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The Revised Uniform Unclaimed Property Act Is an Improvement, but Constitutional Defects Should Be Addressed before Approval

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IN BRIEF

- The American Bar Association should not endorse the 2016 Uniform Unclaimed Property Act in its current form.

- Despite some notable improvements, the Act continues to include provisions that are likely unconstitutional.
- The Act does little to reverse the 30-year trend in state unclaimed property laws that have been expanded to generate revenue for states at the expense of both owners and putative holders of unclaimed property.

In the summer of 2016, the Uniform Law Commission (ULC) adopted a revised Uniform Unclaimed Property Act (the 2016 Act). The 2016 Act is, in a number of respects, a better product than both the 1981 and 1995 versions; unfortunately, the 2016 Act left intact and expanded a number of highly controversial—and likely unconstitutional—provisions from the prior Acts. In particular, the 2016 Act expands states' jurisdiction to escheat unclaimed property inconsistent with federal common law. The 2016 Act purports to alter, rather than defer to, the debtor-creditor relationship, which is contrary to both federal law and the basic purpose of unclaimed property laws to return missing property to the rightful owner. The 2016 Act also lacks adequate constitutional safeguards for securities owners, whose property can be escheated and liquidated without proper notice after a relatively short period of time. For these and other reasons discussed herein, the Unclaimed Property Subcommittee of the Tax Committee of the Business Law Section voted to urge the American Bar Association to reject the 2016 Act if presented before the House of Delegates in its current form.

THE 2016 ACT VIOLATES FEDERAL COMMON-LAW RULES LIMITING STATES' JURISDICTION TO ESCHEAT UNCLAIMED INTANGIBLE PROPERTY

In *Texas v. New Jersey*,[1] the U.S. Supreme Court addressed the fundamental question of when a state has the right and power to escheat unclaimed intangible property. The court noted that for tangible property, "it has always been the

unquestioned rule in all jurisdictions that only the State in which the property is located may escheat."[2] Intangible property has no physical situs, however, and thus initially created uncertainty as to which state had the right to escheat or take custody of such property. The Supreme Court had made clear in *Western Union Telegraph Co. v. Pennsylvania*[3] that a holder of unclaimed intangible property could not, under the due process clause of the U.S. Constitution, be subject to the possible conflicting liabilities caused by two or more states seeking to escheat the same intangible property. Until *Texas*, however, there was no clear rule establishing which state had the right to escheat unclaimed intangible property in any particular case.

The court in *Texas* established two rules intended to settle "once and for all" whether a particular state has jurisdiction to escheat unclaimed intangible property. The court recognized that unclaimed intangible property is an unsatisfied "debt" that is owed by the debtor to the creditor.[4] Reasoning that a debt is the property of the creditor, the court established a "primary rule" that "the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records."[5] The court then established a "secondary rule," which permits the state of domicile of the debtor to escheat the property if (1) the last known address of the owner of the property is unknown; or (2) the owner's "last known address is in a State which does not provide for escheat of the property."[6] The court reaffirmed these rules in *Pennsylvania v. New York* and applied them strictly to require escheat of unclaimed money orders to Western Union's state of domicile (or state of last known address, if Western Union had such records), rather than the state in which the money orders were sold.[7]

The primary and secondary rules constitute federal common law that cannot be superseded by any state.[8] Furthermore, these rules have been held to apply not only in the context of interstate disputes, but also in controversies between states and potential holders of unclaimed property. For example, in *Am. Petrofina Co. of Tex. v. Nance*,[9] the court declared an Oklahoma escheat statute invalid "because it is

inconsistent with the federal common law set forth in *Texas v. New Jersey*."[10] The court held that "[t]he Supreme Court's decision in *Texas v. New Jersey* may be relied upon to prevent state officials from enforcing a state law in conflict with the *Texas v. New Jersey* scheme for escheat or custodial taking of unclaimed property."[11] The Tenth Circuit affirmed, stating, "the district court's reasoning is in accord with our views."[12] The Third Circuit reached the same conclusion in *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*.[13]

The Third Circuit recently revisited this issue in *Marathon Petroleum Co. v. Sec'y of Finance*,[14] expressly holding that "we disagree with [the district court's] conclusion that private parties cannot invoke federal common law to challenge a state's authority to escheat property."[15] The court analyzed the issue in detail, explaining that "the reasoning of the *Texas* cases is directly applicable to disputes between a private individual and a state" because the federal common law rules "were created not merely to reduce conflicts between states, but also to protect individuals."[16] The court stated, "without a private cause of action, the *Texas* trilogy's protections of property against escheatment would, in many instances, become a dead letter."[17] The court warned that "[d]enying a private right of action would leave property holders largely at the mercy of state governments for the vindication of their rights" and "would make it easier for states outside of the line of priority to escheat property and would require the Supreme Court to exercise or delegate its original jurisdiction in a greater number of cases, undermining one of the chief benefits of the rules of priority."[18] The court also noted that "[m]aking private rights contingent on state action would likewise undermine the Supreme Court's goal of national uniformity, because whether an individual is protected would depend on whether a state brings suit to contest escheatment of the property."[19] The court concluded that "the Supreme Court's desire for a uniform and consistent approach to escheatment disputes indicates that a private right of action is fully appropriate."[20] Finally, the court noted, "allowing private parties to sue also

provides secondary benefits that serve the public interest. In protecting their own interests, private parties may also be aiding states in the maintenance of their sovereignty."[21]

Furthermore, the *Marathon* court unequivocally held that "the two states allowed to escheat under the priority rules of the *Texas* cases are the *only* states that can do so."[22] The court further elaborated that "[c]onstructed as federal common law, that order of priority gives first place to the state where the property owner was last known to reside. If that residence cannot be identified or if that state has disclaimed its interest in escheating the property, second in line for the opportunity to escheat is the state where the holder of the abandoned property is incorporated. *Any other state is preempted by federal common law from escheating the property*."[23] Several lower court cases have reached the same conclusion.[24]

The 2016 Act, like the 1981 and 1995 Acts, deviates from these rules in several important respects.

The "Tertiary Rule"

First, in addition to the primary and secondary rules, the 2016 Act includes a tertiary rule, which grants the right to escheat to the state in which the transaction giving rise to the property occurred, if the property was not escheated under the primary or secondary rules.[25] This rule is problematic for several reasons:

- First, in *Texas*, the Supreme Court was primarily concerned with crafting priority rules that would "unambiguously and definitely resolve disputes among states regarding the right to escheat abandoned property."[26] In other words, the court intended the primary and secondary rules to be the sole bases under which states may take custody of unclaimed property. If a state were permitted to adopt a tertiary rule, then different states could easily adopt conflicting tertiary rules.[27] This would ultimately result in an interstate dispute of the sort the court expressly sought to avoid. The possibility of such additional rules would also

undermine the Supreme Court's focus on ease of administration, which was another important objective of the court in creating these rules.

- Second, in crafting the primary and secondary rules, the court stated that it wanted to avoid "[t]he uncertainty of any test which would require us in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."[28] On this basis, the *Texas* court then *specifically rejected* a transaction-based custody rule like that in the 2016 Act, which would allow a state to take custody of unclaimed property based on where the transaction giving rise to the property occurred.[29] Subsequently, in *Pennsylvania v. New York*,[30] the court again rejected a transaction-based custody rule proposed by Pennsylvania with respect to unclaimed money orders.
- Third, in *Delaware v. New York*,[31] the court recognized that a state's power to escheat is derived from the principle of sovereignty. However, if the tertiary rule were enforceable, it would allow the transaction state to infringe on the sovereign authority of other states.[32] Specifically, the tertiary rule would force a holder that is incorporated in a state that does not escheat the property at issue to turn over such property to the tertiary state, which "would give states the right to override other states' sovereign decisions regarding the exercise of custodial escheat."[33] The "ability to escheat necessarily entails the ability not to escheat," and "[t]o say otherwise could force a state to escheat against its will, leading to a result inconsistent with the basic principle of sovereignty."[34]

The constitutionality of the tertiary rule was specifically addressed by the Third Circuit in *N.J. Retail Merchs. Ass'n et al. v. Sidamon-Eristoff*.[35] In that case, the court concluded that the tertiary rule "would stand as an obstacle to executing the purposes of the federal law" and, thus, that the plaintiffs had satisfied their burden of showing that the tertiary rule was "likely preempted under *Texas*, *Pennsylvania*, and *Delaware*."[36] The Third Circuit's decision affirmed the lower district court's opinion, which similarly concluded that under the federal priority rules, "there is no

room for a third priority position."[37] "If the secondary-rule state does not escheat," the court held, "the buck stops there."[38]

The 2016 Act, in apparent recognition that the tertiary rule is problematic, does not apply such rule if the holder's state of domicile "specifically exempts" the property in question.[39] For example, if the holder is domiciled in a state that exempts gift cards from escheat, the holder need not be concerned with a state attempting to escheat gift cards on the basis that the cards were sold in the state. As a practical matter, this change is an improvement in that it reduces the number of instances in which the tertiary rule will apply. However, it does not address the key constitutional defect of that rule, which is that *any* tertiary rule, no matter how narrowly crafted, contravenes *Texas* and is thus preempted. Furthermore, as a practical matter, states often do not "specifically exempt" property from escheat, but nonetheless may not actually escheat such property. For example, a number of states *repealed* provisions requiring the escheat of gift cards in recognition that such escheat violates basic principles of unclaimed property law (discussed further below), but did not expressly *exempt* gift cards from escheat by statute. There is no constitutional or policy rationale for permitting the transaction state to escheat the property in this instance, but not where the state has "specifically exempted" the property from escheat.

Foreign-Owned Property

Like the 1981 and 1995 Acts, the 2016 Act also permits the state of domicile of the holder to escheat property if the last known address of the owner is located in a foreign country.[40] Similar to the tertiary rule, however, the Supreme Court has not permitted the holder's state of domicile to escheat property belonging to an owner residing in a foreign country. To the contrary, the court expressly stated in *Texas* that the state of domicile of the holder has the right to escheat *only* where the last known address of the owner of the property is unknown or "is in *a State* which does not provide for escheat of the property."[41] Accordingly, just as with the tertiary rule, a new rule

providing for escheat of foreign property likewise goes beyond *Texas* and therefore is preempted. Indeed, as noted above, the Third Circuit reached the same conclusion in a different context in *Marathon*, expressly holding that "[c]onstructed as federal common law, that order of priority gives first place to the state where the property owner was last known to reside. If that residence cannot be identified or if that state has disclaimed its interest in escheating the property, second in line for the opportunity to escheat is the state where the holder of the abandoned property is incorporated. *Any other state is preempted by federal common law from escheating the property*."[42]

Accordingly, the 2016 Act's provisions requiring escheat of foreign-owned property are likely unconstitutional on this basis alone. Moreover, the escheat of foreign-owned property also raises serious constitutional concerns under the foreign affairs doctrine[43] and the commerce clause.[44] In *Zschernig v. Miller*,[45] for example, the Supreme Court invalidated an Oregon statute because it had more than "some incidental or indirect effect in foreign countries" and posed a "great potential for disruption and embarrassment" of the nation's foreign relations.[46] The statute in question barred a nonresident alien from acquiring property of an Oregon decedent by testamentary disposition, and required that the property be escheated to Oregon unless the nonresident could show that his country of origin would grant reciprocal rights to a U.S. citizen and that his government would not confiscate the inherited property.[47] Similarly, in *Japan Line, Ltd. v. County of Los Angeles*,[48] the Supreme Court held that Los Angeles County was prohibited by the commerce clause from imposing a fairly apportioned property tax on shipping containers owned by foreign companies that were physically located within the county. The court recognized that special considerations beyond those that govern the regulation of property owned by U.S. citizens come into play when states seek to regulate property owned by foreign citizens, even when that property is physically used in the United States because "[f]oreign commerce is preeminently a matter of national concern." The court emphasized the "overriding concern" that "the Federal Government must speak with one voice when

regulating commercial relations with foreign governments."[49] The court wanted to avoid international disputes and potential retaliation by foreign countries.[50] These same concerns apply in the escheat context, particularly where the property is not just escheated but liquidated (as in the case of securities). Indeed, if merely *taxing* foreign-owned property is unconstitutional, then it follows that entirely depriving an owner of such property should similarly be unconstitutional. The escheat by states of foreign-owned property also prevents the federal government from "speak[ing] with one voice when regulating commercial relations with foreign governments."[51] Notwithstanding the ULC's goals, state unclaimed property laws are anything but uniform in that the states have variously adopted different versions of the Uniform Act, deviated from the Uniform Acts in significant ways, or adopted unique unclaimed property laws.[52] This is hardly part of the "uniform system or plan" required by law.[53]

The escheat of foreign-owned property also may conflict with U.S. treaties with foreign countries, foreign laws, due process, and other international legal standards. Indeed, the foreign country in which the owner is located has a greater interest in regulating the unclaimed property belonging to its citizens than the U.S. state where the holder of the property is domiciled. This is in accordance with the escheat rules developed in *Texas*, which reflect the traditional view of escheat as an exercise of sovereignty over person and property owned by persons and the common-law concept of *mobilia sequuntur personam*, and which recognize that the state of address of the owner has a superior interest of the state of domicile of the holder.

As with the tertiary rule, the 2016 Act makes some effort to soften its provisions applicable to foreign-owned property, providing that escheat is permitted only by the holder's state of domicile if the foreign country "does not provide for custodial taking of the property" (whatever that means) or the property is "specifically exempt from custodial taking" under the laws of the foreign country.[54] The official commentary to the 2016 Act admits, however, that *Texas* did

not permit such escheat, which under the rationale of the federal appellate courts that have addressed the issue means that such escheat is impermissible. Indeed, if the foreign country does not require the escheat of the property (but also does not "specifically exempt" it), the 2016 Act's provision would "override" the foreign country's "sovereign decisions regarding the exercise of custodial escheat."[55] As noted above, the "ability to escheat necessarily entails the ability not to escheat," and "[t]o say otherwise could force a state to escheat against its will, leading to a result inconsistent with the basic principle of sovereignty."[56]

The commentary to the 2016 Act further tries to justify the escheat of foreign-owned property by offering the conclusory assertion that "the rationale used by the Court in [*Zschernig v. Miller*] is neither controlling nor compelling in the context of unclaimed property." But the court's reasoning in *Zschernig* should apply here. In that case, the Supreme Court invalidated an Oregon statute because it had more than "some incidental or indirect effect in foreign countries" and posed a "great potential for disruption and embarrassment" of the nation's foreign relations.[57] The Oregon statute required the state to evaluate foreign laws to determine whether the foreign citizen's country of origin would grant reciprocal rights and would not confiscate the inherited property.[58] The 2016 Act similarly requires an evaluation of a foreign country's laws to determine if such laws "provide for escheat" or "specifically exempt" the property at issue from escheat. A state's confiscation of supposedly unclaimed property creates a significant "potential for disruption and embarrassment" of the nation's foreign relations, particularly where the state is not merely acting in a custodial capacity but is liquidating the property and causing the owner to lose property rights as a result. Foreigners own over *$6 trillion* in U.S. corporate stock, and states escheat hundreds of millions (if not billions) of dollars of such stock per year.[59] It strains credibility to suggest that the appropriation of foreign property on such a massive scale does not have the potential to significantly impact foreign investors and relations.

The official commentary does not address the fact that the escheat of foreign-owned property conflicts with the commerce clause by regulating commercial relations with foreign countries.

Other Jurisdictional Problems

The 2016 Act also deviates from the *Texas* rules in other significant ways. For example, it permits a state to escheat property if the holder of the property does not have a record of the owner's address or identity, but "the administrator has determined" by other means that the last-known address of the owner is in the state.[60] In *Texas*, however, the court held that under the primary rule, "each item of property . . . is subject to escheat only by the State of the last known address of the creditor, *as shown by the debtor's books and records*."[61] Accordingly, the court's decision in *Texas* does not appear to support the use by a state of extrinsic evidence of the owner's address to establish an obligation of the holder under the primary rule. To the contrary, as noted above, one of the key objectives of the court in creating the federal common-law rules was to establish rules that are simple and easy to administer.[62] In particular, the court chose the primary rule because it "involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided."[63] The court explained that "by using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified."[64] The court's goals of simplicity and ease of administration would be served by applying the primary rule based solely on the holder's records. The court's decision in *Texas* seems to be reasonably clear on this point, given the court stated that "since our inquiry here is not concerned with the technical domicile of the creditor, and since ease of administration is important where many small sums of money are involved, *the address on the records of the debtor*, which in most cases will be the only one available, *should be the only relevant last-known address.*"[65]

The 2016 Act, like the 1981 and 1995 Acts, also includes language that arguably permits a holder's state of domicile to assert unclaimed property jurisdiction over property that is not subject to escheat by the state of the last known address of the owner, an issue not expressly addressed by the court in *Texas* but which is inconsistent with the sovereign authority of the primary state to determine not to exercise its right to escheat the property. To the extent that the *Texas* decision was unclear on this point, the court's later decisions in *Pennsylvania* and *Delaware* appeared to clarify that the secondary rule can apply only if there is no record of the owner's address or the primary state "does not provide for escheat of intangibles"[66] or "does not provide for escheat"[67] at all. These subsequent articulations of the federal common-law rules suggest that the court's intent was to allow the holder's state of domicile to escheat the property if the first-priority state has not adopted an escheat law applicable to intangible property in general, and not that the court was intending to allow the holder's state of domicile to escheat property exempted by the primary state. Indeed, the Third Circuit later recognized that "[w]hen fashioning the priority rules, the Supreme Court did not intend [to] . . . give states the right to override other states' sovereign decisions regarding the exercise of custodial escheat."[68] The full faith and credit clause of the U.S. Constitution[69] would also apparently require the second-priority state to give full recognition to the first-priority state's sovereign right not to escheat the exempted property. The full faith and credit clause expresses "a unifying principle . . . looking toward maximum enforcement in each state of the obligations and rights created or recognized by the statutes of sister states,"[70] and "preserve[s] rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others."[71]

The 2016 Act's provision is an improvement over that in the 1981 and 1995 Acts because it prohibits the state of domicile from escheating property that is "specifically exempted" from escheat by the state in which the owner is located. However, as discussed with respect to the tertiary rule and the provision applicable to foreign-owned property,

although this clarification is helpful from a practical perspective where the property is specifically exempted, it does not remedy the constitutional defect. The federal common-law rules appear to prohibit these types of alternative claims outright, even if they are "watered down" from those in the 1981 and 1995 Acts.

The 2016 Act also includes a new provision defining the last-known address of the owner for purposes of establishing state jurisdiction to escheat to mean "any description, code, or other indication of the location of the apparent owner which identifies the state, even if the description, code, or indication of location is not sufficient to direct the delivery of first-class United States mail to the apparent owner."[72] The 2016 Act provides that "[i]f the United States postal zip code associated with the apparent owner is for a post office located in this state, this state is deemed to be the state of the last-known address of the apparent owner unless other records associated with the apparent owner specifically identify the physical address of the apparent owner to be in another state."[73] By contrast, the 1981 Act defined "last known address" to mean "a description of the location of the apparent owner sufficient for the purpose of the delivery of mail." The 1995 Act was silent on the qualifying address issue. The official commentary to the 2016 Act justifies the change as follows:

> the policy underlying the rules establishing priority among contending states is that unclaimed property should be held by the administrator of the state where the owner is most likely to look for it, which is the state in which the owner resided, i.e., had his or her 'last known address', if that state can be determined. It follows that limiting the first priority only to states determined by having an address suitable for mailing frustrates that policy when the owner's state of last known address can be determined another way.

This explanation makes a certain amount of practical sense. However, in *Texas*, the court did not define the term "address," and thus it would seem that the court intended the ordinary meaning of the term to apply.[74] The ordinary

meaning of the term "address" has been defined to be a mailing address.[75] It would therefore appear that the 2016 Act's definition of "address," although perhaps justifiable from a policy perspective, may be preempted by the federal common law jurisdictional escheat rules. Indeed, as the Supreme Court cautioned in *Pennsylvania*, "*to vary the application of the* Texas *rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided—that is, 'to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts.'*"[76] Including a provision that is likely superseded by federal law will invite both interstate disputes and disputes between holders and states. As things currently stand, 17 states still define "last known address" to be a description of the owner's location sufficient for the purpose of delivery of mail.[77] Only eight states have adopted the definition from the 2016 Act or a similar definition.[78]

THE 2016 ACT CONTINUES TO VIOLATE THE FUNDAMENTAL PRINCIPLE IN STATE UNCLAIMED PROPERTY LAWS THAT THE STATE'S RIGHT TO ESCHEAT IS DERIVED FROM THE OWNER'S RIGHT TO CLAIM THE PROPERTY

In *Delaware v. New York*,[79] the Supreme Court clarified that the federal common-law rules established in *Texas* "cannot be severed from the law that creates the underlying creditor-debtor relationships." Thus, "[i]n framing a State's power of escheat, we must first look to the law that creates property and binds persons to honor property rights."[80] Put more simply: "the holder's legal obligations not only defined the escheatable property at issue, but also carefully identified the relevant 'debtors' and 'creditors.'"[81] Accordingly, a state's right to escheat is defined by the legal obligation that is owed by the debtor to the unknown or absent creditor, and the debtor—and not any other person—has the legal obligation to comply with any applicable unclaimed property laws.

Accordingly, *Delaware* stands for the common-sense principle that the state can only escheat property that is actually owed to the creditor or owner. Indeed, if this were not true, then the state would be escheating property from someone who does not owe it for the purpose of giving it to someone to whom it does not belong. The principle that the state's rights are derived from those of the absentee creditor, and thus limited to property actually owed to that creditor, has become known as the principle of derivative rights or as the "derivative rights doctrine."[82] Numerous courts have embraced this doctrine.[83]

The court in *Delaware* clarified that in determining whether a state has the right to escheat unclaimed property, the first step is to "determine the precise debtor-creditor relationship as defined by the law that creates the property at issue."[84] Accordingly, the court found that the "holder" of unclaimed property with the potential obligation to report and remit such property to the state is the "debtor" or the "obligor." As the court stated: "[f]unds held by a debtor become subject to escheat *because the debtor has no interest in the funds*."[85] Conversely, if a person *does* have an interest in the property the state seeks to escheat, then the person is not the legal debtor, and so cannot be the "holder" and cannot have an obligation to escheat the property.

The court's analysis and conclusion is consistent with the age-old axiom that escheat is a right of succession, pursuant to which the state takes custody of property owed to another person who has failed to claim that property. Indeed, citing the Supreme Court's earlier decision in *Christianson v. King County*,[86] one federal district court more explicitly summarized the derivative rights principle as follows:

> The United States Supreme Court has distinctly held that the right of escheat is a right of succession, rather that [sic] an independent claim to the property escheated. The result of that is this: 'The State's right is purely derivative; it takes only the interest of the unknown or absentee owner.'[87]

The 2016 Act deviates from the federal common law principle of derivative rights—i.e., that the holder's unclaimed property obligation must be based on "the precise debtor-creditor relationship as defined by the law that creates the property at issue"[88]—in several important respects.

Perhaps most importantly, the 2016 Act, like the 1981 and 1995 Acts, includes a so-called antilimitations provision, which provides that:

> Expiration, before, on, or after the effective date of this [act], of a period of limitation on an owner's right to receive or recover property, whether specified by contract, statute, or court order, does not prevent the property from being presumed abandoned or affect the duty of a holder under this [act] to file a report or pay or deliver property to the administrator.[89]

These antilimitations provisions were expanded from those in the 1954 and 1966 Acts to include "contractual" limitations. Thus, these revised provisions purport to override contractual restrictions on an owner's right to claim property—*even if those restrictions are valid and enforceable under applicable laws governing the debtor-creditor relationship*. These provisions purport to change the underlying debtor-creditor relationship, rather than defer to it, in direct contravention of *Delaware v. New York*.

States have argued that the Supreme Court's 1948 decision in *Connecticut Mutual Life Ins. Co. v. Moore*[90] somehow overrides *Delaware* (decided 45 years later) and permits states to ignore contractual conditions that may prevent the property from being owed. However, *Connecticut Mutual* involved the narrow issue of whether New York's escheat statute applicable to life insurance proceeds violated the contract clause of the U.S. Constitution. It did not address the derivative rights principle other than to suggest that a state *cannot* constitutionally alter substantive contract conditions existing between the parties.

The law at issue in *Connecticut Mutual* permitted escheat of unpaid life insurance proceeds owed under preexisting policies even without satisfying the insurance policy conditions requiring proof of death and surrender of the policy. The insurance companies argued that these contract conditions served a substantive purpose—they were intended to provide information from which the companies could establish defenses to their obligation to pay. Consequently, the companies argued that New York's attempt to require an insurance company to pay the policy proceeds to the state without satisfaction of these conditions materially changed the terms of its contracts with policyholders, and therefore substantially impaired the contracts in violation of the contract clause. In rejecting this argument, the court stated that the "enforced variations from the policy provisions" were not unconstitutional because otherwise "the insurance companies would retain moneys contracted to be paid on condition and which normally they would have been required to pay."[91] In explaining its holding, the court stated:

> When the state undertakes the protection of abandoned property claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be proper as between the contracting parties. The state is acting as a conservator, not as a party to a contract.[92]

Nevertheless, the court did *not* hold that a state may simply ignore *all* contract conditions that exist between a debtor and creditor, and thereby claim as property an amount that is not owed. To the contrary, the court pointed out that the New York Court of Appeals had construed the escheat law to leave "open to the insurance companies all defenses except the statute of limitations, noncompliance with policy provisions calling for proof of death or of other designated contingency, and failure to surrender a policy on making a claim."[93]

Strikingly, none of the potential defenses cited by the court or the insurers was that the insured had not actually died. Thus, all of the parties and the court assumed that the

insurers would have had actual knowledge of death before escheating—the standard later adopted in the 1981 Act. Given that the court did not place on the insurers any obligation to affirmatively determine whether insureds had died, such an assumption would have been quite reasonable. Therefore, the "proof of death" in question was the merely formalistic substantiation required by the policies. Indeed, given the highly restricted ability at that time to affirmatively determine deaths, insurers would have had no ability to escheat without having actual knowledge of death, which in most cases could arise only by having been provided with some reliable notice of the death, even if not in the exact form required by the policy and the insurance laws of the state.

In other words, the court addressed only *formalistic* contract conditions on property *that was already classified as "abandoned"* by the unclaimed property statute and "which normally [the insurance companies] would have been required to pay."[94] The court specifically recognized that nonformalistic conditions may be raised as defenses to escheat if those conditions have not been satisfied.[95] *Connecticut Mutual* would therefore not support a state escheat law that provides that the state need not satisfy a substantive condition of ownership. Indeed, in distinguishing the *Connecticut Mutual* decision, one court stated that the Supreme Court excused compliance with contract conditions "which only go to formalism of interest, such as proof of death . . . but it is nevertheless held to compliance with matters that deal with substantive determination of ownership."[96] Furthermore, a number of courts have subsequently denied state claims to property where the purported owner of the property had not satisfied certain conditions to claim the property.[97]

More importantly, even if a state could adopt escheat laws that would override other, more substantive conditions without violating the contract clause, that does not mean that such laws would not violate the federal common-law rules set forth in *Delaware v. New York*, the takings clause, substantive due process, or other laws. These issues were never considered by the *Connecticut Mutual* court; thus,

that decision does not stand for the proposition that such escheat laws are valid. Indeed, the *Delaware* court, citing *Connecticut Mutual*, stated:

> Unless we define the terms "creditor" and "debtor" according to positive law, we might "permit intangible property rights to be cut off or adversely affected by state action . . . in a forum having no continuing relationship to any of the parties to the proceedings." *Pennsylvania* at 213. Cf. *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 549–550, 92 L. Ed. 863, 68 S. Ct. 682 (1948) (upholding New York's escheat of unclaimed insurance benefits only "as to policies issued for delivery in New York upon the lives of persons then resident therein where the insured continues to be a resident and the beneficiary is a resident at . . . maturity"). *Texas* and *Pennsylvania* avoided this conundrum by resolving escheat disputes according to the law that creates debtor creditor relationships; only a state with a clear connection to the creditor or the debtor may escheat.[98]

Given the court's emphatic requirement in *Delaware* that a debtor-creditor relationship exist under the positive law of the state, the court would not have cited *Connecticut Mutual* if that case stood for the broad proposition that states are not bound by contractual contingencies. *Delaware v. New York* does not allow the state to create a debtor-creditor relationship where none exists, and neither does *Connecticut Mutual*.[99]

The 2016 Act (like the 1981 and 1995 Acts before it) also attempts to justify the contractual antilimitations provisions by citing three so-called private escheat cases. Each of these cases involved unusual factual situations in which the courts found that the holders of unclaimed property had unilaterally taken actions designed specifically to circumvent state unclaimed property laws by cutting off the rights of owners after a specified period of time.[100] The private escheat actions are in stark contrast to most time-based contractual limitations provisions entered into between sophisticated business entities, which are entered

into for valid business reasons, such as to provide certainty to the parties. Furthermore, all of the private escheat cases predate *Delaware v. New York*; thus, none of them considered the restraints imposed by federal common law on the state's jurisdiction to escheat.

In limited recognition of the derivative rights principle, the 2016 Act includes narrow, optional exemptions for gift cards, store credits, and other similar obligations to provide merchandise or services rather than cash.[101] Yet, even these narrow—and optional—exemptions appear to be merely a nod to political reality and do not adequately take account the fundamental constitutional issue that the state's rights are based on the underlying debtor-creditor relationship; therefore, if cash is not owed to the creditor, the state should be constitutionally barred from demanding the escheatment of cash from the holder.[102]

It is worth noting the 2016 Act does contain one helpful clarification regarding the definition of "holder," which is consistent with *Delaware*. The official comments to the Act provide that:

> In most instances, there should be only one holder of obligations for unclaimed property purposes—the exception being where there are multiple obligors directly liable on a specific obligation, such as co-borrowers on a loan. In circumstances where more than one party potentially meets the definition of holder, the party which is primarily obligated to the owner should be treated as the holder for purposes of application of unclaimed property laws. *See, e.g., Clymer v. Summit Bancorp*, 792 A.2d 396 (NJ 2002) (issuer of bonds, not trustee in possession of funds to be used to pay bondholders and having contractual obligation to issue such payments, is the holder for purposes of determining applicable dormancy period). Where one party has a direct legal obligation to the owner of the property, and another party has possession of funds associated with the property and an obligation to hold it for the account of, or to pay or deliver it to, the owner solely by virtue of a contractual relationship with the

> party who is directly obligated to the owner, but who has not assumed direct liability to the owner, it is the party who is directly obligated to the owner who is the holder for purposes of the act. For example, the issuer of stock or bonds, and not a third party transfer agent or paying agent contracted by the issuer, would, in such circumstances, be the holder of the obligation and any unclaimed dividends on the stock or interest on the bonds. On the other hand, where a party contractually assumes direct liability to the owner for an obligation and is in possession of the funds associated with such obligation, the assuming party becomes the applicable holder for purposes of application of unclaimed property obligations.

This language still leaves some ambiguity where a party contractually assumes direct liability to the owner, but is not in possession of the funds. Presumably, in that situation, the "holder" is still the obligor, consistent with *Delaware*, rather than the person in possession of property, but it would have been preferable if the 2016 Act had made that clear.

THE 2016 ACT INCLUDES SOME IMPROVEMENTS TO BETTER PROTECT SECURITIES OWNERS, BUT DOES NOT GO FAR ENOUGH TO SATISFY CONSTITUTIONAL REQUIREMENTS

The 2016 Act provides that the dormancy period for securities for abandonment purposes is not triggered until mail sent to the owner has been returned as undeliverable. [103] This is commonly referred to as a Returned by Post Office (RPO) dormancy standard and has already been adopted by many (but certainly not all) states. Unlike the 1995 Act, this new RPO rule applies to all securities, not just nondividend-paying securities or securities enrolled in a dividend reinvestment account. This new rule is consistent with federal securities regulations promulgated in 1997 by the Securities and Exchange Commission,[104] which were enacted specifically to protect security holders from having their shares escheated by requiring transfer agents, brokers,

and dealers to exercise reasonable care to attempt to locate "lost security holders."[105] For this purpose, the regulation defines a "lost security holder" to mean a security holder to whom mail has been sent at the address of record and returned as undeliverable and for whom the transfer agent, broker, or dealer has not received information regarding the security holder's new address. The RPO rule is consistent with this regulation because under this rule, the securities will not be escheated until mail has been returned as undeliverable and the issuer of the securities (or other party) has conducted the requisite due diligence under federal law to try to locate the missing owner.

The 2016 Act also includes new notice provisions to owners of escheated securities. Specifically, the revised Act provides that the state must send written notice by first-class mail to the apparent owner and must maintain an electronically searchable website or database accessible by the public which contains the names reported to the administrator of all apparent owners for whom property is being held by the administrator.[106] These provisions are generally an improvement over those in the 1981 and 1995 Acts; however, although such notice may satisfy constitutional requirements for certain types of escheated property, it is likely still constitutionally inadequate to permit liquidation of securities. First, the 2016 Act is conspicuously silent as to when such notice must be sent. Even the 1981 Act required notice to be published within the year following the year of escheat (although the 1981 Act was deficient in not requiring notice by mail and other means except by newspaper publication, which was almost certainly constitutionally inadequate[107]). Second, the 2016 Act does not require the notice to inform the owner that the state will liquidate the securities, and thus fails to apprise the owner of the potential harm that could result from the escheatment of the securities. Third, the 2016 Act requires the notice to be sent to an address that is *already presumed to be invalid* because the securities are reported as unclaimed after the holder's mail to the last known address is returned undeliverable. The Supreme Court has held that to satisfy due process, "[t]he means employed [for the notice] must be such as one desirous of actually informing the absentee

might reasonably adopt to accomplish it."[108] Thus, "notice required will vary with circumstances and conditions."[109] A notice process that is a "mere gesture" is not due process.[110]

To satisfy due process, therefore, the state must undertake further analysis of the type of reasonable action appropriate to attempt to locate the owner of unclaimed securities to provide notice of the impending sale of the owner's property. Indeed, in *Jones v. Flowers*, the court expressly held that "*when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.*"[111] The court explained that it did not think that "a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed," and "failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman."[112] The court's other rulings further support the conclusion that further notice is required if the regular mailing is known to be ineffective or if it would be unreasonable not to do so based on the other facts and circumstances involved.[113] Indeed, in a recent concurring opinion issued by Justice Alito (joined by Justice Thomas) in the U.S. Supreme Court's denial of *certiorari* in *Taylor v. Yee*,[114] Justice Alito made clear that the constitutional issue of adequate notice before seizing private property is an "important" one. Justice Alito stated that "[w]hen a State is required to give notice, it must do so through processes 'reasonably calculated' to reach the interested party—here, the property owner." Furthermore, Justice Alito specifically suggested that states should take advantage of changes in technology that make it easier to locate owners and return their property to them. Accordingly, we believe that the states should be required to utilize other records available to them, such as tax and real estate records, motor vehicle registration databases, the State Vital Statistics database, the U.S. Postal Service's National Change of Address database, and other publicly available databases such as

Accurint or Google to try to locate the missing owner and reunite him or her with the escheated securities.[115] Such actions should be taken well before the securities are liquidated.

The escheat and liquidation provisions in the 2016 Act likely do not satisfy substantive due process and takings concerns. The 2016 Act prohibits the state from selling the owner's securities within the first three years following the remittance of dormant securities, and requires the owner be "made whole" if the state liquidates the securities during the three years following this "no liquidation" period—thus effectively providing six years of protection. At the same time, the 2016 Act *shortens* the dormancy period in the 1995 Act from five years to three years. Thus, whereas the 1995 Act provided a total of eight years of protection, the 2016 Act provides a total of nine years of protection. To be sure, every year counts, and so the 2016 Act is at least moving in the right direction.

However, that does not mean there is no taking. To the contrary, a state's escheat and liquidation of securities is a physical appropriation of property giving rise to a *per se* "taking" because the owner loses the entire "bundle" of rights in the securities.[116] When a government "physically takes possession of an interest in property," it has a "categorical duty to compensate the former owner," regardless of whether it takes the entire property or merely a portion thereof."[117] The government "is required to pay for that share no matter how small."[118] Thus, the issue is how much compensation must be paid by the state. There is scant case law involving takings of securities; however, in *United States v. Miller*,[119] the Supreme Court held that "*[t]he owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken.*" In addition, in *Seaboard Air Line Ry. Co. v. United States*,[120] the court specifically held that where the state seized land belonging to an owner, but the owner was not compensated until after the taking, the amount of just compensation to be paid to the owner was not limited to the value of the land at the time of the taking. Thus, any failure of the state to make an owner whole appears to

contravene *Seaboard*, regardless of when the owner comes forward.[121] Indeed, New York—which has a significant state interest in escheating securities—has adopted a permanent "make whole" provision for this reason.

States have argued that the escheat and liquidation of securities (or any property) does not constitute a taking based on *Texaco, Inc. v. Short*,[122] in which the court held there was no taking where the former owner had abandoned his property and therefore "retain[ed] no interest for which he may claim compensation."[123] But this argument confuses "unclaimed" property with "abandoned" property. Modern custodial escheat laws do not involve abandoned property at all, as was the case in *Texaco*. They involve property that is merely "unclaimed" by the owner often because it has been temporarily forgotten, as opposed to "abandoned" property, which normally indicates an affirmative intent to relinquish rights in the property (or at the very least, a substantial lack of contact with the property such that it would be reasonable to presume the owner had intended to abandon it). That is why the Uniform Acts provide for much shorter dormancy periods for unclaimed property than for older laws involving property that was actually abandoned. One cannot reasonably contend that a person has relinquished all property rights in his or her securities simply because one has not affirmatively accessed his or her account for three, five, or even nine years. Indeed, in *Texaco*, the state law at issue assumed mineral interests were abandoned after those property rights were left unused by the owner for *22 years*.

Furthermore, the court made clear that "[w]e need not decide today whether the State may indulge in a similar assumption in cases in which the statutory period of nonuse is shorter than that involved here, or in which the interest affected is such that concepts of 'use' or 'nonuse' have little meaning."[124] Securities are passive assets such that "concepts of 'use' or 'nonuse' have little meaning," and no regular activity is expected. Thus, it is unclear that the court would sanction even a 22-year period for the escheat and liquidation of securities, particularly given the proliferation of target-date mutual funds, buy-and-hold strategies, and

other investments or practices that encourage the investor not to touch the securities for decades. Indeed, in *Cerajeski v. Zoeller*[125] the Seventh Circuit specifically expressed that a three-year dormancy period for interest "present[s] a serious question whether it is consistent with the requirement in the Fourteenth Amendment that property not be taken without due process of law."

Accordingly, the 2016 Act ultimately confuses the distinction between property that is merely "unclaimed" and not "abandoned." The short dormancy period in the Act is consistent with the concept of unclaimed property, but the state's ability to liquidate securities without recourse is more consistent with the concept of abandoned property. If a state wants to be able to liquidate securities and not make the owner whole, it must adopt a sufficiently long dormancy period after which it is reasonable to presume that the securities are in fact abandoned and the owner has relinquished his or her rights. Alternatively, if the state does not liquidate the securities (or is willing to make the owner whole), a shorter dormancy period may be reasonable.

THE 2016 ACT'S PROVISIONS PERMITTING THE USE OF CONTINGENT-FEE AUDIT FIRMS ALSO RAISE SIGNIFICANT CONSTITUTIONAL CONCERNS

The 2016 Act expressly permits states to use a third-party audit firm that is compensated on a contingent-fee basis. The official commentary explains that "while use of contingent fee auditors can be viewed as controversial, state administrators contend these auditors are necessary for audits to be undertaken."[126] The 2016 Act does, however, include some minor limitations on the use of such auditors. The official commentary summarized these provisions as follows:

> this section limits any actual conflict of interest, or the appearance of conflict of interest, between the administrator and the contractor conducting the examination by precluding the administrator from

> contracting with related persons, and requiring that such third party auditing contracts be awarded on a competitive bid basis. This provision mandates that a person who is to undergo an examination or be audited by a third party contractor be given unredacted copies of the contract.

These provisions avoid the core issue, however, which is whether the use of contingent-fee auditors violates due process or public policy.

Since the early 20th century, the Supreme Court has held in *Tumey v. Ohio*[127] that there is a violation of due process by a system that permits a person to be fined by someone who has direct pecuniary interest in the fine that is imposed. Although the Supreme Court has never considered the validity of using private contingent-fee audit firms, other courts have found that the use of such firms violates due process or public policy. For example, in *Sears, Roebuck & Co. v. Parsons*,[128] the Georgia Supreme Court held that a contract to use a contingent-fee tax audit firm was void, reasoning that:

> The power to tax rests exclusively with the government. . . . In the exercise of that power, the government by necessity acts through its agents. However, this necessity does not require nor authorize the creation of a contractual relationship by which the agent contingently shares in a percentage of the tax collected, and we hold that such an agreement offends public policy. The people's entitlement to fair and impartial tax assessments lies at the heart of our system, and, indeed, was a basic principle upon which this country was founded. Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends.

The Wyoming Supreme Court reached a similar conclusion in *MacDougall v. Board of Land Commissioners of the State of Wyoming*.[129] The court reasoned as follows:

> No rule of law can be sound which encourages officials to neglect their duty. If state officials, charged with the collection of money due to the state under contract, were permitted to act merely perfunctorily, fail to ascertain the amount due, and in a month or a year or other time, were allowed to hire experts at large expense to do what they themselves should have done, they might deprive the state of large amounts of money, which could, by their own proper efforts made at the time, have been easily saved. Not alone would this encourage neglect of duty on their part, which is against public policy, but it might easily open wide the door to fraud, which cannot be countenanced.[130]

In *Yankee Gas Co. v. City of Meriden*,[131] the Connecticut Superior Court, relying on *Tumey*, held that a city's agreement with a contract audit firm violated due process where the firm was compensated based on a percentage of the additional tax collected as a result of the audits. The court held that "the risk of a due process violation is inherent" when the person determining the tax liability has "a direct financial interest in the amount of tax assessed."[132]

To be sure, there are also a number of cases that have reached the opposite result, upholding the use of contingent-fee tax audit arrangements. For example, in *Appeal of Philip Morris U.S.A.*,[133] the North Carolina Supreme Court held that a contingent-fee tax auditor's contract with a local county did not violate public policy. Similarly, the Kansas Supreme Court upheld a contingent-fee "tax ferret" arrangement (in which the firm is hired to identify taxpayers that have a high probability of underreporting taxes) in *Dillon Stores v. Lovelady*.[134]

These cases cannot easily be reconciled, and the due process and public policy concerns are magnified in the case of unclaimed property audits, which are almost always conducted on a multistate basis (often involving over 30 states at once). Thus, to withstand scrutiny, it appears that the administrator must, at a minimum, exercise oversight and control over the contractor and must make all material

decisions regarding the potential liability of the putative holder. As a practical matter, this may prove difficult in that many state administrators currently lack the necessary expertise in unclaimed property matters, and thus give substantial deference to the contract audit firm. Although it is understandable for the states to operate in this manner, it is this type of deference that is precisely the problem.

A recent case, *Temple-Inland, Inc. v. Cook*,[135] would appear to present a textbook example of what can go wrong where an audit is conducted by a private firm on a contingent-fee basis. That case involved the issue of whether Delaware's audit practices, including its methods for estimating unclaimed property liability, were unconstitutional. The court concluded that during the course of Temple-Inland's audit, Delaware and its audit firm "engaged in a game of 'gotcha' that shocks the conscience" sufficient to violate Temple-Inland's substantive due process rights because Delaware:

> (i) waited 22 years to audit [Temple-Inland]; (ii) exploited loopholes in the statute of limitations; (iii) never properly notified holders regarding the need to maintain unclaimed property records longer than is standard; (iv) failed to articulate any legitimate state interest in retroactively applying Section 1155 except to raise revenue; (v) employed a method of estimation where characteristics that favored liability were replicated across the whole, but characteristics that reduced liability were ignored; and (viii) [sic] subjected [Temple-Inland] to multiple liability.[136]

The *Temple-Inland* decision rejected Delaware's audit practice of estimating unclaimed property owed *to Delaware* in years for which the holder lacks complete records based on unclaimed property owed by Temple-Inland to persons *in all states* in the base years. The court held that such a methodology "is contrary to the fundamental principle of estimation,"[137] which requires *both* the existence *and the characteristics* of property from the base years to be extrapolated into the reach-back years. The court then made abundantly clear that "[i]f the property in base years shows

an address in another state, then the characteristic of that property *has to be* extrapolated into the reach back years."[138] Delaware's methodology was therefore invalid because it "created significantly misleading results" by not replicating the "characteristics and qualities of the property within the sample . . . across the whole."[139] Put more simply, Delaware was improperly trying to escheat vastly much more property through the use of estimation than it would have received had the holder reported the property in the first place. The court also held Delaware's "purported reasons for applying [the estimation statute] retroactively [i.e., to raise revenue] do not withstand scrutiny."[140] The court explained that "unclaimed property laws were never intended to be a tax mechanism whereby states can raise revenue as needed for the general welfare."[141] Thus, "[s]tates violate substantive due process if the sole purpose of enacting an unclaimed property law is to raise revenue."[142]

Of course, some of this improper behavior may have been the fault of the state itself, rather than its auditor, because Delaware is notorious for assessing huge sums against companies that conduct little or no business in the state.[143] On the other hand, the two are perhaps inextricably linked, with the audit firm earning over $200 million from its contingent-fee arrangement with Delaware over the course of a decade, and providing lucrative retirement deals for several former high-level unclaimed property officials, including the Delaware State Escheator himself and a Deputy Attorney General.[144]

In any event, it appears that a court will soon weigh in regarding the validity of a contingent-fee multistate unclaimed property audit arrangement. In *Plains All American Pipeline, L.P. v. Cook et al.*,[145] the Third Circuit recently held that the use of a contingent-fee auditor in such an audit raises significant due process concerns, given the financial stake that the auditor has in the outcome of the audit, and has remanded the case to the district court to address that issue on the merits.

THE 2016 ACT DOES INCLUDE CERTAIN IMPROVEMENTS COMPARED TO THE 1981 ACT AND 1995 ACTS

It should be noted that, notwithstanding these constitutional infirmities, the 2016 Act does include some notable improvements as compared to the 1981 and 1995 Acts. Perhaps the most substantial improvement is the statute of limitations provision. The 2016 Act restores the 10-year statute of limitations from the 1981 Act and provides for a five-year statute of limitations if the holder has filed a nonfraudulent report with the administrator.[146] There are several benefits to this bifurcated approach. First, it encourages businesses to file nonfraudulent returns so that they can trigger the earlier statute of limitations. By contrast, under the 1981 Act's rule, the statute of limitations is the same (10 years), regardless of whether a return is filed. This creates a disincentive to file a return. Another benefit of this bifurcated approach is that it encourages states to review returns and issue assessments against delinquent holders more promptly. This will serve the primary goal of these laws in returning property to the rightful owner.

The 2016 Act also includes an optional administrative appeals procedure for the first time; however, the procedure merely provides that a putative holder may initiate a proceeding under the state's administrative procedures act for review of the administrator's audit determination in an audit.[147]

CONCLUSION

State unclaimed property laws have been trending in the wrong direction for over 30 years in that such laws have been greatly expanded in unconstitutional ways for the purpose of generating revenue for states at the expense of both owners and putative holders of unclaimed property. The 2016 Act—while containing some notable improvements from the 1981 and 1995 Acts—does little to reverse this alarming trend and continues to include provisions that are

likely unconstitutional. Accordingly, we urge the American Bar Association not to endorse the 2016 Act until these constitutional infirmities are adequately addressed.

[1] 379 U.S. 674, 678 (1965).

[2] *Id.* at 677.

[3] 368 U.S. 71, 75 (1961).

[4] *Texas,* 379 U.S. at 680.

[5] *Id.* at 680–81.

[6] *Id.* at 682.

[7] *Pennsylvania v. New York*, 407 U.S. 206 (1972). Congress later adopted a federal statute which provides that money orders and traveler's checks are escheatable to (1) the state in which such instruments are sold, if the holder has a record of such information; or (2) the state of principal place of business of the holder, if it lacks such a record. 12 U.S.C. § 2503. This is the *only* exception that has been adopted to the jurisdictional rules established by the court in *Texas*.

[8] *See, e.g.,* Illinois v. City of Milwaukee, 406 U.S. 91, 105–6 (1972), *later opinion*, 451 U.S. 304 (1981) (characterizing the decision in *Texas v. New Jersey* as an example of federal common law); Delaware v. New York, 507 U.S. 490, 500 (1993) ("no state may supersede" these rules); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314 (1955) ("States can no more override . . . [federal] judicial rules validly fashioned than they can override Acts of Congress.").

[9] 697 F. Supp. 1183, 1190 (W.D. Okla. 1986), *aff'd,* 859 F.2d 840 (10th Cir. 1988).

[10] *Id.* at 1190.

[11] *Id.* at 1187.

[12] *Am. Petrofina Co.*, 859 F.2d at 842.

[13] 669 F.3d 374 (2012).

[14] 2017 U.S. App. LEXIS 24437 (3d Cir. 2017).

[15] *Id.* at *3.

[16] *Id.* at *23.

[17] *Id.* at *25.

[18] *Id.* at *26.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at *19 (emphasis in original).

[23] *Id.* at *2 (emphasis added).

[24] *See, e.g.,* Nellius v. Tampax, Inc., 394 A.2d 233 (Del. Ch. 1978); State *ex rel.* Higgins v. SourceGas, LLC, No. CIVAN11C07193MMJCCLD, 2012 WL 1721783 (Del. Super. Ct. May 15, 2012); State *ex rel.* French v. Card Compliant, LLC, 2015 Del. Super. LEXIS 1069, at *6 (Nov. 23, 2015); Temple-Inland, Inc. v. Cook, 192 F. Supp. 3d 527 (D. Del. 2016). A few recent federal district court cases in Delaware have reached the opposite result, but those cases were superseded by the Third Circuit's opinions in *N.J. Retail Merchs. Ass'n* and *Marathon Petroleum*, 2016 U.S. Dist. LEXIS 130358 (D. Del. Sept. 23, 2016); Office Depot, Inc. v. Cook, 2017 U.S. Dist. LEXIS 30210 (D. Del. Mar. 3, 2017); State *ex rel.* French v. Card Compliant, LLC *et* al., Civ. Action No. 14-688-GMS (Dec. 10, 2014) (Judge Sleet's later decision in *Temple-Inland, Inc.*, 192 F. Supp. 3d 527, also indicates that he has changed his mind on this issue).

[25] 2016 Act, § 305. *See also* 1981 Act, § 3(6); 1995 Act, § 4(6).

[26] N.J. Retail Merchs. Ass'n et al. v. Sidamon-Eristoff, 669 F.3d 374, 394 (3rd Cir. 2012). The Supreme Court stated that it wanted to "settle the question" of which state will be entitled to escheat unclaimed property in any given circumstance. *Texas*, 379 U.S. at 677.

[27] The risk of competing claims is amplified when considering the location of an intangible transaction where the debtor, creditor, and controlling law may be located in multiple jurisdictions.

[28] *Texas*, 379 U.S. at 679.

[29] The court held that "uncertainties" would result "if we were to attempt in each case to determine the State in which the debt was created and allow it to escheat. Any rule leaving so much for decision on a case-by-case basis should not be adopted unless none is available which is more certain and yet still fair." *Id.* at 680. Determining the state in which the transaction occurred is particularly problematic for e-commerce or telephone transactions, which often involve parties in multiple states.

[30] 407 U.S. 206 (1972).

[31] 507 U.S. 490, 503 (1993).

[32] *N.J. Retail Merchs. Ass'n*, 669 F.3d at 374.

[33] *Id.* at 395.

[34] *Id.*

[35] 669 F.3d 374.

[36] *Id.* at 396.

[37] N.J. Retail Merchs. Ass'n et al. v. Sidamon-Eristoff, 755 F. Supp. 2d 556 (D.N.J. 2010).

[38] *Id.*

[39] 2016 Act, § 305.

[40] *Id.* at § 304. *See also* 1981 Act, §§ 3, 36; 1995 Act, §§ 4, 26.

[41] *Texas*, 379 U.S. at 682 (emphasis added).

[42] *Marathon Petro. Corp.*, 2017 U.S. App. LEXIS 24437, at *2 (emphasis added).

[43] The U.S. Constitution vests foreign affairs powers exclusively in the federal government rather than the states. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889); *see also* United States v. Pink, 315 U.S. 203, 233 (1942); Bowman v. Chicago & Nw. Ry. Co., 125 U.S. 465, 482 (1888); U.S. Const. art. I, §8, cl. 3; art. II, §2, cl. 2; art. 1, §10, cl. 1–3.

[44] U.S. Const., art. 1, §8, cl. 3 (Congress, rather than the states, shall have the sole and exclusive power to regulate commerce "with foreign Nations . . . ."); Buttfield v. Stranahan, 192 U.S. 470, 493 (1904) (Congress's power over foreign commerce is "exclusive and absolute").

[45] 389 U.S. 429 (1968).

[46] *Id.* at 435.

[47] *Id.* at 430.

[48] 441 U.S. 444 (1979).

[49] *Id.* at 449 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 470 (1976)).

[50] *Id.* at 450–51.

[51] *Id.* at 449.

[52] All states have adopted some form of unclaimed property law, so the possibility that no state law governs has virtually disappeared with the possible exception of a few remote nonstate territories or possessions of the United States.

[53] *Japan Line,* 441 U.S. at 457.

[54] 2016 Act, § 304.

[55] *N.J. Retail Merchs. Ass'n*, 669 F.3d at 395.

[56] *Id.*

[57] *Zschernig*, 389 U.S. at 435.

[58] *Id.* at 430.

[59] U.S. Long-Term Securities Held by Foreign Residents, *available at* http://ticdata.treasury.gov/Publish/slt2d.txt (http://ticdata.treasury.gov/Publish/slt2d.txt).

[60] 2016 Act, § 302(2). *See also* 1981 Act, § 3(3); 1995 Act, § 4(3).

[61] *Texas*, 379 U.S. at 681–82 (emphasis added).

[62] *Id.* at 683.

[63] *Id.* at 681.

[64] *Id.* at 681. In *Texas v. New Jersey*, the court had also rejected other jurisdictional escheat rules proposed by states on the basis that such rules would require a case-by-case analysis that would inevitably be subject to dispute. The court wanted to avoid "[t]he uncertainty of any test which would require us in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts." *Id.* at 679. *See also Nellius*, 394 A.2d at 233, in which the Delaware Chancery Court interpreted the Supreme

Court's decisions in *Texas v. New Jersey* and *Pennsylvania v. New York* as requiring that, even if the records of the holder were proven to be inaccurate, those records would still be determinative for purposes of applying the primary rule.

[65] *Texas*, 379 U.S. at 682, n.11 (emphasis added).

[66] *Pennsylvania*, 407 U.S. at 210–11.

[67] *Delaware*, 507 U.S. at 500, 504, 507 (stating that the second-priority rule applies if "the creditor's last known address is *in a State whose laws do not provide for escheat*" or "*the laws of the creditor's State do not provide for escheat*" or the "*creditor's State does not provide for escheat*"). *See also Pennsylvania*, 407 U.S. at 212 (stating that the second-priority rule applies if the address "was located *in a State not providing for escheat*").

[68] *N.J. Retail Merchs. Ass'n*, 669 F.3d at 395.

[69] U.S. Const. art. IV, § 1.

[70] Hughes v. Fetter, 341 U.S. 609, 612 (1951).

[71] Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 246 (1941).

[72] 2016 Act, § 301(1).

[73] *Id.* at § 301(2).

[74] *See, e.g.*, Perrin v. United States, 444 U.S. 37, 43 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); Burns v. Alcala, 420 U.S. 575, 580–81 (1975) (same); Cottier v. City of Martin, 604 F.3d 553, 567 (8th Cir. 2010) (court considered the ordinary meaning of terms in interpreting case law).

[75] *See, e.g.*, State v. Knudson, 174 P.3d 469 (Mont. 2007) (relying on *Black's Law Dictionary*'s definition of "address" as the "[p]lace where mail or other

communications will reach [a] person. . . . Generally a place of business or residence; though it need not be." Black's Law Dictionary 38 (6th ed., West 1990)); Bank of America, N.A. v. Bridgwater Condos, LLC, 2011 WL 5866932 (Mich. Ct. App. 2011) (noting that *Black's Law Dictionary* (9th ed. 2009) defines the word "address" to mean "[t]he place where mail or other communication is sent" and holding that such "definition is consistent with the plain and ordinary meaning of the term"); *In re* Application of County Collector, 826 N.E.2d 951, 954, 956–57 (Ill. Ct. App. 2005) ("The common and ordinary meaning of the term address . . . clearly contemplates a number and street address. No reasonable argument can be made that the conventional meaning of 'address' does not encompass a number and street name. This clearly is the plain and ordinary meaning of the term 'address.'"); Hoot v. Brewer, 640 S.W.2d 758, 764–65 (Tex. Ct. App. 1982) (dissenting op.) ("I can not conceive of an address as employed in the ordinary course of usage, as being complete and meaningful, that gives only a house number or post office box number, and omitting all reference to a city.").

[76] *Pennsylvania,* 407 U.S. at 213 (emphasis added).

[77] *See* Colo. Rev. Stat. § 38-13-102(8); Conn. Gen. Stat. § 3-56a(8); D.C. Code § 41-102(12); Ga. Code Ann. § 44-12-192(11); Idaho Sess. Laws § 14-501(11); Kan. Stat. Ann. § 58-3934(i); Mich. Comp. Laws § 567.222(l); N.H. Rev. Stat. § 471-C:1.XII; Okla. Stat. § 651.10; Ore. Rev. Stat. § 98.302(9); R.I. Gen. Laws § 33-21.1-1(11); S.C. Code Ann. § 27-18-20(11); S.D. Codified Laws § 43-41B-1(11); Utah Code Ann. § 67-4a-102(19); Wash. Rev. Code § 63.29.010(13); Wis. Stat. § 177.01(11); Wyo. Stat. Ann. § 34-24-102(a)(xi).

[78] Del. Code Ann. tit. 12, § 1139(a) ("a description, code, or other indication of the location of the owner on the holder's books and records which identifies the state of the last-known address of the owner") (eff. Feb. 2, 2017); Fla. Stat. § 717.101(15) ("a description of the location of the apparent owner sufficient for the purpose of the delivery of mail. For the purposes of identifying, reporting, and remitting property to the department which is presumed to be

unclaimed, 'last known address' includes any partial description of the location of the apparent owner sufficient to establish the apparent owner was a resident of this state at the time of last contact with the apparent owner or at the time the property became due and payable"); Ill. Pub. Act 100-0022, § 15-301 (eff. Jan. 1. 2018; Illinois's prior unclaimed property law did not contain a definition); Ind. Code § 32-34-1-10(a) ("a description indicating that the apparent owner was located within Indiana, regardless of whether the description is sufficient to direct the delivery of mail"); N.J. Admin. Code 17:18-1.2 ("a description of the location of the apparent owner sufficient for the purpose of determining which state has the right to escheat the abandoned property and the zip code of the apparent owner's (creditor's) last known address is sufficient"); Tenn. Code Ann. § 66-29-116 (eff. July 1, 2017); Utah Code Ann. § 67-4a-301 (eff. May 9, 2017); Va. Code Ann. § 55-210.2 ("a description of the location of the apparent owner sufficient to identify the state of residence of the apparent owner for the purpose of the delivery of mail").

[79] 507 U.S. 490, 503 (1993).

[80] *Id.* at 501–02.

[81] *Id.* at 503.

[82] Some courts have carved out a narrow exception to this principle where the creditor's claim against the debtor is barred by the statute of limitations. *See, e.g.,* Travelers Express Co. v. Utah, 732 P.2d 121, 124 (Utah 1987) (explaining that "the rights of the State are derivative from the rights of the owners of the abandoned property. That statement is true as to the substance of the State's claim. However, procedural requirements, such as the statute of limitations, should not bar the State."). On the other hand, other courts have reached the opposite result. *See, e.g.,* Pacific N.W. Bell Tel. Co. v. Dep't of Revenue, 481 P.2d 556, 558 (Wash. 1971) ("The state's rights under the act are derivative and it succeeds, subject to the act's provisions, to whatever rights the owner of the abandoned property may have. If the owner may proceed against the holder of the abandoned

property and legally obtain that property, then the state may also effectively enforce that same claim against the holder. If, however, the holder of the property possesses the valid defense of the bar of the statute of limitations, then that holder may successfully assert that bar against either the owner or the state, which stands in the position of the owner. The rights of the state are not independent of the rights of the owner and are therefore no greater than those of the person to whose rights it succeeds.").

[83] *See, e.g.,* Insurance Co. of N. Am. v. Knight, 291 N.E.2d 40, 44 (Ill. App. 1972), *appeal dismissed,* 414 U.S. 804 (1973) (noting that "the rights of the State are derivative from the rights of the owner, and...the State has no greater right than that of the payee owner"); Cole v. Nat'l Life Ins. Co., 549 So. 2d 1301, 1303–04 (Miss. 1989) ("The State Treasurer agrees and the Companies concur that the Treasurer acquires his rights by and through the owners of the abandoned property. This conclusion is based on the custodial nature of the Uniform Act under which the courts have consistently held that the rights of the State are indeed derivative from the rights of the owners of abandoned property. . . ."); *In the Matter of* November 8, 1996 Determination of the State of New Jersey Department of the Treasury, Unclaimed Property Office, 706 A.2d 1177, 1180 (N.J. Super. Ct., App. Div. 1998), *aff'd,* 722 A.2d 536 (N.J. 1999) ("The implication of [the] cases [applying the derivative rights doctrine] is that the [Unclaimed Property] Act cannot, and therefore presumably was not intended to, impose an obligation different from the obligation undertaken to the original owner of the intangible property which it covers."); State v. United States Steel Corp., 126 A.2d 168, 173 (N.J. 1956) ("Limitations operate not against the State *per se*, but against the basic claim of the unknown owner. If, by virtue of limitations, the owner can obtain nothing, the State is under like disability. This is the derivative consequence, long recognized in the law of escheat. The right of action to escheat or to obtain custody of unclaimed property is not derivative; but what may be obtained by exercise of the right is dependent upon the integrity of the underlying obligation."); State v. Elizabethtown Water Co., 191 A.2d 457, 458 (N.J. 1963) (affirming that the state had no right to

escheat funds resulting from unrefunded deposits made by developers where the utility had the contractual right to keep any unrefunded deposits, noting that "the State's claims are nonetheless derivative and certainly no broader than the developers' claims); State v. Sperry & Hutchinson Co., 153 A.2d 691, 699–700 (N.J. Super. App. Div. 1959), *aff'd per curiam,* 157 A.2d 505 (N.J. 1960) (holding that the state had no right to escheat the value of unredeemed trading stamps when the contractual terms required a minimum quantity for redemption, noting that the "State's rights are no greater than that of each stamp holder" and "entirely derivative"); Bank of Am. Nat'l Trust & Sav. Ass'n v. Cranston, 252 Cal. App. 2d 208, 211 (1967) ("The Controller's rights under the act are derivative. He succeeds, subject to the act's provisions, to whatever rights the owners of the abandoned property may have."); Blue Cross of N. Cal. v. Cory, 120 Cal. App. 3d 723 (1981) (holding that "the Controller's rights under the UPL are 'derivative,' and that he accordingly succeeds to whatever rights the owner of unclaimed property may have and no more"); State v. Standard Oil Co., 74 A.2d 565, 573 (1950), *aff'd*, 341 U.S. 428 (1951) ("The State's right is purely derivative: it takes only the interest of the unknown or absentee owner."); Bank of Am. v. Cory, 164 Cal. App. 3d 66, 74–75 (1985) ("With those objectives in mind, we find the derivative rights theory . . . helpful in determining if a statute of limitations is applicable to an action to enforce compliance with the UPL. . . . 'The Controller's rights under the act are derivative. He succeeds, subject to the act's provisions, to whatever rights the owners of the abandoned property may have.'") (internal citations omitted); Barker v. Leggett, 102 F. Supp. 642, 644–45 (W.D. Mo. 1951), *appeal dismissed,* 342 U.S. 900 (1952), *reh'g denied,* 342 U.S. 931 (1952) ("'The state as the ultimate owner is in effect the ultimate heir.' The United States Supreme Court has distinctly held that the right of escheat is a right of succession, rather tha[n] an independent claim to the property escheated. The result of that is this: 'The State's right is purely derivative; it takes only the interest of the unknown or absentee owner.'") (internal citations omitted); State *ex rel.* Marsh v. Neb. State Bd. of Agric., 350 N.W.2d 535, 539 (Neb. 1984) ("Both parties agree that the State's rights under the UDUPA are strictly derivative, and

therefore the uniform act is distinct from escheat laws and the State acquires no greater property right than the owner. The State may assert the rights of the owners, but it has only a custodial interest in property delivered to it under the act."); State v. American-Hawaiian S.S. Co., 101 A.2d 598, 609 (N.J. Super. Ch. Div. 1953) ("[T]he State's right is wholly 'derivative' of the right of the owner."); *In re* Steins Old Harlem Casino Co., 138 F. Supp. 661, 666 (S.D.N.Y. 1956) ("The state's right of escheat is the right of an ultimate heir; it does not assert a separate claim to the fund but stands in the shoes of those so-called unknown creditors who are deemed to have abandoned their claims. Such creditors, by diligence, can cut off the rights of other claimants, and the state, standing in their shoes, has the same right."); Petition of Abrams, 512 N.Y.S.2d 962, 968 (Sup. Ct. 1986) ("The State, in asserting the right of escheat, stands in the shoes of the rightful claimants, and is entitled to reclaim the funds as abandoned property."); S.C. Tax Comm'n v. Metro. Life Ins. Co., 221 S.E.2d 522, 524 (S.C. 1975) ("The Commission's rights under the act are derivative. It succeeds, subject to the act, to the rights of the abandoned property's owners. It takes only the interest of the absent or unknown owner."); Presley v. Memphis, 769 S.W.2d 221, 224 (Tenn. Ct. App. 1988) ("The state acts under the statute to protect the rights of the property owners. Any rights and obligations of the state in the property are derivative of the rights of the owners of the property."); Melton v. Texas, 993 S.W.2d 95, 102 (Tex. 1999) ("Once property is presumed abandoned, the comptroller assumes responsibility for it and essentially steps into the shoes of the absent owner.") (internal citations omitted); State v. Texas Elec. Serv. Co., 488 S.W.2d 878, 881 (Tex. Civ. App. 1972) ("[T]he State of Texas has no greater right to enforce payment of claims through an escheat proceeding under Article 3272a than was possessed by the owner of the claim."); State v. Tex. Osage Royalty Pool, Inc., 394 S.W.2d 241 (Tex. Civ. App. 1965) (adopting "the elementary rule that the State cannot acquire by escheat property or rights which were not possessed at the time of the escheat by the unknown or absent owners of such property or rights"); S. Pac. Transp. Co. v. State, 380 S.W.2d 123, 126 (Tex. Civ. App. 1964) ("[T]he State in escheating such claims did not acquire any better or greater right to enforce

the claims than was possessed by the former owners. The State cannot acquire by escheat property or rights which were not possessed at the time of escheat by the unknown or absentee owners of such property or rights."); State Dep't of Revenue v. Puget Sound Power & Light Co., 694 P.2d 7, 11 (Wash. 1985) ("[T]he State's right is purely derivative and therefore no greater than the owner's").

[84] *Delaware*, 507 U.S. at 499.

[85] *Id.* at 502 (emphasis added).

[86] 239 U.S. 356, 370 (1915).

[87] Barker v. Leggett, 102 F. Supp. 642, 644–45 (W.D. Mo. 1951). *See also* Hamilton v. Brown, 161 U.S. 256 (1896) (escheat involves the regulation of succession to property).

[88] *Delaware*, 507 U.S. at 499.

[89] 2016 Act, § 610(a). *See also* 1981 Act, § 29(a); 1995 Act, § 19(a).

[90] 333 U.S. 541 (1948).

[91] *Id.* at 546.

[92] *Id.* at 547.

[93] *Id.* at 545.

[94] *Id.* at 546.

[95] *Connecticut Mutual* thus did not hold that states can disregard the contractual "due proof of death" requirement in all circumstances. It held only that requiring the reporting of life insurance benefits at the limiting age, or when the insurer has received some notice of death (presumably from, for example, a beneficiary or funeral home), does not impair the contracts in a constitutionally problematic way. In contrast, legislation that eliminates any requirement of notice and requires insurers to affirmatively

seek out deaths substantially impairs preexisting contracts—it shifts the burden of establishing death entirely from the beneficiary to the insurer, and thus fundamentally alters the parties' bargain, a result the court in *Connecticut Mutual* never contemplated. The 2016 Act is problematic in this respect because it includes provisions that require insurance companies to attempt to validate deaths of insureds if the state identifies the insured as potentially deceased using the Social Security Death Master File.

[96] Kane v. Ins. Co. of N. Am., Ct. of Common Pleas, Op. at 21 (Jan. 20, 1976).

[97] *See, e.g.,* State v. Elizabethtown Water Co., 191 A.2d 457 (N.J. 1963) (holding that New Jersey had no right to escheat funds resulting from unrefunded deposits for water utility main construction based on the contract terms among the parties, and noting that "the State's claims are nonetheless derivative and certainly no broader than the [owners'] claims."); State v. Sperry & Hutchinson Co., 153 A.2d 691 (N.J. Super. App. Div. 1959), *aff'd per curiam,* 157 A.2d 505 (N.J. 1960) (holding that the state had no right to escheat the value of unredeemed trading stamps when the contractual terms required a person to obtain a minimum quantity of stamps before they could be redeemed for cash, and the state could not show such minimum quantity was held by any particular owner); Or. Racing Comm'n, 411 P.2d at 63 (holding that an unpresented pari-mutuel ticket that was payable on demand was not "payable or distributable" because the ticket did not become "due" until it was presented).

[98] *Delaware*, 507 U.S. at 504.

[99] Permitting the state to use its escheat laws to override substantive contract conditions also creates significant problems under the full faith and credit clause. For example, consider a contract that is entered into between two parties, and which is expressly agreed to be governed by the laws of a particular state. The governing-law state may be completely different than the state that has the right and jurisdiction to escheat any unclaimed

property arising out of that contract. Thus, if the laws of the state governing the contract permit the parties to impose certain conditions between themselves, then any escheat laws of another state that do not respect such conditions will not be giving full faith and credit to the laws of the governing-law state. This effectively allows states to use their escheat laws to "trump" the debtor-creditor laws of other states, which is not permitted by the full faith and credit clause because the state whose laws govern the debtor-creditor relationship has a substantially greater connection than the state whose unclaimed property laws apply to the property at issue. Allstate v. Hague, 449 U.S. 302, 308 (1981) (where there is a conflict between the laws of different states, the full faith and credit clause requires deference to the state with the most significant contacts to the controversy); Nev. v. Hall, 440 U.S. 410 (1979); Home Ins. Co. v. Dick, 281 U.S. 397 (1930); John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936). Furthermore, if the state that governs the contract is the same as the escheat state, another constitutional problem is created in that the state's escheat laws then may effectively "amend" the state's debtor-creditor laws in violation of the single-subject provision of the state's own constitution. *See, e.g.,* Planned Parenthood Affiliates v. Swoap, 173 Cal. App. 3d 1187, 1196 (1985) (invalidating a budget bill that would have imposed new substantive rules in the Family Planning Act that did not exist under such law); Cal. Labor Fed'n v. Occupational Safety & *Health Standards. Bd.*, 5 Cal. App. 4th 985, 994–95 (1992) (invalidating a budget bill that would have effectively amended the attorney's fee provisions under Cal. Civ. Proc. Code § 1021.5, creating "substantive conditions that nowhere appear in existing law.").

[100] *See, e.g., State v. Jefferson Lake Sulphur Co.*, 178 A.2d 329 (N.J. 1962), in which the holder amended its certificate of incorporation to provide that any dividends that remained unclaimed for a period of three years would revert back to it after New Jersey had enacted an unclaimed property law permitting New Jersey to escheat unclaimed dividends after five years. The New Jersey Supreme Court stated that "[e]scheat of unclaimed dividends serves the important public need of providing revenue to be utilized for

the common good." *Id.* at 336. The court also concluded that a company such as Jefferson Lake that incorporates in New Jersey becomes subject to this public policy, and thus the "[a]lteration of a charter for the avowed purpose of defeating a relevant aspect of the sovereign's declared public policy cannot achieve judicial approval." *Id.* In reaching this conclusion, the court relied on a number of cases holding that a corporation's charter or bylaws that conflicts with the state's public policy is void. Thus, because the holder's charter was amended for the express purpose of avoiding the escheat laws, the court held that the amendment was invalid. *See also* Screen Actors Guild, Inc. v. Cory, 154 Cal. Rptr. 77 (Cal. App. 1979) (the holder similarly amended its bylaws to provide that unclaimed residuals revert back to the holder after six years); People v. Marshall Field & Co., 404 N.E.2d 368 (Ill. App. 1980) (the holder unilaterally amended the terms of its gift certificates to expire them prior to the dormancy period under Illinois's unclaimed property laws).

[101] 2016 Act, § 102(24)(C) (including exemptions for "game-related digital content" and "loyalty cards").

[102] For example, the optional gift card exemption does not apply to gift cards that expire, which may be a legitimate policy decision to encourage retailers not to use expiration dates, but cannot be justified under escheat principles. In addition, the 2016 Act created additional constitutional concerns by providing that if a state does elect to escheat gift cards, the amount escheatable is cash equal to the unredeemed gift card balance, rather than cash equal to 60 percent of the unredeemed card balance, which was the rule adopted in the 1995 Act to recognize that merchandise and services are sold by retailers at a profit, and that escheatment of the full 100 percent of the card balance would deprive the retailer of its anticipated profits—arguably a violation of the takings clause of the U.S. Constitution. The 2016 Act also included a new penalty that is imposed on "a holder [that] enters into a contract or other arrangement for the purpose of evading an obligation under this [act]." *See* 2016 Act, § 1205. This was apparently targeted at retailers that set up special-purpose entities (or contract

with third parties) to issue gift cards, where the special-purpose entity (or third party) is located in a state that exempts gift cards from escheat (as many large retailers have set up such arrangements). However, companies should be free to structure their affairs in a manner that minimizes escheat liabilities, just as they can structure themselves to reduce tax or other regulatory burdens. This sort of provision appears to allow one state (that decides not to exempt gift cards) to punish a retailer that legitimately relies on an exemption adopted by another state.

[103] *Id.* § 208.

[104] 17 C.F.R. § 240.17Ad-17.

[105] *See* Lost Securityholders, 1996 WL 475798 (SEC Release No. 37595 Aug. 22, 1996) (expressing concern with the risk that property of lost security holders "is at risk of being deemed abandoned under state escheat laws").

[106] 2016 Act, § 503.

[107] *See, e.g.,* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950) ("But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness, and hence the constitutional validity, of any chosen method may be defended on the ground that it is, in itself, reasonably certain to inform those affected. . . . It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and, if he makes his home outside the area of the newspaper's normal circulation, the odds that the information will never reach him are large

indeed."); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798, 800 (1983) (holding that more than publication notice is required and "notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . . if its name and address are reasonably ascertainable.").

[108] *Mullane*, 339 U.S. at 315.

[109] Jones v. Flowers, 547 U.S. 220, 227 (2006).

[110] *Mullane*, 339 U.S. at 315.

[111] *Jones*, 547 U.S. at 225 (emphasis added).

[112] *Id.* at 229.

[113] *See, e.g.,* Robinson v. Hanrahan, 409 U.S. 38, 40 (1972); Covey v. Town of Somers, 351 U.S. 141, 146–47 (1956).

[114] 780 F.3d 928 (9th Cir. 2015), *cert. denied,* 136 S. Ct. 929 (Feb. 29, 2016).

[115] Interestingly, the states have recently become more aggressive in asserting in audits that holders be required to utilize such databases, but have been reluctant to agree to use these resources themselves.

[116] *See* Horne v. Dep't of Agriculture, 135 S. Ct. 2419, 2427 (2015) (the physical appropriation of personal property is perhaps the most serious form of invasion of an owner's property interest, depriving the owner of "the rights to possess, use and dispose" of the property).

[117] Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002).

[118] *Id.*

[119] 317 U.S. 369, 373 (1943).

[120] 261 U.S. 299 (1923).

[121] *See also* Cerajeksi v. Zoeller, 735 F.3d 577 (7th Cir. 2013) (ruling Indiana's failure to pay interest on income-earning bank account was an unconstitutional taking because title of the property did not vest in the state). *But cf.* Turnacliff v. Westly, 546 F.3d 1113, 1119–20 (9th Cir. 2008) (assuming, *arguendo*, the owner has a right to interest earned by escheated property, the court ruled that "no further compensation is due . . . because when the Estate abandoned its property, it forfeited any right to interest earned on that property" because "the Estate did not challenge the escheat, per se, of its property to the State").

[122] 454 U.S. 516, 516 (1982).

[123] *Id.* at 530.

[124] *Id.* at 519 n.28.

[125] 735 F.3d 577, 582 (7th Cir. 2013).

[126] It is certainly questionable whether contingent-fee auditors are necessary. A number of states, including California and New York, regularly conduct their own audits. Delaware generally uses contingent-fee auditors, but its voluntary disclosure program—which is essentially a managed audit—is conducted by the state and a private law firm that is compensated on an hourly basis. Most states similarly have voluntary disclosure programs that are run in-house. In any single audit, a contingent-fee auditor may make sense in that it limits the state's risk that the cost of an audit may outweigh its benefits, but the states audit dozens, if not hundreds, of companies each year, and collectively the states almost certainly pay out more in fees to contingent-fee auditors than they would to employees to conduct these audits directly. http://www.delawareonline.com/story/firststatepolitics/2015/01/22/senate-abandoned-property/22176233/ (http://www.delawareonline.com/story/firststatepolitics/2015/01/22/senate-abandoned-property/22176233/) (contingent-fee audit firm paid over $200 million by a single state over the course of a

decade). In theory, contingent-fee auditors should also be more efficient, but that has not been borne out in practice because unclaimed property audits regularly take three to eight years to complete. In the authors' experience, the audits or VDAs conducted by the states themselves have generally been much more efficient.

[127] 273 U.S. 510 (1927).

[128] 401 S.E.2d 4 (1991).

[129] 49 P.2d 663 (Wyo. 1935).

[130] *Id.* at 667, 669.

[131] No. X07-CV960072560S (Conn. Super. Ct. 2001).

[132] *Id.* at 32–33.

[133] 436 S.E.2d 828 (1993).

[134] Temple-Inland, Inc. v. Cook, 192 F. Supp. 3d 527 (D. Del. 2016).

[135] *Id.* at 549.

[136] *Id.* at 550.

[137] *Id.*

[138] *Id.* (emphasis added).

[139] *Id.* at 547.

[140] *Id.* at 548.

[141] *Id.* at 28.

[142] *Id.*

[143] *Temple–Inland*, 2016 WL 3536710, at *2 (noting that unclaimed property has now become "Delaware's third largest revenue source, making it a 'vital element' in the State's operating budget."). Indeed, from 2000–2017, Delaware has escheated over $7.3 billion, but has returned less than 10 percent of that amount to owners.

[144] http://www.delawareonline.com/story/firststatepolitics/2015/01/22/senate-abandoned-property/22176233/ (http://www.delawareonline.com/story/firststatepolitics/2015/01/22/senate-abandoned-property/22176233/).

[145] No. 16-3631 (3d Cir. Aug. 9, 2017).

[146] 2016 Act, § 610(b).

[147] *Id.* at § 1103.

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AMERICAN BAR ASSOCIATION
SECTION OF BUSINESS LAW

DRAFT MODEL UNCLAIMED PROPERTY ACT

AMERICAN BAR ASSOCIATION
DRAFT MODEL UNCLAIMED PROPERTY ACT

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AMERICAN BAR ASSOCIATION
DRAFT MODEL UNCLAIMED PROPERTY ACT

PREFATORY NOTE

(1) The purpose of this Act is to facilitate the return of unclaimed property to its rightful owner.
(2) Under the circumstances described in this Act, the state may take custody of unclaimed property from the holder on behalf of the owner.
(3) The state's right to take custody of property under the Act is derived from that of the owner and, except as expressly set forth in the Act, the state shall have no greater right to the property than the owner.
(4) The state shall make reasonable efforts to notify and return such property to its rightful owner.
(5) The state shall hold any unclaimed property on behalf of the owner in perpetuity until the owner reclaims such property.
(6) This Act shall be preempted to the extent that it conflicts with any federal law.
(7) This Act is not intended to supersede any state contract or debtor-creditor law.

AMERICAN BAR ASSOCIATION
DRAFT MODEL UNCLAIMED PROPERTY ACT

ARTICLE 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This Act may be cited as the Unclaimed Property Act.

SECTION 102. DEFINITIONS. In this Act:

(1) "Address" means an address sufficient for purposes of the delivery of mail, and must include a street address and either the city and state or the zip code of the addressee. An address shall be treated as sufficient for purposes of the delivery of mail even if the address no longer exists, as long as the address existed previously.

(2) "Administrator" means [insert name of the state official with responsibility to administer this Act].

(3) "Administrator's agent" means a person with which the administrator contracts to conduct an examination, including the state's voluntary disclosure program, under Article 10 on behalf of the administrator. The term includes an independent contractor of the person and each individual participating in the examination on behalf of the person or contractor.

(4) "Apparent owner" means a person who appears on the records of a holder as the owner of property held, issued or owing by the holder, provided that:

(A) for an amount held or owing under a life or endowment insurance policy or annuity contract, the owner shall be the beneficiary of the policy or contract;

(B) until the holder has received confirmation that the owner is deceased, such person shall still be considered the apparent owner;

(C) in the case of a security, the apparent owner shall be the person who appears on the records of the holder or the holder's transfer agent as the owner of the security; and

(D) if the holder has substantial reason to believe that the person appearing on the holder's records is not the true owner of the property, such as in instances of identified fraud, the holder may treat the apparent owner of the property as unknown.

(5) "Business association" means a corporation, joint stock company, investment company, partnership, unincorporated association, joint venture, limited liability company, business trust, trust company, land bank, safe deposit company, safekeeping depository, financial organization, insurance company, federally chartered entity, utility, sole proprietorship, or other business entity, whether or not for profit.

(6) "Confidential information" means records, reports, and information that are confidential under Section 1402.

(7) "Domicile" means:

(A) for a corporation, the state of its incorporation;

(B) for a business association other than a corporation or federally chartered entity, whose formation requires a filing with a state, the state of its filing;

(C) for a federally chartered entity, the state of its home office, as designated in the entity's federal organizational filings; and

(D) for any other holder, the state of its principal place of business.

(8) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(9) "Electronic mail" means a communication by electronic means which is automatically retained and stored and may be readily accessed or retrieved.

(10) "Employee benefit plan" shall include both "employee welfare benefit plans" and "employee pension benefit plans," as such terms are defined in Sections 3(1) and 3(2) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

(11) "Financial organization" means a savings and loan association, building and loan association, savings bank, industrial bank, bank, banking organization, or credit union.

(12) "Holder" means:

(A) In the case of tangible property, the person in possession of the property; or

(B) In the case of a security:

(i) the broker, dealer or other intermediary that has the legal obligation to the owner(s); or

(ii) the issuer, if there is no broker, dealer or other intermediary that has a legal obligation to the owner(s);

(C) In the case of intangible property other than a security, the person primarily obligated to pay the property to the owner(s), provided that if the obligation is assigned to another person, the assignee shall be considered the holder if the assignment was valid under applicable debtor-creditor laws.

(13) "Insurance company" means an association, corporation, or fraternal or mutual-benefit organization, whether or not for profit, engaged in the business of providing life endowments, annuities, or insurance, including accident, burial, casualty, credit-life, contract-

performance, dental, disability, fidelity, fire, health, hospitalization, illness, life, malpractice, marine, mortgage, surety, wage-protection, and worker-compensation insurance.

(14) "Last known address" means, for any apparent owner:

(A) if the holder has a record of only one address of the apparent owner, such address;

(B) if the holder has multiple addresses of the apparent owner, the following rules shall apply, in the following order, to determine the apparent owner's "last known address" for purposes of this Act:

(i) the primary address of the apparent owner, as reflected in the books and records of the holder, that specifically relates to the property at issue shall be used rather than an address that does not specifically relate to the property at issue;

(ii) the primary billing address of the apparent owner, as reflected in the books and records of the holder, shall be used rather than a shipping address; or

(iii) the primary address, as reflected in the books and records of the holder, that the holder reasonably believes, based on its own records, is the most recent address of the apparent owner; and

(C) an APO, FPO, MPO or other similar temporary military address shall not be considered a primary address for purposes of this definition.

(15) "Money order" means a payment order for a specified amount of money. The term includes an express money order and a personal money order.

(16) "Municipal bond" means a bond or evidence of indebtedness issued by a municipality or other political subdivision of a state.

(17) "Non-freely transferable security" means a security that cannot be delivered to the administrator by the Depository Trust Clearing Corporation or similar custodian of securities providing post-trade clearing and settlement services to financial markets or cannot be delivered because there is no agent to effect transfer. The term includes a worthless security.

(18) "Owner" means a person that has a legal, beneficial, or equitable interest in property subject to this Act. If there is more than one owner of the property (such as a joint bank account), then each join owner or co-owner shall be considered an "owner" of the property for the purposes of this Act, and the property shall not be considered unclaimed under Section 201 as long as the holder has the name and address of at least one joint owner for whom the dormancy period has not expired.

(19) "Payroll card account" means a payroll-card account as defined in Regulation E, 12 C.F.R. Part 1005, as amended.

(20) "Person" means an individual, estate, business association, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(21) "Property" means:

(A) tangible property described in Section 206;

(B) a fixed and certain obligation to pay money by a holder to an owner under the laws governing the precise debtor-creditor relationship between the holder and the owner; or

(C) a publicly-traded security.

The term does not include (i) any property not included in subsections (A) through (C); (ii) any obligation to provide only goods or services to the owner, such as an obligation represented by a

gift card, store credit or ticket, unless such obligation may also be redeemed for cash; (iii) a non-publicly-traded security or non-freely transferable security; (iv) any property subject to or covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., including without limitation any such property held by an employee benefit plan, third party administrator, trustee, claim administrator or other third party acting on behalf of an employee benefit plan; (v) any property with an aggregated value by owner of less than $10 unless otherwise elected by the holder; (vi) property due or owing from a business association to another business association; (vii) property held in accounts subject to Section 529A of the Internal Revenue Code, as amended; or (viii) any property with no readily ascertainable fair market value, including but not limited to military medals or decorations, awards or trophies, legal documents, family photographs or personal letters. In the absence of any controlling federal law, the law that determines the precise debtor-creditor relationship for an obligation potentially subject to this Act is the substantive law of the state or foreign jurisdiction that creates the property at issue. Any property may be reduced by the amount of any lawful charges that may be imposed with respect to the property under applicable debtor-creditor or other applicable laws; provided, however, that no such charges may be imposed by the holder after the property is required to be reported to the administrator under this Act.

(22) "Putative holder" means a person believed by the administrator to be a holder, until the person pays or delivers to the administrator property subject to this Act or the administrator or a court makes a final determination that the person is or is not a holder.

(23) "Security" means:

(A) a security as defined in Article 8 of the Uniform Commercial Code;

(B) a security entitlement as defined in Article 8 of the Uniform Commercial Code, including a customer security account held by a registered broker-dealer; or

(C) an equity interest in a business association not included in subsection (A) or (B).

(24) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(25) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(26) "Utility" means a person that owns or operates for public use a plant, equipment, real property, franchise, or license for the following public services:

(A) transmission of communications or information;

(B) production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas; or

(C) provision of sewage or septic services, or trash, garbage, or recycling disposal.

(27) "Worthless security" means a security whose cost of liquidation and delivery to the administrator would exceed the value of the security on the date a report is due under this Act.

SECTION 103. INAPPLICABILITY TO FOREIGN PROPERTY. This Act does not apply to property owned by or owed to a foreign person, or resulting from a transaction that occurred in a foreign country.

SECTION 104. RULEMAKING. The administrator may adopt rules that are consistent with the stated purpose of this Act in order to implement and administer this Act.

ARTICLE 2

UNCLAIMED PROPERTY

SECTION 201. WHEN PROPERTY IS UNCLAIMED.

(a) Property is unclaimed if there is no indication of interest by any apparent owner during the dormancy period for the property.

(b) The dormancy period for property subject to the Act is set forth in Sections 202 through 207.

(c) If there is an indication of interest by an apparent owner during the dormancy period, as set forth in Section 208, then:

(1) if the dormancy period for the property is not triggered by the return of first-class United States mail to the holder, the dormancy period shall be restarted to the date of indication of interest by the apparent owner(s) (the "last contact date"); or

(2) if the dormancy period for the property is triggered by the return of first-class United States mail to the holder, then the dormancy period shall not begin to run again until, after the last contact date, first-class United States mail sent to each apparent owner is returned to the holder as undeliverable.

SECTION 202. DORMANCY PERIODS IN GENERAL. The dormancy periods of the following types of property are as follows:

(1) a traveler's check, 15 years after issuance;

(2) a money order, seven years after issuance;

(3) a state or municipal bond, bearer bond, or original-issue-discount bond, two years after the earliest of the date the bond matures or is called or the obligation to pay the principal of the bond arises;

(4) a demand, savings, or time deposit held by a financial organization, including a payroll card account, other than a deposit that is automatically renewable, five years after the date a communication sent by the holder by first-class United States mail to each apparent owner is returned to the holder undelivered by the United States Postal Service;

(5) a deposit that is automatically renewable, five years after the later of:

(A) the date of maturity of the initial renewal period; or

(B) the date a communication sent by the holder by first-class United States mail to each apparent owner is returned to the holder undelivered by the United States Postal Service;

(6) an amount owed by an insurance company on a life or endowment insurance policy or an annuity contract that has matured or terminated, two years after the obligation to pay arose under the terms of the policy or contract or, if a policy or contract for which an amount is owed on proof of death has not matured by proof of the death of the insured or annuitant, as follows:

(A) with respect to an amount owed on a life or endowment insurance policy, two years after the earlier of the date:

(i) the insurance company has knowledge of the death of the insured; or

(ii) the insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve for the policy is based; and

(B) with respect to an amount owed on an annuity contract, two years after the date the insurance company has knowledge of the death of the annuitant;

(C) the company has knowledge of the death of an insured or annuitant when:

(i) the company receives a death certificate or court order determining that the insured or annuitant has died; or

(ii) the company has confirmed, as a result of searches required by applicable insurance laws or regulations, that the insured or annuitant has died; and

(D) the company shall not have any obligation under this Act to take actions to determine whether the insured or annuitant is deceased;

(7) property distributable by a business association in the course of dissolution, one year after the property becomes distributable;

(8) notwithstanding any other provision in this Section or Sections 203 through 207, property represented by an uncashed check owed to individuals, one year after the issuance of the check, unless an apparent owner has previously directed that any amounts represented by the uncashed check be redeposited into an account for the apparent owner;

(9) wages, commissions, reimbursements or other compensation for personal services to which an employee is entitled (but not including any amounts in a payroll card account), one year after the amount becomes payable or distributable;

(10) property held by a court, including property received as proceeds of a class action, one year after the property becomes payable or distributable;

(11) property held by a government or governmental subdivision, agency, or instrumentality, including municipal bond interest and unredeemed principal under the administration of a paying agent or indenture trustee, one year after the property becomes payable or distributable;

(12) a deposit or refund owed to a subscriber by a utility, one year after the deposit or refund becomes payable or distributable; and

(13) property not otherwise specified in this section or Sections 203 through 207, the earlier of five years after each apparent owner first has a right to demand the property or the obligation to pay or distribute the property arises.

SECTION 203. DORMANCY PERIOD OF TAX-ADVANTAGED RETIREMENT ACCOUNT OR HEALTH SAVINGS ACCOUNT.

(a) The dormancy period of property held in a tax-advantaged retirement account or health savings account under the income-tax laws of the United States is seven years after the later of:

(1) the following dates:

(A) except as provided in subsection (B), the date a second consecutive communication sent by the holder by first-class United States mail to each apparent owner is returned to the holder undelivered by the United States Postal Service; or

(B) if the second communication is not sent or is sent later than 30 days after the date the first communication is returned undelivered, the date the first communication was returned undelivered by the United States Postal Service; or

(2) the earlier of the following dates:

(A) the April 1 following the date each apparent owner become 70.5 years of age, if known by the holder; or

(B) five years after the date the holder receives a death certificate for each apparent owner.

(b) A holder shall have no obligation to confirm whether an apparent owner is deceased.

SECTION 204. DORMANCY PERIOD OF OTHER TAX ADVANTAGED ACCOUNTS. Except for property described in Section 203, the dormancy period of property held in a tax-advantaged account or plan under the income-tax laws of the United States is seven years after the later of:

(1) the following dates:

(A) except as provided in subsection (B), the date a second consecutive communication sent by the holder by first-class United States mail to the apparent owner(s) is returned to the holder undelivered by the United States Postal Service; or

(B) if the second communication is not sent or is sent later than 30 days after the date the first communication is returned undelivered, the date the first communication was returned undelivered by the United States Postal Service; or

(2) (A) the date, if known to the holder, specified in the income-tax laws and regulations of the United States by which distribution of the property must begin to avoid a tax penalty; or (B) if such date is not known to the holder, 30 years after the date the account was opened.

SECTION 205. DORMANCY PERIOD OF CUSTODIAL ACCOUNT FOR MINOR.

(a) The dormancy period of property held in an account established under a state's Uniform Gifts to Minors Act or Uniform Transfers to Minors Act is seven years after the later of:

(1) except as provided in subsection (2), the date a second consecutive communication sent by the holder by first-class United States mail to the custodian of the minor on whose behalf the account was opened is returned undelivered to the holder by the United States Postal Service;

(2) if the second communication is not sent or is sent later than 30 days after the date the first communication is returned undelivered, the date the first communication was returned undelivered; or

(3) fifteen years after the date the account is established.

(b) When the property in the account described in subsection (a) is transferred in the holder's records to the minor on whose behalf an account was opened or to the minor's estate, the property in the account is no longer subject to this section.

SECTION 206. DORMANCY PERIOD OF CONTENTS OF SAFE-DEPOSIT BOX. The dormancy period of tangible property held in a safe-deposit box held by a financial organization, and any proceeds from a sale of such property by the holder, is five years after the earlier of:

(1) the expiration of the lease or rental period for the box, including any automatic renewals of such period; or

(2) the earliest date when the lessor of the box is authorized by the laws of this state other than this Act to enter the box and remove or dispose of the contents without consent or authorization of the lessee.

SECTION 207. DORMANCY PERIOD OF SECURITY.

Except for a security held in an account described in Sections 203 through 205, the dormancy period for a security is seven years after:

(1) except as provided in subsection (2), the date a second consecutive communication sent by the holder by first-class United States mail to each apparent owner is returned to the holder undelivered by the United States Postal Service; or

(2) if the second communication is not sent or is sent later than 30 days after the first communication is returned, the date the first communication is returned undelivered to the holder by the United States Postal Service.

SECTION 208. INDICATION OF INTEREST IN PROPERTY.

(a) An "indication of interest" by an apparent owner means any action by the apparent owner which reasonably demonstrates to the holder that the apparent owner knows that the property exists, including without limitation:

(1) any written, oral, electronic, facsimile, or personal contact between an apparent owner and a holder or the holder's agent concerning the property or the account in which the property is held; provided, however, that if the communication is an oral communication, the holder or its agent shall contemporaneously make and preserve a record of the fact of the apparent owner's communication;

(2) presentment of a check or other instrument of payment of a dividend, interest payment, or other distribution, or evidence of receipt of a distribution made by electronic or similar means, with respect to the property or the account in which the property is held.

(3) activity directed by an apparent owner in the account in which the property is held, including accessing the account or information concerning the account, or a

direction by the apparent owner to increase, decrease, or otherwise change the amount or type of property held in the account;

(4) a deposit into or withdrawal from an account, including an automatic deposit or withdrawal previously authorized by an apparent owner other than an automatic reinvestment of dividends or interest;

(5) the non-return of a federal tax form sent by the holder to an apparent owner; and

(6) the payment of a premium on an insurance policy.

(b) If an apparent owner has more than one account with the same holder, the apparent owner's indication of interest with respect to one account shall be considered an indication of interest with respect to all accounts with the same holder, if the holder has sent communications electronically or in writing to the apparent owner with respect to each account.

(c) An action by an agent or other representative of an apparent owner is presumed to be an action on behalf of the apparent owner.

(d) If the holder has obtained information from the Department of Defense indicating that an apparent owner has Active Duty status, including Active Reserve or Active Duty National Guard status, such action by the holder is presumed to be an action on behalf of the apparent owner.

SECTION 209. ELECTRONIC COMMUNICATIONS.

(a) If the dormancy period for the property is triggered by the return of first-class United States mail to the holder and the holder has in its records an electronic mailing address that it does not believe to be invalid, the holder shall attempt to confirm the apparent owner's

interest in the property by sending the apparent owner an electronic-mail communication not later than two years after the apparent owner's last indication of interest in the property.

(b) If the apparent owner does not respond to the electronic-mail communication under subsection (a) or such attempts are returned as undeliverable, the holder shall, within ninety (90) days after sending such electronic-mail communication, attempt to contact the apparent owner by first-class United States mail if the holder has a record of the apparent owner's address and mail sent to such address has not previously been returned as undeliverable. If the first-class United States mail is returned to the holder as undeliverable, the dormancy period shall begin to run as of the date such mail is returned to the holder as undeliverable.

ARTICLE 3

JURISDICTIONAL RULES FOR TAKING CUSTODY OF UNCLAIMED PROPERTY

SECTION 301. JURISDICTION TO TAKE CUSTODY OF PROPERTY. The administrator may take custody of property subject to this Act only under the circumstances set forth in this Article.**TANGIBLE PROPERTY.** The administrator may take custody of tangible property subject to this Act only if the property is physically located within the state.**INTANGIBLE PROPERTY.** Except as otherwise provided in Section 304, the administrator may take custody of intangible property subject to this Act only if:

(1) the last-known address of the apparent owner(s), as set forth on the books and records of the holder, is in this state; or

(2) the holder is domiciled in this state or is this state or a governmental subdivision, agency, or instrumentality of this state and either (a) the holder has no record of the address of the apparent owner of the property; or (b) the last-known address of the apparent owner(s) is an APO, FPO, MPO or other similar temporary military address.

The administrator shall not be permitted to use third-party sources to determine the address of the apparent owner of the property.

SECTION 304. TRAVELER'S CHECK, MONEY ORDER OR SIMILAR INSTRUMENT. The administrator may take custody of unclaimed sums payable on a traveler's check, money order, or similar instrument to the extent permissible under 12 U.S.C. Sections 2501 through 2503, as amended.

ARTICLE 4

REPORTING OF UNCLAIMED PROPERTY

SECTION 401. REPORT REQUIRED BY HOLDER.

(a) A holder of unclaimed property and subject to the custody of the administrator shall file a report concerning the property.

(b) A holder may contract with a third party to make the report required under subsection (a).

(c) Whether or not a holder contracts with a third party under subsection (b), the holder is responsible:

(1) to the administrator for the complete, accurate, and timely reporting of unclaimed property; and

(2) for paying or delivering to the administrator property described in the report.

(d) A group of affiliated companies may file a single report on behalf of multiple holders within the affiliated group; provided, however, that the filing of such report shall not affect:

(1) the identity of any holder within the affiliated group; or

(2) any holder's responsibility:

(A) to the administrator for the complete, accurate, and timely reporting of unclaimed property; and

(B) for paying or delivering to the administrator property described in the report.

SECTION 402. CONTENT OF REPORT.

(a) The report required under Section 401 shall:

(1) be signed by or on behalf of the holder and verified as to its completeness and accuracy;

(2) if filed electronically, be in a secure format approved by the administrator which protects confidential information of the apparent owner in the same manner as required of the administrator and the administrator's agent under Article 14;

(3) state that the holder has complied with the notice requirements of Section 501;

(4) identify the property; and

(5) include the following information:

(A) the name, last-known address, e-mail address, date of birth and Social Security number or taxpayer identification number, if known and reasonably accessible to the holder, of each apparent owner of the property, if disclosure of such information is not prohibited by other federal or state laws;

(B) for an amount held or owing under a life or endowment insurance policy or annuity contract, the name and last-known address, if known and reasonably accessible to the holder, of the insured or annuitant;

(C) for property held in or removed from a safe-deposit box, the location of the property, where it may be inspected by the administrator, and any amounts owed to the holder under Section 603;

(D) the date of commencement of the dormancy period under Article 2; and

(E) the name of the holder of each item of property reported, if the report includes property from multiple affiliated holders.

(b) If a holder has changed its name while holding unclaimed property or is a successor to another person that previously held the property for the apparent owner(s), the holder must include in the report under Section 401 its former name or the name of the previous holder, if any, and the known name and address of each previous holder of the property.

SECTION 403. WHEN REPORT TO BE FILED.

(a) Except as otherwise provided in subsection (b) and subject to subsection (c), the report under Section 401 shall be filed before November 1 of each year and shall include property that became unclaimed during the 12 months preceding July 1 of that year.

(b) Subject to subsection (c), the report under Section 401 to be filed by an insurance company shall be filed before May 1 of each year and shall include property that became unclaimed during the immediately preceding calendar year.

(c) The administrator may grant an extension of time to file the report, upon request of the holder, for good cause. If the extension is granted, no penalties or interest shall apply.

SECTION 404. RETENTION OF RECORDS BY HOLDER. A holder required to file a report under Section 401 shall retain records for seven years after the later of the date the report was filed or the last date a timely report was due to be filed, unless a shorter period is

provided by rule of the administrator. The holder may satisfy the requirement to retain records under this section through an agent. The records must contain (1) the information required by Section 402 to be included in the report; (2) information sufficient to establish the amount of unclaimed property required to be shown by the holder on the report including, if applicable, quarterly bank reconciliations and annual accounts receivable credit aging reports (or, if the holder does not keep such aging reports in the ordinary course of business, then the holder shall retain transactional level detail regarding such credits); and (3) proof of due diligence letter mailings sent by the holder pursuant to Section 501 with respect to such unclaimed property, and a record of any responses to such letters.

SECTION 405. VERIFIED REPORT OF PROPERTY. If a person does not file a report required by Section 401 or the administrator reasonably believes that a person may have filed an inaccurate, incomplete, or false report, the administrator may require the person to file a verified report in a form prescribed by the administrator. The verified report must:

(1) state whether the person is holding property reportable under this Act;

(2) describe property not previously reported or about which the administrator has inquired; and

(3) state the amount or value of the property.

ARTICLE 5

NOTICE TO APPARENT OWNER OF UNCLAIMED PROPERTY

SECTION 501. NOTICE TO APPARENT OWNER BY HOLDER.

(a) Subject to subsection (b), the holder of unclaimed property shall send to each apparent owner notice by first-class United States mail that complies with Section 502 not more than 180 days nor less than 60 days before filing the report under Section 401 if:

(1) the holder has in its records an address for the apparent owner which the holder's records do not disclose to be invalid; and

(2) the value of the property is $50 or more.

(b) If the holder has in its records an electronic mailing address that it does not believe to be invalid, the holder shall send the notice described in subsection (a) both by first-class United States mail to the apparent owner's last-known address and by electronic mail; provided, however, that any such notice by electronic mail shall (1) not be required to include any personal information (as defined in Section 1401) of the owner of the property or any information regarding the property that is unclaimed; and (2) include a website link or other instructions on how to contact the holder and/or receive a copy of a due diligence notice that complies with Section 502.

SECTION 502. CONTENTS OF NOTICE BY HOLDER.

(a) Notice under Section 501 must contain a heading that reads substantially as follows: "Notice. The [State] of [insert name of state] requires us to notify you that your property may be transferred to the custody of the [state's unclaimed property administrator] if you do not contact us before [insert date that is 30 days after the date of this notice]."

(b) The notice under Section 501 must:

(1) identify the property and, except for property that does not have a fixed value, the value of the property that is the subject of the notice;

(2) state that the property will be turned over to the administrator;

(3) state that after the property is turned over to the administrator an apparent owner that seeks return of the property must file a claim with the administrator;

(4) if the property is tangible property or securities, state that the property may be sold by the administrator; and

(5) provide instructions that the apparent owner(s) must follow to prevent the holder from reporting and paying or delivering the property to the administrator.

SECTION 503. NOTICE BY ADMINISTRATOR.

(a) The administrator shall give notice to each apparent owner that unclaimed property that appears to be owned by the apparent owner is held by the administrator under this Act. Such notice shall be given within the first year after the property is paid or delivered to the administrator.

(b) In providing notice under subsection (a), the administrator shall:

(1) send written notice by first-class United States mail to every address known to the administrator of each apparent owner of property valued at $50 or more held by the administrator; and

(2) send the notice to every electronic mail address of each apparent owner of the property if the administrator has an electronic-mail address.

(c) Prior to sending the notice required by this section, the administrator shall contact other state and local agencies to attempt to identify additional addresses of the apparent owner(s), including but not limited to agencies with access to tax and real estate records, motor vehicle registration databases, the State Vital Statistics database, and the U.S. Postal Service's National Change of Address database. The administrator shall also utilize publicly available national databases specified by rule of the administrator to attempt to identify additional addresses of the apparent owner(s). The notice specified in subsections (a) and (b) shall be made for each new address identified.

(d) In addition to the notice under subsection (b), the administrator shall:

(1) publish no later than December 31st of each year in at least one newspaper of general circulation in each county in this state notice of property held by the administrator which must include:

(A) the total value of property received by the administrator during the most recent reporting period under Section 403 taken from the reports under Section 401;

(B) the total value of claims paid by the administrator during the preceding twelve-month period;

(C) the total value of property currently held by the administrator;

(D) the Internet web address of the unclaimed property website maintained by the administrator;

(E) a telephone number and electronic-mail address to contact the administrator to inquire about or claim property; and

(F) a statement that a person may electronically access the state's unclaimed property website or database and a computer may be available as a service to the public at a local public library; and

(2) maintain a website or database that contains the names reported to the administrator of all apparent owners for whom property is being held by the administrator and that is accessible by the public and electronically searchable.

(e) The website or database maintained under subsection (d)(2) must include instructions for filing with the administrator a claim to property, including a printable claim form with instructions for its use.

(f) In addition to the requirements specified in subsections (a) through (e), the administrator may also use any other printed publication, telecommunication, the Internet, or other media to inform the public of the existence of unclaimed property held by the administrator.

SECTION 504. COOPERATION AMONG STATE OFFICERS AND AGENCIES TO LOCATE APPARENT OWNER. Unless prohibited by law of this state other than this Act, on request of the administrator, each officer, agency, board, commission, division, and department of this state, any body politic and corporate created by this state for a public purpose, and each political subdivision of this state shall make its books and records available to the administrator and cooperate with the administrator to determine the current address of an apparent owner of property held by the administrator under this Act.

ARTICLE 6

TAKING CUSTODY OF PROPERTY BY ADMINISTRATOR

SECTION 601. PAYMENT OR DELIVERY OF PROPERTY TO ADMINISTRATOR.

(a) Except as otherwise provided in this section, on filing a report under Section 401, the holder shall pay or deliver to the administrator the property described in the report. The holder may deduct from the amount required to be paid to the administrator $2.00 for each item of property reported and for which a notice under Section 501 was sent.

(b) If a penalty or forfeiture would result from paying the property to the administrator at the time of the report, the date for payment of the property to the administrator is extended until a penalty or forfeiture no longer would result from payment.

(c) Tangible property in a safe-deposit box shall be delivered to the administrator within 120 days after filing the report under Section 401.

(d) If property reported to the administrator under Section 401 is a security, the administrator may make an endorsement, instruction, or entitlement order on behalf of the apparent owner to invoke the duty of the issuer, its transfer agent, or the securities intermediary to transfer the security to the administrator for the benefit of the owner.

(e) If the holder of property reported to the administrator under Section 401 is the issuer of a certificated security, the administrator may obtain a replacement certificate in physical or book-entry form under Section 8-405 of the Uniform Commercial Code.

SECTION 602. EFFECT OF PAYMENT OR DELIVERY OF PROPERTY TO ADMINISTRATOR.

(a) On payment or delivery of property to the administrator under this Act, the administrator as agent for the state assumes custody and responsibility for safekeeping the property.

(b) A holder or other person that acts on behalf of a holder, including a transfer agent, that pays or delivers property to the administrator in good faith and in substantial compliance with Sections 501 and 502 is relieved of liability arising thereafter with respect to payment or delivery of the property to the administrator.

(c) Payment or delivery of property is made in good faith if the holder or other person acting on behalf of the holder had a reasonable basis for believing that the property was required to be paid or delivered to the administrator under this Act. A person shall be deemed to have had a reasonable basis for believing the property was required to be paid or delivered if the holder made payment or delivery:

(1) under the provisions of this Act;

(2) in response to a demand by the administrator or administrator's agent; or

(3) under a guidance or ruling issued by the administrator which the holder reasonably believed required the property to be paid or delivered.

(d) This state shall defend and indemnify a holder and any other person making payment or delivery of the property on behalf of the holder against liability on a claim against the holder or such other person resulting from the payment or delivery of property to the administrator if the property was paid or delivered to the administrator in good faith and the holder or such other person substantially complied with Sections 501 and 502.

SECTION 603. PROPERTY REMOVED FROM SAFE-DEPOSIT BOX. Property removed from a safe-deposit box and delivered to the administrator pursuant to this Act is subject to the holder's right to reimbursement for the cost of opening the box and a lien or contract providing reimbursement to the holder for unpaid rent charges for the box. The administrator shall reimburse the holder from the proceeds remaining after deducting the expense incurred by the administrator in selling the property.

SECTION 604. ADMINISTRATOR'S OPTIONS AS TO CUSTODY.

(a) The administrator may decline to take custody of property reported under Section 401 if the administrator determines that:

(1) the property has a value less than the estimated expenses of notice and sale of the property; or

(2) taking custody of the property would be unlawful.

(b) A holder may pay or deliver property to the administrator before the property is unclaimed under this Act if the holder:

(1) sends each apparent owner of the property notice required by Section 501 and provides the administrator evidence of the holder's compliance with this subsection;

(2) includes with the payment or delivery a report regarding the property conforming to Section 402; and

(3) either:

(A) first obtains the administrator's consent to accept payment or delivery;

(B) is in the process of liquidating or winding up its business; or

(C) reasonably believes that paying or delivering the property at the time required by Section 601 would be detrimental to the owner(s) of the property.

(c) A holder's request for the administrator's consent under subsection (b)(3)(A) must be in writing. If the administrator fails to respond to the request not later than 30 days after receipt of the request, the administrator is deemed to consent to the payment or delivery of the property and the payment or delivery is considered to have been made in good faith.

SECTION 605. PROPERTY HAVING NO SUBSTANTIAL VALUE. If the administrator takes custody of property delivered under this Act and later determines that the property has no substantial commercial value, the administrator shall either (1) hold the property as custodian for the owner; (2) return the property to the holder; or (3) return the property to the owner.

ARTICLE 7

SALE OF PROPERTY BY ADMINISTRATOR

SECTION 701. SALE OF TANGIBLE PROPERTY.

(a) Not earlier than five years after receipt of unclaimed property, the administrator may sell tangible property delivered to the administrator under the Act.

(b) Before selling property under subsection (a), the administrator shall have fully complied with the notice provisions of Section 503 and shall also give notice to the public of:

(1) the date of the sale; and

(2) a reasonable description of the property.

(c) A sale under subsection (a) must be to the highest bidder:

(1) at public sale at a location in this state which the administrator determines to be the most favorable market for the property;

(2) on the Internet; or

(3) on another forum the administrator determines is likely to yield the highest net proceeds of sale.

(d) The administrator may decline the highest bid at a sale under this section and reoffer the property for sale if the administrator determines the highest bid is insufficient.

(e) If a sale held under this section is to be conducted other than on the Internet, the administrator must publish at least one notice of the sale, at least three weeks but not more than five weeks before the sale, in a newspaper of general circulation in the county in which the property is sold.

SECTION 702. SALE OF SECURITIES.

(a) The administrator may not sell, redeem, or otherwise liquidate a security until ten years after the administrator receives the security. In the event that the administrator sells, redeems or liquidates a security after such date, the administrator shall pay to the owner(s) the value of the security, as defined in Section 905(b).

(b) Before selling or liquidating property under subsection (a), the administrator shall have fully complied with the notice provisions of Section 503.

(c) Between the time the administrator assumes custody of any security and the time it is sold, redeemed, or liquidated, any interest, dividends, capital gains, market gains, or other sums that have accrued or been earned on the security shall be the property of the owner(s) of the security and paid to such owner(s) upon the owner(s) claiming the security.

SECTION 703. PURCHASER OWNS PROPERTY AFTER SALE. A purchaser of property at a sale conducted by the administrator under this Act takes the property free of all claims of the owner(s), a previous holder, or a person claiming through the owner(s) or holder. The administrator shall execute documents necessary to complete the transfer of ownership to the purchaser.

ARTICLE 8

ADMINISTRATION OF PROPERTY

SECTION 801. DEPOSIT OF FUNDS BY ADMINISTRATOR.

(a) Except as otherwise provided in this section, the administrator shall deposit in the general fund of the state all funds received under this Act, including proceeds from the sale, redemption or liquidation of property under Article 7.

(b) The administrator shall maintain an account with an amount of funds the administrator reasonably estimates is sufficient to pay claims allowed under this Act in each fiscal year. If the aggregate amount of claims by owners allowed at any time exceeds the amount held in the account, an excess claim must be paid out of the general funds of the state.

SECTION 802. ADMINISTRATOR TO RETAIN RECORDS OF PROPERTY. The administrator shall:

(1) record and retain the name and last-known address of each person shown on a report filed under Section 401 to be an apparent owner of property delivered to the administrator;

(2) record and retain the name and last-known address of each insured or annuitant and beneficiary shown on the report;

(3) for each policy of insurance or annuity contract listed in the report of an insurance company, record and retain the policy or account number, the name of the company, and the amount due or paid;

(4) for each apparent owner listed in the report, record and retain the name of the holder that filed the report and the amount due or paid; and

(5) record and retain all other information provided by the holder with respect to the apparent owner of property delivered to the administrator.

SECTION 803. EXPENSES AND SERVICE CHARGES OF ADMINISTRATOR. Before making a deposit of funds received under this Act to the general fund of the state, the administrator may deduct:

(1) expenses of disposition of property delivered to the administrator under this Act;

(2) costs of mailing and publication in connection with property delivered to the administrator under this Act;

(3) reasonable service charges; and

(4) expenses incurred in examining records of or collecting property from a putative holder or holder.

SECTION 804. ADMINISTRATOR HOLDS PROPERTY AS CUSTODIAN FOR OWNER. Property received by the administrator under this Act is held in trust as custodian for the benefit of the owner and is not owned by the state.

ARTICLE 9

CLAIM TO RECOVER PROPERTY FROM ADMINISTRATOR

SECTION 901. OBLIGATION OF ADMINISTRATOR TO PAY OR DELIVER PROPERTY TO ANOTHER STATE OR THE HOLDER.

(a) Except as otherwise provided in subsection (b), if the administrator knows that property held by the administrator under this Act is subject to a claim of another state, the administrator shall:

(1) report and pay or deliver the property to the other state; or

(2) return the property to the holder so that the holder may pay or deliver the property to the other state.

(b) Property held under this Act by the administrator is subject to the right of another state to take custody of the property if:

(1) the property is tangible property and was physically located in the other state at the time it was delivered to this state;

(2) the property is intangible property and:

(A) the last-known address of the apparent owner(s), as set forth on the records of the holder, is in the other state;

(B) the holder is domiciled in the other state or is the other state or a governmental subdivision, agency, or instrumentality of the other state and either (a) the holder

has no record of the address of the apparent owner of the property; or (b) the last-known address of the apparent owner(s) is an APO, FPO, MPO or other similar temporary military address; or

(C) the property is a traveler's check, money order, or similar instrument, and the other state is entitled to claim such property under 12 U.S.C. Sections 2501 through 2503, as amended.

(c) If the other state does not require the reporting of the property under its unclaimed property laws, the administrator must return the property to the holder.

SECTION 902. CLAIM FOR PROPERTY BY ANOTHER STATE.

(a) Another state may file a claim for property reported to the administrator if:

(1) The administrator has not paid or delivered the property to the other state as required by Section 901(a); and

(2) The other state has a right to take custody of the property under Section 901(b) or under federal law.

(b) A claim by another state to recover property under this section must be presented in a form prescribed by the administrator, unless the administrator waives presentation of the form.

(c) The administrator shall decide a claim under this section not later than 90 days after it is filed, unless an extended period of time is agreed upon by the administrator and the other state in writing. If the administrator determines that the other state is entitled under subsection (a) to custody of the property, the administrator shall allow the claim and pay or deliver the property to the other state. If the administrator has not decided the claim within 90 days or within any extended period of time as may be agreed upon by the administrator and the other state, the claim is deemed denied.

(d) If the claim is denied, in whole or in part, the other state may commence an action under Section 905.

(e) The administrator may require another state, before recovering property under this section, to agree to indemnify this state and its agents, officers and employees against any liability on a claim to the property.

SECTION 903. CLAIM FOR PROPERTY BY PERSON CLAIMING TO BE OWNER OR BY OWNER'S REPRESENTATIVE.

(a) A person claiming to be the owner of property held under this Act by the administrator, or the owner's representative, may file a claim for the property on a form prescribed by the administrator.

(b) If the administrator receives evidence sufficient to establish that the claimant is, or represents, the owner of the property, then the administrator shall pay or deliver the property to the owner as set forth in Section 905. The administrator may, but is not required to, pay or deliver the property to a person claiming to be the owner even in the absence of such evidence if:

(1) the person making the claim is shown to be the apparent owner of the property as identified on the report filed by the holder under Section 401; and

(2) the administrator reasonably believes the person is entitled to receive the property.

(c) Not later than 90 days after a claim is filed under subsection (a), the administrator shall allow or deny the claim and give the claimant notice in writing of the decision, unless an extended period of time is agreed upon by the administrator and the claimant in writing. If the administrator has not decided the claim within 90 days or within any extended period of time as may be agreed upon by the administrator and the claimant, the claim is deemed denied.

(d) If the claim is denied under subsection (c):

(1) the administrator shall inform the claimant of the reason for the denial and specify what additional evidence, if any, is required for the claim to be allowed;

(2) the claimant may file an amended claim with the administrator or commence an action under Section 906; and

(3) the administrator shall consider an amended claim filed under subsection (2) as an initial claim.

SECTION 904. CLAIM FOR PROPERTY BY HOLDER OR PUTATIVE HOLDER OR ITS REPRESENTATIVE.

(a) A holder or putative holder that pays or delivers property to the administrator pursuant to this Act, or the holder's or putative holder's representative, shall be entitled to recover the property from the administrator of the property if:

(1) the holder or putative holder paid or delivered the property in error;

(2) the holder or putative holder has paid or delivered the property to a person that the holder reasonably believes is entitled to the property; or

(3) the holder or putative holder has an ownership interest in the property, the property is exempt from escheat, the state does not have the right to take custody of the property under Article 3 or the holder or putative holder is otherwise entitled to the property.

(b) The holder or putative holder, or its representative, shall file a claim with the administrator to recover property under subsection (a), and shall provide evidence reasonably sufficient to establish that the property was delivered by the holder to the administrator in error, that the holder has paid or delivered the property to a person that the holder reasonably believes is entitled to the property, or that the holder is otherwise entitled to the property. The

administrator may determine that an affidavit submitted by a holder is evidence sufficient to establish that the holder is entitled to reimbursement or to recover property under this subsection.

(c) Not later than 90 days after a claim is filed under subsection (a), the administrator shall allow or deny the claim and give the holder or putative holder notice in writing of the decision, unless an extended period of time is agreed upon by the administrator and the claimant in writing. If the administrator has not decided the claim within 90 days or within any extended period of time as may be agreed upon by the administrator and the holder or putative holder, the claim is deemed denied.

SECTION 905. ALLOWANCE OF CLAIM.

(a) Subject to subsection (e), if a claim has been allowed by the administrator under Section 902, 903 or 904, then not later than 30 days after the claim is allowed, the administrator shall pay or deliver to the claimant:

(1) the property, if it has not been sold by the administrator;

(2) if the property has been sold by the administrator:

(A) the net proceeds of the sale of any tangible property; and

(B) the value of any security as defined in subsection (b); and

(3) any interest, dividends or other amounts that accrued with respect to the property while held by the administrator;

provided, however, that (1) for any money due to the owner, the administrator shall make the check payable to the owner and not the owner's representative; (2) any check or other property required to be sent to the owner shall be sent to the address set forth in the claim form, in the care of the owner; and (3) if there is more than one owner of the property, the claimant shall only be

entitled to that portion of the property that the claimant would have been entitled to recover from the holder if the property had not been transferred to the state pursuant to this Act.

(b) The value of a security shall be equal to the market value of the security at the time the claim is filed, if the claim is paid within 60 days after the date of the claim. If the claim is paid after 60 days, then the value of the security shall be equal to the greater of (1) the market value of the security at the time the claim is filed or (2) the market value of the security at the time the claim is paid. The calculation of market value under this subsection must take into account any stock split, reverse stock split, stock dividend, or similar corporate action. For purposes of this section, the market value of a mutual fund share shall be its net asset value.

(c) Any interest, dividends or other amounts are deemed to have accrued with respect to the property if such amounts would have accrued had the property not been paid or delivered to the administrator under this Act.

(d) Property held under this Act by the administrator is subject to a claim for the payment of an enforceable public or private debt the owner owes in this state for:

(1) child-support arrearages, including child-support collection costs and child-support arrearages that are combined with maintenance;

(2) a civil or criminal judgment, fine or penalty, court costs, a surcharge, or restitution imposed by a final order of an administrative agency or a final court judgment; or

(3) state or local taxes, penalties, and interest that have been determined to be delinquent or as to which notice has been recorded with the [Secretary of State] [or local taxing authority].

(e) Before payment to an owner of any amount under subsection (a), the administrator first shall apply such amount to any debt under subsection (d) the administrator

reasonably determines is owed by the owner. The administrator shall pay the amount determined under subsection (d) to the appropriate state or local agency and notify the owner of the payment.

(f) The administrator may make periodic inquiries of state and local agencies to determine whether an apparent owner included in the unclaimed property records of this state may have enforceable debts described in subsection (d).

SECTION 906. APPEAL BY PERSON WHOSE CLAIM IS DENIED.

(a) If a claim has been denied by the administrator under Section 902, 903 or 904, the claimant may, but is not required to, initiate a proceeding under the state's administrative procedures act for review of the administrator's decision or the deemed denial not later than:

(1) for a claim under Section 903, or a claim under Section 904 where the putative holder asserts that it is also the owner of the property, at any time; or

(2) for a claim under Section 902 or 904, where the putative holder does not assert that it is the owner of the property, 60 days following the date the claim was denied.

(b) A claimant whose claim has been denied may also elect to commence an action against the administrator in a state or federal court of appropriate jurisdiction:

(1) for a claim under Section 902, within one year of the later of:

(A) the date the claim was denied; or

(B) the date of a final decision in the administrative proceeding under subsection (a), if such proceeding is elected by the claimant;

(2) for a claim under Section 903, or a claim under Section 904 where the putative holder asserts that it is also the owner of the property, at any time; or

(3) for a claim under Section 904, where the putative holder does not assert that it is the owner of the property, within one year of the later of:

(A) the date the claim was denied;

(B) the date of a final decision in the administrative proceeding under subsection (a), if such proceeding is elected by the claimant.

(c) In the event a claimant brings an action under subsection (b), the court shall review the matter de novo, regardless of whether the claimant has elected to pursue the administrative proceeding under subsection (a).

(d) In the event the claimant prevails in any claim under subsection (b), the court may, but is not obligated to, award to the claimant its reasonable attorneys' fees and costs. The court may also award the claimant monetary damages in the event that the state failed to comply with its obligations under the Act.

SECTION 907. CLAIM BY ADMINISTRATOR FOR PROPERTY HELD BY ANOTHER STATE.

(a) The administrator may submit a claim to recover property held by another state, if the property should have been remitted to this state under the Act.

(b) If the administrator recovers property from another state pursuant to this Section 907, the administrator shall have the authority to indemnify the other state and its agents, officers and employees, against any liability on a claim to such property.

ARTICLE 10

EXAMINATION OF RECORDS

SECTION 1001. EXAMINATION OF RECORDS TO DETERMINE COMPLIANCE.

(a) Subject to subsection (b), the administrator, at reasonable times and on reasonable notice, may:

(1) examine the records of a putative holder, including examination of appropriate records in the possession of an agent of the putative holder under examination, if the administrator has reason to believe that the putative holder has failed to report property required to be reported by the putative holder pursuant to this Act and the records are reasonably necessary to determine whether the putative holder has complied with this Act;

(2) issue an administrative subpoena requiring the putative holder or the agent of the putative holder to make the records described in subsection (1) available for examination; and

(3) bring an action seeking judicial enforcement of the subpoena.

(b) The administrator shall provide notice to any putative holder subject to examination under this Section.

(c) Notwithstanding subsection (a), the administrator shall not be entitled to examine the records of a putative holder for any period where the administrator has previously issued a notice of determination pursuant to Section 1010 or 1101, except in the case of fraud or willful misrepresentations by the putative holder.

SECTION 1002. RECORDS OBTAINED IN EXAMINATION. Records obtained and records, including work papers, compiled by the administrator in the course of conducting an examination under Section 1001:

(a) are subject to the confidentiality and security provisions of Article 14 and are not public records;

(b) may be used by the administrator in an action to collect property or otherwise enforce this Act;

(c) may be used in a joint examination conducted with another state, the United States, or any other federal, state or local governmental entity if the governmental entity conducting the examination is legally bound to maintain the confidentiality and security of information obtained from a person subject to examination in a manner substantially equivalent to Article 14;

(d) may be disclosed, on request, to the person that administers the unclaimed property law of another state for that state's use in circumstances equivalent to circumstances described in this Article, only if the other state is required to maintain the confidentiality and security of information obtained in a manner substantially equivalent to Article 14 and the records are reasonably necessary to determine whether the person has complied with the unclaimed property laws of the other state;

(e) must be produced by the administrator under an administrative or judicial subpoena or administrative or court order; and

(f) must be produced by the administrator on request of the person subject to the examination in an administrative or judicial proceeding relating to the property.

SECTION 1003. BURDEN OF PROOF. If the administrator asserts a right to custody of unclaimed property, the administrator has the burden to prove:

(a) the existence and amount of the property;

(b) the property is unclaimed; and

(c) the property is subject to the custody of the administrator under Article 3.

SECTION 1004. BURDEN OF PRODUCTION.

(a) The administrator has the initial burden of producing evidence to establish a prima facie case that the putative holder has an outstanding fixed and certain obligation to pay or deliver the property to the apparent owner.

(b) A record of the issuance on a particular date of a check, draft, or similar instrument, in a stated amount, to a third party under circumstances that normally indicate delivery creates a prima facie case of the existence of an outstanding fixed and certain obligation. If an administrator presents evidence sufficient to create a prima facie case, then the burden of production shifts to the putative holder to produce evidence that tends to disprove that the obligation is not a fixed and certain obligation of the putative holder.

(c) A putative holder may overcome prima facie evidence by producing evidence that, among other things, a check, draft, or similar instrument was:

(1) issued as an unaccepted offer in settlement of an unliquidated amount;

(2) issued but later was replaced with another instrument because the earlier instrument was lost or contained an error that was corrected;

(3) issued to a party affiliated with the issuer;

(4) paid, satisfied, or discharged;

(5) issued in error;

(6) issued without consideration;

(7) issued but there was a failure of consideration;

(8) voided within 90 days after issuance; or

(9) issued but not delivered to the third-party payee for a sufficient reason recorded within a reasonable time after issuance.

(d) The record of a liability in a holder's books or records is some evidence of an obligation but is not by itself sufficient to create a prima facie case of a fixed and certain obligation. Examples of such evidence that by itself is insufficient to create a prima facie case include, but are not limited to, the record of:

(1) an accrual of an estimated liability;

(2) an accrual of a contingent liability;

(3) a credit on a holder's books recorded for accounting purposes, including without limitation accounts receivable credit balances; and

(4) uninvoiced payables.

(e) The putative holder may raise any defenses, whether negative or affirmative, to an administrator's claim to property. A negative defense negates the elements of the administrator's prima facie case. Asserting a negative defense does not shift the burden of proof to the putative holder; rather, the burden of proof remains with the administrator. An affirmative defense precludes liability even if all of the elements of the administrator's claim are proven. The putative holder bears both the burden of proof and the burden of production with respect to any affirmative defense it raises.

(f) In order for an administrator to use a method of estimation under Section 1005, the administrator has the evidentiary burden to show that the records of the holder were insufficient to permit the preparation of a report and that unclaimed property was held by the holder. If such burden is met, the administrator shall use a method of estimation that is reasonably crafted to determine the amount of unclaimed property that would have been owed to the state, but was not paid to that state. If the holder disputes the method of estimation and offers

an alternative method of estimation, the trier of fact shall apply the method that is more likely to approximate the actual amount of unclaimed property owed to the state by the holder.

SECTION 1005. USE OF ESTIMATION.

(a) If the putative holder subject to examination under Section 1001, including a putative holder participating in the voluntary disclosure program under Section 1010, has not maintained the records required by Section 404, the administrator may use a reasonable method of estimation to determine the amount of property that should have been but was not reported under this Act. Such estimation shall be considered a penalty for failure to maintain records.

(b) If a putative holder subject to examination under Section 1001, including a putative holder participating in the voluntary disclosure program under Section 1010, has maintained the records required by Section 404, the examination may not be based on an estimate, except that the state and the putative holder may agree in writing to a reasonable process for identifying the existence of unreported unclaimed property, so long as such process would not materially impede the rights of potential owners of such property if the owner makes a claim for such property.

SECTION 1006. REPORT TO PERSON WHOSE RECORDS WERE EXAMINED. At the conclusion of an examination under Section 1001, the administrator shall provide to the putative holder whose records were examined a complete and unredacted examination report that specifies:

(1) the work performed;

(2) the property types reviewed;

(3) the methodology of any estimation used in conducting the examination;

(4) each calculation showing the value of property determined to be due; and

(5) the findings of the person conducting the examination.

SECTION 1007. THIRD PARTY CONTRACTORS.

(a) The administrator may contract with a third party contractor to conduct an examination under this Article, including the voluntary disclosure program under Section 1010, if the following requirements are satisfied:

(1) prior to engaging the contractor, the administrator makes a written determination that such engagement is both cost-effective and in the public interest and posts such determination on the administrator's website;

(2) the contractor is not related to the administrator or owned in whole or in part by the administrator or by an individual related to the administrator;

(3) the contractor shall not be compensated on a contingent fee basis;

(4) the administrator exercises oversight and control over the contractor at all times;

(5) the administrator rather than the contractor makes all material decisions regarding the potential liability of the putative holder, including decisions regarding examination methods, examination scope, legal positions and determinations, and the initiation, resolution or termination of an audit, and the putative holder may contact the administrator's staff directly on any such matter;

(6) the administrator has determined that the contractor owes no material unclaimed property to the state;

(7) the administrator maintains a record of all interactions between the putative holder, the administrator, and contractor relating to the contractor's review of the

putative holder's records including, but not limited to, interactions relating to any concerns raised by the holder regarding the contractor's conduct in conducting the examination; and

(8) the contractor is expressly required to act with the highest ethical standards and to refrain from pursuing abusive, unreasonable or cumbersome audit procedures.

(b) A contract described in subsection (a) may be awarded only after an open, competitive bidding process that satisfies the requirements of any of the state's laws applicable to the competitive procurement of services of private contractors, and such contract must be posted publicly on the administrator's website for public inspection throughout the duration of the contract.

(c) In this section, "related to the administrator" refers to an individual who is:

(1) the administrator's spouse, partner in a civil union, domestic partner, or reciprocal beneficiary;

(2) the administrator's child, stepchild, grandchild, parent, stepparent, sibling, step-sibling, half-sibling, aunt, uncle, niece, or nephew;

(3) a spouse, partner in a civil union, domestic partner, or reciprocal beneficiary of an individual under subsection (2); or

(4) any individual residing in the administrator's household.

(d) Any contract between an administrator and a contractor is subject to public disclosure without redaction under the state's freedom of information act.

(e) The administrator or an individual employed by the administrator who participates in, recommends, or approves the award of a contract under subsection (a) on or after the effective date of this Act may not be employed by, contracted with, or compensated in any

capacity by the contractor or an affiliate of the contractor for five years after the latest of participation in, recommendation of, or approval of the award or conclusion of the contract.

(f) Any contractor of the administrator shall be considered the administrator's agent for purposes of this Act.

SECTION 1008. REPORT BY ADMINISTRATOR TO STATE OFFICIAL.

(a) Not later than three months after the end of the state fiscal year, the administrator shall compile and submit a report to the [Governor, Treasurer, Comptroller, Speaker of the Senate, and Speaker of the House]. The report must contain the following information about unclaimed property for the preceding fiscal year for the state:

(1) the total amount and value of all property paid or delivered under this Act to the administrator, separated into:

(A) the part voluntarily paid or delivered, but not including any property paid or delivered pursuant to the voluntary disclosure program under Section 1010;

(B) the part paid or delivered pursuant to the voluntary disclosure program under Section 1010, separated into the part paid or delivered where the program was conducted by:

(i) a state employee; and

(ii) a contractor under Section 1007; and

(C) the part paid or delivered as a result of an examination under Section 1001, but not including any property paid or delivered pursuant to the voluntary disclosure program under Section 1010, separated into the part recovered as a result of an examination conducted by:

(iii) a state employee; and

(iv) a contractor under Section 1007;

(2) the name of and amount paid to each contractor under Section 1007 for conducting examinations, but not including the voluntary disclosure program under Section 1010, and the percentage the total compensation paid to such contractors bears to the total amount paid or delivered to the administrator as a result of all examinations performed under Section 1001, but not including any property paid or delivered pursuant to the voluntary disclosure program under Section 1010;

(3) the name of and amount paid to each contractor under Section 1007 for conducting the voluntary disclosure program under Section 1010, and the percentage the total compensation paid to such contractors bears to the total amount paid or delivered to the administrator as a result of the voluntary disclosure program under Section 1010;

(4) the total amount and value of all property paid or delivered by the administrator to persons that made claims for property held by the administrator under this Act and the percentage the total payments made and value of property delivered to claimants bears to the total amounts paid and value delivered to the administrator; and

(5) the total amount of claims made by or on behalf of persons claiming to be owners or holders which:

(A) were denied;

(B) were allowed; and

(C) are pending.

(b) The report under subsection (a) is a public record subject to public disclosure without redaction under the state's freedom of information act.

SECTION 1009. RIGHT OF HOLDER TO RETAIN REPRESENTATIVE.

(a) A putative holder under examination pursuant to this Article, or participating in the voluntary disclosure program under Section 1010, may designate a third party to act as its representative in the examination. The designation must be in writing and signed by the putative holder.

(b) Whenever a representative is designated under subsection (a) of this section, the administrator shall communicate with the representative of the putative holder, rather than the putative holder, in all matters concerning the examination or voluntary disclosure program as directed by the putative holder until such time as the designation is revoked by the putative holder.

SECTION 1010. VOLUNTARY DISCLOSURE PROGRAM

(a) Any putative holder that is not under examination by the state pursuant to Section 1001 may elect to participate in the state's unclaimed property voluntary disclosure program conducted by the administrator. Such electing putative holder shall send a notice to the administrator of its intent to participate in the program.

(b) Within one year of the date of such notice, or such other date as may be agreed upon by the administrator and the putative holder, the putative holder participating in the program shall complete a review of its books and records and identify to the administrator any property that the putative holder believes was required to be, but was not previously, reported to the state under this Act.

(c) The administrator shall review the findings of the putative holder and shall request from the putative holder any additional information that the administrator reasonably believes is necessary to validate such findings. In conducting such review, the administrator

shall have all the same rights, duties and obligations, including the right to examine the records of the putative holder, as in the case of an examination under Section 1001.

(d) The putative holder and the administrator shall act in good faith to resolve any differences regarding the amount of property that is due under the program. If the putative holder and the administrator are unable in good faith to agree on the amount of property that is due, then the administrator (1) shall promptly notify the putative holder in writing that the administrator and putative holder are unable to agree on the amount of property that is due; and (2) may, within one year after such notice, file an action against the putative holder in a federal or state court of appropriate jurisdiction challenging the findings of the putative holder.

(e) If the putative holder and administrator agree on the amount of property that is due, then (1) the administrator shall issue a notice of determination to the putative holder identifying the property that is due; and (2) the putative holder shall pay or deliver such property to the administrator within 30 days after receipt of such notice of determination. The putative holder shall not be subject to interest or penalties on any property reported in the voluntary disclosure program.

ARTICLE 11

DETERMINATION OF LIABILITY; PUTATIVE HOLDER REMEDIES

SECTION 1101. DETERMINATION OF LIABILITY. If the administrator determines from an examination conducted under Section 1001 that a putative holder failed to pay or deliver to the administrator property which is reportable under this Act, the administrator shall issue a determination of the putative holder's liability to pay or deliver the property to the administrator and shall promptly give notice in writing to the putative holder of the determination.

SECTION 1102. INFORMAL CONFERENCE.

(a) Not later than 30 days after receipt of a notice under Section 1101, the putative holder may request an informal conference with the administrator to review the determination. Except as otherwise provided in this section, the administrator may designate an employee to act on behalf of the administrator.

(b) If a putative holder makes a timely request under subsection (a) for an informal conference:

(1) not later than 30 days after the date of the request, the administrator shall set the time and place of the conference, which shall be no later than 90 days after the date of the request;

(2) the administrator shall give the putative holder notice in writing of the time and place of the conference;

(3) the conference may be held in person, by telephone, or by electronic means, as determined by the administrator;

(4) the request tolls the 90-day period under Sections 1104, 1105 and 1106 until notice of a decision under subsection (7) has been given to the putative holder or the putative holder withdraws the request for the conference;

(5) the conference may be postponed, adjourned, and reconvened as the administrator and the putative holder may agree;

(6) the administrator or administrator's designee with the approval of the administrator may modify a determination made under Section 1101 or withdraw it; and

(7) the administrator shall issue a decision in writing and provide a copy to the putative holder and contractor, if applicable, not later than 30 days after the conference ends.

(c) A conference under subsection (b) is not an administrative remedy and is not a contested case subject to the state's administrative procedure act. An oath is not required and rules of evidence do not apply in the conference.

(d) At a conference under subsection (b), the putative holder must be given an opportunity to confer informally with the administrator and the person that examined the records of the putative holder to:

(1) discuss the determination made under Section 1101; and

(2) present any issue concerning the validity of the determination.

(e) If the administrator fails to act within the period prescribed in subsection (b)(1) or (7), the failure does not affect any right of the administrator, except that penalties and interest do not accrue on the amount for which the putative holder was determined to be liable under Section 1101 during the period in which the administrator failed to act until the earlier of:

(1) the date under Section 1104 or Section 1105 the putative holder initiates administrative review or files an action under Section 1106; or

(2) 90 days after the putative holder received notice of the administrator's determination under Section 1101 if no review was initiated under Section 1104 or Section 1105 and no action was filed under Section 1106.

(f) Except as provided above, penalties and interest under Section 1204 continue to accrue on property not reported, paid, or delivered as required by this Act after the initiation, and during the pendency, of an informal conference under this section.

SECTION 1103. REVIEW OF ADMINISTRATOR'S DETERMINATION. A putative holder may seek relief from a determination under Section 1101 by:

(1) administrative review under Section 1104;

(2) alternative administrative appeal under Section 1105; and/or

(3) judicial review under Section 1106.

SECTION 1104. ADMINISTRATIVE REVIEW.

(a) Not later than 90 days after the later of (i) receiving notice of the administrator's determination under Section 1101 or (ii) receipt of a final decision in an administrative proceeding initiated under Section 1105, a putative holder may initiate a proceeding under the state's administrative procedure act for review of the administrator's determination without waiver of any right to later pursue a judicial or administrative appeal pursuant to Section 1105 or 1106. In such proceeding:

(1) The presiding officer reviewing the administrator's determination shall be independent of the state agency that issued the determination and shall be selected after consultation with the administrator and the putative holder; and

(2) The review of the administrator's determination shall be *de novo*, and either party shall be entitled to introduce evidence to supplement the record.

(b) A final decision in an administrative proceeding initiated under subsection (a) is subject to judicial review by a federal or state court of appropriate jurisdiction as a matter of right in a *de novo* proceeding in which either party is entitled to introduce evidence as a supplement to the record.

SECTION 1105. ALTERNATIVE ADMINISTRATIVE APPEAL

(a) Not later than 90 days after the later of (i) receiving notice of the administrator's determination under Section 1101 or (ii) receipt of a final decision in an administrative proceeding initiated under Section 1104, a putative holder may elect to pursue an administrative appeal as set forth in this Section 1105 without waiver of any right to later pursue a judicial or

administrative appeal pursuant to Section 1104 or 1106. Such appeal must be in writing, must be dated and signed by the holder and mailed or e-mailed to the administrator and contain the following information:

(1) The names of all parties involved in the audit at issue;

(2) The specific findings the holder is protesting including any amounts in question, property types, and the years audited. The holder is presumed to have agreed to any findings not contested;

(3) A clear and concise description of each error that the holder is alleging the Administrator's Office made in its findings;

(4) A summary of the argument and legal authority upon which each assignment of error is made; provided, that the applicant shall not be bound or restricted in any hearing to the arguments and legal authorities contained and cited in said appeal;

(5) The relief requested; and

(6) Whether or not the holder is requesting a hearing.

(b) Within 10 calendar days from the administrator's acknowledgement of receipt of the written appeal, the holder must pay the undisputed amount of the audit findings to the administrator.

(c) A hearing examiner shall be mutually selected by the parties to issue a determination on the appeal through the following process:

(1) Within 45 calendars days after the putative holder has filed the appeal pursuant to Section 1105(a), each party shall provide to the other a list of no more than five people who are qualified to be a designated hearing examiner. The hearing examiner shall be a

former member of the judiciary or an attorney who is qualified by experience or training to serve and shall not be any current employee of the administrator or an agent of the administrator.

(2) Within 5 calendar days from receipt of the list, each party may, without cause, remove two names from the list provided by the other party.

(3) Within 5 calendar days from communicating the removal of names, the parties shall agree to a random selection process for choosing the hearing examiner from the remaining names and shall select the designated hearing officer in accordance with such process.

(4) The administrator shall notify the hearing examiner of his or her selection within 5 calendar days from the selection.

(5) If the selected individual is unable or unwilling to serve as the hearing examiner for any reason, the parties shall randomly select another hearing examiner from the remaining names on the lists provided by the parties.

(d) If requested by the putative holder, the hearing examiner shall schedule a hearing, to be conducted within 60 calendar days from the date of the notice of his or her selection.

(1) The administrator, hearing examiner and the putative holder shall agree upon a date(s) for the hearing which are within the 30 calendar day period.

(2) The hearing examiner shall issue a notice of hearing, notifying the administrator and putative holder of the date, time, and place of the hearing. Such notice shall provide that:

(A) The administrator and putative holder may present witnesses and documents at the hearing.

(B) Failure to appear for the scheduled hearing without good cause shall be treated as (i) if the failure is by the putative holder, a withdrawal of appeal; and (ii) if the failure is by the administrator, a withdrawal of the determination against the putative holder.

(3) The hearing examiner may reschedule a hearing upon determining that good cause exists.

(e) The hearing examiner shall have the discretion to allow the administrator or the putative holder to provide additional information subsequent to the hearing and will supplement the record accordingly.

(f) Within 60 calendar days after the hearing, the hearing examiner shall:

(1) Issue a written determination to the administrator and putative holder, which shall include findings of fact and conclusions of law; and

(2) Provide an official record of the appeal that includes, but is not limited to, a transcript of all testimony and all papers, motions, documents, evidence and records reviewed in the appeal process, and a statement of matters officially noted.

(g) The hearing examiner may award reasonable attorney's fees and the costs of the appeal to the prevailing party, except that the administrator may be awarded fees or costs only where it is the prevailing party and the putative holder acted with fraud or willful misconduct.

SECTION 1106. JUDICIAL REMEDY BY HOLDER.

(a) Not later than 90 days after the later of (i) receipt of notice of the administrator's determination under Section 1101, (ii) receipt of a final decision in an administrative proceeding initiated under Section 1104, or (iii) receipt of a final decision in an administrative proceeding initiated under Section 1105, the putative holder may:

(1) file an action against the administrator in a federal or state court of appropriate jurisdiction challenging the administrator's determination of liability and seeking a declaration that the determination is unenforceable, in whole or in part; or

(2) pay the amount or deliver the property determined by the administrator to be paid or delivered to the administrator and, not later than six months after payment or delivery, file an action against the administrator in a federal or state court of appropriate jurisdiction for a refund of all or part of the amount paid or return of all or part of the property delivered.

(b) If a putative holder pays or delivers property the administrator determined must be paid or delivered to the administrator at any time after the putative holder files an action under subsection (a)(1), the court shall continue the action as if it had been filed originally as an action for a refund or return of property under subsection (a)(2).

(c) If the putative holder is the prevailing party in an action filed under subsection (a), the court may, on application, award to the putative holder its reasonable attorney's fees, costs, and expenses of litigation.

(d) A putative holder that is the prevailing party in an action under subsection (a)(2) for refund of money paid to the administrator is entitled to interest on the amount refunded, at an annual rate equal to the one-year United States Treasury bill rate plus 1% on the property from the date paid to the administrator until the date of the refund. For purposes of this subsection, the "one-year United States Treasury bill rate" means the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the last full week of the calendar year immediately prior to the year in which post-judgment interest begins to accrue. If the Board of Governors of the Federal Reserve System ceases to publish the weekly average one-year constant maturity Treasury yield or it is otherwise unavailable, then the

administrator shall annually establish by rule a rate that most closely approximates the rate established in this subsection.

(e) A putative holder's decision to forego either or both of the administrative appeal options set forth in Section 1104 and 1105 shall not constitute a failure to exhaust administrative remedies.

SECTION 1107. JUDICIAL REMEDY BY ADMINISTRATOR.

(a) Not later than 90 days after the later of (i) receipt of a final decision in an administrative proceeding initiated under Section 1104, or (ii) receipt of a final decision in an administrative proceeding initiated under Section 1105, the administrator may file an action against the putative holder in a federal or state court of appropriate jurisdiction challenging the final decision in the administrative proceeding, in whole or in part.

(b) If the administrator is the prevailing party in an action filed under subsection (a) and the putative holder acted with fraud or willful misconduct, the court may, on application, award to the administrator its reasonable attorney's fees, costs, and expenses of litigation.

SECTION 1108. COMPLAINT TO ADMINISTRATOR ABOUT CONDUCT OF PERSON CONDUCTING EXAMINATION.

(a) If a putative holder subject to examination under Section 1001 believes the person conducting the examination has made an unreasonable or unauthorized request or is not proceeding expeditiously to complete the examination, the putative holder may ask the administrator to intervene and take appropriate remedial action, including countermanding the request of the person conducting the examination, imposing a time limit for completion of the examination, or reassigning the examination to another person.

(b) If a putative holder files a written request with the administrator for a conference or meeting to present matters that are the basis of a request under subsection (a), the administrator shall hold the conference or meeting not later than 30 days after receiving the request. The administrator may hold the conference or meeting in person, by telephone, or by electronic means.

(c) If a conference or meeting is held under subsection (b), not later than 30 days after the conference or meeting ends, the administrator shall provide a report in a record of the conference or meeting to the putative holder that requested the conference.

(d) If a putative holder requests a conference, and either the administrator does not hold such conference or does not provide the report specified in subsection (c), then the examination shall be held in abeyance upon the request of the holder, and no penalties or interest shall accrue on any property that may be owed by the putative holder, until such conference is held and such report is provided.

ARTICLE 12

ENFORCEMENT BY ADMINISTRATOR

SECTION 1201. JUDICIAL ACTION TO ENFORCE LIABILITY; PERIODS OF LIMITATION AND REPOSE.

(a) If a determination under Section 1101 becomes final and is not subject to administrative or judicial review, the administrator may commence an action in a state or federal court of appropriate jurisdiction in this state or in an appropriate court of another state to enforce the determination and secure payment or delivery of past due, unpaid, or undelivered property.

(b) The administrator may not commence an action or proceeding to enforce this Act later than one year after the determination under Section 1101 becomes final.

(c) The administrator may not commence an action or proceeding to enforce this Act with respect to the reporting, payment, or delivery of property more than four (4) years after the holder filed a non-fraudulent report under Section 401 with the administrator.

(d) The administrator may not commence an action, proceeding, or examination with respect to a duty of a holder under this Act more than seven (7) years after the duty arose.

(e) The parties may agree in writing to extend the periods of limitation in subsections (b) through (d).

(f) The expiration of a statute of limitations on an owner's right to recover property from the holder does not prevent the administrator from commencing an action or proceeding to enforce this Act, if the statute of limitations expired after the date the property became unclaimed under this Act.

SECTION 1202. INTERSTATE AND INTERNATIONAL AGREEMENT; COOPERATION.

(a) Subject to subsection (b), the administrator may:

(1) exchange information with another state relating to unclaimed property or relating to the possible existence of unclaimed property; and

(2) authorize in writing another state or a person acting on behalf of the other state to examine the records of a putative holder as provided in Article 10.

(b) An exchange or examination under subsection (a) may be done only if the state has confidentiality and security requirements substantially equivalent to those in Article 14 or agrees in writing to be bound by this state's confidentiality and security requirements.

SECTION 1203. ACTION INVOLVING ANOTHER STATE.

(a) The administrator may join another state to examine and seek enforcement of this Act against a putative holder.

(b) On request of another state, the Attorney General may commence an action on behalf of the other state to enforce, in this state, the law of the other state against a putative holder subject to a claim by the other state, if the other state agrees to pay costs incurred by the Attorney General in the action.

(c) The administrator may request the official authorized to enforce the unclaimed property law of another state to commence an action to recover property in the other state or country on behalf of the administrator. This state shall pay the costs, including reasonable attorney's fees and expenses, incurred by the other state in an action under this subsection.

(d) The administrator may pursue an action against another state on behalf of this state to recover property subject to this Act but delivered to the custody of another state if the administrator believes the property is subject to the custody of the administrator.

(e) The administrator may retain an attorney in this state or another state to commence an action to recover property on behalf of the administrator and may agree to pay attorney's fees based in whole or in part on a fixed fee, hourly fee, or a percentage of the amount or value of property recovered in the action.

(f) Expenses incurred by this state in an action under this section may be paid from property received under this Act or the net proceeds of the property. Expenses paid to recover property may not be deducted from the amount that is subject to a claim under this Act by the owner or other claimant.

SECTION 1204. INTEREST AND PENALTIES.

(a) Except as otherwise provided in subsection (d), a holder that fails to remit property, other than securities or tangible personal property, within the time prescribed by this Act shall pay to the administrator interest at an annual rate equal to the one-year United States Treasury bill rate plus 1% on the property from the date such property was required to be remitted until the date of remittance. For purposes of this subsection, the "one-year United States Treasury bill rate" means the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the last full week of the calendar year immediately prior to the year in which interest begins to accrue. If the Board of Governors of the Federal Reserve System ceases to publish the weekly average one-year constant maturity Treasury yield or it is otherwise unavailable, then the administrator shall annually establish by rule a rate that most closely approximates the rate established in this subsection.

(b) Except as otherwise provided in subsection (d), the administrator may require a holder that fails to report, pay, or deliver property within the time prescribed by this Act to pay to the administrator a civil penalty equal to:

(1) For each safe deposit box the contents of which the holder failed to timely deliver to the administrator, $100 per annum, up to a maximum of $1,000 per safe deposit box;

(2) For all other property, five percent (5%) of the value of the property that should have been but was not reported, per annum, up to a maximum of twenty-five percent (25%). For securities property, the value shall be determined as of the date the securities should have initially been but were not reported to the administrator.

(c) If a holder makes a fraudulent report under this Act, the administrator may also require the holder to pay to the administrator a civil penalty equal to fifty percent (50%) of the amount or value of the property that should have been but was not reported.

(d) The administrator:

(1) may waive, in whole or in part, interest or penalties in the administrator's discretion; and

(2) shall waive interest or penalties if the holder had reasonable cause for not reporting or delivering the property to the administrator.

(e) A holder has reasonable cause for not reporting or delivering property to the administrator if the holder exercised ordinary care and prudence. A holder shall be deemed to have reasonable cause:

(1) where, in the absence of willful neglect, the failure to report or deliver the property was due to circumstances beyond the holder's control;

(2) where the holder relied on information given to the holder by the administrator or his agent that the property was not required to be reported or delivered to the administrator;

(3) where the administrator or his agent has requested that the holder delay the reporting or delivery of the property to the administrator; or

(4) where the holder reasonably relied on legal authorities providing that the property was not required to be reported or delivered to the administrator.

ARTICLE 13

AGREEMENT TO RECOVER UNCLAIMED PROPERTY

SECTION 1301. WHEN AGREEMENT TO RECOVER PROPERTY ENFORCEABLE.

(a) An agreement by an owner and another person, the primary purpose of which is to locate, deliver, recover, or assist in the location, delivery, or recovery of property held by the administrator, is enforceable only if the agreement:

(1) is in writing and clearly states the nature of the property and the services to be provided;

(2) is signed by or on behalf of the owner;

(3) states the amount or value of the property reasonably expected to be recovered, computed before and after a fee or other compensation to be paid to the person has been deducted; and

(4) the amount of compensation paid is not unconscionable.

(b) This section does not apply to an owner's agreement with an attorney to pursue a claim for recovery of specifically identified property held by the administrator or to contest the administrator's denial of a claim for recovery of the property.

SECTION 1302. RIGHT OF REPRESENTATIVE OF OWNER TO RECOVER PROPERTY HELD BY ADMINISTRATOR.

(a) An owner that contracts with another person to locate, deliver, recover, or assist in the location, delivery, or recovery of property of the owner which is held by the administrator may designate the person as the representative of the owner. The designation must be in writing and signed by the owner.

(b) The administrator shall give the representative of the owner all information concerning the property which the owner is entitled to receive, including information that otherwise is confidential information under Section 1402.

(c) If authorized by the owner, the representative of the owner may bring an action against the administrator on behalf of and in the name of the owner.

ARTICLE 14

CONFIDENTIALITY AND SECURITY OF INFORMATION

SECTION 1401. DEFINITIONS; APPLICABILITY.

(a) In this Article, "personal information" means:

(1) information that identifies or reasonably can be used to identify an individual, including one or more of the following:

(A) first and/or last name;

(B) Social Security number or other government-issued number or identifier;

(C) date of birth;

(D) home or physical address;

(E) electronic-mail address or other online contact information or Internet provider address;

(F) financial account number or credit or debit card number;

(G) biometric data, health or medical data, or insurance information; or

(H) passwords or other credentials that permit access to an online or other account;

(2) personally identifiable financial or insurance information, including nonpublic personal information defined by applicable federal law; and

(3) any combination of data that, if accessed, disclosed, modified or destroyed without authorization of the owner of the data, or if lost or misused, would require notice or reporting under any applicable federal or state privacy or data security laws, whether or not the administrator or the administrator's agent is subject to the law.

(b) Any provision of this Article that applies to the administrator or the administrator's records applies to an administrator's agent.

SECTION 1402. CONFIDENTIAL INFORMATION.

(a) Except as otherwise provided in this Act, the following are confidential and exempt from public inspection or disclosure:

(1) records of the administrator and the administrator's agent related to the administration of this Act;

(2) reports and records of a holder or putative holder in the possession of the administrator or the administrator's agent; and

(3) personal information and other information derived or otherwise obtained by or communicated to the administrator or the administrator's agent from an examination under this Act of the records of a person or in connection with the state's voluntary disclosure program under Section 1010.

(b) A record or other information that is confidential under the laws of this state other than this Act, another state, or the United States continues to be confidential when disclosed or delivered under this Act to the administrator or administrator's agent.

SECTION 1403. WHEN CONFIDENTIAL INFORMATION MAY BE DISCLOSED.

(a) When reasonably necessary to enforce or implement this Act, the administrator may disclose confidential information concerning property held by the administrator or the administrator's agent only to the extent not inconsistent with other federal or state laws and only to:

(1) the owner, the apparent owner, a person appearing to be the owner or apparent owner, the owner or apparent owner's attorney or other legal representative, or a relative or representative of the owner or apparent owner designated under Section 1302 to have the information;

(2) the deceased owner or apparent owner's executor or other legal representative, or a relative or representative of the deceased owner or apparent owner that was designated under Section 1302 by the deceased owner or apparent owner, or a person entitled to inherit from the deceased owner or apparent owner;

(3) another department or agency of this state or the United States;

(4) the person that administers the unclaimed property law of another state, if the other state accords substantially reciprocal privileges to the administrator of this state and if the other state is required to maintain the confidentiality and security of information obtained in a manner substantially equivalent to Article 14; and

(5) a putative holder subject to an examination or participating in the voluntary disclosure program under Section 1010, to the extent the confidential information relates to that putative holder.

(b) Except as otherwise provided in Section 1402(a), the administrator shall include on the website or in the database required by Section 503(d)(2) the name of each apparent owner of property held by the administrator. The administrator may include in published notices, printed publications, telecommunications, the Internet, or other media and on the website or in the database additional information concerning the apparent owner's property if the administrator believes the information will assist in identifying and returning property to the owner; provided, however, that the administrator shall not disclose any such information that would violate any privacy laws or other federal or state laws.

(c) The administrator and the administrator's agent may not use confidential information provided to them or in their possession except as expressly authorized by this Act or required by law other than this Act.

SECTION 1404. CONFIDENTIALITY AGREEMENT. A putative holder to be examined under Section 1001, or participating in the voluntary disclosure program under Section 1010, may require, as a condition of disclosure of the records of the putative holder, that each person having access to the records disclosed in the examination or voluntary disclosure program execute and deliver to the person to be examined a confidentiality agreement that:

(1) is in a form that is reasonably satisfactory to the administrator; and

(2) requires the person having access to the records to comply with the provisions of this Article applicable to the person.

SECTION 1405. NO CONFIDENTIAL INFORMATION IN NOTICE. Except as otherwise provided in Sections 501 and 502, a holder is not required under this Act to include confidential information in a notice the holder is required to provide to an apparent owner under this Act.

SECTION 1406. SECURITY OF INFORMATION.

(a) If a holder is required to include confidential information in a report to the administrator, the information must be provided by a secure means.

(b) If confidential information in a record is provided to and maintained by the administrator or administrator's agent as required by this Act, the administrator or agent shall:

(1) implement administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of the information required by any applicable federal or state privacy or data security laws whether or not the administrator or the administrator's agent is subject to the law;

(2) protect against reasonably anticipated threats or hazards to the security, confidentiality, or integrity of the information; and

(3) protect against unauthorized access to or use of the information which could result in substantial harm or inconvenience to a holder or the holder's customers, vendors, shareholders or their beneficiaries.

(c) The administrator:

(1) after notice and comment, shall adopt and implement a security plan that identifies and assesses reasonably foreseeable internal and external risks to confidential information in the administrator's possession and seeks to mitigate the risks; and

(2) shall ensure that an administrator's agent adopts and implements a similar plan with respect to confidential information in the agent's possession.

(d) The administrator and the administrator's agent shall educate and train their employees regarding the plan adopted under subsection (c).

(e) The administrator and the administrator's agent shall in a secure manner return or destroy all confidential information no longer reasonably needed under this Act.

SECTION 1407. SECURITY BREACH.

(a) Except to the extent prohibited by law other than this Act, the administrator or administrator's agent shall notify a putative holder as soon as practicable of:

(1) a suspected loss, misuse or unauthorized access, disclosure, modification, or destruction of confidential information obtained from the putative holder in the possession of the administrator or an administrator's agent, other than information reported by the holder to the administrator pursuant to Section 401; and

(2) any interference with operations in any system hosting or housing confidential information obtained from the putative holder which:

(A) compromises the security, confidentiality, or integrity of the information; or

(B) creates a substantial risk of identity fraud or theft.

(b) Except as required by law, the administrator and an administrator's agent may not disclose an event described in subsection (a) to a person whose confidential information was supplied by the putative holder, without the express consent of the putative holder in writing.

(c) If an event described in subsection (a) occurs, the administrator and the administrator's agent shall:

(1) take action necessary for the putative holder to understand and minimize the effect of the event and determine its scope; and

(2) cooperate with the putative holder with respect to:

(A) any notification by the putative holder concerning a data or other security breach; and

(B) a regulatory inquiry, litigation, or similar action.

SECTION 1408. INDEMNIFICATION FOR BREACH.

(a) If an event described in Section 1407(a) has occurred relating to confidential information possessed by the administrator, this state shall indemnify, defend, and hold harmless the putative holder and the putative holder's affiliates, officers, directors, employees, and agents as to:

(1) any claim or action arising from the event; and

(2) any liability, obligation, loss, damage, cost, fee, penalty, fine, settlement, charge, or other expense, including reasonable attorney's fees and costs, arising from the event.

(b) If an event described in Section 1407(a) has occurred relating to confidential information possessed by an administrator's agent, the administrator's agent shall indemnify, defend, and hold harmless the putative holder and the putative holder's affiliates, officers, directors, employees, and agents as to:

(1) any claim or action arising from the event; and

(2) any liability, obligation, loss, damage, cost, fee, penalty, fine, settlement, charge, or other expense, including reasonable attorney's fees and costs, arising from the event.

(c) The administrator shall require an administrator's agent that will receive confidential information required under this Act to maintain adequate insurance for indemnification obligations of the administrator's agent under subsection (b). The agent required to maintain the insurance shall provide evidence of the insurance to:

(1) the administrator not less frequently than annually; and

(2) the holder on commencement of an examination and annually thereafter until all confidential information is returned or destroyed under Section 1406(e).

ARTICLE 15

MISCELLANEOUS PROVISIONS

SECTION 1501. FAILURE BY THE ADMINISTRATOR TO PERFORM DUTIES REQUIRED BY THE ACT. In the event that the administrator or its agent fails to perform any of the duties required by this Act, then any aggrieved person may bring an action for monetary damages or injunctive or declaratory relief in a state or federal court of appropriate jurisdiction. Such action shall be brought no later than three years after the aggrieved person became aware of the failure to perform by the administrator or its agent.

SECTION 1502. TRANSITIONAL PROVISION. Any property that was required to be reported before the effective date of this Act, but that is not required to be reported under this Act, shall not be required to be reported after the effective date. Any property that was in existence prior to the effective date of this Act, and was not required to be reported before the effective date of this Act, shall not be required to be reported under this Act.

SECTION 1503. SEVERABILITY. If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 1504. EFFECTIVE DATE. This Act takes effect on the date of its enactment.

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Senior Tax Counsel
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January 20, 2021

SUBMITTED VIA EMAIL

North Dakota Legislative Assembly
Senate Industry, Business, and Labor Committee

Re: Comments on S.B. 2048

Dear Chair Klein, Vice-Chair Larsen and Members of the Committee:

On behalf of the Council On State Taxation (COST), I respectfully submit these comments opposing S.B. 2048 as currently drafted. We encourage you to take the opportunity to consider enacting exemptions for business-to-business transactions and gift cards. Lastly, this measure lacks the reforms proposed by the American Bar Association's (ABA) Draft Model Unclaimed Property Act (attached for your reference).[1] This ABA draft model act was drafted by leading national unclaimed property experts and reviewed by the ABA's Business Law and Tax Sections and should provide a basis for any revisions to the unclaimed property law in North Dakota. We respectfully request that you oppose the bill in its current form and amend it to closely follow the ABA draft model or study the matter further before advancing it.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of over 500 major corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multistate business entities. Many COST members do business in North Dakota and would be impacted by this bill.

Significant Expansion of Unclaimed Property Base

Although North Dakota does not currently exempt business-to-business transactions and gift cards, we encourage you to consider them. Each of these exemptions represents good public policy for the reasons set forth below.

[1] Note, while the ABA draft model was supported by the ABA's Business Law and State Tax Sections, to date, neither the RUUPA nor the ABA draft model has not been officially approved by the ABA.

Businesses are in the best position to determine whether another business holds their property, and they do not desire the assistance of the State in making such determinations. When two companies reconcile and settle their accounts, it makes no sense for the State to come in years later and re-open those closed books and records to determine whether one business may hold property that belongs to another business. Credit balances between business associations should be excluded from unclaimed property laws.

A retail sale is consummated when a gift certificate is purchased. The gift certificate essentially serves as a contract between the customer and the store, with full notice of the consequences of nonperformance. Including gift certificates and gift cards in the definition of unclaimed property interferes with private contract rights. Moreover, gift certificates and gift cards are typically redeemable in merchandise only; they are not redeemable for cash. The State should never acquire any rights greater than those held by the owners of the property. Finally, requiring retailers to turn over the full face value of gift certificates deprives the retailer of profit on the transaction—profit to which they are entitled.

COST's Board of Directors approved a policy position on unclaimed property laws which provides the following:[2]

> *State unclaimed property programs should seek to unite owners with their property in the manner that is least burdensome to owners, holders and the State. Toward that end, such programs must:*
> *• Provide clear, reasonable and consistent definitions of items included in and excluded from the definition of abandoned or unclaimed property;*
> ***• Exclude from the definition of abandoned or unclaimed property unidentified remittances, credit balances arising from business-to-business transactions, merchandise due bills, gift cards and gift certificates****;*
> ***• Exclude items that are accounting or bookkeeping discrepancies, fraudulent transactions, or that do not have a rightful owner other than the holder;***
> *• Provide a reasonable statute of limitations for holders; and*
> *• Ensure that administration of State unclaimed property statutes is conducted in a fair, evenhanded and predictable manner by banning contingent-fee arrangements to compensate outside auditors and by providing holders access to an independent tribunal to appeal the findings or assessment resulting from an unclaimed property audit.*

ABA Advisors Concerned with the RUUPA, Offer Draft Alternative

After the Uniform Law Commission's adoption of the Revised Uniform Unclaimed Property Act (RUUPA), upon which S.B. 2048 is loosely based, representatives of the ABA Business Law Section, who served as ABA advisors on the RUUPA drafting committee, led an effort to address the RUUPA's Constitutional infirmities by drafting an ABA Draft Model Unclaimed Property Act. The ABA advisors' concerns with the RUUPA included the following:

[2] COST policy position is available at: https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/unclaimed-property.pdf.

- Allowing states to use unclaimed property laws to override other substantive laws governing the debtor-creditor relationship;
- Allowing states to escheat foreign-owned property;
- Allowing states to escheat property in a manner which is inconsistent with federal common law rules in this area;
- Allowing states to liquidate securities in a manner that violates the U.S. Constitution's provisions regarding due process and taking; and
- Allowing states to require that the holders of property possibly subject to escheat incur significant expenses in investigating rights to the property.

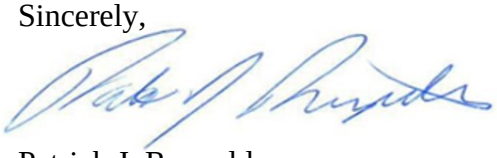
The ABA advisors' concerns are set forth in more detail in the attached article from the ABA's *Business Law Today* publication.

During the effort to draft the ABA Draft Model Unclaimed Property Act, the drafters sought input from ABA members in both the Business Law Section and Tax Section who practice unclaimed property law, as well as from other interested parties. COST feels that the ABA draft model act is a far superior product that, if adopted by North Dakota, will go a long way toward preventing the kind of bad conduct by unclaimed property auditors that a federal district court judge, in *Temple-Inland v. Cook*, 192 F.Supp.3d 527 (2016), found to "shock the conscience," while furthering the goal of reuniting unclaimed property with its owners. COST therefore urges you to reject S.B. 2048 as currently drafted, and instead work to incorporate the reforms outlined in the ABA draft model act into North Dakota's unclaimed property law.

Conclusion

COST respectfully suggests that you oppose the bill in its current form and amend it to closely follow the ABA draft model or study the matter further before advancing it. If you have any questions or would like to discuss further, please do not hesitate to contact me.

Sincerely,



Patrick J. Reynolds

CC: COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director