

Honey, I Shrunk the Dormancy Periods!

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Dormancy periods — the periods after which a state presumes that property has been abandoned by its owner and requires that the property be turned over to the state — have become incredibly short. These periods, once characterized as “long lapses of time,”¹ are now as short as three years for many of the most common property types. Owners are routinely caught unaware that states will seize — or have seized — their property. Property that owners believe is safe, sound, and protected, earning interest and appreciating in value, often becomes lost or untraceable, its income-generating capacity stripped. The effect of the premature takings is often dire. In this article we will focus on some of the practical and legal implications of shrinking dormancy periods in unclaimed property statutes.

Historical Background

In the early years of unclaimed property law, statutory distinctions in dormancy periods for different types of property were common, based on the realistic understanding that some property was intended by owners to sit untouched and that no presumption of abandonment should arise prematurely. For example, in 1942 Kentucky set its dor-

mancy period at 10 years for bank demand deposits, but at 25 years for bank time deposits.² Likewise, state courts recognized the wisdom in long dormancy periods for some types of property. In New York the courts had recognized that the length of time before lapsing and the nature of the property were relevant to a constitutional analysis, and that a 30-year dormancy period for bank deposits might well be proper because such deposits are “ordinarily made to remain for a long period of time.”³ Similarly, in declaring unconstitutional Ohio’s Unknown Depositors Law, which defined unknown depositors as those whose bank accounts have gone untouched for seven years, Ohio’s court of appeals concluded that it was not a “fanciful notion” for a party to “provide a sum for his future needs . . . intending to leave it there, to forget it . . . until some time in the future.”⁴

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However, any statutory presumption of abandonment, even after as long as 30 years, is at best highly questionable. Pennsylvania was the first state — in 1872 — to provide for the escheat of dormant bank deposits, and it initially provided for a 30-year dormancy period.⁵ In a case upholding the constitutionality of the 1872 Pennsylvania provision, the court noted that half of the depositors accessed their

¹*Provident Inst. for Sav. v. Malone*, 221 U.S. 660 (1911).

²1942 Ky. Acts ch. 156; Ky. Rev. Stat. Ann. sections 393.060 and 393.070 (1942). Kentucky eliminated the distinction between demand and time deposits in 1998. 1998 Ky. Acts ch. 560, section 1. The dormancy period for bank accounts is now three years. 2008 Ky. Acts ch. 132, section 12.

³*Bklyn. Borough Gas Co. v. Bennett*, 154 Misc. 106, 114 (N.Y. Sup. Ct. Albany County 1935).

⁴*Millikan v. Cook*, 180 N.E. 554, 558 (1931), *aff’d*, 180 N.E. 896, *cert. denied*, 287 U.S. 626 (1932).

⁵Public Law 62, April 17, 1872. See also *Provident Inst. for Sav. v. Malone*, 221 U.S. 660 (1911) (30-year dormancy period for bank accounts).

accounts *after* the termination of the 30-year period.⁶ Nonetheless, the court upheld the constitutionality on the basis that the “sovereign State has jurisdiction to take charge of apparently abandoned or unclaimed property.”⁷

Over time, the distinctions in dormancy periods among property types have decreased along with the dormancy periods themselves, with a drastic downward dormancy spiral evident in most, if not all, states. For example, Massachusetts has decreased its dormancy period tenfold for bank accounts from 30 years in 1907 to three years in 1992.⁸ Delaware reduced the dormancy period for property held by banking organizations from 25 years to seven years in 1985,⁹ and to five years in 1988.¹⁰ New Jersey recently reduced the abandonment period for traveler’s checks from 15 years to three years and for money orders from seven years to three years,¹¹ and those reductions are the subjects of litigation pending in the Third Circuit.¹² New Jersey reduced the period for demand, savings, and time deposits from 10 years to three years in 2002.¹³

⁶*Commonwealth v. Dollar Savings Bank*, 102 A. 569 (1917).

⁷*Id.* 102 A. at 571.

⁸Mass. Laws 1907; ch. 340 (30 years); St. 1950, ch. 801 (14 years); St. 1975, ch. 608, section 4 (10 years); St. 1980, ch. 130, section 4 (seven years); St. 1981, ch. 351, section 104 (five years); and St. 1992, ch. 133, section 533 (three years).

⁹65 Del. Laws Ch. 140 (1985).

¹⁰66 Del. Laws c. 379 (1988).

¹¹Chapter 25 of the Laws of 2010 (Chapter 25).

¹²In response to Chapter 25, New Jersey’s 2010 legislation, five complaints were filed in the U.S. District Court, District of New Jersey: *Amer. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, Civ. No. 10-4890 (FLW); *New Jersey Retail Merch. Ass’n v. Sidamon-Eristoff*, Civ. No. 10-5059 (FLW); *New Jersey Food Council v. Sidamon-Eristoff*, Civ. No. 10-5123; *Amer. Express Prepaid Card Mgmt. Corp. v. Sidamon-Eristoff*, Civ. No. 10-5206 (FLW); and *MEMO Money Order Co. v. Sidamon-Eristoff*, Civ. No. 10-5460 (FLW). An opinion was issued on November 13, 2010, regarding the first four cases (D.N.J. Nov. 13, 2010). A separate decision was issued on November 18, 2010, for the fifth case, which had been filed after the others. The district court declined to issue preliminary injunctions regarding the decrease in the traveler’s check dormancy period from 15 to three years and the decrease in the money order dormancy period from seven to three years. The court did issue preliminary injunctions on the retroactive subjectivity of non-cash-redeemable stored value cards and on Chapter 25’s adoption of a “third priority” rule, a place of purchase rule, which would require that stored value cards sold in New Jersey escheat to New Jersey, despite the U.S. Supreme Court precedent stating that if the address of the owner is unknown the property is to escheat to the state of the issuer’s domicile. Notices of appeal were filed in the Third Circuit, which then issued preliminary injunctions on the traveler’s check and money order dormancy period provisions of Chapter 25, pending appeal on the merits.

¹³P.L. 2002, ch. 35.

California has steadily reduced the dormancy periods for bank accounts from 20 years in 1913,¹⁴ to 15 years in 1959, seven years in 1977, five years in 1989, and finally three years in 1990.¹⁵ Even the legislative director of the California State Controller’s Office had acknowledged that the office is looking at lengthening the escheatment period: “Three years appears quite low and we’re looking at what should be the appropriate period before property escheats.”¹⁶ In 2007 legislation was proposed in California to increase the dormancy period from three to five years for most property; the legislation was not enacted.¹⁷

Just last month, New York Gov. Andrew Cuomo (D) proposed shortening dormancy periods on various property types from five or six to three years.¹⁸ The memorandum in support and the Executive Budget Briefing Book leave no question that the reduction is a “revenue action” motivated by the state’s need to balance its budget without raising taxes.¹⁹

The National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission (NCCUSL), an association of state tax commissioners on uniform laws, has drafted several model statutes dealing with unclaimed property. The first, the Uniform Disposition of Unclaimed Property Act (UDUPA) issued in 1954, adopted a uniform seven-year presumption of abandonment for all types of property. In their comments to the 1954 UDUPA, the commissioners said that differing business practices might dictate that other dormancy periods were more appropriate. Savings bank accounts were mentioned as a property type

¹⁴Calif. Code Civ. Proc. section 1273 (since repealed); *Security Savings Bank v. California*, 263 U.S. 282 (1923) (“long-dormant bank accounts”).

¹⁵Calif. Code Civ. Proc. section 1513; Stats 1976 ch. 1214; Stats 1988 ch. 286; Stats 1990 ch. 450.

¹⁶Informational Hearing: State Controller’s Office and Unclaimed Property (Calif. Senate Governmental Organization, Oct. 22, 2007).

¹⁷AB 2221 (Calif. 2007-08 Leg. Sess.).

¹⁸2011-12 Executive Budget, Article VII Revenue Bill, Part A.

¹⁹2011-12 Executive Budget Briefing Book at 69 (“Other Executive Budget General Fund revenue actions that do not result in an increase of tax or fee liability . . . include reducing dormancy periods on various abandoned property items); at 70 (lists the \$55 million of estimated revenue from reduction of the dormancy period under “Other Revenue Actions”). The memorandum in support at 4 states that enactment of the provisions reducing the dormancy periods is “necessary to implement the 2011-2012 Executive Budget because it generates \$55 million in 2011-12 revenue and \$70 million in 2012-13 revenue.” Gov. Andrew Cuomo’s Annual Message confirmed his promise to “hold the line on taxes.” Governor’s Annual Message at 14 (Jan. 5, 2011).

for which a longer period of dormancy might be desirable. In the 1966 revision to the UDUPA, the seven-year presumption was retained for all property types, with the exception of 15 years for traveler's checks. When NCCUSL overhauled the model act in 1981, to address the ruling by the U.S. Supreme Court in *Texas v. New Jersey*,²⁰ which dealt with states' priority rules for laying claim to unclaimed property, the 1981 Uniform Unclaimed Property Act (UUPA) lowered the general seven-year presumption of abandonment to five years, consistent with the "tendency of state legislatures in recent years to reduce dormancy periods." As the comments to the 1981 UUPA acknowledged, "states have become increasingly aware of the opportunities for collecting . . . unclaimed money and using the 'windfall' unreturned funds as general fund receipts." The rationale provided for lowering the general dormancy period was that the "current high rate of inflation exacts a severe penalty from one who holds money or its equivalent for extended periods; an inference of loss or abandonment may be drawn more quickly than in 1966 when the value of money was more stable." In the comments to NCCUSL's most recent iteration, its 1995 UUPA, the commissioners said that "statistical evidence indicates that a period of 15 years continues to be appropriate in the case of traveler's checks, and seven years in the case of personal money orders issued by express companies."

The UUPA's 1981 premise to support a decrease in the dormancy period — that inflation affects abandonment — is flawed regarding property in interest-bearing accounts, which increases in value despite inflation. Further, if the rate of inflation was truly the justification for reducing dormancy periods, it would follow that when the inflation rate decreases, the dormancy periods would correspondingly increase. Needless to say, with rare exceptions, the downward spiral in dormancy periods has continued, even in 2009, a deflationary period. Arizona,²¹ Indiana,²² and New Jersey²³ are states that

have recently jumped on the shrinking dormancy period bandwagon, deflation aside.

Constitutional and Practical Implications of Short Dormancy Periods

When dormancy periods were long — that is, 15, 20, or 30 years — justification might have existed for state intervention, given the real likelihood that an actual abandonment had occurred. Now, however, with the short periods in vogue — for example, one, two, and three years — there is scant basis to conclude that the property actually has been abandoned, and escheat statutes may run afoul of constitutional protections to property owners and holders.

Due Process Clause

The U.S. Constitution's due process clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." It is based on the notion that there should be fundamental fairness in states' dealings with individuals and is often viewed as having both substantive and procedural components. Early U.S. Supreme Court cases recognized that a short dormancy period could violate the due process clause. In *Cunnius v. Reading School District*,²⁴ the Court upheld an 1885 provision appointing administrators for the estates of those missing and presumed dead after seven years. And while recognizing that the "right to regulate concerning the estate or property of absentees is an attribute, which, in its very essence belongs to all governments," the Court noted that a presumption of death resulting from the absence from the state of a brief period would violate due process.²⁵ Similarly, in *Provident Institution for Savings v. Malone*,²⁶ the Court understood that the evaluation of the constitutionality of unclaimed property laws might well turn on the length of the dormancy period: "If the statute had provided that the money should be paid over to the receiver-general if the owner, after a short absence, could not be found, or if the account remained inactive for a brief period, a very different question would be presented."²⁷

Takings Clause

The takings clause of the Fifth Amendment to the Constitution provides that no state shall take "private property for public use, without just compensation." Generally, unclaimed property statutes have been found not to run afoul of the takings clause,

²⁰379 U.S. 674 (1965).

²¹SB 1003 (Ariz. 2009) (included reduced dormancy periods for traveler's checks from 15 to three years, money orders from seven to three years, stock or equity interests from three to two years, and demand, savings, or time deposits — including a deposit that is automatically renewable — from five to three years).

²²HB 2636 (Ind. 2010) (reduced dormancy periods for several property categories from five to three years).

²³AB 3002 (N.J. 2010) (included reduced dormancy periods for traveler's checks from 15 to three years, money orders from seven to three years, and created a two-year dormancy period for stored value cards). An entire article can easily be dedicated to the many infirmities of New Jersey's recent legislation.

²⁴198 U.S. 458 (1905).

²⁵*Id.* at 469.

²⁶221 U.S. 660 (1911).

²⁷*Id.* at 664.

and some courts have set the bar very high, requiring that a plaintiff have a property interest that is constitutionally protected in order to prevail in a takings clause case.²⁸

Contract Clause

Article I, section 10, clause 1 of the Constitution provides that states cannot pass laws “impairing the Obligation of Contracts.” More than 60 years ago, the Sixth Circuit recognized, regarding the applicability of escheat provisions to national banks, that short limitations periods would negatively affect national banks’ ability to contract.²⁹ Nonetheless, courts have generally sided against holders claiming that short dormancy periods impinge on their right to contract.³⁰

However, when it is the holders that modify contractual rights with their customers after states decrease the dormancy period, courts usually void those provisions as impermissible private escheat provisions, finding the corresponding downward revisions to contract terms an unseemly race to the bottom.³¹ That seems unfair and contradictory: Par-

ties should remain free to negotiate their contracts without the government’s hands in the parties’ pockets.

Recent Developments

Most state courts seem to have viewed as virtually unfettered legislators’ authority to grab other people’s property after short dormancy periods, and do not seem to be too concerned with such trivialities as the Constitution.

However, one recent case, from the federal district court in Kentucky, viewed the legislative impetus in its proper light and refused to sanction the Kentucky legislators’ attempt to raise revenue by decreasing the dormancy periods for uncashed traveler’s checks from 15 to seven years.³² The court held that shortening the dormancy period, without any evidence that the traveler’s checks are actually abandoned after that time, violated the due process, takings, and contracts clauses. The court rejected the state’s purported “boundless authority,” noting that:

Here, there is clear evidence that the state legislature enacted the abandoned property law as an effort to raise revenue. “Complete deference to a legislative assessment of reasonableness and necessity is not appropriate [where] the State’s self-interest is at stake. A government entity can always find a use for extra money, especially when taxes do not have to be raised.”³³

The shortening was found to impair the certainty in private contracting that underlies the contract clause.³⁴ The lower court rightfully noted that the reduction in the dormancy period was a taking, “a forced contribution to governmental revenues.”³⁵ That the revenue generated from unclaimed property is earmarked for noble causes,³⁶ moreover, does not make the taking any less egregious.

years; the court held that “defendants’ private escheat law is clearly opposed to the spirit and essence of the public custodial escheat law and to the broad public policy represented thereby,” *id.* at 338-39).

³²*Hollenbach, supra.*

³³*Id.* at 763, citing *U.S. Trust Co. of New York*, 431 U.S. 1, 25-26 (1977).

³⁴*Id.*

³⁵*Amer. Express Travel Related Servs. v. Hollenbach*, 597 F. Supp. 2d 717, 728 (E.D. Ky.), *aff’d*, 630 F. Supp. 2d 757 (E.D. Ky.), *motion to alter or amend, or vacate judgment denied*, Civ. Action No. 3:08-58-DCR (E.D. Ky. 2009).

³⁶*E.g., see Rowlette v. North Carolina*, 656 S.E.2d 619 (N.C. Ct. App.), *review denied*, 666 S.E.2d 487 (N.C. 2008) (emphasizing that the money raised under North Carolina’s Unclaimed Property Act is transferred “to the State Education Assistance Authority for grants and loans to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State”).

²⁸*Simon v. Weissmann*, No. 07-3880, 2008 U.S. App. LEXIS 27025 (3d Cir. 2008); *see, e.g., Morris v. Chiang*, 77 Cal. Rptr. 3d 799, 805 (Calif. Ct. App. 4th), *review denied*, S165055 (Cal. 2008); *Rowlette v. North Carolina*, 656 S.E.2d 619, 625-626 (N.C. Ct. App.), *review denied*, 666 N.E.2d 487 (N.C. 2008); *Hooks v. Kennedy*, 961 So.2d 425, 431 (La. Ct. App.), *cert. denied*, 967 So., 2d 507 (La. 2007); *Clark v. Strayhorn*, 184 S.W.2d 906, 913 (Tex. App.), *review denied*, 06-0195 (Texas), *cert. denied*, 549 U.S. 995 (2006); *Smyth v. Carter*, 845 N.E.2d 219, 224 (Ind. Ct. App.), *transfer denied*, 860 N.E.2d 588 (Ind. 2006), *cert. denied*, 549 U.S. 1181 (2007); *Fong v. Westly*, 12 Cal. Rptr. 3d 76, 83 (Calif. Ct. App. 3d 2004).

²⁹*Starr v. O’Connor*, 118 F.2d 548, 557 (6th Cir. 1941), *overruled on other grounds; Anderson Nat’l Bank v. Luccett*, 321 U.S. 233 (1944).

³⁰*See, e.g., Amer. Express Travel Related Servs., Inc. v. Hollenbach*, 630 F. Supp. 2d 757 (E.D. Ky. 2009) (*Hollenbach*) (although the court held that the reduction in the dormancy period for traveler’s checks from 15 to seven years violated due process, it concluded that the “traveler’s check funds in dispute do not appear to be the sort of contracts targeted by the Contract Clause”), *motion to alter or amend, or vacate judgment denied*, Civ. Action No. 3:08-58-DCR (E.D. Ky. 2009); *Amer. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 2010 U.S. Dist. LEXIS 120153 (D.N.J. Nov. 13, 2010) (“State’s escheat laws do not relate to the ‘validity, construction, and enforcement’ of the sales contract of travelers checks, nor do they impair the obligations of preexisting contracts.”).

³¹*People ex rel. Callahan v. Marshall Field & Co.*, 404 N.E.2d 368 (Ill. App. Ct. 1980) (holders’ reduction of 10-year gift certificates to five years following the statutory reduction of the dormancy period to seven years was improper); *New Jersey v. Jefferson Lake Sulfur Co.*, 178 A.2d 329 (N.J. 1962), *cert. denied*, 370 U.S. 158 (1962) (shortly after the dormancy period for dividends was reduced to three years, the company amended the certificate of incorporation to provide that uncashed dividends would revert to the company after three

(Footnote continued in next column.)

However, the New Jersey federal district court chose not to follow the Kentucky federal court's well-thought-out decision; the New Jersey court refused to issue preliminary injunctions in cases challenging the reductions of the traveler's check and money order dormancy period.³⁷ Regarding traveler's checks, despite acknowledging that most states have a 15-year dormancy period, and that "it appears that a primary aim of Chapter 25 was to increase the State's coffers," the New Jersey court held that the holder was not likely to succeed on the merits of its substantive due process, contracts clause, or takings clause claims.

The holder raised what appear to be valid arguments in support of its position that no legitimate state interest warranted the state's reduction in the dormancy period with the resulting loss to the holder of its right to earn income from investing the proceeds from sales of the traveler's checks: (a) there is no evidence that a three-year dormancy period bears a rational relationship to the actual abandonment; and (b) the state's revenue-raising purpose was primary and "does not pass constitutional muster" because it is not a rational purpose. The court cited several purported purposes for the legislation — "to protect New Jersey consumers from the commercial dormancy fee practices and to modernize [New Jersey's] unclaimed property laws," and to protect property owners in case the holder declares bankruptcy — and held that the statute would likely survive the substantive due process challenge given the "great deference and the presumption of validity under the rational basis review" afforded the state. The court distinguished *Hollenbach* on the basis that there the "only reason" for the Kentucky General Assembly to reduce the dormancy period was revenue, while in New Jersey raising revenue was "not the only conceivable basis," and the property could be used for public good.

As readily acknowledged by New Jersey's treasurer, who is responsible for administering New Jersey's Unclaimed Property Law, "Unclaimed Property is not a tax or an additional liability to businesses. The goal of the Unclaimed Property Office is to recover, record and reunite the property with the rightful owner and/or heirs."³⁸ However, when the fundamental underlying purpose of the unclaimed property act is to reunite owners with their property,

a legislature's revenue-raising goal is inherently suspect and *should* be subject to heightened scrutiny, particularly when, as in this case, the decrease in dormancy period negatively affects the contractual rights of the holder. Further, under the court's reasoning, any action that raises revenue for the public good would be rational.

When the fundamental underlying purpose of the unclaimed property act is to reunite owners with their property, a legislature's revenue-raising goal is inherently suspect and should be subject to heightened scrutiny.

Despite the evidence that 90 percent of the traveler's checks that are sold in the state and are uncashed after three years of sale are ultimately cashed, the court focused on the large percentage of traveler's checks cashed within a year of purchase, 96 percent, and concluded that "it would not be irrational for the Legislature to have determined that the small percentage of the unclaimed three-year old travelers checks are presumed abandoned." However, once it is established that the 90 percent of the property that would be deemed abandoned under Chapter 25 is not actually abandoned, even under a deferential, rational basis standard, the primary purpose of the abandoned property law is thwarted, and deeming un-abandoned property to be abandoned purely to raise revenue cannot be rational. The percentage of traveler's checks redeemed within one year is simply not a relevant inquiry to determine whether checks not cashed within three years have been abandoned. Taking the court's premise to its absurd conclusion, if 99 percent of payroll checks are redeemed within a week, a dormancy period of three weeks would be rational, even if *all* the checks are cashed within a month.

Protecting owners from traveler's check issuers in the event that they declare bankruptcy — another purported purpose asserted by New Jersey to justify the shortened dormancy period — is also a suspect rationale. Taken to its logical extreme, since all businesses can go bankrupt, perhaps all proceeds from the issuance of traveler's checks (and money orders, stored value cards, and so on) should simply be given to the government on receipt "for protection." But, although there may be de minimis aspects of consumer protection inherent in unclaimed property law, consumer protection and bankruptcy laws are the proper places to so legislate. Further, given the dire financial straits many states are in,

³⁷*Amer. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, Civ. Action No. 10-4890 (FLW), 2010 U.S. Dist. LEXIS 120153 (D.N.J. Nov. 13, 2010).

³⁸N.J. Dep't of Treasury, Unclaimed Property — Definition (July 19, 2010), available at <http://www.unclaimedproperty.nj.gov/defined.shtml>.

and the recent talk of having Congress provide a mechanism that would allow states to seek bankruptcy protection,³⁹ the protectionist rationale is particularly dubious. Owners may be safer with their property in the keeping of holders rather than states.

The claim that the shrinking dormancy period violated the traveler's check issuer's contract rights was also rejected on the basis that the issuer did not have a contractual right to invest the proceeds. However, the parties *did* agree that the issuer would pay on presentation and, conversely, the issuer had a right to retain and invest the proceeds on checks not yet presented. By shortening the dormancy period the state *does* affect the issuer's contractual rights.

The court also rejected the holder's claim that by shortening the dormancy period, New Jersey divested it of a property right, that is, the right to invest the proceeds from traveler's check sales until claimed by the purchasers. The court reasoned that because the purchaser was the owner, the holder did not have a property interest in the profits derived from investing the funds until the purchasers used the checks. However, the court's reasoning is flawed. Under the court's narrow view, a leasehold interest held by a person other than the owner of the underlying realty would not have a property interest. Money is property, and an income interest in property is therefore also property. It is also noteworthy that the state itself considers the right to use the abandoned funds "for the common good until claimed by its owner" a valuable right.⁴⁰

The federal district court ruled similarly regarding the shortening of the dormancy period for money orders. All five related cases challenging Chapter 25 have been consolidated and are on appeal to the Third Circuit. Significantly, the Third Circuit granted the motions for injunctive relief filed by the traveler's check and money order issuers, apparently finding that there is a likelihood of success on the merits of the claims made by the issuers challenging the reduction in the dormancy periods. Eventually, the Third Circuit (and perhaps the U.S. Supreme Court) may provide additional guidance on the scope of the contract and takings clauses, and what constitutes a failure to provide substantive due process in the context of shortened dormancy periods. Holders of property should hope that the Third Circuit will follow *Hollenbach*, will not allow New

Jersey's revenue needs to pervert unclaimed property laws and the Constitution, and will not allow the state to impose an additional liability or tax on businesses — precisely what the treasurer stated the law is not intended to do — under the flimsy guise of modernization.

Given the unequivocal, sole purpose of reducing the dormancy period — revenue — if Gov. Cuomo's recent budget proposal is enacted, challenges to the enacted measure could be forthcoming.

Practical Implications

The Ninth Circuit has also recognized the burdensome practicalities of short dormancy periods and lack of reasonable notice provisions. In addition to the possibility of "permanent deprivation" of their property, property owners need to "constantly monitor their property to avoid escheat, either by devoting significant time to searching the Internet themselves, by paying a service to do the same, or by 'churning' their property so that it stays active and avoids escheat."⁴¹

One New York court addressed a bank's handling of security deposits on commercial premises that had remained on deposit for more than 20 years.⁴² Although the bank alleged that the account would have been deemed abandoned after five years, the New York State Comptroller's Division of Abandoned Property had no record of the account having been turned over to the state as unclaimed property. The court posed the common-sense question:

Why would the person who opens a savings account necessarily add or subtract monies to the amount in the account? . . . People often open savings accounts solely to have money available for themselves or their family at a future date and do so solely so as to earn a fixed rate of interest paid by the bank.⁴³

The court refused to conclude that the security deposits were unclaimed property because "common sense leads to the conclusion that savings accounts of all kinds should be excluded from the definition of unclaimed and ultimately abandoned property. To do so defeats one of the purposes for which people open such an account — to save money for a 'rainy day' or some other particular purpose."⁴⁴ The court also considered the 20-year common-law presumption of payment, that is, a presumption that "an unexplained neglect to enforce an alleged right, for a

³⁹See, e.g., Mary Williams Walsh, "A Path Is Sought for States to Escape Their Debt Burdens," *The New York Times*, Jan. 20, 2011, available at <http://www.nytimes.com/2011/01/21/business/economy/21bankruptcy.html>.

⁴⁰Brief in Opposition to Plaintiff's Motion for Injunctive Relief at 19, *Amer. Express Travel Related Servs. v. Sidamon-Eristoff*, No. 10-4328 (3d Cir. 2010).

⁴¹*Taylor v. Westly*, 488 F.3d 1197, 1199-1200 (9th Cir. 2007).

⁴²*D&I Fashions, Inc. v. JP Morgan Chase Bank*, 24 Misc. 3d 694 (N.Y. Civ. Ct. 2009).

⁴³*Id.* 24 Misc. 3d at 700.

⁴⁴*Id.* 24 Misc. 3d at 701-702.

long period, casts suspicion on the right itself.”⁴⁵ Although the court concluded that 20 years had not yet elapsed, it noted the decisions in New Jersey and Utah refusing to apply the doctrine to savings accounts. In the New Jersey case, *Pagano v. United Jersey Bank*, the New Jersey Supreme Court agreed with the appellate division that “the depositor of funds into a bank savings-account is ordinarily entitled to believe, and does in fact expect, that the deposit is entirely safe, that the funds will be indefinitely available, and that no demand need be taken to protect the right to obtain those funds at any time the passbook is presented.”⁴⁶

It is simply too common for bank and brokerage accounts to remain activity free for many years, particularly if the money was deposited or the securities purchased for retirement or for funding a child’s college education. Owners have enough on their plates without having to keep up with the accounts they knowingly maintain for use in the beyond-dormancy-period future. A more reasoned and revenue-dispassionate look is needed to assess and determine abandonment periods that actually make sense based on property type and are consistent with the purported goal of protecting the interests of property owners.

Concluding Thoughts

Unclaimed property laws have become legislatures’ piggybanks. For most property types, the shortened dormancy periods ignore common sense, and impinge on owners’ and holders’ constitutional rights. The tendency of courts to rubber-stamp

revenue-enhancing legislative action in tough fiscal times is shortsighted and, as applied to the shrinking dormancy periods under unclaimed property laws, contrary to the fundamental purpose of such laws — to reunite abandoned property with its owners. As Justice Louis Brandeis recognized:

Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁴⁷ ☆

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⁴⁵*Id.* 24 Misc. 3d at 702.

⁴⁶670 A.2d 509, 514 (1995) (quotation omitted).

⁴⁷*Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).