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## What's New in the Revised Uniform Unclaimed Property Act?

*By Raymond P. Pepe<sup>1</sup>*

The unclaimed property laws of most states are based in whole or in part on one of the multiple versions of the Uniform Unclaimed Property Act promulgated by the Uniform Law Commission. The Uniform Act was initially promulgated by the Commission in 1954 and has been revised in 1966, 1981, 1995, and most recently in July 2016. Currently, 15 states and the Virgin Islands have substantially enacted the 1995 version of the Uniform Act, and 23 states have substantially enacted the 1981 version of the Act. The unclaimed property laws of most of the remaining states are either based on one of the earlier versions of the Uniform Act or contain a combination of provisions derived from multiple versions of the Act plus provisions unique to each jurisdiction.

The 2016 revision of the Uniform Unclaimed Property Act represents an extraordinary four-year effort to improve unclaimed property laws conducted in consultation with more than 150 public and private groups and organizations that submitted more than 100 sets of detailed comments and recommendations, all of which are available for public review and were subject to vigorous and thorough public evaluation.<sup>2</sup>

In the next several years, most states are expected to engage in a review of the recommendations contained in the 2016 revisions to the Uniform Act, which may result in numerous revisions to state unclaimed property laws. The recommendations contained in the revised Act may also influence the interpretation of existing laws with respect to issues addressed in the revised Act for which current laws are unclear or silent. While the extent to which states will adopt the 2016 revisions to the Uniform Act is uncertain, the recommendations contained in the revised Act will almost certainly trigger extensive deliberations regarding the future of unclaimed property laws and may significantly affect their implementation and administration.

This article attempts to provide a concise and reasonably comprehensive review of the major modifications to existing law contained in the 2016 Revised Uniform Unclaimed Property Act ("RUUPA").

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<sup>2</sup> The text of the act and the comments and recommendations received by the Uniform Law Commission are available at <http://www.uniformlaws.org/Committee.aspx?title=Revise%20the%20Uniform%20Unclaimed%20Property%20Act>. In the fall of 2016, the act will be subject to review and potential non-substantive revision by the Style Committee of the Uniform Law Commission and should be published with a detailed prefatory note and section-by-section commentary late in 2016. Based on Style Committee recommendations, some provisions of the published act may differ from the text approved at the 2016 meeting of the Commission and the descriptions provided in this article.

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### I. Background

Unclaimed property laws (which are often mistakenly referred to as escheat laws) are currently in effect in all U.S. states, the District of Columbia, and in most U.S. territories; most Canadian provinces and territories; and in a few foreign countries. In the United States, these laws apply to all types of businesses, nonprofit organizations, government agencies, and individuals who hold property owned by other persons or have fixed and certain obligations to pay debts due to other persons. With limited exceptions, unclaimed property laws apply to most types of abandoned or unclaimed intangible property, and tangible property in safe-deposit boxes or safekeeping repositories.

Currently the National Association of Unclaimed Property Administrators recognizes 123 different types of property that when presumed abandoned or unclaimed must be reported and remitted to states. The most common types of unclaimed property are bank accounts and deposits, trust and fiduciary accounts, securities, life insurance proceeds, amounts owed in business-to-business and consumer transactions, wages, class action proceeds, property distributable upon the dissolution of a business, unclaimed funds held by courts and government agencies, money orders and travelers checks.

Unclaimed property laws create presumptions that various types of property are abandoned or unclaimed after designated periods of time elapse (often referred to as dormancy periods) following the last owner-initiated activity with respect to property, communications between owners and holders of the property, or other evidence or indications of interest in the property by the owner sufficient to show that the owner is aware of the existence of the property and the identity of the holder of the property.

Property that is presumed abandoned or unclaimed must be reported and remitted to states, which are required to honor claims submitted by owners to recover property upon the submission of proof of ownership. Most unclaimed property laws do not impose periods of limitation restricting the ability of owners, or their heirs or successors in interest, to reclaim property. In addition, after abandoned or unclaimed property is transferred to states, the former holders of property who remit property to states in good-faith efforts to comply with state laws are generally granted immunity from claims that may be asserted by owners with respect to property obligations.

Compliance with unclaimed property laws is challenging because holders are required to report and remit properties to any state indicated as the address of an apparent owner on the records of the holder. When addresses are not available, property must be reported and remitted to the state of domicile of the holder, or if the property is not subject to the laws of the state of domicile of the holder, to the state in which transactions occurred out of which property rights arose. As a result, holders doing business nationally face the daunting challenge of being aware of and complying with the laws of numerous different states, regardless of whether they have other contacts with states sufficient to imposition of state taxation. Determining compliance with these obligations can be particularly challenging during the course of mergers and acquisitions.

Because states sell financial assets recovered as unclaimed property, and property owners are only entitled to recover from states the sale proceeds, persons who have remitted property to states without proper notice or in compliance with state law may also be exposed to claims asserted by property owners. Claims of this type often arise when at the time a

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transfer of property to a state is discovered by an owner, financial assets have appreciated in value in excess of the sales proceeds received by states.

Currently more than \$7.5 billion of unclaimed property is paid annually to states, and more than \$2.5 billion of property is returned annually to property owners by state unclaimed property administrators. These amounts, however, understate the amount of potential liabilities of property holders because states estimate only approximately 30 percent of businesses and nonprofit organizations are fully compliant with unclaimed property laws. Because the level of compliance with unclaimed property laws is poor, states have become increasingly aggressive in efforts to compel the filing of unclaimed property reports and the remittance of unclaimed property to states and often engage contingent-fee contract auditors to conduct multistate examinations of holders. When holders are found not to be in compliance with unclaimed property laws, most states will insist of the recovery of property for at least the last ten years, and some states will attempt to recover 20 to 30 years of unclaimed property obligations, plus interest and penalties. Auditors also often aggressively use statistical estimation techniques to determine amounts due to states when records are absent or are incomplete.

The 2016 revisions to the Uniform Unclaimed Property Act provide a comprehensive and extensive set of revisions to the Uniform Act relating to:

- when property is presumed abandoned;
- which state has custody of property;
- the duties imposed on holders to give notice to property owners before property is transferred to states;
- filing reports and remitting property to states;
- the powers and responsibilities granted to state unclaimed property administrators;
- the recovery of unclaimed property from states by owners;
- how unclaimed property laws are enforced and what penalties may be imposed for non-compliance;
- the rights of holders to seek administrative and judicial review of examinations conducted by administrators; and
- the duties of administrators and their agents to protect the confidentiality of information obtained from unclaimed property reports and examinations of holders.

The following sections of this article describe how the 2016 revisions to the Uniform Act change and supplement the provisions of earlier versions of the Uniform Act in each of these areas.

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### II. Presumptions of Abandonment

#### A. *Property Included and Excluded from Custodial Taking*

The 2016 revisions to the Uniform Act propose to exclude from custodial taking:<sup>3</sup>

- unused tickets for which the issuer does not have an obligation to provide refunds;
- worthless securities (i.e., those for which the cost of liquidation and delivery would exceed the value of the security on the date an unclaimed property report is due);
- non-freely transferable securities (those without a custodian or transfer agent providing clearing and settlement services to financial markets);
- securities subject to liens, legal holds, or restrictions evidenced on the records of the holder or imposed by operation of law that restrict the owner's ability to engage in transfers or sales;
- game-related digital content;
- loyalty cards;
- ABLE accounts (i.e., accounts established under Section 529A of the Internal Revenue Code by the Achieving a Better Life Experience Act); and
- tangible personal property in safekeeping repositories other than safe-deposit boxes (but not the proceeds of the sale of unclaimed property in such repositories in excess of amounts recovered to pay delinquent rental charges).

RUUPA also recognizes that the laws of several states contain exemptions from custodial taking for gift certificates and business-to-business transactions and that some states by law or policy exclude in-store returned merchandise credits. As a result, the revised Act provides an optional exclusion for gift certificates and in-store returned merchandise credits,<sup>4</sup> but defers to state law to determine the scope of any exemption provided for business-to-business transactions. The Uniform Law Commission has neither endorsed nor opposed exemptions for gift certificates, in-store returned merchandise credits and business-to-business transactions, but recognizes these are important issues in which policymakers in different jurisdictions may take differing views.

While existing unclaimed property laws generally apply to all types of intangible property not expressly excluded from custodial taking, the Revised Act clarifies that intangible property subject to custodial taking includes:<sup>5</sup>

- virtual currency;
- payroll cards;

<sup>3</sup> RUUPA, §§ 102(24)(B)(ii) (nonrefundable used tickets); 102(20), 102(24)(B)(iii), and 102(33) (securities that are non-freely transferable, worthless securities, or subject to liens or restrictions); 102(10), 202(14), and 102(24)(C) (game-related digital content and loyalty cards); and 205 (safekeeping repositories other than safe-deposit boxes).

<sup>4</sup> RUUPA, §§ 102(11), 102(24)(C)(iii), 102(24)(C).

<sup>5</sup> RUUPA, §§ 102(24)(B)(i) and 102(32) (virtual currency); 102(22) and 102(24)(B)(i) (payroll cards); 102(24)(B)(ii) and 102(30) (stored-value cards); 201(3) (municipal bonds); 202 (health savings accounts); 201(11) (commissions and employee compensation); and 204 (custodial accounts for minors). As drafted, it is unclear whether ABLE accounts are only excluded from section 203 or exempt from custodial taking because unclaimed accounts are subject to claims by states as creditors under 26 U.S.C. § 529A(f).

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- stored-value cards;
- municipal bonds;
- health savings accounts;
- commissions;
- employee reimbursements; and
- custodial accounts for minors.

In the process of considering revisions to the Uniform Act, the drafting committee elected not to address issues relating to the preemption of state law by ERISA and other federal laws; instead they elected to allow the scope of federal preemption to continue to be addressed judicially.

### *B. Events Triggering Presumed Abandonment*

Unclaimed property laws all designate specific events after which property may be presumed abandoned if during designated periods of time following these events (informally referred to as dormancy periods) the apparent owner of property does not express any indication of interest in the property. RUUPA establishes the following new or modified events from which presumed abandonment is measured:

- For securities and securities entitlements, presumed abandonment is measured from the date a second consecutive communication sent by the holder by first-class mail to the apparent owner is returned to the holder undelivered by the U.S. Postal Service, or if the second communication is made later than 30 days after the first communication, the date the first communication is returned undelivered by the Postal Service.<sup>6</sup>
- For pension, retirement, or health savings accounts that qualify for tax deferral under U.S. income tax laws, presumed abandonment is measured from the date a second communication sent to the apparent owner by first-class mail is returned undelivered, or the earlier of the date the apparent owner becomes 70.5 years of age; distributions are required under federal tax laws; or the holder in the ordinary course of business receives confirmation of the death of the apparent owner.<sup>7</sup>
- For federally tax-deferred accounts other than pension, retirement, or health saving accounts, presumed abandonment is measured from the earlier of the date distributions are required to avoid federal tax penalties or 30 years after the account was opened.<sup>8</sup>
- For custodial accounts for minors, presumed abandonment is measured from the later of the date a second communication sent to the custodian by first-class mail is returned undelivered or the minor on whose behalf the account was opened reaches the statutory age of majority.<sup>9</sup>

<sup>6</sup> RUUPA, § 208(a). The 1995 Act measures presumed abandonment from the earlier of (1) the date any dividend, stock split, or other distribution is unclaimed by the owner, (2) the date a second mailing of a statement of account, communication, or notification was returned as "undeliverable"; or (3) the date the holder discontinued mailings, notifications, or communications to the apparent owner. RUUPA (1995) § 2(a)(3).

<sup>7</sup> RUUPA, § 202(a) and (b). The 1995 Act measures presumed abandonment for these accounts from the date of the earliest distributions or the date distributions are required to avoid federal tax penalties. UUPA (1995), § 2(a)(14).

<sup>8</sup> RUUPA, § 203. No comparable provisions are included in the 1995 Act.

<sup>9</sup> RUUPA, § 204(a). No comparable provisions are included in the 1995 Act.

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- For life insurance policies and annuity contracts not matured by proof of death, presumed abandonment is measured from the earlier of the date the insurance company has knowledge of the death of the insured or annuitant, or the insured or annuitant has attained, or would have attained if living, the limiting age under the mortality table on which policy or contract reserves are based.<sup>10</sup> These provisions are similar to those contained in the 1981 version of the Uniform Act.<sup>11</sup>
- For gift certificates, presumed abandonment is measured from the date of purchase or most recent use.<sup>12</sup>
- For stored-value cards, presumed abandonment is measured from the later of (1) December 31 of the year the card is issued or additional funds are added to the card; (2) the most recent indication of interest in the card by the apparent owner; or (3) a verification or review of the balance made by or on behalf of the apparent owner.<sup>13</sup>
- For municipal bonds, bearer bonds, or original-issue bearer bonds, presumed abandonment is measured from the earlier of the date the bond matures or is called, or the date the obligation to pay the principal arises.<sup>14</sup>
- For funds in payroll card accounts, presumed abandonment is measured by the same rules as applicable to demand, savings, and time deposit accounts.<sup>15</sup>

### *C. Electronic Communications with Owners of Securities; Pension, Retirement, or Health Savings Accounts; and Custodial Accounts for Minors*

RUUPA provides that if the holder of securities or securities entitlements; pension, retirement, or health savings accounts; or custodial accounts for minors does not send communications to the apparent owner by first-class mail, the holder is required, not later than two years after the owner's latest indication of interest in the property, to attempt to establish contact with the owner electronically. If the holder receives notification the electronic communication was not received, or the apparent owner does not respond to the electronic communication, the holder is required to "promptly" attempt to contact the owner by first-class mail. The return of this notice as undelivered by the U.S. Postal Service commences the dormancy period from which presumed abandonment is measured.

### *D. Modified and New Dormancy Periods*

The period of time that must elapse without an apparent owner's indication of interest in property before property is presumed abandoned is shortened by RUUPA from five years to three years for securities, debt obligations, deposit accounts, and for all types of intangible

<sup>10</sup> RUUPA, § 201(7). The 1995 Act only measures presumed abandonment from the limiting age. Section 7 of 1981 Act, in a manner similar to RUUPA, also measures presumed abandonment from the date of knowledge of death. UUPA (1995), § 2(a)(8).

<sup>11</sup> UUPA (1981), § 7.

<sup>12</sup> RUUPA, § 207. The 1995 Act only measures presumed abandonment from the date of purchase. UUPA (1995), § 2(a)(7).

<sup>13</sup> RUUPA, § 206. No comparable provisions are included in the 1995 Act.

<sup>14</sup> RUUPA, § 201(10). No comparable provisions are included in the 1995 Act.

<sup>15</sup> RUUPA, § 201(5). No comparable provisions are included in the 1995 Act.

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property not subject to a specific dormancy period, and for gift certificates it is increased from three to five years.<sup>16</sup>

Specific dormancy periods are also established for the following types of property not addressed in prior versions of the Uniform Act or for which the relevant dormancy period was uncertain:<sup>17</sup>

- municipal bonds, bearer bonds, or original-issue bearer bonds – three years;
- payroll card accounts – three years;
- municipal bond interest and unredeemed principal under the administration of a paying agent or indenture trustee – one year;
- commissions and reimbursements to which an employee is entitled – one year.
- health savings accounts – three years;
- tax-deferred accounts other than pension, retirement, or health savings accounts – three years;
- custodial accounts for minors – three years; and
- stored-value cards – three years.

### *E. Indications of Interest in Property That Prevent Presumed Abandonment*

The 2016 Act expressly provides that property is not presumed abandoned if the apparent owner indicates an interest in the property during the applicable dormancy period. Under the 1995 Act, it is unclear whether an indication of interest in property not accompanied by communication in writing, or by other means reflected in a contemporaneous record prepared by or on behalf of the holder, is sufficient to avoid the presumed abandonment of property.

The types of activities that constitute an indication of interest in property sufficient to avoid its presumed abandonment are expanded to include:

- a “record” (i.e., “information that is inscribed on a tangible medium or that is stored in an electronic or other medium that is retrievable in perceivable form”) communicated by the apparent owner to the holder concerning the property or an account in which the property is held;<sup>18</sup>
- oral communications by an apparent owner to a holder or its agent if the holder or its agent contemporaneously makes and preserves a record of the communication;
- any activity by an apparent owner to access an account or information concerning an account;

<sup>16</sup> RUUPA, §§ 201(4) (debts of business associations); 201(5) (demand, savings, or demand deposits); 201(13) (all other types of intangible property); 207 (gift certificates) and 208 (securities).

<sup>17</sup> RUUPA, §§ 201(3) (municipal bonds), 201(5) (payroll cards), 201(10) (municipal bond interest and unredeemed principal held by paying agent or trustee), 202 (health savings accounts), 203 (other tax-deferred accounts), 204 (custodial accounts for minors), and 206 (stored-value cards).

<sup>18</sup> Under the 1995 Act, an electronic communication does not prevent the presumed abandonment of property unless the communication is also “reflected in a contemporaneous record prepared by or on behalf of the holder.”

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- the authorization by an apparent owner of automatic deposits into or withdrawals from an account other than the automatic reinvestment of dividends or interest, and
- any action by an apparent owner of property, or the owner's agent or representative, "which reasonably demonstrates to the holder that the apparent owner is aware that the property exists."

### F. *Knowledge of Death of an Insured or Annuitant*

The 2016 revisions to the Uniform Act reinstate provisions of the 1981 version of the Act that measured the presumed abandonment of life insurance or annuity benefits not matured by proof of death from the date an insurance company has knowledge of the death of insured or annuitant. RUUPA, however, provides a variety of rules not contained in the prior law to determine when an insurance company has knowledge of death, namely:

- receipt of death certificate or court order;
- due diligence required under state law or regulations to maintain contact with insureds or annuitants or to determine their death;
- validated matches between the names of persons reported as deceased in a death master file, such as the file maintained by the Social Security Administration, and the names of insured or annuitants; or
- receipt of notice of death by the insurance company from a state unclaimed property administrator, beneficiary, policy owner, relative, trustee, or legal representative of the estate of the insured or annuitant.<sup>19</sup>

Upon receipt of notice of the possible death of an insured or annuitant, an insurance company is required within 90 days to make a good-faith effort to validate that the death has occurred. If an insurance company is not able to validate using available records and information, presumed abandonment will not occur until it is possible to validate the death, or the insured or annuitant, if alive, would have attained the limiting age for purposes of determining policy or contract reserves.<sup>20</sup>

## III. Which State Has Custody over Unclaimed Property?

### A. *First-Priority Rule*

The Supreme Court in *Texas v. New Jersey*, 379 U.S. 674 (1965) held that the state of the last known address of a creditor (i.e., the "apparent owner") as shown on the books and records of the debtor (i.e., the "holder") has a first-priority claim to take custody of unclaimed intangible property. RUUPA contains the following refinements to rules identifying which state may take custody over unclaimed property under that rule:

- The revised Act provides that the last known address is any description, code, or other indication of the location of the apparent owner that identifies the state, regardless of whether the indication is sufficient to direct delivery of first-class mail.<sup>21</sup>

<sup>19</sup> Compare RUUPA, § 211(b) with UUPA (1981), § 7(c).

<sup>20</sup> RUUPA, §§ 201(7) and 211(c).

<sup>21</sup> RUUPA, § 301.



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- Where a zip code is located in more than one state, the revised Act provides that a state may take custody over property based on the location of the post office, unless other information identifies a physical address in another state.<sup>22</sup>
- To determine what constitutes the last known address of the apparent owner when the records of the holder contain two or more addresses, the revised Act provides that a temporary address should be disregarded.<sup>23</sup>

### B. *Second-Priority Rule*

The second-priority rule articulated in *Texas v. New Jersey* provides that where there is no record of the address of the apparent owner, or the address of the apparent owner is in a state that does not provide for the escheat or custodial taking of the property, the property is subject to escheat or custodial taking by the state of corporate domicile of the holder. RUUPA adopts the following refinements to the rules identifying which state may take custody of unclaimed property under that rule:

- For any business association (not just a corporation) whose formation requires a filing with a state, the revised Act defines the domicile of the holder to be the state in which the formation of the holder is filed.<sup>24</sup>
- For a federally chartered entity or an investment company registered under the Investment Company Act of 1940, the revised Act defines the domicile of the holder as the state of the home office of the holder.<sup>25</sup>
- If the address of the apparent owner is in a state or foreign country that specifically exempts the property of the apparent owner from custodial taking, the revised Act provides that the property is not subject to custodial taking by the state of domicile of the holder.<sup>26</sup>

### C. *Third-Priority Rule*

Prior versions of the Uniform Act established a third-priority rule that allows the state in which a transaction occurred, out of which property rights arose, to take custody over unclaimed property when (1) there is no last known address of the apparent owner or the state of the last known address of the apparent owner does not provide for the custodial taking of the property, and (2) the state of domicile of the holder does not provide for custodial taking of the property. RUUPA modifies this rule by providing that the state in which the transaction occurred may not take custody of the property if the last known address of the apparent owner is in a state or foreign country that specifically exempts the property from custodial taking.<sup>27</sup>

For traveler's checks, money orders, and similar instruments, the revised Act adopts by reference the custody rules established by federal law, i.e., 12 U.S.C. §§ 2501–2503, and

<sup>22</sup> *Id.*

<sup>23</sup> RUUPA, § 303.

<sup>24</sup> RUUPA, § 102(6).

<sup>25</sup> *Id.*

<sup>26</sup> RUUPA, § 304(b).

<sup>27</sup> RUUPA, § 305.

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eliminates from state law any language that could be construed as interpreting the provisions of federal law addressing which state has custody over such property.

### IV. Duties of Holders of Unclaimed Property

#### A. Notices Provided to Apparent Owners by Holders Prior to Filing Reports

RUUPA modifies the requirements for holders to give apparent property owners notification that property presumed abandoned may be transferred to the administrator by:

- allowing the use of electronic notices;<sup>28</sup>
- eliminating the exemption provided in the 1995 version of the Act from the notice requirements if an owner's claim to property is barred by a statute of limitations;<sup>29</sup>
- requiring notices to identify the property and its value (except for property without a fixed value), advise the owner that the property may be sold by the administrator, provide instructions for how to prevent the property from being delivered to the state; and setting forth a deadline for when action must be taken by the owner to prevent the delivery of property to the state;<sup>30</sup> and
- providing that a holder is not required to include any confidential information in the notice provided to the apparent owner that can be used to verify the identity of an individual.<sup>31</sup>

#### B. Filing Reports

RUUPA makes the following modifications to requirements for the filing of unclaimed property reports:

- States are prohibited from requiring the submission of unclaimed property reports in paper form.<sup>32</sup>
- Holders are expressly authorized to contract with third parties to report unclaimed property to the state administrator, but when doing so remain liable for the failure of the third party to submit complete, accurate, and timely reports and to deliver unclaimed property to the administrator.<sup>33</sup>
- Any reports filed electronically must be in a secure format approved by the state administrator.<sup>34</sup>
- Unclaimed property reports may not include confidential information the disclosure of which is prohibited by federal law.<sup>35</sup>
- If a holder determines that a security is "non-freely transferable," the holder is not required to deliver the security to the state administrator unless a determination is made that the

<sup>28</sup> RUUPA, § 501.

<sup>29</sup> UUPA (1995), § 7(e)(2).

<sup>30</sup> RUUPA, § 502.

<sup>31</sup> RUUPA, § 1405.

<sup>32</sup> RUUPA, § 401.

<sup>33</sup> *Id.*

<sup>34</sup> RUUPA, § 402(a)(2).

<sup>35</sup> RUUPA, § 402(c).

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security is no longer non-freely transferable, in which case it must be delivered with the next regularly submitted unclaimed property report of the holder.<sup>36</sup>

- Holders are required to retain records concerning each report for ten years from the date the report was filed or was required to be filed.<sup>37</sup>

### C. *Relief from Liability Provided to Holders upon Delivery of Abandoned Property to the State*

Where there is a reasonable basis for a holder to believe that property is presumed abandoned and that payment or delivery of the property to the state administrator is required or authorized, RUUPA makes the following changes to the relief from liability provided to holders upon the good-faith payment or delivery of unclaimed property to a state:

- The definition of what constitutes “good faith” is revised to eliminate requirements contained in the 1995 Uniform Act that required the payment or delivery of property to “meet reasonable commercial standards of practice” and required that the holder not be “in breach of a fiduciary obligation with respect to the property.”<sup>38</sup>
- The definition of “good faith” is modified to clarify that it includes the payment or delivery of property made in response to a demand by the state unclaimed property administrator or an agent of the administrator or pursuant to any guidance or ruling issued by the administrator.<sup>39</sup>
- The state unclaimed property administrator is required to defend and indemnify a holder against a claim against the holder resulting from the payment or delivery of property to the administrator made in good faith.<sup>40</sup>
- To qualify for relief from liability and indemnification, the holder is required to substantially comply with the requirements to provide notice to the apparent owner prior to the delivery or payment of property to the state.<sup>41</sup>

## V. Responsibilities of State Unclaimed Property Administrators

### A. *Informing Owners That Property Has Been Transferred to the State*

RUUPA makes the following changes to obligations imposed upon states to advise property owners that their assets have been transferred to the state and may be reclaimed upon proof of ownership:<sup>42</sup>

- Newspaper notices published by states are no longer required to list the names of each apparent owner of property valued at \$50 or more identified in annual unclaimed property reports and are no longer required to be published in each county. If states wish to continue to publish notices to identify apparent owners, however, they are authorized, but not required, to do so.

<sup>36</sup> RUUPA, § 603(h).

<sup>37</sup> RUUPA, § 404.

<sup>38</sup> Compare RUUPA, § 601(b) with UUPA (1995), § 10(a).

<sup>39</sup> RUUPA, § 601(b).

<sup>40</sup> RUUPA, § 604.

<sup>41</sup> *Id.*

<sup>42</sup> RUUPA, § 503.

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- Rather than being published annually and listing individual property owners, newspaper notices must instead be published every six months and must report the total value of property received by the administrator and the total value of property returned by the administrator to property owners, provide an Internet Web address to access a database searchable by property owners, provide phone numbers for property owners to contact the state unclaimed property office, and advise the public that Internet access to the database may be available at public libraries.
- States are required to send by first-class mail or electronically a notice to each owner of property transferred to the custody of the state for which the state has a physical or electronic address not known to be invalid advising the owner that property is now in the possession of the state and can be reclaimed from the state by the owner.

### *B. Sale of Abandoned Property and Disposal of Abandoned Securities*

RUUPA modifies rules governing the sale or disposal of unclaimed property by the state unclaimed property administrator as follows:

- Except for securities, rather than being required to sell property within three years of its receipt, the administrator is authorized to sell unclaimed property three years after its receipt but is not required to do so.<sup>43</sup>
- Securities may not be sold until three years after the administrator provides any required mail or electronic notice to the apparent owner of the securities that the securities have been transferred to the possession of the administrator.<sup>44</sup>
- To create an incentive for states to delay the sale of securities in order not to deprive owners of potential gains in the value of securities after their transfer to the state, the revised Act provides that if securities are sold before the expiration of six years following their delivery to the administrator, an owner that makes a valid claim of ownership may recover, at the option of the owner, either a replacement security or the market value of the security at the time the claim is made, plus dividends, interest, and other increments to the value of the security received by the administrator. After six years, the owner may recover only the net proceeds of the sale of a security that is sold by the administrator plus any dividends, interest, and other increments received by the administrator.
- Administrators are given the option of conducting the sales of property at whatever location or forum will provide the most favorable market, including electronic or Internet sales.<sup>45</sup>
- The administrator is prohibited from selling medals or decorations awarded for military services, but may deliver them to military veterans' organizations or government entities.<sup>46</sup>

The options provided to owners of securities sold by the administrator less than six years after their receipt by the state are similar to options provided by the 1981 version of the Uniform Act for securities sold less than three years after their receipt, except that the 1981 Act did not provide the option of delivering a replacement security rather than the current

<sup>43</sup> RUUPA, § 701(a).

<sup>44</sup> RUUPA, § 703.

<sup>45</sup> RUUPA, § 701(c).

<sup>46</sup> RUUPA, § 705.

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value of the security and allowed the administrator to deduct from amounts paid to the owner any costs incurred in connection with the sale and holding of the securities.<sup>47</sup>

### VI. Recovery of Property by Owners

#### A. Claims Filed By owners

RUUPA modifies the provisions of the 1995 version of the Uniform Act relating to the submission, review, and payment claims submitted by owners of the recovery of property as follows:

- The state unclaimed property administrator is authorized to waive the requirements for the filing of a claim by an owner to recover property with a value of less than \$250 if the person receiving the property is the same person as the apparent owner, as indicated in the unclaimed property report filed by the holder, and the administrator reasonably believes the person is entitled to receive the property.<sup>48</sup>
- The state may deduct from amounts paid to the owner debts owed in the state for child-support, civil or criminal fines or penalties, court costs, surcharges, restitution, and delinquent taxes.<sup>49</sup>
- When the property being recovered is a security still in the possession of the state, the owner may request that the state sell the security and pay the owner the net proceeds of the sale rather than requesting return of the security.<sup>50</sup>
- An amended claim is treated as an initial claim for purposes of the deadlines imposed to allow or deny the claim.<sup>51</sup>

#### B. Agreements with Agents to Locate Property

RUUPA retains without modification the provisions of the 1995 version of the Uniform Act relating to agreements between owners of property and “finders” engaged to locate and recover property. RUUPA supplements the provisions of the 1995 Act, however, by requiring a signed record to be executed to designate a finder as an agent of the owner. When a finder is designated as an agent of an owner, the finder is authorized to receive all information the owner is entitled to receive, and may (if authorized by the owner) bring an action against the unclaimed property administrator on behalf of the owner, such as the appeal of a denial of a claim to property.<sup>52</sup>

<sup>47</sup> UUPA (1981), § 22(d).

<sup>48</sup> RUUPA, § 903(b).

<sup>49</sup> RUUPA, § 905. To determine amounts that may be deducted from claims paid, RUUPA also allows the unclaimed property administrator to make inquiries of all state and local agencies.

<sup>50</sup> RUUPA, § 905(a).

<sup>51</sup> RUUPA, § 904(b)(3).

<sup>52</sup> Compare RUUPA, §§ 1302, 1303; UUPA (1995), § 25.

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### VII. Enforcement Provisions

#### A. *Burden of Proof*

When a state asserts a right to custody of unclaimed property, RUUPA expressly provides that the state has the burden to prove the existence and amount of the property; that the property is presumed abandoned; and that the property is subject to the custody of the administrator.<sup>53</sup> These rules are implied, but not expressly set forth, in prior versions of the Uniform Act.

#### B. *Overcoming Presumptions of Abandonment*

As provided in prior law, RUUPA provides that a record of the holder showing an unpaid debt or discharged obligation is prima facie evidence of debt or obligation subject to presumed abandonment. The revised Act, however, provides that a presumption of abandonment can be overcome by a preponderance of the evidence, including a course of dealing or a custom or practice, demonstrating that a check, draft, or similar instrument that appears to reflect the evidence of a debt or obligation was:

- issued as an unaccepted offer in settlement of an unliquidated amount;
- issued but later replaced with another instrument because the earlier instrument was lost or contained errors that were corrected;
- issued to a party affiliated with the issuer;
- paid, satisfied, or discharged;
- issued in error;
- issued without consideration;
- voided within 90 days or a reasonable time after issuance for a valid business reason set forth in a contemporaneous record; or
- issued but not delivered to the third-party payee for a sufficient reason recorded within a reasonable time after issuance.<sup>54</sup>

#### C. *Dormancy Charges*

In the same manner as provided by the 1995 version of the Uniform Act, RUUPA provides that a holder may only deduct a dormancy charge from property paid or delivered to the administrator if there is a valid and enforceable contract between the holder and the apparent owner that authorizes imposition of the charge; the holder regularly imposes the charge and does not regularly reverse or otherwise cancel the charge; and the amount of the charge is not unconscionable. RUUPA modifies these rules, however, by providing that to determine whether a dormancy charge is unconscionable, consideration must be given to all relevant factors, including the marginal transactional costs incurred by the holder in

<sup>53</sup> RUUPA, § 307.

<sup>54</sup> RUUPA, § 1005.

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maintaining the property and any services provided by the holder to the apparent owner of the property.<sup>55</sup>

### *D. Rules and Procedures for Conducting Examinations*

RUUPA requires state unclaimed property administrators to adopt rules governing procedures and standards for the examination of the records of holders to determine compliance with unclaimed property laws. The rules must provide that examinations will be conducted in accordance with generally accepted examination procedures and prohibits the use of estimation methods in examinations when a holder has maintained all required records unless the holder consents to an examination using estimation procedures.<sup>56</sup>

### *E. Use of the Death Master File*

For purposes of providing notice of death of insureds or annuitants to insurance companies and potentially classifying the proceeds of an insurance policy or annuity contract as presumed to be abandoned<sup>57</sup>, states and their agents are expressly authorized to conduct matches between the names of insureds or annuitants and persons identified in the Social Security Administration's Death Master File, or another database or service that is at least as comprehensive, as having died. A match occurs when the criteria for an exact or partial match are satisfied as provided by state law, a rule of policy adopted by the state insurance department, or in the absence of any such law or regulation, as provided by the Model Unclaimed Life Insurance Benefits Act published by the National Conference of Insurance Legislators.<sup>58</sup>

### *F. Confidentiality of Records Obtained in Examinations*

RUUPA defines as confidential and exempt from public inspection or disclosure records related to administration of the Act, reports and records of a holder in the possession of the state unclaimed property administrator or the administrator's agents, personal information derived or obtained by the administrator or its agents from an examination, and any records that are classified as confidential under the laws of any state or the United States that are delivered to the administrator or its agent.<sup>59</sup> Personal information treated as confidential pursuant to these requirements consists of any information that identifies or reasonably can be used to identify an individual, personally identifiable financial or insurance information, and any information the unauthorized disclosure of which would require notice or reporting under federal or state privacy and data security laws.<sup>60</sup>

Confidential information may not be used by the administrator or the administrator's agents for any purpose except as authorized by RUUPA or other law of the state.<sup>61</sup>

A person subject to examination by the state unclaimed property administrator or its agents may require that each person having access to its records enter into a confidentiality

<sup>55</sup> Compare RUUPA, § 602 with UUPA (1995), § 5.

<sup>56</sup> RUUPA, §§ 1003, 1006.

<sup>57</sup> RUUPA, § 211(a)(4).

<sup>58</sup> RUUPA, § 211(c)(1).

<sup>59</sup> RUUPA, § 1402.

<sup>60</sup> RUUPA, § 1401.

<sup>61</sup> RUUPA, § 1403(c).

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agreement in form satisfactory to the administrator and which requires the person to comply with the confidentiality and data security obligations imposed by RUUPA.<sup>62</sup>

The revised Act provides that confidential information held by the administrator or its agents may only be disclosed by the administrator for good cause to:

- an apparent owner or the owner's personal representative, next of kin, or an agent authorized by the owner to recover unclaimed property;
- another department or agency of the state or the United States;
- the unclaimed property administrator of another state, but only if the state provides substantially reciprocal privileges to the state administrator and the other state has substantially similar confidentiality requirements; or
- a person subject to examination for use in an administrative or judicial proceeding relating to the property.<sup>63</sup>

These confidentiality provisions do not prevent the administrator from disclosing the names of apparent owners and additional information that will assist in facilitating the identification and return of property in the state's unclaimed property website or electronic database.

### *G. Complaints Regarding Examinations*

Holders often complain that unclaimed property audits, especially those conducted by outside auditors, may continue for 15–36 months—and sometimes longer—and that while an audit is ongoing, there is no effective way to obtain the review of demands for records and other information being made by an auditor or to protest the scope of an examination or the manner in which it is being conducted.

RUUPA provides that a person subject to examination has the right to ask the unclaimed property administrator to intervene and take remedial action, including setting a deadline for the completion of an audit, if a person conducting an examination has made an unreasonable or unauthorized request, or is not proceeding expeditiously to complete the examination. If a conference is requested, it must be held within 30 days of the request, and the administrator must provide a report of the conference not later than 30 days after the conference ends.<sup>64</sup> While this is an informal mechanism that does not provide a determination subject to administrative or judicial review, it creates a record that may later constitute evidence in any challenge to the results of an examination and may be relevant if the administrator seeks judicial enforcement of a subpoena issued for the production of records.

### *H. Use of Contract Auditors*

During the course of its deliberations, the Uniform Law Commission's Drafting Committee received numerous complaints about the conduct of contract auditors, especially auditors engaged on a contingent-fee basis. The Drafting Committee was also advised by state unclaimed property administrators that they cannot effectively conduct complex audits without the assistance of contract auditors, and that without the availability of contingent-fee

<sup>62</sup> RUUPA, § 1404.

<sup>63</sup> RUUPA, §§ 1004, 1403(a).

<sup>64</sup> RUUPA, § 1008.



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arrangements would not have the resources available to conduct audits. In response to these competing interests, RUUPA imposes the following new restrictions on the use of outside auditors and contingent-fee engagements, but does not prohibit the engagement of outside auditors on a contingent-fee basis:

- States are prohibited from contracting with auditors related to their unclaimed property administrators or with businesses owned in whole or in part by the administrators or persons related to administrators.<sup>65</sup>
- At least 60 days before entering into an agreement with an auditor to engage in an audit of a holder or agent of a holder, the state must provide the person to be examined a demand in a written record to submit a report and deliver any property to the state the administrator believes has not been reported or may have been underreported.<sup>66</sup>
- Contract with auditors may not provide for the payment of contingent fees in excess of ten percent of the amount of property paid or delivered as a result of an audit.<sup>67</sup>
- Complete and unredacted copies of any contracts between the state and contract auditors and auditors and subcontractors are made available for disclosure to persons subject to audit and to members of the public under state freedom-of-information laws.<sup>68</sup>
- Contracts to conduct audits must be awarded pursuant to state laws that provide for the competitive procurement of services from private contractors.<sup>69</sup>
- For two years after their participation in the recommendation, approval, or award of an audit contract, or the conclusion of an audit contract, state administrators and individuals employed by state unclaimed property administrators may not be employed by, contract with, or be compensated by the auditors, or affiliates of the auditors, to whom a contract was awarded.<sup>70</sup>
- States are required annually to prepare reports regarding the amounts of property delivered to states voluntarily and as a result of audits and examinations; the extent to which property was recovered through examinations conducted by state employees and by contract auditors; the names of each auditor engaged by a state and the amount of compensation paid to each auditor; and the amounts of claims made by owners to recover property paid to the state that were granted or denied.<sup>71</sup>

### *I. Enforcement Actions*

When a determination made pursuant to an examination becomes final and is not subject to administrative or judicial review, RUUPA requires the administrators to bring an action to enforce the determination and secure payment or delivery of past due, unpaid, or undelivered property not later than one year after the determination becomes final. No such limitation is imposed by prior versions of the Uniform Act. The 2016 revisions also delete

<sup>65</sup> RUUPA, § 1009(a) and (c).

<sup>66</sup> RUUPA, § 1009(d).

<sup>67</sup> RUUPA, § 1009(e)(2).

<sup>68</sup> RUUPA, § 1009(e)(3) and (g).

<sup>69</sup> RUUPA, § 1009(f).

<sup>70</sup> RUUPA, § 1010.

<sup>71</sup> RUUPA, 1011.

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authorization provided by the 1995 version of the Act (but not included in the 1981 Act) for a court to award reasonable attorneys' fees to the prevailing party in an enforcement action.<sup>72</sup>

The interstate enforcement provisions of RUUPA are the same as the 1981 and 1995 versions of the Uniform Act, except that RUUPA also allows a state to initiate action to enforce the unclaimed property laws of another country (rather than only another state); requires any information provided to another jurisdiction to be subject to confidentiality and security requirements equivalent to those imposed by the state; and expressly authorizes the retention of private counsel to pursue enforcement actions on behalf of another jurisdiction.<sup>73</sup>

### *J. Statute of Limitations and Repose*

The ten-year period of limitation imposed by the 1995 version of the Uniform Act on proceedings initiated by the state unclaimed property administrator regarding the reporting, payment, or delivery of property identified in unclaimed property reports is reduced to five years, and a statute of repose is imposed on any proceedings initiated by the administrator more than ten years after a duty arose requiring the holder to report, pay, or deliver unclaimed property to the administrator. The ten-year statute of repose reinstates provisions included in the 1981 version of the Act that were not carried forward into the 1995 version of the Act.<sup>74</sup>

## VIII Review and Appeal of Examination Reports

The 2016 revisions to the Uniform Act for the first time provide explicit rights for holders of property to seek administrative or judicial review of determinations made by state unclaimed property administrators regarding their liability to pay or deliver property to the state.

### *A. Informal Conference*

Not later than 30 days after receipt of any determination of liability, a holder alleged to be liable to pay or deliver property to the state (i.e., a "putative holder") may request an informal conference with the administrator to review the determination. The administrator must conduct the conference within 20 days of receiving a request for the purpose of discussing any determination of liability and any issues raised by the putative holder regarding the validity of the determination, but may postpone, adjourn, and reconvene the conference as the administrator deems appropriate. Once the conference ends, the administrator is required to issue a decision regarding the issues reviewed during the conference to the putative holder within 20 days. Pending issuance of a decision by the administrator, the deadlines for the putative holder to seek administrative or judicial review of a determination are tolled. If a conference is requested and any of the deadlines to commence a conference or issue a decision are not met, interest on any amounts due does not begin to accrue until the putative holder seeks administrative review, or files suit to commence judicial review, of the determination for which a conference was requested.<sup>75</sup>

<sup>72</sup> Compare RUUPA, § 1201; UUPA (1995), § 22; UUPA (1981), § 32.

<sup>73</sup> Compare RUUPA, §§ 1201, 1202; UUPA (1995), § 23; UUPA (1981), § 33.

<sup>74</sup> Compare RUUPA, § 619; UUPA (1995), § 19; UUPA (1981), § 29.

<sup>75</sup> RUUPA, § 1101.

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### *B. Right to Formal Review of Determination*

Unless tolled by a request for an informal conference, RUUPA provides a putative holder the right to challenge a determination that is illegal, unjust, incorrect, or in error by seeking either administrative or judicial review of the determination within 90 days of receiving notice of a determination.<sup>76</sup>

### *C. Administrative Review*

RUUPA provides that an administrative review of a determination made by the state unclaimed property administrator is conducted pursuant to the state's administrative procedures law and that a final decision in an administrative proceeding is subject to judicial review. RUUPA contains optional provisions that allow a state to designate that judicial review may be conducted in a de novo proceeding in which either party is entitled to introduce additional evidence to supplement the administrative record.

### *D. Judicial Review*

RUUPA provides that a putative holder may seek judicial review of a determination by, within 90 days of receiving notice of the determination, either (1) filing an action challenging all or part of the administrator's determination; or (2) paying or delivering the property for which the putative holder was found to be liable, and within six months of the payment or delivery filing suit to claim the refund of all or part of the property or the amount paid. Upon a final determination, RUUPA allows states to optionally authorize the award of reasonable attorneys' fees or costs (to either the plaintiff or the prevailing party), and provides for the refund with interest of any amount paid to the administrator not determined to be due at the same interest rate imposed upon the holder.

## IX. Information Security

Because of the extensive amounts of confidential information often requested to be disclosed in audits and the expanding threat of the unauthorized releases of confidential information as a result of hacking and other security breaches, RUUPA requires state unclaimed property administrators and their agents to:<sup>77</sup>

- notify a holder as soon as practical of any suspected loss, misuse, or an unauthorized access or disclosure of any confidential information provided by the holder, or any interference with the operation of a system housing confidential information that compromises its security or creates a substantial risk of identify fraud or theft;
- take action to minimize the effects of, and to investigate, a security breach, and cooperate with respect to any data breach notifications required by law, and any regulatory inquiries, litigation, and similar action needed to address the consequences of a security breach; and
- indemnify, defend, and hold harmless the holder for any losses or claims resulting from a data breach of information in the possession of the state or its agents.

<sup>76</sup> RUUPA, § 1102.

<sup>77</sup> RUUPA, §§ 1407, 1408.

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Because of concerns regarding fiscal impacts, RUUPA designates provisions of the act relating to the indemnification, defense, and hold-harmless obligations of the state unclaimed property administrator (but not its agents) as optional, i.e., recommended for enactment but not deemed necessary to achieve substantial uniformity.

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