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## Abandoned and Unclaimed Property: The New Virginia Statute

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# **Abandoned & Unclaimed Property: The New Virginia Statute**

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## **Unclaimed Property: General Concepts**

- A “chance possessor” of property belonging to another should not benefit; rather, the property should be remitted to the state.
- The state holds the property as custodian on behalf of the rightful owner.
- Until the rightful owner can be located, beneficial ownership remains with the state.

## **Unclaimed Property: Statutory Framework**

- Most states have an unclaimed property statute, usually modeled after a uniform act, with certain modifications.
  - 1954/1966 Uniform Act
  - 1981 Uniform Act
  - 1995 Uniform Act
- Virginia's statute is modeled after the 1981 Uniform Act, but with certain revisions, including amendments enacted by the General Assembly effective July 1, 2000.

## **Unclaimed Property: Definitions**

Items of “unclaimed property” include:

- Bank deposits and safety deposit box contents;
- Uncashed payroll, dividend, and refund checks; and
- Stock certificates and unredeemed interest coupons.

Also includes:

- General ledger items, such as uncashed vendor checks, credit balances, credit memos, and customer rebates; and
- Amounts due under health and welfare benefit plans.

## **Unclaimed Property: Reporting Responsibilities**

A holder is defined as a person who is in possession of property belonging to another.

If the owner does not claim the property within a specified time period, the property is presumed abandoned.

Once the requisite period of inactivity has passed (generally 5 years after property first became payable or distributable), the property is presumed abandoned.

Abandoned property must be reported (and remitted) to the state – generally by November 1<sup>st</sup> for property presumed abandoned by June 30<sup>th</sup>.

## **Unclaimed Property: Example**

Customer A issues a check to Vendor B on Feb. 1, 1998.  
The check is not cashed. After several years, Customer A clears the outstanding check from its general ledger.

Question: What is Customer A's reporting obligation – assuming the uncashed check represents property legally due and owing to Vendor B?

After 5 years (i.e., on Feb. 1, 2003), the debt evidenced by the check becomes "abandoned." Because it constitutes abandoned property on June 30, 2003, it should have been remitted to Virginia on or before November 1, 2003.

## **Unclaimed Property: Timeline for Today**

All checks, credit memos, journal entries, credit balances, and similar items issued on or before June 30, 1998 were due to Virginia on or before November 1, 2003.

Failure to do so may result in interest and penalties.

What to do? First, consider exceptions what to Virginia's unclaimed property statute.

## **Unclaimed Property: Statutory Exclusions in Virginia**

Effective July 1, 2000, Virginia's statute excludes property arising from:

- **Business-to-business transactions:**
  - Statute excludes credit balances, overpayments, credit memos, outstanding checks, and other items of intangible property *resulting from the sale of goods or services to a business association.*
  
- **Promotional incentives:**
  - Statute excludes promotional incentives, credits, gift certificates, coupons, and similar property redeemable in merchandise, in services, or through future purchases.

## **Unclaimed Property: Remaining Legal Issues**

- How to ascertain when property is “abandoned,” and when property is legally “belonging to another”?
- Who is the rightful “owner” (i.e., the “creditor, claimant, or payee ... or a person having a legal or equitable interest in property”)?
- Uncashed checks and outstanding credit balances may not represent property legally due and payable.

## **Unclaimed Property: Remaining Legal Issues (continued)**

- How is property ownership determined?
  - Requires the application of state laws pertaining to property rights, contracts, secured and commercial transactions.
  
- Application of the concept of “private escheat.”
  - Limitations imposed by statute or court order are disregarded by law;
  - Limitations imposed by contract? Not specified in Virginia’s statute.
  
- State auditors look to:
  - Normal business practices of the holder; and
  - Circumstances surrounding each specific transaction, as evidenced in the books and records of the holder.

## **Unclaimed Property: Statute of Limitations in Virginia**

- The revised Virginia statute limits audits to:
  - Five (5) years after a report is filed if the report:
    - covers the period in which the property should have been reported;
    - includes the property; or
    - provides notice of a dispute to the Treasurer.
  - Ten (10) years after the transaction becomes reportable if:
    - no report is filed; or
    - a false or fraudulent report is filed with the intent to evade delivery of the property.

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## **Unclaimed Property: Record Retention in Virginia**

- The revised Virginia statute limits record retention to:
  - Ten (10) years prior to the year preceding the examination *provided* the holder previously filed a report with Virginia
  - If the holder never filed a report with Virginia, records must be maintained back to the 1985 report year (i.e., for transactions of 5-year property which occurred in 1979).
  - If holder fails to maintain records, Virginia (if the state of corporate domicile) permitted to employ statistical sampling to estimate presumed deficiency.

## **Unclaimed Property: Penalties for Noncompliance in Virginia**

- The revised Virginia statute increases penalties for noncompliance:
  - Failure to file a report or deliver property -- a penalty of \$100 per day up to the lesser of \$10,000 or 25% of the value of the property.
  - Willful failure to report or deliver property, or the filing of a fraudulent report -- a penalty of \$1,000 per day up to the lesser of \$50,000 or 100% of the value of the property.

## **Unclaimed Property: Administrative Relief in Virginia**

- The revised Virginia statute encourages administrative relief:
  - Extends the period for filing a petition for judicial relief from 90 days to 3 years;
  - Provides guidelines for administrative appeals;
  - Provides for regulations and the public disclosure of rulings; and
  - Provides for a suspension of collection activity until a final administrative or judicial determination is made.

## **Unclaimed Property: Administrative Relief in Virginia**

- The Virginia Department of Unclaimed Property's amnesty program:
  - Process for registration;
  - Timing for filing corrective reports;
  - Waiver of interest and penalties; and
  - Disclosure.

## **Unclaimed Property: Remaining Legal Issues (continued)**

- Companies in multiple states are subject to competing and often conflicting state laws:
  - Variations in record retention periods;
  - Variations in audit periods;
  - Variations in the types of property subject to escheat; and
  - Variations in the audit method to identify “unclaimed property.”

## **Unclaimed Property: Judicial Rulings on Competing State Claims**

- Texas v. New Jersey (1965): The U.S. Supreme Court
  - Rejected the “contacts” test for purposes of establishing the priority of competing state claims, and
  - Established a simplified two-step test.
  
- The test:
  - Unclaimed property is first payable to the state of the owner’s last known address.
  - If no address exists, or if the state of last known address does not provide for escheat of the property, then the unclaimed property is payable to the state of corporate domicile of the holder.

## **Unclaimed Property: Judicial Rulings (continued)**

- Pennsylvania v. New York (1972): U.S. Supreme Court
  - Rejected Pennsylvania’s assertion that “the State of origin of the transaction” has priority where the holder fails to maintain the address of the owner, and thereby
  - Rejected the concept of statistical sampling by Pennsylvania (the non-domiciliary state).
  
- Delaware v. New York (1993): The U.S. Supreme Court
  - Affirmed the two-step test, and
  - Affirmed that statistical sampling is not a valid basis for determining last known address.

## **Unclaimed Property: Summary of Practical Issues**

- Contingent fee auditors hired by syndicates of states to conduct multi-state audits -- often of transactions occurring back to 1979.
- Conflict between state's stated objective and financial needs:
  - Statistical estimation fails to identify “rightful owner.”
  - Some states retain contingent fee auditors of motivation.
- Virginia prohibited by statute from hiring contingent fee auditors to exam holders domiciled in Virginia.

## **Unclaimed Property: Summary of Practical Issues**

- Identification of the “rightful owner.”
- Exclusion for business-to-business and promotional incentives.
  - Consider “choice of law” provisions to limit claims by other states.
- Statute of limitations on years subject to examination.
- Utilization of statistical sampling.
- Right to pursue administrative relief.
- Requirement that Treasurer:
  - Issue a written finding of fact and supporting law; and
  - Publicly report her determinations.



