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Issues Of Sovereignty In Escheat And The Uniform Unclaimed Property Act*

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ISSUES OF SOVEREIGNTY IN ESCHEAT AND THE UNIFORM UNCLAIMED PROPERTY ACT*

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I. INTRODUCTION

States throughout the country are scrambling to fill their coffers with billions of dollars in unclaimed funds unknowingly left in the possession of literally every business in the United States. While unclaimed property holders, courts, commentators and others have often assumed that the Supreme Court in *Texas v. New Jersey*[1] limited the right to claim abandoned property to the state of last known address of the owner, a careful analysis of the holding does not support this conclusion. This article will examine the ability of a state to claim abandoned intangible property and to exclude the claims of other states to that same property. In 1981, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the Uniform Unclaimed Property Act (the "Act") which offers a resolution of these issues different from the resolution contained in the previous Uniform Disposition of Unclaimed Property Act.[2] The ability of one state to claim abandoned intangible property and to exclude the claims of rival states to the same property poses vexing questions of sovereignty, jurisdiction and priority of claims.

While this article is limited to issues bearing on the right of a state to claim property and the ability of a state to secure its claims, a brief

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[1] 379 U.S. 674 (1965).

[2] *See Uniform Disposition of Unclaimed Property Act* (1954); *Uniform Unclaimed Property Act* (1981). The National Conference of Commissioners on Uniform State Laws promulgated the original Uniform Disposition of Unclaimed Property Act in 1954. The Commissioners made some minor amendments in 1966. The portions of the 1954 Act pertinent to this article remained unchanged following the 1966 amendments. Available records do not indicate the reasons that the Uniform Laws Conference did not consider the impact of *Texas v. New Jersey* at the time of the 1966 revision. The authors speculate that the 1966 amendments, which were made at the request of the traveler's check and money order issuers, were substantially completed prior to the Supreme Court decision.

discussion of modern unclaimed property doctrine is provided to assist the analysis. Accordingly, Section I of the article consists of a brief historical sketch of the roots of modern unclaimed property doctrine, escheat and *bona vacantia*, as well as a brief examination of current unclaimed property laws. The peculiar nature of intangible property, a chose in action with no apparent situs, has given rise to conflicting claims of sovereignty. Section II of this article examines the Supreme Court cases leading up to *Texas v. New Jersey* that have wrestled with the problems of escheat of intangible property. *Texas v. New Jersey* marked a change in direction by the Supreme Court and raised some difficult problems with existing abandoned property legislation, including the 1954 Uniform Act. A major reason for the 1981 revision of the Uniform Act was to conform the Act to the United States Supreme Court's decision in *Texas v. New Jersey*. Section III of this article considers *Texas v. New Jersey* and the 1981 revision of the Act.

While the controlling principle of *Texas v. New Jersey*, that unclaimed property is an asset of the lost creditor and is subject to claim by the state of the creditor's last known address, is easy to articulate, implementation of that principle by statutory enactment is not so simple. Varying business practices of obligors (holders), limitations on state power to compel reporting, and costs of collection are significant factors that make efforts to carry out the priority scheme of *Texas* precarious. Section IV of this article reviews those provisions of the 1981 Uniform Act that concern the states' authority to claim abandoned property, or state sovereignty, and the states' ability to effectively assert its claims. While the 1981 Act's provisions permitting the assertion of claims to abandoned property go beyond the bare rule of *Texas v. New Jersey*, the provisions are fully consistent with the philosophy of that decision and provide a comprehensive scheme for the assertion of claims to abandoned property.

II. ESCHEAT, *BONA VACANTIA* AND MODERN UNCLAIMED PROPERTY LEGISLATION

At common law, the lands of a tenant who died without heirs escheated to the feudal lord or, in the absence of a mesne lord, to the Crown itself.[3]

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[3] *See* Garrison, *Escheats, Abandoned Property Acts, and Their Revenue Aspects*, 35 KY. L.J. 302, 302 (1947); Sentell, *Escheat, Unclaimed Property, and the Supreme Court*, 17 W. RES. L. REV. 50, 50 & n.4 (1965); Note, *Origins and Development of Modern Escheat*, 61 COLUM. L. REV. 1319, 1319-20 (1961) [hereinafter cited as *Escheat*]. The courts originally developed escheat to assure continued performance of services to the lord as consideration for the grant of land from lord to tenant in fee. *Escheat, supra*, at 1319-20. If the tenant died without heirs, by definition no member of the tenant's line existed to perform the required services. *Id.* Consequently, the land reverted to the tenant's immediate lord. *Id.* at 1320. If the King was the tenant's immediate lord, or if the immediate lord could not be determined, escheat operated in favor of the Crown. *Id.*

Escheat developed initially as a doctrine applicable only to real property held in fee. F. ENEVER, BONA VACANTIA 15 (1927); Garrison, *supra*, at 303; *Escheat, supra*, at 1327. The

Certain ownerless personal property also passed directly to the sovereign under the doctrine of *bona vacantia*.[4] The Crown's claim to realty was based on its right as lord paramount. Royal claim to personalty was predicated on the absence of, or abandonment by, the owner, rather than the Crown's status as an ultimate owner. In this country, the Crown's claims of sovereignty were assumed by the states.[5] All states provide for the escheat of real property. Title to the property ultimately vests in the state after the expiration of statutorily prescribed time periods for missing heirs to assert claims. Modern legislation is based on the concept of abandonment and seeks to assert control over a wide array of tangible and intangible property.[6]

Unclaimed property legislation generally covers all forms of abandoned intangible property, including bank deposits, savings accounts, stocks, bonds, dividends, utility deposits, and insurance drafts.[7] The broad reach of the 1954 Uniform Act is typical, covering "*all* intangible property . . . held, issued or owing in the ordinary course of a holder's business."[8] States have become increasingly aware that unclaimed property is big business both financially and politically.[9] Unclaimed property represents possibly

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common law doctrine of *bona vacantia* applied to personalty in situations otherwise calling for escheat. *See infra* note 4 (explanation of *bona vacantia*). Current statutes do not preserve the distinction between realty and personalty, therefore, escheat is applicable to personality. *See infra* note 8 (§9 of Uniform Disposition of Unclaimed Property Act).

[4] *Escheat, supra* note 3, at 1326. Originally, *bona vacantia* applied only to personalty. *Id. Bona vacantia* enabled the Crown to claim personalty against all but the rightful owner. *Id.* If a person died without heirs, the Crown could claim the decedent's personal property. *See id.* at 1327. The Crown claimed as custodian for the rightful owner and had a more equitable claim than that of a stranger. *Id.* at 1326-27. If no rightful owner existed, or if none appeared to claim the property, the Crown kept title. *Id.; see generally id.* at 1326-31.

[5] Standard Oil Co. v. New Jersey, 341 U.S. 428, 435-36 & nn.5-6 (1951). "As a broad principle of jurisprudence ... a state ... may use its legislative power to dispose of property within its reach, belonging to unknown persons." *Id.* at 435-36. States remain free to escheat property provided the state operates within state and federal constitutional limits. *See* Cunnius v. Reading School Dist., 198 U.S. 458, 471-72 (1905). States assert escheat rights under their police power as protectors of their citizens. *Escheat, supra* note 3, at 1320. A state, however, must exercise its powers by legislation. In *Illinois Bell Telephone Co. v. Slattery*, the court refused to apply the doctrine of *bona vacantia* to unclaimed telephone rate refunds since no unclaimed property legislation existed in the state. 102 F.2d 58, 68 (7th Cir. 1939). The court held that the doctrine of *bona vacantia* was too uncertain and indefinite to be declared a part of the common law of Illinois. *Id.*

[6] *See* Note, *Unclaimed Property—A Potential Source of Non-Tax Revenue*, 45 MO. L. REV. 493, 500-501 (1980) [hereinafter cited as *Unclaimed Property*] (explaining wide scope of Uniform Disposition of Unclaimed Property Act § 9 (1954)); *Uniform Unclaimed Property Act* § 1(10) (1981) (defining "intangible property" broadly for purpose of Act)).

[7] *See, e.g., Uniform Unclaimed Property Act* § 1(10) (1981).

[8] *Uniform Disposition of Unclaimed Property Act* § 9 (1954). The comment to § 9 describes the section as an "omnibus" provision covering all intangible personal property not otherwise covered by the 1954 Act. *Id.* § 9, comment. The only limitation on the scope of the 1954 Act, besides time limitations, is the requirement that the property be "held or owing in the ordinary course of the holder's business." *Id.*

[9] N.Y. Times, Feb. 20, 1982, at 30, col. 1.

the single largest source of non-tax revenue now available to financially strapped states. Additionally, the return of unclaimed property to constituents offers real political rewards. States pursuing aggressive policies to locate missing owners have been able to return as much as fifty to sixty percent of the value of savings accounts initially reported as abandoned property by banks.[10]

While precise information on the total value of unclaimed property outstanding is unavailable, in 1962 the Wall Street Journal reported a figure of fifteen billion dollars, growing at the rate of one billion dollars annually.[11] States with aggressive programs have recovered significant sums of money. For instance, in 1978 California took in more than thirty-two million dollars and over the last three years Massachusetts has recovered in excess of fifty-five million dollars.[12] Presently the states are holding an estimated 1.2 billion dollars in unclaimed property.[13]

All but two states have some form of unclaimed property legislation covering various types of intangibles that have remained unclaimed by the owner for a statutory period.[14] Following a prescribed period of dormancy, the property is presumed abandoned and then is reported to the state.[15] If reunification efforts are unsuccessful, amounts remaining unclaimed are ultimately turned over to the state. A few states have escheat laws that provide for a period of custody during which the owner can appear and redeem his property. After the period of custody, the state initiates formal escheat proceedings that vest absolute ownership in the state.[16] Most statutes, however, are purely custodial in nature. The state

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[10] Letter from Jim Lord, Minnesota State Treasurer (1982) [hereinafter cited as *Letter from Lord*], on file at *Washington and Lee Law Review* office; Letter from Paul Shanley, Chief Legal Counsel to Massachusetts State Treasurer (1982) [hereinafter cited as *Letter from Shanley*], on file at *Washington and Lee Law Review* office.

[11] Wall St. J., Jan. 22, 1962, at 1, col. 1.

[12] *See Letter from Shanley, supra* note 10.

[13] *See Letter from Lord,* supra note 10.

[14] *Uniform Unclaimed Property Act* prefatory note, at 5 (1981). Neither Colorado nor Missouri has a comprehensive statute covering unclaimed intangible personal property. Colorado's applicable statute only covers automobiles. COLO. REV. STAT. § 42-16-101 to 46-16-107 (Supp. 1981). *See Unclaimed Property, supra* note 6, at 497-502, 509-10 (comparing 1954 Act to Missouri's existing statutes and concluding that Missouri should adopt 1954 Act). Ohio law has scattered code sections relating to escheat.

[15] *Compare Uniform Unclaimed Property Act* § 2 (1981) (general period of dormancy five years, yet, §§ 4, 8, 9, 13, 15 allow for one-year period for certain types of property and fifteen-year period for travelers checks), *with Uniform Disposition of Unclaimed Property Act* § 2 (1954) (general period of dormancy seven years). *But see id.* §§ 2(c), 6 (providing two-year period for property held by dissolved business association and fifteen years for travelers checks).

[16] *See, e.g.*, N.J. STAT. ANN. §§ 2A:37-12, 37-13 (West Supp. 1981). The formal escheat proceedings include court trial, *see* N.J. STAT. ANN. § 2A:37-17 (West 1952), and adequate notice to the unknown owner of the property, *id.* § 2A:37-18, 37-19. New Jersey also allows the unknown owner to reopen his claim against the state for two years after final judgment in the escheat proceeding. *Id.* § 2A:37-28 (West Supp. 1981). *Cf. supra* note 17 (states generally have custodial and not escheat statutes, allowing unknown owner to claim at any time).

remains a perpetual custodian for the owner and never claims title to the property. The 1981 Uniform Act, like its predecessor, is a custodial statute and applies generally to all intangible property.[17]

The operative procedures of custodial unclaimed property laws are quite simple. Assume that W.C. Fields, while enroute from Philadelphia, got off the train for a few minutes in Smalltown and opened a checking account.[18] As was his custom, W.C. Fields got back on the train, went to Philadelphia and forgot all about the account with Smalltown Bank. The legislature has said that after a requisite number of years, generally seven, an account like W.C. Fields' is presumed abandoned. The relationship between Smalltown Bank and Fields is, in banking law terms, that of debtor-creditor. In terms of abandoned property legislation the relationship is that of owner-holder. Smalltown Bank is an obligor or "holder" and is indebted to Fields on an obligation subject to the state unclaimed property law. The bank is required to attempt to locate Fields and reunite him with his property. If those reunification efforts fail, the bank must report the existence of the property to the state.[19] The state subsequently must attempt to locate the missing owner, Fields, by a combination of mail and advertising notices.[20] If the state cannot locate Fields, Smalltown Bank is required to pay the amount owing to Fields over to the state and Smalltown Bank is relieved of liability.[21] Most states hold the proceeds from the property in the general fund subject to later claim by owners like Fields who subsequently appear.[22]

III. CLAIMS OF SOVEREIGNTY

States possess the right to determine the mode of acquisition and transfer of property and the rules for succession to ownership of property under the perogative of sovereignty. States may subject debts owed

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[17] *Uniform Unclaimed Property Act* prefatory note, at 5 (1981) (1981 Act custodial in nature).

[18] W.C. Fields apparently went through life with a constant fear of poverty. At an early age he decided to open a bank account everywhere he went. "Sometimes he hopped off trains and opened an account while the engine took on water. He piled the bank-books in a corner in his wardrobe trunk, and, for the most part forgot them." R.L. TAYLOR, W.C. FIELDS 58-60 (London 1950). At one time he had, according to his own estimate, 700 accounts in banks all over the world. At the time of death 30 accounts were located by his executors. *Id.*

[19] *See Uniform Unclaimed Property Act* § 17 (1981); *Uniform Disposition of Unclaimed Property Act* § 11 (1954).

[20] *See Uniform Unclaimed Property Act* § 18 (1981); *Uniform Disposition of Unclaimed Property Act* § 12 (1954).

[21] *See Uniform Unclaimed Property Act* § 19 (1981); *Uniform Disposition of Unclaimed Property Act* § 13 (1954).

[22] *See Uniform Unclaimed Property Act* § 23 (1981); *Uniform Disposition of Unclaimed Property Act* § 17 (1954). Several states have made special provisions for deposit of the funds from unclaimed property. For example, in Wisconsin, the school fund receives the unclaimed property. WIS. STAT. § 177.18 (1977). In Illinois, the State Pension Fund is the recipient. ILL. REV. STAT. ch. 141 § 118 (1961).

to unknown persons to claims of sovereignty.[23] Most assertions of sovereignty over realty and tangible personalty present no problems of competing state claims since the state may reach property located within its borders. States encounter greater difficulties when claiming intangible property. The issue is under what circumstances a state may reach intangible property belonging to unknown persons. A holder domiciled in State A, with its principal place of business in State B, may owe unclaimed intangible property to a missing owner whose last known address is in State C. Any or all of these states could make a colorable claim to the property.[24] Judicial authority lends support to the claims of the domiciliary state and the state of last known address.[25] Congressional legislation supports the claim of the state of principal place of business in the case of money orders.[26]

Much of the difficulty in establishing limits on sovereignty results from attempts to create a fictional situs for an intangible chose in action which has no real situs.[27] A state claiming intangible property traditionally

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[23] Provident Inst. for Sav. v. Malone, 221 U.S. 660, 664 (1911); *see supra* note 5 (state sovereignty).

[24] *See* Texas v. New Jersey, 379 U.S. 674, 676, 677, 679-82 (1965) (claims were made by state of corporate domicile, state of principal place of business, and state of creditor's last known address); Standard Oil Co. v. New Jersey, 341 U.S. 428, 429 (1951) (claim by state of corporate domicile); Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 548, 549 (1948) (claim by state of creditor's last known address). *See generally* Note, *Texas v. New Jersey, 379 U.S. 674 (1965)—Escheat of Intangibles*, 60 NW. U.L. REV. 550, 554-56 (1965) [hereinafter cited as *Escheat of Intangibles*].

[25] *See* Texas v. New Jersey, 379 U.S. 674, 680-82 (1965) (upholding claim of state of creditor's last known address); Standard Oil Co. v. New Jersey, 341 U.S. 428, 442 (1951) (upholding claim of state of corporate domicile); Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 548, 549 (1948) (upholding claim of state of creditor's last known address).

[26] *See* Disposition of Abandoned Money Orders and Travelers' Checks, Pub. L. No. 93-495, §§ 603, 604, 88 Stat. 1525, 1525-26 (1974)(codified at 12 U.S.C. § 2501 et seq. (1976)). Following the decision in *Pennsylvania v. New York*, holding that the state of corporate domicile was entitled to escheat money orders when no last known address of the purchaser existed although the property had been purchased in other states, Congress enacted legislation providing that the state of purchase may claim money orders and traveler's checks even without any record of the last known address of the purchaser. *See* 407 U.S. 206 (1972) (Pennsylvania); 12 U.S.C. §§ 2501 et seq. (1976). If the state of purchaser did not claim, the property could be taken by the state of principal place of business of the holder. *Id.* *Texas v. New Jersey* was the first case in which the Court faced actual competing claims by states. *See infra* notes 70-133 and accompanying text. Both in *Standard Oil* and in *Connecticut Mutual* the claim of only one state was before the Court. *See infra* notes 41-53 and accompanying text.

[27] *See* Severnoe Sec. Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 123-24, 174 N.E. 299, 300 (1931).

> The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to the discharged; for others, any place where the debtor can be found. At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions. (citations omitted).

would base its claim on a fictional situs within the state's borders.[28] Other states could construct equally plausible fictions. For instance, in the example above, State A, the state of corporate domicile, could claim that the situs of the debt was within its boundaries because all corporate transactions "originate" there.[29] State B, the holder's principal place of business, could claim that because the holder transacted the most business in B, the holder's obligations must be located in B as well.[30] Finally, State C, the state of last known address of the owner, could argue that since the property was an asset of the creditor, the situs was in the state where the creditor resided.[31] The early unclaimed property legislation, however, did not raise these questions of sovereignty because the initial state claims were generally local in character. Only later did conflicting claims to property arise. The following paragraphs briefly trace the history of the major unclaimed property cases in the United States Supreme Court.

In the early twentieth century, several states exercised sovereignty and passed unclaimed property or escheat laws applicable to dormant accounts in savings institutions and banks. The Supreme Court upheld the constitutionality of one of the earliest of these statutes in *Provident Institution for Savings v. Malone*.[32] Massachusetts had enacted a statute authorizing the state to take custody of dormant savings accounts. The statute required the state to hold money received in custody subject to the claim of the rightful owner. The holder contested the authority of the state to require the turnover of a depositor's account. In rejecting the holder's argument, the *Malone* Court noted that the Massachusetts statute was custodial and that the owner could always claim his money from the state.[33]

A few years later, the Supreme Court was called upon to review a California escheat statute, the application of which also was limited to dormant bank accounts. In the first case from California, *First Nat'l Bank of San Jose v. California*,[34] the Court disallowed the escheat of deposits in a national bank, primarily because the Court believed state escheat legislation would interfere with the congressional purpose of establishing a national banking system. In the same year, however, the Court in *Security Sav. Bank v. California*,[35] upheld the validity of the California escheat statute as applied to state bank deposits. In *Security Savings*, Mr. Justice Brandeis, writing for the Court, made it clear that, if minimal due pro-

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Id. "... intangible property, such as a debt ... is not physical matter which can be located on a map." *See* Texas v. New Jersey, 379 U.S. 674, 676 (1965).

[28] *See, e.g.*, Standard Oil Co. v. New Jersey, 341 U.S. 428, 430, 438 (1951) (claimant maintained debt's situs was in state of corporate domicile).

[29] *See id.*

[30] *See* Texas v. New Jersey, 379 U.S. 674, 680 (1965).

[31] *See id.* at 677, 680-82; Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 548, 549 (1948).

[32] 221 U.S. 660, 666 (1911).

[33] *Id.* at 664, 665.

[34] 262 U.S. 366, 370 (1923).

[35] 263 U.S. 282, 285-86 (1923).

cess safeguards were provided to protect the depositor's legitimate interests, whether the state actually escheated the property or merely transferred custody to itself was irrelevant.[36] In 1944, the Court in *Anderson Nat'l Bank v. Luckett*,[37] permitted Kentucky to take custody of unclaimed accounts in a national bank. The Court distinguished *First Nat'l Bank of San Jose v. California* on the somewhat disingenuous ground that the California statute was an escheat statute, disregarding the fact that the Kentucky statute also provided for a possible ultimate escheat. The *Luckett* Court permitted the most minimal due process steps and made clear that any due process distinction between custodial and escheat statutes was at best a technical one.

Supreme Court cases reviewing state unclaimed property statutes generally point in one direction, indicating the Court's willingness to uphold state legislative efforts to acquire abandoned property whether by formal escheat or custodial taking. The Supreme Court's continuity remained with the post-World War II cases, but with an added dimension. In the cases dealing with bank accounts, the state that chartered the bank, or the state in which a national bank was located, sought to claim deposits left inactive by bank customers. Courts generally assumed, without discussion, that the state in which the deposit had been made could claim the property, since in all likelihood the proceeds belonged to residents of that state.[38] No other state sought to claim these accounts. The dispute was solely between the holder and the state of the holder's principal place of business. While the Supreme Court had regularly confirmed the right of the states to take bank deposits, the Court did not consider the possibility of competing claims by other states, particularly with regard to other types of abandoned property. Conflicting claims, however, inevitably would occur as the states' appetites for unclaimed property as a source of revenue increased.

Following World War II, states, recognizing the potential for substantial revenues, began to enact broad custodial statutes encompassing all kinds of unclaimed property and using various tests of sovereignty to claim the property.[39] Widespread legislative activity gave birth to many abandoned property programs and breathed new life into existing programs. States began to make broad claims of sovereignty against holders who did business in numerous states. Courts needed some test to determine

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[36] *See id.* at 285, 287, 289-90 (procedural safeguards included notice by publication before trial, allowance of intervention by any interested party, and five-year period to reclaim property after final adjudication). *See also* Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 241-42, 247 (1944) (citing *Security Savings* favorably for example of due process requirements).

[37] Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 252 (1944).

[38] *But see* First Nat'l Bank of San Jose v. California, 262 U.S. 366, 370 (1923). In *First National*, the Court found that California's escheat statute was an unconstitutional interference with national banks and observed that the depositors of a national bank often live in many different states. *Id.*

[39] *See* Garrison, *supra* note 3, at 315; Shestack, *Disposition of Unclaimed Property—A Proposed Model Act*, 46 ILL. L. REV. 48, 49 (1952).

the legitimacy of a state's claim of sovereignty. The judiciary framed an analysis based on the state's contacts with the obligation. The contacts test provided a pragmatic means to determine the legitimacy of state claims of sovereignty. Contacts analyses succeeded if only one state claimed the property. The post-World War II cases, however, pushed the contacts theory beyond its effective limits. It was only a matter of time until actual conflicts would arise, since state courts were simply unwilling to find that the forum state lacked sufficient contacts.[40] When the Supreme Court

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[40] *See* New Jersey v. American-Hawaiian Steamship Co., 29 N.J. Super. 116, 101 A.2d 598 (1953). In *American-Hawaiian*, the court said with reference to the escheat of wages earned in New Jersey and payable by a foreign corporation authorized to do business in New Jersey:

> It is apparent that New Jersey is not the only state which has contact with the subject matter. The substance of defendants' position is that New Jersey's interest is not such as to exclude the authority of another state to escheat the same property and hence there looms the prospect of double escheat. In fact, New Jersey's claim ultimately to escheat wages earned elsewhere from its domestic corporations as well thus to escheat wages earned here from foreign corporations, postulates a like power in another state to escheat wages earned there from New Jersey corporations and wages earned here from corporations of that other state.
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> The United States Supreme Court has not yet formulated a test for determining the respective rights of several states where each has contact with the intangible and each is in a position to effect seizure by personal service of process upon the debtor within its jurisdiction. In Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541, 68 S. Ct. 682, 92 L. Ed. 863 (1948), it was held that New York could act with respect to proceeds of insurance policies issued by a foreign corporation for delivery in New York on lives of persons resident in New York at the time of delivery. And in the Standard Oil case (State, by Parsons v. Standard Oil Co., 5 N.J. 281, 74 A.2d 565 (1950); affirmed 341 U.S. 428, 71 S. Ct. 822, 95 L. Ed. 1078 (1951)) the possibility of a superior claim in another state was held not to invalidate the escheat by New Jersey. This seems necessarily to follow from the conclusion that although the debtor was entitled to the protection of the full faith and credit clause, yet another state was nonetheless free to assert its claim against the escheating state in the Federal Supreme Court. 341 U.S., at page 443, 71 S. Ct. 822, 95 L. Ed. 1078.
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> Hence New Jersey's right to escheat does not depend upon a nice weighing of the respective contacts of this and another state. New Jersey's contact being substantial, its power to escheat the property as against defendant seems clear, albeit that in a later proceeding between contending states superiority of claim may be found in another state.
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> Moreover it cannot be assumed that a mere superiority of interest will carry an exclusive right to the property. The final solution may be an equitable prorating between or among the interested states. And further, it may be that the state which acts first will prevail. Unseemly as a race among states may be, it is not uncommon for the law to reward the vigilant and this rule may here apply even though its usual application occurs between private litigants. . . .) *Id.* at 608-609.

The *American-Hawaiian* court formulated what might be termed "the devil take the hind-most" theory of escheat. The theory's effects are evidenced by the fact that the New Jersey courts held that New Jersey had the power to escheat unclaimed dividends of a New Jersey corporation payable to stockholders whose last known addresses are in other states. New Jersey v. American Sugar Refining Co., 20 N.J. 286, 119 A.2d 767 (1956). New Jersey courts also ruled that unclaimed dividends of foreign corporations are payable to stockholders whose last known

faced legitimate competing claims, the use of a contacts analysis to resolve the conflict proved unworkable.

The first Supreme Court contacts case arose in the 1940s when New York attempted to assert custody over the proceeds of unclaimed insurance policies issued on the lives of New York residents by companies incorporated in other states. Nine of the companies sought to declare the New York unclaimed property statute invalid. In *Connecticut Mutual Life Insurance Co. v. Moore*,[41] the Supreme Court sustained the validity of the New York statute and permitted New York to take the unclaimed insurance proceeds. The insurers asserted that the statute impaired the obligation of their contracts with policy holders since it dispensed with proof of death and surrender of the policy, and that the statute violated due process because only the state of corporate domicile possessed the power to escheat.[42] The Supreme Court, pursuing a contacts analysis, concluded that New York had sufficient contacts with the property to claim the property, and further noted that New York had a better claim than anyone other than the owner, including the insurer. The Court expressly declined to consider the priority of other states' possibly competing claims, such as the potential claim of the state in which potential beneficiaries resided.[43] Since the New York statute in *Connecticut Mutual* was custodial, the property always would be available for later claim by some other state. Justice Frankfurter nevertheless dissented, urging that the Court should have declined to decide the ownership issue because of the possibility of prejudice to unrepresented interests. Justice Frankfurter suggested that the Supreme Court, exercising its original jurisdiction, would be the proper forum for resolving conflicting claims.[44] Justice Jackson also dissented, complaining that the Court "[i]n sustaining the broad claims of New York ... either cut[s] off similar and perhaps better rights of escheat by other states or ... render[s] insurance companies liable to two or more payments of their single liability."[45] Justice Jackson chastised the Court for failing to address fully the extent of state power over abandoned property and prophesied the confusion that became manifest in future cases.[46]

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addresses are in New Jersey. New Jersey v. F. W. Woolworth Co., 45 N.J. Super. 259, 132 A.2d 550 (1957).

[41] 333 U.S. 541 (1948).

[42] *Id.* at 545.

[43] *See id.* at 549-50 (limiting the holding). *But see infra* notes 44-46 and accompanying text (Justices Frankfurter and Jackson criticized Court for deciding issue without ruling on other possible claims).

[44] Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 551-52, 555-56 (1948) (Frankfurter, J., dissenting).

[45] *Id.* at 560 (Jackson, J., dissenting).

[46] *Id.* at 563 (Jackson, J., dissenting). Justice Jackson declared:

> While [the court] may evade [the issue of priority of various states' claims] for a time, the competition and conflict between states for "escheats" will force us to some lawyerlike definition of state power over [intangible personalty]. It is naive beyond even requirements of the judicial office to assume that this lately manifest concern of the states over abandoned insurance proceeds reflects only

Not long after *Connecticut Mutual*, the Supreme Court was faced with New Jersey's claim against Standard Oil for unclaimed dividends and reissuance in the name of New Jersey of the outstanding stock that generated those dividends. *Standard Oil Co. v. New Jersey*[47] brought to fruition Justice Jackson's prophecy. New Jersey, the state of corporate domicile, rather than claiming custody, sought to escheat the property of missing owners who did not reside in New Jersey. According to company records, the last known addresses of the missing owners were in other states and in a foreign country. The New Jersey Supreme Court upheld New Jersey's right to escheat.[48] The United States Supreme Court sustained New Jersey's claim, and rejected Standard Oil's due process defense of potential multiple liability. The *Standard Oil* Court stated that the full faith and credit clause of the United States Constitution protected Standard Oil by requiring other courts to recognize the New Jersey judgment.[49] Although the New Jersey statute provided for an escheat, the majority pointed out that any claims of other states were not before the Court.[50] That reasoning did not persuade the entire Court. Mr. Justice Frankfurter, joined by Mr. Justice Jackson in dissent, complained that "[t]he Constitution ought not to be placed in an unseemly light by suggesting that the constitutional rights of the several States depend on, and are terminated by, a race of diligence."[51]

The Supreme Court produced a confusing state of the law which allowed the state of residence of the creditor to claim unclaimed property under the authority of *Connecticut Mutual Life Insurance Co. v. Moore*.[52] Additionally, the state of the holder's domicile could escheat according to *Standard Oil*.[53] *Standard Oil* further held that for more than one state to escheat the same property denied the holder due process. This latter

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> solicitude for the unknown claimants. . . . [E]scheat of these interests is a newly exploited, if not newly discovered, source of state revenue. . . . [W]e should use [caution and precision] in sustaining one state's claim, lest we be foreclosing other better-founded ones. This competition and conflict between states already require us, in all fairness to them, to define the basis on which a state may escheat.

Id. (Jackson, J., dissenting).

[47] 341 U.S. 428 (1951).

[48] State v. Standard Oil Co., 5 N.J. 281, 74 A.2d 565, 579 (1950), *aff'd sub nom.* Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951).

[49] Standard Oil Co. v. New Jersey, 341 U.S. 428, 443 (1951). "The debts ... having been taken from [Standard Oil] by a valid judgment of New Jersey ... cannot be taken by another state. The Full Faith and Credit Clause bars any such double escheat." *Id.*

[50] *Id.* "The claim of no other state to this property is before us and, of course, determination of any right of a claimant state against New Jersey for the property escheated by New Jersey must await presentation here." *Id.*

[51] *Id.* at 444 (Frankfurter, J., dissenting).

[52] Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 548, 549 (1948); *see supra* notes 41-46 and accompanying text (discussing *Connecticut Mutual*). In *Standard Oil*, Justices Black, Frankfurter, Douglas and Jackson dissented because the Court left open the possibility that the state of residence of the creditor could escheat the property under *Connecticut Mutual*. *See* Standard Oil Co. v. New Jersey, 341 U.S. 428, 444 (1951) (Frankfurter, J., dissenting); *id.* at 445 (Douglas, J., dissenting).

[53] Standard Oil Co. v. New Jersey, 341 U.S. 428, 442 (1951).

aspect of the holding, together with seemingly inconsistent decisions, created among the states a race of diligence to escheat.

Against this backdrop of potential multiple liability, the 1954 Uniform Disposition of Unclaimed Property Act was written.[54] The 1954 Act generally followed the contacts analysis articulated in *Connecticut Mutual* and *Standard Oil*, providing two bases for claiming property.[55] Unclaimed property would be subject to the claim of an enacting state if the holder was domiciled in the state or if the last known address of the owner was in the state and the holder did business there.[56] The 1954 Act, therefore, made the right to assert a claim of sovereignty depend on the ability of the state to subject the debtor to suit in its courts. The thrust of the contacts test generally was to bestow rights to unclaimed property on at least two states that could subject the holder to service of process.

Consider, for instance, unclaimed dividend payments. The 1954 Act provided that the state of corporate domicile could assert custody to unclaimed dividends.[57] The state of the owner's last known address, however, also could assert custody to unclaimed dividends payable by a foreign corporation, provided the corporation did business in that state.[58] In recognition of the potential for conflict among states enacting the legislation, the 1954 Act contained a reciprocity clause.[59] The reciprocity clause favored the state of last known address, but its operation depended on that state's ability to subject the holder to jurisdiction in its courts and

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[54] *See Uniform Disposition of Unclaimed Property Act* prefatory note, at 1-5 (1954).

[55] *See id.* §§ 2, 3(a), 5, 10. Although the Uniform Act did not explicitly so state, the contacts analysis provided the basis for gaining custody of unclaimed intangible personalty under the 1954 Act. *See id.* With the exception of § 3(a) insurance companies, § 4 public utilities, § 8 state courts, the 1954 Act relied on contacts between the holder and the claimant state to grant custody. *See, e.g., id.* §§ 2, 5, 10.

[56] *See, e.g., id.* § 2. Section 2 of the Uniform Act concerns the disposition of unclaimed property held by banking and financial institutions. *Id.* To establish a claim over intangible property, the state must be the one in which the owner made the deposit, *id.* § 2(a), or paid for shares of the bank or financial institution, *id.* § 2(b). Other requirements show an even more direct connection between the holder bank and the claimant state. Under § 2(c), a state could claim the sum represented by checks certified in the state. *Id.* § 2(c). Because state banks operated solely intrastate, only the state of corporate domicile could claim certified checks. Finally, under § 2(d) a state could claim property removed from safe deposit boxes within the state. *Id.* § 2(d). Again, only the state of corporate domicile could claim under § 2(d) against state banks. *Id.* § 2(d).

[57] *Id.* § 5(a).

[58] *Id.* § 5(b).

[59] *Id.* § 10. Section 10 provided a means of differentiating between the priority of claims:

> If specific property [subject to certain enumerated 1954 Act provisions] is held for or owed or distributable to an owner whose last known address is in another state by a holder who is subjected to the jurisdiction of that state, the specific property [is payable to that other state] if:
>
> (a) It may be claimed as abandoned or escheated under the laws of such other state; and
>
> (b) The laws of such other states make reciprocal provision [as, for example, is contained in this section.]

Id.

on the enactment of legislation by that state foregoing its claims in reciprocal circumstances.[60]

The 1954 Act was widely but by no means universally adopted.[61] Conflicts between states continued and the states viewed the earlier Supreme Court decisions as an invitation to a race of diligence. *Western Union Telegraph Co. v. Pennsylvania* brought a halt to the race.[62] In *Western Union*, Pennsylvania sought to escheat unclaimed money orders purchased in Pennsylvania from Western Union, a New York corporation, for transmittal to payees primarily in states other than Pennsylvania. Western Union opposed the action on the ground that the Pennsylvania escheat judgment would not protect the company from multiple liability to the unpaid owners either in Pennsylvania or in other states.[63] Western Union also argued that the Pennsylvania judgment would not bind other states that might seek to escheat the same property.[64] In fact, New York had already taken a portion of the property originally claimed by

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[60] *See id.* Not all property was subject to the reciprocity clause. *See supra* note 56. Curiously, the 1954 Act made no provision for an enacting state, also the state of last known address, to reclaim property from the state of corporate domicile when the state of corporate domicile had obtained the property, even though the state of last known address could not obtain jurisdiction over the holder in its own courts.

[61] *See Uniform Disposition of Unclaimed Property Act*, 8 U.L.A. 63 (Supp. 1982). Ten states currently have a version of the 1954 Act in force. *See* ARIZ. REV. STAT. ANN. §§ 44-351 to 44-378 (1967 & Supp. 1982) (enacted in 1956); FLA. STAT. ANN. §§ 717.01 to 717.30 (1969 & Supp. 1981) (enacted in 1961); MD. COM. LAW CODE ANN. §§ 17-101 to 17-324 (1975 & Supp. 1981) (enacted in 1966); N.H. REV. STAT. ANN. §§ 471-A:1 to 471-A:28 (1968 & Supp. 1977) (enacted in 1966); OR. REV. STAT. §§ 98.302 to 98.436 (1977) (enacted in 1957); UTAH CODE ANN. §§ 78-44-1 to 78-44-28 (1977) (enacted in 1957); VT. STAT. ANN. title 27, §§ 1208-1237 (1975 & Supp. 1978) (enacted in 1965); VA. CODE ANN. §§ 55-210.1 to 55-210.29 (1981) (enacted in 1961); WASH. REV. CODE ANN. §§ 63.28.070 to 63.28.920 (1966 & Supp. 1980) (enacted in 1955); W. VA. CODE §§ 36-8-1 to 36-8-31 (1982) (enacted in 1967). Twenty-one states have enacted the 1966 Act which revised and updated the 1954 Act. *See* ALA. CODE §§ 35-12-20 to 35-12-48 (1977 & Supp. 1981) (enacted in 1973); ARK. STAT. ANN. §§ 50-620 to 50-647 (Supp. 1981) (enacted in 1979); GA. CODE ANN. §§ 85-2001 to 85-2031 (1978 & Supp. 1981) (enacted in 1972); HAWAII REV. STAT. §§ 523-1 to 523-30 (1976 & Supp. 1981) (enacted in 1974); ILL. ANN. STAT. ch. 141, §§ 101-130 (Smith-Hurd 1964 & Supp. 1980) (enacted in 1961); IND. CODE ANN. §§ 32-9-1-1 to 32-9-1-45 (Burns 1980 & Supp. 1981) (enacted in 1967); IOWA CODE ANN. §§ 556.1 to 556.29 (West 1967 & Supp. 1980) (enacted in 1967); LA. REV. STAT. ANN. §§ 9:151 to 9:182 (West Supp. 1981) (enacted in 1972); ME. REV. STAT. ANN. title 33, §§ 1301-1365 (Supp. 1981) (enacted in 1979); MINN. STAT. ANN. §§ 345.31 to 345.60 (West 1972 & Supp. 1981) (enacted in 1969); MONT. CODE ANN. §§ 70-9-101 to 70-9-316 (1981) (enacted in 1963); NEB. REV. STAT. §§ 69-1301 to 69-1329 (1976) (enacted in 1969); NEV. REV. STAT. §§ 120A.010 to 120A.450 (1979) (enacted in 1980); N.M. STAT. ANN. §§ 7-8-1 to 7-8-34 (Supp. 1981) (enacted in 1959); N.D. CENT. CODE §§ 47-30-01 to 47-30-28 (1978 & Supp. 1981) (enacted in 1975); OKLA. STAT. ANN. title 60, §§ 651-686 (West 1971 & Supp. 1981) (enacted in 1967); R.I. GEN. LAWS §§ 33-21-11 to 33-21-40 (1970 & Supp. 1981) (enacted in 1968); S.C. CODE ANN. §§ 27-17-10 to 27-17-360 (Law Co-op. 1977) (enacted in 1971); S.D. COMP. LAWS ANN. §§ 43-41A-1 to 43-41A-52 (Supp. 1981) (enacted in 1978); TENN. CODE ANN. §§ 64-2901 to 64-2932 (Supp. 1981) (enacted in 1978); WIS. STAT. ANN. §§ 177.01 to 177.30 (West 1974 & Supp. 1981) (enacted in 1970).

[62] Commonwealth v. Western Union Tel. Co., 400 Pa. 337, 339-40, 162 A.2d 617, 621 (1960), *rev'd sub nom.* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961).

[63] Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 73 (1961).

[64] *Id.* at 74.

Pennsylvania.[65] No question of the reportability of the property was before the Court since Western Union had abandoned any claim to it.

The Supreme Court did not consider Western Union's argument of potential multiple liability to individual claimants, and instead focused on the power of Pennsylvania to render a judgment that would bar multiple escheat. Since neither New York nor any other state besides Pennsylvania was a party to the Pennsylvania judgment, Pennsylvania could not protect Western Union from a claim by other states.[66] The Court reversed the Pennsylvania Supreme Court, denying escheat. Distinguishing *Standard Oil*, the *Western Union* Court returned to the language of *Standard Oil* to point out that "[t]he claim of no other state to this property [was] before [the *Standard Oil* Court] and, of course, determination of any right of a claimant state against New Jersey for the property escheated by New Jersey must await presentation here."[67] The *Western Union* Court further noted that *Standard Oil* did not present a real controversy between States over the right to escheat part or all of the proceeds.[68] Although the contacts test in *Standard Oil* was sufficient to resolve claims between one state and a holder, the test was unworkable to resolve disputes among various states claiming from one holder. *Western Union* therefore, signaled the Court's intention to finally resolve the problems created by a contacts analysis.

The *Western Union* Court noted the problem of rapidly multiplying unclaimed property laws covering a broad range of intangible transactions which produced inevitable conficts between states and invited states to present conflicting claims to the Supreme Court as a forum for final and authoritative determination.[69] *Western Union* forced any state facing an actual dispute by a sister state to bring an original action in the Supreme Court for a declaration of its rights before it could take the property. At the time the Court decided *Western Union*, fewer than ten states had adopted the 1954 Act with its full reciprocity provision.

IV. TEXAS V. NEW JERSEY

Shortly after the *Western Union* decision, Texas invoked the original jurisdiction of the Supreme Court and brought an action against New Jersey and Pennsylvania to seek a declaration of Texas' right to escheat

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[65] *Id.* at 74, 76. New York was not a party in the *Western Union* litigation. *Id.* at 75. New York filed an amicus curiae brief. *Id* at 71.

[66] *Id.* at 75.

[67] *Id.* at 76 (distinguishing Standard Oil Co. v. New Jersey, 341 U.S. 428, 443 (1951)).

[68] *Id.*

[69] *Id.* at 76-77. The Constitution gives the Supreme Court original jurisdiction in actions between states. U.S. CONST. art. III, § 2. Mr. Justice Frankfurter had recognized this jurisdictional grant in *Connecticut Mut. Life Ins. Co. v. Moore.* 333 U.S. 541, 555-56 (1948) (Frankfurter, J., dissenting). *See* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 78 (1961) (recognizing that Supreme Court's original jurisdiction in controversies between states was urged by dissent in *Connecticut Mutual*).

property held by Sun Oil Company.[70] The Court in *Texas v. New Jersey* had to decide which of the contending states' claims to sovereignty was superior.[71] At least four states asserted the right to escheat or to take custody of debts owed by Sun and left unclaimed by creditors. Four rules were proposed. First, Texas urged that the funds should go to the state having the most significant contacts with the debt.[72] Sun Oil had two offices in Texas and did a great deal of business there. Many of Sun Oil's creditors resided in Texas. Second, New Jersey, Sun Oil's state of corporate domicile, argued that the funds should go to the state of the debtor company's incorporation.[73] Third, Pennsylvania argued that the debtor should pay the unclaimed funds to the state in which the company had its principal place of business.[74] Finally, Florida, an intervenor in the litigation, argued that the funds should be paid to the state of the creditor's last known address.[75] Each of the claimant states contended that its contacts with the obligation were superior to those of rival claimants.

The *Texas* Court rejected the contacts analysis as being "not really any workable test at all." The question was not whether the various claims were legitimate, but rather which of several legitimate claims was superior. The *Texas* Court adopted a system of priorities based on the principle that unclaimed property belongs to the creditor and, therefore, should be payable to the creditor's state of residence.[76] For ease of administration, the Court defined the creditor's state of residence to be the state of the owner's last known address as shown on the debtor's records. Since no applicable federal statute existed, the Court explained its role as that of an arbitrator of interstate disputes and announced that it was "not controlled by statutory or constitutional processes or by past decisions"[77] but by "principles of fairness"[78] and "ease of administration."[79] The principle of fairness was to distribute escheats among states in the proportion to the commercial activities of the residents. The principle is a variation of the common-law doctrine of *mobilia sequuntur personam.*[80]

To provide a comprehensive scheme and to resolve interstate disputes, the Supreme Court provided that the state of the debtor's domicile could

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[70] Texas v. New Jersey, 379 U.S. 674, 675 (1965).

[71] *See id.* at 677. The *Texas* Court stated that it is the responsibility of the courts to formulate a rule settling the question concerning which state may escheat intangible property. *Id.*

[72] *Id.* at 678.

[73] *Id.* at 679.

[74] *Id.* at 680.

[75] *Id.* at 680-81.

[76] *Id.* at 681-82.

[77] *Id.* at 683.

[78] *Id.* at 680.

[79] *Id.* at 683.

[80] *Id.* at 680 n.10, 681. *Mobilia sequuntur personam,* literally translated says that movables follow the law of the person. BLACK'S LAW DICTIONARY 905 (5th ed. 1979). The term means "that intangible personalty has [its] situs at the domicile of its owner." Blodgett v. Silberman, 277 U.S. 1, 10 (1928). The Supreme Court called *mobilia sequuntur personam* a well-settled rule of law. *Id.*

take custody if either the state of the owner's last known address did not provide for escheat or the owner had no recorded address.[81] This provision prevented a windfall to the holder and assured that unclaimed property benefitted the state's citizenry.[82] The claim of the state of the holder's domicile would yield, however, if another state later proved that the last known address of the creditor was within its borders or if the creditor's state subsequently adopted abandoned property legislation.[83] The Court thought it had enunciated a clear rule governing intangible obligations and providing a definite reference point for all the states.[84]

Not long after *Texas v. New Jersey*, the Court in *Pennsylvania v. New York*[85] was asked to extend its principle of fairness distributing escheats among the states. Plaintiffs requested that the state in which Western Union money orders were purchased prevail over the claim of New York, the state of domicile of the holder. Pennsylvania urged that the state of purchase should be presumed to be the state of the sender's residence.[86] The Court declined to indulge that presumption and instead adhered to the *Texas* rule permitting a first priority claim only if the owner's actual last known addresses existed, giving preference to the ease of administration principle.[87]

Both *Texas* and *Pennsylvania* are beguiling in their simplicity and definitiveness and were intended to resolve the question reserved in *Western Union* concerning which state has the right to claim when conflicting state claims exist. Unfortunately, some genuine confusion about the meaning of the *Texas* decision has occurred. The rules enunciated in *Texas* substantially undermine the bases for claims of sovereignty made in many existing unclaimed property statutes, including the 1954 Uniform Disposition of Unclaimed Property Act.

Since much of the analysis of the 1981 Act depends on a proper understanding of *Texas v. New Jersey*, it is important to clarify the limits of that decision. The decision provides a rule of priorities that may be stated quite simply:

> *When two or more states, exercising valid claims of sovereign power to take custody of abandoned property assert conflicting claims to the same property, priority shall be given to the state of the creditor.*

The additional rules enunciated in *Texas* are designed to ensure that this

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[81] Texas v. New Jersey, 379 U.S. 674, 682 (1965). The *Texas* Court sought to prevent a windfall to the holder, or to assure that unclaimed property "is used for the general good rather than for the chance enrichment of particular individuals or organizations." *Id.; see* Standard Oil Co. v. New Jersey, 341 U.S. 428, 436 (1951).

[82] *See supra* note 81 and accompanying text.

[83] Texas v. New Jersey, 379 U.S. 674, 682 (1965).

[84] *Cf. id.* at 678 (criticizing Texas' basis for its claim because of lack of clarity and ease of administration).

[85] 407 U.S. 206 (1972).

[86] *Id.* at 212.

[87] *Id.*; *see* Texas v. New Jersey, 379 U.S. 674, 683 (1965) (ease of administration principle).

basic resolution of the priority question is carried out. *Texas* does not limit the power of a state to enact legislation encompassing a broad array of unclaimed property. A state may claim the right to assert custody to abandoned property regardless of the residence of either the creditor or the debtor. For instance, claims based on the situs of the transaction or on the principal place of business of the holder are not impermissible.[88] *Texas v. New Jersey* does not require that a state be able to subject a holder to process in its own courts before the state may exercise previously legislated powers of sovereignty to claim abandoned property. In short, the *Texas* Court merely provided a mechanism for the resolution of valid but conflicting claims to the same property and awarded priority to the state of the creditor.

Unfortunately, commentators, courts, holders, and on occasion, state unclaimed property administrators have confused the issues of jurisdiction, both subject matter and personal, with the issues of sovereignty. Holders have argued, for instance, that *Texas v. New Jersey* limits the power to claim abandoned property to two states, the state of last known address of the creditor and the state of corporate domicile, with the state of corporate domicile having no power to claim if there is a state of last known address with an applicable unclaimed property law. Others have decried the Court's rejection of its previously used contacts analysis, claiming that without some minimum contacts between the claimant state and the holder, a state is without jurisdiction over the holder and cannot enforce its claim.[89] Both arguments are misplaced. The first argument incorrectly presumes that states cannot exercise the power to legislate, or sovereignty, in conflict with competing state claims. The second argument confuses sovereignty with jurisdiction, or the ability of a state to use its courts to reach a person holding property.

Escheat is an exercise of sovereignty.[90] Under the ancient doctrine of *bona vacantia*, when one died without blood relations, his property passed to the Crown, subject to the rights of the widow.[91] The Crown held personal property not as an ultimate owner but as one with a greater equitable claim than that of a stranger.[92] Recognizing the principle of *bona vacantia*, the Supreme Court on several occasions has viewed unclaimed

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[88] Sperry & Hutchinson Co. v. O'Connor, 488 Pa. 340, 412 A.2d 539 (1980) (basis for claim situs of the transaction); Depository Institutions-Insurance Act Pub. L. No. 93-495, §§ 603-604, 88 Stat. 1525-26 (1974) (codified at 12 U.S.C. §§ 2501 *et seq.* (1976)) (permitting state of principal place of business to assert claim to money orders and traveler's checks when state of last known address of purchaser is unknown or that state has no applicable abandoned property law.)

[89] *See Last Known Address, infra* note 126, at 570-77.

[90] Standard Oil Co. v. New Jersey, 341 U.S. 428, 435-36 (1951). "As a broad principle of jurisprudence rather than as a result of the evolution of legal rules, it is clear that a state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons." *Id.*

[91] See *Escheat, supra* note 3, at 1326-27 n.4.

[92] See *Escheat, supra* note 3, at 1326-27.

property laws as conservation statutes with the state acting in its sovereign capacity as a conservator of its vanished residents' property.[93]

In numerous prior decisions dating back to 1911, the Supreme Court has analyzed exhaustively the question of state sovereignty over abandoned property. In *Provident Institution for Savings v. Malone*,[94] the Court provided an extensive analysis of sovereignty based on the right of a state to act as a conservator or administrator of a missing person's estate. Commenting on the Massachusetts statute, the Court said that the statute was like other legislation providing for the appointment of custodians for an absentee citizen's real and personal property.[95] Just as a state can legislate to determine the right to descent and distribution of property, the state can legislate to determine the succession to property belonging to its missing residents. As the Court concluded in *Malone*, such legislative power is undoubted.[96]

Problems arise in our federal system because fifty sovereigns exist and all but two have unclaimed property laws. When claims of states interfere with each other, the Supreme Court must resolve those disputes. In none of the intangible escheat cases beginning with *Connecticut Mutual*[97] and continuing through *Standard Oil*,[98] *Western Union*,[99] *Texas v. New Jersey*,[100] and *Pennsylvania v. New York*,[101] however, did the Supreme Court deny a state's claim on grounds of lack of sovereignty. Even in *Western Union* the Court rejected Pennsylvania's claim not because the state's assertion of sovereignty was too broad, but because Pennsylvania courts could not protect Western Union from the legitimate claims to the same property by other states.

An unfortunate choice of language in *Texas v. New Jersey* caused some confusion about the meaning of the decision. Justice Black, writing for the majority, initially characterized the issue before the Court as "... a controversy as to which State has *jurisdiction* to take title to certain abandoned intangible personal property through escheat . . . ."[102] Later in the opinion, the Court said that the property was subject to escheat only by the State of the creditor's last known address.[103] Many holders

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[93] *See, e.g.*, Provident Inst. for Sav. v. Malone, 221 U.S. 660 (1911); Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541 (1948); Standard Oil Co. v. New Jersey, 347 U.S. 428 (1951). The Court in *Connecticut Mutual* described the state as a conservator when claiming property under a custodial unclaimed property law. 333 U.S. at 546-47. In *Standard Oil*, the Court characterized *Moore* as involving a conservation statute. 347 U.S. at 437.

[94] 221 U.S. 660 (1911).

[95] *Id.* at 663.

[96] *Id.* at 666.

[97] Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541 (1948).

[98] Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951).

[99] Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961).

[100] Texas v. New Jersey, 379 U.S. 674 (1965).

[101] Pennsylvania v. New York, 407 U.S. 206 (1972).

[102] Texas v. New Jersey, 379 U.S. 674, 675 (1965) (emphasis added).

[103] *Id.* at 681-82 (emphasis added).

have assumed that the use of the term "escheat" was generic, by including custodial taking as well as traditional escheat. The holders have suggested further that the Court prescribed a requirement of subject matter jurisdiction outlining the only possible claims of sovereignty.

Considering the particular context in which the Court used the term, however, the *Texas* Court clearly was speaking of escheat in the formal sense. The Court did not prohibit a custodial taking when a state had exercised its legislative powers, since the state of the creditor's last known address can reclaim the property later.[104] Only the first priority claimant, the state of last known address, finally can escheat the property and therefore, actually vest title in itself and place the property in repose. While other states might cut off the rights of private parties, no other state can cut off the right of the state of last known address to reclaim the property. The *Texas* Court remarked that the power to claim abandoned property is a state legislative function, as is jurisdiction, and need not be exclusive.[105] In other words, several states may claim the same abandoned property. If a dispute actually arises, the Supreme Court as the ultimate arbitrator of disputes between the states, must resolve the various claims.

The foregoing analysis rationalizes what has been viewed by many as an inconsistent line of cases preceding *Texas v. New Jersey*. In *Connecticut Mutual*, the state of domicile of the insured was allowed to claim the property because otherwise "the insurance companies would retain moneys contracted to be paid on condition and which normally they would have been required to pay."[106] Although the state of domicile of the holder was entitled to escheat in *Standard Oil*, the Court noted that property subject to escheat escapes seizure by inferior claimants "and is used for the general good rather than for the chance enrichment of particular individuals or organizations."[107] In effect, the Supreme Court in *Connecticut Mutual* and *Standard Oil* did not allow issues concerning which state might become the ultimate beneficiary of the funds to interfere with the process of placing the funds in the custody of some state.[108] *Texas v. New Jersey* merely concluded the process. *Texas* established the rules to sort out abandoned property among the states.

In some state court cases holders have urged that *Texas v. New Jersey* limits claims to two states: the state of the owner's last known address and the state of the holder's domicile. Arguably, the state of the holder's domicile may take only if no record of the owner's address exists or if

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[104] *See* Texas v. New Jersey, 380 U.S. 518 (1965) (clarified in final decree entered by Court).

[105] Texas v. New Jersey, 379 U.S. 674, 678 n.8 (1965).

[106] Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 546 (1948).

[107] Standard Oil Co. v. New Jersey, 341 U.S. 428, 436 (1951).

[108] *See* Texas v. New Jersey, 379 U.S. 674, 682 n.13 (1965). In *Texas v. New Jersey*, the Court noted that "none of this Court's cases allowing States to escheat intangible property decided the possible effect of conflicting claims of other States." *Id.*

the last known address state has no applicable escheat legislation. The *Texas* analysis also suggests that the failure of either the state of last known address or the state of corporate domicile to make a claim results in ultimate retention of the property by the holder, since no other state is empowered to claim the property.

Recently, the Pennsylvania Supreme Court faced the issue of subject matter jurisdiction in *Sperry & Hutchinson v. O'Connor*.[109] In *Sperry & Hutchinson*, the Escheator of Pennsylvania filed a petition to escheat unclaimed trading stamps issued by Sperry & Hutchinson (S&H), a New Jersey corporation, to Pennsylvania retail establishments for ultimate distribution to customers of those retailers. Since no one kept records of the owners' last known addresses, no state could take as a first priority claimant.[110] The state of corporate domicile is the second priority claimant. Pennsylvania argued that New Jersey, the state of corporate domicile, could not escheat trading stamps under New Jersey law.[111] The Pennsylvania Escheator asserted that *Texas v. New Jersey* simply established a rule of priority and that claims based on other grounds were not prohibited. Pennsylvania claimed that it had greater contacts with the debt than anyone else and that equity demanded payment of the money to Pennsylvania where the money would benefit the residents of the state of purchase rather than leave a windfall with the corporate holder.

S&H filed a motion to dismiss for lack of subject matter jurisdiction, claiming that *Texas v. New Jersey* constituted a complete bar to Pennsylvania's claim.[112] S&H maintained that Pennsylvania had no power to claim the unredeemed stamps and hence could not confer power on its courts to hear and decide the claim.[113] S&H also argued that *Texas v. New Jersey* established that only the state of the owner's last known address or the state of corporate domicile could claim the property. Under S&H's analysis of *Texas v. New Jersey*, any order entered in favor of Pennsylvania would be void, and the decision would not be entitled to full faith and credit. S&H maintained that if it had to pay Pennsylvania, other claimants could subject S&H to multiple liability, thus violating the due process clause. Specifically, S&H denied that a decision in favor of Pennsylvania would foreclose New Jersey from claiming the same property.[114]

The trial court denied S&H's motion to dismiss and the commonwealth court affirmed.[115] On appeal, the Supreme Court of Pennsylvania affirmed

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[109] Sperry & Hutchinson Co. v. O'Connor, 488 Pa. 340, 412 A.2d 539 (1980), *aff'g*, 32 Pa. Commw. 599, 379 A.2d 1378 (1977).

[110] Sperry & Hutchinson Co. v. O'Connor, 488 Pa. 340, 342, 412 A.2d 539, 541 (1980).

[111] *Id.* at 342, 412 A.2d at 541 & n.4 (New Jersey's right to escheat trading stamps denied in *New Jersey v. Sperry & Hutchinson Co.*, 56 N.J. Super. 589, 153 A.2d 691 (1959), *aff'd per curiam*, 31 N.J. 385, 157 A.2d 505 (1960)).

[112] Sperry & Hutchinson Co. v. O'Conner, 488 Pa. 340, 341, 412 A.2d 539, 540 (1980).

[113] *Id.* at 341-42, 412 A.2d at 540-41.

[114] *Id.* at 343, 412 A.2d at 542.

[115] O'Connor v. Sperry & Hutchinson Co., 32 Pa. Commw. 599, 379 A.2d 1378 (1977), *aff'd*, 488 Pa. 340, 412 A.2d 539 (1980).

the trial court, holding that Pennsylvania had jurisdiction to hear and decide the case.[116] The validity of Pennsylvania's claim was to be determined by the scope of its legislation. The issue was whether the Pennsylvania statute encompassed the property in conflict. The Pennsylvania Supreme Court declined to decide the due process issue raised by S&H regarding possible multiple liability. The Pennsylvania Supreme Court, however, noted that the Pennsylvania statute would provide indemnification to S&H, seemingly foreclosing any argument of potential multiple liability.[117]

In a second case interpreting *Texas v. New Jersey*, the Supreme Court of Texas clearly rejected a jurisdictional interpretation and distinguished *Texas* as involving a direct controversy between states over unclaimed property.[118] *State v. Liquidating Trustees of Republic Petroleum Co.*[119] involved a controversy between Texas and the trustees of a long defunct corporation originally chartered in New Mexico. Trustees domiciled in Texas held the remaining corporate assets, consisting of unpaid liquidating dividends.[120] The assets belonged to 208 stockholders with addresses in states other than Texas and in foreign countries. Several of the other states had applicable unclaimed property laws. Only one missing stockholder had a last known address in Texas.[121] The trustees reported the existence of the property to Texas but denied that Texas had any right to it, asserting that since the last known addresses of most shareholders were in states with unclaimed property legislation, only those states could claim the property under *Texas v. New Jersey*.[122]

The Texas Supreme Court held that New Mexico, Republic Petroleum's state of domicile, could not claim as the domiciliary state since the trustees elected to conduct the liquidation in Texas and since the corporation had been dissolved for 24 years.[123] New Mexico could not subject the trustees to the jurisdiction of its courts. The *Liquidating Trustees* court permitted Texas, the state of domicile of the trustees, to assert custody over all the property, holding that Texas unclaimed property law allowed other states to come forward later with proof of a superior right to escheat or to take custody. Unless the court allowed Texas to claim the property, the court noted the trustees likely would dissipate the property, defeating

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[116] Sperry & Hutchinson Co. v. O'Connor, 488 Pa. 340, 412 A.2d 539, 541-42 (1980).

[117] *Id.* at 341, 412 A.2d at 542.

[118] State v. Liquidating Trustees of Republic Petroleum Co., 510 S.W.2d 311, 314-15 (Tex. 1974). *See* Comment, *Escheat in Texas: A Current Look at the Intangible Issue*, 29 Sw. L.J. 575, 595-99 (1975) (discussing *Liquidating Trustees*).

[119] State v. Liquidating Trustees of Republic Petroleum Co., 510 S.W.2d 311, 314-15 (Tex. 1974)

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 312-13. In *Liquidating Trustees*, the trustees had completed liquidation except for payments to shareholders more than 24 years before Texas sought to escheat the unclaimed funds. *Id.* at 312.

the rights of those claimant states having a superior right to custody.[124] The *Liquidating Trustees* court, therefore, interpreted *Texas v. New Jersey* as allowing the state of Texas to obtain custody of property from the holder even though the state of last known address had an applicable unclaimed property law.[125]

Sperry & Hutchinson and *Liquidating Trustees* clearly are correct decisions. The result in each case is salutary, preserving assets for the common good. Additionally, the decisions are fully consistent with the priorities of *Texas v. New Jersey*.

Some commentators have maintained that the Court's rejection of a contacts test in *Texas v. New Jersey* was unwise because without some minimum contact the state of last known address could not sue the holder.[126] On occasion, holders have raised the defense that unless they can be served with process, the state is without power to enact legislation to claim abandoned property in the holder's possession. This is a mistaken view.

In the earlier cases, *Connecticut Mutual* and *Standard Oil*, the Supreme Court employed a contacts analysis only as a means of justifying the legitimacy of a state's claim to abandoned property. In *Texas v. New Jersey*, the Supreme Court recognized that the role of the state as the protector of its vanished citizen's property was another basis for a state's claim of sovereignty among competing claimant states. The *Texas* Court deemed the state's role as protector superior to a state's claim based on corporate domicile. The *Texas* Court expressly noted that the issues did not involve any questions of state sovereignty. As the Supreme Court enunciated in *Texas*, unclaimed property is an asset of the creditor and not of the debtor.[127] The relationship of a sovereign to its citizenry does not depend on contacts with the debtor.

Even if a state lacks sufficient contacts to establish personal jurisdiction, and, therefore the power to use its own courts to subject the holder

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[124] *Id.* at 315.

[125] *Id.* at 313-14.

[126] *See* Note, *Escheat of Corporate Intangibles: Will the State of the Stockholder's Last Known Address Be Able to Enforce Its Right?*, 41 NOTRE DAME LAW. 559, 570-77 (1966) [hereinafter cited as *Last Known Address*]; *Escheat of Intangibles, supra* note 24, at 556, 558 nn. 49 & 51; Comment, *Escheat - Abandoned Intangible Property - State of Last Known Address of Creditor Given Exclusive Right - Texas v. New Jersey, 379 U.S. 674 (1965)*, 33 GEO. WASH. L. REV. 979, 983 (1965). Effective enforcement of unclaimed property laws requires that the state seeking to enforce be aware of the existence of the property and be able to subject the noncomplying holder to some court's jurisdiction. *See Last Known Address, supra*, at 568. *See also, Escheat of Intangibles, supra* note 24, at 556 (1966). The note, *Escheat of Intangibles*, in general refers to "... legal arguments which cogently question the right of the state of creditors last known address to escheat intangibles, ..." without spelling these arguments out in detail. *Id.* The note does urge that the Court's action was misdirected. *Id.*

[127] Texas v. New Jersey, 379 U.S. 674, 680 (1965); *see supra* note 80 (*mobilia sequuntur personam*).

to suit, the state nonetheless may enact legislation to determine its residents' rights to intangible property. The contacts analysis has no bearing on the issue of the power of a state to legislate succession. As in the case of decedents' estates, if the state of the decedent cannot subject a debtor to process in its courts, ancillary administrative proceedings must be initiated against the debtor when the state can serve the debtor with process. The fact that a state cannot use its own courts to protect property belonging to its residents does not vitiate the authority of the state's legislation to determine the succession to intangible property.

State v. Amsted Industries[128] is illustrative and provides a resolution to the apparent contradiction that is entirely consistent with *Texas v. New Jersey*. In *Amsted Industries*, the State of New Jersey sought to escheat unclaimed dividends, wages and other property held by Amsted, a corporation domiciled in New Jersey. The three classes of owners present were New Jersey residents, persons with last known addresses in states without applicable escheat legislation, and persons with last known address in states with applicable escheat legislation that could not subject Amsted to the jurisdiction of their courts. New Jersey sought to claim all of the property, arguing that unless a state could subject the holder to process, the state had no effective unclaimed property legislation. The New Jersey court denied its state's claim to the property belonging to persons with last known addresses in states that had unclaimed property legislation but that could not serve Amsted with process in their courts. The court pointed out that New Jersey must yield in its claim to this property since other states could always come into New Jersey and use the New Jersey courts to enforce their unclaimed property laws.

Obviously, contacts between the holder and the state of last known address are important for effective administration of an unclaimed property program, a matter considered in Section IV. Nevertheless, the contacts test raises an entirely different question and is not a problem of sovereignty. The state, therefore, acts as conservator of property belonging to its residents and that relationship has priority over a competing claim to the property based solely on a relationship between the debtor and his state of domicile. The *Texas v. New Jersey* Court was not called upon to consider how the conservator state could enforce power over unclaimed property when the conservator state's only contact with the debtor was the debtor's record of the creditor's last known address in the conservator state.[129]

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[128] 48 N.J. 544, 226 A.2d 715 (1967). *See* State v. New Jersey Nat'l Bank and Trust Co., 117 N.J. Super. 38, 283 A.2d 543 (1971), *modified on other grounds*, 62 N.J. 50, 298 A.2d 65 (1972); Commonwealth of Pennsylvania v. Kervick, 60 N.J. 289, 288 A.2d 289 (1972).

[129] *See* Texas v. New Jersey, 379 U.S. 674 (1965). In *Texas*, the Court was not required to face the issues of reporting and amenability to suit. The litigants neither briefed nor argued those issues to the special master or to the Court itself for several reasons. First, Sun was apparently amenable to suit in each state claiming the property. Second, the parties exercising the original jurisdiction of the Supreme Court only called on that body to resolve an interstate dispute to specific property. Third, the Court could not have resolved the problem even if it had wanted to.

Accordingly, *Texas v. New Jersey* rendered the 1954 Act inadequate because in large part, the 1954 Act based its assertion of sovereignty on the claimant state's ability to subject the holder to the jurisdiction of its courts.[130] Facing the rival claim of another state, *Texas v. New Jersey* might bar a state under the 1954 Act from claiming certain property held by persons subject to the state's jurisdiction, even though the 1954 Act would permit the claim. *Texas v. New Jersey*, however, would not prevent the state, as did the 1954 Act, from asserting custody to property held by persons not subject to the state's jurisdiction.

A simple hypothetical illustrates the impact of the rule of *Texas v. New Jersey* on the 1954 Act. Assume that a corporate holder, incorporated in State A, holds unclaimed property, or the corporation's obligation to its shareholder represented by an uncashed dividend check, belonging to a creditor whose last known address is in State B. The holder did not do business in State B. Under *Texas v. New Jersey*, State B's claim has first priority. Since the holder did not do business in B, however, the 1954 Act would not authorize State B to assert a claim to the property, or to recover from another state under the 1954 Act's reciprocity provision.[131] State A, if it had enacted the 1954 Act, could claim the property under state law in accordance with the second priority rule of *Texas v. New Jersey*. Allowing A to recover, however, would frustrate the goal of equitable distribution of unclaimed property among creditor states and would effectively destroy the concept of the state acting as conservator of the property of its unlocated residents. The contacts requirement of the 1954 Act limited state sovereignty over intangibles, making it unnecessary to provide for possible claims by states having no power over the debtor, a matter discussed in Section IV of this article.

The *Texas* Court partially answered the ringing dissent of Justice Jackson in *Connecticut mutual*, stating:

> While we may evade it for a time, the competition and conflict between states for "escheats" will force us to some lawyerlike definition of state power over this subject.[132]

The *Texas* Court gave a lawyerlike answer to the major problems of the priority and enforcement puzzle. The Court, however, also recognized its own institutional limitations, which foreclosed a complete solution and called for ultimate resolution by the states themselves.[133] This article now turns to a resolution of those matters not considered by the Court in *Texas*.

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[130] *See Uniform Disposition of Unclaimed Property Act* § 10 (1954) (requiring state to have jurisdiction over holder to assert custody).

[131] *See id.* § 10.

[132] Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 563 (1948) (Jackson, J., dissenting).

[133] Texas v. New Jersey, 379 U.S. 674, 683 (1965). "We believe that the rule we adopt is the fairest, is easy to apply *and in the long run will be the most generally acceptable to all the States.*" *Id.* (emphasis added)

V. THE 1981 UNIFORM ACT

One of the drafters' major goals for the 1981 Act was to make the Act's basic thrust of sovereignty consistent with *Texas v. New Jersey*.[134] A second goal was to provide an effective means to insure that states could enforce the broadened claims of sovereignty. Several collateral issues bearing on the ease of enforcement goal do not have simple solutions. For example, under the first priority of *Texas v. New Jersey*, the holder must turn over unclaimed property to the state of the owner's last known address. That priority is meaningful only if the holder keeps some record of last known addresses. For a large percentage of abandoned property, however, holders have destroyed or never have obtained address records.[135] Since a state must rely on the holder to report the existence of property, the claiming state cannot know of or enforce its claim absent contacts with the holder sufficient to compel reporting. The remainder of this article addresses the statutory resolution of the Act's major objectives to provide rights of sovereignty consistent with *Texas v. New Jersey*, and to insure a state's ability to exercise that sovereignty.

A. The Claims of Sovereignty

The propositions that unclaimed property remains an asset of the vanished owner and that the state of last known address of that owner has a paramount right to assert custody to the property underlie all the priority rules of the 1981 Act.[136] Additionally, the Act is structured to eliminate competing claims of sovereignty among states. The Act also minimizes, if not eliminates, any need for a race of diligence among the states.

Section 3 of the 1981 Act is the key section for assertion of sovereignty by a state. Section 3 provides a statutory system of priority incorporating the holding in *Texas v. New Jersey*.[137] The state with first prior-

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[134] *See Uniform Unclaimed Property Act* prefatory note, at i (1981).

[135] *See infra* note 148. Unclaimed property administrators estimate that holders have no owner's address for more than 50% of the value of unclaimed property reported to the states. *Id.*

[136] *Uniform Unclaimed Property Act* § 3, comment (1981)

[137] *Id.* § 3. Section 3 provides that:

> Unless otherwise provided in this Act or by other statute of this State, intangible property is subject to the custody of this State as unclaimed property if the conditions raising a presumption of abandonment under Sections 2 and 5 through 16 are satisfied, and:
>
> (1) the last known address, as shown on the records of the holder, of the apparent owner is in this State;
>
> (2) the records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in this State;
>
> (3) the records of the holder do not reflect the last known address of the apparent owner, and it is established that:
>
> (i) the last known address of the person entitled to the property is in this State, or

ity is the state of the last known address of the owner asserting custody over unclaimed intangible property.[138] If there is no last known address or if the state of last known address does not have applicable abandoned property legislation, the state of the holder's domicile may claim.[139] If neither the state of last known address nor the state of domicile of the holder can assert a valid claim, section 3 provides that the state in which the transaction creating the property right occurred may claim.[140] Section 3 was drafted narrowly to avoid competing claims to the same property.

(ii) the holder is a domiciliary or a government or governmental subdivision or agency of this State and has not previously paid or delivered the property to the state of the last known address of the apparent owner or other person entitled to the property;

(4) the last known address, as shown on the records of the holder, of the apparent owner is in a state that does not provide by law for the escheat or custodial taking of the property of its escheat or unclaimed property law is not applicable to the property and the holder is a domiciliary or a government or governmental subdivision or agency of this State;

(5) the last known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary or a government or governmental subdivision or agency of this State; or

(6) the transaction out of which the property arose occurred in this State, and

(i)(A) the last known address of the apparent owner or other person entitled to the property is unknown, or

(B) the last known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property, and

(ii) the holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

Id.

The general scheme of priority for asserting claims to abandoned property is found in § 3. *Id.* However, a special provision for asserting custody over unclaimed travelers checks and money orders is present in §§ 4(d) and (e). The special rules in §§ 4(d) and (e) generally provide that the state of purchase shall have first priority with a second priority for the state of principal place of business of the issuer. *Id.* §§ 4(d), (e). This scheme of priority was authorized by Congress. *See* Pub. L. No. 93-495, §§ 603, 604, 88 Stat. 1500, 1525-26 (1974) (codified at 12 U.S.C. §§ 2501 *et seq.* (1976)). The congressional action was taken in response to the Supreme Court decision in *Pennsylvania v. New York.* 407 U.S. 206 (1972). In *Pennsylvania v. New York*, Pennsylvania sought to escheat Western Union money orders sold in Pennsylvania on the basis that the state of purchase could be presumed to be the state of last known address for purposes of the priority rules of *Texas v. New Jersey.* The Supreme Court would not indulge the presumption and held that without last known address information, the property was subject to escheat only by the state of corporate domicile. Following *Pennsylvania*, Congress passed Pub. L. No. 93-495 that substituted as the basis for asserting a claim to travelers checks and money orders the state of purchase. Pub. L. No. 93-495, §§ 603, 604, 88 Stat. 1500, 1525-26 (1974) (codified at 12 U.S.C. §§ 2501 *et seq.* (1976)). The Uniform Act adopts the authorization permitted by Congress. Further, § 31 of the Act requires that holders of travelers checks and money orders retain records indicating the state of purchase. *Uniform Unclaimed Property Act* § 31 (1981).

[138] *Uniform Unclaimed Property Act* § 3(1) (1981).

[139] *Id.* §§ 3(3)(ii), 3(4).

[140] *Id.* § 3(6).

Potential claimants can assert custody only when no higher priority claimant seeks custody. For instance, the Act authorizes the state of corporate domicile to assert a claim to property only if the last known address of the owner is unknown,[141] or if the state of last known address has not provided legislation for taking custody of the property.[142]

Section 25 of the Act provides the mechanism for states with a higher priority claim to come forward subsequently and reclaim the property from the state that obtained custody initially.[143] Section 25 insures that the first priority claimant will take custody of its property and removes any incentive for a lower priority state to engage in a race of diligence.

Sections 3(1), (2) and (3)(i) of the Act encompass the first priority claim of *Texas*. The holder's records are the most likely place from which to ascertain the last known address of the owner. The holder, however, may not have kept complete or accurate records. If the records of the holder no longer contain the name of the owner but do provide the owner's address, the state of the owner's address may claim the property. For example, insurance records sometimes show that the insurer made a payment to a particular address, but the insurer did not retain the name of the payee. While it would be impossible to reunite the owner with his property in this circumstance, permitting the state of last known address to claim the property fulfills the goal of proportional distribution of escheats according to the commercial activities of the the states' residents.[144]

Sections 3(3)(ii) and (4) of the Act provide for the claim of the second priority state established by *Texas v. New Jersey*.[145] If the state of last known address cannot be determined when the property is presumed abandoned or if the state of last known address does not have an applicable unclaimed property law, the 1981 Act authorizes the state of domicile of the holder to take the property. The initial assertion of custody of the second priority state remains subject to a later claim by the state of the owner's last known address, if that state can prove that the address of the creditor was within its borders or if that state subsequently enacts an unclaimed property law.[146]

Section 3(6) goes beyond the *Texas* decision, but makes an extension of sovereignty consistent with *Texas*. If for any reason the state of the creditor cannot take, either because no last known address exists or that state does not have applicable unclaimed property legislation, and the state of corporate domicile does not have a law applicable to the property, the state in which the transaction arose can claim. The third priority claimant state holds subject to defeasance under section 25 if either of the first

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[141] *Id.* § 3(6)(i)(A).

[142] *Id.* §§ 3(4), 3(6)(i)(B).

[143] *Id.* § 25.

[144] *See* Texas v. New Jersey, 379 U.S. 674, 681 (1965).

[145] *Compare Uniform Unclaimed Property Act* §§ 3(3)(ii), 3(4) (1981), *with* Texas v. New Jersey, 379 U.S. 674, 682 (1965).

[146] *Uniform Unclaimed Property Act* § 25(a) (1981).

two priority states subsequently makes a valid claim to the property.[147] In *Pennsylvania v. New York*, the Supreme Court was faced with rival claimants. The Supreme Court in *Pennsylvania v. New York*[148] would not indulge the presumption that the purchase of Western Union money orders in a given state was sufficient proof that the last known addresses of the creditors were within that state. The competing presumption that the money orders were purchased for use elsewhere was equally plausible. Nevertheless, *Pennsylvania v. New York* does not preclude a state's claim, provided no higher priority claimant seeks custody. The 1981 Act relieves the holder of liability upon payment to a legitimate claimant and protects the holder from claims made by any other state or the owner.[149] Section 3(6) is designed to insure that the chance possessor of unclaimed property does not become the ultimate beneficiary to the exclusion of all residents of the claimant state.

B. The Exercise of Rights of Sovereignty

Although the provisions of section 3 go beyond the Court's opinion in *Texas v. New Jersey*, few holders should object to the Act's extensions of sovereignty. If the 1981 Act forces a holder to disgorge a windfall in favor of a state, the holder cares little what state receives the money. The holder suffers the loss of a windfall in either instance. Providing for effective enforcement of the broad principles enunciated in section 3, however, may cause some genuine anguish among holders. Record keeping and reporting are not without expense. Unclaimed property programs depend primarily on voluntary compliance. If the cost of compliance exceeds a certain minimum amount, holders will complain to the legislature or refuse to comply. The cost of compliance, therefore, remains a paramount concern in any attempted solution to the enforcement problem.

Unclaimed property administrators estimate that up to now no last known addresses for fifty percent or more of all abandoned property have been reported to the states.[150] The 1954 Act did not mandate expressly that holders retain records of last known addresses, even though the reporting provisions presupposed record retention. High costs prohibit detailed record retention for many kinds of abandoned property such as trading stamps, scrip, coupons, and small denomination gift certificates. The transactions giving rise to such property simply do not provide a reasonable opportunity for detailed information gathering.

No state unclaimed property laws intially require that holders obtain owners' addresses.[151] Holders who initially obtain address information often clear their files after a given number of years for legitimate cost control

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[147] *Id.*

[148] 407 U.S. 206 (1972).

[149] *Uniform Unclaimed Property Act* §§ 20(a), 20(e) (1981).

[150] *See Letter from Lord, supra* note 10; *Letter from Shanley, supra* note 10. *See also supra* note 133 and accompanying text (holders lack owners' addresses).

[151] *See, e.g., Uniform Unclaimed Property Act* § 31(a) (1981).

reasons. Whether as a result of legitimate house cleaning or deliberate evasion, the effect of record destruction remains the same. Record destruction vitiates the state's ability to reunite owners with their property and wipes out the first priority claim provided in *Texas v. New Jersey*.[152]

The 1981 Act recognizes the impossible burden of a blanket requirement that all holders initially obtain last known addresses in every instance. The Act, therefore, does not mandate that holders obtain address information. Section 31, however, requires that a holder initially obtaining the information must maintain address records for ten years after the property first becomes reportable as abandoned property, or for any shorter period the state may provide by rule.[153] Section 31 seeks to insure that holders do not frustrate the last known address priority by destruction of records that often constitute the only source of information. Section 30(e) buttresses the record retention requirement of section 31 by preventing holders from indiscriminately destroying records and failing to report abandoned property.[154] Section 30(e) permits a state to base its claim on estimates or other available records of reportable property if the holder fails to maintain required records.

The record retention policies of holders vary greatly. Often holders have computer codes or other means of identifying the states in which the claimant resided, but no longer can provide an address sufficient for mail delivery. *Texas v. New Jersey* does not clarify whether a computer code would constitute proof that the creditor's last known address was within the claimant state.[155] The 1981 Act permits a state to rely on other sources besides the holder's records to prove that the last known address of the owner of abandoned property was within the state's borders. A computer code may be sufficient to establish a last known address if the holder has destroyed the original record.[156] On occasion, states and holders have negotiated settlements to distribute property to creditor states when neither party could supply actual last known address information.

No iron clad mechanism exists for a state to assure that the holder will comply with reporting requirements. Reporting requirements are crucial to the successful operation of an unclaimed property program. Although the state has the power to require reports of holders through legislation, the state's inability to obtain crucial information certainly would weaken the efficacy of any unclaimed property program. The success of an unclaimed property program depends more on the state's ability to obtain reports than on the state's ability to subject a holder to suit in the state's local courts. Potential legal and administrative difficulties are present in compelling holders to report.

A distinction exists between "doing business" to sustain service of

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[152] *See* Texas v. New Jersey, 379 U.S. 674, 680-82 (1965).

[153] *Uniform Unclaimed Property Act* § 31(a) (1981).

[154] *Id.* § 30(e).

[155] *See* Texas v. New Jersey, 379 U.S. 674, 682 (1965).

[156] *See Uniform Unclaimed Property Act* § 3, comment (1981).

process and "doing business" to sustain a detailed scheme of regulation by a state.[157] For example, a state may be able to subject a foreign corporation to suit and yet be unable to require the same corporation to collect taxes on sales made within the state. Some commentators have urged that case law makes it exceedingly difficult to compel reporting by holders.[158] In our opinion, however, the "doing business" cases are inapposite. Since the state of last known address is entitled to assert by legislation its claim to succeed to the property of the state's missing residents, the state is entitled to compel the disclosure of the existence of abandoned property. A state may use the courts of a sister state to compel property turnover if the state has no jurisdictional power over the holder.[159] Likewise, the state may use foreign courts to require a holder to report property belonging to the missing residents.[160] A state asserting a claim to property belonging to its residents is not regulating the affairs of a corporation in the same way that a state regulates health or safety.

Less populated states have complained that some holders use the defense of failure to do business as an excuse for not reporting abandoned property. Nevertheless, most major holders do not rely on this potential statutory infirmity. Recent experience in states with aggressive unclaimed property programs has shown that holders seldom interpose failure to do business as a defense to state claims against them for failing to report and turn over. More often, the reason holders fail to file is the assumption that individual states with relatively small claims will not go to the expense of auditing a holder's records.

The 1981 Act includes an interesting self-regulating feature that reduces the possibility that holders will refuse to file unclaimed property reports with the state of last known address since no benefit will be derived from refusing. If a holder declines to file reports and to pay unclaimed property to the first priority claimant, the state of the owner's last known address, the second priority claimant, the state of corporate

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[157] "Doing business" for purposes of service of process is limited only by the Fourteenth Amendment of the United States Constitution. *See* U.S. CONST. amend. XIV. On the other hand, jurisdiction to regulate a foreign corporation in a substantive fashion must run the gauntlet of the Commerce Clause, U.S. CONST. art. 1, §8, cl. 3, the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, and the Impairment of Contracts Clause, U.S. CONST. art. 1, § 10, cl. 1, as well as the Due Process Clause, U.S. CONST. amend. V; U.S. CONST. amend. XIV, §1. *See* Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954) (Delaware business not required to collect sales tax from Maryland purchasers even though business makes some deliveries in Maryland).

[158] *See generally Last Known Address, supra* note 126, at 570-77; *supra* note 157.

[159] *See* State v. Amsted Industries, 48 N.J. 544, 226 A.2d 715 (1967); *supra* note 128 and accompanying text.

[160] Some states require holders to file negative reports, or to report that they have no property payable to the state. *See, e.g.*, VA. CODE § 55-210.12:1 (Supp. 1981). Presumably a state with no jurisdiction over the holder could not require the filing of a negative report since the state would not be regulating the succession and ownership of any unclaimed property.

domicile, could take custody under section 3 of the 1981 Act.[161] The state of corporate domicile may assert priority on either of two bases. The first basis is that the state of the owner's last known address cannot be determined when the property is presumed abandoned under section 3(3)(ii). The second basis is that the state of the owner's last known address does not have applicable legislation under section 3(4).[162] The 1981 Act requires the holder to report and ultimately pay over to the second priority claimant, who would then hold the property in custody for the state of last known address. The states then could adjust the claims among themselves under the authority of section 25 which provides for state turnovers to the state of last known address. The Act thereby bypasses the holder's claim of lack of jurisdiction or other refusal to report.[163] The procedure authorized by section 25 is similar to the course taken by the Texas Supreme Court in *State v. Liquidating Trustees of Republic Petroleum Co.*[164] In *Liquidating Trustees*, the court permitted the second priority claimant, the state of Texas, to assert custody over property and hold property for states of last known address because the first priority states could not obtain jurisdiction over the holder in their own courts.[165] The provisions for states' claims from each other in section 25 and for joint agreements in section 33 should provide the necessary administrative infrastructure to effectively distribute property among the claimant states.

The growing concern for state revenues prompted many states to enter into cooperative agreements to aid each other in the collection process.[166] These agreements are of questionable legality under existing law and holders initially evidenced skepticism about the validity of such agreements. Nevertheless, many holders prefer dealing with one inquiry rather than fifty. The 1981 Act seeks to encourage reciprocal agreements through the provisions of section 33.[167]

The reciprocal agreements envisioned in section 33 do not require the consent of Congress under the compact clause of the Constitution.[168] The Supreme Court has limited the the compact clause to combinations or agreements that tend to increase the political power of states to such an extent that the arrangements interfere with the supremacy of the United States. In *United States Steel Corp. v. Multistate Tax Commission*,[169] the Supreme Court upheld a tax compact that created a permanent ad-

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[161] *Uniform Unclaimed Property Act* § 3(3)(ii) (1981).

[162] *Id.* § 3(4). Section 3(4) deems the holder's failure to report to the state of last known address to establish conclusively that the state had no applicable law. *Id.*

[163] *See id.* §§ 25(b), 25(c).

[164] 510 S.W.2d 311, 315 (Tex. 1974).

[165] *Id.*

[166] States entering into cooperative agreements include California, Illinois, Minnesota, Massachusetts and Virginia, among others.

[167] *See Uniform Unclaimed Property Act* § 33, comment (1981).

[168] U.S. CONST. art. I, §10, cl. 3.

[169] 434 U.S. 452 (1978).

ministrative body to perform audits of multistate taxpayer operations and to enforce the audits in the courts of the member states when requested. Congress had not given approval to the compact. States could make similar agreements under the authority granted by section 33 of the 1981 Act. The agreements would provide an economical method to enforce individual state claims under the Act. Each state would retain discretion to bring suit or to forego a claim, thereby remaining free to adopt individual abandoned property policies.

Section 33 further authorizes one state to bring an action on behalf of another.[170] In some cases, a state administrator may find it prudent to seek counsel in a foreign jurisdiction. Small claims may not justify individual action by a claimant state in a foreign forum, but if several states joined forces, economies of scale might warrant maintenance of the action. Section 33 expressly permits joint actions.

VI. CONCLUSION

The Court in *Texas v. New Jersey* did not attempt, wisely we believe, to establish the limit of state power to assert custody over intangible property. To establish that limitation may well be an impossible task. Instead, the Court did the next best thing by establishing an initial system of priorities for resolving conflicting claims. To the extent that the law provides a mechanism for the resolution of competing claims, the need to define absolute limits on state power is lessened. The 1981 Uniform Act, likewise, does not attempt to define the limits of state power. Instead, the Act builds on the initial system of priorities established by the Court in *Texas v. New Jersey*. The Act's ancillary provisions for reporting, record retention, and interstate cooperation should lessen the need to solve the intractable problem of articulating ultimate limits on state power.

Any law that affects many persons with varied interests and that is intended to resolve some of the most vexing conflicts between and among states is bound to have ragged edges and lack the elegance of symmetry. The Uniform Unclaimed Property Act is no exception. While law reformers always seek elegant solutions to intractable problems, we generally must be satisfied with more practical ones. The law would be neater if a state authorized to claim property as a sovereign did not have to be concerned that it might not be able to require holders to report directly to it. The law would be neater if all abandoned property had a clear label identifying the name and last known address of the owner. But it is not to be that way. A little chewing gum, a lot of bailing wire, and, one hopes, some common sense went into drafting the 1981 Uniform Unclaimed Property Act. With some common sense administration and good faith cooperation among states and between states and holders, the Act can provide at least a pragmatic solution to a series of rather important problems.

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[170] *See Uniform Unclaimed Property Act* §§ 33(a), 33(c), 33(d), 33(e) (1981).

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