



## THE UNCLAIMED PROPERTY LEDGER

### IN THIS ISSUE

#### CURRENT EVENTS

- Events
- About Venio

#### HOT TOPIC

- **Audits: The Stick of Unclaimed Property Enforcement**

*by Christa DeOliveira,  
CIA, CCEP*

This article is part one of a two-part installment focused on state unclaimed property audits

#### CONTRIBUTOR'S CORNER

- **What about this 'Third Priority Rule'?**

*by Ted Ziegler*

This article examines preconceived notions about priority rules

### CURRENT EVENTS

Venio will be exhibiting at the Shareholder Services Association (SSA) Annual Conference from July 15-18 in Coeur d'Alene, Idaho. We are platinum sponsors for this conference.

From September 2-3, Christa DeOliveira and Mike Ryan will be speaking at the regional conference for the Unclaimed Property Professionals Organization (UPPO) in St. Louis, Missouri.

We will be exhibiting at the annual conference of the National Association for Variable Annuities (NAVA) from September 20-22 in Boston, Massachusetts.

Venio will be exhibiting at the Stone River Summit in Orlando, Florida from September 21-24.

Mike Ryan will be speaking at the National Association of Division Order Analysts Annual Institute to be held in Washington, D.C. from September 23-25.

### ABOUT VENIO

Venio finds owners of unclaimed property for banks, brokerage firms, mutual funds, insurance companies, transfer agents and publically held companies. Its search and location, reporting and risk management services ensure compliance with SEC regulations and state laws, reduce expenses and improve customer and asset retention. With over 45 years of experience, Venio has recovered and restored hundreds of millions of dollars in unclaimed property for clients and their customers.

## HOT TOPIC

# Audits: The Stick of Unclaimed Property Enforcement

By *Christa DeOliveira, CIA, CCEP*

While holder outreach and amnesty programs are the carrots of state unclaimed property enforcement, audits are definitely the stick. Enforcement of unclaimed property laws is a fundamental element of all jurisdictions' statutes. Unfortunately, there is not a silver bullet to prevent your company from being selected for an audit; although, there are mitigation efforts that can be taken both before and after an audit notice is received.

All 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam have enacted unclaimed property statutes which give them the right to enforce their unclaimed property laws through an examination of records. The Uniform Unclaimed Property Act (1995) in Section 20 (b) reads,

The administrator, at reasonable times and upon reasonable notice, may examine the records of any person to determine whether the person has complied with this [Act]. The administrator may conduct the examination even if the person believes it is not in possession of any property that must be reported, paid, or delivered under this [Act]. The administrator may contract with any other person to conduct the examination on behalf of the administrator.

Being selected for an audit can result from a variety of different reasons ranging from a simple lack of reporting to a sophisticated comparison across holders in the same industry. Audit selection can be based on non-compliance with specific reporting requirements or inconsistent or sporadic reporting. Reports that do not include common property types or similar ratios of those property types to other comparable companies can lead to an audit. The appearance of inadequate due diligence, such as a significant number of rightful owners being found at the address that was reported, can increase your audit risk. Sometimes it is something as simple as being a large company, belonging to a specific industry, or reporting a specific property type. Other times it can be tied to coordinating information with other state agencies such as a holder consistently paying payroll taxes within a state, yet not filing an unclaimed property report. Another flag can be submitting a claim to retrieve property reported by another holder, but never having reported property to that particular state. It is important to note, at times companies are selected for audit even though they have a solid and consistent reporting history; this is especially common for large holders.

There is significant anecdotal evidence suggesting there are trends in auditing, particularly by third party or contract auditors. These trends appear to be based on belonging to a certain industry or generating specific types of property. For example, recently there has been an increase in the number of audits tied to property associated with a corporate issuer's transfer agent's activities and before that there was a focused interest on companies that offer IRA accounts. It is difficult to track these trends with precision as companies under audit are reticent to discuss this publicly and details of audits are treated as confidential by states.

### **You have received the dreaded audit letter- now what?**

Firstly, do not ignore the letter and hope it will go away; it will not. The letter should outline nature of the audit being conducted. There are three general categories of audits:

- Desk audits- Desk unclaimed property audits typically consist of a questionnaire and a basic document request list being sent to a holder. The holder completes the information and provides the requested documents back to the auditing state. These types of audits are not handled on the premises of the company. (The information garnered during this type of review can be used to conduct a more comprehensive audit in the future.)
- Single state audits- These unclaimed property audits are conducted at the company's premises. They can be conducted either by state employees or third party auditors that are engaged by a state and audits on its behalf.
- Multi-state audit- These unclaimed property audits are performed jointly by more than one state. They can be conducted by state employees or contract auditors. Some states have agreements in place with other states to combine their audit efforts for greater efficiency.

It is worth keeping in mind that usually contract auditors are compensated on a contingent fee basis, where they receive a percentage of the findings. Naturally, this leads to concerns in the holder community about the independence of the auditors and their inherent motivation to have large findings and use aggressive estimation techniques. If the letter that you receive regarding the audit is from a third party auditor, then verify with the state or states referenced that the auditor is working on the jurisdiction's behalf and with their approval.

Treat auditors courteously and with respect; things will run more smoothly if you develop a constructive and professional relationship. Ultimately, this can also reinforce your good faith effort to work with them. While the auditors are onsite, make sure they have adequate work space to meet their needs.

Provide them with requested documents or data in a timely manner; if you will be unable to provide information within the time requested, proactively work with the auditors to collaborate on a modified timeframe. It is important to be cooperative; however, you are not required to format data beyond any of your systems' capabilities.

it can go as far back as when a jurisdiction's unclaimed property statute was enacted or when the company began operations, whichever is shorter. For example Delaware generally has a look back period to 1981, which is when its unclaimed property statute was enacted. Since the look back period can exceed the common data retention requirements necessary to



When you have received an audit notice, it is advisable to conduct an internal assessment of your company's past compliance. Begin with pulling copies of past reports and related documents and records. Also, as part of the review, look for any unreported property for the period in question. For general ledger property some areas to review include the chart of accounts, looking for any accounts that could have unclaimed property, open items on bank reconciliations, lists of outstanding checks, lists of voided checks, lists of open credit memos, transaction flow, and all pertinent policies and procedures. There are also many industry specific areas and property types that should be reviewed. This review process will give you a better feel for your historical level of compliance.

support things such as the Uniform Commercial Code or IRS requirements, companies run the risk of not having records that cover the entire audit period. When there are insufficient records, auditors apply estimations to extrapolate a figure for the estimated unreported property.

Beyond conducting your own review and assessing your historical and current compliance level, there are steps you can take to mitigate your exposure. Involve your legal counsel early in the process so they are aware of the audit from the beginning. To stave off the propensity for "scope creep", establish both the property types that will be reviewed and the look back period from the outset of the audit. This should also help avoid a situation where auditors could be on a "fishing expedition". Have the auditing parties sign non-disclosure agreements; this should preclude auditors from communicating unreported property to a state that is not involved from the outset of the audit. Establish the dates and expected timeline of the audit. Agree on estimation methodologies; this comes into play if it is determined that inadequate records are available to cover the entire period being audited. Researching the pertinent state's position on penalties, interest, and assessing audit costs will also help you to extrapolate potential costs in the event that previously unreported property is discovered.

The Uniform Unclaimed Property Act (1995), in Section 20 (f) provides for estimations, when records are not available.

[A] holder [that] does not maintain the records required by Section 21 and the records of the holder available for the periods subject to this [Act] are insufficient to permit the preparation of a report, the administrator may require the holder to report and pay to the administrator the amount the administrator reasonably estimates, on the basis of any available records of the holder or by any other reasonable method of estimation...

This is why it is crucial to both determine what records you have available and set estimation methodologies early in the audit process.

### Mitigation Efforts

Not all is lost- there are ways to curtail the potential look back period, such as by routinely filing unclaimed property reports. For some jurisdictions this automatically limits the look back period; however, it is important to note that the look back period is not restricted in the case of fraudulent reporting. Coordinating amnesty with a state for catch up reporting or coming into compliance for the first time, either through of a formal voluntary disclosure agreement (VDA) or seeking out informal amnesty for states that do not offer VDAs can also limit look back periods. Though it is not always possible to get amnesty, it is beneficial when available.

The look back period, also referred to as the reach back period, is potentially troublesome. It is the historical amount of time auditors will look at for the purposes of the audit. It is not unusual for look back periods to be anywhere from 10 to 20 years, plus the applicable dormancy period. However,

Another aspect for mitigating your exposure and coordinating the audit is to assign a single competent person at your com-

pany to be the auditors' point person and have all information requests funnel through this person. This individual should be at an appropriate management level and have sufficient knowledge of the overall operations of the company. This will ensure all communication between the parties is coordinated and managed. If auditors are dealing with multiple employees, then you run the risk of things quickly expanding beyond the initial scope, not all appropriate document requests being fulfilled in a timely manner, or those managing the audit simply not being aware of the requests or developments. Some audits can take several years to conclude, so the point person must keep clear status records and copies of all documents given to auditors, in case it becomes necessary to transition to a new point person for the audit. Additionally, throughout an audit, schedule routine periodic meetings with the auditors, the point person, and appropriate management to cover any findings to date as they come up, rather than waiting until the end and trying to address all of the findings at one time.

If a large period of time transpires between when you verified that the auditors were authorized by the respective state or states and the actual start of the audit, it can be fruitful to reconfirm an auditor's authorization to audit on a state's behalf. At times, they are no longer authorized due to an expired or terminated contract.

Especially in industries that deal with sensitive data and are governed by regulations such as HIPPA, the Gramm Leach Bliley Act, or Regulation S-P take extra steps to ensure the auditors have appropriate information technology security. If there is not a secure FTP site to transfer files between the auditors and your company, it would be useful to set up one and insist that it be used for transfer of data. This method permits you to conform to your internal security requirements for data transfer. If confidential or non-public information is going to be on laptops, insist the laptops are encrypted. If sensitive data is put on any type of portable media, such as a USB drive or a CD-ROM, these devices or data should also be encrypted. Determine if any audit steps requiring sensitive data are going to be subcontracted out, if so, verify that the subcontractors are required to have the same or better security standards and protocols as the auditors.

At the end of an audit, have an exit meeting to cover the final findings. About a month after the exit meeting have a closing conference. During this closing conference, work to resolve any open adjustments and discuss any differences in legal or accounting opinion and estimation issues. Once final settlement amounts are decided and any outstanding amounts

due to the state or states are remitted, sign an audit completion and indemnification agreement with the auditing states, releasing you from further audits of the same time period and applicable property types. This offers protection that you will not be audited again for the same time period and/or type of property.

If you have not received an audit letter and you want to be prepared, there are steps you can take. In advance of an audit you can take preemptive action and elect to conduct a self-audit of your organization's compliance. Invite your internal audit group to review your area or hire unclaimed property compliance specialists to assess your compliance level. If through this review process you find unreported property, seek out formal and informal amnesty programs to report that property; this can mitigate penalties and interest, as well as limit the look back period.

Sometimes you should look at hiring unclaimed property audit specialists with a fitting level of expertise and background to represent your company and ensure appropriate compliance. This is especially important if you do not have adequate internal resources and expertise. When hiring specialists, it is critical to get qualified specialists early enough in the process to guide you and assist in the direction and tone of the overall audit. Waiting until an audit assessment has already been made before hiring specialists could lead to fighting an uphill battle. Early engagement will also give the auditor time to gain an understanding of your records and your way of conducting business.

The benefits of selecting the right specialists are you can proceed with confidence through the audit and know that your interests and compliance will be addressed. Specialists are able to proactively address any compliance issues and assist you in establishing and even implementing a comprehensive plan to address and manage your ongoing compliance.

Audits are here to stay; regrettably, there is no protection against them. However, the situation is not hopeless; there are mitigating steps that can be used to reduce your exposure both before and after an audit has commenced.

*Please look for the second article on audits in our next issue.*

To automatically receive notification of posting for of our online newsletters, you may subscribe by sending an email to [newsletter@venio.com](mailto:newsletter@venio.com).

## CONTRIBUTOR'S CORNER

### What about this 'Third Priority Rule'?

By Ted Ziegler

Despite the proliferation of “third priority rule” or “transactional” statutes, enforcement of these statutes has been sporadic at best. However, before companies get too comfortable with the belief they are safe from state claims based on a third priority rule, companies should be aware that arguments favoring the enforceability of these statutes have merit.

In truth, there are cogent arguments both for and against the enforceability of the third priority rule. However, this article will focus on arguments favoring the enforceability third priority rule statutes because these arguments seem to be less frequently discussed amongst holders.

#### What is the Third Priority Rule?

In Texas v. New Jersey, 379 U.S. 674 (1965), the Supreme Court announced a priority system for determining which state, among multiple claiming states, had first opportunity to claim an item of abandoned property. In ruling on the case, the Supreme Court invoked its “original jurisdiction under Art. III, §2, of the Constitution”, which empowers the Court to resolve disputes between states. Id. at 675.

The priority rules announced by the Court indicated that the state of the property owner's last known address had the first priority in claiming the abandoned property (the “first priority rule”). See Id. at 681-82. If there was no last known address, or if the state of last known address failed to provide for escheat of the property, the holder's state of domicile could claim the property (the “second priority rule”). See Id. at 682. As the facts of the Texas case did not require setting forth additional priority rules, the Court articulated only these two priority rules. An open question, therefore, is: “What is the disposition of abandoned property in the event that the first two priority rules do not result in a taking by escheat?”

The Uniform Unclaimed Property Act (1995) and statutes in a majority of U.S. jurisdictions provide for the escheat of property that escapes escheat under the first two priority rules. See e.g. Uniform Unclaimed Property Act (1995) §4(6). In essence, these statutes presume that where abandoned property is not seized under the first or second priority rule, the state

in which the transaction giving rise to the property right took place may claim the property. Such statutes have come to be known as “third priority rule” or “transactional” statutes.

#### Overview of the argument against the Third Priority Rule

An argument against the validity of the third priority rule is likely predicated on the belief that the Texas court's rules were meant not only to set the priority among competing state claimants, but also to govern the interaction between states and private holders. Additionally, one must believe that these rules were meant to operate as the exclusive basis for state escheat of intangible property. If both of the above are true, then only the state of the owner's last known address or the state of the holder's incorporation can make a claim.

Another argument against the validity of the third priority rule is that allowing a lower priority state to seize property, which is exempted from escheat by a higher priority state, offends the sovereignty of the higher priority state. Note, however, that if the priority rule system was meant to be applied only to controversies between states, as opposed to controversies between states and private holders, this argument is completely without merit.

In short, the argument against the third priority rule is as follows:

- The priority rules apply to state-state AND state-holder controversies.
- The two priority rules discussed in Texas provide the exclusive basis for state power to escheat.

#### Synopsis of the argument in favor of the Third Priority Rule:

An argument favoring the enforceability of the third priority rule can be stated as follows:

- Before Texas, the state where the transaction took place could seize abandoned property from a private holder by escheat.
- The Texas priority rules do not apply as between a state and a private holder.
- Therefore, Texas v. New Jersey does not prevent the state where the transaction took place from seizing the property from a private holder by escheat.

Holders are often surprised to learn that most almost all of the courts that have considered whether the priority rules apply as between a state and a holder have concluded that they do not. (See, e.g. State of Texas v. Liquidating Trustees of Republic

Petroleum Co. 510 S.W. 2d 311 (Texas 1974); New Jersey v. Chubb, 570 A.2d 1313 (N.J. Super 1989); TXO Production Corp. v. Oklahoma Corporation Commission, 829 P.2d 964 (Okla. 1992).)

The District of Columbia Court of Appeals concisely stated the idea in Riggs National Bank v. District of Columbia, 581 A.2d 1229 (D.C. Ct. App. 1990). “The [Texas] Court was not confronted with, nor did it decide, the relative rights to custody of abandoned property as between a private holder and a state.” Id. at 1245.

The basic policies driving the decision in Texas were ease of administration and the desire to insure that a holder could never be forced to remit abandoned property to more than one state. Application of the third priority rule offends neither of these policies.

Importantly, even if the priority rules did apply as between a state and holder, it would not negate the third priority rule. For example, if the first two priority states exempt a type of property from escheat, the stated policies announced in Texas are not offended if a third priority state seizes the property.

It is worth taking a few moments to examine individually the bullet points above.

#### **Before Texas, place of transaction states could seize property by escheat**

It has been the settled law for hundreds of years that a state may seize property, by escheat or otherwise, whenever the state has the sovereign power to do so. In a decision prior to announcing the priority rules for unclaimed property, U.S. Supreme Court stated, “it is clear that a state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons.” Standard Oil v. New Jersey, 341 U.S. 428, 435-36 (1951). However, by virtue of the priority rules announced in Texas, the state’s retention of the seized abandoned property is subject to the claim of another state with a higher priority.



Therefore, it is inarguable that before Texas, the state where the transaction took place could seize abandoned property by escheat or custodial taking, so long as it had constitutionally sufficient contacts with the holder. After all, the Texas court considered giving the place of transaction state the first priority. Of course, after Texas, by virtue of the priority rules, a

state’s retention of the seized abandoned property is subject to the claim of another state with a higher priority.

#### **The priority rule system has no application as between a state and a holder**

The case of Texas v. New Jersey was a controversy between states only. Recognizing this fact, the Court announced that it had invoked its original jurisdiction under Art. III, §2, of the Constitution, which empowers the Court to resolve disputes *between states*. Id. at 675. Accordingly, in the Texas case and its progeny, the Supreme Court may not have had the authority to make new law as between a state and a private holder. Moreover, the Court was not confronted with the issue of whether a state could, or could not, claim abandoned property from a private holder and no arguments by private holders were considered.

The Supreme Court of Oklahoma succinctly stated this position in TXO Production Corp. v. Oklahoma Corporation Commission, 829 P.2d 964 (Ok. 1992).

In Texas the Court was not confronted with, nor did it decide, the rights to custody of abandoned property as *between a private holder and a state*. The Texas guidelines establish priority among multiple states attempting to escheat or take custody of the same property. They are binding only when there are multiple states with claims to the same property. Id. at 971. (emphasis in original)

In short, because the Supreme Court’s priority rules apply only to controversies between states, the priority rules cannot be used to limit a transactional state’s power to seize property from a private holder by escheat or otherwise.

This takes us back to the Supreme Court’s decision in Texas v. New Jersey. Did the Texas court intend to take away sovereign states’ (including the transactional state’s) power to seize abandoned property? Or, did the Court intend to simply prioritize multiple valid claims to abandoned property?

The logical answer seems to be that the Texas court sought to prioritize multiple valid state claims. Taking away sovereign states’ power over private holders would have been a departure from hundreds of years of legal precedent. Furthermore, the forum for this supposed dramatic change in precedent would have been very peculiar as well. It seems unlikely that

the Court would choose a conflict only between states as the time to depart from all previous precedent with respect to unclaimed property controversies between states and private holders.

In the Court's own words, "[t]he issue before us is not whether a defendant has had sufficient contact with a State to make him or his property rights subject to the jurisdiction of its courts, a jurisdiction which need not be exclusive. ... Since this Court has held ... that the same property cannot constitutionally be escheated by more than one state, we are faced here with the very different problem of deciding which State's claim to escheat is superior to all others." Texas, at 678.

### ***Amsted and Tampax***

Two cases are often cited in support of the idea that the Texas priority rules apply as between a state and a holder and limit a lower priority state's ability to seize property from a private holder. The cases are Nellius v. Tampax, 394 A.2d 233 (Del. Ch. 1978) and New Jersey v. Amsted Industries, 226 A.2d 715 (N.J. 1967). There are few, if any, other cases that can be cited as supporting the idea that the priority rules apply as between a state and a holder.

In Amsted, a lower priority state argued that it should be allowed to escheat property where the holder was not authorized to do business in the higher priority state. The issue on which the court focused was whether or not the higher priority state might actually be able to reach the property. The court concluded that the higher priority state would likely be able to reach the property and, therefore, the holder would be required to remit the property to the higher priority states.

There are facets of the Amsted case that may render it of little precedential value in attempting to defeat a third priority claim. First, the court seems to imply that if it could easily and conclusively decide that the higher priority state could not claim the property, then it would allow the lower priority state to take the property.

Second, subsequent to the New Jersey court's ruling in the Amsted case, New Jersey courts have upheld the third priority rule. For example, the court in New Jersey v. Chubb acknowledged the Amsted case, but concluded that "Nothing in Texas v. New Jersey [ ] prohibits a state from claiming custodial escheat of property based on the locale of the transaction or the place of business of the holder being in that state." New Jersey v. Chubb, 570 A.2d 1313, 1315-16 (N.J. Super 1989)

The 30-year-old Tampax case may be of similarly dubious precedential value. The published opinion comes from the trial level in a court of equity on a defendant's motion for summary judgment.

In both Amsted and Tampax, the court refused to allow the lower priority state to seize the unclaimed property because the laws of a higher priority state required the holder to remit the property to the higher priority state. In other words, the higher priority state's laws provide for the escheat or custodial taking of the subject property. Neither case addressed the outcome if the higher priority state did not provide for the escheat of the property, such as when the higher priority state exempts a property type from reporting and escheat.

Amsted and Tampax notwithstanding, it can reasonably be claimed that every court that has directly addressed whether the Texas priority rules apply as between a state and a private holder has concluded that they do not.

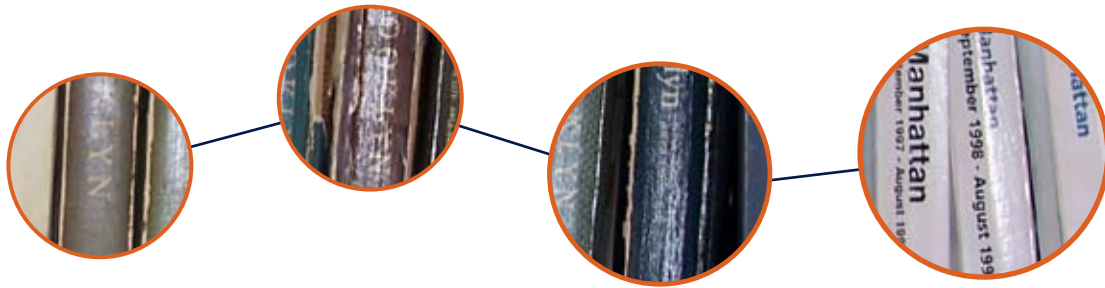
### **The sovereignty of the exempting state**

It has been argued that allowing a lower priority state to seize property that is exempted from escheat by a higher priority state offends the sovereignty of the higher priority state. It does not. Federal common law is clear: a state can only cut off a lower priority state's right to escheat an item of property by "providing for the escheat" or custodial taking of the property.

Allowing a lower priority state to seize property from a private holder, when the higher priority state does not seize the property, does not violate the rights of the holder or impinge on the sovereignty of the exempting state. In contrast, allowing a higher priority state to cut off the sovereign right of a state to seize property when the lower priority state has constitutionally sufficient contacts with the holder, would seem to allow the exempting state to act extraterritorially.

It is unclear what the justification could be for allowing a higher priority state to cut off a lower priority state's claim to property simply because the higher priority state exempted the property from its unclaimed property laws. Consider, exactly what interest does a state have in property belonging to an unknown person and in which the state has expressly disclaimed any interest by exempting the property from its unclaimed property law?

The intention of a statutory exemption from unclaimed property reporting may be to give the property right to the holder. However, a state exemption does not and cannot do that. In order for a state to give rights in the exempt property to the holder, a state cannot simply exempt the property from its unclaimed property laws. The state must enact a pure escheat statute (as opposed to a custodial statute) and then, after the escheat of the property, affirmatively give the property to the holder. This is truly the only effective means for a state to cut off a lower priority state's claim and allow the holder to retain the property.



### What does “a state which does not provide for escheat” mean?

The overarching legal principle dealt with by the Texas court was that it was unconstitutional for a holder to have the same property taken (by escheat or otherwise) by more than one state. See Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961). Cognizant of the need to avoid the possibility of escheat by more than one state, the Texas court set up the two priority rules we all know so well. These priority rules completely disposed of the claims before the court without need to resort to a 3rd, 4th, or 5th priority rule.

If one believes that the Texas ruling was meant to apply to controversies between states and between states and private holders, then the interpretation of the phrase “provide for escheat” may be important. It has been argued that if a state affirmatively exempts a type of property from its escheat laws, then it has a provision relevant to the property and no lower priority state may claim the property.

The above argument necessarily assumes that the Texas Court did not actually mean “provide for escheat” when it stated “provide for escheat”. Those arguing that a higher priority state’s exemption precludes escheat by a lower priority state seem to suggest that the important words are “provide for” and that the word “escheat” was superfluous. They argue that when the Court said, “a state which does not provide for escheat of the property”, what the court actually meant was “a state which has no relevant provision relating to the abandoned property.”

We know that avoiding escheat by multiple states was the precise issue with which the Texas court was concerned. In the opening paragraphs of the Texas opinion, the Court states, “Since we held in Western Union [ ] that the Due process Clause of the Fourteenth Amendment prevents more than one State from escheating a given item of property, we granted Texas leave to file this complaint...” Texas at 676.

Since the Texas court was concerned about avoiding an unconstitutional taking by more than one state, a conclusion

that the Court meant “no relevant provision” seems much less credible than interpreting the Court’s statement literally – “provide for escheat”. This is especially true since all three of the relevant Supreme Court cases always use the phrase “provide for escheat” and never use the phrase “no relevant provision”.

A discussion about whether the Texas court and progeny meant what they said, or if an alternate interpretation is correct, is only academic exercise if you believe that the Texas case applies only to controversies between states. If the Texas case does not apply between a state and a private holder, how one interprets the phrase “provide for escheat” is of no consequence to a private holder.

### Conclusion

No court has ever concluded that the third priority rule is unenforceable. No court has concluded that a lower priority state is precluded from seizing an item of property for itself when a higher priority state does not provide for escheat or custodial taking of an item of property. This is true whether the higher priority state cannot take the property because the higher priority state enacted an exemption for the property type or simply lacks a provision relevant to the property type.

Hopefully, this article will serve to caution holders not to take the third priority rule too lightly. Cogent arguments can be made that state escheat claims based on a place of transaction test are perfectly valid.

*Ted Ziegler is the Founder and CEO of CardFact, the leading third party issuer of gift cards in the U.S. Prior to founding CardFact, Mr. Ziegler was a CPA and attorney in the Columbus, Ohio office of Jones Day, working primarily in the areas of corporate law, state tax, and unclaimed property.*

To subscribe, ask questions, or submit suggestions, please send an email to [newsletter@venio.com](mailto:newsletter@venio.com).