



ABANDONED PROPERTY SERVICES LLC

## **The Heightened Importance of Unclaimed Property Due Diligence**

By: Karen Anderson, Senior Compliance Advisor  
Abandoned Property Services, LLC

Most state unclaimed property laws require that a business make a last attempt to contact the owner of funds, securities, or safe deposit box contents it holds. This last attempt is called “due diligence”. State unclaimed property laws generally include a requirement that the business send a letter to the owner at the last known address in the business’ records within a specified period of time prior to the property being reported to the state as unclaimed property. In the past few years, performing due diligence has become more important and many states have taken measures to insure that due diligence is performed and to insulate the state from liability to the owner if it is not.

### **The Catalyst**

Greater focus on due diligence was sparked by a lawsuit called, Taylor v. Westly, filed in a California federal district court.<sup>1</sup> On June 1, 2007, the District Court issued a preliminary injunction that prohibited the California Controller from accepting any unclaimed property (i.e., cash and securities) until such time that the Controller could devise a regulatory scheme that would afford owners adequate notice prior to the state taking their property. The District Court, echoing the Ninth Circuit stated, “It is clear.....under the presently existing scheme, California does not give constitutionally adequate notice before accepting or taking title to property, or selling, converting to cash, or destroying property under the UPL.” The plaintiffs had argued that their rights under the Due Process Clause of the US Constitution had been violated.<sup>2</sup>

The preliminary injunction was dismissed on October 18, 2007 by the District Court after it reviewed information from the California Controller. The Controller detailed the changes made in state law in August (Senate Bill 86 - 2007) and the additional appropriations that now permit the Controller to make reasonable

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<sup>1</sup> Taylor v. Westly, No. Civ. S-01-2407 WBS GCH (U.S. Dist. Ct. E. D. Cal. June 1, 2007). This decision was based on a decision and remand by the United States Court of Appeals for the Ninth Circuit.

<sup>2</sup> Taylor v. Westly, No. Civ. S-01-2407 WBS GCH (U.S. Dist. Ct. E. D. Cal. June 1, 2007) at pg 7.

attempts to notify owners prior to property being reported and remitted to the Controller's office. The main case is still pending before the court.

In October, 2007 the California Senate Government Organization Committee held hearings focused on the California unclaimed property program operated under the authority of the California Controller. An official in the Controller's office testified that there was a need to make business' more compliant with the California unclaimed property statute. Further, the official noted that the current California Unclaimed Property Law<sup>3</sup> includes a provision that relieves the holder of liability upon the payment or delivery of the property to the unclaimed property division and that the Controller would like to change this provision so that only holders that have complied with the California Unclaimed Property Law will be relieved of liability with respect to the property. Interestingly, in the Spring 2008 (California Senate Bill 1319) and 2009 (California Assembly Bill 1291) legislative sessions bills were introduced that would eliminate the release of liability if due diligence was not properly performed by businesses. The 2008 bill was not enacted and the 2009 bill is pending at the time of this writing. (Note: Most state unclaimed property laws contain a "release of liability" provision similar to the one now in the California statute.)

#### The States' Responses

The Taylor case, at a minimum, has made states aware of the importance of owner notification efforts in the context of the Due Process Clause. However, new state measures to insure owner notification put much of the burden on businesses holding unclaimed property. Many of these measures are designed to make businesses more accountable for following the due diligence requirements already in state law. For example, within the past 2 years, several states have added either check boxes or attestations to the required report cover sheets under which the business must attest that they have performed due diligence in accordance with the state's law. Specifically, the new relevant attestation language on the Tennessee cover sheet reads:

"I have attempted to contact property owners at their last known address by first-class mail not more than one hundred twenty days and no less than sixty days prior to filing date of the report. I am duly authorized to attest to this." Tennessee Form TR0201

The state of Tennessee requires the Chief Financial Officer to sign the entire attestation on the cover sheet and for the signature to be notarized.

Other states that now have a similar attestation language or a check box on the required report cover sheets are: Alabama, Hawaii, Illinois, Kansas, Michigan, Montana, Nevada, North Carolina, Ohio, Vermont, and West Virginia. Also, note that last year the Virgin Islands enacted a new unclaimed property law to replace

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<sup>3</sup> California Code of Civil Procedure, Section 1560 (a)

its former law. The new law includes a section requiring that due diligence letters be sent within 120 to 60 days prior to the reporting deadline and correspondingly includes a provision that the report the holder must file an affidavit stating that holder has complied with the due diligence requirements of the law.<sup>4</sup> It is anticipated that more states will follow the trend and either include the attestation language on their report cover sheets or change their law to require that an affidavit be filed with the reports.

Further, note that the State of Texas recently enacted changes to their unclaimed property law which implement a new unclaimed property due diligence requirement. On May 27, 2009, the Texas Governor signed into law requirements for businesses to send notice letters to an apparent owner's last known address before August 1<sup>st</sup> prior to the November 1<sup>st</sup> the property would be due for reporting. The notice must be sent if the property is valued more than \$250.

In addition, more scrutiny of due diligence practices is occurring in unclaimed property audits. Unclaimed property auditors are requesting specific information pertaining to due diligence mailings performed by businesses under audit by states.

### Conclusion

The states' obligation to insure that unclaimed property owners receive notice and an opportunity to reclaim property is being redefined due to federal court action. In an effort to stem further lawsuits, states are and will continue to implement measures to compensate for the redefined requirements. These state measures most likely will require more effort on the part of businesses to make sure that they are compliant with due diligence requirements. As the redefinition and reactions occur, businesses must be alert to changes and be poised to take appropriate action to insure compliance.

*About Abandoned Property Services LLC (APS): APS serves the unclaimed property compliance needs of all types of businesses. APS provides policy /procedure and liability prevention consulting, audit defense and compliance maintenance via its annual reporting and due diligence services. Annual reporting and due diligence services are facilitated by APS' specially-devised and perpetually updated "in-house" systems.*

APS, LLC was formed in 2003 with the mission of providing high quality, effective, efficient and affordable unclaimed property compliance and audit support services to the business community. To this end, the fourteen (14) APS staffers have over 160 years of combined unclaimed property experience including unclaimed property consulting for big four accounting firms, and serving as unclaimed property officials for Illinois, New York, and Oregon. APS, LLC's principal office is located in New York, New York. For more information, please visit the APS LLC website at [www.abandonedpropertyservices.com](http://www.abandonedpropertyservices.com) or contact Karen Anderson at 317-577-9530 or [kanderson@apsesheat.net](mailto:kanderson@apsesheat.net)

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<sup>4</sup> Virgin Islands Code, Title 28, Chapter 29, Section 658 paragraphs (e)(3) and (g), respectively.