



South Dakota Legislative Research Council

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Unclaimed and Abandoned Property

This paper contains an overview of the law of unclaimed and abandoned property. It begins with the evolution of the law from feudal England and traces the development of the law in the United States. The paper continues with a discussion of the current law in South Dakota, which is a version of the 1981 Uniform Unclaimed Property Act.

History of Unclaimed and Abandoned Property

Unclaimed property law has its roots in the old English common law of escheat. Strictly speaking, escheat applies only to real estate although most often it is used in reference to personal property as well. In England, escheat as applied to real estate refers to real estate reverting to the lord when there were no heirs of the original grantee to inherit the real estate. In the case of personal property which did not have an owner, the Crown took the property as *bona vacantia*, "vacant goods" or "unclaimed property."

In the United States, escheat refers to the right of a state to the estate left without an owner when no person is legally entitled to claim it. Unlike feudal England where escheat was the privilege of the feudal lord, in the United States escheat refers to property passing to the state because of the state's residual right as sovereign. While in a strict sense, escheat at common law applied only to real property, it has gradually been extended to include personal property, tangible and intangible.

As sovereign, a state may use its legislative

power to dispose of unclaimed and abandoned property within its jurisdiction. Most states have enacted legislation providing for escheat of abandoned and unclaimed property or for giving the state custody with or without ultimate escheat.

South Dakota has had a procedure for actions for escheat of property on the books since 1909. If any property escheats to the state, the state has an action to recover the property. Any action of this kind may be brought by the attorney general or the state's attorney of the county in which the property is located. The state's attorneys and the judges are to report to the Governor or the attorney general any cases in which there is reason to believe some property may escheat to the state. The procedure for actions for escheat of property is codified at SDCL 21-36 and covers both real and personal property.

The 1954 Uniform Act and the 1966 Revision

The National Conference of Commissioners on Uniform State Laws approved the first Uniform Unclaimed Property Act in 1954. The 1954 Uniform Act was drafted to respond to conflicting legislation among the states and to U.S. Supreme Court decisions in the 1940s and 1950s. The Act was revised in 1966. The 1954 and 1966 Uniform Acts tied the enacting state's claim to abandoned property to the ability of that state's courts to assert personal jurisdiction over the holder. Jurisdiction was based on the state having sufficient contacts with the property. The result of a "contacts" test is

generally to allow any state with jurisdiction to take unclaimed property. Recognizing the potential for conflict among states over the application of the "contacts" test, the Uniform Act contained a reciprocity clause allowing another state to claim abandoned property if the last known address of the claimant was in that state and if other states with contacts would forego their claims. The success of this depended on uniform enactment by all the states. This did not happen and states continued to have competing claims.

The Supreme Court decisions did not clarify the law. In *Connecticut Mutual Life Insurance v. Moore*, 333 U.S. 541 (1948), the court held that the state of residence of the creditor could claim the property. However, the court also held that the state of the holder's domicile could likewise escheat, *Standard Oil Co. v. New Jersey*, 347 U.S. 428 (1951).

The court in *Standard Oil* also held that it was a denial of due process for more than one state to escheat the same property. This meant that the most diligent state would usually be successful in its effort to escheat the property. However, in *Western Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1962), the court told the most diligent state, Pennsylvania, that it had to assure Western Union that no other state would claim the property. In this case, Pennsylvania sought to escheat uncashed money orders and drafts which were held by Western Union and unclaimed by either the senders or the payees. The court did not believe that Western Union should be involved in a race of diligence among several states. In practical terms the states were left to mutually agree on which state was entitled to claim abandoned property, and if they could not agree, they had to present their conflicting claims to the only judicial forum which could hear such a case, the U.S. Supreme Court. Any state with a dispute

with another state was forced to bring an original action in the U.S. Supreme Court for declaration of rights before it could take the property. Then came the decision in *Texas v. New Jersey*, 379 U.S. 674 (1965) which was the impetus to the 1981 Uniform Act.

Texas v. New Jersey

In *Texas v. New Jersey*, intangible property consisting of debts owed by Sun Oil Company and left unclaimed by creditors was sought by several states. The issue was which state could claim the property. The following four rules were proposed regarding which state should receive the funds:

- (1) The state having the most significant "contacts" with the debt;
- (2) The state of the debtor company's incorporation;
- (3) The state in which the company has its principal place of business; and
- (4) The state of the creditor's last known address as shown by the debtor's books and records.

The fourth rule was adopted by the court. In addition to the holding that the state of the creditor's last known address is entitled to escheat or claim custody of the property owed to the creditor, the court also held that if the address is not shown or the state does not provide for escheat of intangibles, then the state of the debtor's incorporation may take custody of the property until some other state proved a superior right to the property.

The rule as set forth in *Texas v. New Jersey* made the 1954 Uniform Act and the 1966 revisions inadequate since they were based on the claimant's ability to assert jurisdiction over the holder. Under the rule of *Texas v. New Jersey*, a state with the Uniform Act could not claim certain property held by persons subject to its jurisdiction even though covered by the Uniform Act. The same state after this decision could assert

custody to property held by persons not subject to its jurisdiction, but this is not covered by the Uniform Act.

Since the 1954 and 1966 Uniform Acts were inconsistent with the rule in *Texas v. New Jersey* and other cases, the National Conference of Commissioners on Uniform State Laws revised the Uniform Act again. This revision was the 1981 Uniform Unclaimed Property Act.

The 1981 Uniform Act

The 1981 Uniform Unclaimed Property Act provided a statutory response consistent with the rules set out by the Supreme Court in *Texas v. New Jersey*. The Act provided that unclaimed intangible property is payable to the state in which the last known address of the owner is located. If that information is unknown or the state of the owner's last known address does not assert a claim to the property, it is payable to the state of the holder's domicile.

The Act is akin to a succession statute with the state acting as a conservator of the lost owner's property. The Supreme Court noted that the rule in *Texas v. New Jersey* is a variation of the common law concept of *mobilia sequuntur personam*, "movables follow the [law of the] person." According to this common law rule, the law of the state of domicile of the intestate owner determines the right of succession to personal property. The state in which the owner last resided is an indicator of domicile, and that state may provide for succession by legislation. The state of the last known address, succeeding to the right of the owner, is entitled to compel a holder to disclose the existence of property which

belongs to the owner in the same manner that a conservator of an estate of an incompetent or the administrator of the estate of a missing person or decedent may compel the holder of that person's property to account for it. The fact that a state is not able to assert its claim in its own courts and would be required to use the courts of another jurisdiction is not determinative of its power to act as custodian. Therefore, corporate holders which do not conduct business in a state cannot escape their obligation to pay unclaimed property owing to persons with last known addresses in that state.

There are several other changes in the 1981 Uniform Act in addition to the sections providing compliance with *Texas v. New Jersey*. Since South Dakota has adopted the 1981 Uniform Unclaimed Property Act, the important changes between the acts will be addressed in the following discussion of the law as it exists in South Dakota.

South Dakota Law

South Dakota is among the nineteen states which have enacted versions of the most current uniform law on unclaimed and abandoned property, the 1981 Uniform Unclaimed Property Act. Seventeen states retain the 1954 Uniform Disposition of Unclaimed Property Act or its 1966 Revision. Six states have adopted many provisions of the 1981 Act but not the Act in its entirety. Eight other states have other unclaimed property laws, some containing provisions of the Uniform Acts. The following table illustrates the law of unclaimed and abandoned property as it exists in the various states.

1981 Uniform Act	1954 Uniform Act or its 1966 Revision	Many Provisions of the 1981 Uniform Act	Other Unclaimed Property Laws
Alaska	Alabama	Colorado	California
Arizona	Arkansas	Iowa	Delaware
Florida	Connecticut	Massachusetts	Kentucky
Georgia	Illinois	Montana	Michigan
Hawaii	Indiana	Nevada	New York
Idaho	Kansas	Oklahoma	North Carolina
Louisiana	Maryland		Ohio
Maine	Minnesota		Texas
New Hampshire	Mississippi		
New Jersey	Missouri		
New Mexico	Nebraska		
North Dakota	Oregon		
Rhode Island	Pennsylvania		
South Carolina	Tennessee		
South Dakota	Vermont		
Utah	Virginia		
Washington	West Virginia		
Wisconsin			
Wyoming			

Before enacting the current law, the South Dakota Legislature had adopted the Revised Uniform Disposition of Unclaimed Property Act, which was the 1954 Act with the 1966 Revisions. This Act was introduced by Representative Dennis C. McFarland in 1973 as House Bill 863. But, as previously discussed, court cases exposed problems with the first Uniform Act. In 1992 Senators Scott Heidepriem and Harold Halverson and Representatives Jim Hood and Lola

Schreiber sponsored Senate Bill 104, which was a version of the 1981 Uniform Act. Senate Bill 104 was adopted by the Legislature and became effective on July 1, 1993.

A notable change in the 1981 Uniform Act is the inclusion of a definition for intangible property. SDCL 43-41B-1. The definition is essentially a list including a number of items which were often overlooked by

holders. All of the additions were within the coverage of the 1966 Act, so this is not a substantive change. Nevertheless, the new definition clarified the issue.

In connection with this, the general rule of the 1981 Uniform Act is that all intangible property held, issued, or owing in the ordinary course of the holder's business is within the coverage of this Act. SDCL 43-41B-2. This statute, along with the definition of intangible property, reinforce the intention that all intangible property is included under the Uniform Act.

SDCL 43-41B-2 also states the general rule that unless another time period is specified, all intangible property which is unclaimed for more than five years is presumed abandoned. This compares with seven years in the 1966 Act. Finally, this section also clarified that the property is reportable even though the owner has not presented the holder with evidence of his ownership or made a demand for payment.

The general rules for claiming abandoned intangible property are outlined in SDCL 43-41B-3. This section closely follows *Texas v. New Jersey*. SDCL 43-41B-3(1) states the factual situation in that case, that is, the address on the records of the holder should be used. Simply stated, the property is subject to the custody of South Dakota if the last known address of the apparent owner (as shown on the holder's records) is in South Dakota. SDCL 43-41B-3(2) covers those situations when the identity of the person entitled to the property is unknown but it can be established that the property was owned by or payable to a person whose last known address was in the claiming state. Therefore, if the person entitled to the property can not be identified and the person who is last identified with the property has a South Dakota address, the property is subject to the custody of South Dakota. SDCL 43-41B-3(3) states the secondary rule of the

case, that is, that when property is owed to a person with no known address, the property is subject to escheat by the state of the holder's estate. In other words, if the records do not provide an address for the apparent owner, South Dakota gets custody of the property if the holder is a domiciliary or governmental agency of the state. However, this claim is subject to another state who may later claim that the property is owing to a person with a last known address in that state. SDCL 43-41B-3(4) provides that if the law of the state of the owner's last known address does not provide for escheat or the taking of unclaimed property or if that state's law is not applicable, the property may be claimed by the state in which the holder is domiciled. Therefore, if the last known address is in a state which does not have a law allowing the state to claim the property and the holder is a domiciliary or governmental agency of South Dakota, South Dakota may take custody of the property. SDCL 43-41B-3(5) provides that when the last known address of the owner is a foreign nation, the state in which the holder is domiciled may claim the property; so if the holder is domiciled in South Dakota and the last known address of the apparent owner is in a foreign country, South Dakota can claim custody of the property. In situations in which there is no last known address and the state of the corporate domicile does not have abandoned property law covering the property in question, South Dakota could claim the property if the transaction arose in the state. This is provided in SDCL 43-41B-3(6).

SDCL 43-41B-4 to 43-41B-17, inclusive, deal with specific types of property and prescribe the situation when abandonment is presumed. As stated earlier, the general rule is five years; however there are several exceptions. For example, the presumed period of abandonment is fifteen years for traveler's checks. This did not change from the 1966 Revised Uniform Act. The

presumed period of abandonment did change for several types of property. A seven-year period was replaced by a one-year period for unpaid wages, utility deposits, refunds due from utilities, refunds held by business associations, property of business associations held in the course of dissolution, and property held by courts and governmental agencies.

Another change in this area concerns securities which are not in the possession of the issuer. The 1966 Act provided for a presumption of abandonment of an unclaimed dividend or interest check but did not cover the underlying ownership interest represented by issued and outstanding securities certificates. To deal with the issue of when to presume abandonment, the 1981 Act required that at least seven years pass after the failure of an entitled person to claim or inquire about a dividend, interest payment, or other distribution and at least seven dividends, interest sums, or other distributions remain unclaimed in that period. South Dakota adopted this change but made the presumed period of abandonment five years rather than seven.

The remaining statutes of the Act, SDCL 43-41B-18 to 43-41B-38, inclusive, deal largely with procedural and administrative concerns. The areas covered include the reporting procedures for holders and the responsibilities of the administrator. For a more complete discussion of these statutes, see the attached Appendix.

Conclusion

The law of abandoned and unclaimed property has a long history which can be traced to feudal England. It has evolved over the years to fit the demands of a changing society. The National Conference of Commissioners on Uniform State Laws strives to meet those changes with revisions to its uniform law on abandoned and unclaimed property. Some of the recent revisions were due to the U.S. Supreme Court decision of *Texas v. New Jersey*. As a result of that decision, the 1981 Uniform Unclaimed Property Act provided that unclaimed intangible property is payable to the state in which the last known address of the owner is located. If that information is unknown or the state of the owner's last known address does not assert a claim to the property, it is payable to the state of the holder's domicile. The 1981 Uniform Act included other important changes as well. One significant change was to clarify that all intangible property held, issued, or owing in the ordinary course of the holder's business is within the coverage of this Act. This was bolstered with the inclusion of a definition of intangible property. Other changes were added to make the administration of these unclaimed and abandoned properties more efficient. As of July 1, 1993, South Dakota was among the states which have enacted the most current uniform unclaimed property act.

Appendix

SDCL 43-41B-18 sets out the reporting procedure for a person holding property which is presumed abandoned and subject to custody as unclaimed property. Before filing the report, the holder must send notice to the apparent owner if the holder has an address for the owner, the claim of the owner is not barred by the statute of limitations, and the property has a value of fifty dollars or more.

SDCL 43-41B-19 outlines the dates by which the administrator must publish in a newspaper the names of missing owners.

SDCL 43-41B-20 proscribes the payment or delivery of the abandoned property. The majority of this section is unchanged from the 1966 Revised Uniform Act. However, the version adopted in South Dakota did not include the provision allowing the holder to pay or deliver the property within six months after the final date for filing the report required in SDCL 43-41B-18. Rather, the South Dakota law states that payment or delivery to the administrator should occur on the final date for filing the report. The rationale behind the six-month waiting period was to permit owners to reclaim their property from the holders after notification. This statute also deals with the rights of the parties when the conditions for abandonment occur. The administrator may have duplicate certificates issued in the state's name. The issuer of the duplicate certificate is relieved of all liability for the property delivered. The issuer is protected against claims by virtue of the administrator's duty to defend on behalf of the issuer and to indemnify that party against any liability.

SDCL 43-41B-21 provides that when property is turned over to the state, the holder is relieved of all liability for any payment or delivery made in good faith. This statute also allows a holder to be reimbursed if the holder elected to pay an owner who appeared after the property was turned over to the state. In addition, this statute requires that the administrator defend and indemnify a holder against liability if, after turning over the property to the state, any person makes a claim on the holder.

SDCL 43-41B-22 states that when property other than money is delivered to the administrator, the owner is entitled to any dividends, interest, or other increments realized on the property after delivery to the administrator.

SDCL 43-41B-23 requires that a public sale of the property be held by the administrator within three years of receiving the property. For securities, however, the administrator must hold them for one year before selling.

SDCL 43-41B-24 requires that the administrator shall promptly deposit in the general fund of the state all funds received. The administrator shall retain a separate fund of fifty thousand dollars for making prompt payment of claims. This figure varies from state to state.

SDCL 43-41B-25 provides the procedure for filing a claim with the administrator. If a valid claim is made, the administrator is required to return the property, or if it has been sold, to pay the net proceeds of the sale.

SDCL 43-41B-26 sets out the procedure to be followed when another state makes a claim to recover abandoned property. This section, like SDCL 43-41B-3, is intended to carry out the rule announced in *Texas v. New Jersey*.

SDCL 43-41B-27 allows a person who claims to be the owner but cannot satisfy the administrator of his right to claim the property in an administrative hearing as provided in SDCL 43-41B-25 to assert his claim in circuit court.

SDCL 43-41B-28 allows an administrator to decline to take certain property when the administrator considers the expense of administration to be greater than the value of the property. This statute also allows a holder to report and deliver property before it is presumed abandoned. An example of a situation for which this statute is necessary is when there are contents in a safety deposit box and the holder is terminating business but the property is not yet reportable.

SDCL 43-41B-29 provides the administrator with the discretion to destroy or dispose of property having insubstantial commercial value and with immunity from liability for doing so. For example, a safety deposit box may contain only personal correspondence or lapsed insurance policies. Depending on the nature of the item, the administrator may choose to destroy the item or give it to a museum.

SDCL 43-41B-30 states that an expiration period in a contract does not prevent the property from becoming reportable and provides that an administrator must commence an action against a holder within ten years after the duty arose. Under the 1966 Revised Act the holder may have been subject to suit for an indeterminate amount of time.

SDCL 43-41B-31 provides the administrator with certain authority which was not provided in the previous Acts. The administrator may require any person who has not filed a report to file a verified statement regarding whether or not the person has any unclaimed and reportable property. The administrator is also entitled to audit records.

SDCL 43-41B-32 expressly states that a holder must maintain records of addresses of owners. The maintenance of records was unclear in the 1966 Revised Uniform Act. This statute, like the Uniform Act, does not require that the holder obtain the address in the first place.

SDCL 43-41B-33 authorizes the administrator to use the court of any competent jurisdiction. Although typically the court would be in the administrator's state, the administrator may enforce the Act in another state as well.

SDCL 43-41B-34 encourages cooperation among administrators by allowing the administrator to join other states in seeking enforcement and exchanging information. Unlike the Uniform Act, the South Dakota statute does not authorize the administrator to enter into agreements with other states to exchange information needed to enable this state or

another state to audit or otherwise determine unclaimed property that this state or another state may be entitled to claim. Another part of this statute which is not included in South Dakota are the statements that the attorney general, at the request of another state, may bring an action in the name of the administrator of the other state and that the administrator may request the attorney general of another state to bring an action in the name of the administrator in the other state.

SDCL 43-41B-35 provides that a person failing to make timely payment to the administrator is subject to interest payments on the property. Unlike the Uniform Act, the penalty provisions were omitted.

SDCL 43-41B-36 states that all agreements to locate reported property made twelve months before reporting of the property and twenty-four months after the date of payment or delivery are unenforceable. This was a new area addressed by the 1981 Act--the heir finders industry. Heir finders are those who, pursuant to a contract, attempt to find owners of abandoned property. The 1981 Act prohibits any activity by an heir finder until two years after payment or delivery to the state. South Dakota added a provision not found in the Uniform Act which states that an agreement entered into after the twenty-four-month period is not valid if the compensation exceeds twenty-five percent of the value of the property unless it is in writing and signed by the owner.

SDCL 43-41B-37 clarifies the application of the Act. It states that this law does not relieve the duty to report and pay the property abandoned under the Act then existing. It also requires that a holder pay to the state any property which ten years prior to the enactment would have been payable if the Act was in effect then. However, if that property was paid to another state under its then existing unclaimed property laws, the holder does not have to pay again to South Dakota. South Dakota may make a claim on the state to which the property was originally paid.

SDCL 43-41B-38 authorizes the administrator to promulgate rules.

This issue memorandum was written by Jacquelyn Storm, Senior Legislative Attorney for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
