

What's UP in the Digital World?

by Diann L. Smith and Mark W. Yopp



A fundamental premise of unclaimed property law is that it is better that property be held by a state for the general good of the public than be held by an individual entity for singular enrichment. That premise presupposes that the property itself be subject to state unclaimed property laws. Historically, states have considered traditional types of intangible property, such as bank accounts, payroll checks, and stock certificates, as unclaimed property — and generally, the escheatment of that property is undisputed. But more recent forms of property do not enjoy that simplicity. For example, the high-tech world in which we live and practice is creating new forms of property that are fast outpacing traditional notions of unclaimed property. In this edition of UPwords, we take a brief look at the future of unclaimed property law and its implications for the modern economy.

Technological Advances

Technological advances have led to the creation and sale of new forms of digital and virtual property. While those advances are happening at an increasing pace, it is fair to say that unclaimed property laws are not nearly as adaptable. The introduction of digital property in the undefined unclaimed property universe has exposed the law's rigidity, stretching the limits of traditional unclaimed property jurisprudence. Whether that tension has arisen as a result of states' aggressiveness in expanding the law in order to fit (or grab) the newly created digital property, or whether digital property types are even

covered under the existing unclaimed property net is a larger debate — a debate that is similar to what is developing in the courts in *McKesson Corp. v. Cook*.¹

Certainly not all property is subject to state unclaimed property laws, and this article will not try to distinguish what digital property is unclaimed property under the existing laws. The purpose of this article is to identify issues that have begun to be discussed in the unclaimed property profession — a sure sign that controversy will follow. “Digital codes” and “online accounts” are terms that will inevitably dominate the unclaimed property discourse of the future. It will take years however for states to address those property types and for state efforts to be fully vetted through the judicial and legislative process.

The New Property: From Video Games to Digital Codes

Currently, one of the most popular video games is *Red Dead Redemption* (Redemption), published by Rockstar Games. In Redemption, players roam around a fictionalized state set in the American West in 1911. One of the themes of the game is the inevitable encroachment of technology into a pastoral setting. The player hears characters complain about the new iron horse and horseless carriages, encounters an inventor trying to create a glider that can support a man's weight, and generally deals with a world in which everything seems to be changing. Although unclaimed property law has been on the books even before the rise of the iconic American cowboy, in many ways unclaimed property law reflects one of the themes in Redemption: inevitable encroachment of technology.

Digital Goods

Although Redemption is available for purchase only on a physical disc, more and more video games are being sold as digital downloads. Digital goods are nothing new to state tax practitioners, but states have yet to truly consider how unclaimed property law affects digital purchases for download such as

¹No. 4920 (Del. Ch. filed Sept. 25, 2009) (addressing the scope of the unclaimed property laws generally).

video games, music files, and videos when the property ultimately goes “unclaimed.” To the extent that states have taken a position on those issues, it is often based on statutory language written long before the invention of the compact disc — much less the MP3 — and therefore the authority should be questioned.

Stored Value Accounts

Many video games now offer downloadable content (DLC), usually released some time after the initial release of the game. On some systems, DLC is available for purchase using a credit card. For other systems, DLC² is purchased by means of a prepaid point system. Customers have an account and purchase gamer points to use at a later time, either directly through the gaming system or by means of a card sold online or at a retail store. Those accounts may have unused points that still have value.

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Many businesses outside the video game industry also use stored value accounts. Instead of currency, some retail websites run online auctions using points that customers purchase and use in the auction. Other retailer websites allow customers to add value to their online accounts for use in later purchases. For instance, instead of requiring a customer to enter a gift card code at the point of purchase, a website may allow customers to add the gift card to their account, and then the customers can use the credits on later purchases. Another example would be the way that some companies handle the sale of ringtones, in which customers purchase credits for a ringtone program and use those credits to download various ringtones.

Those accounts can become “lost” or unclaimed in a variety of ways. Users may simply stop using their accounts, or forget how to access them. Some accounts are accessed only through specific devices, such as video game consoles, which may break, or become obsolete and users simply stop using them.

Other Accounts

Customers can have accounts other than stored-value accounts. Some popular video games require players to use an account to access the games.

Players spend many hours creating their characters, which are tied to the accounts. The accounts are valuable, and there is a market for reselling accounts so that new players do not have to spend the same number of hours developing a high-level character.

Social media websites also use accounts that may have value. For instance, one social media website has several popular games in which users pay money for in-game items, creating accounts that have value. Users may abandon their accounts for a variety of reasons, such as to move on to the next popular social media website or because they become dissatisfied with the website.

Promotional Codes

For many video games, retailers offer promo codes if customers preorder the games. Those promo codes are usually redeemable for in-game content, such as additional levels or costumes. For instance, in Redemption, various retailers offered preorder bonuses in the form of additional costumes and weapons. The promo codes are e-mailed to customers or sometimes distributed as a flier with the purchase of the game at a physical retail store.

Promo codes are not limited to use in the video game world. Many retailers cross-promote their inventory by offering promotional codes redeemable for related digital content, such as codes redeemable for the purchase of MP3s if a customer purchases an MP3 player, promotional codes redeemable for videos with the purchase of a TV, or promotional codes redeemable for electronic books with the purchase of an electronic reader.

States’ Stances Toward New Property — Is It All Fair Game?

As we have seen recently in *District of Columbia vs. AT&T Corp.*,³ states are constantly considering what other property can be swept into the unclaimed property net. According to the complaint filed in the District of Columbia Superior Court, the district’s attorney general alleges that “AT&T’s prepaid calling cards must be treated as unclaimed property under district law.” The case has yet to be decided and is scheduled for a status conference on July 9.⁴

The property at issue in *District of Columbia* is unused minutes. However, the case could obviously have implications far beyond prepaid phone cards to any type of prepaid service or service measured in units. This issue also implicates third-party vendors that sell prepaid cards. Further, if the district prevails, the court will also likely face valuation issues.

³2009 CA 009655 B (D.C. Sup. Ct. filed Dec. 31, 2009).

⁴Since this article was submitted for publication, a consent order was entered and signed dismissing the case. The terms of the consent were not disclosed.

²In addition to DLC, digitally downloaded games are available through the prepaid point system.

Prepaid phone cards are partially priced based on the carrier's calculations of the minutes that will likely go unused; therefore, that some minutes will go unused lowers the actual price charged. If all unused minutes are subject to remittance to the state, the price of the minutes may increase or the remittance itself wouldn't reflect property actually paid for by the holder. The various iterations are interesting to contemplate, including the implications on prepaid phone plans and whether this decision will affect the way states treat the other types of property described above.

Putting Policy First

The scope of property subject to the states' unclaimed property laws is unsettled. However, there has been a recent trend by states to assert jurisdiction over nontraditional property types (for example, inventory). Although states can define property subject to their respective unclaimed property differently, they generally follow one version of the Uniform Unclaimed Property acts. State definitions usually define unclaimed property broadly — generally covering all types of intangible property.⁵ Also, most states have a catchall provision that mirrors the language in section 1(13) of the 1995 act.⁶

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This is not the first time new property types have been considered. A similar debate occurred over

frequent flyer miles. Ultimately, states chose not to cast the unclaimed property net over that type of property. Like with frequent flyer miles, stored value accounts, promotional codes, other online accounts maintained through social networking sites, and some digital goods represent property on the fringe of the unclaimed property laws. Just because you can (escheat), doesn't mean you should (escheat).

A plethora of legal arguments can be made as to why these new types of property are not unclaimed property. States and third-party auditors have demonstrated that they are eager to go after new types of property, despite all the reasons why that property isn't, or shouldn't be, unclaimed. As the slowdown in the economy continues, and states look for ways to fill the budget gaps, states may be inclined to shoot first and ask questions later.

Conclusion

State efforts to expand the types of property covered by unclaimed property laws are limited only by the imagination of those responsible to administer the law. Unfortunately, many of the creative ideas do not provide holders and owners with adequate notice and guidance through legislation or regulations, but appear first on audit. As the digital world continues to evolve, so too should the law regarding the treatment of the digital world for purposes of determining the application of unclaimed property laws. The states, the owners, and the holder community would be well served to address these issues through legislation or affirmative regulations and policy statements, and to do so sooner rather than later. ☆

UPwords is a column about unclaimed property from Sutherland Asbill & Brennan LLP's State and Local Tax Practice. This installment is by Diann L. Smith, counsel, and Mark W. Yopp, an associate, with Sutherland's State and Local Tax Practice. Matthew P. Hedstrom also contributed to this article.

⁵The 1981 Act, sections 1(10) and 2 focus on "intangible property" and provide a broad definition for this type of property. The 1995 Act, section 1(13) defines property to include both "a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business," as well as "money, a check, draft, deposit, interest, or dividend." See also 1981 Uniform Disposition of Unclaimed Property Act, section 1(10)(i) (defining intangible property by reference to specific types of property, including checks and drafts). Section 2(a) sets forth general rules for the presumption of abandonment of property; namely, abandonment is presumed if intangible property is "held, issued or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than 5 years after it became payable."

⁶States have often interpreted that provision broadly.