

# Unclaimed Property 101: Cooperative Perspective

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# What is Unclaimed Property?

**Unclaimed Property is personal property (as opposed to real property or land) that has remained unclaimed by its apparent owner for a statutorily predetermined period of time.**

**Examples for co-ops:**

- **Payroll or Rebate Checks**
- **Allocated patronage capital**

# Holder v. Owner

**A “holder” is loosely defined as any individual, business association, estate, trust or any other type of legal or commercial entity in possession of property that belongs to another or is indebted to another, i.e., a cooperative.**

**An “owner” is a person whose name appears on the records of a holder as the person entitled to property held, issued, or owing by the holder, i.e., a member, patron or other payee of a cooperative.**

# Rights to Unclaimed Property

**Holders must turn over (“report”) unclaimed property. You are out of compliance if you are still holding unclaimed property.**

**States generally have the right to property which has not been claimed by the owner within the applicable statutory period.**

**Holders generally have an obligation to report to the State any property which has been deemed abandoned, and turn over the unclaimed amounts to the State.**

**Why? Because states can best reunite the property with the owner.**

**But, really . . . why? \$ Revenue \$**

# Which State May Claim?

**States started fighting over buckets of unclaimed intangible property, i.e. money orders.**

**Disputes between states are resolved at the U.S. Supreme Court.**

**SCOTUS created a rule in the 1960s:**

- **First priority: state of the last known address of the apparent owner as shown by the books and records of the holder.**
- **Second priority: state of incorporation of the owner's domicile to determine which state law governs the transfer or custody of unclaimed property.**

**Why? Practical fairness among states.**

# When Can a State Claim?

**Depends on state law and depends on the property!**

**Each state has adopted unclaimed property statutes. Forms of uniform laws exist but have not been uniformly adopted—including versions based on 1954, 1981, 1995 and 2016 Uniform Acts.**

**A co-op formed under Oregon law operating around the country may have 50 different state laws to address.**

**2016 Act:**

- **Money order, seven years.**
- **General debt, three years**
- **Utility refund, one years.**

**Do you see this can get messy in a hurry!**

# Compliance with Unclaimed Property Law—Practical Steps

**Build a team. Compliance is a blend of: compliance or risk management + accounting + legal.**

**Engage third party consultants.**

# Unclaimed Property Audit

**They will find you! States in recent decades have engaged third-party contingency-based audit firms to audit companies on behalf of the states (including multiple states at once).**

**Auditors use lookback periods and extrapolation or estimation techniques to fill in missing records. Some state statutes create a presumption against a company if records are missing or incomplete.**

**Consider participating in:**

- **Voluntary Disclosure Agreement programs.**
- **Delaware Expedited Audit Program.**



# Unclaimed Patronage Interests Can be Unclaimed Property

**Unclaimed property statutes were historically cautious to include underlying equity interests in the scope of unclaimed property reporting because the owner is not ordinarily expected to make indications of ownership of equity interests.**

**1981 Act, 1995 Act and 2016 Act clearly provide that the *underlying equity interest* is subject to unclaimed property reporting.**

# What Constitutes “Abandoned”?

**There are certain state-by-state nuances.**

**Each state effectively provides that failure by a shareholder to deposit a certain number of distribution/dividend checks or returned/undeliverable mail to a shareholder constitutes evidence of abandonment of an equity interest.**

# Unenforceable Provisions

**Contractual provisions which forfeit an owner's right to unclaimed property may not be enforced against the State. This is sometimes called "Private escheat".**

**As it pertains to dividends, members have already performed their obligation by virtue of being a member of the cooperative. Provisions requiring members to "claim" their dividends will likely be held unenforceable against the state.**

# Only “Fixed and Certain” Property Rights Can be Unclaimed Property

Unclaimed property reporting statutes generally apply only to property rights that are “fixed and certain”.

Both the 1995 and 2016 Act have a definition of “Property” that covers only “a *fixed and certain* interest in intangible property” (emphasis added).

The 1954 and 1981 Acts do not expressly include “fixed and certain” in the statutory definitions; however, prevailing case law and commentary suggest that the fixed and certain requirement is implied.

# Conditions Precedent to Collection Unenforceable Against the State

**While a property right must be fixed and certain, most states have adopted a statutory provision that the state is not subject to a demand/presentment condition that is otherwise applicable to the property.**

**These statutory provisions permit a state to take unclaimed property from a holder, even though the owner has failed to satisfy a condition precedent to the owner's rights in the property.**

**See for example Section 2(b) of the 1981 Act and 2(e) of the 1995 Act, which provide that "Property is payable or distributable for the purpose of this Act notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment."**

# Cooperative Interests are (Sometimes) Squishy

**Outcomes in co-op equity interest litigation depend on language in bylaws—in particular director discretion to redeem—and the nature of the equity interest.**

**Courts have found that in certain circumstances under the by-laws of the Co-op, any “right of payment” does not exist.**

**The presence of board discretion with respect to redemption/cancellation of patronage equity has also resulted in other rulings that member interests have no intrinsic value and that a co-op’s obligation to a member does not constitute an indebtedness obligation.**

# Patronage Equity Features to Avoid Unclaimed Property

**Look for facts that the member does not have a “fixed and certain” obligation to pay distributions. For instance:**

- **Any redemption is in the discretion of the board.**
- **No member has a right to require redemption.**
- **The board may in its discretion cancel patronage interests in the event of a net loss, subject to certain limitations.**
- **Membership can be terminated in the discretion of the board, if a member does not patronize for XYZ period (among other reasons).**
- **Age-eligible redemption is not “automatic”.**
- **Any redemption policies may be modified by the board.**
- **Follow your own policies/requirements.**

# Co-op Exceptions in Unclaimed Property Laws

**Several states have statutory exceptions to unclaimed property reporting for property held by cooperatives.**

**State-specific exemptions may apply only to cooperatives organized in the given state. Recall the first priority rule: the relevant state is the last known address of the *owner*.**

**Many states that have adopted exceptions limit the exception to electric co-ops or other specific types of co-ops.**





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Erik is a partner in the Finance & Restructuring practice group of Dorsey & Whitney.

Unclaimed property matters make up an important part of Erik's practice. Erik advises companies on a full range of unclaimed property matters—from establishing an initial compliance program and voluntary disclosures through navigating and defending an unclaimed property audit.

In addition to unclaimed property matters, Erik's practice also includes:

- representing administrative agents, lenders and borrowers in various forms of debt financing transactions;
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Mike is the Firmwide Leader of Dorsey & Whitney's 200-lawyer Food & Agribusiness industry Group.

Mike started his career as a client, not a lawyer. He represented the same company where he worked in management, thus “walking both sides of the street.” As a lawyer, Mike had devoted his practice to practical, results-oriented advice and litigation representation in situations where the law, facts or business risks are ambiguous.

Mike's practice is devoted to the areas of employment law, agriculture and cooperative law, and in the food and agriculture industries. He has litigated employment and labor issues across Washington and California and advised across the United States. Throughout his career, a substantial part of Mike's practice has been representing agriculture and food-based companies. He acts as outside general counsel in that industry, handles corporate governance, and manages complicated domestic and international transactions.

On the business side, Mike developed Dorsey's LegalMine Document Review Solution from concept to operation. He has also held leadership roles as Office Head for Seattle (where he negotiated a large office move, and the office was named one of Washington's Best Workplaces) and as co-head of the Labor & Employment and other practice groups.

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