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Lynden Lyman Esq. on

Unclaimed Property Used By States as "General Revenue": When The Unclaimed Remains So, Where Does The Money Go?

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The blog "Life, Liberty and the Pursuit of..." recently featured a posting captioned "When Is Forever Not Actually Forever?" The blogger reacted negatively to an unclaimed property article that had appeared in the *Minneapolis Star-Tribune* reporting, in part, that "States have three years to locate owners or beneficiaries [and] after that, the money goes to the general fund, which pays for the bulk of state programs and services." The blogger concluded that state unclaimed property programs aren't "about protecting consumers," and instead their purpose is to allow politicians, who "are nothing but bandits and thieves" hiding under the guise of the law to "get free money."

As it turns out, the *Star-Tribune* didn't quite understand the operation of unclaimed property statutes—that it is the holders of the property (and not the states) that have a defined period of time (the "abandonment period") to search for the the asset's owner. The blogger might have had a better day and brighter outlook had the *Star-Tribune* been clearer. But what about the point that the unclaimed funds were being moved into the state's general fund (in this case, Minnesota's) and the idea that claimants really don't have forever to reclaim their property? Is in fact something sinister afoot, and was the blogger's cynicism concerning unclaimed programs in fact justified?

Minnesota does in fact deposit all unclaimed property cash receipts directly into the state's general fund; for the most part, the unclaimed property collections take on the character of "general revenue" and are utilized to cover state expenditures and other obligations (including, but by no means limited to, unclaimed property claims). The critical fact to remember is that the liability to pay reappearing owners does not vanish through this procedure. There is a "legal liability" established by the state, which recognizes the concept that all of the unclaimed property collections represent the asset of the individual owners, and not the state. However, there is also a separate "accounting liability," which recognizes that portion of the "legal liability" that will in fact likely be paid to reappearing owners.

The Governmental Accounting Standards Board ("GASB") mandates the creation of a funded "accounting liability" for those states that transfer unclaimed property collections to the general fund. This procedure is covered by GASB Statement Number 21. Each year,

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Minnesota public finance officials must undertake a claims probability analysis, based on historical volumes and other factors, to determine the "accounting liability." The funding of this liability reduces the amount of unclaimed property collections that can be utilized for general revenue purposes.

Is this bad accounting, or bad public policy? Few state budget directors would think so, and they are backed up by GASB. The Minnesota Legislature (along with many other state legislatures) made a public policy decision that the state would make active use of the unclaimed funds pending claim by the missing owners. The approach enhances the state's cash flow and reduces borrowing costs, and it also recognizes the unfortunate reality that a material percentage of property is likely to remain unclaimed.

The Council on State Taxation ("COST"), "the premier state tax organization representing over 600 multi-state companies," has argued that all states should be required to "escrow" all unclaimed property receipts, presumably on the basis that states should not regard unclaimed property collections as "revenue." COST has suggested that where states rely on unclaimed property to augment their budgets, they are more inclined to undertake aggressive approaches and otherwise act in manners inconsistent with the philosophies of COST's membership.

Some states do in fact maintain dedicated trust funds, representing the accumulated unclaimed property collected and not otherwise returned to owners. The interest earnings on the fund balance is typically earmarked for a particular program, such as education. In some instances the trust funds were created through the state constitution, and thus the legislature is unable to expend any portion of the principal balance.

Is there an accounting approach that better serves the missing owner? It is not likely that most claimants have an opinion on the subject, particularly in view of the fact that there is no evidence to suggest that "trust fund" states undertake a more aggressive search for lost owners than do "appropriation" states. If the claim is paid, the source of the funding is unlikely to be of any concern. But if the property is not held in trust, is there a possibility that funding to repay claims would be unavailable? This seems unlikely, in view of the state's ability to repay by virtue of its taxing power. Indeed, courts that have dismissed out of hand as a mere "abstract possibility" the suggestion that a state could ever become insolvent and unable to honor unclaimed property claims.

But even assuming that the state will always have the financial wherewithal to pay the claims of reappearing owners, what's to say that legislatures will in fact honor unclaimed

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property claims “forever”? The Minnesota unclaimed property law does not use the word “forever,” nor does it expressly state that owners may reclaim their property at any time. However, in order for the state to assume “absolute title” to the property— thereby extinguishing the claims of the owner of record— the state would be constitutionally required to undertake “pure escheat” proceedings. “Pure escheat” cannot be achieved through mere statutory pronouncement; it requires extensive procedural safeguards and judicial proceedings. In the past, the courts upheld “pure escheat” where a combination of newspaper advertising, court hearings, and targeted follow-up to identify and contact all potential heirs of missing owners were undertaken. No court has reviewed a “pure escheat” process in decades (in large part, because they so rarely undertaken in this day and age) but it is likely that in the “communications age,” the bar would be raised and the outreach efforts necessary to satisfy due process would be considerably greater. But we may never know, because states almost universally have abandoned this approach to unclaimed property administration (several states still do have escheat provisions in their law, but the statutory procedures are of dubious constitutionality.) As John Lease, the Deputy Treasurer of Wisconsin, recently commented, “no state wants to have to asterisk the promise that an owner can claim their property forever.”

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 LexisNexis / Matthew Bender) over the last 16 years, Lynden has reviewed and annotated every state unclaimed property law.

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