

# What in the World is “UNCLAIMED PROPERTY”?

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## ...and Why Does it Matter to Your Business?

Every state in the U.S. has some form of an unclaimed property law, or UPL. State UPLs generally require businesses that are holding property due and owing to another (i.e., usually money) to hand over that property to the appropriate state government if the business loses contact with the owner for a statutory period known as a “dormancy period.” Dormancy periods for various property types range from one to seven years.

So, if businesses are obligated to comply with state UPLs in situations where they are holding property that is due and owing to another, why is it that so many businesses have never heard of unclaimed property or filed an unclaimed property report?

### Unclaimed property at a glance

To get some sense of why unclaimed property law compliance is not on many business’ radars, we have to start with some historical context about where the concept originated. In medieval England, the doctrine



of *bona vacantia* was developed to ensure that lands and other property owned by deceased or absent owners would not go unclaimed or unattended. The doctrine of *bona vacantia* required unclaimed personal property and lands to revert to the Crown because the benefit to society was considered to be more important than the benefit to the individual finder or possessor of the unclaimed property. Over the years, *bona vacantia*



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evolved under English common law and carried over to the United States common law; it was recognized judicially as early as 1905. At that time, the development of unclaimed property law concepts in the United States was disjointed and nonuniform, which created competition, and often disputes, among states over which state had the most superior claim to unclaimed property.

In order to bring uniformity, order and predictability to the administration of unclaimed property, the National Conference of Commissioners on Uniform State Laws released its first Uniform Unclaimed Property Act in 1954. A second version was released in 1966, a third version was released in 1981, a fourth version in 1995 and a fifth version in 2016. Forty-one states have enacted at least one version of the Uniform Act. Coincidentally, Ohio is among the few states that have enacted their own UPL and not adopted any version of the Uniform Act.

In the 1960s, the Supreme Court of the United States established federal common law rules that govern which state has the most superior right to take custody of unclaimed property. In *Texas v. New Jersey*, the Supreme Court established the Primary and Secondary Rules of Escheat.<sup>i</sup> Under the Primary Rule, the state with first priority to take custody of unclaimed property is the state of the owner’s last known address according to the books and records of the holder of the property. Under the Secondary Rule, if the owner’s last known address is unknown, the state of the holder’s incorporation or organization may take custody of the property. When a state asserts jurisdiction over unclaimed property through its UPL, this is colloquially referred to as “escheat”; however, the concept of escheat typically refers to a permanent taking of property or taking title to property. Under state UPLs, the states’ rights in unclaimed property are custodial in nature, meaning the state merely has authority to hold the property until the owner of the property comes forward to claim it.

In order to compel compliance with the UPL, the UPLs permit the states to audit businesses for unclaimed property law compliance. These audits are typically conducted by auditors compensated on a contingent-fee basis, meaning the auditor's fee is paid out of the unclaimed property located during the audit. Auditing businesses for unclaimed property compliance is the primary enforcement mechanism used by states to "encourage" compliance with the UPLs.

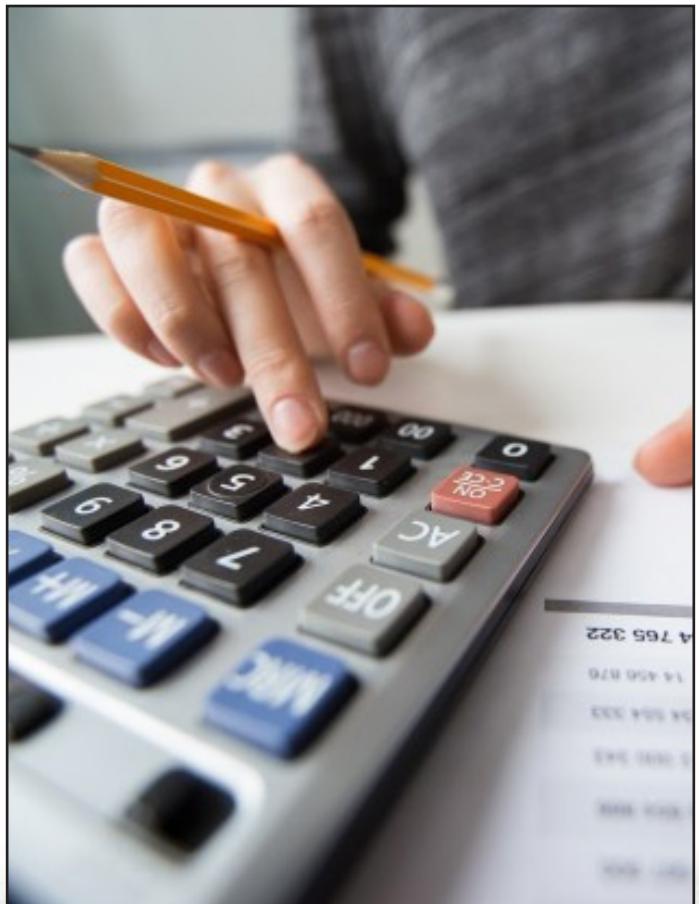
Businesses comply with UPLs by filing annual unclaimed property reports and paying the properties identified in the report to the appropriate state government to hold in trust until the true owner comes forward. Despite the fact that the vast majority of businesses, large and small, have an obligation to file annual reports and pay unclaimed property liabilities, less than 2 percent of businesses in the United States file unclaimed property reports as required by law.

## What are some examples of unclaimed property held by businesses?

Unclaimed property has two forms – tangible (i.e., physical property – tables, chairs, etc.) and intangible property (e.g., money, uncashed checks, credit balances, stock shares, etc.). Most state UPLs do not require unclaimed tangible property to be reported, so we will not address that here. A majority of businesses, however, generate a significant amount of unclaimed intangible property on an annual basis in the ordinary course of business through payroll, customer and/or vendor credit balances, voided and uncashed checks,

lost stockholders, and mergers and acquisitions. Businesses that fail to comply with state UPLs and do not file reports where required risk the dreaded "audit lottery." Unclaimed property audits typically last three to seven years and cause a significant amount of business disruption and human resource allocation. The contingent-fee auditors running the audits routinely issue extremely voluminous and overbroad information requests and often take unreasonable positions given their pecuniary interest in the outcome of the audit. Consequently, unclaimed property audits more closely

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resemble fishing expeditions than a process to enforce a legitimate state interest. Companies that willfully fail to comply with state UPLs and take their chances with the audit lottery likely face significant interest charges and other penalties when their numbers eventually come up.

## How can I help my client comply with the UPLs?

If your client has never filed an unclaimed property report, there are some steps that you can help them take to begin the journey toward full compliance. First and foremost, you should inform them about opportunities to voluntarily come into compliance. Many states offer amnesty or Voluntary Disclosure Programs, which allow businesses that are out of compliance to voluntarily report their unclaimed property in exchange for a waiver of interest and penalty. Second, evaluate which areas of your client's business create unclaimed property exposure and advise them on how to fill those gaps and prevent liability from continuing to accrue. Businesses that are newer and have not accrued several years of historical unclaimed property liability can come into compliance by filing annual reports as required by law. For the more unfortunate businesses that have already received a Notice of Examination and have been selected for audit, ensure that the auditors play by the rules (and consult an unclaimed property professional as necessary).

The worst approach you can take is to ignore your client's unclaimed property obligations or take the position that the business does not generate unclaimed property. Noncompliance with state UPLs over a long period of time can lead to millions of dollars of liability. For more general information on unclaimed property laws and how they impact your clients (or you, if you own your own law firm), check out UPPO.org and the Ohio Division of Unclaimed Funds website - <https://www.com.ohio.gov/unfd/>.

<sup>1</sup> 379 U.S. 674 (1965)

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