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Lynden Lyman on Rebutting the Presumption of Abandonment: Does Accessing An Account On-Line Suffice?

You turn on your computer, call-up your broker's website, and log in to your account with your password. Does this on-line perusal of your assets constitute sufficient contact, so as to rebut, in the absence of other activity, a presumption of abandonment under state unclaimed property laws?

Depending on your state of residence (or, in unclaimed property parlance, your "state of last known address"), the answer is either: (a) definitely, (b) probably, or (c) maybe.

When the Conference of Commissioners of Uniform State Laws promulgated the first Uniform Unclaimed Property Act in 1954, only the most creative of the commissioners could have envisioned the creation of the Internet, and its ever-expanding reach. Needless to say, electronic records were not addressed at the time in either the Uniform Act, or in other state specific statutes adopted during the period. Fortunately, most of these early unclaimed property statutes were superseded, as states adopted later model laws, specifically the 1981 Uniform Act (approximately 20 states currently follow it in substantial form) and the 1995 Uniform Act (some 12 states have adopted most of its provisions).

Generally, under various provisions of the 1981 Uniform Act, the presumption of abandonment is rebutted if the owner "communicates in writing" with the holder concerning the account, or where the owner otherwise "indicates an interest" in the account, "as evidenced by a memorandum or other record on file prepared by an employee" of the holder. Confusion over whether accessing an account on-line represents a "written" communication, and if so, if electronic bits and bytes evidencing this contact constitute a "record" (neither term being a defined term by the 1981 Uniform Act) is largely rectified, however, by virtue of the Uniform Electronic Transactions Act (the "UETA"), which was also promulgated by the Uniform Law Commission, with the objective, in the words of the Commission in 1999, of making "an electronic record of a transaction . . . the equivalent of a paper record," and with the ultimate goal that "any law [requiring] a writing will be satisfied by an electronic record."

The UETA, which has now been adopted by all states except Georgia, Illinois, New York, and Washington, in effect acts as an "upgrade" to the 1981 Uniform Act, bringing

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it into the digital age. However, even in the absence of the UETA, most state unclaimed property administrators operating under the 1981 Uniform Act shared with this commentator the fact that “common sense” dictated on-line account access be regarded as “contact,” provided that the owner accessed the account with a unique password and the access time, date and scope of access could be verified. Implicit in the 1981 Uniform Act is the notion that where the owner expresses an awareness of the existence of an account, it should not be regarded as abandoned, and transferred to the state.

The case is even clearer as to the 1995 Uniform Act. The 1995 Act contemplates “communication in writing or by other means,” and unlike its 1981 Act counterpart not only defines a “record,” but defines it broadly as “information that is inscribed on a tangible medium or that is shared in an electronic or other medium, and is retrievable in perceivable form.” Discussions between this commentator and the late Willis E. Sullivan, Chair of the 1995 Act drafting committee, indicated that the intent of the drafters was to promulgate a law where abandonment is only presumed where an owner’s interest in an account “remained completely unexpressed.” The text of the 1995 Uniform Act helps ensure that the presumption of abandonment is avoided where it can be demonstrated that an owner accessed an account on-line during the “abandonment period.”

[A subtle, but important distinction between the 1981 and 1995 Uniform Acts is the manner in which they treat individual items of property, such as a stand alone check, and a more formalized relationship as evidenced by a savings account or stockholding. With respect to the 1995 Uniform Act, contact – the expression of interest in or knowledge of the property - rebuts abandonment and “resets” the running of the abandonment period. The 1981 Uniform Act, however, distinguishes “account relationships” (savings accounts, stockholdings) from “miscellaneous intangibles.” In the latter instance, the owner must actually undertake proactive steps to claim the property, otherwise it will be presumed abandoned, “contact” notwithstanding (see Section 2 (a) of the 1981 Uniform Act, in contrast to Section 2 (c) of the 1995 Uniform Act; many states that have not adopted either uniform law nonetheless follow the 1981 Uniform Act’s bifurcation of “account assets” and miscellaneous intangibles.]

And what about those states that have adopted either the 1981 or 1995 Uniform Acts, and are working under statutes possibly older than your mother? The answer may come down to how good of an “electronic paper trail” that a holder has maintained with respect to the alleged owner’s activity. All states consulted on this issue noted the need for holders to maintain detailed, verifiable logs of an owner’s on-line account access – including dates, times, and the scope of the access. A holder with concise and verifiable data may be able to satisfy a state with even the most ambiguous contact provi-

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sions that an owner clearly demonstrated knowledge of an otherwise abandoned account. Conversely, a holder with incomplete and imprecise records may not be able to rebut a presumption of abandonment under the most up to date version of the Uniform Disposition of Unclaimed Property Act.

Frequently, revisions to the law trail behind advances in technology, and state unclaimed property statutes certainly aren't immune to this scenario. Existing legislation is largely premised on owners receiving mail, and maintaining a current mailing address. But the advent of the Internet has made mail irrelevant in terms of many financial transactions. The world is moving away from passbooks and quarterly statements; customers may now frequently engage in on-line, "self service." Owners may feel it is less important to keep a holder apprised of their physical whereabouts, because the owner can access their account information 24/7 over the web. The potential for losing greater numbers of owners, who suspend receiving mail, is significant.

Some holders realize the need to adapt their websites in ways that both educate customers about unclaimed property and leverage the technology in ways that keep owners from being treated as abandoned. [Bank of New York Mellon](#), for instance, notifies shareholders of its stock transfer clients of the existence of aged, uncashed dividend checks whenever the owner logs into their account. The [website](#) then provides specific directions for obtaining the reissuance of the checks. And since Bank of New York Mellon performs an annual review of its owner account addresses against various commercial databases to ensure their accuracy, Bank of New York Mellon can advise an owner when they view their account that the mailing address is obsolete—and request that they provide an updated address, electronically. Bank of New York Mellon plans on continually upgrading its website to better educate owners about unclaimed property,¹ and specifically the consequences of failing to communicate in such a way to confirm that the owner is not lost, and is aware of the existence of their property.

There was a time not so long ago when some thought technology would result in all unclaimed property disappearing. The irony is that the convenience of technology could in fact have the opposite effect, reducing the level of interaction with a holder, eliminating the need to maintain contact and otherwise increasing abandonment rates. Holders of unclaimed property are well-advised to consider the impact of the elimination of paper transactions on maintaining and documenting contact with their customers, vendors and shareholders.

1. http://www.mellon.com/mis/pdf/factsheets/shar_unclaimed.pdf.

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Additional Resources

[E-Commerce and Communications § 6.04](#), A "Minimalist" Approach: Technology-Neutral Procedure

[Unclaimed Property Law, Chapter 13](#), An Analysis of the 1995 Uniform Unclaimed Property Act

About the Author. Lynden Lyman is the managing director of the [ACS Unclaimed Property Clearinghouse](#) in Boston, serving as chief executive of the Clearinghouse since 1999. Lynden is a licensed attorney with 20 years experience in unclaimed property law, administration and auditing. Formerly, as an assistant attorney general with the state of Iowa, Lynden participated in state-initiated audits of banks, insurance companies, utilities, and publicly traded companies. From 1986 to 1993, he was associate special counsel/consultant for the Clearinghouse. In this capacity, he coordinated and participated in the examination of records, preparation of reports, and the reporting and collection of property from more than 12,000 different companies. Additionally, Lynden worked with more than 30 states in the drafting and adoption of unclaimed property statutes and regulations. From 1993 to 1998, during which time the Clearinghouse operated as a unit of State Street Bank, Lynden held various management positions, culminating in senior vice president and division executive. As contributing editor of the five-volume legal treatise [Unclaimed Property Law and Reporting Forms](#) (published by Lexis/ Matthew Bender) over the last 16 years, Lynden has reviewed and annotated every state unclaimed property law.