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FOR DISCUSSION ONLY

REVISED UNIFORM UNCLAIMED PROPERTY ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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September 29, 2015

REVISED UNIFORM UNCLAIMED PROPERTY ACT

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REVISED UNIFORM UNCLAIMED PROPERTY ACT

TABLE OF CONTENTS

REVISED UNIFORM UNCLAIMED PROPERTY ACT

PREFATORY NOTE

This revised act started out as a substantial revision of its immediate predecessor, the Uniform Unclaimed Property Act (1995) (the "1995 Act"), which itself was a rewrite of its predecessor, the Uniform Unclaimed Property Act (1981) (the "1981 Act"), which was a revision of the Uniform Disposition of Unclaimed Property Act (1966) (the "1966 Act"), and of the Uniform Law Commission's first effort in this field which was the Uniform Disposition of Unclaimed Property Act (1954) (the "1954 Act"). However, as it developed in the drafting process, which brought to light some 77 issues for discussion, it became itself a complete revision of the prior uniform unclaimed property acts.

While all 53 jurisdictions that make up the Uniform Law Commission have some form of unclaimed property law on their books, some which predate the 1954 Act, the various Uniform Acts have received substantial but not complete acceptance. In one form or another (with modifications) either the 1981 Act or the 1995 Act has been adopted in 39 of the 53 jurisdictions. Of these, the most accepted version is the 1981 Act which has been adopted (with revisions) in 23[1] jurisdictions. Ten[2] states have adopted the 1995 Act without revisions and six[3] more have a hybrid version. There are, however, still fourteen jurisdictions−most notably California, New York, Texas, and Delaware, that have non-uniform unclaimed property acts.

The concept of "unclaimed property" is a modern outgrowth of the ancient English law of escheat, and while the two concepts have substantial differences they have become entangled and are frequently and somewhat improperly used interchangeably.[4] Although rooted in the Common Law doctrine of escheat, since their inception all of the Uniform Unclaimed Property Acts have been "custodial" acts which deal with the right of states to take custody of abandoned property to hold indefinitely for the benefit of the owner, which is different from a state taking title to and ownership of abandoned property under its escheat law.

Since the Norman Conquest all real property in England has belonged to the Crown who could give the use of it to a tenant, but if the tenant was convicted of a felony or died without an heir who could take the tenancy, it escheated to the sovereign to keep or give to another as he or she saw fit. The official in charge of collecting escheated property was called the Escheator, a term still in use today. Over time the concept has been extended to tangible and intangible personal property, and in modern times the concept of custodial taking of unclaimed property by the sovereign to hold for the benefit of owners has been developed.

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[1] AK, CO, DC, FL, GA, ID, IL, IA, MD, MN, NH, NJ, ND, OK, OR, RI, SC, SD, TN, UT, VA, WA, WI, and WY.

[2] AL, AZ, AR, IN, KS, LA, MT, MI, NM, NC, and VI.

[3] HI, MI, NV, VI, VT, and WV.

[4] *See e.g.*, Section 23(c) of the 1995 Act which allows a state to maintain an action to enforce the unclaimed property laws of another state against the holder of property "subject to escheat" or a claim of abandonment by the other state, and Section 14 which refers to the laws of another state that do "not provide for the escheat or custodial taking of property."

Although the distinction has become blurred, and the terms "escheated" and "unclaimed" have become confused, the two terms are not the same. [5] In an escheat the state succeeds to legal ownership of the property. When property has "escheated," the state has become the legal owner of the property with no obligation to return it to the previous owner or to anyone claiming to have derived title from or through the previous owner. But in the case of unclaimed property, after it is out of the hands of the holder and in the hands of the state, legal title to the unclaimed property remains in the owner, or in those deriving title from or through the previous owner. The state merely holds possession of the property, indefinitely, as custodian for the benefit of the owner or the previous owner's successors-in-interest or legal heirs.

The significance of the distinction between property that has escheated to the state, and unclaimed property held in custody by the state, is illustrated in the case of *Treasurer of New Jersey vs. United States Treasury*, 684 F.3d 382 (3d Cir. 2012), where the Court held that United States Savings Bonds are not subject to a state's unclaimed property laws. By federal statute the United States holds unclaimed United States Savings Bonds as custodian for the owners; thus Federal custodial holding preempts state custodial taking of United States Savings Bonds as unclaimed property. However, the Court, citing United States Treasury Regulations, observed that the United States Treasury recognizes escheat statutes that provide that when a state has become the legal owner of bonds by escheat, payment of the bonds to the state as the owner results in a full discharge of the Treasury's obligation with respect to the bonds. But payment of bonds to a state as a custodian for the owner would only substitute one obligor, the Department of the Treasury, for another, the state.

Under the common law of escheat as codified into state law, if an owner of property dies intestate without "legal heirs" entitled to inherit the property, the property escheats to the state and the state takes title to the property as its owner. [6] Whether there are any "legal heirs" of the decedent is determined under the laws of each state. Some state statutes refer to heirs as next-of-kin, or closest relatives by blood or marriage, which theoretically could mean every decedent has one or more heirs, no matter how many generations one has to go back to find them. However, the laws of intestacy of many states, Tennessee for example, define "heirs" entitled to take the property of an intestate decedent as the grandparents or a grandparent of the decedent or the descendants of the grandparents or a grandparent of the decedent. (Tenn. Code Ann. Section 31-2-104). If there are no living heirs of the intestate decedent found within the requisite degree of

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[5] Confusion exists over when an unclaimed property statute is an escheat statute and when it is a custodial statute. The Courts have done little to clarify the issue and in fact have added to the confusion. For example, the majority opinion in *Delaware v. New York*, 507 U.S. 490 (1992) starts out reciting that it is another dispute among states over unclaimed securities held for owners who cannot be located and holds that the state in which the intermediary is incorporated has the right to "escheat" funds belonging to individual owners who cannot be located. However, further on in the opinion the Court says that "States as sovereigns may take custody of or *assume title* to abandoned personal property as *bona vacantia* [vacant goods]" a process commonly (though somewhat erroneously) called escheat. In the majority opinion of the Court in *Pennsylvania v. New York*, 407 U.S. 206 (1972), the first paragraph says this case is an action brought to determine the authority of states to *escheat, or take custody* of, unclaimed funds for the purchase of money orders. And in an effort to clear up the confusion, the opinion of the 3d Circuit Court of Appeals in *Treasurer of New Jersey v. United States Dept. of the Treasury*, 689 F.3d. 382 (3d Cir. 2012) creates further confusion when it refers to the unclaimed property act at issue as a "custody escheat" statute rather than a "title escheat" statute.

[6] "Escheat - Reversion of property (esp. real estate) to the state upon the death of an owner who has neither a will nor any legal heirs." *Black's Law Dictionary*, 10th ed. (2012) at p. 661.

kinship, the decedent's property escheats to the state, even if there are kin of a more remote degree.[7]

The rules by which a state may escheat abandoned property are outside the scope of this revised act. However, in analyzing the source of unclaimed property, it becomes apparent that when turned over to the Administrator, the funds fall into one of two "buckets" or categories--property with respect to which there is an identifiable or determinable owner and property which is not identified in the holder's records as being the property of an owner whose identity is known or ascertainable. Unclaimed property which falls in the first category is held for the owner, who may or may not be the original owner, but now is the person legally entitled to recover the property as its owner. On the other hand, unclaimed property for which there is no known or ascertainable owner, in effect becomes the same as escheated property where the state has become the owner by operation of law when the owner has died intestate with no heirs to inherit the property--the legal right to hold and use the property falls to the state by default. While this Act cannot be expected to clear up the confusion, it is well to keep in mind the distinction between a state taking title to property as the owner of the property through escheat, and the custodial taking of unclaimed property by the state to hold for the benefit of its owner. To that end this act avoids the use of the term "escheat" to refer to the process by which a state takes custody of, but not title to, unclaimed property for the benefit of its owner. However, it implicitly recognizes that the Act serves a dual function. Its primary function is to provide protection for owners and reunite them with their lost or abandoned property. But a secondary function is to take, hold, and use for the common good, property which has been lost or abandoned for which there is no way to identify the owner nor ability to restore the property to its owner. In those situations the policy is that it is better that the state and its citizens enjoy the benefit of the windfall rather than the holder.

The process by which "unclaimed" property[8] comes into the custody of a state administrator of unclaimed property is as follows: (1) businesses which have possession or control of property that does not belong to them, hold it for the benefit of the owners of the property, thus they are called "holders." If the status of the property is in question as to whether or not it is "unclaimed" property being held for owners, they are referred to as "putative holders" until there has been a determination of the status of the property, i.e., they are persons who are said to be but have not yet been determined to be holders as a result of an examination. "Owners" are the people who own property which is in the possession of another. During a specified holding period (the "Holding Period"), which under the various acts varies from one to

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[7] An example is a recent case in Florida where an elderly widow died intestate without issue. She had been born in Sweden and when her estate was administered in Florida, no one knew or thought to look for her relatives in Sweden and the state administrator took the net proceeds from sale of her house as unclaimed property. An unclaimed property locator later found her heirs in Sweden and asserted a claim on their behalf. The Florida Administrator denied the locator's claim made on behalf of the Swedish heirs despite the fact that the Florida probate court had modified the final probate order to establish them as her heirs. The matter was still being litigated when last reported.

[8] Some confusion arises out of the undifferentiated use of the terms "unclaimed" and "abandoned" property. When property is in the hands of a holder who is not its owner, and the owner is either not known or is not presently asserting his rights of ownership, the property is said to be "unclaimed." Under the act, after the passage of a set amount of time that can vary from one to 15 years, the property is deemed to have been abandoned and becomes subject to being turned over to the custody of the state administrator of unclaimed property. All abandoned property is also unclaimed, but not all unclaimed property is abandoned.

15 years for different categories of property, the holder is required to attempt to notify the owner to claim his or her property. After unsuccessful attempts at notification, at the end of the holding period, the unclaimed property is deemed to have been abandoned and the holder is required to file a report with the unclaimed property administrator in the appropriate state and remit or deliver the property into the custody of the administrator.

The rules for determining which state has the priority right to take custody of unclaimed property were set out by the *U. S. Supreme Court in Texas v. New Jersey*, 379 U.S. 674 (1965)[9], and were incorporated into the 1981 Act. The first priority state is the state of the residence of the owner if it is known or can be determined from the records of the holder. How much information is required to establish the state of the owner's residence is in dispute, with some states asserting that only an address sufficient for mailing notice to the owner is sufficient to establish that there is a state with first priority. Absent being able to determine the state of the owner's residence, the second priority state is the state of incorporation of an incorporated holder. For holders that are not corporations, such as sole proprietorships, partnerships, and limited liability companies, the second priority state is the state in which the unincorporated holder's principle place of business is located. Some states have gone further and created a "third priority" by asserting that if neither the first nor the second priority state provides for taking custody of the property, the state in which the transaction which gave rise to the property took place is entitled to take custody of the property.

The records of a holder who does not timely file and deliver unclaimed property may be examined to determine if the holder has a liability for unremitted unclaimed property. If a liability is determined to exist, the holder can be required to turn the unremitted property over to the administrator together with applicable penalties and interest. A holder who has filed and remitted as required may nevertheless be examined to verify or confirm the accuracy and completeness of its filings. However, holders who have timely filed as required are not usually a target for examination.

As the body of unclaimed property law has matured since 1954, five significant sets of economic interests have evolved, each with its own, sometimes conflicting, concerns. In the process of preparing this revised act significant effort was made to include and involve parties with a significant stake in the outcome of the policy decisions required for the revision; and there are many and they have become very involved.[10]

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[9] This holding was reexamined and affirmed by the Court in *Delaware v. New York,* 509 U.S. 470 (1993).

[10] The organizations that have participated in the drafting meetings through representatives and by written submissions to the Committee are: the National Association of Unclaimed Property Administrators (NAUPA); the American Council of Life Insurers (ACLI); the Council on State Taxation (COST); the Investment Company Institute (ICI); the Securities Transfer Association (STA); the Securities Industry and Financial Markets Association (SIFMA); Shareholder Services Association (SSA); the American Bar Association's Business Section (ABA); the Unclaimed Property Professionals Association (UPPO); and the U. S. Chamber Institute for Legal Reform (US Chamber). Drafting committee meetings have been attended by upwards of 100 observers and more than 2,000 pages of written materials have been submitted by interested parties.

State administrators obviously have a significant interest. In 1954 when the Uniform Law Commission undertook to create the first Uniform Disposition of Unclaimed Property Act, unclaimed property taken into custody was not initially intended to be a significant source of state revenue, but rather was intended to create uniformity in the means by which states provide protection of the unclaimed property of consumers and residents. Nevertheless, when the state becomes the custodian of unclaimed property, regardless of how diligently and effectively the administrator acts to return the property to the owner, it will always be the case that a significant portion, if not the majority of the funds held in the custodial account, will never be returned to an owner for three reasons. One is that a significant portion of the funds are turned over with no identification of the owner, thus there is no possibility of its return to the owner. These funds are essentially escheated to the state for its use. Second, states vary in the diligence and effectiveness of an administrator's efforts to locate the owner, even though the identity of the owner is known. And third, the extent to which administrative barriers are imposed which impede the ability of owners to recover their property also varies.

It has been estimated that in 2011 states collectively held more than $40 billion in unclaimed property, a figure nearly double the figure of $22.8 billion reported by NAUPA[11] in 2003. This property seldom lies fallow in the hands of the administrators. Most states use that portion of the funds that are estimated will never be returned to the owners for purposes ranging from supplementing educational funds to helping fund Medicaid obligations. It involves a lot of money. Delaware, by far the largest custodian of unclaimed property, brought in over $600 million in 2014.[12] A substantial majority of unclaimed property turned over to Delaware is second priority funds with no ability to identify the owner and no viable address, and thus it will never be returned to an owner and is effectively escheated to the state.

Administrators have been represented in the drafting process by representatives of NAUPA. Administrators are sincere when they say the principal focus of their office is to reconnect unclaimed property with owners. In the current economic climate, states are looking for more money, and legislators and governors are squeezed between the demands of constituents for services and the resistance of voters to tax increases. For some states unclaimed property has been seen as money available to make up revenue shortfalls.[13] It can be anticipated that states will oppose enactment of this revised act if it is seen as having a significant potential of decreasing the amount of money that will come into state coffers as unclaimed property that will never be returned to owners. If that is the case, it can be anticipated that significant negative fiscal notes will be attached to introductions of the revised act.

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11 National Association of Unclaimed Property Administrators. https://www.unclaimed.org.

12 Reportedly it is Delaware's third largest source of state revenue. *See* Del. S. Com. Res. 59, 147th Gen. Assem. (2014).

13 The states' use of the funds is outside of the control of the administrators. A recent article in the Charleston (WV) Gazette (2/19/15) reported on that state's unclaimed property administrator's complaint that the Governor had taken $15 million out of the state's unclaimed property fund to help balance the state's 2015-16 budget, saying it would cripple the division's ability to pay the rightful owners of lost assets. "This is the people's money. This is not taxpayer's money" the administrator told the Senate Finance Committee.

While unclaimed property funds are not tax revenues, some state courts have agreed with states that they have the right to expand unclaimed property claims as a means of augmenting state revenues.[14] However, it is well to keep in mind the fundamental constitutional relationship between states and their citizens. A state, acting through the people's elected representatives, may impose taxes for the purpose of raising revenues, and may exact fees for certain services. Otherwise a state is without legal authority to seize and take title to property belonging to a citizen other than by condemnation or seizure for public use for which it must pay fair compensation, forfeiture for wrongdoing, or by escheat. That funds from unclaimed property held in custody for owners may be available for public use should be a byproduct and not the object or purpose of a state's unclaimed property laws. Administrators recognize that they are under a duty to seek to locate owners and that unnecessary requirements that frustrate or delay the return of unclaimed property to owners has no place in the context of a custodial unclaimed property act.[15]

The second group with a significant stake in the outcome of this revision is a business that has grown up alongside the growth of receipts from unclaimed property laws. This group is composed of private firms organized to examine the records of holders looking for unreported unclaimed property. Depending on decisions made by the Uniform Law Commission with respect to this proposed revision of the Act, these firms stand to gain or lose millions of dollars in fees paid to them by administrators for services in connection with examinations of records of holders looking for unremitted unclaimed and abandoned property on their books. These examinations are usually[16] performed on a contingency fee basis where the firms performing the examinations receive an agreed percentage of between 10% and 15% of the monies recovered in the process of examining the books and records of the companies under examination. [17]

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[14] The Court in *Treasurer of New Jersey v. United States Dept. of the Treasury*, 684 F.3d 382 (3d Cir. 2012) observed that the case was not about returning the bond proceeds to the owner, but was about whether the United States or the State of New Jersey would be able to hold and keep unclaimed bonds for its own uses. The Court pointed out that although the practical effect of the Unclaimed Property Act is to prevent unclaimed property from being eventually appropriated by the holders, it is sometimes admitted that unclaimed property statutes "are also a means of raising revenue, citing *Louisiana Health Serv. & Indem. v.. McNarmara*, 561 So.2d 712, 716 (Ca. 1990) and *Clymer v. Summit Bancorp*, 771 N.J. 57, 292 A.2d 396, 400 (2002); noting that 75% of the funds New Jersey collects under its Uniform Unclaimed Property Act is transferred to the General State Fund. *See also American Express Travel Related Services v. Kentucky*, 641 F.3d 685 (6th Cir. 2011) where the Court specifically held that revenue raising is a legitimate purpose and a state may use its legislative power to take custody of property within its reach belonging to unknown persons, because doing so prevents the property from being used by "would-be possessors" and can be "used for the general good" rather than the chance enrichment of particular individuals or organizations.

[15] *See* the holding of a federal court in California which specifically recognized that "If the purpose of the [unclaimed property] law is . . . to reunite owners with their lost or forgotten property, its ultimate goal should be to generate little or no revenue at all for the state." Order re Preliminary Injunction. Case 2:01-CV-02407-WBS-GGH, June 1, 2007.

[16] According to the NAUPA advisors all states except one regularly employ independent auditors to perform unclaimed property examinations on a contingent fee basis.

[17] Another less significant source of revenue is a service offered to holders who have not been examined where for a fee the firm helps them prepare returns and voluntarily remit the unclaimed property on their books.

Auditing holders for unremitted unclaimed property is big business. Recently, in the course of a review of its practices by officials in Delaware, it was revealed that one private company had been awarded substantially all of the private examinations performed on behalf of the Delaware Escheator, and had been paid over $200 million in contingent fees over a period of 10 years. [18] It also came to light that an official responsible for awarding these contracts had recently retired from state service and joined the company as an employee.

Contingent fee examinations have recently come under scrutiny in North Carolina with the result that legislation which was enacted bans, as a general practice, the use of contingent fee examiners, other than in examinations of life insurance companies, on the basis that the "fee may impair an auditor's independence, or the perception of the auditor's independence by the public." N.C. Gen. Stat. Section 116B-8.

NAUPA representatives have said to the Drafting Committee that Administrators do not have sufficient resources to hire examiners, and the continued use of contingent fee examiners is essential to the ability of most states to examine holders and enforce compliance with their unclaimed property laws.

The third group with an economic interest at stake is the cadre of professionals who have developed the expertise needed to service the needs of businesses who as putative holders of unclaimed property are subject to unclaimed property examinations. The two organizations whose members have been most affected and who have been most involved in the drafting process are the Unclaimed Property Professionals Organization (UPPO) and the Business section of the ABA; both of which have advanced substantial arguments and documentation in support of their constituents' interests.

The fourth group is composed of various industries and industry groups[19] whose members as holders and putative holders will be substantially impacted, for good or ill, by the revised act. This group, as a Holders' Coalition, has participated in the drafting process through their representatives. Their insight into the problems the current acts cause or contribute to, and their suggestions of how the act can be improved have been very helpful to the Drafting Committee.

The fifth group with an economic stake in this effort is made up of those individuals and companies whose business is to assist owners in finding and recovering unclaimed property. They report anecdotal instances in which rules and rulings by administrators have created substantial, unnecessary procedural roadblocks that make it difficult for them to learn about property held by administrators for owners, or to pursue claims effectively on behalf of owners for which they expect to receive under contract with the owners a percentage of any recovery as a contingent fee.

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[18] Contingent fees for the most part do not receive much scrutiny because they are usually netted out of the recoveries and are rarely reflected in the state's records outside of the administrator's office.

[19] *See* list in footnote 10.

There are three broad categories of disputes that most often arise between the holders and the examiners. The first category has to do with how far back in time the examiner may go in looking for unclaimed property, what records the holders are required to maintain, and for how long.[20] The 1981 Act provides an absolute 10 year statute of repose. The 1995 Act does not, and takes the position that no statute of limitations on examinations begins to run until a report is filed. The revised act reverts to the 1981 Act and provides a 10 year time bar on how far back of the end of the holding period an examiner can go, as well as specifies a 10 year record retention rule.

The second category has to do with whether or not the examiner may use estimation methods when records are not available or are incomplete, and the permissible use and scope of statistical sampling as a technique for estimation of liabilities of holders.

The third category concerns the doctrine of "derivative rights" and how it applies in the context of unclaimed property. In essence the "derivative rights" doctrine is the position taken by holders that vis-à-vis the holder of property, the state steps into the shoes of the owner as custodian, and the state's right to unclaimed property, being derived from the owner, can be no greater than the rights the owner had with respect to the property. States do not agree that the "derivative rights" doctrine should apply to limit their right to take custody of unclaimed property. They assert instead that their right to unclaimed property cannot be limited to the rights of the owner because some limitations placed on owners are beyond the state's ability to perform, and as the sovereign with the ultimate and superior right to the benefit of property which has been permanently lost or abandoned by its lawful owner, its rights are superior to the rights of the holder.[21]

Two situations illustrate the problem. If a person whose life has been insured by an insurance company dies, the insuror's contractual obligation to pay the death benefit does not mature until a claim has been filed by the beneficiary with proof of the decedent's death under circumstances that do not preclude payment of the claim, such as a death by suicide. When death benefits otherwise payable by reason of the death of an insured are not claimed during the requisite holding period, states have successfully maintained their right to take custody of the funds without having to submit a claim on behalf of the owner, even though the owner would have been required to file a claim.[22] Another example arises when the owner of a claim does not file suit to recover on the claim before the applicable statute of limitations has run and the owner's claim has become time-barred. States have asserted that their right to take custody of the funds survives the running of the statute of limitations, because it is the state, not the holder, that should have the benefit of the windfall, if there is one. The problem is that the claim may be disputed or the holder may have offsetting claims, so the question is should the holder be entitled to litigate those issues in defense of a state's custody claim? Conversely, should the owner be allowed to circumvent to bar of the statute of limitations by waiting until the funds have been

[20] Some states, Delaware for example, assert the right to go back as far as 1981 in an examination in its search for unreported and unremitted unclaimed property. This practice is currently under review in that state and Delaware is defending a due process constitutional challenge to its practices in the Delaware Federal District Court. *Temple-Inland, Inc. v. Cook*, Civ. No. 14-6-54-SLR (D. Del. Mar. 11, 2015).

[21] *See American Travel Related Services, supra*, at note 14.

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

turned over to the state and then asserting his claim against the administrator? Representatives of the ABA and the Holders Coalition have argued strenuously that since the derivative rights doctrine has been recognized by the Supreme Court[23] as the basis for custodial taking of property, it should apply as well as a limitation on the obligations of holders to turn over property to the administrator.

Probably the most contentious issues that come up in any discussion of the extent and reach of the derivative rights doctrine arise in two contexts. One involves freedom of contract and the rights of parties to limit their liability by contract that waives potential claims. The other is the issue of uncompensated taking of property.

The first arises in the context of the "gift card" issue. Traditionally a retail merchant or seller of goods and services offers a "gift card"–originally a paper card or gift certificate, but more recently an electronically loaded plastic card–which a customer may buy to use, or to present to another as a gift. By its express terms, the card is only redeemable for merchandise or services from the retail seller up to the limit of the amount of the value printed or loaded into the card. When the value within the "gift card" has not been fully utilized within the holding period, the remaining unused amount is deemed to be abandoned and subject to a claim by some states[24] that cash in the amount of the unused portion[25] is due to be turned over to the custody of the state. On the other hand retailers[26] point out that the terms of the gift card contracts with their customers do not provide for cash refunds, but rather only allow redemption in the form of merchandise or services priced at their retail value. In making their argument the retailers point out that they incur incremental costs in selling the card, not the least of which may be the credit card transaction fee if the purchaser pays with a credit card, and that when forced to pay off the full amount in cash rather than in goods or services, they lose the gross profit[27] earned at the time of the initial purchase of the gift card which properly would have been included in the seller's income and subjected to taxation.[28]

It is an issue that is at the heart of the arguments made to the Drafting Committee on behalf of the retailers. They point out that 31 states have enacted some version of a "gift card" exemption. But the twenty-two states that do not exempt gift cards say the loss of the ability to recover unclaimed gift card proceeds will result in a loss of funds that probably will never be claimed by owners and will be fully usable by the state because by their nature gift cards are usually issued in a form which allows them to be redeemed by the bearer of the card and only rarely is the owner's name and address associated with or attached to the card. States say that in

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[23] *Delaware v. New York*, 507 U.S. 490, 503 (1991).

[24] Thirty-one states have enacted one version or another of an unclaimed property exemption for "gift cards" and other forms of stored value cards.

[25] Some states have claimed a right to receive the original face amount of the card.

[26] Through the representatives of their associations such as the Retail Industry Leaders Association.

[27] The margin between the amount paid for the gift card and the retailer's average cost of goods or services delivered to the bearer of the gift card.

[28] One state trial court has held that a state's requirement that the value remaining in unclaimed gift cards be turned over to the state in cash violates both the "takings" provision of the Due Process Clause and the impairment of contract provision of the Constitution. *Service Merchandise Co., Inc. v. Adams, Treasurer*, Chancery Court of Davidson County, Tennessee, # 97-2782-III, 2001. To avoid "taking" the gross profits some states that claim gift cards only require that the retailer remit 60% of the unclaimed value in the card.

that case, they, not the holder, should receive the benefit of any windfall.

The other context in which the issue arises is the "business to business" or "B2B" exemption, which excludes from property subject to the unclaimed property rules, credit balances, debts and other transactions of record between two businesses. Fifteen states have adopted some form of a B2B exemption from their unclaimed property laws which in essence recognizes that businesses, particularly those in an ongoing, continuing business relationship with each other, are in the best position to determine whether they have unclaimed property being held by the other business. These businesses say that they are not likely to lose track of their respective claims and obligations, and do not need or want the assistance of states in making such determinations. Moreover, they say that they should be allowed to enter into arm's length agreements by which each party affirms that they keep track of their accounts and agree to waive any entitlement on the part of either party to recover "unclaimed" property or obligation to turn over such "unclaimed" property to the state. A particular concern of businesses is the practice of examiners who use a statistical sample of a company's commercial accounts for a specified period of time to identify outstanding credit balances, then extrapolate the results back to a point in time, which in states with no statute of repose, can be as far back as 1981; well beyond any company's normal record retention policy. Businesses point out that frequently business credits are only promised or offered purchase price discounts which remain on the businesses' books premised upon there being future purchases, and remain uncollected or unredeemed if such future purchases are never made. Records frequently do not exist by which business can refute or rebut a presumption that commercial credit accounts represent real debts owed by the business to its business customers. The result of allowing states to assert a deficiency for unclaimed property not based on actual records, but on no more than a statistical sample relating back before the time where records still exist, often may be nothing more than a true windfall derived by the state at the expense of a holder who may not in fact have owed the extrapolated liability to any owner.

On the other side, administrators say that in their experience it is not that clear that businesses, even large businesses with sophisticated accounting systems, are always careful to keep track of credit balances and other obligations owed to them by businesses they regularly do business with. This is especially true where there is a significant disparity in the size, sophistication, and bargaining power of the two businesses. States say that they see many instances in which businesses, particularly small businesses, lose track of the claims they have against other businesses. Many never realize they have a claim against the other party until their property is turned over to the State, and are pleasantly surprised to learn that they are the owners of unclaimed property being held by the state for their benefit. Achieving the proper balance between these competing interests will be difficult. The B2B provisions incorporated into this act are intended to provoke discussion which hopefully will result in an acceptable solution which most likely will be that states that have a B2B exemption will be able to keep it if they want to, and those who do not have or want a B2B exemption, will be free to leave it out without offending the goal of achieving substantial uniformity.

The revised act also addresses less controversial issues such as procedural and process changes designed to make the system work better and more efficiently for all parties. These include administrative and judicial remedies for resolution of disputes, protection of confidential information, and procedures for voluntary interaction by state administrators with their counterparts in other states.

This revised draft act is the result of the Committee having worked through and resolved in one fashion or another most of the preliminary issues identified by stakeholders at the outset of the drafting process. It has been read and discussed on the floor of the Conference at its first reading and is scheduled to be read again on the floor at the annual conference to be held in July 2016. The Committee recognizes that while substantial progress has been made and many issues have been resolved, this effort so far has not yet produced a finished product and is still very much a work-in-progress. It is our hope that this draft will focus the drafting committee and observers and advisors on the remaining issues in a way that will allow resolution of the remaining issues and completion of the goal of producing a fair, balanced, and enactable Revised Uniform Unclaimed Property Act.

Charles A. Trost
Reporter

REVISED UNIFORM UNCLAIMED PROPERTY ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Revised Uniform Unclaimed Property Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Address" means for the purpose of giving notice by United States Mail to an apparent owner the location of the apparent owner sufficient to direct the delivery of first class United States Mail to the apparent owner; however, for purposes of determining the first priority state of property held for an apparent owner under Section 5 of this [act], the term means and includes any description, code, or other indication of the location of the apparent owner which sufficiently identifies the state that was the last known address of the apparent owner, regardless of whether the description, code, or indication of location is sufficient to direct the delivery of first class United States Mail to the apparent owner.

Comment

This draft act provides for the first time a definition of "address." Because the term "address" becomes important in two different contexts and for different purposes, it is a two part definition. The first is the address sufficient to direct the delivery of mail to the apparent owner for the purpose of providing notice to the apparent owner as required under the act. The second defines "address" as an indication of the state of residence of the apparent owner sufficient for purposes of establishing which state has priority. Its advantage over the second priority alternate state of domicile of the holder that would otherwise have priority if the state of the owner's residence is not known, is that the owner is more likely to see notice of unclaimed property being held in his or her name when it is published in his or her state of residence, even if his or her partial known address is not sufficient to give him or her notice by delivery of United States Mail.

Some examiners have asserted in the examination process that only a complete mailing address sufficient to direct the delivery of United States Mail to the owner is sufficient to establish the state with first priority. But in establishing the first priority rule, the Court in *Texas v. New Jersey*, 379 U.S. 674 (1965), merely assigns it to the state of the creditor's (owner's) "last known address" as shown on the books and records of the debtor (holder). It appears that the Court was looking for a simple, easy-to-apply rule of first priority and intended it to be the state in which the owner resided as evidenced by his last known address on the records of the holder. If I am the owner and all the holder's records reveal is that my address is in Nashville, Tennessee, or maybe only somewhere in Tennessee, or merely showed that the postal service zip code of my address was a number which uniquely identifies a mailing address located in Tennessee, then the inquiry into what was my state of residence is ended–it is Tennessee. A house number and street name may be required to deliver mail to me, but that additional information adds nothing to an inquiry undertaken to determine the state of my residence. Indicating that this is the correct interpretation of what the Court intended is how the Court phrases the question of what is to be done with property "owned by persons. . .as to whom there is no record of any address at all?" From the language "any address at all" we can easily reach the conclusion that if the holder has some record of the owner's address that is sufficient to identify the state of the owner's residence, that state is the first priority state entitled to receive and hold the property for the owner without regard for whether that much of this owner's address was of itself sufficient to direct the delivery of United States Mail to the owner. Of like import is the language used by the Court in *Delaware v. New York*, *supra*, "if the primary rule fails because the debtor's records disclose no address for a creditor" the secondary rule applies. There the Court also said that "the primary rule permits the escheating state to protect the interest of a creditor last known to have resided there." You can know from the records the state of residence of the owner, even if what you know of the address is not sufficient for delivery of mail to the owner.

The last sentence of this definition reenacts provisions found in Section 3(a) of the 1966 version of the Uniform Unclaimed Property Act and Section 7(b) of the 1981 version of the Uniform Act that remain in effect in a substantial number of states. It is appropriate to rely on the last known address of the insured or annuitant where the address of a beneficiary is unknown because the insured or annuitant qualifies as "owner," i.e., "a person who has a legal or equitable interest in property" regardless of whether the insured or annuitant is entitled to policy or contract proceeds. Prior to and during the February 2015 Drafting Committee Meeting, the reenactment of provisions found in the 1981 Uniform Act was recommended to the Drafting Committee by representatives of unclaimed property administrators and by certain insurance industry representatives.

(2) "Administrator" means [insert name of appropriate officer with responsibility for the administration of the agency of the state that takes custody of unclaimed property and maintains the records required herein.]

(3) "Apparent owner" means a person whose name appears on the records of a holder as the person entitled to property held, issued, or owing by the holder.

(4) "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 consisting of one or more persons, whether or not for profit.

(5) “Domicile” means the state of incorporation of a corporation; [the state of formation of a limited partnership, limited liability company, business trust or other limited liability entity authorized or created by state statute], the state of the home office of an entity that is federally chartered or federally registered, and unless otherwise provided, the principal place of business of a partnership, limited partnership, limited liability company, business trust or sole proprietorship or other entity whose owners do not have limited liability [other than a limited liability company which has adopted an obligated member amendment].

Comment

The definition of “domicile” in the 1995 Act is the state of incorporation of a corporate holder. For other types of businesses their “domicile” is where their principal place of business is located. This definition was brought into the 1981 Act from the decision of the Supreme Court in *Texas v. New Jersey*, 379 U.S. 674 (1965) which concluded that for reasons of certainty of location the place of incorporation of an incorporated holder would be its domicile for unclaimed property purposes. In 1965, limited liability companies did not exist, and in 1981 they only existed in Wyoming by virtue of a statute enacted in 1977. The situation today is entirely different. The limited liability company is by far the more prevalent business form, particularly in smaller, privately held enterprises. Defining domicile as the state in which a limited liability entity is created or organized would make sense in today’s legal climate and would be consistent with the rationale of the Court behind using the state of incorporation as domicile in *Texas v. New Jersey*. However, the Court said in *Delaware v. New York*, 509 U.S. 470 (1993) that no state may supersede the Court’s priority rules by seeking to establish different priorities under state law. So changing the Court-made rule in a uniform act may be problematic, hence the language in brackets.

(6) “Face value” means the original purchase price or original issued value of a stored-value card if unused, plus any amounts subsequently loaded into the card or otherwise added to its original value which remain unused, or, if partially used, the remaining balance before the deduction of any service charge, fee, or dormancy charge when not prohibited by other law.

Comment

A definition of “face value” has been added to the act to make it clear that the amount of value in a stored value card subject to becoming “unclaimed property” is the original maximum amount of value in the card, less any amounts used or withdrawn from the card, prior to reduction for service or dormancy fees, and includes additional amounts subsequently loaded into the card which have not been withdrawn.

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

(8) "529 Plan" means a tax advantaged account established under Section 529 of the Internal Revenue Code and includes 529A or ABLE accounts.

(9) "Game-related digital content" means digital content that appears in a video game and on a video game platform as a virtual item that is a licensed element of a video game or game platform. The term includes game play currencies such as virtual wallets, even if denominated in United States currency, and points sometimes referred to as gems, tokens, gold, and similar names, and digital codes that can be redeemed only for digital items or points which can only be used to play games. The term does not include items that may be redeemed for money or monetized by the issuer in any other way.

(10) "Gift card" means a record containing a stated monetary value that may be redeemed only to its stated value for merchandise, goods, or services; the value of which may not be decreased other than by the value of merchandise, goods; or services for which it has been redeemed, the obligation for which does not expire, and which may not be redeemed for money or monetized by the issuer in any other way, unless required by law. The term includes prepaid commercial mobile radio services, as defined in 47 CFR 20.3, but does not include game-related digital content or loyalty cards.

Comment

It was the consensus of the Drafting Committee that a clear and comprehensive definition of a gift card should be included in the revised act to take into account the various ways in which a gift card can be issued and used. It is to be distinguished from a stored value card in that unlike other stored value cards, a gift card is only redeemable in merchandise, goods, and services provided or sold by the issuer, and is not redeemable for money and may not otherwise be monetized.

(11) "Holder" means a person obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this [act]; however, except as otherwise specifically provided in this [act], a person is not a holder with respect to property for which the person is not a debtor or for which the person has no obligation to the owner, and the person may not be required to report or remit any such property to the state. For purposes of property consisting of a securities distribution or a security [as defined by Article 8 of the Uniform Commercial Code] that is not held in the name of the owner on the records of the issuer, a financial intermediary that holds the property in the name of the owner is deemed the holder for purposes of this [act].

Comment

The language used in the revised act is intended to limit who may be considered a "holder" to only one person to avoid the confusion of having it appear that there are two "holders" of the same property. The last sentence is intended to address the concern of the securities industry that securities might be said to have multiple potential "holders" where the securities are held in a "street name." It is in accord with the decision in *Delaware v. New York* which held that intermediaries who hold securities and securities distributions in their own names are the relevant "debtors" (i.e., holders). Once the issuer has distributed the property to intermediaries who are the record owners, the issuer can no longer be considered to be the holder. It also addresses who should be the "holder" of value contained in a payroll card, by making it the bank or other holder of the funds in the account and not the employer who has discharged its obligation to the employee by depositing money due the employee into a payroll card.

(12) "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, and includes accident, burial, casualty, credit life, contract performance, dental, disability, fidelity, fire, health, hospitalization, illness, life, malpractice, marine, mortgage, surety, wage protection, and workers' compensation insurance.

(13) "Loyalty card" means a record issued by a provider or seller of goods or services given for no monetary consideration to a customer or potential customer under an awards,

rewards, loyalty, incentive, rebate, or promotional program which may be used or redeemed only to obtain goods or services from the issuer at no cost to the customer or potential customer. The term does not include a record that may be redeemed for money or may be monetized by the issuer in any other way.

(14) "Mineral" means gas; oil; coal; other gaseous, liquid, and solid hydrocarbons; oil shale; cement material; sand and gravel; road material; building stone; chemical raw material; gemstone; fissionable and nonfissionable ores; colloidal and other clay; steam and other geothermal resource; or any other substance defined as a mineral by the law of this state other than this [act].

(15) "Mineral proceeds" means amounts payable for the extraction, production, or sale of minerals, or, on the abandonment of those payments, all payments that become payable thereafter. The term includes amounts payable:

(A) for the acquisition and retention of a mineral lease, including bonuses, royalties, compensatory royalties, shut-in royalties, minimum royalties, and delay rentals;

(B) for the extraction, production, or sale of minerals, including net revenue interests, royalties, overriding royalties, extraction payments, and production payments; and

(C) under an agreement or option, including a joint operating agreement, unit agreement, pooling agreement, and farm-out agreement.

(16) "Money order" means an express money order or a personal money order purchased by an individual. The term does not include a bank money order or any other instrument sold by a financial organization and any instrument on which a business association, financial organization, or insurance company is the remitter.

Comment

The changes to the definition of "money order" were suggested by NAUPA to prevent issuers from creating debt instruments that technically fit the 1995 definition of a "money order" to allow a longer seven year dormancy period.

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

Comment

A definition of municipal bond is included to differentiate municipal bonds from United States issued bonds, and relates to abandonment of unclaimed bonds other than United States issued bonds.

[(18) "Non-freely transferable securities" means securities that cannot be delivered to the state by Depository Trust Clearing Corporation or a similar custodian, or because there is no agent to effect transfer. The term includes unpriced and worthless securities.] [Refer to (27)]

(19) "Owner" means a person who has a legal, beneficial, or equitable interest in property subject to this [act], or the person's legal representative, and includes a depositor in the case of a deposit, a beneficiary in the case of a trust other than a deposit in trust, and a creditor, claimant, or payee in the case of other property.

(20) "Payroll card" means a stored-value card issued to an employee [by or at the direction of the employer] into which monetary value has been loaded to discharge the employer's legal obligation to pay wages, commissions, bonuses, or reimbursements to the employee.

Comment

A payroll card is a specific form of stored value card used to pay wages or other monetary amounts owed to an employee who may not have or choose to use a bank account. Its use as a means by which to compensation due the employee is paid discharges the employer's obligations to the employee in the same way that making a direct deposit into the employee's bank account does.

(21) "Person" means an individual, estate, business or nonprofit entity, [public corporation, government or governmental subdivision, agency, or instrumentality,] or other legal entity.

(22) "Property" means tangible property described in Section 3 or a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business, or by a government, governmental subdivision, agency, or instrumentality, and all income or increments therefrom. The term:

(A) includes property referred to as or evidenced by:

(i) money, a check, draft, deposit, interest, or dividend;

(ii) a credit balance, customer's overpayment, stored-value card, [other than a gift card], security deposit, refund, credit memorandum, unpaid wage, unused ticket, mineral proceeds, or unidentified remittance[,] [but does not include game-related digital content, [and] loyalty cards, [and] [virtual currency] [and] [gift cards];

Comment

Presently 31 states exempt "gift cards" from the definition of reportable unclaimed property, but 22 states do not exempt "gift cards." The preference of the Drafting Committee is to exempt them all together. Not exempting them may arguably violate federal constitutional provisions regarding taking property without due process and fair compensation and impairment of the obligations of contract. See, e.g., Service Merchandise Co., Inc. v. Adams, Treas, Davidson Co. Tennessee, Chancery Ct. (Docket #____________) (1995). The Committee realizes, however, that not all states will choose to do so. Consequently, the applicable language is presented in brackets so that a state that wants to exempt gift cards from being unclaimed property subject to this act may delete bracketed language "gift cards" where it first appears and remove the brackets and include the language "gift cards" where it appears in the phrase beginning "but does not include." On the other hand, a state that does not want to exempt gift cards should do the reverse–retain the words "gift card" where they first appear and delete them where they appear second.

(iii) stock or other evidence of ownership of an interest in a business association or financial organization and any security as defined by [Article 8 of the Uniform

Commercial Code]; if the ownership interest has an ascertainable market value and is free from any lien, legal hold, or restriction that is evidenced on the records of the holder or imposed by operation of federal law, and which limits the owner's ability to legally receive, transfer, sell, or otherwise negotiate the ownership interest; or

(iv) a bond, debenture, note, or other evidence of indebtedness, but does not include a United States Savings Bond or other bond issued by the United States;

Comment

This definition treats corporate and municipal bonds alike. The exclusion of United States Bonds is consistent with the decision of the *Third Circuit in Treasurer of New Jersey v. United States Dept. of the Treasury*, 684 F.3d 382 (3d Cir. 2012) which held that custodial taking of United States Bonds is preempted by federal law, but recognizes that if a state has taken title to the bonds under provisions of an escheat law then it is entitled to redeem the bonds as the owner, but may not do under a custodial taking law. Therefore, this provision does not preclude a state that has become the legal owner of a U.S. Savings Bond by escheat from claiming their proceeds as the owner.

(v) money deposited to redeem stocks, bonds, coupons, or other securities or to make distributions [in liquidation or partial liquidation] [or as dividends];

(vi) an amount due and payable under the terms of an annuity or insurance policy, including policies providing life insurance, property and casualty insurance, workers' compensation insurance, or health and disability insurance; and

(vii) an amount distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits; and

[(B) [The term does not] include[s] property owed to a person whose last address shown on the records of the holder is in a foreign country or location outside the jurisdiction of the United States [or an army, air or fleet post office], unless the holder voluntarily remits the property to the custody of the state under Section 5(4).]

Comment

The 1995 Act allows the state of the holder's domicile or residence to take custody of foreign addressed unclaimed property. NAUPA recommended leaving it as is. UPPO recommended that it be amended. The consensus of the committee at its last meeting before the Annual Conference was to accept UPPO's recommendation. However, this decision was questioned from the floor and reconsideration has been requested by NAUPA. For these reasons the language has been bracketed for further discussion.

(23) "Putative holder" means a person believed by the administrator to be a holder until the person has paid or delivered to the administrator property subject to this [act] or until the determination that the person is a holder has become final.

Comment

Other provisions in this revision dealing with holders' remedies make it necessary to distinguish between persons who acknowledge or have been finally determined to be "holders" and persons an examiner or the administrator have merely asserted are holders, but the assertion is contested and has not yet been finally determined. This definition establishes a "putative holder" as one who may or may not be a holder, but at the present is merely said to be a holder.

(24) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Comment

This is a standard definition used in ULC Acts to replace the terms "writing" or "written."

(__) "Security" means [________________] [and includes security entitlements].

Comment

At the Annual Meeting in Williamsburg, VA, it was suggested from the floor of the conference that the term "security" be defined. At least three interested constituencies have suggested definitions of securities. These definitions are provided below and this needs to be addressed and discussed by the drafting committee.

<u>NAUPA</u>: *"Security" means (a) a share, participation, debt obligation or similar interest issued by a corporation, business trust, joint stock company, or similar entity; (b) a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws; (c) an interest in a unit investment trust that is so registered; (d) a face-amount*

certificate issued by a face-amount certificate company that is so registered; or (e) an interest in a partnership or limited liability company that is dealt in or traded on securities exchanges or in securities markets. For purposes of this Act, a "security" additionally includes securities and other financial assets maintained in a securities account, but does not include physical securities held in a safe deposit box or other safekeeping repository. See NAUPA Redline of Draft Act (September 17, 2015)\

UPPO: *Securities means an instrument, whether certificated or uncertificated, that represents an ownership position or rights to ownership in a corporation, trust, plan, or other legal entity, any customer security account held by a broker-dealer, and any interest in an investment company under the Investment Company Act of 1940.* See UPPO Issue Refinement Letter (September 18, 2015).

Investment Company Institute: Suggested defining "security" as any security defined by Article 8 of the Uniform Commercial Code. See Letter to Reporter (February 24, 2015).

(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) "Stored-value card" means a record evidencing a promise, made for consideration, by the seller or issuer of the record that goods, services, or money will be provided to the owner of the record to the value shown in the record. The term includes a record that contains a microprocessor chip, magnetic stripe, or other means for the storage of information, which is prefunded and for which the value is decreased on each use, or may be increased by payment of additional consideration, and includes [gift cards and] payroll cards. The term does not include loyalty cards or game-related digital content.

Comment

Stored value cards are property subject to being turned over to the state if they are unclaimed and abandoned. The definition includes payroll cards and gift cards, unless they are exempted. Gift cards are a subset of stored value cards that can only be used to purchase goods or services. A gift card evidences that the owner has a credit which can be used to make a purchase of merchandise, goods, or services, but may not be redeemed for money. States that currently exempt gift cards may continue to do so by deleting the bracketed "gift card" portion of the definition of stored value cards. States that do not exempt gift cards will want to leave it in.

[(27) "Depository Trust & Clearing Corporation" refers to a United States-based central custodian of securities, providing post trade, clearing and settlement services to the financial markets.]

Comment

In brackets to use if § 2(18) - non-freely transferable securities is retained.

(28) "Under protest" means a notation on the face of a record of payment or delivery of unclaimed property, or in the body of a record transmitting or delivering the payment or delivery that it is paid or delivered "under protest." Payment or delivery made "under protest" is no longer "under protest" if the protest has been withdrawn in a record delivered to the Administrator.

(29) "Unpriced securities" means illiquid securities for which no market valuation is available [or ascertainable].

(30) "Utility" means [a person who owns or operates for public use any plant, equipment, real property, franchise, or license for the transmission of communications or information, or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas, or provision of sewage and septic services, trash, garbage, or recycling disposal, or other essential public services.] [insert cross reference to statute defining utility].

(31) "Virtual currency" means electronically stored and denominated value such as Bitcoin and similar payment media which are not measured or denominated in United States currency or currency convertible into United States dollars, and which may be used to trade for or purchase or exchange for things of value, including United States currency or currency convertible into United States currency.

Comment

The Drafting Committee is concerned that exempting "virtual currency" from the definition of property subject to this act may leave a wide loophole. But this means of denominating exchangeable value is of relatively recent origin, and it is not clear that administrators want to or have been successful in capturing this value as unclaimed property. The Internal Revenue Service and the New York Department of Finance and Revenue (and possibly other states) have issued revenue rulings that take the position that if a United States or state taxpayer uses Bitcoin or other virtual currency in exchange for or to buy goods or services or United States currency, the gain or loss realized in the transaction by the taxpayer will be treated as gain or loss from the sale or exchange of property. In this regard the tax treatment of the transactions is no different than one in which the taxpayer had used Krugerrands or Canadian “Loonies” to exchange for or buy goods or services or other property. Since it is possible for a United States citizen to hold value in a Bitcoin account in a foreign country, gaining nexus or practical access to that value is at best problematic for administrators. Accordingly, the Drafting Committee has elected to define and exempt virtual currency in this draft until such time as a parallel drafting committee on Regulation of Virtual Currency has considered the issue in more depth and can provide guidance to our drafting committee on whether to include or exclude it from this act.

(32) “Worthless securities” means securities of a defunct, bankrupt, or delisted issuer, or securities for which the cost of liquidation and delivery would exceed their value on the date a report is due under this act.

SECTION 3. PRESUMPTIONS OF ABANDONMENT.

(a) Property is presumed abandoned if it is unclaimed by the apparent owner at the time set forth below for the particular property:

(1) a traveler’s check, fifteen years after issuance;

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

(3) any security, other than a debt obligation, three years after the date of a second consecutive first class mailing to the owner was returned as undelivered by the United Postal Service, unless a subsequent first class mailing to the owner was not returned as undeliverable;

Comment

A comment from the floor suggests that not all post offices return undelivered mail marked “undeliverable” and therefore this indicia may not always be reliable. Some alternative method could be considered.

(4) a state or municipal bond or the debt of a business association, nonprofit

organization, or financial organization, [other than a bearer bond or an original issue discount bond,] three years after the date of when the bond matured or was called;

Comment

This change puts state and municipal bonds on the same footing as corporate bonds, and includes bonds issued by non-profits such as churches and schools. The principal obligation of the obligor on the bond is not accelerated by an interest payment not being claimed. An uncashed check in payment of an interest installment is treated like any other uncashed check. See Section 3(e)(iii). Brackets have been placed around the bearer bond and OID bond exclusion to elicit discussion and consideration of why they are exempt.

(5) a demand, savings, or time deposit, including a deposit that is automatically renewable, and amounts held in a payroll card, five years after the [earlier of] maturity or the date of the last indication by the owner of interest in the property. A deposit that is automatically renewable is deemed matured on its initial date of maturity, unless the owner has consented in a record on file with the holder to a renewal at or about the time of the renewal;

(6) money or credits owed to a customer as a result of a retail business transaction, three years after the obligation accrued;

(7) a stored-value card, [other than a gift card], the latest of five years after

(A) December 31 of the year in which the card was issued, or additional funds were deposited into it;

(B) the most recent indication by the owner of an interest in the card; or

(C) any verification or review of the balance by or on behalf of the owner.

The amount abandoned by the owner is the value remaining at the time it is presumed abandoned; [except for gift cards with respect to which the amount abandoned is [60%] of the value remaining at the time it is presumed abandoned];

Comment

This section is changed to extend the time for presuming a stored value card to be abandoned from three to five years to put them on the same footing as demand, savings, and time deposits. If gift cards are exempt then the first bracketed language would remain. If gift cards are not exempt, then the bracketed language would be removed. And if only 40% is exempt, then the bracketed 60% would be retained.

(8) an amount owed by an insurance company on a life or endowment insurance policy or an annuity contract that has matured or terminated, three years after the obligation to pay arose or, in the case of a policy or contract that has not matured by actual proof of the death of the insured or annuitant, three years after the insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve is based;

(9) property distributable by a business association or financial organization in the course of dissolution, one year after the property becomes distributable;

(10) property received by a court as proceeds of a class action and not distributed under the judgment, one year after the distribution date established by the court;

(11) property held by a court, government, governmental subdivision, agency, or instrumentality, one year after the property becomes distributable;

(12) wages or other compensation for personal services, one year after the compensation becomes payable, except amounts paid to or for the benefit of an employee and held in a payroll card;

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

(14) notwithstanding any other provision of this [act], property held in an account or plan that qualifies for tax deferral under the income tax laws of the United States, as well as property held in custodial accounts for the benefit of minors, including those created pursuant to the Uniform Gifts for Minors Act and Uniform Transfers to Minors Act, as follows:

(A) property in an individual retirement account or any retirement health savings account, three years from the later of:

(i) the date a second consecutive item sent to the owner by first class United States Mail was returned as undeliverable by the United States Postal Service, unless a subsequent item mailed to the owner by first class United States Mail was not returned as undeliverable; and

(ii) the date the owner attains the age of 70.5, if determinable by the holder, or two years after the date the holder has received proof of death of the owner in the form of a claimant's presentation of a certified death certificate, but only if the death of the owner results in a mandatory distribution under the Internal Revenue Code. This paragraph does not require the holder to solicit a death certificate or otherwise attempt to confirm whether the owner is deceased; or

(B) property in any other such account or plan, three years from the later of

(i) the date a second consecutive item sent to the owner by first class United States mail was returned as undeliverable by the United States Postal Service (unless a subsequent first class United States mailing to the owner was not returned undeliverable); and

(ii) 30 years have elapsed after the date the account was opened;

Comment

The Drafting Committee decided that the standard for presumption of abandonment for tax deferred accounts or similar plans should be permutations of the standard proposed by the ABA, with some modifications suggested by NAUPA.

(15) all other property, five years after the owner first has a right to demand the property, or after the obligation to pay or distribute the property arises, whichever first occurs.

(b) At the time an interest is presumed abandoned under subsection (a), any other property right accrued or accruing to the owner as a result of the interest, and not previously presumed abandoned, is also presumed abandoned.

Alternative A

[(c) [Insert state's existing business-to-business exemption, or other form of business-to-business exemption which a state may include if it so chooses.]

End of Alternative

Comment

Fifteen states presently have some form of "business to business" exemption. It is a topic of considerable interest to the Council on State Taxation (COST) whose members collectively bear a major portion of the brunt of the financial cost of compliance with unclaimed property laws in the other 35 states that do not have the exemption. In the COST Scorecard on state Unclaimed Property Statutes titled "*The Best and Worst of State Unclaimed Property Laws*" (October 2013), the statement is made that "[e]limination of business-to-business transactions from the definition of unclaimed property is the single most important issue for the holder community." It is a bracketed provision in recognition that the "B2B" exemption has only been adopted by a minority of states and putting it in the act would likely create enactability problems in states that currently do not provide the exemption and do not wish to change in order to achieve uniformity. Those who wish to do so can include the language of their own or another state's B2B exemption. In addition, in the discussion of the Act at the Annual Meeting in Williamsburg, VA, it was suggested that there by no placeholder in the statute itself for a B2B exemption but only a reference to B2B exemptions constituting a minority rule, and that such an exemption could be available to states who elect that course, but that such an exemption was not a recommendation of the ULC as part of this Act.

[(d)] Except as otherwise provided in this section for specific property, property is unclaimed if, for the applicable period set forth in subsection (a), the apparent owner has not in a record or by other means reflected in a contemporaneous record prepared by or on behalf of the holder, communicated with the holder concerning the property or the account in which the property is held, and has not otherwise indicated an interest in the property. A communication with an owner by a person other than the holder or its representative which is not in a record that identified the property to the owner is not an indication of interest in the property by the owner.

[(e)] An indication of an owner's interest in property includes:

(1) a written communication or record, including any electronic communication, by the owner to the holder or agent of the holder concerning the property or the account in which the property is held;

(2) an oral communication by the owner to the holder or agent of the holder concerning the property or the account in which the property is held, if the holder or its agent makes and preserves a contemporaneous record of the [fact of the] owner's communication;

(3) presentment of a check or other instrument of payment of a dividend, interest payment, or other distribution made with respect to an account or underlying stock, bond, debt, or other interest in a business association, non-profit organization, or financial organization or, in the case of a distribution made by electronic or similar means, electronic or other evidence that the distribution has been received;

(4) owner-directed activity in the account in which the property is held, including accessing the account, or a direction by the owner to increase, decrease, or otherwise change the amount or type of property held in the account;

(5) making a deposit or withdrawal from an account in which the property is held, including [automatic deposits or withdrawals previously authorized by the owner [and] [any automatic reinvestment of dividends or interest];

(6) payment of a premium with respect to an interest in an insurance policy, but the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from maturing or terminating if the insured has died or the insured or the beneficiary of the policy has otherwise become entitled to the proceeds before depletion of the cash surrender value of a policy by the application of those

provisions;

(7) any other action by the owner that demonstrates to the holder that the owner is aware that the property exists; and

(8) any action by an agent or other representative of an owner is presumed to have been done on behalf of the owner, and is considered an action by the owner.

Comment

It has been argued by holders that the owner's interest in property should not be deemed abandoned if there have been any indications that the owner is aware of the existence of his claim and it is not in fact abandoned property. The revision expands the ways in which such continuing interest may be indicated, and makes clear that an owner may act through an agent or representative.

(f) A holder may contract with a third party to report unclaimed property, provided that both the third party contractor and the holder shall be jointly and severally responsible to the administrator for the complete, accurate, and timely reporting of property and liable for paying or remitting the property to the administrator.

Comment

This provision has been added to make it clear that while a holder may contract with another to carry out its reporting and remitting obligations under the [act], both parties will be responsible for the completeness, timeliness and accuracy of the report and payment or remission of the property.

(g) Property is payable or distributable for purposes of this [act] notwithstanding the owner's failure to make demand or present an instrument or document otherwise required to obtain payment.

Comment

This provision was in brackets until the arguments made by holders concerning the derivative rights doctrine were presented at the annual conference. There was no direction given so the brackets have been removed. This is an example where courts have made an exception and allowed the unclaimed property administrator to take custody of assets even though the owner would have had to make a demand or present an instrument to obtain payment. This reflects the reality that the administrator virtually never will have access to the instrument or an opportunity to make a demand and therefore not leaving the language in the act would severely constrain the administrator from being able to recover certain abandoned property.

(h) With respect to an amount owed by an insurance company on a life or endowment insurance policy the following rules apply:

(1) A policy or contract that provides benefits upon the death of an insured or annuitant is deemed matured for purposes of this [act] when the insurer has notice of death of the insured or annuitant and the insurance company is able through reasonable efforts to obtain proof of death from publicly available records, and determine that an amount is owed on the policy or contract.

(2) An insurance company that conducts a death master file comparison in the manner [provided by paragraphs (3) and (4)] [required by law] is deemed to have notice of death of an insured or annuitant only based on:

(A) a death master file match; or

(B) notice provided to the insurance company in a record by a beneficiary, policy owner, or other apparent owner of the policy or contract, or its benefits.

[(3) A death master file match for purposes of paragraph (2)(A) occurs when an insurance company can reasonably determine based on records of death contained in an officially recognized death master file that an insured or annuitant has died, provided comparisons are conducted at least biennially between the names of all insureds or annuitants covered by policies or contracts in force, or terminated, during the year for which a report is due under Section 8(d) and for which any amounts due are subject to the custody of this state under Section 5.

(4) The [state insurance commissioner] shall, [in cooperation with] [after consultation with] the [state unclaimed property administrator], adopt regulations regarding the conduct of death master file comparisons and the manner in which insurance companies may

reasonably obtain proof of death of insureds and annuitants and make determinations that amounts are owed on policies covering such insureds or annuitants. Death master file comparisons [are not] [may not be] required for:

Comment

It was suggested by the floor that while an act can require consultation it is very difficult to require cooperation, so additional language to consider is provided in brackets.

(A) any contract or policy used to fund an employment-based retirement or benefit plan or program unless the insurance company as agreed to be responsible for obtaining, maintaining and administering information about each individual insured, or is required by terms of an annuity contract to pay death benefits of specific plan participants;

(B) any policy or certificate of life insurance that provides a death benefit under an employee benefit plan subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001 et seq.;

(C) any policy or certificate of life insurance that provides a death benefit under a governmental plan as defined by 25 U.S.C. Section 1002(32);

(D) any policy or certificate of life insurance that is used to fund a pre-need funeral contract of prearrangement; or

(E) any policy or certificate of credit life or accidental death insurance.

(5) For purposes of this subsection, and subsection (a)(8), a life or endowment insurance policy or annuity contract includes a retained asset account into which the proceeds payable under a policy or contract are deposited into an account with check or draft writing privileges for the beneficiary of the contract or policy, if those proceeds are retained by the insurance company or its agent pursuant to a supplementary contract not involving annuity benefits other than death benefits.]

Comment

Subparagraph (h) provides bright line rules an insurance company may rely upon to determine whether it has notice of the death of an insured or annuitant. The procedures established by these paragraphs are consistent with a Model Act adopted by the National Conference of Insurance Legislators that has been generally endorsed both by unclaimed property administrators and by many insurance industry representatives. These procedures are also consistent with settlement agreements between a substantial number of States and many large life insurance companies. The settlement agreements resolved claims made by state unclaimed property administrators in multistate audits in which administrators alleged that insurers that conducted Social Security Administration Master Death File comparisons for purposes of terminating annuity payments had constructive notice of the deaths of individuals covered by policies or contracts providing death benefits because the information was contained in the Death Master File. The administrators claimed that such information was sufficient to commence the running of deemed abandonment periods, but insurers had elected to either intentionally disregard or ignore the information in a manner that constituted willful blindness so as to delay the commencement of deemed abandonment periods transfer of policy proceeds to states until insureds or annuitants, if alive, had attained the limiting age upon which policy reserves were based (i.e., after the time at which an insured or annuitant would have attained 100 years of age)..

Suggestions have been made by insurance industry representatives that the manner in which death master file comparisons should be conducted as set forth in paragraphs (3), (4) and (5) should not be included in state unclaimed property laws, but instead should be exclusively determined by state insurance laws. The Drafting Committee has a strong preference for the inclusion of these principles in state unclaimed property laws to preserve the integrity and completeness of unclaimed property laws, but enactment of these provisions in separate states will not undermine the objectives of achieving uniformity if done substantially in compliance with the principles set forth in paragraphs (3), (4), and (5). For this reason, paragraphs (3), (4) and (5) are bracketed, indicating that states adopting laws regarding death master file comparisons need not adopt these provisions.

The act does not require an insurance company to perform a master death file match, but if an insurance company does so in accordance with the requirements established by state insurance regulators or as otherwise required by law, and also conducts due diligence to investigate claims submitted by beneficiaries but not subsequently pursued, it is not required to investigate or take action upon other events that may provide notice of death of an insured or annuitant.

An insurance company that fails to rely on the bright line rules set forth in paragraph (2) may be subject to examination by State unclaimed property administrators to determine if it had actual or constructive knowledge of the death of an insured.

A death master file match under these rules does not constitute proof of death. Instead, policy or contract proceeds are subject to custodial claims of the State only if the insurance company is able after a reasonable effort to obtain proof of death from publicly available records and determine that policy or contract proceeds are owed to beneficiaries.

Procedures for conducting master death file matches, including what types of master death files may be utilized, as set forth in paragraphs (3), (4) and (5) are to be determined by rules adopted by State insurance regulators after consultation with the administrator in that state or may be otherwise established by laws similar to those that have been enacted in several States. Similarly, what constitutes reasonable efforts to obtain proof of death of an insured or annuitant and to determine whether policy or contract proceeds are owed is to be determined either by rules adopted by State insurance regulators or as otherwise provided by law.

Paragraph (4) requires regulations regarding master death file requirements to be adopted by State insurance regulators in consultation with unclaimed property administrators. Other options considered by the Drafting Committee are to require the rules to be adopted by unclaimed property administrators in consultation with insurance regulators or to be the exclusive responsibility of one of the two regulatory authorities. Any such regulations should be adopted in a manner to promote uniformity among the States and should take into consideration recommendations of the National Association of Insurance Commissioners.

(6) The three year period provided by subsection (a)(8) during which an amount owed by an insurance company on a life or endowment insurance policy or an annuity contract is presumed unclaimed and abandoned is measured from the later of events described in subsection (a)(8), or any subsequent indication of interest in the policy or contract by the insured or annuitant, the policy or contract owner, a beneficiary, or other apparent owner of the policy or contract, in the manner provided by subsections (d) and (e).

Comment

This paragraph clarifies how the rules established by subsections (d) and (e) apply to amounts owed on life insurance policies and annuity contracts by clarifying that an expression of interest that tolls running of the three year dormancy period may be made by the insured or annuitant, a policy owner, a beneficiary, or other apparent owner of the policy or contact, including its benefits, such as a representative of the estate of an insured, annuitant, or beneficiary.

(7) This [act] does not affect the extent to which an insurance company was or was not deemed to have knowledge of the death of an insured or annuitant or was required to conduct a death master file comparison to determine whether amounts owed by the insurance company on a life or endowment insurance policy or an annuity contract were presumed abandoned or unclaimed before [the effective date of this [act].

Comment

This paragraph provides that to the extent it amends or revises prior law, enactment of this Act should not be construed as either endorsing or rejecting claims made by parties in ongoing examinations in which many states have alleged that amounts owed under policies or contracts are subject to unclaimed property reporting and remittance requirements when insurance companies have actual or constructive knowledge of the death of insureds and annuitants have not paid the proceeds to the owners.

SECTION 4. CONTENTS OF SAFE DEPOSIT BOX. Tangible property held in a safe deposit box and proceeds resulting from the sale of the property by the holder permitted by other law, are presumed abandoned if the property remains unclaimed by the apparent owner for more than five years after:

(1) the earlier of the expiration of the lease or rental period on the safe deposit box; or

(2) the earliest date when the lessor of the safe deposit box is authorized by law to enter a box and remove or dispose of the contents without consent or authorization of the lessee.

Comment

This provision remains unchanged from the 1995 Act and applies only to the contents of safe deposit boxes usually associated with banks as specifically requested by NAUPA.

SECTION 5. RULES FOR TAKING CUSTODY. Except as otherwise provided in this [act] or by other statute of this state, property that is presumed abandoned, whether located in this or another state, is subject to the custody of this state if:

(1) the last known address of the apparent owner of the property, as shown on the records of the holder, is in this state;

(2) the records of the holder do not reflect the identity of the apparent owner of the property, but it is established that the last known address of the apparent owner of the property is in this state. If there is a United States postal zip code associated with the apparent owner, the state in which the specific post office associated with that zip code is located is deemed to be the state of residence of the apparent owner, unless other records associated with the apparent owner

specifically identify a physical address of the apparent owner to be in a different state, in which case that state is deemed to be the state of residence of the apparent owner. If the records of the holder reflect two or more addresses for the apparent owner, the most recently recorded address governs, or if recorded simultaneously, the address that is believed to be the apparent owner's principal address governs;

(3) the records of the holder do not reflect the last known address of the apparent owner, but it is otherwise established that:

(A) the last known address of the apparent owner of the property is in this state; or

(B) the holder is domiciled in this state or is a government or governmental subdivision, agency, or instrumentality of this state and has not previously paid or delivered the property to the state of the last known address of the apparent owner or other person entitled to the property, and is not obligated to pay or deliver the property to that state; provided, if the state of domicile of the holder has changed, the holder's state of domicile is the state where the holder was domiciled at the time the property was deemed abandoned;

[(4) the holder, at its option, voluntarily remits property for which the last known address of the apparent owner, as shown on the records of the holder, is a foreign country or is in a state that does not provide custodial taking of the property, and the holder is domiciled in this state or is a government or governmental subdivision, agency, or instrumentality of this state;]

Comment

Allowing voluntary remission of foreign held property presumes that the act will not require remission of property where the apparent owner's address is in a foreign country, therefore this provision is bracketed until the Committee decides whether to exclude foreign addressed property.

(5) the last known address of the apparent owner, as shown on the records of the holder, is in a state that does not provide for the custodial taking of unclaimed property, [or in a foreign

country] and the holder is domiciled in this state or is a government or governmental subdivision, agency, or instrumentality of this state, property that is specifically exempt from custodial taking under the laws of the state of the last known address of the apparent owner, if applicable, or if not, the state of domicile of the holder, if applicable, is not subject to the custody of any state;

Comment

This revision recognizes a limited third-priority rule. The Court in *Texas v. New Jersey*, 379 U.S. 674 (1965) established the priority between the state of residence of the owner and the domicile of the holder, but did not address the situation where neither state provides for custodial taking. Providing a third priority rule avoids the situation of a holder getting a windfall where neither the first nor the second priority state is entitled to take custody of the property. However, the situation is different if the absence of a custodial provision with respect to specific property is not an oversight and is therefore not a "windfall," but results from the state's deliberate decision to exempt a class or type of property from its unclaimed property laws. For example, if the law of the state of residence of the owner expressly exempts gift cards, or the law of the state of domicile of the holder expressly exempts gift cards, to allow the state where the transaction took place (assuming it is a third state) to take custody of gift cards would not give the laws of the state or other states full faith and credit. *See American Express, etc. v. Sidamon-Eristoff*, 755 F.Supp. 2d 556, 604-05 (D.C.N.J. 2011).

(6) the transaction out of which the property arose occurred in this state, the holder is domiciled in a state that does not provide for the custodial taking of the property, and the last known address of the apparent owner or other person entitled to the property is unknown or is in a state that does not provide for the custodial taking of the property, unless the property is expressly exempt from custodial taking under the laws of that state;

(7) the property is a traveler's check or money order purchased in this state, or the issuer of the traveler's check or money order has its principal place of business in this state and the issuer's records show that the instrument was purchased in a state that does not provide for the custodial taking of the property, or the issuer's records do not show the state in which the instrument was purchased; and

(8) the property is the proceeds of life insurance or an annuity and a person other than the

insured or annuitant is entitled to the funds and an address of that person is not known to the insurance or annuity company, or it is not definite or certain from the records of the company who is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant as reflected or indicated in the records of the company. The address of the apparent owner of a life insurance policy or annuity or its proceeds is presumed to be the address of the insured or annuitant if a person other than the insured or annuitant is entitled to the amount owed under the policy or contract and the address of the other person entitled to the amount owed is not known by the insurer or cannot be determined from the records of the insurer.

Comment

This provision was added at the suggestion of NAUPA to provide that when proceeds of life insurance or an annuity are payable to a person other than the insured or annuitant, and the records of the holder do not indicate the address of the owner, the holder will presume that the state of residence of the owner is the same as that of the insured or annuitant. This presumption will make it more likely that the owner will receive notice of the abandoned property.

SECTION 6. DORMANCY CHARGE. A holder may deduct from property presumed abandoned a charge imposed by reason of the owner's failure to claim the property within a specified time if there is a valid and enforceable written contract between the holder and the owner under which the holder may impose the charge and the holder regularly imposes the charge, which is not regularly reversed or otherwise canceled. The amount of the deduction is limited to an amount that is not unconscionable.

SECTION 7. BURDEN OF PROOF AS TO UNPAID DEBTS OR UNDISCHARGED OBLIGATIONS EVIDENCED BY RECORDS OF A HOLDER.

(a) In asserting a right to take custody of property from a putative holder who is also the issuer, the administrator has the burden of proving the existence and amount of the property and its abandonment.

(b) An unpaid debt or undischarged obligation, including an uncashed check, draft, or similar instrument reflected in the records of the holder is [prima facie] [presumptive] evidence of an obligation, and unless rebutted by the putative holder under the provisions of paragraph (c), is sufficient to prove the existence and amount of the property and its abandonment.

(c) The putative holder may establish that there is no unpaid debt or unsatisfied obligation with respect to the record under subparagraph (a) or otherwise show that it never was or no longer remains a fixed and certain obligation of the putative holder by presentation of evidence sufficient to overcome the presumption in subsection (b)[.] Evidence that tends to disprove a [prima facie case] [presumption] includes [but is not limited to] evidence that the check, draft or similar instrument was issued:

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

(2) but was lost and replaced with another instrument;

(3) to a governmental entity, charitable organization, or party affiliated with the issuer;

(4) but was voided not later than 90 days of issuance;

(5) but was never delivered to the third party payee;

(6) was paid, satisfied, or discharged; or

(7) but there was a lack of consideration or a failure of consideration for the issuance.

(d) A putative holder may establish a defense to an assertion by the administrator to a right to take custody of property under subsection (a) by showing proof of evidence of custom and practice, or course of dealings between the putative holder and the apparent owner.

Comment

In establishing the rules for determining the first and second priority states, the rationale used by the Court in *Delaware v. New York*, 507 U.S. 490, 501 (1993) was to analyze the relationship between the debtor who owed an unpaid obligation and was therefore the "holder" of the property, and the creditor—the person to whom the debt was owed was the owner. Since the obligation is intangible personal property, it follows that the situs of the debt is the location of the creditor. From that it was resolved that the situs of the property is the creditor/owner's state of residence as indicated by the address of the owner reflected on the books and records of the holder.

In its analysis the Court said: "In framing a State's power of escheat, we must first look to the law that creates property and binds persons to honor property rights. . .First we must determine the precise debtor-creditor relationship as defined by the law that creates the property at issue. . . '[P]roperty and interest in property are creatures of state law. [The] law that creates property necessarily defines the legal relationships under which certain parties ("debtors") must discharge obligations to others [creditors].'"

From that language the Holders Coalition advances the argument that Section 7 should be drafted to establish that a state's burden of proof matches that of a creditor in a creditor-debtor relationship. They argue that in taking custody of property the state steps into the shoes of the owners and gains no greater right to the property than does the owner. They argue that a creditor asserting a claim against a debtor has the burden of proving the existence and amount of the debt he is owed, and the mere existence of a record on the holder's books of a credit or an unpaid debt or undischarged obligation such as an accrual for an estimated or contingent liability (which GAAP rules may require to be recorded) should not be sufficient to satisfy the State's obligation to establish a *prima facie* case that a fixed and certain liability or obligation exists, or to shift to the holder the burden of establishing that such entries do not represent abandoned property.

But the Holders' argument does not take into account the fact that the relationship between the debtor and the creditor is a two party transaction in which both parties are assumed to have equal access to and knowledge concerning the facts and circumstances underlying why the record reflects a credit or accrual, and while the burden of establishing the fact of the obligation is on the creditor, unless he is absent or has lost his memory, or copies of the record of the transaction, or both, he should have no trouble meeting that burden. What the position of the Holders Coalition fails to address is that in the context of unclaimed property, the administrator as a third party is a stranger to the transaction, and absent being able to locate the missing owner, has no means of establishing anything more than what the examination has revealed on the debtor/holder's books.

Were the Drafting Committee to accept this argument, the practical consequence would be to eliminate an entire category of property from ever being turned over to the administrator, without regard for whether or not the debt still exists.

On the other hand, being one of the parties to the transaction, the holder at one point would have had access to the records and memories of the event or transaction which underlies the existence of the credit balance or accrual reflected on its books, and therefore is in the better position to explain why the records are as they are.

The problem, of course, is that when most of these situations surface on examination many years later, the holder's records may no longer exist or may be incomplete, and the employees of the holders who were involved in the underlying transaction may either have moved on or cannot now recall the event or its details.

Thus the problems that are the basis for the Holders Coalition concerns are exacerbated by the absence of a statute of repose in the 1995 Act and some states' ability to use extrapolation from a small sample to go back up to 35 years. Hopefully, the inclusion in this act of a 10 years statute of repose and a 10 year record retention requirement on limitations on estimations will go a long way towards ameliorating the situation, as will having a clear and certain access to an impartial judicial resolution of disputes.

Provisions have been added to this section of the act based on recommendations of the Holders Coalition intended to give greater clarity to the kinds of evidence which the holder can use to rebut the presumption if such evidence is still available.

SECTION 8. CONTENTS OF REPORT OF ABANDONED PROPERTY.

(a) A holder of property presumed abandoned shall make a report in a record to the administrator concerning the property by a means and in a format approved by the administrator. The format must be designed so as to protect the confidentiality of the owner's information contained in the report, to the extent it is required to be protected under Section 27.

Comment

One of the concerns of holders such as banks and securities brokers is that they are under very strict federal rules regarding maintenance of the confidentiality of their client's/customer's financial records. New Section 27 of this act provides the requirement that the administrator maintain that same degree of confidentiality of owner's records when property is turned over to them. This revision implements the requirements of new Section 27 in the process by which these holders may report this information to the administrator.

(b) The report under subsection (a) must be signed by the holder under the penalties of perjury or verified by the holder as to its completeness and accuracy. The administrator may accept an electronic signature or waive verification. The report may not otherwise include any sensitive nonpublic personal information of the owner or the owner's property, but must contain:

(1) a description of the property;

(2) [except with respect to a traveler's check or money order,] the name, if known, and last known address, if any, and the Social Security number or taxpayer identification number, if known or readily ascertainable, of the apparent owner of property with a value of $50 or more;

Comment

[Why are travelers checks and money orders excluded? Bracketed to flag issue.]

(3) an aggregated amount of items valued less than $50 each;

(4) in the case of an amount held or owing under an annuity or life or endowment insurance policy, the full name and last known address of the annuitant or insured and of the beneficiary;

(5) in the case of property held in a safe deposit box, an indication of the place where it is held and where it may be inspected by the administrator, and any amounts owing to the holder;

(6) the date, if any, on which the property became payable, demandable, or returnable, and the date of the last transaction with [and notification from] the apparent owner with respect to the property;

(7) a statement that the holder has complied with the owner notification requirements of subsection (e) and of Section 9;

(8) other information that the administrator by rule prescribes as necessary for the administration of this [act]; and

(9) an indication that the property is not freely transferable, if applicable under Section 2(18).

(c) If a holder of property presumed abandoned is a successor to another person who previously held the property for the apparent owner, or the holder has changed its name while holding the property, the holder shall file with the report its former names, if any, and the known names and addresses of all previous holders of the property.

(d) The report must be filed before November 1 of each year and cover the 12 months next preceding July 1 of that year; however, a report to be filed by an insurance company must be filed before May 1 of each year for the calendar year next preceding.

(e) Before the date for filing the report, the holder of property presumed abandoned may request the administrator to extend the time for filing the report, which may be granted for good cause. If the extension is granted, the holder may make a payment or partial payment on the amount the holder estimates will ultimately be due, which payment terminates the accrual of interest on the amount paid.

(f) Except as otherwise provided in this section, the holder of property presumed abandoned shall send notice in a record that complies with Section 10(a) by first class United States Mail to the apparent owner at least 60 days before filing the report. The holder may also send the notice earlier and as often as it chooses to do so, stating that the holder is in possession of property subject to this [act], if:

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

(2) the claim of the apparent owner is not barred by a statute of limitations; and

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

(g) If the owner has previously consented to electronic delivery of information from the holder, the notice under this section may be sent by electronic delivery instead of first class United States Mail unless the holder has reason to believe that the owner's electronic mail address is invalid. If the holder sends the required notice to the owner electronically and receives information indicating that the owner's electronic address is not valid, the holder shall send the required notice by first class United States Mail to the owner's last known mailing address. A holder is not required to send any notice required by this section to any address that the holder [knows] [has reason to believe] is not a valid address for the owner.

(h) Instead of the requirements set forth in subsection (e), the holder of securities shall perform the following due diligence with respect to the securities:

(1) For any apparent owner of a security who does not otherwise receive communications from the holder by United States Mail, the holder shall send a communication electronically that complies with Section 10 not later than two years after the owner's last indication of interest in the property. If the holder receives notification that the electronic communication was not received, or if the owner does not respond to the electronic communication, the holder shall send the owner by first class United States Mail a written notice which complies with Section 10(a), unless the owner otherwise indicates an interest in the security after the electronic communication.

(2) For any apparent owner of a security who receives communications from the holder by United States Mail, if a second consecutive first class mailing to the apparent owner was returned to the holder as undeliverable by the United States Postal Service (unless a subsequent first class mailing to the owner was not returned as undeliverable) and the value of the property is $50 or more, the holder shall:

(A) send by first class United States Mail to the apparent owner a written notice that complies with Section 10(a) not later than two years after the date the second consecutive first class mailing was returned to the holder as undeliverable;

(B) send by first class United States Mail to the apparent owner a written notice that complies with Section 10(a) not later than 90 days before filing the report. There is no limit as to the number of notices that a holder may send to an apparent owner.

(3) A holder is not required to send any notice required under this section to any address that the holder [knows] [has reason to believe] is not a valid address for the owner.

[(i) The holder of property presumed abandoned shall file with the report an affidavit or verification under the penalties of perjury that the holder has complied with the requirements of subsections (f), (g), and (h).]

Comment

[Is this provision necessary? See § 8(d).]

SECTION 9. PAYMENT OR DELIVERY OF ABANDONED PROPERTY.

(a) Except for property held in a safe deposit box, and for property described in subsections (d) and (e), on filing the report required by Section 8, the holder of property presumed abandoned shall pay, deliver, or cause to be paid or delivered to the administrator the property described in the report as unclaimed.

(b) If the property is an automatically renewable deposit, and a penalty or forfeiture in the payment of interest would result, the time for compliance is extended until a penalty or forfeiture would no longer result from payment on delivery.

(c) Tangible property held in a safe deposit box may not be delivered to the administrator until [120] days after filing the report required by Section 8.

(d) If the property reported to the administrator is a security or security entitlement under [Article 8 of the Uniform Commercial Code], the administrator is [an appropriate person] [authorized] to make an endorsement, instruction, or entitlement order on behalf of the apparent owner to invoke the duty of the issuer or its transfer agent or the securities intermediary to transfer or dispose of the security or the security entitlement in accordance with [Article 8 of the Uniform Commercial Code].

Comment

[Which of these bracketed provisions is current?]

(e) If the holder of property reported to the administrator is the issuer of a certificated security, the administrator may obtain a replacement certificate in physical or book entry form pursuant to [Section 8-405 of the Uniform Commercial Code], but an indemnity bond is not required.

(f) The administrator shall adopt [by rule] [rules governing] [pursuant to _____] procedures for the registration and issuance, method of delivery, transfer, and maintenance of unclaimed securities and security entitlements [.] [delivered to the administrator by a holder.]

(g) An issuer, the holder, and any transfer agent or other person acting pursuant to the instructions of and on behalf of the issuer or holder in accordance with this section is not liable to the apparent owner and must be indemnified by the administrator against claims of any person under Section 10.

(h) A holder of a security that the holder has determined in good faith is non-freely transferable is not required to deliver the security to the administrator if the holder has so indicated in the report required pursuant to Section 8. Not later than 10 days following a determination by the administrator or the holder that the security is freely transferable or is no longer worthless, the security must be delivered to the administrator.

Comment

This new provision is intended to spell out when and how the holder of a security believed or determined to be worthless should deal with it and what the administrator may do with it.

SECTION 10. NOTICE TO OWNER.

(a) A holder of property that is presumed abandoned [,or that may become abandoned,] shall send notice to the apparent owner as required by Section 8(f), in a format acceptable to the administrator, at least 60 days before filing the report, and may send such additional notices as may be required.

Comment

[Why is "or that may become abandoned" included?]

(b) The notice under subsection (a) must contain a heading that reads as follows: "THE STATE OF [________] REQUIRES US TO NOTIFY YOU THAT YOUR UNCLAIMED PROPERTY MAY BE TRANSFERRED TO THE UNCLAIMED PROPERTY ADMINISTRATOR AS CUSTODIAN FOR YOU IF YOU DO NOT CONTACT US BEFORE [insert date the report is due to be filed]," or substantially similar language.

(c) The notice under subsection (a) must specify the date that the property will be turned over to the state and explain the necessity of filing a claim for the return of the property following receipt by the administrator. The notice must identify the nature and amount of the property that is the subject of the notice; and provide instructions that the apparent owner must follow to prevent the property from being reported and turned over to the administrator.

(d) The holder of property that is presumed abandoned is not required to send a notice if the records of the holder indicate the address of the apparent owner is incorrect, if the [total] value of the property is less than [$50,] or if the property consists of non-freely transferable securities.

Comment

Section 10 has been substantially rewritten to deal with the separate but different obligations that holders and administrators have with respect to giving notification to owners that their property will be or has been turned over to an unclaimed property administrator. Paragraph (a) deals with the holder's obligations and is cross-referenced to the notice required by Section 7(e). Paragraph (b) establishes for the first time the administrator's duties. Both are intended to further the primary goal of this [act] which is to protect unclaimed property and reunite it with its owners.

(e) The administrator shall maintain a program to give notice to owners of the possible existence of unclaimed property held by the state under this [act]. The program must include, but is not limited to:

(1) the sending of a written notice by first class United States Mail to apparent owners of unclaimed property presumed abandoned and held by the administrator, and in the case of property in the form of securities held in electronic form, electronic notice if the electronic address of the apparent owner is known to the administrator and the administrator has been advised that the apparent owner has consented to receive electronic notification instead of notification by mail. If the administrator does not have a valid United States postal mailing address for an apparent owner, but has an electronic mailing address which it does not know to be invalid, notice must be sent to the owner's electronic address. The administrator may elect not to send written notices by first class United States Mail to an apparent owner if the administrator determines that such mailing would not be received by the apparent owner;

(2) publication of notice, every six months in at least one newspaper of wide general circulation in this state, of unclaimed property received by the state. This publication must include the following information:

(A) the total number and value of abandoned unclaimed property accounts received by the administrator during the preceding six-month period;

(B) the total number and value of claims to abandoned accounts paid by the administrator during the preceding six-month period;

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

(D) a telephone number by which persons wishing to contact the administrator for purposes of inquiring about or claiming abandoned property may do so; and

(E) a statement that anyone interested in searching for unclaimed property may access the Internet by use of a computer and that computers may be provided as a service to the public at a local public library; and

(3) the maintenance of an Internet website or database accessible by the public which sets forth in an electronically searchable manner the names of all apparent owners reported to the state in an approved electronic format for whom unclaimed property is being held by the state. The Internet database must include instructions for filing a claim to abandoned property with the administrator, and a printable form of claim with instructions for its use.

(c) Notwithstanding subsections (a) and (b), this section does not apply to property that has been reported as a non-freely transferable security.

(d) The administrator may undertake additional notification efforts through printed publication, telecommunication, the Internet, or other media in an effort to apprise the public of the existence of unclaimed property and the state's unclaimed property program.

Comment

Paragraph (b) of Section 10 sets out the requirements imposed on administrators to make reasonable, good faith efforts to notify owners of unclaimed property being held for them in furtherance of the goal of reuniting owners with their property. Exactly how it is done is left to the discretion of the administrators, but at a minimum they are required to send written notices by first class United States Mail to apparent owners, except for the use of electronic mail in some limited circumstances. In addition, publication of newspaper notices are required each six months with the understanding that what is intended is that the broadest possible circulation of the notice within the state is expected given the size and population of the state. It also calls for the maintenance of an electronically searchable website accessible to the public from which unclaimed property information can be obtained, and authorizes use of additional means of apprising the public of unclaimed property rights.

(e) Notwithstanding any provision of law to the contrary, all officers, agencies, boards, commissions, divisions, and departments of the state, including any body politic and corporate created by the state for public purposes, and every political subdivision of the state shall, on the request of the administrator, make its books and records available and cooperate with the administrator to determine the current whereabouts of an apparent owner of unclaimed property. Subject to Section 27, the administrator, or an employee or agent of the administrator, may not use or disclose such information or record obtained except as is useful and appropriate to locate the apparent owner of unclaimed property.

Comment

This new provision is intended to allow for interagency cooperation between other agencies and subordinate governments of the state and the administrator for the purpose of locating apparent owners of unclaimed property. Because the administrator is under the duty of confidentiality, it would authorize Departments of Revenue and other agencies to disclose to the administrator information about taxpayers that might otherwise not be available due to confidentiality requirements. [Thought needs to be given to whether exceptions can be made for public safety reasons, or if a person is in a witness protection program.]

SECTION 11. CUSTODY BY STATE; RECOVERY BY HOLDER; DEFENSE OF HOLDER.

(a) On payment or delivery of property to the administrator, the administrator as agent for the state assumes custody and responsibility for the safekeeping of the property. A holder who pays or delivers property to the administrator in good faith is relieved of all liability arising thereafter with respect to the property. If the holder's records contain an address for the apparent owner which the holder's records do not disclose to be inaccurate, and the holder has made reasonable efforts to notify the owner by mail or in substantial compliance with Section 10, the holder is relieved of all liability arising thereafter with respect to the property to the extent of the amount of money or value of property so paid or delivered.

(b) In this section, payment or delivery of property is made in “good faith” if:

(1)(A) payment or delivery was made in a reasonable attempt to comply with this [act];

(B) the holder was not then in breach of a fiduciary obligation with respect to the property and had a reasonable basis for believing, based on the facts then known, that the property was presumed abandoned; and

(C) there is no showing that the records under which the payment or delivery was made did not meet reasonable commercial standards of practice; or

(2) payment or delivery was made by the holder:

(A) in response to a demand by the administrator or an agent of the administrator; or

(B) pursuant to private or public guidance or ruling by the administrator or an agent of the administrator which the holder reasonably believed required the property to be reported and remitted.

Comment

These new revisions expand the circumstances under which a holder may turn over unclaimed property to the administrator for safekeeping and avoid any further liability or responsibility for it to the owner or anyone claiming to be the owner.

(c) A holder who has made a payment to the administrator pursuant to this [act] may subsequently make payment to a person reasonably believed by the holder to be the owner of the property, and may claim reimbursement from the administrator, or may deduct the amount of the payment from its next subsequent unclaimed property due to be paid to the state, if:

(1) the deduction is supported by proof of payment; and

(2) proof that the person to whom the payment was made was the owner entitled to the payment previously made to the administrator.

(d) If a deduction under subsection (c) is taken for a payment made on a negotiable instrument, including a traveler's check or money order, the holder must file proof that the instrument was presented and that payment was made to a person reasonably believed to be entitled to payment. The holder may deduct for payment made, even if the payment was made to a person whose claim was barred by the expiration of a period of limitation on the owner's right to receive or recover property.

Comment

Even though a holder has turned over abandoned property to the administrator, it may subsequently elect to honor a claim made by the owner to the holder for the property. In that case, rather than seek and wait to be reimbursed by the administrator, the holder may offset its future obligations to the administrator pro tanto with an explanation and proof of payment provided to the administrator.

(e) A holder who has delivered property other than money to the administrator pursuant to this [act] may reclaim the property still in the possession of the administrator, without paying any fee or other charge, on filing proof that the owner has claimed the property from the holder.

(f) The administrator may accept a holder's affidavit as sufficient proof of the holder's right to recover money and property under this section.

(g) If a holder pays or delivers property to the administrator in good faith and thereafter another person claims the property from the holder, or another state or foreign government claims the money or property under its laws relating to unclaimed property, the administrator, on written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability on the claim resulting from payment or delivery of the property to the administrator.

(h) Property removed from a safe deposit box under Section 3 is received by the administrator subject to the holder's right to be reimbursed for the cost of the opening and to any valid lien or contract providing for the holder to be reimbursed for unpaid rent or storage charges. The administrator shall reimburse the holder out of the proceeds remaining after deducting the expense incurred by the administrator in selling the property.

SECTION 12. CREDITING OF DIVIDENDS, INTEREST, AND INCREMENTS TO OWNER'S ACCOUNT. If property other than money is delivered to the administrator, the owner is entitled to receive from the administrator any income or gain realized or accrued on the property before liquidation of the property into money. If the property was an interest-bearing demand, savings, or time deposit the administrator shall pay interest at a rate of [insert legal rate] percent a year or any lesser rate the property earned while in the possession of the holder. Interest begins to accrue when the property is delivered to the administrator and ceases on the earlier of the expiration of 10 years after its delivery or the date on which payment is made to the owner. Interest on interest bearing property is not payable for any period before the effective date of this [act], unless authorized by law superseded by this [act].

SECTION 13. PUBLIC SALE OF ABANDONED PROPERTY.

(a) Except as otherwise provided in this section, not later than three years after the receipt of abandoned property, the administrator shall sell it to the highest bidder at public sale at a location in the state which in the judgment of the administrator affords the most favorable market for the property.

(b) The administrator may conduct the sale on the Internet or any other forum or medium the administrator believes is likely to yield the highest net proceeds of sale.

(c) The administrator may decline the highest bid and reoffer the property for sale if the administrator considers the highest bona fide bid to be insufficient.

(d) The administrator is not required to offer the property for sale if the administrator considers that the probable cost of sale will exceed the proceeds of the sale. In that case the administrator may destroy or dispose of the property under Section 18.

(e) A sale held under this section, conducted other than by electronic means, must be preceded by not less than one publication of notice, at least [three] weeks but not more than [five] weeks before sale, in a newspaper of wide general circulation in the [county] in which the property is to be sold.

Comment

The new provisions in this section allow for sale of abandoned property by electronic means rather than by a public auction. It also permits the administrator to exercise discretion to destroy rather than sell low value items.

(f) The administrator may not sell or otherwise liquidate securities until three (3) years after the administrator has received the securities and provided the owner with notice of the administrator's possession of the securities, pursuant to Section 10.

(g) Securities listed on an established stock exchange may not be sold at prices less than the price prevailing on the exchange at the time of sale. Other securities may be sold over the counter at prices prevailing at the time of sale or by any other reasonable method selected by the administrator.

(h) If securities are sold by the administrator before the expiration of six years after their delivery to the administrator, a person making a claim of ownership of the securities determined to be valid under this [act] before the end of the six-year period is entitled, at the option of the state, to an equal number of shares, or to the market value of the securities at the time the claim is made by the owner plus dividends, interest, and other increments thereon up to that time, less any deduction for expenses of sale. The market value of the securities must be calculated in such a manner as to place the owner in the same, or as close to the same, position as the owner would have been if the securities had never been sold, and must take into account any stock splits, reverse stock splits or other transactions that would have affected the value of the securities. If the securities were acquired by another company in exchange for cash, the owner is entitled to the cash that the owner would have received upon exchange of the securities. If the securities were acquired by another company in exchange for other securities, the owner is entitled to the shares or market value of the securities that the owner would have received in the exchange.

(i) A person making a claim of ownership of securities determined to be valid under this [act] after the expiration of the six-year period is entitled to receive:

(1) the securities delivered to the administrator by the holder, if they are in the custody of the administrator, plus any dividends, interest, and other increments thereon up to the time the [claim] [payment] is made; or

(2) the net proceeds received from the sale of the securities, plus any dividends, interest, and other increments thereon up to the time the property was sold.

(j) A purchaser of property at a sale conducted by the administrator pursuant to this [act] takes the property free of all claims of the owner or a previous holder, and of all persons claiming through or under either of them. [and shall be indemnified by the administrator from any loss resulting from a successful claim.] The administrator shall execute all documents necessary to complete the transfer of ownership.

(k) Medals and decorations for military service in the armed forces of the United States may not be sold by the administrator, but in the discretion of the administrator may be delivered to a military veteran's organization qualified under Section 501(c)(19) of the Internal Revenue Code to hold as custodian for the owner.

Comment

Military medals are not generally considered to be abandoned property appropriate for custodial taking. An alternate means of handling them is made available. [**Query**: What about military medals of other countries?]

SECTION 14. DEPOSIT OF FUNDS.

(a) Except as otherwise provided in this section, the administrator shall deposit in the general fund of this state all funds received under this [act], including the proceeds from the sale of abandoned property under Section 13. The administrator shall maintain an account with an amount of funds reasonably estimated to be sufficient to pay claims allowed [in each calendar quarter]. If the aggregate amount of the owner's claims allowed at any time exceeds the amount held in the account, excess claims must be paid as a priority claim out of the general funds of the state.

Comment

This language is added to make it clear that after abandoned funds are received and deposited by the administrator into the general funds of the state, but if the administrator does not hold readily available funds sufficient to honor the valid claims by owners, the owners are nevertheless entitled in all events to be paid out of the general funds of the state as a priority claim. *Also see* subsection (d).

(b) The administrator shall:

(1) record and retain the name and last known address of each person shown on the holders' reports to be the apparent owner entitled to the property;

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

(3) with respect to each policy of insurance or annuity listed in the report of an

insurance or annuity company, its number, the name of the company, and the amount [due] [paid].

(c) Before making a deposit of funds received under this act to the general fund, the administrator may deduct:

(1) expenses of sale of abandoned property;

(2) costs of mailing and publication in connection with abandoned property;

(3) reasonable service charges; and

(4) expenses incurred in examining records of holders of property and in collecting the property from those holders determined to hold unremitted property.

(d) Funds received by the administrator as unclaimed property under this [act] are custodial funds held by the state for the benefit of owners, are not funds that belong to the state, and payment of a claim may not be avoided by the state on an assertion of sovereign immunity.

Comment

This provision is intended to make it clear that unclaimed property held by the state as custodian under this act for the benefit of the owner is not property of the state and payment of a claim may not be avoided by a claim of sovereign immunity.

SECTION 15. CLAIM OF ANOTHER STATE TO RECOVER PROPERTY.

(a) If property is received by the administrator and the administrator is aware that the property is subject to the superior claim of another state, the administrator shall:

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

(2) return the property to the holder so that the property may be paid or delivered to the other state.

(b) Except for an agreement to indemnify under subsection (e), a formal agreement may not be required for the administrator to undertake such transfer to the correct state, other than as provided in subsection (e).

(c) Property in the custody of the administrator under this [act] is subject to recovery by another state if:

(1) the property was paid or delivered to the custody of this state because the records of the holder did not reflect a last-known address of the apparent owner in the other state and:

(A) the other state later establishes that the last-known address of the apparent owner or other person entitled to the property was in the other state;

(B) under the laws of the other state the property has become subject to a claim of abandonment by the other state;

[(2) the property was paid or delivered to the custody of this state because the laws of the other state did not provide for a custodial taking of the property, but under laws of the other state subsequently enacted, the property has become subject to a claim of abandonment by that state;]

(3) the records of the holder did not accurately identify the owner of the property and the last-known address of the owner was in another state, and under the laws of the other state the property has become subject to a claim of abandonment by the other state;

(4) the property was subjected to custody by this state under Section 5(6) and under the laws of the state of domicile of the holder, the property has become subject to a claim of abandonment by the state of domicile; or

(5) the property is a sum payable on a traveler's check, money order, or similar instrument that was purchased in the other state and delivered into the custody of this state under

Section 5(7) and under the laws of the other state the property has become subject to a claim of abandonment by that state.

(d) Unless waived by the administrator, a claim of another state to recover abandoned property must be presented in a form prescribed by the administrator. The administrator shall decide the claim not later than [90] days after it is presented. The administrator shall allow the claim on determining that the other state is entitled to the abandoned property under subsection (a).

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

Comment

Section 15 is to be read together with Section 5. Together Sections 5 and 15 are designed to carry out the priority scheme set out by the Court in *Texas v. New Jersey*, 379 U.S. 674 (1965). In general the state in which the owner had his or her last known address has first priority to claim abandoned property. Where there is insufficient information to permit this assertion of custody, the state of the holder's domicile takes the property and holds it subject to a later claim by the state of the owner's last known address.

Paragraph (1) of subsection (a) provides that if property was paid to the state of the holder's domicile because the last known address of the owner was unknown and it is later established by another state that the last known address of the person entitled to the property was in the other state, the state of domicile should pay the property over to the other state.

Paragraph (2) parallels Section 5, paragraph (4), which permits the state of corporate domicile to take if the state of the last known address has not specifically exempted the property from its unclaimed property laws but simply does not provide for the custodial taking of the property. If the state of the last known address subsequently enacts an unclaimed property law which covers the property, the taking state must turn it over, unless the state of the last known address of the owner exempts it from custodial taking.

Paragraph (3) addresses the problem of *Nellius v. Tampax, Inc.*, 394 A.2d 333 (De. Ch. Ct. 1978) in which the holder's records did not reflect the fact that the record owner had sold the property to another. The court concluded, under *Texas v. New Jersey*, that the holder's records were controlling and that it could properly report and deliver the property to the state in which its records showed the owner to be resident. However, as provided in *Texas v. New Jersey* and in paragraph 4, the state of the owner's actual residence could then claim the property from the state to which it was initially reported.

Paragraph (4), paralleling Section 5(6), provides that property initially claimed under a “contacts” test because there was no last known address and the state of domicile had no applicable unclaimed property law may be reclaimed by the state of corporate domicile if it enacts an applicable unclaimed property law, unless the first property state specifically exempts the property form custodial taking under its laws, in which case full faith and credit must be given to that state’s laws.

Subsection (e) provides that the state that initially receives property later claimed by another state may require an indemnification agreement from the claiming state.

SECTION 16. FILING CLAIM WITH ADMINISTRATOR; HANDLING OF CLAIMS BY ADMINISTRATOR; ACTION TO ESTABLISH CLAIM.

(a) A person, other than another state, claiming to be the owner of property paid or delivered to the administrator may file a claim for the property on a form prescribed by the administrator and verified or signed under the penalty of perjury by the claimant.

(b) The administrator may waive the requirement of a claim being filed and pay property directly to a person if:

(1) the person receiving payment is shown to be the same person as the apparent owner included in a report of unclaimed property;

(2) the administrator reasonably believes that the person is entitled to receive the property; and

(3) the property has a value of less than $[250].

(c) The administrator may pay or deliver property to a claimant if the administrator has been given proof sufficient to establish to the satisfaction of the administrator that the claimant is the rightful owner of the property.

(d) Not later than 90 days after a claim is filed, the administrator shall allow or deny the claim and give written notice of the decision to the claimant. If the claim is denied, the administrator shall inform the claimant of the reasons for the denial and specify what additional evidence, if any, is required before the claim will be allowed. The claimant may thereafter file an amended claim with the administrator, or maintain an action under subsection (g). An amended claim must be treated as an initial claim for purposes of this section.

Comment

A person who claims the right to abandoned property as the owner is entitled to a prompt determination and payment of the claim, and if denied to know the reasons why, and what other information might be required. The claimant then has the option of submitting an amended claim or proceeding to court under Section 16(g), or may abide by the administrator's decision. No limitation is imposed on the number of claims or amended claims that may be filed by the same person with respect to the same property since conceivably additional new information bearing on its ownership may turn up at any time. But an unsuccessful suit under Section 16(g) would bar the plaintiff/claimant from filing further claims absent new evidence. Subsection (b) which allows the administrator to waive the requirement that a claim be filed under certain circumstances was added at the suggestion of NAUPA.

(e) Not less than 30 days after a claim is allowed by the administrator, the administrator shall deliver or pay the property or the net proceeds of a sale of the property to the claimant, together with any dividends, interest, or other increments to which the claimant is entitled under Section 12.

(f) Before making delivery or payment to the owner of a claim allowed by the administrator, the administrator shall:

(1) determine, by making inquiry of appropriate agencies in this state, if there are legally enforceable debts which the claimant owes for:

(A) child support arrearages to include child support collection costs and child support arrearages that are combined with maintenance;

(B) civil and criminal fines, court costs, surcharges, or restitution imposed by final court judgment; or

(C) state or local taxes, penalties, and interest that have been determined to be deficient and are delinquent, or as to which notice has been recorded with the [Secretary of the State]; and

(2) withhold from delivery or payment to the claimant and deliver to the appropriate agency an amount sufficient to discharge the debts the administrator determines to be owed by the claimant.

Comment

The language added to Subsection (e) requires the administrator to determine if there are certain debts owing by the owner that need to be satisfied before turning the funds or property over to the owner.

(g) A holder who pays the owner for property that has been delivered to this state and which, if claimed from the administrator by the owner, would be subject to an increment under Section 12, may recover from the administrator the amount of the increment.

(h) A claimant whose claim has been denied, or whose claim has not been acted on not later than [90 days] after its filing, may not later than a year after filing the claim, maintain an original action to establish the claim in the [appropriate] court, naming the [administrator] as a defendant. [On final determination of a suit brought under this subsection, the court may award the [claimant] [prevailing party] reasonable attorney's fees and expenses of litigation.]

Comment

If the administrator fails to act on an owner's claim within 90 days, or if the claimant is dissatisfied with the administrator's decision, the claimant has a year from the date the claim was filed to file suit to establish the claim.

SECTION 17. ELECTION TO TAKE PAYMENT OR DELIVERY.

(a) The administrator may decline to take custody of property reported under this [act] if the administrator considers the property to have a value less than the estimated expenses of notice and sale.

(b) If a holder has not succeeded in notifying the apparent owner of property under section 10(a), the holder may voluntarily report and deliver to the administrator property that is not yet presumed abandoned. On delivery, to the administrator, the property is deemed abandoned [and the holder shall no longer be liable to anyone with respect to any current or future claim to the property].

Comment

This change to the act would permit a holder to deliver property voluntarily to the administrator before it has been presumed to be abandoned, which then converts it into abandoned property. The administrator may destroy or dispose of the property if it has no substantial value under Section 18. Upon delivery of the property to the administrator the holder is relieved of all further liability with respect to the property delivered.

[(c) The following property may not be reported and delivered to the administrator under subsection (b):

[(i) tangible property entitlements that are due or deliverable to the owner by the holder in a form other than money; and

(ii) tangible property taken from a safe deposit box under Section 3.]

Comment

This bracketed paragraph (c) sets out various types of property it has been suggested should not become abandoned property. It requires a decision by the Committee whether to include it or not.

SECTION 18. DESTRUCTION OR DISPOSITION OF PROPERTY HAVING NO SUBSTANTIAL COMMERCIAL VALUE; IMMUNITY FROM LIABILITY.

(a) If the administrator determines that property delivered under this [act] has no substantial commercial value or that the costs of taking custody and disposing of the property will exceed the value of the property, the administrator may disclaim the property or accept it and destroy or otherwise dispose of the property.

(b) Except for intentional misconduct or malfeasance, an action or proceeding may not be maintained against the state or any officer [or against the holder] for or on account of an act of the administrator under this section.

Comment

[Is the bracketed language appropriate?]

SECTION 19. PERIODS OF LIMITATION AND REPOSE.

(a) Expiration[, before, on, or after the effective date of this [act],] of a period of limitation on the owner's right to receive or recover property, whether specified by [contract], statute, or court order, [precludes] [does not preclude] the property from being presumed abandoned [or affect a duty to file a report or to pay or deliver or transfer property to the administrator as required by this [act]].

Comment

The first bracketed provision in this subsection asks the Committee to decide when the statutes of repose and limitations are to take effect. The second bracketed provision asks the Committee to make a choice of whether to apply the derivative rights doctrine to preclude a holder having to report and pay to the administrator property the owner of the property would be barred from recovering from the holder by contract, court order, or operation of law, such as the running of a statute of limitations.

(b) An action or proceeding may not be maintained by the administrator to enforce this [act] with respect to the reporting, delivery, or payment of property more than five years after the holder specifically identified the property in a report filed with the administrator or gave express notice in a record to the administrator of a dispute regarding specifically identified property. The parties may agree in a record to extend the limitation in this subsection.

Comment

This new provision would establish a five year statute of limitations on examinations for unclaimed property with respect to which the holder has filed a report or given express notice of a dispute.

(c) An action, proceeding, or examination may not be commenced by the administrator with respect to a duty of a holder under this [act] more than 10 years after the first date the duty arose.

Comment

This new provision returns to the 1981 Act and provides a statute of repose and bar to examination and required payment or delivery of property more than 10 years after a report of such property was due to be filed.

SECTION 20. REQUESTS FOR REPORTS; EXAMINATION OF RECORDS; LIMITATIONS ON USE OF INFORMATION AND DOCUMENTS OBTAINED BY THE ADMINISTRATOR.

(a) The administrator may require a person who has not filed a report, or a person who the administrator believes may have filed an inaccurate, incomplete, or false report, to file a verified report in a form specified 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 as to which the administrator has made inquiry; and

(3) specifically identify and state the amounts of property as to which there is a dispute as to whether it is reportable under this [act].

(b) The administrator, at reasonable times and on reasonable prior notice, may:

(1) examine the records of any person to determine whether the person has complied with this [act];

(2) issue an administrative subpoena requiring that such records be made available for examination;

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

(4) conduct the examination even if the person being examined believes it is not in possession of any property that must be reported, paid, or delivered under this [act].

(c) The administrator may contract with another person to conduct an examination under this section. If an individual, the other person may not be a person related to the administrator, and if a business entity, the other person may not be owned in whole or in part by the administrator or a person related to the administrator. [As used in this section a person related to the administrator means a person related by marriage or kinship within the third degree] [a related party under Section 267(c) of the Internal Revenue Code], or by common ownership. [In this subsection a person "related to the administrator" includes the administrator's spouse, child, stepchild, grandchild, parent, stepparent, sibling, step-sibling, half-sibling, aunt, uncle, niece, or nephew, or spouse of any of them, or any other person living in the administrator's home.]

Comment

That administrators are allowed to enter into contracts to engage outside examiners on a contingent fee basis to conduct unclaimed property examinations is a very serious issue for the holder community. Without exception, the holders and their representatives, including COST, the U. S. Chamber, the ABA, and the other members of the Holders Coalition have strongly recommended that the revised act prohibit the use of contingent fee examiners and consider placing even more restrictions on the hiring of private contractors on a non-contingent fee basis.

Were we able to go back in time to 1954, and were we drafting a new act on a blank slate, knowing what we now know, it is likely that the Drafting Committee would not allow administrators to contract with independent examiners on any basis, fixed or contingent. However, that does not now appear to be feasible based on NAUPA's statement that their members would be unable to carry out their responsibilities without being able to contract with independent examiners on a contingent fee basis. The Drafting Committee is unwilling to impose an absolute prohibition on the use of contingent fee examiners, although individual states that wish to do so may appropriately modify this section of the act to prohibit their use.

It is hoped that the constraints and reporting requirements introduced into this act will serve to ameliorate the worst aspects of the practice. The transparency best practices and contract best practices recommended by the Holders' Coalition for the most part have been included in this act, to the extent they were thought to be reasonable and appropriate and have been accepted as appropriate by the NAUPA Advisors to the Committee.

(2) Before authorizing another person to conduct an examination, the administrator shall give the person to be examined prior demand in a record to file a report and deliver property that

may be subject to this [act] not later than [60] days of receipt of the demand.

Comment

Before an examination can be commenced by a contractor, the person to be examined must be given notice and an opportunity to report and deliver abandoned property voluntarily.

(d)(1) If the administrator contracts with another person to conduct an examination on behalf of the administrator, the terms of the contract may provide for compensation of the person based on a fixed fee, hourly fee, or contingent fee.

Comment

If a state decides it wants to follow the lead of North Carolina, Illinois, and Virginia and prohibit the use of contingent fees in contracts with the third party examiners, it may do so by deleting the words "contingent fee" at the end of the first sentence of this subsection (4), and deleting everything following in this subsection (4), down to the last sentence and adjusting the following subsection as appropriate to reflect that decision.

(2) A contingent fee arrangement may not provide for a payment that exceeds [10] percent of the amount or value of property paid or delivered as a result of an examination.

(3) A contingent fee may not be payable with respect to property paid or delivered to the administrator under protest or that is the subject of pending litigation brought by a putative holder until the protest is withdrawn or otherwise resolved, or the litigation has been finally resolved in favor of the administrator.

(4) Any fee payable with respect to unreported securities must be calculated based on the fair market value of the securities as of the date they are turned over to the administrator and must be payable out of funds otherwise available to the administrator.

Comment

Continuing to permit administrators to engage outside examiners to conduct examinations on a contingent fee basis is a compromise between the demands of the holders and the requirements of the administrators. The practice is surprising and disconcerting to many people when they first learn of it. It is hoped that with the new reporting and transparency provisions, over time the administrators will develop the capability and capacity to perform examinations without having to rely on outside examiners, and it will no longer be thought to be necessary to resort to the practice.

(5) Before an examination is commenced by a person with whom the administrator has contracted, the administrator shall deliver to the person to be examined complete unredacted copies of all contracts between the administrator and the examiner, and between all persons participating in conducting the examination and the contractor by whom they are employed or engaged.

Comment

A person to be examined by a third party contractor is entitled to be given complete unredacted copies of the contract between the examiner and the administrator and all persons participating in the examination.

(e) A contract between the administrator and another person which authorizes the other person to conduct an examination under this section may not be awarded unless it is awarded pursuant to the code section authorizing the state's competitive procurement of services to be provided by private contractors [and has been approved by the state Comptroller or other appropriate official].

(f) All contracts described in subsection (e) must be [posted without a redaction on a website maintained by the administrator accessible to the public;] [or are subject to public disclosure without redaction pursuant to [the state's Freedom of Information Act];]

(g) Before entering into a contract with another person to conduct an examination under subsection (e), the administrator shall make a good faith determination that:

(1) it is not economically feasible or would not be fiscally responsible to hire as employees of the state a sufficient number of persons who are competent to conduct such examinations to reasonably insure voluntary compliance of this [act]; and

(2) it is not economically feasible or would not be fiscally responsible to authorize

auditors employed by the [Department of Revenue] of this state to conduct such examinations on behalf of the administrator.

(h) Before entering into a contract with another person to conduct examinations on a contingent fee basis, the administrator shall determine that it is not economically feasible, or would not be fiscally responsible to contract with another person, [including persons who are residents of this state], to conduct such examinations on an hourly or fixed fee basis.

[(5) The administrator's determinations under paragraphs (2) and (3) must be reviewed by and concurred in by the state [Comptroller] before the contract may be awarded.]

Comment

It is the view of the Drafting Committee that the decision by an administrator to use examiners should be subject to review by some other responsible state official. States may elect to default to their existing processes for awarding services contracts. Obviously, even if using state employees to audit would be fiscally responsible, if the legislature fails to appropriate sufficient funds to do so, it would not be economically feasible to do so.

(f) Not later than three months after the end of the state's fiscal year, the administrator shall compile and submit a report to the [Governor, the Comptroller, the Speaker of the Senate, and the Speaker of the House] which must contain the following information with respect to the preceding fiscal year:

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

(A) the part voluntarily paid or delivered, and

(B) the part paid or delivered as a result of an examination, which amount must be further separated into the parts recovered as a result of an examination conducted by state employees, and the part recovered as a result of an examination conducted by outside parties under contract, and further divided between those parts recovered under hourly or fixed fee contracts and those parts recovered under contingent fee contracts;

(2) the total amount.

(A) paid as compensation to state employees who conducted examinations, and the percentage the total compensation paid to them bears to the amount paid or delivered to the administrator as a result of the examinations;

(B) the names and amounts paid to all outside contractor examiners on a fixed fee or hourly basis, and the percentage the total compensation paid to them bears to the total amounts paid or delivered to the administrator as a result of the examinations by them; and

(C) the names and amounts paid as contingent fees to contract examiners, and the percentage the total compensation paid to them bears to the total amounts paid or delivered to the administrator as a result of the examinations;

(3) the total amount and value of all property paid or delivered by the administrator to owners who made claims for property held by the administrator and the percentage the total payments made or value of property delivered bears to the total amounts paid or value delivered to the administrator; and

(4) the total amount of:

(A) claims made by persons claiming to be owners which were denied;

(B) funds received that were made available for its use, and

(C) funds received and value of property held by this state subject to the claims of owners.

Comment

Subparagraph (f) establishes reporting requirements intended to better inform the public and other responsible officials of the state with how much net revenue from unclaimed property is being collected through the use of contract examiners and at what cost. The current acts do not require such disclosures and contracts are awarded which often pass outside public notice, and the cost of these audits are sometimes hidden when only the net amount of unclaimed property recovered is reported after the fees are deducted. It also requires detailed reporting of how much property is returned to owners, how many claims are denied, and how much net revenue is generated for the benefit of the state. This report will allow assessment of how effective the administrator has been in collecting unclaimed property and returning unclaimed property to owners, and how such net revenue has been recovered for the benefit of the state.

Contingent fee auditors are paid substantial amounts of money and have an economic incentive to recover the greatest amounts possible, which can reasonably be expected to incentivize them to conduct aggressive examinations. It also incentivizes them to be selective of the potential targets in choosing who to examine. This circumstance has recently prompted North Carolina to enact legislation banning as a general matter (except with regard to life insurance companies) the use of contingent fee auditors on the basis that they "may impair an auditor's independence or the perception of the auditor's independence by the public." N.C. Gen. Stat. Section 116B-8. Illinois and Virginia have banned the use of contingent fee examiners for in-state businesses. NAUPA representatives have said in their presentations to the drafting committee that they would be severely constrained in their ability to do the job assigned to them were they not able to use outside examiners and pay them on a contingent fee basis. These new provisions are intended to allow them to continue to do so if it is determined that they are necessary and it is fiscally responsible to do so, but mandates greater transparency and disclosure of the practice to other state authorities and to the public.

(g) Reports compiled by the administrator pursuant to subsection (f) are public records [available for inspection on a website maintained by the administrator which is accessible to the public] [subject to public disclosure without redactions pursuant to [the state's Freedom of Information Act]].

[(h) For a period of [two] years after leaving employment with the state, neither the administrator nor any persons employed by the administrator who participated in, recommended, or approved the award of an unclaimed property examination contract [on or after the effective date of this [act,]] may be employed by, contracted with, or compensated in any capacity by the contractor, or an affiliate of the contractor whose contract the administrator or other employee of the administrator participated in, recommended, or approved.]

Comment

Developments which have recently come to light in Delaware caused that state to enact laws imposing post-employment constraints on administrators who have awarded contingent fee contracts to third party examiners from being able to leave state employment and go to work for the firms to whom they have awarded contingent fee examination contracts.

(i) The administrator may examine at reasonable times the records of an agent, including a dividend disbursing agent, transfer agent, or tax reporting agent, of the holder of property if the administrator has given the notice required by subsection (b)(3) to both the holder and the agent at least 60 days before the examination.

(j) Documents and working papers obtained or compiled by the administrator, or the administrator's agents, employees, designated representatives or contractors, in the course of conducting an examination are subject to the confidentiality provisions of Section 27, and are not public records. However, the documents and papers may be:

(1) used by the administrator in the course of an action to collect unclaimed property or otherwise enforce this [act];

(2) used in joint examinations conducted with or pursuant to an agreement with another state, the federal government, [a foreign country or subordinate governmental unit of a foreign country] or any other governmental subdivision, agency, or instrumentality if the other governmental entity is legally bound to maintain the confidentiality of information obtained from persons examined in a manner equivalent to Section 27 of this [act];

(3) disclosed to the administrator of another state for that state's use in circumstances equivalent to those described in this subdivision, if the other state is legally bound to maintain the confidentiality of information obtained in a manner equivalent to the provisions of Section 27; or

(4) produced pursuant to subpoena or court order.

(k) The administrator shall issue rules regarding examination procedures and standards to include rules regarding procedures and standards for the use of estimations, extrapolations, and statistical sampling in conducting an examination under this [act].

(*l*) All examinations performed by the administrator or the administrator's authorized agents or contractors of the administrator must be performed in accordance with generally accepted examination practices and standards applicable to unclaimed property examinations.

(m) At the conclusion of an examination the person whose books and records were examined must be provided a complete and unredacted copy in printed or printable electronic format of the examination report, which must identify in detail:

(1) the work performed;

(2) the property types reviewed;

(3) any estimation techniques, extrapolations, and statistical sampling used in conducting the examination;

(4) the methodology of any estimation techniques, extrapolations, and statistical sampling used in conducting the examination;

(5) calculations showing the amount of property determined to be due; and

(6) a statement of the examiner's findings, together with all other correspondence, documentation, or other information which formed a basis for the findings.

Comment

In issuing rules under this subsection, administrators are encouraged to do so in a way that promotes the use of relevant national standards and uniformity of practice among the states.

(n) If the person being examined has not maintained the records required by Section 21 of this [act], the administrator or agents or contractors of the administrator may determine the amount, if any, of unclaimed property due and owing using a reasonable method of estimation based on all information available to the administrator, including extrapolation and the use of statistical sampling when appropriate and necessary, consistent with the examination standards promulgated under subsection (j).

(o) If the person being examined has filed all required reports and has maintained the records required by Section 21, all the following apply to the examination:

(1) The examination must include a review of the person's books and records;

(2) The examination may not be based on an estimate unless the person being examined expressly consents in a record to the use of an estimate; and

(3) The examiner shall consider all evidence presented by the person being examined to remediate the findings.

Comment

New paragraphs (h), (i), (j), and (k) were adapted from 2013 Mich. Pub. Acts, 148 (Oct. 29, 2013).

[(p) If an examination of the records of a person results in the disclosure or discovery of property reportable under this [act] which has not been reported to the administrator, the administrator may assess the cost of the examination against the holder at the rate of $[200] a day for the days the examination was conducted, or a greater amount, if it is reasonable and was actually incurred, but the assessment may not exceed the lesser of [$5,000] or the value of the unreported property found to be reportable.]

Comment

A question was raised at the reading before the Conference whether this is a penalty provision and is it appropriate.

(q) If a person being examined believes that the examiner is making unreasonable or unauthorized demands, or is not proceeding expeditiously to complete the examination, the person may request that the administrator intervene and take such remedial action as the circumstances require, including countermanding the demands of the examiner, imposing time limits for the completion of the examination, or reassigning the examination to another examiner. The person making the request, or the person's authorized agent or attorney, shall be entitled to a conference with the administrator to present the matters that are the basis of the request. The conference may be held in person, telephonically, or by other electronic means.

Comment

Subparagraph (q) has been added to provide a method by which a person being examined may seek timely intervention and redress from the administrator if the putative holder believes he is being treated unfairly by the examiner.

SECTION 21. RETENTION OF RECORDS BY HOLDERS.

(a) Except as otherwise provided in subsection (b), a holder required to file a report under Section 8 shall maintain the records containing the information required to be included in the report for 10 years after the [earlier of] [later of] the date the report was filed, or the last date a timely report was due to be filed. The records required must include:

(1) the date, place, and nature of the circumstances that gave rise to the property right;

(2) the amount or value of the property; and

(3) the last known address of the owner, if known to the holder.

(b) If a holder sells, issues, or provides to others for sale or issue in this state traveler's checks, money orders, or similar instruments, other than third-party bank checks, on which the holder is directly liable, the holder shall maintain a record of the instruments while they remain outstanding, indicating the state and date of issue for [10] years after the holder files the report.

SECTION 22. DETERMINATION OF LIABILITY FOR UNREPORTED REPORTABLE PROPERTY; [ADMINISTRATIVE AND] JUDICIAL ENFORCEMENT.

(a) If the administrator finds from an examination conducted pursuant to Section 20 that a putative holder has failed or refused to pay or deliver property to the administrator that the administrator believes is reportable under this [act], the administrator shall issue a written determination of the putative holder's liability to pay or deliver, and provide written notice of the determination to the putative holder.

(b) If the putative holder does not comply with a determination by the administrator under subsection (a) within [90] days of the mailing of notice of the determination, the administrator may maintain an action in the [court], or in an appropriate court of another state, to enforce the determination and secure payment or delivery of past due unreported unclaimed property. The action must be brought within [one] year of the mailing of notice of the determination.

Comment

As revised, Section 22 provides a legal procedure by which an administrator who has determined that a holder has an unremitted unclaimed property obligation may pursue collection of property determined to be due to be paid to the administrator. When the administrator gives the putative holder written notice of the determination, the notice triggers the running of a 90 day period during which the putative holder may either pay or deliver the property or file suit to dispute the determination in whole or in part. If the putative holder does neither, the administrator has one year from the date of notice to commence an enforcement action against the putative holder. If no timely action is commenced, the administrator is thereafter barred from attempting to enforce his or her determination or collect funds determined to be due.

Alternative A

(c) If the putative holder against whom a determination of liability to pay or deliver reportable property believes the determination to be illegal, unjust, incorrect, or in error, in whole or in part, the putative holder may request a conference with the administrator no later than 30 days of the receipt of a notice of determination of liability to pay or turn over reportable property. If a timely request for a conference has been made:

(1) the administrator may designate an employee of the administrator's office to conduct the conference;

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

(3) a timely request for a conference tolls the 90-day period under subsection (2) until the notice of the decision of the administrator or the designee has been given to the putative holder, or the request for a conference has been withdrawn.

(4) the administrator shall set a time and place for the conference and the conference must be held not later than 20 days after the date of the request. The administrator shall give the person requesting the conference notice of when and where it will be held.

(5) The conference may be postponed, adjourned, and reconvened by the administrator or designee. The putative holder must have an opportunity to confer informally with the administrator or the designee and the examiner to discuss the determination and present matters for consideration that the putative holder and the examiner may consider informative and relevant to any issues raised by the putative holder concerning the validity of the determination. An oath may be required and judicial rules of evidence may not be enforced.

(6) The administrator or the designee, with the approval of the administrator, may adjust a determination in part or withdraw it in its entirety.

(7) The administrator or the designee shall issue a decision in a record and provide a copy of the record to the putative holder and the examiner not later than 20 days of the conclusion of the conference. A putative holder must not be prejudiced in any manner by seeking or failing to seek or pursue a conference.

(8) A conference is not an administrative remedy and does not constitute a contested case subject to the [Administrative Procedures Act].

(9) The administrator must not be prejudiced in any manner by failing to act

within the periods prescribed in subsection (c), except that interest does not accrue on any amount determined to be reportable property during any period in which the administrator or designee has not acted within the period prescribed in this subsection until the earlier of such time as a suit is filed by the putative holder or the [90] day period for filing suit under subparagraph (d)(1) has expired.

(10) At any time before the filing of suit by the putative holder, the administrator, in the administrator's discretion, may hold a conference with the putative holder without the requirement of timely written request for a conference.

Comment

Within the 30 days from the date of receipt of the record of the determination the putative holder may, but is not required to request an informal conference with the administrator or a designee of the administrator. A timely request for a conference tolls the running of the 90 day period within which to file suit to challenge the determination until after the conference has been held and the administrator or designee has issued conference findings. The conference is informal. It is not an administrative procedure or contested case. No rules of evidence are enforced, no testimony is taken, and no record is created. If the administrator or designee agrees with the holder the determination may be altered or reversed in whole or in part by the administrator or designee.

(d) If the putative holder does not request an informal conference or is not satisfied with the outcome of the informal conference, the putative holder may:

(1) within ninety (90) days after receipt of a determination of liability to pay or deliver reportable property, file suit against the administrator in the [___] court of this state challenging all or part of the administrator's determination of liability and seek a judgment of the court declaring that the determination or the portion thereof being challenged is invalid, unlawful, or unenforceable; or

(2) pay the amount or deliver the property determined to be reportable to the administrator under protest, and not later than six (6) months of payment or delivery, maintain an

action against the administrator in the [___] court for a refund of all or part of the amount paid or return of all or part of the property delivered.

Comment

A putative holder who disputes the determination of the administrator either before or after an informal conference has two avenues for judicial review of the determination: (1) to pay or deliver the property and within one year file suit for refund, or (2) not pay and within the 90 day period (plus any period tolled) file a suit challenging the determination by the administrator. During the 90 day period and while a timely filed suit is pending the administrator is not barred from proceeding to collect the amount.

(e) If the putative holder pays or is required to pay the amount or delivers the property determined to be reportable property to the administrator at any time after filing suit for a declaratory judgment under subparagraph (d)(1), the suit must continue as if it had been originally filed as a suit for refund or return of property under subsection (d)(2).

Comment

After the putative holder has filed a timely suit challenging the determination it may elect to pay or deliver the property the administrator has determined that the putative holder owes, and the suit will thereafter continue as a suit for refund.

(f) On the final determination of any suit brought under subsection (d), the court [may] [shall], on application or petition, award to the [plaintiff] [prevailing party] its reasonable attorney's fees and expenses of litigation.

(g) A putative holder who is the prevailing party in a suit for refund of money paid to the administrator [shall be entitled to] [may be awarded] interest on the amount recovered from the date paid to the administrator at the same rate a holder is required to pay to the administrator under Section 24(a).

Comment

This provision would either allow or require the court to award to the prevailing party its reasonable attorneys' fees and expenses of litigation. The foregoing provisions of Section 22 were adapted from the Tennessee Tax Procedures Act of 1996, Tenn. Code Ann. Section 67-1-

1801, et seq.

Alternative B

[(c) If the putative holder against whom a determination of liability to pay or deliver unclaimed property has been made believes the determination, in whole or in part, is illegal, unjust, incorrect, or in error, the putative holder not later than 90 days after the mailing of a record of determination of liability to pay or deliver reportable property, may initiate a proceeding for review of the determination under the [State's Administrative Procedures Act]. The ruling of the administrative proceeding in all events shall be subject to judicial review by the [________] court as a matter of right in a *de novo* proceeding on the record in which either party is entitled to introduce evidence in addition to or as a supplement to the record.]

End of Alternatives

Legislative Note: *Adoption of Alternative B will require that subsections (d) - (f) be deleted.*

Comment

An alternative subsection (c) is provided for those states that may prefer that instead of providing for an informal conference with the administrator or the administrator's designee, a person who is dissatisfied with the results of an examination would first have to pursue an intermediate administrative remedy to resolve the dispute before the dispute can be taken to court. In Tennessee, unlike the procedure for going to court without an administrative proceeding used in disputes of taxes administered by the Department of Revenue, the State Board of Equalization procedures for review of property tax assessments mandate a hearing before an administrative judge from which either party may appeal to the Chancery Court for a trial *de novo* on the record. In the Reporter's experience this is a cumbersome exercise that causes delay and additional expense. By contrast, experience has shown that more than 80% of disputed tax assessments which are taken to informal conference in the Tennessee Department of Revenue result in an outcome sufficiently satisfactory to the taxpayer to allow resolution of the issue without suit thereafter being filed in court.

The Holders' Coalition recommends including in the act a procedure for administrative review specific to unclaimed property disputes arising from examinations by the administrator of a putative holder. This five page long procedure, if adopted, would be a *sui juris*, one of a kind administrative procedure which litigators with experience in trying an administrative appeal under their state's administrative procedures act would have to learn anew in order to handle an unclaimed property administrative appeal. No good reason has been shown why the Drafting

Committee should undertake to reinvent this particular new wheel. The Holders Coalition's suggestion that judicial appeal of an administrative procedure should be *de novo* with the parties being able to introduce additional evidence to supplement the record is a good one and is incorporated into the act in the alternative subsection (c).

SECTION 23. INTERSTATE AGREEMENTS AND COOPERATION; JOINT AND RECIPROCAL ACTIONS WITH OTHER STATES.

(a) The administrator may exchange information with another state [or foreign jurisdiction] relating to abandoned property or its possible existence, and the administrator may in a record authorize another state [or foreign jurisdiction], or a person acting on behalf of another state [or foreign jurisdiction], to examine its records as authorized in Section 20; provided that the other state either has statutory confidentiality requirements comparable to those in Section 27 or agrees in a record to be bound by this state's confidentiality requirements.

(b) The administrator may join with one or more other states [or foreign jurisdictions] to examine and seek enforcement of this [act] against any person who is believed to be holding property reportable under this [act].

(c) At the request of another state [or foreign jurisdiction], the Attorney General of this state may maintain an action on behalf of the other state [or foreign jurisdiction] to enforce, in this state, the unclaimed property laws of the other state [or foreign jurisdiction] against a holder of property subject to a claim of abandonment by the other state, if the other state [or foreign jurisdiction] has agreed to pay expenses incurred by the Attorney General in maintaining the action.

(d) With the approval of the Attorney General of this state, the administrator may request that the Attorney General of another state [or foreign jurisdiction] commence an action in the other state [or foreign jurisdiction] on behalf of the administrator, or with the approval of the Attorney General the administrator may retain any private attorney in this state or another state to commence an action in this state on behalf of the administrator. This state shall pay all expenses, including attorney's fees, in maintaining an action under this subsection. The expenses and attorney's fees may be paid from money received under this [act]. With the approval of the Attorney General, the administrator may agree to pay attorney's fees based in whole or in part on a percentage of the amount or value of any property recovered in the action. Any expenses or attorney's fees paid under this subsection to recover unclaimed property may not be deducted from the amount that is subject to the claim by the owner under this [act].

Comment

The language "or foreign jurisdiction" in brackets is there to recognize that a significant number of foreign countries or their subordinate jurisdictions have enacted unclaimed property laws which are similar to ours. These countries are Australia, Germany, France, Kenya, New Zealand, the United Kingdom, and the Canadian provinces of Alberta, British Columbia, and Quebec. All are countries with which the United States has friendly commercial relations and treaties, and all but France and Germany are English commonwealth countries or provinces with an English language based common law legal system. No good reason appears why states should require unclaimed property whose owner resides in one of these countries to be turned over to our states rather than their unclaimed property administrators. It equally makes no sense why state administrators would not want to work cooperatively with their counterparts in those jurisdictions to foster and pursue the common goals of protecting abandoned unclaimed property and returning it to the rightful owner.

There is also no reason why property which falls into the third priority rule with respect to situations where neither the first nor the second priority state claims the property should not just as well apply to property whose residence is in a foreign country that does not provide for custodial taking by the sovereign of abandoned unclaimed property. However, as to them the requirement to give full faith and credit does not exist.

(e) In an action to enforce this [act] under Section 22, if no court of general jurisdiction in this state has jurisdiction over the defendant, the administrator, with the approval of the Attorney General, may commence an action in a federal court or a court of any other state having jurisdiction over the defendant.

Comment

The administrator is a necessary party to any judicial or administrative proceedings concerning the receipt, recovery, disposition, or handling of unclaimed property that is or may be payable to or distributable into the custody of the administrator. The administrator shall have a right to intervene and participate in any judicial or administrative proceeding when in his or her judgment, to do so will be in the best interest of this state, or of the apparent owner of the unclaimed property, or may be necessary and appropriate to conserve and safeguard the unclaimed property against dissipation, undue diminishment or adverse discriminatory treatment.

SECTION 24. INTEREST AND PENALTIES.

(a) A holder who fails to report, pay, or deliver property within the time prescribed by this [act] shall pay to the administrator interest at [a fixed annual rate of [___]% percent] [two percentage points above the annual rate of discount in effect on the date the property should have been paid or delivered for the most recent issue of 52-week United States Treasury bills] [the interest payable to the Department of Revenue of this state on delinquent taxes] on the property or value thereof from the date the property should have been reported, paid or delivered to the administrator, until paid or delivered to the administrator.

(b) Except as otherwise provided in subsection (c), a holder who fails to report, pay, or deliver property within the time prescribed by this [act], or who fails to perform other duties imposed under this [act], may be required to pay to the administrator, in addition to interest as provided in subsection (a), a civil penalty of $[200] for each day the report, payment, or delivery is withheld, or the duty is not performed, up to a cumulative maximum amount of $[5,000].

(c) A holder who enters into a contract or other arrangement for the purpose of evading its obligations under this [act] or who willfully fails to report, pay, or deliver property within the time prescribed by this [act], or willfully fails to perform other duties imposed by this [act], may be required to pay to the administrator, in addition to interest as provided in subsection (a), a civil penalty of $[1,000] for each day the report, payment, or delivery is withheld, or the duty is not performed, up to a cumulative maximum of $[25,000], plus twenty-five percent of the amount of value of any property that should have been but was not reported.

(d) A holder who makes a fraudulent report may be required to pay to the administrator, in addition to interest as provided in subsection (a), a civil penalty of $[1,000] for each day from the date the report was made, up to a cumulative maximum of $[25,000], plus twenty-five percent of the amount or value of any property that should have been but was not reported.

(e) The administrator for good cause may waive, in whole or in part, [interest under subsection (a) and] penalties under subsections (b) and (c), and shall waive penalties if it is determined that the holder acted in good faith and without negligence.

SECTION 25. AGREEMENT TO LOCATE PROPERTY FOR OWNERS.

(a) An agreement by an owner with another person, the primary purpose of which is to locate, deliver, recover, or assist in the recovery of unclaimed property that is presumed abandoned, is void and unenforceable if it was entered into during the period commencing on the date the property was paid or delivered to the administrator and extending to a time that is [24 months] after the date the property was paid or delivered to the administrator. This subsection does not apply to an owner's agreement with an attorney to pursue a claim for recovery of specifically identified unclaimed property in the custody of the administrator, or to contest the administrator's denial of a claim for recovery of unclaimed property held in custody.

Comment

[Why 24 months? Is that a reasonable quarantine period?]

(b) An agreement between an owner and another person, the primary purpose of which is to locate, deliver, recover, or assist in the recovery of property, is enforceable only if the agreement

(1) is in a record which clearly sets forth the nature of the property and the services to be rendered;

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

(3) states the amount or value of the property estimated to be recovered both before and after the fee or other compensation has been deducted.

(c) If an agreement in subsection (a) applies to mineral proceeds, and the agreement contains a provision to pay compensation to the locator based in whole or in part on a part of the underlying minerals or any mineral proceeds not then presumed abandoned, the [provision] [entire agreement] is void and unenforceable.

(d) An agreement under subsection (a) which provides for compensation in an amount that is unconscionable is unenforceable other than by the owner. If an owner believes that he or she has agreed to pay compensation that is unconscionable, or the administrator, on behalf of the owner who so believes, may maintain an action to reduce the compensation to the maximum lesser amount that is not unconscionable. [The court may award reasonable attorney's fees and expenses of litigation to the prevailing party in the action.]

(e) This section does not preclude an owner from asserting that an agreement covered by this section is invalid on grounds other than it provides for payment of unconscionable compensation.

(f) An owner who has contracted with another person to locate, deliver, recover, or assist in the recovery of property of the owner that is in the custody of an administrator may appoint or designate the other person as the owner's agent. The appointment or designation must be in a record signed by the owner. The owner's agent is entitled to receive from the administrator all information concerning the unclaimed property, including information that would otherwise be confidential, that the owner would be entitled to receive. The owner's agent may bring and maintain actions against the administrator on behalf of and in the name of the owner, if the agent is authorized by the owner to have that authority.

[SECTION 26. FOREIGN TRANSACTIONS.

(a) Except as provided in subsection (b), this [act] does not apply to property held, due, and owing to a person whose last known address is in a foreign country or to property arising out of a foreign transaction where the property is held in a foreign country or location outside the United States, if the foreign country, or a subordinate governmental unit of the foreign country, has laws which entitle it to take and hold unclaimed property of its citizens and residents which are comparable to the laws of this state.

(b) If the property has been voluntarily turned over to this state by the holder pursuant to Section 4(5), the administrator in whose custody the property has been placed may deliver the property to the foreign country or subordinate government unit of the foreign country on receipt of a record from the other country or unit requesting its payment or delivery.]

Comment

This Section is bracketed until there is a decision by the Conference whether property held for the benefit of an owner whose address is outside of the United States is reportable property. Several foreign jurisdictions have unclaimed property laws similar to ours that arguably may be entitled to priority over a claim of the administrator. If this provision is adopted then the bracketed language of "foreign jurisdictions" will come into play in agreements to locate property under Section 26. *Also see* Comment following Section 23(d), *supra*.

SECTION 27. CONFIDENTIALITY OF INFORMATION.

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

(1) the records of the administrator, and employees, agents, and contractors of the administrator;

(2) the reports and books of holders; and

(3) the information derived from an examination of the records of a person or

otherwise obtained by or communicated to the administrator.

(b) Any record or other information that is confidential under the law of this state, of another state where the property is located, or of the United States, when in the possession of any person, shall continue to be confidential when disclosed or delivered to the administrator. Any record or information that is confidential under law of another state [or foreign country] shall continue to be confidential when disclosed or delivered to the administrator by that other state [or foreign government or subordinate unit of the government].

(c) Confidential information concerning property presumed abandoned and reported and delivered to this state may be disclosed only to:

(1) an apparent owner, the owner's personal representative, next of kin, attorney-at-law, an agent designated in a record under Section 25(f) to have such information, or a person entitled to inherit from the person who was the apparent owner who is now deceased, or that person's personal representative, next-of-kin, attorney-at-law, or agent designated in a record to have such information pursuant to Section 25(f);

(2) another department or agency of the state or of the federal government; and

(3) the administrator of another state, [or of a foreign country or subordinate governmental unit of the foreign country], if the other state [or a foreign country or subordinate governmental unit of the foreign country] accords substantially reciprocal privileges to the administrator of this state and the administrator reasonably believes that it has and enforces legal requirements of confidentiality of records comparable to those of this state;

(d) Except as provided in subsection (b), the administrator shall include in published notices and on the Internet databases provided for in Section 9 (b)(2) and (3) the names of all apparent owners of property presumed abandoned and in the custody of this state, and may include additional information concerning an apparent owner's property on the Internet database if the administrator believes the information will assist in facilitating the identification and return of property to the owner and does not disclose protected confidential information.

(e) Each person with whom the administrator contracts to conduct examinations under this [act] on behalf of the administrator, and each affiliate, officer, director, owner, employee and independent contractor of such person is subject to the provisions of this section. Before undergoing an examination conducted by or on behalf of the administrator, the person to be examined may require, as a condition of disclosure of its records, that all persons participating in any way in the examination execute and deliver to the person to be examined a confidentiality agreement in a form reasonably satisfactory to the administrator.

(f) Any person subject to this section is subject to the provisions of [the statute of the state imposing criminal penalties for violation of a requirement of maintaining confidentiality of information].

Comment

Section 27 is a new provision providing for confidentiality intended to address holders' concerns about possible disclosure of their confidential information, and more importantly concerns that the confidential information of their customers be protected, especially where there are stringent federal requirements of client confidentiality imposed on financial institutions. This provision is adapted from the statutory confidentiality provisions dealing with taxpayer information in the hands of the Tennessee Department of Revenue.

(g) A holder is not required under this [act] to include any confidential or non-public information or data in any notices it is required to provide under this [act] to an owner of property held by the holder. If a holder is required to include the information or data in a report provided to the administrator, the holder may only be required to submit the information or data in a secure means. The holder must provide the administrator with a means to access the information or data.

Comment

Subsection (g) was included at the request of representatives of the securities industry to provide them and their customers additional safeguards for maintaining the confidentiality of their information mandated by federal law. A "secure means" can be such things as a strong password protected website or Internet address, or an encrypted compact disk, thumb drive or similar means.

SECTION 28. TRANSITIONAL PROVISIONS.

(a) An initial report filed under this [act] for property that was not required to be reported before the effective date of this [act], but which is required to be reported under to this [act], must include all items of property that would have been presumed abandoned during the 10-year period next preceding the effective date of this [act] as if this [act] had been in effect during that period.

(b) This [act] does not relieve a holder of a duty that arose before the effective date of this [act] to report, pay, or deliver property. Except as otherwise provided in Section 19(b), a holder that did not comply with the law in effect before the effective date of this [act] is subject to the applicable provisions for enforcement and penalties which then existed, which are continued in effect for the purpose of this section.

SECTION 29. RULES. In addition to the rules the administrator is required to adopt under this act, the administrator may also adopt [pursuant to the Administrative Procedures Act of this state] rules necessary to carry out this [act].

SECTION 30. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 31. 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.

Legislative Note: *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

SECTION 32. EFFECTIVE DATE. This [act] takes effect ____________________.

SECTION 33. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .