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# Virginia's Acquisition of Unclaimed and Abandoned Personal Property

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# VIRGINIA'S ACQUISITION OF UNCLAIMED AND ABANDONED PERSONAL PROPERTY

The concept of "escheat," under which the state acquires an interest in unclaimed property,[1] originated as an inseparable incident of the feudal tenure system in medieval England. Under the feudal system, the king granted estates in land to the lords, who in turn granted portions to freeholding tenants. If a tenant died without heirs to continue the service that the lord demanded in return for granting the land, the estate would "escheat" to the lord, and the lord could grant it to another tenant. If a lord died without heirs, his estate similarly escheated to the Crown.[2] In this way, escheat perpetuated the tenure system. It also ensured, among other things, the continuing flow of revenue to the Crown.

The importance that the Crown placed on the escheat of realty in medieval times, however, contrasted with its treatment of unclaimed personal property. The Crown largely ignored personalty as a source of revenue. Because relatively little wealth in feudal England consisted of personal property, this treatment is not surprising. As attitudes concerning the intrinsic value of personalty changed, however, the distribution between personalty and realty also changed. Personal property, especially intangible personal property,[3] now comprises the bulk of wealth in the United States.[4]

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1. "Escheat" generally is "reversion of property to the state in consequence of a want of any individual to inherit." BLACK'S LAW DICTIONARY 488 (5th ed. 1979). Although the term in medieval times referred only to state acquisition of title to real property, *see infra* note 2 and accompanying text, this Note uses the term in its broader sense, which includes state acquisition of an interest in the title to or the possession of *any* property. *Accord* 1 A. ANDREOLI & D. SHUMAN, GUIDE TO UNCLAIMED PROPERTY AND ESCHEAT LAWS ch. 2:1 (1985).

2. *See* Garrison, *Escheats, Abandoned Property Acts, and Their Revenue Aspects*, 35 KY. L.J. 302, 302 (1947); Note, *Origins and Development of Modern Escheat*, 61 COLUM. L. REV. 1319, 1319-20 (1961).

3. "Intangible property" is property that "has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stocks, bonds, [and] promissory notes." BLACK'S LAW DICTIONARY 726 (5th ed. 1979).

4. *See* BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1985, at 461 (1984) (assets of top U.S. wealthholders between 1953 and 1976 comprised of between 23.0 and 34.8 percent real property and between 65.2 and 77.0 percent personal property).

Consequently, states increasingly have concentrated their efforts to acquire abandoned property on this formerly untapped fiscal resource.

Most states have adopted acts providing for the acquisition of intangible as well as tangible property. The Virginia Uniform Disposition of Unclaimed Property Act[5] (Act), for example, covers virtually every type of intangible personalty, including stock dividends, wages, bank deposits, and traveler's checks.[6] Because Virginia recently has enacted provisions designed to facilitate enforcement of the Act,[7] millions of dollars soon may become available to the Commonwealth.

This Note examines Virginia's acquisition of unclaimed and abandoned personalty in the context of modern jurisprudence. The Note first traces the evolution of states' power to escheat abandoned tangible personalty, focusing both generally on the doctrine and specifically on its status in Virginia. This survey starts with the humble common law origins of the doctrine, and ends with its current expansive statutory expression. The Note then turns to a similar analysis of intangible property. This analysis recounts the development of successive uniform acts to harmonize and consolidate the state law governing unclaimed personalty, discusses the policies underlying these acts, and considers the operation and effectiveness of the version adopted in Virginia. The Note identifies three problems likely to arise in litigation under the Virginia Act—retroactivity, contractual provisions allowing "private escheat," and unreasonable holding charges. The Note concludes that the Virginia courts and legislature should respond to these problems in a way that promotes the policies behind the Act, and suggests what those responses should be.

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5. VA. CODE §§ 55-210.1 to .30 (1981 & Supp. 1985).
6. *See id.* § 55-210.2 (Supp. 1985) (definition of "intangible property").
7. *See infra* notes 118-20 and accompanying text.

## THE ORIGIN AND DEVELOPMENT OF THE POWER TO ESCHEAT TANGIBLE PERSONALTY

### *Common Law Development*

When an owner leaves behind personal property with the specific intent to terminate ownership, or when an owner, after a casual and unintentional loss, ceases all efforts to seek and reclaim lost property, the law considers that property abandoned.[8] Title to abandoned property generally vests in the first person to assert dominion and control over it.[9] Under the English common law doctrine known as *bona vacantia*,[10] however, rights to some types of personal property traditionally passed to the sovereign rather than to the finder. Because no true owner of these types of property could be ascertained, the *bona vacantia* doctrine considered the Crown's claim to the property on behalf of society stronger than the claim of the finder or other holder of the property.[11]

The largest category of personalty considered *bona vacantia* was goods left when a person died intestate without heirs.[12] The doctrine also applied to personal property held in a failed trust,[13] personal property held in the name of a dissolved corporation,[14] and some forms of abandoned personal property such as wrecks,[15]

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8. *See* R. BROWN, THE LAW OF PERSONAL PROPERTY § 1.6, at 8 (3d ed. 1975).

9. *See id.* § 3.1, at 24.

10. The term *bona vacantia* literally means "vacant goods." BLACK'S LAW DICTIONARY 161 (5th ed. 1979).

11. *See* Garrison, *supra* note 2, at 303. The desire to avoid disputes among private claimants also motivated application of the escheat concept. *See* Note, *supra* note 2, at 1327; *see also* 1 W. BLACKSTONE, COMMENTARIES *299 (Title also vested in the Crown "to prevent that strife and contention, which the mere title of occupancy is apt to create and continue."). *See generally* F. ENEVER, BONA VACANTIA UNDER THE LAW OF ENGLAND (1927) (thoroughly discussing the *bona vacantia* doctrine).

12. Note, *supra* note 2, at 1327. Modern intestate succession statutes treat this category of property similarly. *See, e.g.*, UNIF. PROBATE CODE § 2-105, 8 U.L.A. 65 (1983) ("If there is no taker under the provisions of this Article, the intestate estate passes to the [state]."); VA. CODE § 64.1-12 (1980) ("[A]ll the personal estate of every decedent, of which there is no other distributee [shall accrue to the Commonwealth].").

13. Note, *supra* note 2, at 1327.

14. *Id.* at 1328.

15. *See* 1 W. BLACKSTONE, *supra* note 11, at *290-94. "Wrecks" were goods or cargo, thrown upon the land from a shipwreck, for which no owner could be ascertained. *Id.* at *290, *291.

treasure troves,[16] waifs,[17] and estrays.[18] Under the doctrine, all these types of property escheated to the Crown.

After the American Revolution, certain inherent sovereign powers vested in the new states, including power to determine the disposition of property.[19] Many of the new states, faced with the decisional void created by the separation from British authority,[20] adopted the common law of England.[21] In doing so, these states implicitly adopted the *bona vacantia* doctrine.[22]

Because acquisition of property in the limited *bona vacantia* categories produced little revenue, some jurisdictions enacted comprehensive legislation expanding the categories of tangible personalty subject to escheat.[23] Despite these attempts, however, the

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16. A "treasure trove" was "money or coin, gold, silver, plate, or bullion . . . found hidden *in* the earth, or other private place, the owner thereof being unknown." *Id.* at *295 (emphasis in original).

17. "Waifs" were "goods stolen, and waved or thrown away by the thief in his flight, for fear of being apprehended." *Id.* The *bona vacantia* doctrine gave these goods to the king to punish the owner for not pursuing the thief and capturing the goods. *Id.*

18. "Estrays" were valuable animals found wandering loose with no known owners. *Id.* at *297.

19. *Cf.* Standard Oil Co. v. New Jersey, 341 U.S. 428, 435-36 (1951) (states' power to dispose of unknown owners' property derives from a broad principle of jurisprudence); Cunnius v. Reading School Dist., 198 U.S. 458 (1905) (state may provide for administration of the estate of a person who has been missing for seven years and has been presumed dead, after publishing notice).

20. *See* 9 HENING'S STATUTES AT LARGE 126 (1821) (Virginia Ordinances of Convention, ch. V, § I (1776)).

21. The Virginia Ordinances of Convention, for example, provided:

> [T]he common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.

*Id.* at 127 (Virginia Ordinances of Convention, ch. V, § VI (1776)). The common law of England still is the rule of decision in Virginia except when the General Assembly has altered it. *See* VA. CODE § 1-10 (1979).

22. Once it was adopted in the United States, *bona vacantia* lost its importance, as the concept of escheat came to govern state acquisition of both real *and* personal property. *See supra* note 1; Note, *supra* note 2, at 1327.

23. *See* McThenia & Epstein, *Issues of Sovereignty in Escheat and the Uniform Unclaimed Property Act*, 40 WASH. & LEE L. REV. 1429, 1431 (1983); Note, *Unclaimed Property—A Potential Source of Non-Tax Revenue*, 45 MO. L. REV. 493, 493 (1980).

relative monetary significance of escheated tangible property declined with time.[24] Today, revenue produced by income and sales taxes dwarfs the fiscal importance of tangible escheats.[25] Nevertheless, most states, including Virginia, continue to escheat some forms of tangible assets.

*Adoption in Virginia*

Virginia generally adheres to the common law rules governing disposition of abandoned and unclaimed tangible personalty, under which the finder usually acquires title to the property.[26] Other states, desiring to vest title to this property in the state instead of the finder, have replaced the common law rules with broad legislation.[27] Virginia, however, never has adopted similar legislation. In fact, the Commonwealth appears to have relinquished some of the rights it implicitly acquired when it adopted the common law rule. For example, the Virginia Code provides that title to estrays and drift property accrues to the owner of the land on which the property is found if the true owner cannot be located,[28] while at common law title to both of these types of property accrued to the Crown as *bona vacantia*.[29] These provisions of the Virginia Code have expanded the rights that finders of abandoned tangible property had under common law, and have diminished the Commonwealth's rights.

On the other hand, three statutory exceptions to the Virginia version of the common law rule have expanded the Commonwealth's rights to abandoned and unclaimed tangible property, and

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24. *See* Garrison, *supra* note 2, at 314-15.

25. *See id.*

26. *See* Talley v. Drumheller, 143 Va. 439, 449, 130 S.E. 385, 388 (1925); *see also* Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 456 (E.D. Va. 1960) (quoting with approval the general rule, as stated in 1 C.J.S. *Abandonment* § 9, at 18 (1936); same rule now stated in 1 C.J.S. *Abandonment* § 12, at 19-20 (1985)).

27. *See supra* note 23.

28. *See* VA. CODE §§ 55-202 to -210 (1981). The term "drift property" or "drift stuff" refers to goods "floating at random, without any known or discoverable ownership, which, if cast ashore, will probably never be reclaimed, but will, as a matter of course, accrue to the riparian proprietor." Watson v. Knowles, 13 R.I. 639, 641 (1882).

29. *See* 1 W. BLACKSTONE, *supra* note 11, at *297 (estrays); *id.* at *292 (drift property). Blackstone refers to drift property as "flotsam." *See id.* ("[F]lotsam is where [goods are cast into the sea and] continue swimming on the surface of the waves.").

have diminished finders' rights. First, Virginia and its municipalities can acquire and sell abandoned motor vehicles to benefit the Commonwealth.[30] The Virginia Code permits the Commonwealth to take possession of any vehicles left unattended for more than twenty-four hours[31] and permits municipalities to take possession of any vehicles left unattended for more than ten days.[32] If the Commonwealth or municipality cannot determine the identity of the owner or his whereabouts within thirty days, it may dispose of the vehicle at a public sale.[33] A municipality gets the proceeds of any sale after three years if the owner does not claim them.[34] Surprisingly, however, the proceeds of a sale by the Commonwealth remain available to the owner in perpetuity.[35]

Second, Virginia can acquire certain tangible property voluntarily reported to the Commonwealth. Under Virginia's unclaimed property act, any holder of tangible personal property for which the true owner cannot be located may report the property to the State Treasurer.[36] Once the Treasurer receives the holder's report, the statute creates a presumption that the true owner of the property has abandoned it.[37] The presumption triggers another provision that requires the holder to relinquish the property to the Commonwealth.[38] Because this statute turns a holder's voluntary

30. VA. CODE §§ 46.1-2 to -3.01 (1980 & Supp. 1985).

31. *Id.* § 46.1-2 (1980). If the vehicle has remained "in a specific location for ten days without being moved," and "does not bear a current license plate or a valid state inspection certificate or sticker," the statute creates a presumption that the vehicle is abandoned. *Id.* § 46.1-2(c).

32. *Id.* § 46.1-3 (Supp. 1985). If the vehicle has remained "in a specific location for four days without being moved" and "lacks either . . . a current license plate, or . . . a current county, city or town, plate or sticker, or . . . a valid state inspection certificate or sticker," the statute creates a presumption that the vehicle is abandoned. *Id.* The statute does not explain why the periods for authorization of seizure and for presumption of abandonment differ for the Commonwealth and for municipalities.

33. *Id.* §§ 46.1-2, -3 (1980 & Supp. 1985).

34. *Id.* § 46.1-3 (Supp. 1985).

35. *Id.* § 46.1-2 (1980). Although the statute does not explain why municipalities eventually get the proceeds of these sales but the Commonwealth does not, one possible explanation is that the General Assembly did not wish to burden municipalities with the additional administrative costs associated with a custodial statute.

36. *Id.* § 55-210.10:2 (Supp. 1985). This provision is unique to Virginia's version of the Uniform Unclaimed Property Act.

37. *Id.*

38. *Id.* § 55-210.14.

report of property into a relinquishment of all common law rights to the property, few holders are likely to report property under this provision. As a result, the statutory exception has little future as a revenue generating device.[39]

Third, Virginia can acquire tangible property that is "held, issued, or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than five years after it became payable or distributable."[40] Under Virginia's unclaimed property act, property meeting the requirements of this statutory exception is presumed abandoned by its true owner. The holder of such property must report it,[41] and eventually must pay or deliver it,[42] to the Commonwealth. Similar provisions also give the Commonwealth the right to acquire tangible property held in a safe deposit box if the property remains unclaimed for more than five years after the lease or rental period of the box expires.[43]

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39. Virginia's inclusion of the voluntary reporting provision for tangible property may have been a response to the situation that precipitated a 1971 opinion by the Attorney General. The Rockingham County Commonwealth's Attorney had requested an opinion concerning the proper disposition of seven chain saws that had been recovered from a river bottom and that were in the possession of the sheriff's department. The police had recovered one of the saws, and private individuals had recovered the other six and had relinquished them to the sheriff's department. The department had been unable to determine the ownership of any of the saws. 1971-72 Op. Att'y Gen. 97 (Va. 1972). The Attorney General concluded that no statutory authority existed for the disposition of the saws because "[t]he Uniform Disposition of Unclaimed Property Act . . . deals only with intangible property or tangible property in safe deposit boxes." *Id.* As a result, according to the Attorney General, the six voluntarily relinquished chain saws had to be returned to the private finders as lost property. *Id.* The other saw, according to the Attorney General, should be treated as the legal equivalent of an abandoned motor vehicle governed by section 46.1-3 of the Virginia Code. *Id.* at 98; *see also supra* notes 30-35 and accompanying text (discussing the abandoned motor vehicle provisions). Section 46.1-3 also should apply to the other six saws, the Attorney General opined, if the finders refused to accept them. 1971-72 Op. Att'y Gen. at 98.

40. VA. CODE § 55-210.2:1 (Supp. 1985). The precise scope of the provision is indeterminate because it is peculiar to the Virginia Act and the Virginia courts have not interpreted it yet.

41. *Id.* § 55-210.12.

42. *Id.* § 55-210.14.

43. *Id.* § 55-210.3:3.

## THE ORIGIN AND DEVELOPMENT OF THE POWER TO ESCHEAT INTANGIBLE PERSONAL PROPERTY

### *Development of the Power to Escheat*

The United States Supreme Court first recognized the states' rights to control disposition of intangible as well as tangible abandoned property in *Cunnius v. Reading School District*,[44] decided in 1905. The Court in that case considered the validity of a Pennsylvania statute that provided for "the grant of letters of administration upon the estates of persons, presumed to be dead, by reason of [a seven year or longer] absence from their former domicil."[45] Acting under this authority, the Commonwealth of Pennsylvania had granted a letter of administration to the son of a resident woman who had been missing from the Commonwealth for nine years. The letter, among other things, permitted the son to collect a debt consisting of accrued interest on the missing woman's dower rights in a parcel of real estate.[46] The Court upheld the statute.[47] The Court did not mention the intangible nature of the property specifically, but it did state that "the right to regulate the estates of absentees . . . has [always] been recognized as being within the scope of governmental authority."[48]

### *Development of Comprehensive Statutes*

#### *Early Statutory Responses*

Following *Cunnius*, an increasing number of states scrambled to escheat intangible property, apparently realizing its great revenue generating potential. Some states sought to acquire intangible property merely by extending the coverage of their laws governing escheat of tangible personalty, but courts rejected these attempts and required particularized statutes.[49] These courts reasoned that the states' rights to acquire tangible property had originated from

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44. 198 U.S. 458 (1905).
45. *Id.* at 458 (quoting Act of June 24, 1885, 1885 Pa. Laws. 155 (repealed 1917)).
46. *Id.* at 460-61.
47. *See id.* at 476-77.
48. *Id.* at 471.
49. *See* Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58 (7th Cir. 1939); State v. Phillips Petroleum Co., 212 Ark. 530, 206 S.W.2d 771 (1947).

a doctrine covering property with no legal owner,[50] while the states, after *Cunnius*, were attempting to expand this doctrine to cover unclaimed intangible property when the property did have an owner, but the identity of that owner or his whereabouts was unknown.[51] Although the states could expand the categories of tangible property subject to escheat, these courts concluded, they could not expand the categories of escheatable property to include intangible assets without specific statutory authority.[52]

The states responded to these decisions by enacting various escheat statutes that applied explicitly to intangible property. These statutes, however, were disorganized[53] and narrowly focused. Virginia, for example, first attempted to authorize acquisition of unclaimed intangible property in 1887 through a statute that applied solely to funds held by its courts.[54] Virginia also enacted legislation in 1918 covering unclaimed bank deposits,[55] but it did not attempt, early on, to pass comprehensive legislation governing the escheat of unclaimed property.

### *Uniform Acts*

By the early 1950's, the states had begun clamoring for uniform legislation addressing the escheat of intangible property. In response, the National Conference of Commissioners on Uniform

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50. Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58, 68 (7th Cir. 1939); State v. Phillips Petroleum Co., 212 Ark. 530, ____, 206 S.W.2d 771, 773 (1947); *see supra* notes 8-18 and accompanying text.

51. State v. Phillips Petroleum Co., 212 Ark. 530, ____, 206 S.W.2d 771, 773 (1947); *see* Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58, 62 (7th Cir. 1939).

52. State v. Phillips Petroleum Co., 212 Ark. 530, ____, 206 S.W.2d 771, 776 (1947); *see* Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58, 68 (7th Cir. 1939).

53. *See* UNIF. DISPOSITION OF UNCLAIMED PROPERTY ACT (1954) prefatory note, 8A U.L.A. 215 (1983) [hereinafter cited as 1954 ACT].

54. *See* VA. CODE §§ 3429-3432 (1887) (current version at VA. CODE §§ 8.01-600, -602 to -605 (1984)). The statute allowed any court of the Commonwealth to pay any monies that it had held for seven years to the Commonwealth, provided that the court knew of no owner or claimant of the money. *Id.* §§ 3429, 3430. Although ostensibly custodial, the statute limited the period during which the owner could claim and recover the property to ten years, running from the time the claim could have been presented or asserted. *See id.* § 3432 (referring to limitations imposed under sections 751 and 770).

55. *See* Act of Mar. 15, 1918, ch. 252, § 1, 1918 Va. Acts 430 (repealed 1928).

State Laws began drafting comprehensive legislation.[56] The Commissioners ultimately produced three uniform acts. The first, promulgated in 1954, was the Uniform Disposition of Unclaimed Property Act.[57] The 1954 act consisted of thirty-two sections,[58] including one purporting to aid the settlement of concurrent claims to the same property by two or more states.[59] The second act, promulgated in 1966, was a revision of the 1954 act designed to address the special problems associated with the escheat of money orders and traveler's checks.[60] The third and final act, promulgated in 1981, was the Uniform Unclaimed Property Act.[61] The 1981 act harmonized the previous acts with the decision of the United States Supreme Court in *Texas v. New Jersey*,[62] in which the Court had established a hierarchy of escheat among several claimant states that was inconsistent with the hierarchy established in the 1954 act.[63] The 1981 act also contained strengthened enforcement provisions to assist the states' efforts to monitor compliance by holders.[64] To date, thirty-five states and the District of

56. Before the first uniform act, many state statutes had covered the disposition of unclaimed bank deposits, but only ten states had enacted comprehensive legislation covering the entire field of unclaimed property. *See* 1954 ACT, *supra* note 53, prefatory note, 8A U.L.A. at 215.

57. 1954 ACT, *supra* note 53.

58. For a brief discussion of the 1954 act, see *id.* prefatory note, 8A U.L.A. at 216-17.

59. *Id.* § 10, 8A U.L.A. at 244-45. This section was designed to "preclude the possibility of multiple liability being imposed upon the holder of unclaimed property who happens to be subject to the jurisdiction of two or more states." *Id.* prefatory note, 8A U.L.A. at 217.

60. *See* UNIF. DISPOSITION OF UNCLAIMED PROPERTY ACT (1966) prefatory note, 8A U.L.A. 136 (1983) [hereinafter cited as 1966 ACT]. For example, the 1966 act eliminated the requirement that holders of money orders or traveler's checks report the names and addresses of the owners, because these holders generally do not know the owner. *See id.*

61. UNIF. UNCLAIMED PROPERTY ACT (1981 ACT), 8A U.L.A. 617 (1983) [hereinafter cited as 1981 ACT].

62. 379 U.S. 674 (1965); *see* 1981 ACT, *supra* note 61, prefatory note, 8A U.L.A. at 620-21.

63. *See* 1981 ACT, *supra* note 61, prefatory note, 8A U.L.A. at 619.

64. *Id.* § 34, 8A U.L.A. at 674. Section 34 provided that a person who fails to deliver property to the state within the prescribed period may be required to pay interest. *See id.* § 34(a), 8A U.L.A. at 674. In the 1966 act, the predecessor to section 34 did not provide for interest on improperly withheld funds. *See* 1966 ACT, *supra* note 60, § 25, 8A U.L.A. at 209. The predecessor section did provide for fines and imprisonment, *id.*, but these criminal sanctions proved ineffective. *See* 1981 ACT, *supra* note 61, § 34 commentary, 8A U.L.A. at 674.

Columbia have adopted one of the uniform acts, or a combination of these acts, in some form.[65]

According to the Commissioners, the uniform acts promote at least three important policies.[66] First, the acts protect unknown or unlocatable owners by requiring attempts to reunite the owner with his property by both holders and the adopting state before the property is transferred to the state,[67] and by preventing any statute of limitations from running on the state's claim against a holder.[68] Second, the acts purport to "relieve . . . holders from annoyance, expense and liability,"[69] including multiple liability,[70]

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65. *See* 8A U.L.A. table of jurisdictions, at 30 (Supp. 1985) (five states have adopted the 1954 act); *id.* table of jurisdictions, at 17 (twenty-two states and the District of Columbia have adopted the 1966 act); *id.* table of jurisdictions, at 129 (twelve states have adopted the 1981 act). The tables of jurisdictions list Iowa, Nevada, Oregon, and Tennessee as states that have adopted both the 1966 act and 1981 act because these four states have followed the format of the 1966 act, but also have adopted many of the provisions of the 1981 act. *Compare id.* table of jurisdictions, at 17 (1966 act) *with id.* table of jurisdictions, at 129 (1981 act).

For an excellent analysis of the uniform acts, see 1 D. EPSTEIN, A. MCTHENIA, JR. & C. FORSLUND, UNCLAIMED PROPERTY LAW AND REPORTING FORMS (1985).

66. *See* 1954 ACT, *supra* note 53, prefatory note, 8A U.L.A. at 217. For a more comprehensive discussion of these and other rationales, see Note, *Modern Rationales of Escheat*, 112 U. PA. L. REV. 95, 96-111 (1963).

67. 1981 ACT, *supra* note 61, § 17, 8A U.L.A. at 652-53. Some states have been very successful in returning forgotten property to owners. *See* McThenia & Epstein, *supra* note 23, at 1432.

68. 1981 ACT, *supra* note 61, § 29(a), 8A U.L.A. at 667. At common law, statutes of limitations and other claim prerequisites not only had precluded owners from asserting claims against the holders of their property, but also had precluded states from asserting escheat claims against these holders on the theory that the states' claims derive from the owners' claims and therefore cannot exceed them in nature or scope. *See, e.g.*, Oregon Racing Comm'n v. Multnomah Kennel Club, 242 Or. 572, 411 P.2d 63 (1963) (requirement that claimants present tickets precluded state from escheating winnings from unpresented parimutuel tickets); Murdock v. Stetson, 32 Pa. D. & C.2d (1936) (requirement that claimant present Stetson Hat gift certificates precluded Commonwealth from escheating value of unredeemed certificates). Section 29(a) of the 1981 act eliminated the statute of limitations as a method by which a holder can retain possession of an owner's property in the face of a claim by an adopting state.

69. 1954 ACT, *supra* note 53, prefatory note, 8A U.L.A. at 217.

70. Before the uniform acts, a holder could have become subject to double liability "[i]f two [states' escheat] statutes cover[ed] the same items of property, and if each state [sought] to exercise its jurisdiction." 1954 ACT, *supra* note 53, prefatory note, 8A U.L.A. at 216. The uniform acts remedy the multiple liability problem by relieving holders of all liability after they deliver the property to the state. 1981 ACT, *supra* note 61, § 20(a), 8A U.L.A. at 656.

associated with maintaining their own unclaimed property funds. Finally, and perhaps most importantly, the acts provide adopting states with a method for raising revenue, thereby promoting the general welfare of the community.

Although the revenue generating potential of escheat has been the foremost concern of legislators, it also has been the aspect that they have been least likely to express.[71] Even the Commissioners did not express this justification unequivocally, couching it primarily in terms of preventing unjust enrichment.[72] The uniform acts do prevent unjust enrichment by precluding a holder from receiving a "windfall"[73] or getting "something for nothing,"[74] and by conserving the property for the true owner.[75] Because forgetfulness and death prevent most owners from reappearing to claim their property from the state,[76] however, the ultimate result usually is not protection of the owner, but instead is escheat of property to the state, which can use it for the public good.

### *Comprehensive Statutory Response in Virginia: The Virginia Uniform Disposition of Unclaimed Property Act*

Although Virginia sought to acquire intangible personalty beginning in 1887,[77] the Commonwealth did not enact a comprehensive statutory scheme covering unclaimed intangible property until

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71. *See* Note, *supra* note 66, at 102; *see also* State v. Jefferson Lake Sulphur Co., 36 N.J. 577, ____, 178 A.2d 329, 334 ("The [New Jersey escheat] statute . . . manifests the legislative will that . . . unclaimed moneys be used for the good of all our citizens."), *cert. denied*, 370 U.S. 158 (1962).

72. *See* 1954 ACT, *supra* note 53, prefatory note, 8A U.L.A. at 217 (listing as one of the purposes of the uniform acts the need "to . . . give the adopting state the use of some considerable sums of money that otherwise would, in effect, become a windfall to the holders thereof.").

73. *Id.*

74. Note, *supra* note 66, at 101.

75. The uniform acts, as "custodial escheat statutes," essentially require the adopting state to hold property for the true owner until he reclaims the property, and never give the state a full ownership interest in the property. *See, e.g.*, 1954 ACT, *supra* note 53, prefatory note, 8A U.L.A. at 216; 1981 ACT, *supra* note 61, prefatory note & n.3, 8A U.L.A. at 620 & n.3.

76. *See* Shestack, *Disposition of Unclaimed Property—A Proposed Model Act*, 46 ILL. L. REV. 48, 48 (1951); Note, *supra* note 66, at 98 & n.19. *But see* Garrison, *supra* note 2, at 316 (noting that, in Kentucky, diligent efforts to find owners have reduced the amount of unclaimed property escheated by the state).

77. *See supra* note 54 and accompanying text.

1960, when it adopted the 1954 uniform act.[78] Between 1980 and 1983, the General Assembly updated Virginia's unclaimed property statute to reflect the Commissioners' revisions to the 1954 uniform act.[79] Finally, in 1984, the General Assembly essentially rewrote the old legislation, enacting most of the provisions contained in the 1981 uniform act.[80]

*General Procedures Under the Act*

As it now stands, the Virginia Uniform Disposition of Unclaimed Property Act[81] applies to several categories of intangible property left unclaimed for various statutory periods. Once the statutory period for a particular item of property has elapsed,[82] the Act requires the holder to attempt diligently to reunite the true owner with his property.[83] If the holder's efforts prove fruitless, the Act creates a presumption that the property has been abandoned,[84] and the holder must include the property in an annual report to

78. Uniform Disposition of Unclaimed Property Act, ch. 330, 1960 Va. Acts 385.

79. Act of Mar. 15, 1983, ch. 190, 1983 Va. Acts 209; Act of Apr. 9, 1982, ch. 331, 1982 Va. Acts 537; Act of Mar. 5, 1981, ch. 47, 1981 Va. Acts 54; Act of Mar. 22, 1980, ch. 293, 1980 Va. Acts 323.

80. Act of Mar. 10, 1984, ch. 121, 1984 Va. Acts 262.

81. VA. CODE §§ 55-210.1 to .30 (1981 & Supp. 1985); *see supra* notes 5-7 and accompanying text.

82. The statutory period for intangible property under the Act varies from one year, *e.g.*, VA. CODE § 55-210.5 (Supp. 1985) (deposits held by utilities), to fifteen years, *id.* § 55-210.3:02 (traveler's checks).

83. *See id.* § 55-210.12(e). The diligence required by the statute includes, but is not limited to, mailing a first-class letter to the last address of the owner contained in the holder's records. *Id.*

84. The presumption is created in the sections containing the rules for disposition of the various classes of unclaimed property, which explicitly create a presumption of abandonment based on the running of the statutory period. *See, e.g., id.* § 55-210.2. The presumption, however, is rather ambiguous because of language in the due diligence provision stating: "If the holder of property *presumed abandoned* . . . knows the whereabouts of the owner, the holder shall . . . take necessary steps *to prevent abandonment from being presumed.*" *Id.* § 55-210.12(e) (emphasis added). The ambiguity arises because, if the law properly has declared that the property is presumptively abandoned, the holder cannot subsequently prevent that presumption from attaching. To harmonize this provision with the rest of the Act, it should be interpreted as requiring the holder to attempt to *rebut* the presumption of abandonment before listing the property on the annual report to the State Treasurer.

the State Treasurer[85] due by the first of November each year.[86] By the first of March, working from the names and last known addresses of property owners provided in these annual reports by holders throughout the Commonwealth, the State Treasurer must publish a list in a newspaper of general circulation in each county containing the names of property owners last known to have resided in that county.[87] Each holder has three months from publication to relinquish the property to the State Treasurer.[88] Once the holder delivers the property to the Treasurer, the Commonwealth assumes custody, and the holder is relieved of all liability to the owner.[89]

The Act empowers the Treasurer to sell all relinquished unclaimed property. After selecting the most favorable location in which to conduct a sale, and publishing a notice three weeks before the sale in a newspaper of general circulation in that area, the Treasurer may proceed with the sale.[90] The Act requires the Treasurer to maintain a separate trust fund containing funds sufficient to satisfy claims of subsequently appearing owners.[91] Most of the sales proceeds, however, as well as funds received directly as unclaimed property, must be deposited in the Literary Fund of the Commonwealth,[92] which provides low interest loans[93] to various

85. *Id.* § 55-210.12(a). This provision actually refers to the "administrator" rather than the "State Treasurer." Because the Act defines the "administrator" as the "State Treasurer or his designee," *id.* § 55-210.2, and to reduce confusion, this Note refers only to the State Treasurer.

86. *Id.* § 55-210.12(d). Insurance corporations must file this report before the first of May each year. *Id.*

87. *Id.* § 55-210.13. The list for insurance corporations must be published by the first of September. *Id.*

88. *Id.* § 55-210.14 (referring to "the time specified in § 55-210.13(b)(3)").

89. *Id.* § 55-210.15(a).

90. *Id.* § 55-210.18.

91. *Id.* § 55-210.19(a). The true owner may recover escheated property in two ways. First, the owner may make a claim against the former holder. If the owner presents sufficient evidence of ownership to satisfy the holder, the holder may pay the owner's claim and then receive reimbursement from the Commonwealth. *Id.* § 55-210.15(a). Second, the owner may proceed directly against the Commonwealth for return of the property, or its monetary equivalent if the Commonwealth already has sold the property. *See id.* §§ 55-210.20 to .22 (1981). Virginia's recovery methods conform substantially to the 1981 uniform act. *See* 1981 ACT, *supra* note 61, §§ 20, 24, 8A U.L.A. at 657, 661.

92. VA. CODE § 55-210.19(a) (Supp. 1985). The provisions governing the Literary Fund are contained in VA. CODE §§ 22.1-142 to -161 (1985).

school boards for the construction of new educational facilities or the enlargement of existing facilities.[94] By placing these monies in the Literary Fund, the Commonwealth employs its power over unclaimed property to improve the general welfare of its citizens.

*Property Included Under the Act*

The Virginia Disposition of Unclaimed Property Act includes specific provisions governing the acquisition of bank deposits and funds in financial institutions;[95] traveler's checks and money orders;[96] checks, drafts, or similar instruments such as cashier's checks and certified checks;[97] the contents of safe deposit boxes or other repositories;[98] funds owing under life or endowment insurance policies or annuity contracts;[99] deposits held by utilities;[100] stocks, dividends, and other sums owed by business associations;[101] funds remaining after court-ordered refunds by business associations;[102] property of business associations held in the course of dissolution;[103] certain property held by fiduciaries;[104] gift certificates and credit memos;[105] unclaimed wages;[106] private property held by public agencies;[107] private property held by state and federal courts;[108] and employee benefit trust distributions.[109] Additionally, an omnibus provision encompasses all tangible and intangible property not specifically included or excluded elsewhere in the

93. VA. CODE § 22.1-150 (1985) (interest of not less than two and not more than six percent per year, payable annually).
94. *Id.* § 22.1-146.
95. *Id.* § 55-210.3:01 (Supp. 1985).
96. *Id.* § 55-210.3:02.
97. *Id.* § 55-210.3:2.
98. *Id.* § 55-210.3:3; *see supra* note 42 and accompanying text.
99. VA. CODE § 55-210.4:01 (Supp. 1985).
100. *Id.* § 55-210.5.
101. *Id.* § 55-210.6 to .6:1.
102. *Id.* §§ 55-210.6:2.
103. *Id.* § 55-210.7.
104. *Id.* § 55-210.8.
105. *Id.* § 55-210.8:1.
106. *Id.* § 55-210.8:2.
107. *Id.* § 55-210.9.
108. *Id.* § 55-210.9:1.
109. *Id.* § 55-210.10:1.

Act.[110] Finally, the Act provides for the escheat of some forms of tangible property, including property located in safe deposit boxes, property owing in the ordinary course of a holder's business, and property voluntarily reported to the Commonwealth.[111]

*Enforcement*

The State Treasurer can require any person to file a verified report stating whether he holds any reportable unclaimed property.[112] The Treasurer also can examine the records of any person to determine if that person has been complying with the Act.[113] Significantly, however, the Treasurer no longer needs to have "reason to believe that the holder has failed to report property" before he can examine a person's records.[114]

The Act also contains similar reporting requirements for financial institutions and businesses. For example, when a financial institution, a banking organization, or a business association with annual sales of at least $10,000,000 is required to report abandoned

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110. *Id.* § 55-210.2:2. Other jurisdictions have interpreted similar catch-all provisions as including such articles as trading stamps, New Jersey v. Sperry & Hutchinson Co., 56 N.J. Super. 589, 153 A.2d 691 (1959), pari-mutuel ticket winnings, Oregon Racing Comm'n v. Multnomah Kennel Club, 242 Or. 572, 411 P.2d 63 (1963), residuals, Screen Actors Guild, Inc. v. Cory, 91 Cal. App. 3d 111, 154 Cal. Rptr. 77 (1979), and oil royalties, Citronelle-Mobile Gathering, Inc. v. Boswell, 341 So. 2d 933 (Ala. 1977).

111. *See supra* notes 36-43 and accompanying text.

Virginia's inclusion of the latter two categories of tangible property expands the coverage of the uniform acts, which apply only to the contents of safe deposit boxes. *See* 1981 ACT, *supra* note 61, § 1 comment, 8A U.L.A. at 629. The uniform acts' intended application only to intangible property, except for the contents of safe deposit boxes, was brought out in a colorful colloquy in the Commissioners' committee reports:

> MR. KOHN: . . . I notice . . . tangible property referred to at the bottom of page 10. I thought you said a few minutes ago that tangible property was not included.
>
> MR. STASON: Not except that that comes out of a safe deposit box.
>
> MR. KOHN: It couldn't be an elephant.
>
> MR. STASON: It couldn't be an elephant or yet an umbrella.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ACT FOR THE DISPOSITION OF UNCLAIMED PROPERTY, PROCEEDINGS IN COMMITTEE OF THE WHOLE, AUG. 10, 1954, at 94-95 [hereinafter cited as PROCEEDINGS].

112. VA. CODE § 55-210.24(A) (Supp. 1985).

113. *Id.* § 55-210.24(B).

114. *See id.*; *see also* 1981 ACT, *supra* note 61, § 30 comment, 8A U.L.A. at 669 (noting that the "reason to believe" requirement was dropped from the 1981 act because it generated excessive litigation and imposed an unreasonable burden on the state).

property to the Treasurer, it must retain for ten years, for each reported item of property, a record of the owner's name and last known address.[115] Additionally, any business that sells money orders or traveler's checks must maintain a record of those instruments for three years.[116] If a business fails to maintain this record, it must report and pay to the Treasurer a reasonable estimate of the amount that would have been reported had the business kept the required record.[117]

Unlike earlier versions, the current Virginia Act provides for interest and penalties. A person who, after receiving a written demand from the Treasurer, fails to report abandoned property or to perform other duties required by the Act may be assessed a civil penalty of up to $100 a day.[118] In addition, a person who fails to pay or deliver property after receiving a written demand from the Treasurer may be assessed a penalty equaling twenty-five percent of the value of the property withheld.[119] In these situations, the Commonwealth also may charge interest on late delivery of any property.[120]

Now that Virginia has the power to assess interest and penalties against recalcitrant or negligent holders of unclaimed property, litigation inevitably will occur. In this litigation, the Commonwealth probably will encounter a number of problems, fundamental to state acquisition of unclaimed property, for which the sparse prior judicial consideration in Virginia will provide little guidance. The experience of other states with these problems could be instructive.[121]

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115. VA. CODE § 55-210.24:1(A) (Supp. 1985). This record is designed to provide evidence in resolving disputes between two or more states claiming the same property. *See* 1981 ACT, *supra* note 61, § 30 comment, 8A U.L.A. at 670. The Supreme Court has stated that, in such disputes, the owner's last known address is a determinative factor. *See* Texas v. New Jersey, 379 U.S. 674, 681-82 (1965).

116. VA. CODE § 55-210.24:1(B) (Supp. 1985).

117. *Id.* § 55-210.24(C).

118. *Id.* § 55-210.26:1.

119. *Id.*

120. *Id.*

121. This Note does not address problems in escheat litigation that are related to jurisdictional issues. For a general discussion of these issues, see McThenia & Epstein, *supra* note 23.

## Issues Likely to Arise in Litigation Under the Virginia Uniform Disposition of Unclaimed Property Act

### *Retroactive Application of Escheat Statutes*

One of the questions often associated with the escheat of unclaimed property is the extent of a state's ability to escheat property that had been left unclaimed before that state's escheat statute took effect. Although many states, including Virginia, first enacted comprehensive escheat provisions more than two decades ago, this retroactivity question still arises whenever a state discovers property reachable under its statute that has remained unescheated for many years.[122] Such property can remain unescheated only when the holder, for some reason, never files the required reports[123] and the state never enforces the requirements by examining the holder's records.[124] Virginia's adoption, along with many other states, of the strengthened enforcement provisions in the 1981 uniform act[125] gives it the power to pursue these recalcitrant or uninformed holders vigorously, and inevitably will cause the Commonwealth to encounter the retroactivity issues associated with escheat of this property.

In formulating the 1954 uniform act, the Commissioners debated this retroactivity question. The Commissioners considered three potential general limitations on an adopting state's ability to escheat property that was left unclaimed before the state adopted the uniform act: federal constitutional provisions; state constitutional provisions; and state statutory and common law, including statutes of limitations.[126] Other than possible state law restrictions, the Commissioners concluded that only practical record-keeping considerations precluded them from drafting a uniform act that

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122. *See, e.g.*, State *ex rel.* Marsh v. Nebraska State Bd. of Agriculture, 217 Neb. 622, 350 N.W.2d 535 (1984) (State in 1980 sought to escheat pari-mutuel betting winnings left unclaimed between 1960 and 1972, even though it did not pass an escheat statute until 1969).

123. *See supra* notes 81-89 and accompanying text (noting reporting procedures in Virginia, through which the Commonwealth escheats intangible personalty).

124. *See supra* notes 112-20 and accompanying text (noting enforcement provisions in Virginia).

125. *See supra* notes 118-20 and accompanying text (noting strengthened enforcement provisions in Virginia).

126. *See* Proceedings, *supra* note 111, at 95, 106-07.

reached "back to the beginning of time."[127] Because of the probability of inadequate records, however, the Commissioners limited the reporting requirements under the 1954 act to "property that would have been presumed abandoned if th[e] act had been in effect during the ten-year period preceding its effective date."[128] Virginia's adoption of a version of this provision[129] effectively cut off its ability to escheat property left unclaimed before January 1, 1951.[130]

When the Commissioners adopted the ten-year retroactivity provision, they recognized that a problem might exist regarding claims for property within the ten-year period because, in many states, the running of the statute of limitations on a debt creates rights vested in the debtor holder.[131] The Virginia Supreme Court, for example, held in *Kesterson v. Hill*[132] that expiration of the applicable statute of limitations gives a debtor a vested right to assert the limitations defense.[133] In unclaimed property cases, the *Kesterson*

127. *Id.* at 95.

128. 1954 ACT, *supra* note 53, § 11(g), 8A U.L.A. at 247; *see* PROCEEDINGS, *supra* note 111, at 95.

129. *See* VA. CODE § 55-210.12(g) (Supp. 1985) ("The initial report filed under this chapter and the subsequent duty to pay or deliver shall include all items of property that would have been presumed abandoned if this chapter had been in effect during the ten-year period preceding January 1, 1961.").

130. The Virginia Act became effective on January 1, 1961. Uniform Disposition of Unclaimed Property Act, ch. 330, § 2, 1960 Va. Acts 385, 392.

131. *See* PROCEEDINGS, *supra* note 111, at 106.

132. 101 Va. 739, 45 S.E. 288 (1903).

133. *See id.* at 744-45, 45 S.E. at 288. The court's rationale rested on two generally-accepted legal rules: first, the doctrine that expiration of a statute of limitation bars an action on a debt, but does not extinguish the underlying cause of action; and second, the doctrine that expiration of a limitations period gives a defendant a vested right "to set up the bar of a statute of limitations as a defence to a cause of action" and that this vested right "cannot be taken away by legislation, either by a repeal of the statute without saving clause, or by an affirmative act." *Id.* at 743, 45 S.E. at 289. Although other jurisdictions generally had accepted these doctrines, *see, e.g.*, Board of Educ. v. Blodgett, 155 Ill. 441, 447, 40 N.E. 1025, 1027 (1895), the Virginia court never had considered them directly before *Kesterson*. Nevertheless, the court found support for the doctrines, and for its holding in *Kesterson*, in dicta from one of its previous decisions. *See Kesterson*, 101 Va. at 744, 45 S.E. at 289 (quoting Johnson v. Gill, 68 Va. (27 Gratt.) 587, 595 (1876)) ("It is very clear that when the bar of the statute of limitations has once attached, the legislature cannot remove the bar by retrospective legislation."). The court also noted a specific Virginia statute that prevented the repeal of a statute from removing a bar that had resulted from a prior running of the statutory period. *See id.* at 744, 45 S.E. at 290 (quoting VA. CODE § 2936 (1887) (current version at VA. CODE § 8.01-234 (1984)).

rule gives a holder of unclaimed property a vested right to defeat an owner's claim once the statute of limitations has expired. Because most statutes of limitations are shorter than ten years, the ten-year retroactivity provision reaches property for which the statute of limitations already had expired before the provision took effect and for which the limitations defense had vested under *Kesterson*. The resulting conflict between the retroactivity provision and the *Kesterson* rule must be examined separately for claims involving two distinct sets of property: property on which the limitations period for claims had not run before the effective date of the Virginia Act,[134] and property on which the limitations period for claims had run before the effective date.

*Escheat When Claims Were Not Time-Barred Before the Act's Effective Date*

The first category of property claims consists of claims not time-barred on January 1, 1961, when the Virginia Act took effect. For example, this category would include a claim for uncollected wages that arose when a worker employed under a written contract quit his job on January 1, 1957 and neglected to collect his final paycheck. Because the Virginia statute of limitations on claims based on written contracts is five years,[135] the rule in *Kesterson*[136] would give the worker's employer, on January 1, 1962, a vested right to assert the limitations defense against any subsequent claim by the forgetful employee.[137] Before this right would have vested, however, the Act, effective January 1, 1961, would have imposed on the employer a statutory duty to report the unpaid wages.[138]

A hypothetical based on this employer demonstrates the retroactive reach of the Virginia Act to property in this category. Suppose that the employer never filed the required reports. Suppose further that, while conducting a routine examination of the employer's

134. *See supra* note 130.

135. VA. CODE § 8.01-246(2) (1984). If the employee had been employed under an oral contract, the statute of limitations would have been three years rather than five. *Id.* § 8.01-246(4).

136. *See supra* notes 132-33 and accompanying text.

137. *See supra* text following note 133.

138. VA. CODE §§ 55-210.8:2, .12(a), .12(g) (Supp. 1985).

records[139] in 1986, the State Treasurer discovers these unreported unclaimed wages from 1957. Because the *Kesterson* rule would give the employer in 1986 the right to raise the limitations defense against a claim by the employee, and because states' rights to escheat are considered by many courts as deriving from owners' claims,[140] one might expect that the employer in this situation also would be able to raise the limitations defense against the Commonwealth. Section 55-210.17 of the Virginia Act, however, provides:

> The expiration of any period of time specified by statute . . . during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property, nor affect any duty to . . . pay or deliver abandoned property to the State Treasurer.[141]

Because of this provision, the Act's imposition in 1961 of an obligation to report and later to deliver the wages, and the resulting right of the Commonwealth to escheat the wages,[142] would not have been affected by the expiration of the statute of limitations in 1962. The Commonwealth, in 1986, would be able to recover wages originally payable in 1957.

Interestingly, by permitting the Commonwealth to acquire abandoned property long after the statute of limitations has expired, section 55-210.17 also revives the owner's ability to reclaim the property. Because the Virginia Act, like most state escheat statutes, gives the Commonwealth only a possessory interest in property it acquires,[143] true owners can reclaim their property from the Commonwealth at any time. Consequently, whenever Virginia acquires unclaimed property after the statute of limitations has run

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139. *See id.* § 55-210.24(B); *supra* note 113 and accompanying text.

140. *See supra* note 68 (describing cases in which courts have held that states' escheat claims derive from owners' claims); *infra* note 152 and accompanying text.

141. VA. CODE § 55-210.17 (1981).

142. The Commonwealth's right to escheat under the Act depends on its ability to enforce the provisions mandating reporting and delivery of the wages. *See supra* notes 123-24 and accompanying text.

143. VA. CODE §§ 55-210.20 to .21 (1981). Most state escheat statutes share this custodial nature. *See supra* note 75; *see, e.g.*, 1981 ACT, *supra* note 61, § 24, 8A U.L.A. at 661.

against the owner, the Commonwealth, in effect, has lifted the bar of the statute of limitations on the true owner's claim.[144]

*Escheat When Claims Were Time-Barred Before the Act's Effective Date*

The retroactive reach of the Virginia Act to the second category of property is demonstrated by changing the above hypothetical, placing the forgetful employee's resignation on January 1, 1952, rather than January 1, 1957, so that the five-year statute of limitations would have run before the Act became effective. Because the original Virginia Act created a presumption that wages unclaimed for seven years were abandoned,[145] and because the ten-year retroactivity provision requires holders to report "all items of property that would have been presumed abandoned if this chapter had been in effect during the ten-year period preceding January 1, 1961,"[146] the employer would have had a duty under the Act to report the unclaimed wages in his initial report to the State Treasurer. This duty would have arisen even though, under *Kesterson*,[147] expiration of the statute of limitations on January 1, 1957 gave the employer a vested right to assert the limitations defense against the employee[148] four years before the Virginia Act took effect and purportedly created a duty to report relating back to 1951.

In this situation, the conflict between the ten-year retroactivity provision and the vesting rule in *Kesterson* becomes clear and direct. Section 55-210.17 of the Act,[149] which eliminated the same conflict when the statute of limitations *had not* run before the Act took effect,[150] cannot resolve the conflict in this context unless that section, when it became effective in 1961, applied retroactively to

144. This feature helps protect the unknown or unlocatable owner, which is an avowed policy of unclaimed property acts. *See supra* notes 67-68 and accompanying text.

145. VA. CODE § 55-210.10 (1969) (amended 1984). In 1984, this provision was amended, creating a presumption of abandonment only one year after the wages became payable. *Id.* § 55-210.8:2 (Supp. 1985).

146. *Id.* § 55-210.12(g) (Supp. 1985); *see supra* note 129 and accompanying text.

147. *See supra* notes 132-33 and accompanying text.

148. *See supra* text following note 133.

149. VA. CODE § 55-210.17 (1981).

150. *See supra* notes 141-42 and accompanying text.

prevent the assertion of limitations defenses that already had vested under the *Kesterson* rule. Virginia law, however, would not allow legislative removal of a holder's vested limitations defense.[151] As a result, the Commonwealth's ability to escheat property when the statute of limitations *had* run before the Act's effective date depends on resolution of the conflict.

The key to resolving the conflict is the nature of Virginia's interest in statutorily "abandoned" property. If the Commonwealth derives its interest in the property from the interest of the true owner, as courts in many other states have held,[152] then the bar against the owner's claim against the holder under the *Kesterson* rule should operate to bar the Commonwealth's claim to the property as well. If the Commonwealth does not derive its interest in the property from the interest of the true owner, however, then the bar against the owner's claim under *Kesterson* should not affect the Commonwealth's claim to the property and, because statutes of limitations generally do not run against the Commonwealth,[153] Virginia should be able to assert its claim.

Commentators addressing the nature of states' interests under escheat statutes have concluded that states derive their interests from the interests of true owners.[154] The overwhelming weight of judicial authority also has recognized the derivative nature of the states' interests.[155] As the Supreme Court of Utah stated, "It is well settled from the custodial nature of the Unclaimed Property Act that the rights of the State are merely derivative from the rights of the owners of abandoned property. '[T]he state has no

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151. *See Kesterson*, 101 Va. at 744, 45 S.E. at 289 (quoting Johnson v. Gill, 68 Va. (27 Gratt.) 587, 595 (1876)) ("It is very clear that when the bar of the statute of limitations has once attached, the legislature cannot remove the bar by retrospective legislation."); *supra* note 133; *see also infra* notes 158-59 (noting that legislative divestment of a vested right is a deprivation of property without due process of law that violates the Virginia Constitution).

152. *See, e.g.*, State v. Standard Oil Co., 5 N.J. 281, 74 A.2d 565 (1950), *aff'd sub nom.* Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951); Oregon Racing Comm'n v. Multnomah Kennel Club, 242 Or. 572, 411 P.2d 63 (1963); Murdock v. Stetson, 32 Pa. D. & C.2d (1936); State *ex rel.* Baker v. Intermountain Farmers Ass'n, 668 P.2d 503 (Utah 1983); *supra* notes 68 & 140 and accompanying text.

153. VA. CODE § 8.01-231 (1984).

154. *See, e.g.*, 1 A. ANDREOLI & D. SHUMAN, *supra* note 1, ch. 7:1; 1 D. EPSTEIN, A. MCTHENIA, JR. & C. FORSLUND, *supra* note 65, § 302.

155. *See supra* note 152.

greater right than that of the payee owner.' "[156] Because Virginia also has adopted the custodial uniform act,[157] the Utah court's statement should apply with equal force to the Commonwealth. Virginia's rights to unclaimed property should be viewed as deriving from owners' rights and, therefore, as incapable of exceeding the owners' rights. When the *Kesterson* rule would have prevented an owner from defeating a holder's vested limitations defense, the Commonwealth also must be subject to the limitations defense, even when the ten-year retroactivity provision otherwise would allow the Commonwealth to reach the property.

The conclusion that Virginia's ten-year retroactivity provision does not allow the Commonwealth to escheat property when the holder's statute of limitations defense against the owner had vested before the Act's effective date is consistent with Virginia constitutional, statutory, and common law principles, as well as with the results that other states have reached when confronted with the same issue. For example, in *Kennedy Coal Corp. v. Buckhorn Coal Corp.*,[158] the Virginia Supreme Court held that legislative divestment of a vested right is a deprivation of property without due process of law that violates the Virginia Constitution.[159] If a holder of unclaimed property retained the property after the statute of limitations period ran, and never had a duty to report or deliver the property to the Commonwealth during the statute of limitations period because the Act became effective at a later date, the holder would have obtained a vested right under *Kesterson* to assert the limitations defense. The General Assembly's subsequent passage of the Act, and the ten-year retroactivity provision, would be an attempt to defeat this vested right. Under *Kennedy Coal*, this attempt arguably would violate the due process clause of the Virginia Constitution.[160]

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156. State *ex rel.* Baker v. Intermountain Farmers Ass'n, 668 P.2d 503, 507 (Utah 1983) (citations omitted) (quoting Insurance Co. v. Knight, 8 Ill. App. 3d 871, 876, 291 N.E.2d 40, 44 (1973)).

157. *See supra* note 143 and accompanying text.

158. 140 Va. 37, 124 S.E. 482 (1924).

159. *Id.* at 43, 124 S.E. at 484.

160. The retroactivity provision, however, does not violate the fourteenth amendment due process clause of the United States Constitution. The United States Supreme Court has held, "as a matter of [United States] constitutional law, . . . that statutes of limitation go to matters of remedy, not to destruction of fundamental rights," Chase Securities Corp. v.

For intangible property rights arising from contractual obligations, such as the unclaimed wages held by the employer in the above hypothetical, the prohibition in the Virginia Constitution against impairing the obligation of contracts[161] also arguably supports the limitation on the ten-year retroactivity provision. In *Smith & Marsh v. Northern Neck Mutual Fire Association*,[162] the Virginia Supreme Court intimated that the Virginia contracts clause precluded the legislature from affecting the period of limitations on an existing contract once the right to plead it had accrued.[163] This interpretation of the contracts clause is bolstered by the settled rule of law that a contract impliedly includes the provisions of statutes in force when the contract is made.[164] If a written contract impliedly includes the provisions of the five-year statute of limitations on contract claims,[165] the Commonwealth's attempt to change this impliedly-included provision through the ten-year retroactivity provision would be an impairment of a contractual obligation in violation of the Virginia Constitution.

A close look at *Kesterson* also supports the conclusion that the vesting rule limits the ten-year retroactivity provision when vesting occurred before the Act's effective date, as another look at the unclaimed wages hypothetical demonstrates. Under the *Kesterson* rule, and in the absence of the ten-year retroactivity provision, the hypothetical employee in 1986 could not recover the wages he forgot to claim in 1952 because his employer would have acquired a vested right on January 1, 1957 "to set up the bar of the statute of limitations as a defence"[166] to the employee's claim. The

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Donaldson, 325 U.S. 304, 314 (1944), and therefore that the retrospective repeal of a statute of limitations is not a deprivation of property without due process of law in violation of the fourteenth amendment. *Id.* at 311-12.

161. VA. CONST. art. I, § 11, cl. 2.

162. 112 Va. 192, 70 S.E. 482 (1911).

163. The court noted: "It is generally conceded that . . . the legislature may shorten or lengthen the period of limitation at any time *before* the bar has become complete." *Id.* at 199, 70 S.E. at 485 (quoting H. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND EQUITY 42 (3d ed. 1901) (emphasis added)).

164. *See* Hawes & Co. v. Wm. R. Trigg Co., 110 Va. 165, 190, 65 S.E. 538, 548 (1909) (quoting with approval Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 550 (1866) (erroneously cited in opinion as "United States v. Quincey")), *modified on other grounds sub nom.* United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1910).

165. VA. CODE § 8.01-246(2) (1984); *see supra* note 135 and accompanying text.

166. *Kesterson*, 101 Va. at 743, 45 S.E. at 289; *see supra* note 133.

Commonwealth likewise could not recover the wages under the Virginia Act because the Commonwealth's right to the property is no greater than the employee's right.[167] The employer thus can assert its vested limitations defense to defeat the Commonwealth's claim as well as the employee's claim. The ten-year retroactivity provision purports to change this result by imposing upon the employer a duty to relinquish property, such as the employee's wages, that the Act would have declared presumptively abandoned if it had been effective during the ten years before January 1, 1961.[168] Under *Kesterson*, however, the employer's vested right to assert the limitations defense "cannot be taken away by legislation, either by repeal of the statute without a savings clause, or by an affirmative act."[169] The ten-year retroactivity provision clearly is such such an "affirmative act," repugnant to the *Kesterson* rule.

Courts in other jurisdictions following the vested limitations defense rule have resolved the conflict between the rule and the retroactivity provision in favor of the rule, thus defeating the states' claims. In *Douglas Aircraft Co. v. Cranston*,[170] for example, the California Supreme Court considered whether California's unclaimed property statute[171] required Douglas Aircraft to report $17,000 in unpaid wages when claims for the wages were barred by the statute of limitations before the California statute took effect. Douglas Aircraft argued that the reporting requirement for the wages violated the due process clauses of the California Constitution and the United States Constitution.[172] The court, however, avoided the constitutional questions. Instead, it resolved the issue by interpreting the scope of the California statute narrowly. The court, focusing on holders' reliance on statutes of limitations, held that the California statute reached only debts for which the limitations period had not expired before the statute's effective date. According to the court:

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167. *See supra* notes 154-57 and accompanying text.

168. VA. CODE § 55-210.12(g) (Supp. 1985); *see supra* note 129.

169. 101 Va. at 743, 45 S.E. at 289; *see supra* note 133.

170. 58 Cal. 2d 462, 374 P.2d 819, 24 Cal. Rptr. 851 (1962) (en banc).

171. CAL. CIV. PROC. CODE §§ 1500-1527 (West ____) (amended 1968; current version at CAL. CIV. PROC. CODE §§ 1500-1582 (West 1982 & Supp. 1986)).

172. 58 Cal. 2d at ____, 374 P.2d at 821, 24 Cal. Rptr. at 853.

> The keeping of records, the maintenance of reserves, and the commitment of funds may all be affected by [a holder's] reliance [on the statute of limitations], particularly in a well-organized enterprise that seeks to operate efficiently. To defeat such reliance does more than deprive obligors of windfalls; it deprives them of the ability to plan intelligently with respect to stale and apparently abandoned claims.[173]

Since *Douglas Aircraft*, courts in at least three other states have considered this issue. The Supreme Court of Illinois struck down retroactive application of the Illinois unclaimed property statute to time-barred property in *Country Mutual Insurance Co. v. Knight*.[174] In that case, the court rested its decision both on a vested limitations defense theory similar to *Kesterson*[175] and on the rationale of *Douglas Aircraft*.[176] The court also asserted that its decision would further "the policy of uniformity of law expressed in the [uniform acts]."[177] Six years later, the Supreme Court of Alabama explicitly, and succinctly, followed *Douglas Aircraft* and *Country Mutual*.[178] Most recently, the Utah Supreme Court denied retroactive effect to its unclaimed property statute because of reservations about its constitutionality.[179]

These decisions, as well as Virginia constitutional, statutory, and case law, all support the conclusion that the General Assembly cannot impair holders' rights to assert statute of limitations defenses that had vested before the Act took effect through the "affirmative act" of passing the ten-year retroactivity provision. This conclusion not only upholds the legal principles embodied in these decisions, but also promotes uniformity in the law of escheat and protects holders' justifiable reliance on statutes of limitation.[180]

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173. *Id.* at ____, 374 P.2d at 822, 24 Cal. Rptr. at 854.

174. 40 Ill. 2d 423, 240 N.E.2d 612 (1968).

175. *See id.* at 428, 240 N.E.2d at 615.

176. *See id.* at 428-29, 240 N.E.2d at 615-16.

177. *Id.* at 429, 240 N.E.2d at 616.

178. Boswell v. South Cent. Bell Tel. Co., 293 Ala. 189, ____, 301 So. 2d 65, 67 (1974).

179. State *ex rel.* Baker v. Intermountain Farmers Ass'n, 668 P.2d 503 (1983). A recent opinion by the Attorney General of Tennessee came to the same conclusion. *See* Op. Att'y Gen. No. 83-499 (Tenn. Nov. 22, 1983) (available Jan. 1, 1986, on LEXIS, States library, Tenn file).

180. This conclusion does not affect the Commonwealth's ability to escheat property for which the limitations period had not expired before the Act became effective because, for

*Contractual Limitations*

A second issue, related to retroactivity, concerns contractual limitations on the Commonwealth's right of recovery under the Act. Again, the unclaimed wages hypothetical is useful to demonstrate the problem. Suppose that the employee's written contract had provided that any wages left unclaimed for six months became the property of the employer. Because the Virginia Act does not declare wages presumptively abandoned until they have remained unclaimed for a year,[181] the critical question would be whether the employer could defeat the Commonwealth's right to the property by creating this "private escheat law."

The seminal decision concerning contractual limitations was *State v. Jefferson Lake Sulphur Co.*[182] In that case, in an admitted attempt to circumvent the newly-enacted New Jersey custodial escheat law,[183] Jefferson Lake amended its certificate of incorporation to provide that "every [stock] dividend . . . which shall remain or has remained, unpaid and unclaimed for a period of three years following the date on which it was payable . . . shall . . . revert in full ownership to, th[e] corporation."[184] In effect, the amendment "escheated" unclaimed dividends to the corporation

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this property, the holder's limitations defense would not have vested before the Act and the retroactivity provision would have imposed a duty on the holder to report the property and would have given the Commonwealth an interest in the property. *See supra* notes 135-44 and accompanying text. Because of the rule for property for which the limitations period had expired, however, the Commonwealth will have to be content with different cutoff dates for different types of property rather than one uniform ten-year cutoff date. For each category of unclaimed property, the retroactive reach of the Virginia Act will have to be calculated by subtracting the applicable statute of limitations period from January 1, 1961. For example, because of the five-year limitation for claims based on written contracts, the cutoff date for Virginia's claims against unclaimed wages would be January 1, 1956. If a forgetful employee left behind wages payable on January 1, 1957, the Commonwealth could escheat the wages under its Act. *See supra* notes 135-44 and accompanying text. If the employee left the wages behind on January 1, 1952, on the other hand, the Commonwealth's claim would be barred by the employer's previously-vested statute of limitations defense. *See supra* notes 145-79 and accompanying text.

181. VA. CODE § 55-210.8:2 (Supp. 1985); *see supra* note 145.

182. 36 N.J. 577, 178 A.2d 329, *cert. denied*, 370 U.S. 158 (1962).

183. N.J. STAT. ANN. §§ 2A:37-29 to -50 (West 1952 & Supp. 1985).

184. 36 N.J. at ____, 178 A.2d at 332. The New Jersey legislature had enacted the escheat statute on July 13, 1951, and the corporation's board of directors had proposed the amendment to the certificate of incorporation less than five months later, on December 5, 1951. 36 N.J. at ____, ____, 178 A.2d at 331, 332. The board had stated in a subsequent call for

two years before the State could claim them.[185] When the State later sued to take possession of the unclaimed dividends, the corporation attempted to interpose its amended certificate as a bar to the State's claim. The State prevailed, and Jefferson Lake appealed.[186]

On appeal, the Supreme Court of New Jersey characterized Jefferson Lake's amendment as an attempt "in effect . . . to establish a private escheat law."[187] The court stated that it would uphold that "law" only if it was not "obnoxious to any applicable general law or to public policy."[188] After exhaustively analyzing analogous case law and the policies underlying the New Jersey escheat statute,[189] the court concluded that the corporation's amendment was invalid because it was "clearly opposed to the spirit and essence of the public custodial escheat law and to the broad public policy represented thereby."[190]

Other jurisdictions encountering similar contractual limitations also have rejected them as repugnant to the public policy considerations underlying escheat statutes.[191] In addition, the National Conference of Commissioners on Uniform State Laws inserted language in the 1981 uniform act intended to prevent contractual limitations from barring escheat claims of adopting states.[192] In

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special meeting and proxy statement that the amendment was prompted by the new escheat statute. *Id.* at ____, 178 A.2d at 333.

185. New Jersey could not take possession of dividends until they had remained unclaimed for five years. *Id.* at ____, 178 A.2d at 331.

186. *See id.* at ____, 178 A.2d at 334.

187. *Id.* at ____, 178 A.2d at 332.

188. *Id.* at ____, 178 A.2d at 335.

189. *See id.* at ____, 178 A.2d at 336-38.

190. *Id.* at ____, 178 A.2d at 339.

191. *E.g.*, Blue Cross of N. Cal. v. Cory, 120 Cal. App. 3d 723, 174 Cal. Rptr. 901 (1981); People v. Marshall Field & Co., 83 Ill. App. 3d 811, 404 N.E.2d 368 (1980).

192. The Commissioners added the words "by contract" to the old statute. As amended, the new statute provided:

> The expiration, before or after the effective date of this Act, of any period of time specified *by contract*, statute, or court order, during which a claim for money or property can be made or during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or to recover property, does not prevent the money or property from being presumed abandoned or affect any duty to file a report or to pay or deliver abandoned property to the administrator as required by this Act.

1981 Act, *supra* note 61, § 29(a), 8A U.L.A. at 667 (emphasis added).

Virginia, however, the courts have not considered the contractual limitations issue and the General Assembly did not include the Commissioner's new language when it amended its Act to conform with the 1981 uniform act.[193] As a result, the validity of "private escheat laws" in Virginia remains unsettled.

Virginia's rule generally allowing contracting parties to agree to limitations periods shorter than those provided by statute[194] seems to support holders' ability to enforce "private escheat laws." Virginia, however, should not permit holders to circumvent its Unclaimed Property Act in this manner. "Private escheat laws" undermine the important policies underlying the Act, including the policy of providing revenue for the benefit of the public[195] and the policy of preserving unclaimed property for true owners.[196] If these contractual agreements were upheld in Virginia, property would revert to the *ownership* of the holder rather than to the *custody* of the Commonwealth,[197] and the race of diligence between the Commonwealth and the holder for increasingly shorter escheat periods[198] would leave true owners as the ultimate losers.

The Virginia General Assembly could avoid these problems by amending section 55-210.17 of the Act, adding the word "contract" so that the section would void contractual, as well as statutory limitations periods. The provision then would read:

> The expiration of any period of time specified by *contract*, statute or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property, nor affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the State Treasurer.[199]

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193. *See* VA. CODE § 55-210.17 (1981) (not amended since enactment in 1960).

194. *See* Smith & Marsh v. Northern Neck Mut. Fire Ass'n, 112 Va. 192, 200, 70 S.E. 482, 485 (1911). Insurance agreements now are an exception to the general rule. *See* VA. CODE § 38.1-341 (1981).

195. *See* 1954 ACT, *supra* note 53, prefatory note, 8A U.L.A. at 217; *supra* text following note 70.

196. *See supra* notes 67-68 and accompanying text.

197. *See supra* note 143 and accompanying text.

198. *See Jefferson Lake*, 36 N.J. at ____, 178 A.2d at 338.

199. VA. CODE § 55-210.17 (1981) (italicized language added); *see also supra* note 192 and accompanying text (noting insertion of similar language in 1981 uniform act).

Passage of this amendment would help vindicate the general policy rationales underlying the Act, as well as the Act's explicit purpose of "mak[ing] uniform the law of those states which enact [some version of the uniform acts]."[200]

*Holding Charges*

Another issue that may cause problems in litigation under the Virginia Act is the scope of holders' rights to deduct "holding charges" from abandoned property. On the one hand, holders deserve to be reimbursed for legitimate expenses they incur in maintaining unclaimed property. On the other hand, holders could circumvent unclaimed property statutes by demanding holding charges high enough to eliminate the corpus of any unclaimed property before the abandonment period expires.

The Virginia Act expressly permits holders to charge maintenance fees, but it imposes various conditions on the right to collect these fees, depending upon the nature of the property.[201] For example, a bank cannot charge holding fees due to dormancy or inactivity, beyond the usual maintenance fees it charges against active accounts, unless the bank: (1) had a legally enforceable contract with the owner of the deposit allowing the additional charges; (2) gave written notice to the owner, at the owner's last known address, at least three months before imposing the charges; and (3) regularly enforces agreements to impose such additional charges.[202] The Act, however, contains no provision that directly limits the *amount* that a holder can charge.

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200. VA. CODE § 55-210.29 (1981).

201. *Compare* VA. CODE § 55-210.2:1 (Supp. 1985) (permitting deduction of "lawful charges" from property escheated under omnibus provision) *and id.* § 55-210.5 (permitting "any lawful deduction" from escheated utility deposits) *with id.* § 55-210.3:02 (permitting deduction of holding charges during the escheat of travelers' checks and money orders only if a valid and enforceable written contract between the issuer and the owner of the property permits the issuer to impose the charges, and only if the issuer regularly imposes such charges and does not regularly reverse or otherwise cancel them with regard to such property) *and id.* § 55-210.3:2 (same rule for cashier's checks and certified checks, looking to contract between holder and owner).

202. *Id.* § 55-210.3:01(B). The Commissioners added these requirements to the 1981 uniform act to prevent financial institutions from applying service charges only to property that a state is preparing to escheat. *See* 1981 ACT, *supra* note 61, § 6 comment, 8A U.L.A. at 640.

The lack of any apparent limitation on the amount a holder can charge allows holders to circumvent the Act by contracting for service charges when they actually render little or no service. The facts of *Boswell v. Samson Banking Co.*[203] illustrate how a bank in another jurisdiction sought to avoid an act similar to Virginia's, and how that jurisdiction acted to prevent the avoidance. In *Boswell*, the signature card of each depositor included language providing: "It is agreed that a service charge may be made by the bank each month for handling this account, and the amount thereof shall be charged against this account."[204] The bank's general policy was to charge three dollars per month on "active" accounts, but not to charge a fee when no transactions had been recorded on an account for the previous two or three months. In 1958, the bank segregated these dormant accounts at the request of the Federal Deposit Insurance Company. From that date until April 1971, when Alabama adopted the Uniform Disposition of Unclaimed Property Act, the bank did not assess service charges against the segregated accounts. In July 1971, however, the bank decided to assess a "deferred accumulative" service charge on the dormant accounts. These deferred charges eliminated the balance of 222 of the 248 segregated accounts, preventing the State from escheating the proceeds of those accounts under its new statute.[205] The Alabama Court of Civil Appeals held that the bank could not lawfully withhold any charges after the Alabama act had made the property presumptively abandoned and reportable to the State. It specifically expressed no opinion, however, regarding whether the bank could have deducted the charges before the accounts had become escheatable.[206]

Even if the Virginia courts followed *Boswell*, holders of unclaimed property still could circumvent the Virginia Act. By providing contractually for holding charges on abandoned property, holders effectively could "escheat" to themselves a large portion of the property. As long as these contracts were made up front, so that they complied with the requirement in *Boswell* that charges

203. 368 So. 2d 547 (Ala. Civ. App. 1978).
204. *See id.* at 549.
205. *See id.*
206. *Id.* at 551.

be imposed before property becomes presumptively abandoned,[207] and so that they complied with the requirements of the Virginia Act,[208] the charges apparently would be upheld.

Courts in other jurisdictions have been hostile to such evasive schemes[209] but, unlike decisions concerning private escheat laws,[210] no court has held maintenance charges invalid per se.[211] Some of these jurisdictions, however, successfully have discouraged evasion by imposing a "reasonableness" standard on holders. California, for example, allows banking and financial institutions to deduct only "reasonable service charges which may lawfully be withheld and which do not (where made in this state) exceed those set forth in schedules filed . . . from time to time with the State Controller."[212] Holding fees on deposits with these institutions that escheat to the State, beyond these "reasonable service charges," explicitly are prohibited.[213]

The General Assembly could avoid circumvention of the Virginia Act by adopting a similar standard. A reasonableness standard would permit holders who actually incur costs in maintaining unclaimed property to recover those costs, but it also would prevent overreaching by holders bent on retaining escheatable property. The reasonableness standard should not be limited to banking and financial organizations, as it is in California, because the rationale for the standard applies equally to all holders who might incur costs in maintaining unclaimed property. The standard should extend to all holders desiring to offset their costs by charging a holding fee.

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207. *See supra* note 206 and accompanying text.

208. *See supra* notes 201-02 and accompanying text.

209. *See, e.g.*, Cory v. Golden State Bank, 95 Cal. App. 3d 360, 157 Cal. Rptr. 538 (1979) (holding charge on money orders not cashed within one year struck down because contractual provision too inconspicuous); *see also* Travelers Express Co. v. Cory, 664 F.2d 763 (9th Cir. 1981) (report including service charge on unclaimed property that wiped out 78% of all accounts held improper).

210. *See supra* note 191 and accompanying text.

211. *See supra* note 209.

212. CAL. CIV. PROC. CODE § 1513(a) (West Supp. 1986) (banking organizations); *id.* § 1513(b) (financial institutions).

213. *See id.* § 1522 (West 1982) (prohibiting holding fees of any kind "unless specifically permitted by this chapter").

## CONCLUSION

Virginia's current unclaimed property law generally follows the common law doctrine with regard to tangible personalty, giving ownership to the first person to take physical possession, except for statutory provisions governing abandoned motor vehicles, property abandoned in safe deposit boxes, unclaimed property voluntarily reported to the Commonwealth, and unclaimed property held in the ordinary course of business. With regard to intangible property, Virginia has joined thirty-five other jurisdictions in adopting a version of the Uniform Disposition of Unclaimed Property Act. This Act gives the Commonwealth, after a specified dormancy or "abandonment" period, a right to possess abandoned property covered by the Act until the owner appears to claim it. Recent amendments designed to strengthen enforcement under the Act are likely to cause increased litigation, in which several problems in the current Act may arise.

The ten-year retroactivity provision of the Act, for example, may cause significant problems if the Commonwealth attempts to escheat property for which the statute of limitations had run before the Act became effective. When finally confronted with the issue, the Virginia courts should refuse to permit the Commonwealth to apply the Act retroactively to reach such property. The General Assembly could avoid two other potential problems, involving holders' contractual impositions of "private escheat" provisions and unreasonable holding charges, by modifying the Act to prohibit "private escheat" contracts and to impose a reasonableness requirment on holding charges. Adoption of all these suggestions would help further the goals and general purpose of the Virginia Act by balancing the needs and interests of holders, owners, and the Commonwealth.

K. REED MAYO