds. The contract terms vary between gift card programs.

Stored value cards constitute a broader category that includes gift cards. Many bank-like financial institutions issue debit cards preloaded with specific spendable amounts. Customers may purchase these cards directly as a way to transfer funds. Retailers may purchase stored value cards to give away as customer rebates, credit for returned merchandise, or employee performance incentives. Employers and public assistance programs may issue stored value cards rather than distributing cash and paper checks. Some of these stored value cards can be used in foreign countries as well as in the USA. The issuers of these stored value cards might or might not maintain records of the purchasers' names and addresses.

Unless the gift cards or stored value cards qualify for some exemption, the remaining balances must be remitted as unclaimed property. In most states the dormancy period for gift cards is five years. Some states impose shorter dormancy periods. Stored value cards may have a shorter dormancy period than gift cards.

Practice Tip

The rules for gift cards and stored value cards are changing in many states. Be sure to look up the latest rules that apply to the states of last known address.

[b] Determining the true owner

Determining the true owner of a gift card or stored value card is a major challenge in unclaimed property compliance. Some issuers do not maintain any records of the name and address of the person they are sold to. Sometimes the purchasers do not want the issuer to record their name and address, or provide false or incomplete name and address information. If the purchaser uses a credit card to buy a stored value card, the credit card issuer may refuse to release the purchaser's name and address information.

The purchasers of stored value cards often intend to transfer their card to some other person. Transfers are particularly common with gift cards and parents providing stored value cards to their children. Issuers might have the name and address of the original purchaser, but probably do not have name and address for the subsequent owners.

Practice Tip

Suppose Aunt Bee in Mayberry, North Carolina buys a stored value card issued by National Bank at the Mayberry General Store. She gives the card to Opie Taylor on his 18th birthday. Aunt Bee receives personal satisfaction from giving the card and does not intend to retain any property rights in the card. Opie leaves North Carolina and moves to Hollywood, California. Opie uses the card to make some purchases in California and gives the card to Gomer Pyle who moves to Florida. Five years later National Bank's records show that there is a remaining balance in the card.

How does National Bank comply with the unclaimed property laws? Suppose National Bank can contact Aunt Bee in North Carolina. Should National Bank refund the unused balance to Aunt Bee? If Aunt Bee tells National Bank that she gave the card to Opie, does National Bank have to track down the last known address of Opie or Gomer? Under the general rules National Bank would remit the remaining balance to the state of last known address as shown in its own records. If National Bank's records do not show the last known address, then the remaining balance goes to the state of incorporation for the entity that issued the stored value card. Numerous scenarios and regulations could change the unclaimed property outcome.

[c] Gift card exemptions

Many states have considered legislation regarding gift cards. Many of the states are concerned about protecting consumers from what activists consider to be unfair practices. Some gift card issuers impose high monthly maintenance fees and expiration dates. It could be argued that the time value of money between the date when the cards are sold and redeemed should be enough to offset the retailer's administrative costs. If the gift card issuers impose fees and expiration dates, the states generally view those as unfair and require the unclaimed balances to be remitted as unclaimed property.

Some states offer exemptions for gift card programs that meet certain requirements. The states with full or partial exemptions for specified gift cards or gift certificates are Alabama, Arizona, Arkansas, California, Florida, Idaho, Illinois, Indiana, Kansas, Maryland, Minnesota, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, Tennessee, Virginia, Washington, and Wyoming. Each state has its own particular rules that must be carefully followed.

Observe that many corporations are chartered in states that do not exempt gift cards: Delaware, Massachusetts, Nevada, New York, and Texas. Although those states may have corporation laws that benefit businesses in some ways, they do not benefit gift card issuers.

Some retailers create affiliated gift card companies that are incorporated in states that exempt gift cards. Other retailers choose to outsource their gift card programs to companies incorporated in states favorable to gift cards.

A typical arrangement works as follows: The gift card company prepares numbered gift cards with the retailer's logo. As the retailer sells the cards, they electronically transmit from their point of sale terminals regarding the amount loaded onto each card. The gift card company maintains electronic records on each card. As customers present cards for redemption, the gift card company validates the amount and decreases the remaining balance. The gift card company has a contract with the retailer to transfer funds to the gift card company as the cards are redeemed. The gift card company collects fees from the retailer based on the dollar volume issued and redeemed. The advantage of this arrangement is that the retailer keeps the customer's cash until the redemptions occur.

For the gift card company to qualify for exemption, it must be legally domiciled in a state that allows the exemption. The gift card company should have its own employees and make a small profit. If the gift card company does not have a viable legal and economic existence, it might be disregarded.

Practice Tip

The hypothetical American Steak Houses is incorporated in Delaware and operates restaurants in many states. American Steak Houses creates a wholly-owned subsidiary corporation ASH GiftCo in Virginia, a state that exempts gift cards. American Steak Houses believes that ASH GiftCo will prevent all unclaimed property exposure related to gift cards. Unfortunately, ASH GiftCo is only a paper entity with no employees, no separate bank account, and no transaction records. When Delaware's unclaimed property auditors examine American Steak Houses, they assert that ASH GiftCo is a sham. Delaware assesses American Steak Houses for all unredeemed gift cards that are dormant more than five years. The assessment could have been avoided by outsourcing the gift card management to an independent company, or by making the subsidiary a properly functioning entity.

[4] Accounts Receivable Credit Balances

Most business managers fail to understand their exposure to unclaimed property liability for accounts receivable credit balances. The reasons for credit balances are explained below in [4] [a]. Considerable time and company-specific knowledge is required to determine if a credit balance really is unclaimed property that must be remitted. Fortunately there are a number of ways that companies can reduce their exposure in this area.

[a] Reasons For Credit Balances

Most business executives think accounts receivable balances go only one way: customers owe us money, and we collect it until the balance is zero. But there are many ways that accounts receivable can result in credit balances where the business owes money to the customer. Here are a few examples:

- Customer pays an invoice twice.
- Customer pays by both check and credit card.
- Customer pays an invoice in full, and the customer's insurance company also pays for part of the invoice.
- Customer pays an invoice in full, but returns some of the merchandise for a credit.
- Customer buys industrial material that includes a returnable container and pays a deposit for that container. The customer returns the container, and the accounts receivable system records a credit due to the customer. Due to the inaction of the customer or the accounts receivable system, that credit is not applied to another invoice.
- Customer terminates a service contract, but the initial deposit is not returned.
- Customer makes an error in writing the check amount and pays more than is owed.

Some situations, on the other hand, look like credit balances are due to a customer, but upon further investigation turn out not to be. Here are a few examples:

- The accounts receivable system records a payment received from a customer, but fails to record an invoice showing that amount billed the customer.
- The accounts receivable system has several different customer account numbers for the same customer. An invoice is billed under one customer account number, but the payment is received and credited to a different account number for that customer.
- Customer terminates a service contract that has a termination fee. The customer has accumulated a credit balance sufficient to pay the termination fee. But, the accounts receivable system fails to bill the termination fee.
- Customer is granted a credit for future merchandise purchased before the end of the year. The customer fails to order enough merchandise to use up the credit. The credit remains on the accounts receivable system even though the customer failed to meet its purchase requirement.

In a perfect world, there would be no credit balances. But the business world is imperfect and credit balances do occur. There are lots of small “bookkeeping errors” that may seem immaterial, but can accumulate to significant liabilities. Some of these credit balances can be detected and resolved by software to fix problems. In large companies with thousands or millions of transactions running through the accounts receivable system, some of these errors get through. Many of the credit balances will be detected by either the accounts receivable manager or the customer and resolved before the unclaimed property becomes dormant. A small percentage of these “bookkeeping errors” are not resolved and become unclaimed property.

In some companies with large numbers of customer accounts, an accounts receivable manager will decide to “clean up” old accounts receivable balances. These managers believe the company’s contracts and policies allow them to absorb small credit balances without refunding them to customers. They decide to “sweep” all small credit balances away by making an accounting journal entry that debits accounts receivable and credits miscellaneous income. These journal entries may be buried within many other journal entries and escape the attention of the corporate controller. However, sweeping credit balances into income causes several problems with different parties as follows:

1. Customers are not paid what they are owed.
2. The company could be sued in a plaintiff class action lawsuit by attorneys representing all similarly treated customers.
3. The financial statements fail to record the liability owed to the customers, overstate net income, and overstate retained earnings.
4. Unclaimed property auditors discover the liability and assess the company for credit balances that have reached dormancy.

Customer credit balance problems are particularly severe in companies that grew by acquiring other companies. As the prior companies were integrated into the surviving company, the managers focused on the continuing customers. They saw no need to keep information on former customers who are not continuing. If the acquired company had accounts receivable credit balances related to inactive customers or long-outstanding transactions, those records were not loaded into the continuing accounts

receivable system. Records related to the acquired companies are purged or lost. It is no longer possible to investigate those old transactions.

The unclaimed property liability for credit balances may be small or large. The problem is that most companies have never identified the issue and have no idea how large their exposure is. They may be surprised when the unclaimed property auditors probe into the accounts receivable system.

[b] Holder defenses on credit balances

Businesses with customer credit balances have a number of defenses to avoid credit balances turning into an unclaimed property liability. Effective application of these defenses requires some knowledge of accounting, contract law, and unclaimed property law. The concepts for these defenses are described below.

[i] Customer contact

The best defense is to contact customers and ask them about their credit balances. The customer may have an explanation that shows there is not a liability due to the customer. The customer may want the credit applied to some other outstanding balance. Or the credit could be resolved by sending a check or merchandise to the customer.

Talking to customers about credits may help with issues other than unclaimed property. A conversation about credits may lead to a discussion that identifies other problems such as poor customer service, fraud, or internal control breakdowns. Customer satisfaction increases when they believe the vendor is talking to them and resolving problems.

All communication with customers about credits must be documented. The communication can be email, fax, or printed mail. If the communication is by an oral conversation, write some notes and send a note to the customer confirming the conversation.

Documentation of the customer communication should be stored in electronic or paper files for many years so that it can be retrieved for an unclaimed property audit. It is possible that by the time an unclaimed property auditor is doing field work that he could be looking back on events that occurred ten years earlier. Given the difficulties of retaining and retrieving paper documents, retaining correspondence in electronic files is preferable.

Practice Tip

Consider the following scenario with a customer credit and unclaimed property. In 2001 Customer Charley pays an invoice twice to Holder Company. In 2002 Holder has a conversation with Charley and applies the overpayment to another outstanding invoice from Holder to Charley. Holder files its unclaimed property report in 2007 for property that became dormant in 2001. The state could wait until 2010 to notify Holder that its 2007 report is being audited. Audit field work does not begin until 2011. Thus, in 2011 the auditor is asking for documentation about events that took place ten years earlier.

Unfortunately customer contact is not always feasible for the following possible reasons:

- The customer cannot be located.
- The customer has no recollection of what happened.
- The customer has become hostile to the vendor and will not cooperate.
- The time and expense to contact all customers is too great.
- The vendor's records are incomplete.

[ii] Multi-account Offsets

Many customers have multiple accounts with the same vendor. For example, a customer with multiple locations or departments might have several different accounts with the vendor. If a customer changed its name or billing address, the vendor's accounts receivable system might have several accounts for that customer.

If the accounts are still active, it may be possible to apply a credit from one account against outstanding invoices for a different account. This defense may not work if the customer has no outstanding invoices. The state auditor might not allow a multi-account offset to reduce liability for credits where the unclaimed property dormancy period has expired.

[iii] Contractual Offsets

Holders may be able to argue that some accounting data in their books does not constitute proof of unclaimed property due to the state. These defenses require an understanding of the holder's accounting procedures and contract law.

Many insurance companies offer to settle claims by presenting a check payable to the insured or other party. This check may remain uncashed because the party chooses not to accept it. This could also happen when a potential customer presents a check with a "low-ball" offer to a vendor who decides not to accept that offer. In these scenarios the payee named on the check did not agree to the terms and should not be considered a true owner of the property.

Many service companies have specific provisions about terminations in their service contracts. Customers may be required to provide termination notice at some minimum number of days before termination takes place. Some service agreements provide for termination fees if the customer terminates before the end of the contract period. These companies should be able to use these termination provisions to reduce the customer credit balances.

The burden of proof is on the holder. When a holder issues a check or credit, that is prima facie evidence that an obligation is owed.⁷⁸ The unclaimed property administrator and its auditor take the position that it is the holder's burden of proof to show the obligation is not owed. In many situations the holder is unable to produce the documentation that proves the obligation is not owed.

⁷⁸ *Uniform Unclaimed Property Act of 1995*, § 6, Burden of Proof as to Property Evidenced by Record of Check or Draft.

Practice Tip

Among unclaimed property professionals, a common maxim is that auditors treat holders as “guilty until proven innocent.” The holders’ own accounting records can and will be used against them. Many people view unclaimed property assessments as a “penalty for inadequate documentation.”

[iv] Business-to-Business Exemption (B2B)

Many states allow business-to-business (B2B) exemptions for unclaimed property when the holder and true owner are businesses. The justification is that businesses should be more sophisticated in their recordkeeping and reconciliation activity with other businesses, and can clear their unclaimed property without the state’s involvement. All the states require remitting unclaimed property when the true owner is a consumer.

The following states allow some form of business-to-business exemption for accounts receivable: Arizona, - Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, New York, North Carolina, Ohio, Tennessee, Virginia, and Wisconsin. Since there are many differences between states in how the B2B exemption is defined, practitioners must review the statutes in each state before reaching a conclusion.

A relatively new area of exposure in B2B commerce is unmatched inventory receiving reports, also known as open receivers. In this situation a company receives inventory or materials from its supplier, records that inventory on a receiving report, but the company does not pay for the exact amount on the receiving report. For example, the receiving report shows 24 cartons received, but subsequently the company discovers one was damaged, and pays for only 23 cartons. Some unclaimed property auditors assert that when a company’s records show that it received goods but did not pay for them, then the company has a liability for unclaimed property. Companies with adequate records can show that the problems with open receivers are resolved in the ordinary course of business.⁷⁹

Practice Tip

Dandy Stores is a national retail chain with a dozen large distribution centers that supply hundreds of stores. Every day thousands of lines of receiving report data are recorded at each distribution center. Sometimes cartons are received, but damaged goods are not discovered until later. Sometimes the vendor ships a quantity or product that is not ordered. Some vendors tell the distribution center to destroy unwanted goods rather than return them. Dandy Stores’ supply chain management team actively works with all its vendors to resolve discrepancies. If Dandy Stores can document how the open receivers are resolved, they should be able to convince the auditor they do not have unclaimed property exposure in this area.

⁷⁹ Brooke Spotswood and Will Yancey, “Unclaimed Property and Open Receivers: What’s In Your Warehouse?”, *Accounts Payable Now & Tomorrow*, September 2007, pages 9-11.

§23.05 Voluntary Disclosure Agreements (VDA)

Many holders initiate voluntary disclosure agreements (VDA) when they discover their failure to file an unclaimed property return, or that a filed return omitted a category. The states do not have to accept the VDA if the holder has already been notified of audit, or the state does not believe the holder will timely or accurately complete all the procedures requested by state. States may be reluctant to accept a VDA request from a company that is in financial distress.

Most holders considering a VDA will engage an attorney or consulting firm with experience in unclaimed property. They will prepare a plan for what states to contact and when. The consultants will help estimate the magnitude and different areas of exposure before the VDA is filed. The most important state for a VDA is usually the state of incorporation or legal domicile.

The initial request for a VDA is usually made by a phone call from the outside adviser to the state unclaimed property administrator. The adviser inquires as to the state's current policy on accepting a VDA. If the state is ready to accept a VDA request and the holder wants to proceed, the adviser sends a short letter to the state identifying the company and requesting a VDA.

Most states have some standard terms for a VDA. The holder has to agree to file complete returns for all open years for all categories. If no returns have been filed, the period is generally reports for the prior ten years. Since dormancy periods are five years for most categories, the VDA will cover property with a last known contact that occurred five to fifteen years prior to the VDA year. The state will issue information requests that cover all the information requested in an unclaimed property audit as discussed in § 23.06. The holder must agree to gather and organize the material using its own employees or outside consultants. The state sets target completion dates that are typically six to twelve months from the date the VDA is executed.

Practice Tip

Suppose Friendly Florists, Inc. operates a nationwide chain of floral and gift stores. It has been filing unclaimed property returns for uncashed payroll and accounts payable checks. None of these unclaimed property returns included any customer credit balances or gift cards. Friendly Florists is incorporated in Delaware. Friendly Florists files a VDA request with Delaware near the end of 2007. That VDA request covers ten years of reports that were due for property that became dormant in 1995 to 2006. The property that became dormant in 1995 had a last contact in 1990. In 2008 Friendly Florists has to produce data and estimates related to events that took place 18 years earlier. Since that documentation is difficult to retrieve, they will use the estimation techniques described in § 23.06.

The state will insist that the holder's chief financial officer, chief executive officer, or both, sign the VDA. The state administrators want to be sure the holder is committed at the highest levels to carrying out the terms of the VDA. If a holder does not carry out the terms of the VDA, it could be subject to a conventional unclaimed property audit.

If the holder completes all the VDA requirements and the state accepts it, most of the states will abate penalty and interest. Some states will abate the penalty, but not

the interest. Given the length of time involved, the penalty and interest might significantly exceed the amount of the unclaimed property itself. Abatement of penalty and interest is the incentive for holders to file and complete the VDA.

§23.06 Audits of Unclaimed Property

Unclaimed property audit practices are evolving from the experience of the different states. Although there are few published regulations on unclaimed property audit methods, this section can describe typical procedures.

[1] Auditors

The state unclaimed property administrators conduct audit programs under their general authority to audit for unclaimed property. In most states the unclaimed property programs are so small that the same people are setting policy and overseeing the audits.

Most states do not have full-time unclaimed property audit staff, but contract with unclaimed property audit firms. Most of the audit firm staff members work from their homes or small offices scattered across the country.

Practice Tip

The two largest unclaimed property audit firms are the ACS Unclaimed Property Clearing House, Inc. and Kelmar Associates, and both of them are headquartered in Massachusetts. A list of unclaimed property audit contractors is at <http://willyancey.com/unclaimed.htm#auditors>

The unclaimed property audit firms receive their authority from the states and other jurisdictions that they represent. One audit firm may audit a holder on behalf of several states. If disputes arise about the auditor's authority to audit or demand records, the holders can and should contact the respective state unclaimed property administrators. The auditor should send a letter to the holder notifying the holder what states they are auditing for.

Practice Tip

When a holder is contacted by an unclaimed property auditor of states X, Y, and Z, the holder can and should verify that auditor is duly authorized. The holders can obtain contact information for each state's unclaimed property administrator at their websites listed in §23.02[8]. Be certain to verify the legal entities and time periods that the auditor is authorized to audit for. There have been situations where unclaimed property auditors misrepresented the scope of their authority.

The selection of which holders to audit could be determined by the state or the audit contractors. A state could have its own list of large holders to target and then make assignments to the contractors. The audit contract firms could approach the state with a list of holders that may have exposure. The state may authorize an audit on holders who file reports that the state believes might be incomplete. The holder may have no physical presence or business activity in the state, but may have unclaimed property exposure arising from the true owners who reside in that state.

Compensation of the unclaimed property audit contractors is a controversial topic. Since the state governments have limited funds, most of the unclaimed property audit contractors' compensation is related to the amount of unclaimed property funds they obtain for the state. The audit contract may be structured as a percentage of what unreported unclaimed property the contractors identify, a percentage of what the state collects, or as an hourly fee. If the fee is based on hours, the number of hours authorized is related to the state's estimate of how much funds will be generated from the audit. The auditor's percentage is usually in the range of ten to 15 percent of the amount collected.

Practice Tip

Unclaimed property audit contractors will invest most of their effort where they believe the holders have significant unreported unclaimed property. If a holder organizes the evidence to show that a particular area has little or no exposure, the auditor will probably move on to other areas. Since the auditor's compensation is directly or indirectly related to the amount discovered, the auditor should not waste a lot of time on unproductive areas. Some inexperienced auditors do waste time on unproductive areas.

[2] Holder's Audit Representative

Holders should designate a person to act as their representative. Holders could designate some accounting or finance executive, such as the chief financial officer, controller, senior finance director, or tax director to serve as the lead representative. They may also select an outside attorney, accountant, consultant, former auditor, or other advocate to serve as the representative. In large companies, one person may be designated as the formal representative for authorizing agreements, and another person may be designated as the operating manager for day-to-day decisions with responding to document requests.

Practice Tip

Some companies make the mistake of designating a holder representative who is too busy with other tasks. In these situations the auditor is unlikely to get prompt and accurate responses to document requests. Delays may make the auditor more likely to issue an arbitrarily large assessment as a way of getting the holder's attention. The tensions are exacerbated if the holder's representative is rude and disrespectful to the auditor. This possibility is reduced if the holder's representative has the time and patience to deal with the auditor.

[3] Information Requests

Unclaimed property audits are conducted with long lists of document requests. The auditors may request hundreds pages of documents and data files with millions of rows. The holder representative's challenges are to understand why the auditor is requesting the documents, what documents would satisfy the auditor's request, and how to respond when documents are unavailable or costly to retrieve.

[a] Audit opening conference

The auditor will schedule an audit opening conference sometime after the notice of audit. Depending on the location and preferences of the various parties, this conference could be held in person or by phone.

At the opening conference the auditor will identify particular areas of interest. The auditor might or might not send a written information request prior to the opening conference. The auditor may ask questions to help identify the various legal entities and doing-business-as operations that will be included in the scope. The holder can ask questions.

Practice Tip

Prior to the opening conference the holder's representative should gather information about prior unclaimed property returns and potential exposure areas. At least one senior executive, such as the chief financial officer, controller, or tax directors, from the holder should be present at the opening conference. The presence of a senior executive symbolizes that the holder respects the importance of the audit. However, the holder's representative should do most of the talking for the holder. If the executives have more questions and comments, they should discuss them with their representative outside the presence of the auditor.

[b] Categories of Documents

Following is a comprehensive list of documents that may be requested.⁸⁰ Not all categories are applicable to every company.

[i] General Escheat Questions/Information

- ∅ Is there a formalized escheat policy in place?
 - § If so, when was it established?
- ∅ Has the company ever reported Unclaimed Property before?
 - § If so, in what states and for what periods?
- ∅ What year-ends does the company use for reporting on financial statements, tax returns, and unclaimed property tax returns?
- ∅ Provide federal income tax returns (such as the IRS Form 1120) to verify Revenues and Cost of Goods Sold for the period 1991 through the current year.
- ∅ Provide a schedule listing all entities, as well as their state and date of incorporation. If any of the entities were acquired or sold during the period 1991 through current year, please provide the date of these transactions.
- ∅ Provide history of company and organization chart.
- ∅ Provide a written statement from the Chief Financial Officer (CFO) indicating for what periods detailed records do not exist.

[ii] Accounts Payable

⁸⁰ Adapted from *Delaware Unclaimed Property Audit Draft Document Request*, Delaware Department of Revenue, 2007, unpublished.

1. Provide the actual bank reconciliations for periods 1991 through the current year for each calendar quarter end. [As a practical matter, most companies cannot produce all of these.]
2. Are these records available electronically? If so, provide in an electronic format.
3. How many general ledger accounts were used during 1991 to the current year?
 - a. Provide the date(s) opened and closed.
 - b. What happened to the balances when these accounts were closed?
 - c. How were these balances reconciled?
4. How many AP disbursement accounts were there during 1991 to the current year?
 - a. Provide the date(s) opened and closed for all bank accounts.
 - b. What happened to the balances when these accounts were closed?
 - c. How many accounts were there for AP since 1991?
5. Has the company ever written off outstanding checks/balances? If so, what was the process/procedure?
6. Has the company ever had a void policy? If so, what was the process/procedure?
 - a. Provide annual void listings containing the original check number, issue date and void date for the periods 1991 to the current year.
 - b. How were voids retained?
 - c. If the check was reissued, provide the new check number and date of reissue.
6. Provide dates for all system conversions.
 - a. Was there a full or partial conversion?
 - b. Do the conversions maintain the legacy data? If so, did they retain detailed data or balances?
 - c. How were outstanding balances handled?
7. Does the company have a history of performing due diligence on outstanding items? If so, when did the process begin and what are the policies and procedures (Supporting documentation will be needed.)

[iii] Payroll

1. Provide the **actual** bank reconciliations for periods 1991 through the current year for each calendar quarter end.
 - a. Are these records available electronically? If so, provide in an electronic format.
2. How many general ledger accounts were there?
 - a. Provide the date(s) opened and closed.
 - b. What happened to the balances when these accounts were closed?
 - c. How were these balances reconciled?
3. How many disbursement accounts were there?
 - a. Provide the date(s) opened and closed.
 - b. What happened to the balances when these accounts were closed?
 - c. How many accounts were there for payroll since 1991?
4. Has the company ever written off outstanding checks/balances? If so, what was the process/procedure?
5. Has the company ever had a void policy? If so, what was the process/procedure?
 - d. Provide a void listing containing the original check number, issue date and void date.
 - e. How were voids retained?
 - f. If the check was reissued, provide the new check number and date of reissue.

- 6 Has payroll ever been handled through a third party representative? If so, how long has the practice been in place?
 - a. What are the TPA's policies and procedures for outstanding checks, voids, & stop pays?
 - b. How were the TPA accounts funded?
- 7 Has the company ever offered direct deposit? If so, how long has this service been offered?
 - a. What percentage of employees utilized direct deposit?
- 8 Provide dates for all system conversions.
 - a. Were conversions full or partial conversions?
 - b. Do they maintain the legacy data? If so, did they retain detailed data or balances?
 - c. How were outstanding balances handled?
9. Does the company have a history of performing due diligence on outstanding items? If so, when did the process begin and what are the policies and procedures (Supporting documentation will be needed.)

[iv] Accounts Receivable

1. What was the policy for all credit balances?
 - a. How were these credit balances reconciled?
2. Has the company ever written off outstanding balances? If so, what was the process/procedure?
3. How many general ledger accounts were there?
 - a. Provide the dates opened and closed.
 - b. What happens to the credit balances when these accounts are closed?
 - c. How are these credit balances reconciled?
4. Are the credit reports for the period 1991 to the present available? If so, please provide.
5. Are the aging reports for the period 1991 to the present available? If so, please provide.
6. Provide dates for all system conversions.
 - a. Was it a full or partial conversion?
 - b. How was the conversion data treated?
 - c. How were balances handled?

[v] Gift Cards and Similar Products

1. Did "company" ever issue gift certificates with expiration dates?
2. Provide a full narrative outlining the timeline associated with the internal and affiliated entities that issues gift cards, gift certificates, and stored value cards.
3. Did "company" ever operate a gift certificate program with expiration dates? If not, provide a statement from the CFO that expiration dates were never used.
4. Describe every gift card program and similar programs since 1991.
5. Provide the annual sales and redemptions for all programs the company operated.
6. How many general ledger accounts are there?
 - a. Provide the date(s) opened and closed.
 - b. What happens to balances when these accounts are closed?
 - c. How are balances reconciled?
7. Were there any system conversions? If so, provide dates for all system conversions.

- a. Was it a full or partial conversion?
- b. How was the conversion data treated?
- c. How were balances handled?

[vi] Rebates

1. Is there or has there ever been a rebate program in existence? If so, provide a detailed description of the program, including length of existence.
2. Are there multiple accounts or only one Rebate account?
3. Are the Rebate programs maintained in-house or by a third party? If so, what are the vendor names and periods used?
4. How is the Rebate program monitored?
5. How is the Rebate program funded?
6. How are credit balances tracked and reconciled?
7. How are outstanding checks tracked and reconciled?
8. How are un-refunded balances handled?

[vii] Unapplied Checks / Unapplied Wire Transfers

1. Has the company ever written off these kinds of transactions? If so, what is the process/procedure?
2. How many general ledger accounts were used to track these transactions?
3. Provide the dates when general ledger accounts for unapplied checks were opened and closed.
4. What happens to the balances when these accounts are closed?
5. How are credit balances reconciled for this account?

[viii] Benefit Plans

1. Does the company administer any employee benefit plans?
2. If so, what are the policies and procedures for handling outstanding checks, voids and stop payments?
3. Is a third party administrator (TPA) used for any of the plans? If so, how many and how long have they been contracted?
4. What are the TPA's policies and procedure for outstanding checks, voids & stop pays?
5. How are the TPA accounts funded?
6. Has the company or any of its entities ever utilized self managed benefit during the periods 1991 through present?

[c] Unavailable Records Affidavit

Few companies are able to provide every document requested above. The unavailable records affidavit identifies these documents.

As the fieldwork nears its conclusion, the holder's representative should prepare an affidavit identifying documents not provided and the reasons why they are not available. This affidavit should be reviewed by people with relevant knowledge and the corporate counsel. After their review and revisions, the chief financial officer (CFO)

should sign the affidavit in front of a notary. The CFO's signature symbolizes that the holder has taken the request seriously.

One particularly important aspect of the affidavit is the assertion about names and addresses. If the holder has name and address information for the true owners, that information must be disclosed and the property will be remitted to the state of last known address. Because the property without a last known address goes to the state of incorporation or domicile, that state wants some verification that there are no last known addresses.

Practice Tip

Delaware is particularly sensitive about the absence of a last known address. If there is no known address, Delaware can use the funds without challenge from other states. If Delaware receives property that belongs to people in some other state, then it must transfer the property to that state.

[4] Sampling and Estimation

Sampling and estimation are useful for two different purposes in unclaimed property practice:

- 1) Estimating liability for financial statements, and
- 2) Estimating liability for periods where records are unavailable.

Sampling and estimation are not necessary if the amounts can be readily determined by quantifying the actual amount.

Estimation is often necessary soon after the company discovers it has an unreported liability for unclaimed property. FAS 5 requires companies to record a liability when losses are probable and estimable.⁸¹ Since the company's controller should record the liability in the financial statements for the quarter in which the issue is discovered, there may not be enough time to examine all the records. The controller could ask that a sample be taken and then update the estimate as more records become available. The company may estimate a reserve in one quarter, but it may take years until the unclaimed property audit and appeals are resolved.

Practice Tip

Most holders do not reveal to the unclaimed property auditor how much they have reserved for unclaimed property liability. Even if the auditor could see the reserve calculations, the calculations might not allocate the reserve to specific states. The company may have estimated an unclaimed property liability that includes property that will be returned directly to the true owners, remitted to the state of last known address, and remitted without address to the domiciliary state.

In *Delaware v. New York*, the US Supreme Court commented on statistical sampling for unclaimed property.⁸² New York proposed that the disposition of unclaimed financial security distributions in the accounts of New York financial institutions be determined using statistical sampling. The Court specifically rejected the allocation

⁸¹ Financial Accounting Standards Board, *Statement of Financial Accounting Standards No. 5: Accounting for Contingencies* (March 1975), www.fasb.org/pdf/fas5.pdf

⁸² *Delaware v. New York*, 507 U.S. 490, 508 (1993).

concept proposed by New York. However, the Court did not ban the use of statistical sampling for all aspects of unclaimed property.

A New Jersey trial court allowed the state of New Jersey to use estimation techniques to claim uncashed insurance drafts.⁸³ The court cautioned the state that the estimation and extrapolation techniques must be scientifically reliable.

Numerous courts and state statutes allow the use of “best available information” to estimate liability when records are not available for the entire period of interest. Hundreds of reported decisions on tax audits of bars, restaurants, and convenience stores support this principle.⁸⁴

Sampling unclaimed property is particularly helpful when there are very large volumes of data and researching individual items is time-consuming. Sampling is particularly appropriate with customer credit balances where records are not available for the entire period.⁸⁵ In these situations there is “Light Period” where supporting documentation, revenue and other data can be retrieved. There is also a “Dark Period” where only total revenue is known and no customer-specific information is available.

The essential steps of sampling unclaimed property for customer credit balances are as follows:

1. Draw a sample from the credit balances in the Light Period and research to determine the ratio of unclaimed property to credit balances in the sample.
2. Apply this ratio to estimate the amount of unclaimed property in the Light Period.
3. Compute the ratio of unclaimed property to revenue for the Light Period.
4. Apply the ratio of unclaimed property to revenue from the Light Period onto the revenue for the Dark Period. This yields a projection of the unclaimed property in the Dark Period.

[5] Report of Examination

After the auditor gathers sufficient evidence, the auditor and audit supervisor decide when to issue a report of the examination. If the auditor has not found much, there may be no report. If there are only a few items that the holder does not dispute, the report could be issued within a few weeks or months. Large complicated audits can take years to complete.

The auditor should schedule a fieldwork exit conference to discuss the audit results. This exit conference may be in person or by phone. The holder’s controller and CFO and the state unclaimed property administrator are usually invited to attend this exit conference. The holder’s representative might or might not present objections at the exit conference.

⁸³ *New Jersey v. The Chubb Corp.*, 239 N. J. Super. 257, 570 A2d 1313 (1989).

⁸⁴ See <http://willyancey.com/sampling.htm>

⁸⁵ Will Yancey and Cathleen Bucholtz, "Unclaimed Property Audits - Sampling and Estimation", Unclaimed Property Professionals Organization (UPPO), 2008 Annual Conference, Phoenix, March 6, 2008.

The holder's representative usually has some specific period, such as thirty days, to submit additional comments in writing. Submitting written comments is important even if the auditor and audit supervisor make no changes. The comments may be useful in later appeals when the holder wants to show it did not accept the methods and conclusions of the auditor.

[6] Assessment

The assessment notice is usually issued by the state unclaimed property administrator. The administrator usually does a minimal review of the auditor's examination report and approves it without change. The assessment notice will include the amount of additional unclaimed property due, late filing penalties, and interest. Some states can assess the holder for the auditor's expenses.⁸⁶

If the assessment amount is small enough, some holders choose to pay it immediately rather than appeal. Some holders will negotiate to pay the unclaimed property due immediately, if the state will abate some or all of the penalty and interest. As state finances become more squeezed, they are less likely to abate penalty and interest.

Practice Tip

Some holders attempt to go around the unclaimed property administrator by appealing to elected officials. This effort can easily backfire on the holder. Even if the administrator abates some abatement under political pressure, the administrator will resent it. The holder will be subject to other audits in future years and on related entities.

[7] Appeals

Administrative appeals on unclaimed property audits are limited. The holder could appeal to the unclaimed property administrator, but this administrator is probably the same person who approved the assessment. If the holder can show flaws in the audit method or weaknesses in the legal arguments, the administrator may agree to some concessions.

The next level of appeal is the head of the department, such as the State Treasurer, Secretary of Revenue, or State Comptroller. Usually the higher level administrators have little interest in hearing these appeals, and will support the decision at the lower level.

If holders are not satisfied with their administrative appeals, they can begin threatening to take the case to state district court. At this stage, the unclaimed property administrator becomes more concerned about the hazards of litigation. The administrator may offer some concessions and settle the audit.

To file in state district court, the holder generally has to pay the assessment and then litigate to obtain a refund. Litigation is expensive and takes years to reach a final conclusion.

⁸⁶ See 60 Okla. St. § 679; Minn. Stat. § 345.53.

[8] Collection procedures

Most of the states do not have elaborate statutory or regulatory schemes for enforcing collections on unclaimed property assessments. If the assessment is not paid, they can keep issuing more assessment notices with more penalty and interest. Generally it takes at least six to twelve months of delay before the state unclaimed property administrator will refer a case to the state attorney general for prosecution. The state attorney general's office is usually so backed up with other matters that it takes months before they contact the holder. If the holder has significant business activity in the state, it is possible the state could threaten to terminate business licenses or right to contract with state government agencies.

The state unclaimed property administrator or attorney general may move more quickly if the holder is likely to declare bankruptcy. The state may be able to assert some claim in the bankruptcy proceedings and negotiate a settlement with the creditors' committee.

§23.07 Unclaimed Property Professional Practice

Unclaimed property professional practice has grown significantly in the past twenty years. The growth is comparable to what the sales and use tax profession went through about ten to twenty years earlier.

Many unclaimed property professionals work part-time on unclaimed property and part-time in some other areas, such as sales and use tax, billing, payables, database management, and other finance areas. Depending on their employers and career opportunities, they move back and forth between part-time and full-time work on unclaimed property.

Unclaimed property professionals work for different kinds of employers. State unclaimed property administrators have some employees. The unclaimed property audit contractors hire and train some professionals. They may also work as employees of the holders or their advisers: law, accounting, and consulting firms.

Many unclaimed property professionals enjoy the intersection of different skill sets. The profession combines skills in accounting, finance, law, information technology, business management, and negotiations.

Practice Tip

This is not a profession for people who crave order and well-defined rules. There are constantly new challenges and problems to solve.

The professional organization for government employees is the National Association of Unclaimed Property Administrators (NAUPA). The NAUPA headquarters is in Lexington, Kentucky in an office shared with the Council of State Governments. The NAUPA annual and regional conferences are often held in

conjunction with conferences of the National Association of State Treasurers (NAST). Their website is <http://www.unclaimed.org/>

The professional organization for holders and their advisers is the Unclaimed Property Professional Organization (UPPO). This organization began as the Unclaimed Property Holders Liaison Council (UPHLC) that met with the state administrators at the NAUPA conferences. UPPO holds annual and regional conferences. Their website is <http://www.uppo.org/>

§23.08 Unclaimed Property Checklist and Practice Tools

This checklist is intended for unclaimed property managers in large companies. These steps are not applicable to all businesses. See also the document request list at §23.06[3][b].

___ Designate one senior manager in the corporate headquarters to take charge of unclaimed property for all business units.

___ Begin preliminary research about the company's unclaimed property exposure by reviewing prior unclaimed property returns.

___ Convene a meeting of key people in the company including representatives from legal, internal audit, accounting, and finance departments to discuss the preliminary findings and action plan.

___ Select one or more outside advisers such as law, accounting, or consulting firms.

___ Decide whether to file VDA requests or wait for unclaimed property audit notices.

___ Gather corporate history information including all legal entities and acquisitions.

___ Meet with corporate treasury managers to identify exposure in security distributions including shareholder dividends and bondholders.

___ Meet with corporate accounts payable staff to identify exposure with accounts payable.

___ Meet with accounts receivable managers to identify exposure with credit balances.

___ Meet with human resource managers to identify exposure with payroll and employee benefits. Be sure to consider issues with third party administrators of employee retirement and health programs.

___ Meet with marketing managers to identify exposure with gift cards, rebates

___ Meet with legal counsel to discuss risks with contracts and class action litigation.

___ Meet with internal and external auditors regarding possible internal control weaknesses related to unclaimed property.

___ Respond to information requests from unclaimed property auditors and state administrators.

___ Review due diligence procedures to contact true owners with available name and address information.

___ Consider installing or improving unclaimed property tracking software.

___ Expand filing of unclaimed property returns to more jurisdictions or more categories.

___ Report results to senior management. Identify needs for additional resources and internal control procedures as needed.