Unclaimed property in the 21st century

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Meet the speakers

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Agenda

- How did we get here?
- The “gift card” question
- Analog rules for the digital world
- What’s on the horizon?
How did we get here?
Unclaimed property trends in the 21st century

– Unclaimed property laws are being applied more broadly, more aggressively and to new property types

– Unclaimed property is now a significant source of state revenue
Escheat in the rear view mirror

— What were unclaimed property/escheat laws originally designed to cover?

“Property”
— Fixed and certain
— Due and payable
The derivative rights doctrine

- The state stands in the shoes of the owner, as custodian
- The state’s right should be no greater than the rights of the owner
- But, the states do not agree. Opposed inclusion of this principle as part of the 2016 Uniform Act.
States assert rights greater than the owner

- **Conditions precedent**
  The life insurance experience and proof of death

- “**Anti-Limitations Bar**”
  Restrictions on time limits by contract (expiration) to avoid escheat
How did we get here?

Trend towards increasingly broad scope of escheat laws
The “gift card” question
“Gift card” characteristics vary

- Gift certificate/gift card/general purpose
- Plastic/electronic
- Closed-loop – open-loop
- Terms and conditions
  - Merchandise only/cash
  - Expiration date/no expiration date
  - Service fees – often prohibited
  - Card language and agreement
- Consideration given
“Anonymous” gift cards
State priority rules for unclaimed property

1. First Priority State → Last known address of the card owner
2. Second Priority State → The company’s state of incorporation

Plan for anonymous cards by incorporating an affiliate (Giftco) in a state with an exemption
“Anonymous” gift cards

“Giftco” structures set up to plan for UP

2000

Delaware respects Giftcos in UP audits

2010

Delaware v. Card Compliant
Delaware AG joins lawsuit challenging third-party card issuer structure

Marathon v. Delaware
(3rd Cir. 2017)
Federal Appeals Court upholds Giftco concept; limits scope of audits

2015

Delaware v. Card Compliant
Delaware court denies retailers’ motion for summary judgment (April 30, 2018)

NJ Retail Merchants
(3rd Cir. 2012)
Federal Appeals Court rejects third priority rule

Delaware auditors challenge Giftcos in audit. Litigation follows.
Know your customer?
“Gift cards” and stored value

— Trend towards known customers, known addresses
  • Mobile apps
  • Customer online accounts
  • Registered/reloadable cards
  • Electronic delivery
  • Other payments trends

— Potentially escheatable to the state of the customer, depending on state law
Non-anonymous “gift cards”

*Map applies only to traditional closed-loop gift cards and does not address other card types. The map provides only a general overview of state unclaimed property laws and does not reflect all details needed for compliance with any particular state law.
Analog rules for the digital world
Stored value cards

- 2016 Uniform Act definition of “stored value card”
  - A record evidencing a promise made for consideration by the seller or issuer of the record that goods, services or money will be provided to the owner of the record to the value or amount shown in the record
Stored value cards

– Would a promise for a digital currency be a stored value card?
  • What if the digital currency is never issued/created?
  • What if the digital currency is created and issued but the creator cannot issue it to a specific purchaser?
Stored value cards

- Some states place restrictions on stored value cards
  - Dormancy fees
  - Expiration dates
- State’s approach varies – requires state-by-state analysis
Store credit for returned merchandise

- **Bed Bath & Beyond v. California**
  - The credits did not fall within the catchall for "property" because they were redeemable only for merchandise and therefore not "payable"
  - Alternatively, the credits were exempt as "gift certificates"

- **Bed Bath & Beyond v. New Jersey**
  - New Jersey could not escheat the credits before the change in law that required escheat of gift cards
Game-related digital content

- The 2016 Uniform Act excludes “game-related digital content” from the definition of property
- What is “game-related digital content”?
- Includes:
  - Virtual wallet
  - Points (also known as gems, tokens, gold, etc.)
  - Digital codes
Game-related digital content

- What if a state has not excluded game-related digital content from its unclaimed property laws?
  - Does game-related digital content fall within the “catchall” for property?
  - Can states monetize game-related digital content?

- State approaches may vary based on the type of game-related digital content
Loyalty, award and promotional programs

- Loyalty programs are a potential risk area
- Most state laws are silent on loyalty
- Mitigate risk through terms and conditions
Loyalty, award and promotional programs

2016 Uniform Act

“Loyalty card” means a record given without direct monetary consideration under an award, reward, benefit, loyalty, incentive, rebate or promotional program . . . The term does not include a record that may be redeemed for money or otherwise monetized by the issuer.

States may take different approaches

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<thead>
<tr>
<th>Ohio Proposed Legislation</th>
<th>New Jersey Proposed Regulations</th>
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<tbody>
<tr>
<td>Proposes a broad exemption for loyalty cards</td>
<td>Would require escheat if there was “any consideration” – providing a service, making a purchase or taking some other action beneficial to the issuer</td>
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Cryptocurrencies and tokens
Considerations for escheat
What’s on the horizon?
The future of unclaimed property

– 2016 Uniform Act
– Further application of the laws to new areas
An era of rapid change in state law
2016 Uniform Act

– Versions of the new 2016 Uniform Act already enacted as legislation in whole or in part:
  • Delaware
  • Illinois
  • Tennessee
  • Utah
  • Kentucky

– Many states considering the legislation in some form
## Highlights of the 2016 Uniform Act

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<th>Helpful to holders</th>
<th>Unhelpful to holders</th>
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<tr>
<td>– Broader coverage of issues</td>
<td>– No express adoption of derivative rights doctrine</td>
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<td>– 5-year statute of limitations on assessment (10-year statute of repose)</td>
<td>– Use of contingency fee auditors permitted</td>
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<td>– Appeal process for audits</td>
<td>– No business-to-business or de minimis exemption</td>
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<td>– Confidentiality and data security for audits</td>
<td>– No exclusion for foreign-owned property</td>
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<td>– Contractual anti-limitations provision</td>
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<td>– Third priority rule remains</td>
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<td><strong>Retroactive transitional provision</strong></td>
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Audit risks and trends

- Audit trends
  - Estimation
  - Audits by first priority states (multistate audits)
  - Audits of companies with robust reporting histories
  - Securities audits
  - New third-party auditors

- Audit processes
  - Large data requests and reconciliations
  - Enterprise-wide inquiries
  - A retail audit can last 5+ years