MISSING MONEY EXPOSES HEALTH CARE ORGANIZATIONS: THE TENSION BETWEEN STATE UNCLAIMED PROPERTY REPORTING AND HIPAA COMPLIANCE

V. Katie Davidson[*]

I. INTRODUCTION

In the United States, there are currently billions of dollars of unclaimed property waiting to be collected.[1] Unclaimed property is not limited to the loose change collected from uncashed checks. In most jurisdictions, unclaimed property includes uncollected life insurance policies,[2] gift cards,[3] credit balances,[4] stocks,[5] bonds,[6] safety deposit box

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[*] J.D. Candidate, May 2021, Louis D. Brandeis School of Law, University of Louisville; B.A., May 2018, Centre College; Certified Revenue Cycle Recovery Representative, September 2020, Healthcare Financial Management Association (HFMA™). I would like to thank Professor Ariana Levinson for guidance and mentorship during the Note-writing process and beyond. I would also like to thank the editors of the University of Louisville Law Review, past and present, for their boundless patience and diligence in preparing this Note for publication. Lastly, I would like to acknowledge the powerful women on whose shoulders I stand: my mother Elizabeth Estrada, the woman who models advocacy in every area of her life; my late great-grandmother Ernestine Baxter, the sharp-witted matriarch who never stood still; and the late Justice Ruth Bader Ginsburg, an advocate and jurist who blazed a trail so that I, too, could be an attorney.

[1] *See, e.g.*, Mike Cherry, *Many NH Cities, Towns Have Unclaimed Property With State*, WMUR MANCHESTER (Jan. 31, 2020), https://www.wmur.com/article/many-nh-cities-towns-have-unclaimed-property-with-state-1/30733161 [https://perma.cc/74XY-HZ3W]; Brian Lawson, *Alabama Has Nearly $1 Billion in Residents Unclaimed Property, Is It Yours?*, WHNT NEWS 19 (Feb. 6, 2020), https://whnt.com/taking-action/alabama-has-nearly-1-billion-in-residents-unclaimed-property-is-it-yours/ [https://perma.cc/4F2R-J45C]; Graham Brink, *Florida Has $2 Billion in Unclaimed Property. Is Some of It Yours?*, TAMPA BAY TIMES (Jan. 31, 2020), https://www.tampabay.com/news/business/2020/01/31/florida-has-2-billion-in-unclaimed-property-is-some-of-it-yours/ [https://perma.cc/3U8S-KSM2].

[2] *See* James M. Carson et al., *Dead or Alive? The Law, Policy, and Market Effects of Legislation on Unclaimed Life Insurance Benefits*, 31 NOTRE DAME J. L. ETHICS & PUB. POL'Y 1, 2 (2017).

[3] *See* Sean M. Diamond, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*, 60 EMORY L.J. 971, 973 (2011).

[4] Am. Bar Ass'n Section of Taxation, State and Local Taxes Comm., *An Examination of Unclaimed Property Laws After the Adoption of RUUPA: Suggestions for Continued Advancement*, 71 THE TAX LAW. 941, 971 (2018).

[5] T. Conrad Bower, *Inequitable Escheat?: Reflecting on Unclaimed Property Law and the Supreme Court's Interstate Escheat Framework*, 74 OHIO ST. L.J. 515, 517 (2013).

[6] *Id.*

contents,[7] estate real,[8] and much more.[9] All this property—intangible and tangible—has one thing in common: it is held by state governments pending collection by the rightful owner.[10] In most instances, state governments obtained the property from businesses by the process of escheatment.[11] Businesses, or property holders,[12] are required by state law to "escheat" unclaimed property after the dormancy period passes.[13] Escheatment involves collecting the property itself, along with any known information about the property owner, and compiling reports to submit to the appropriate state unclaimed property administrator.[14] After collecting and compiling this information, most states participate in publishing unclaimed property to an online, searchable database called MissingMoney.com.[15]

Health care organizations are a unique type of business, and therefore a unique type of property holder. Take, for example, a patient who visits the doctor's office and receives an unspecified service that costs $500. Due to a billing error, the patient overpays for the service. By the time the doctor's office notes the billing error and issues a refund, the patient has moved and does not receive the refund. The credit on that patient's account remains untouched until two years later. The doctor's office is left with a credit balance that they are obligated under unclaimed property law to report.[16] Along with a check in the amount of the patient's credit, the doctor's office reports the patient's name, last-known address, birthday, phone number, and Social Security number. The state unclaimed property administrator eventually takes this information and publishes a notice so that the rightful owner can come forward to claim his or her missing money. In most cases, this unclaimed property will end up on MissingMoney.com—along with the patient's name, the name of the doctor's office, and the approximate amount of money the patient is owed. All of this data is accessible to anyone with a computer, internet connection, and a name to search.

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[7] Nat'l Ass'n of Unclaimed Prop. Adm'rs, *What is Unclaimed Property*?, UNCLAIMED, https://unclaimed.org/what-is-unclaimed-property/ (last visited July 12, 2020) [hereinafter NAUPA].

[8] *See* John V. Orth, *Interest Follows Principal: Why North Carolina Should Pay Interest on Unclaimed Personal Property*, 37 CAMPBELL L. REV. 321, 321 (2015).

[9] *See, e.g.*, NAUPA, *supra* note 7; Bower, *supra* note 5, at 517–18.

[10] *See* Orth, *supra* note 8, at 321–22.

[11] *See* Bower, *supra* note 5, at 520–23.

[12] *See id*. at 528.

[13] *See id.*

[14] Anthony L. Andreoli & Josiah S. Osibodu, *Unclaimed Property*, J. OF ACCT. (Feb. 1, 2004), https://www.journalofaccountancy.com/issues/2004/feb/unclaimedproperty.html.

[15] MISSINGMONEY.COM, https://missingmoney.com/ (last visited Feb. 12, 2020).

[16] *Unclaimed Property - Beware of Patient Credit Balances*, BAKERTILLY (Oct. 23, 2015), https://www.bakertilly.com/insights/unclaimed-property-beware-of-patient-credit-balances [https://perma.cc/ZLR2-UG3J].

If the above scenario bothers you, you are not alone. Today, privacy and health care are inexorably intertwined. An ordinary visit to the doctor comes with pages upon pages of forms containing information about patient rights.[17] While the principle that a health care organization can share sensitive information with state entities without patient consent is bothersome, it may also violate federal law.[18] Health care providers acting as both businesses and as providers of health care services are effectively between a rock and hard place.

This Note will first provide an overview of the traditional rationales supporting the interstate unclaimed property reporting scheme before discussing the modern trends of acts promulgated by the Uniform Law Commission (ULC). Next, this Note will discuss the metes and bounds of the Health Insurance Portability and Accountability Act (HIPAA) as it relates to health care privacy and protected health information (PHI). Then, this Note will analyze the challenges that health care organizations face as they attempt to comply with state law and federal law. Specifically, this Note will demonstrate that, under most state laws, complete and accurate reporting of unclaimed property almost certainly requires health care organizations to violate HIPAA.

As no court has yet declared that HIPAA preempts state unclaimed property laws, health care organizations are left walking a fine line between submitting incomplete unclaimed property reports and disclosing PHI to entities not covered under HIPAA, specifically state unclaimed property administrators. The ultimate aim of this Note is to heighten awareness of the competing obligations that health care organizations have as business associations under state law and as covered entities under HIPAA. This Note will offer three approaches to a solution that could be pursued individually or in conjunction with one another: (1) states can amend state unclaimed property laws to no longer require the reporting of PHI; (2) Congress can

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[17] *See* Office for Civil Rights, U.S. Dep't of Health & Human Servs., *Model Notices of Privacy Practices*, HHS.GOV, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/model-notices-privacy-practices/index.html [https://perma.cc/MV8T-MMTQ] ("The HIPAA Privacy Rule requires health plans and covered health care providers to develop and distribute a notice that provides a clear, user friendly explanation of individuals rights with respect to their personal health information and the privacy practices of health plans and health care providers."); *see also* Office for Civil Rights, U.S. Dep't of Health & Human Servs., *Your Information. Your Rights. Our Responsibilities.*, HHS.GOV, https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/npp_fullpage_hc_provider.pdf [https://perma.cc/42GP-7TFE] (providing a model notice "describ[ing] how medical information about [the patient] may be used and disclosed and how [the patient] can get access to this information").

[18] Office for Civil Rights, U.S. Dep't of Health & Human Servs., *Your Rights Under HIPAA*, HHS.GOV, https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html [https://perma.cc/E4GD-5VSC].

amend HIPAA to allow unclaimed property reporting to be a permissible disclosure; and (3) health care organizations can improve internal revenue cycle practices in order to prevent refunds and reimbursements from becoming subject to unclaimed property reporting and improve unclaimed property reporting when unavoidable. Any solution must balance the aims of the state to reunite property holders with their missing money alongside the growing public concern for patient privacy in the digital age.

II. BACKGROUND

A. History of Unclaimed Property: Common Law to Legislative Authority

Modern unclaimed property, sometimes referred to as abandoned property or escheat, comes in many different forms. It generally includes any property—real, personal, or intangible—that has been in the possession of a non-owner (property holder) for a period specified by statute, which is called the property's dormancy period.[19] Prior to the dormancy period elapsing, the property holder may return the property to its owner by any method. However, if the property holder is unsuccessful in its attempts to return the property and the dormancy period elapses, the property becomes unclaimed and is subject to state unclaimed property laws.[20]

Historically, the primary purpose of unclaimed property laws was to "safeguard the interests" of property holders until they could claim their property.[21] Unclaimed property laws can be traced back to two British common law mechanisms.[22] First, the concept of "escheat" would revert land to the most proximate feudal lord when the ordinary course of descent was broken.[23] Second, "*bona vacantia*" gave the Crown a right to take possession of property when a subject died without heirs and to act as custodian if and until the "rightful owner" came forward with a claim.[24] Both of these doctrines made the Crown the custodian of real and personal property in the event an owner died, abandoned the estate, or otherwise left the property unattended. It fell on the Crown to serve as custodian of the property and to

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[19] *See* NAUPA, *supra* note 7.

[20] *See id.*

[21] Bower, *supra* note 5, at 518.

[22] DAVID J. EPSTEIN, UNCLAIMED PROPERTY LAW AND REPORTING FORMS § 1.01 (Matthew Bender & Co. ed., 2009).

[23] *Id.*

[24] *Id.* § 1.02; *see also* Standard Oil Co. v. New Jersey, 341 U.S. 428, 435 n.5 (1951) ("The right of the King at common law to take possession, in certain circumstances, of abandoned chattels is clear.").

grant the title to a true owner when and if she came forward because the English sovereign had a greater claim to unclaimed property than a stranger.[25]

The escheat and *bona vacantia* doctrines did not easily translate to the United States.[26] After the Revolutionary War, the states incorporated British common law through statute or constitutional provisions.[27] In many instances, states chose to adopt existing British common law between 1607 and the date the states adopted the statutory or constitutional provision.[28] While the doctrine of escheat was well-developed in England prior to 1607,[29] the doctrine of *bona vacantia* was not.[30] For this reason, the power of the state to escheat real property was presumed under common law, while its power of *bona vacantia* diverged as understood in the British context.[31] In the United States, *bona vacantia* was thought to have been derived from the states' police power rather than the sovereign's superior claim to personal property.[32] Escheat and *bona vacantia* doctrines eventually merged into a single doctrine of denominated escheat.[33]

Although the United States inherited this doctrine, a uniquely American escheat law began to take shape in the late nineteenth and early twentieth centuries among state legislatures and in the United States Supreme Court.[34] At the state level, escheat law developed in light of intestate succession, wherein property owners died without an instrument devising their property to another individual and the state could not identify an heir.[35] In 1896, the Supreme Court differentiated American escheat from its English counterpart in *Hamilton v. Brown*.[36] When an owner of real estate died without an evident heir, Texas took title of the land and subsequently sold the property.[37] Plaintiffs, the apparent heirs of the previous owner, claimed that Texas wrongfully dispossessed them of the property and that the new owner's title was faulty.[38]

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[25] *Id.* § 1.01.

[26] *Id.* § 1.04.

[27] *Id.*

[28] *Id.*

[29] CATHLEEN A. BUCHOLTZ ET AL., UNCLAIMED PROPERTY: KNOWING HOW FAR YOU MUST GO 15 (2003) (stating that subinfeudation in England ended with the passage of the Statute of Quia Emptores in 1290, ensuring that real property would default to the Crown).

[30] EPSTEIN, *supra* note 22, § 1.04.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] John V. Orth, *Escheat: Is the State the Last Heir?*, 13 GREEN BAG 2d 73, 77 (2009).

[36] Hamilton v. Brown, 161 U.S. 256 (1896).

[37] *Id.* at 261–62.

[38] *Id.* at 262.

The Supreme Court ultimately held in favor of Texas, not because the State of Texas was the presumptive owner—analogous to the Crown in England—but because Texas had carried out its obligations under its own legislative provisions. The Court explained:

> By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the King as the sovereign lord; but the King's title was not complete without an actual entry upon the land, or judicial proceedings . . . . The usual form of proceeding . . . was really a proceeding at common law . . . . The inquest of office was a proceeding in rem; when there was a proper office found for the King, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the King's favor.[39]

Here, the Court described the common law proceeding of escheat, wherein (1) land would default to the Crown, (2) the Crown would notify all interested individuals, and (3) the interested individuals would come forward to assert their claim.[40] If an individual's claim was stronger than the Crown's, the Crown would vest title in that individual.[41] If no one made a claim, or if the claim was considered insufficient, then the title would vest in the Crown.[42] However, this is not how escheat developed in the United States. The *Hamilton* Court held that when land "fairs for want of heirs[,]" the land could only escheat to the state "according to the law of the particular State."[43] As state law provided that Texas need only give constructive notice by publication—a burden that the Court said Texas met—title of the land *did* vest in Texas and resale of the land was proper.[44] Texas assumed the role as administrator and was responsible for holding title for the period required by state statute before it could invoke its administrative authority to assume title of the land itself.[45]

In addition to limiting the escheat power to state statutes and state constitutional provisions, the Court also addressed constitutional issues related to the Due Process Clause of the Fourteenth Amendment.[46] In *Cunnius v. Reading School District*, an absentee creditor alleged that a Pennsylvania law permitting the state to appoint an administrator for the

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[39] *Id.* at 263.
[40] *Id.* at 263; *see also* EPSTEIN, *supra* note 22, at § 1.04.
[41] *Hamilton*, 161 U.S. at 263.
[42] *Id.* at 263; *see also* EPSTEIN, *supra* note 22, at § 1.04.
[43] *Hamilton*, 161 U.S. at 263–64.
[44] *Id.* at 275.
[45] *Id.* at 268.
[46] U.S. CONST. amend. XIV, § 1.

estates of those missing or presumed dead violated the Due Process Clause of the Fourteenth Amendment. [47] The Court held that "if a state law . . . contained no adequate safeguards concerning property, and amounted therefore simply to authorizing the transfer of the property of the absentee to others, that such a law would be repugnant to the Fourteenth Amendment."[48] However, "the right to regulate the estates of absentees, both in the common and civil law, has ever been recognized as being within the scope of governmental authority" and therefore the Pennsylvania law allowing the state to appoint an administrator in some instances was within the police powers of the state unless the law was otherwise "restrained by some constitutional limitation."[49]

Cunnius safeguarded states' power to transfer property when the law provided that the true owner was sufficiently absent. This same power extended from the realm of estate administration to the realm of escheat. The Supreme Court reaffirmed the boundaries of state power to regulate title of property in *Provident Institution for Savings v. Malone* when it held that the statute provided for both notice and opportunity to be heard, and did not violate or deny the plaintiff's due process rights.[50] The Court also reaffirmed that this was a right reserved to the states, but not to the national government, in *United States v. Klein*.[51] These decisions defined and solidified the outer boundaries of escheat in the United States.

B. A Path to Uniformity: the Uniform Acts of 1954, 1981, and 1995

As American escheat law developed, states began to see revenue potential in taking possession of abandoned property,[52] in particular intangible property such as bank account balances, investment securities, undisbursed reimbursements, and insurance proceeds.[53] As states expanded the body of property subject to escheat to increase state revenue, new problems arose.[54] To fill gaps created by increasingly complex escheat law,

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[47] Cunnius v. Reading Sch. Dist., 198 U.S. 458 (1905).

[48] *Id.* at 468.

[49] *Id.* at 471.

[50] Provident Inst. for Sav. v. Malone, 221 U.S. 660, 666 (1911) (holding that "[t]here is nothing unequal or discriminatory in making the act applicable only to abandoned deposits in a savings bank" and "[t]he classification is reasonable").

[51] United States v. Klein, 303 U.S. 276, 282 (1938) (holding "the jurisdiction and possession of the federal district court does not operate to curtail the power which the state may constitutionally exercise over persons and property within its territory").

[52] David C. Auten, *Modern Rationales of Escheat*, 112 U. PA. L. REV. 95, 115 (1963).

[53] U.S. Sec. & Exch. Comm'n, *Escheatment Process*, SEC.GOV, https://www.sec.gov/fast-answers/answersescheathtm.html [https://perma.cc/PMQ2-XAQ6].

[54] Auten, *supra* note 52, at 116.

some states adopted catch-all statutes that would maximize their ability to escheat unclaimed property.[55]

States are incentivized to escheat and administer unclaimed property because, until the property is claimed by its rightful owner, the state can use both the principal and interest that the property accrues while in the possession of the state.[56] One rationale for allowing states to use unclaimed property to boost state revenue is that "property should benefit the citizenry rather than remain with the debtor or holder, thus preventing a windfall to the holder and returning the unclaimed property to the stream of commerce."[57] In some jurisdictions, states charge an administration fee when the owner comes forward to claim their property as a method of generating revenue.[58] However, this problem of "lucrative silence"[59] frustrated owners whose property was held in the name of other entities, such as insurance companies who reported proceeds to state administrators.[60] Under this system, rightful owners of such property had no indication or notice that they had property in the custody of the state.[61] States generating revenue by holding unclaimed property likewise had no incentive to provide adequate notice to owners or heirs.[62]

There was also a growing tension between states who believed they had equal claim to certain escheatable property—which also meant property holders could be subject to multiple liability under different state laws.[63] Two Supreme Court cases, *Connecticut Mutual Insurance Co. v. Moore*[64] (1948) and *Standard Oil Co. v. New Jersey*[65] (1951) revealed the potential for confusion among unclaimed property holders and state administrators alike. First, the *Connecticut Mutual Insurance Co.* Court held that life insurance policies issued to New York residents that went unclaimed for seven years were subject to the "care and custody" of the state of New York even though the insurance company was domiciled in Connecticut.[66] This holding

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[55] *Id.*

[56] Cerajeski v. Zoeller, 735 F.3d 577, 583 (7th Cir. 2013).

[57] La. Health Serv. & Indem. Co. v. Tarver, 635 So. 2d 1090, 1092 (La. 1994).

[58] *But see* Cerajeski, 735 F.3d at 583 (stating that there are limitations on the fee that a state may charge for unclaimed property administration).

[59] Unclaimed Property Act Summary, UNIFORM LAW COMMISSION, http://uniformlaws.org/ActSummary.aspx?title=Unclaimed%20Property%20Act [https://perma.cc/GU5Y-DJXS].

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

[61] *Unclaimed Property Act Summary*, *supra* note 59.

[62] *Id.*

[63] Willoughby A. Colby, *The 1954 Uniform and Model Acts: A Summary and Analysis*, 41 A.B.A J. 39, 39 (1955).

[64] *Conn. Mut. Life Ins. Co.*, 333 U.S. 541.

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

[66] *Conn. Mut. Life Ins. Co.*, 333 U.S. at 544.

promulgated an apparently cogent rule: the state in which the property owner was domiciled was the state with the right to escheat the unclaimed property.

The holding, however, had the possibility of creating more confusion. Justice Frankfurter soundly articulated the problem in his dissent of *Connecticut Mutual Insurance Co.*, writing:

> [A]t the heart of the controversy are the conflicting claims of several States in a hotchpot of undifferentiated obligations. The proceeds of "abandoned" life insurance policies cannot, I assume, be seized as for escheat more than once. Since the rights and liabilities growing out of such policies are, to a vast extent, the result of a process that concerns two or more States, their interests may come into conflict when, in exigent search for revenue, they invoke the opportunities of escheat against unclaimed proceeds from insurance policies.[67]

In *Standard Oil Co.*, the Court revisited the question of unclaimed property jurisdiction in the context of unclaimed stock certificates and dividends.[68] The Court held that "[u]nclaimed property at the disposal of the state may include deposits in banks doing business in the particular state, though incorporated by the Federal Government."[69] The rule that arose from this holding did not overrule *Connecticut Mutual Insurance Co.*, but it did muddy the water: the state where the property was located after becoming unclaimed had the first right to escheatment.[70] Justice Frankfurter reiterated his frustrations with the Court's reasoning in his dissent of *Standard Oil Co.*, writing that "the Court specifically bars the possibility of double escheat, which would logically result from such a holding."[71] It became clear to states that, no matter how carefully they drafted their escheat laws, the lack of uniformity among states would guarantee that escheatment would remain a "race of diligence between states" with apparent jurisdiction over unclaimed property.[72]

This scaffolding of unclear law frustrated property owners and states alike.[73] Universal frustration laid the groundwork for a series of attempts to blaze a trail toward uniformity.[74] The Uniform Law Commission (ULC)

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[67] *Id.* at 552 (1948) (Frankfurter, J., dissenting).
[68] 341 U.S. at 429.
[69] *Id.* at 441.
[70] *See id.* at 443.
[71] *Id.* at 444 (Frankfurter, J., dissenting).
[72] Colby, *supra* note 63, at 39.
[73] *See id.* at 39–40.
[74] *See id.*

drafted the first version of a model custodial unclaimed property framework[75] shortly after the *Standard Oil Co.* decision: the Uniform Disposition of Unclaimed Property Act of 1954.[76] The ULC amended the 1954 Uniform Act in 1966.[77] The model for a custodial-based unclaimed property framework generally meant that custodians of unclaimed property increasingly were required to report as much personal information about the owner as possible because the ultimate goal was to actually reunite owners with the property.[78] The success of the 1954 Uniform Act was limited by the number of states that would adopt it[79]—a trend that remains pervasive today.[80]

The landscape of interstate unclaimed property changed radically as states attempted to assimilate the Supreme Court's decision in *Texas v. New Jersey*,[81] the so-called "linchpin"[82] in the modern unclaimed property framework, into existing unclaimed property laws.[83] In *Texas v. New Jersey*, the Court held that the right to escheat debts belonged to the state of the creditor's last known address or, where no address was known, to the state in which the debtor is domiciled.[84] This decision took the critiques espoused by Justice Frankfurter and adopted a "conservator" theory, which established once and for all a scheme of prioritization that applies when multiple states have a claim to escheat the same property.[85]

In light of the substantive shift in Supreme Court jurisprudence, the ULC revamped the 1954 Uniform Act and drafted the Unclaimed Property Act of 1981.[86] In addition to integrating the *Texas v. New Jersey* holding into its

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[75] Greg Vermulm, *What's the Difference Between Escheatment and Custodial Possession?*, KEEPUP™ BLOG (June 12, 2015, 1:21 PM), https://www.unclaimedpropertyspecialists.com/blog/whats-the-difference-between-escheatment-and-custodial-possession [https://perma.cc/8WV8-BXT4] ("Escheatment is the permanent transfer of property to state whereas a custodial-based approach involves the state acting as a custodian for the property owner until they come forward. Generally, states approach the custodial model in three ways: (1) the state may hold the property until the true owner comes forward, (2) the state my hold the property for a certain period of time until it is permanently transferred to the state, or (3) the state may hold the property in perpetuity and never take ownership of it.").

[76] UNIF. DISPOSITION OF UNCLAIMED PROP. ACT (Unif. Law Comm'n 1966).

[77] *Unclaimed Property Act Summary*, *supra* note 61.

[78] *Id.*

[79] EPSTEIN, *supra* note 22, § 12.00 (stating that thirteen states adopted the 1954 Uniform Act, and some eighteen states adopted the 1966 revised version).

[80] *See* Email from Kaitlin Wolff, Legis. Couns., Unif. Law Comm'n, (Nov. 4, 2019, 9:58 EST) (on file with author) (stating that California and Nebraska are the only states that have retained one of these versions of the 1954 Uniform Act).

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

[82] EPSTEIN, *supra* note 22, at § 2.04.

[83] EPSTEIN, *supra* note 22, at § 12.00.

[84] 379 U.S. at 682.

[85] EPSTEIN, *supra* note 22, at § 12.00.

[86] UNIF. UNCLAIMED PROP. ACT (Unif. Law Comm'n 1981).

framework, the 1981 Uniform Act also reduced the dormancy period for property becoming statutorily unclaimed.[87] The ULC shortened the dormancy period required for property to become unclaimed in part because it saw that property owners in states with shorter dormancy periods were more likely to be reunited with unclaimed property.[88] In 1995, the ULC drafted the Uniform Unclaimed Property Act of 1995[89] to codify these shorter dormancy periods while also expanding the body of covered intangible property to unclaimed securities.[90] The 1995 Uniform Act also sought to increase the ease with which state unclaimed property administrators could give notice to property owners by requiring unclaimed property reports to include the Social Security number or tax identification number associated with the unclaimed property's rightful owner.[91]

C. The 2016 Uniform Act and the Problem of Privacy Under HIPAA

1. The Latest Attempt at Uniformity: 2016 Uniform Act

Each iteration of a model act led to the ULC's most recent attempt at uniformity: the Revised Uniform Unclaimed Property Act.[92] Four states have enacted it: Colorado, Kentucky, Tennessee, and Utah.[93] Like its predecessors, the 2016 Uniform Act aims to streamline the reunion between property and its owners and to limit the windfall to states with custody of the unclaimed property.[94] In addition, the 2016 Uniform Act addresses for the first time privacy concerns arising out of technological developments.[95] In particular, the 2016 Uniform Act improves notice obligations required of property holders and unclaimed property administrators. Previous acts required notice that property was in the custody of a particular state to be published in a

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[87] *Id.* § 2 (stating that the dormancy period refers to the period of time the property holder retains the property before law requires the holder to report it to the state unclaimed property administrator); *see generally* EPSTEIN, *supra* note 22, at § 12.00.

[88] UNIF. UNCLAIMED PROP. ACT 8–9 (Unif. Law Comm'n 1981); *see generally* EPSTEIN, *supra* note 22, at § 12.00.

[89] UNIF. UNCLAIMED PROP. ACT (Unif. Law Comm'n 1995).

[90] Todd R. Stimmel, The Uniform Unclaimed Property Act (1995), BUSINESS CREDIT, Oct. 1996, at 39.

[91] *Id.*; *see, e.g.*, MONT. CODE ANN. § 70-9-808(2) (2015) ("The report must be verified and must contain: . . . (b) . . . the name, if known, and last-known address, if any, and the social security number or taxpayer identification number, if readily ascertainable, of the apparent owner of property of the value of $ 50 or more . . . .").

[92] REVISED UNIF. UNCLAIMED PROP. ACT (Unif. Law Comm'n 2016).

[93] *See* Email from Kaitlin Wolff, *supra* note 80 ("[T]he ULC only tracks bills and counts enactments that reflect our uniform language or language that is 'substantially similar' to our uniform language.").

[94] REVISED UNIF. UNCLAIMED PROP. ACT 1–2 (Unif. Law Comm'n 2016).

[95] *Id.*

newspaper.[96] In addition to a mailing requirement,[97] the 2016 Uniform Act requires states to "maintain a website or database accessible by the public and electronically searchable which contains the names reported to the administrator of all apparent owners for whom property is being held . . . ."[98]

2. 2016 Uniform Act Acknowledges HIPAA

The 2016 Uniform Act also acknowledges privacy concerns arising out of the passage of the Health Insurance Portability and Accountability Act (HIPAA)[99] in 1996. HIPAA "is primarily concerned with simplifying and reducing the administrative costs in healthcare delivery[,] . . . providing some measure of insurance coverage portability."[100] However, another aspect that HIPAA addressed was "health information privacy and security."[101] In light of the increased utilization of technology to transfer private information about patients between various health care organizations—"covered entities"[102]—Congress sought to limit the degree and circumstances under which health care organizations may disclose individuals' PHI.[103] Article 14 of the 2016 Uniform Act mirrors language used in the HIPAA Security Rule[104] regarding disclosure of confidential information. In part, the HIPAA Security Rule requires:

> (a) *General requirements*. Covered entities and business associates must do the following:
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> (1) Ensure the confidentiality, integrity, and availability of all electronic protected health information the covered entity or business associate creates, receives, maintains, or transmits.

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[96] UNIF. UNCLAIMED PROP. ACT 8–9 (Unif. Law Comm'n 1981) ("The administrator shall cause a notice to be published . . . at least once a week for 2 consecutive weeks in a newspaper of general circulation in the [county] of this State in which is located the last known address of any person to be named in the notice.").

[97] *See, e.g.*, KY. REV. STAT. ANN. § 393A.270 (LexisNexis 2019) (providing that the holder must notify the apparent owner by mail or, if the apparent owner previously consented to electronic notice, by e-mail).

[98] REVISED UNIF. UNCLAIMED PROP. ACT at art. 14 cmt. (Unif. Law Comm'n 2016); *see, e.g.*, MISSINGMONEY.COM, *supra* note 15.

[99] Health Insurance Portability and Accountability Act, 42 U.S.C. § 201 (2019).

[100] Stephen K. Phillips, *Practice Resource: A Legal Research Guide to HIPAA*, 3 J. HEALTH & LIFE SCI. L. 134, 134 (2010).

[101] *Id.*

[102] 45 C.F.R. § 160.103 (2000) ("Covered entity means: (1) [a] health plan[,] (2) [a] health care clearinghouse[,] [or] (3) [a] health care provider who transmits any health information in electronic form . . . .").

[103] REVISED UNIF. UNCLAIMED PROP. ACT art. 14 (Unif. Law Comm'n 2016).

[104] Office for Civil Rights, Dep't of Health & Hum. Servs., *The Security Rule*, HHS.GOV, https://www.hhs.gov/hipaa/for-professionals/security/index.html [https://perma.cc/ZCR9-RX2N].

> (2) Protect against any reasonably anticipated threats or hazards to the security or integrity of such information.
> (3) Protect against any reasonably anticipated uses or disclosures of such information that are not permitted . . . .
> (4) Ensure compliance with this subpart by its workforce.[105]

The drafters' comment to Article 14 explain that the ULC "intended to reinforce that administrators (and their representatives) have a duty to maintain the confidentiality of such confidential or non-public personal information provided by holders, including, without limitation, information relating to apparent owners, the holder's business and the holder's employees."[106]

The confidential, non-public information to which the ULC refers correlates to the very same PHI protected by HIPAA. HIPAA defines PHI as "individually identifiable health information" that is either transmitted or maintained in any "form or medium," in particular "electronic media."[107] Individually identifiable information is:

> [A]ny information, including demographic information collected from an individual, that—
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> (A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and—
>
> (i) identifies the individual; or
>
> (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.[108]

Current Department of Health and Human Services (HHS) guidance distinguishes eighteen "identifiers" that meet the statutory definition of PHI: name; date; telephone numbers; geographic data; fax number; Social Security number; email address; medical record number; account number; health plan beneficiary number; certificate or license number; vehicle identifier; serial numbers including license plates; web URL; device identifiers and serial number; internet protocol address; full face photos and comparable images; biometric identifiers; and any unique identifying number or code.[109] When a

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[105] 45 C.F.R. § 164.306(a) (2003).
[106] REVISED UNIF. UNCLAIMED PROP. ACT at art. 5 § 503(c)(2) (Unif. Law Comm'n 2016).
[107] 45 C.F.R. § 160.103 (2000).
[108] 42 U.S.C. § 1320d-6 (2018).
[109] *What is Considered PHI Under HIPAA?*, HIPAA JOURNAL (Dec. 28, 2017),

health care organization transfers one or more of these identifiers to an entity not "covered" by HIPAA without the patient's permission, the transmittal usually constitutes a HIPAA violation.[110] A HIPAA violation may come in the form of a civil penalty or a criminal charge, depending on the circumstances of the disclosure.[111]

There are three types of permitted disclosures under HIPAA: first, a disclosure is permitted when the patient or insured consents to the disclosure;[112] second, a disclosure is permitted between covered entities or qualified business associations when the disclosure is made for the purposes of "treatment, payment, or health care operations";[113] and third, a disclosure is permitted under certain public policy exceptions carved out under HIPAA.[114] If health care organizations wish to report the unclaimed refunds and reimbursements of individual patients or insureds without their permission, then unclaimed property law must fall into one of these three categories provided under HIPAA.

Herein lies the conflict between HIPAA and modern unclaimed property laws. On one hand, health care organizations operate as business associations and, therefore, are statutorily liable if they fail to completely and accurately report unclaimed property to the appropriate state administrator.[115] On the other hand, health care organizations are covered entities under HIPAA and are statutorily liable if they fail to protect the privacy and security of patients and insureds.[116] Compliance with the state statutory scheme may, in some instances, force the health care organization to be noncompliant with HIPAA. Conversely, compliance with HIPAA may mean the health care organization is not fully and accurately reporting the information required by state unclaimed property reporting laws, particularly in states that have adopted the 1981 Uniform Act, the 1996 Uniform Act, or the 2016 Uniform Act.

Even though the 2016 Uniform Act is the first version of the Act to acknowledge privacy concerns promulgated by the passage of HIPAA in

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https://www.hipaajournal.com/considered-phi-hipaa [https://perma.cc/S58C-J77L].

[110] *Id.* ("HIPAA covered entities and their business associates will also need to ensure appropriate technical, physical, and administrative safeguards are implemented to ensure the confidentiality, integrity, and availability of PHI . . . .").

[111] *What are the Penalties for HIPAA Violations?*, HIPAA JOURNAL (June 24, 2015), https://www.hipaajournal.com/what-are-the-penalties-for-hipaa-violations-7096/ [https://perma.cc/9YY4-9S5L].

[112] 45 C.F.R. § 164.506(b) (2002).

[113] *Id.* § 164.506(a).

[114] *Id.* § 164.512.

[115] *See* Ezra Church & Andrew Katz, *What is 'Unclaimed Property' and Why Should Hospitals Care?*, JD SUPRA (Jan. 2, 2018), https://www.jdsupra.com/legalnews/what-is-unclaimed-property-and-why-37201/ [https://perma.cc/39CG-ZE7P].

[116] *Id.*

1996, its adoption raises compliance issues created by conflicts with both federal and state frameworks.[117] In fact, the 2016 Uniform Act appears not only to leave these problems unsolved, but it may also increase liability under HIPAA by requiring health care organizations to report even more PHI identifiers than required under previous versions of the Act.[118]

The possibility of liability or double liability will no doubt burden the health care system, and health care organizations may ultimately pass along the cost of their liability to patients and insured individuals. The skyrocketing cost of health care in the United States is not only an economic issue, but further contributes to a public health crisis that has resulted from health care and insurance becoming increasingly cost prohibitive.[119]

Also at issue is the prevailing question of how much sensitive and confidential information is actually being safeguarded within the complex, interstate unclaimed property scheme. Any resolution of health care organization liability must also remain mindful of competing public policies: first, the historically-grounded objective to reunite mislaid, abandoned, and otherwise unclaimed property with its rightful owner; and second, the modern outcry for a modicum of privacy in an era where individuals' most sensitive information is only a few clicks away.

III. ANALYSIS

An attempt to resolve the mounting tension between state unclaimed property laws and HIPAA will likely begin at the state level. Uniformity across states would be the most practical for health care organizations and unclaimed property administrators alike, especially in instances where a single health care system expands into multiple jurisdictions with varying laws and corresponding liability. The breadth and reach of health care organizations is relevant, because unclaimed property law compliance in one jurisdiction could very well be a violation in another.[120] In spite of its efforts

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[117] *See supra* II.C.1–2 (discussing the 2016 Uniform Act and its attempt to acknowledge privacy conflicts without resolving tension between state and federal law).

[118] *See supra* II.A.2 (discussing that unclaimed property reporting under the 2016 Uniform Act requires a description of the property, the property owner's last known address, and the Social Security number or taxpayer identification number of the property owner).

[119] *See* Thomas Bodenheimer, *High and Rising Health Care Costs. Part 1: Seeking an Explanation*, 142 ANNALS OF INTERNAL MED. 847, 848–82 (2005) (discussing different explanations for rising health care costs).

[120] Michelle Moloian, *10 Best Practices for Unclaimed Property Compliance*, TAX EXECUTIVE (July 16, 2019), https://taxexecutive.org/10-best-practices-for-unclaimed-property-compliance/ [https://perma.cc/6AV7-6LPY] ("[M]any states do not provide uniform reporting guidelines and can differ significantly from one another on methods of performing due diligence, submission of reports, and remittance requirements.").

to address the security of confidential information, the 2016 Uniform Act has failed to alleviate liability on the part of health care providers. Therefore, widespread adoption of this act may solve jurisdictional problems and alleviate the financial burden associated with preparing unclaimed property reports, but it will not resolve the tension between a health care provider's obligation to state unclaimed property administrators and its obligations to individual patients and insureds under HIPAA.

States could resolve this tension by merely amending existing unclaimed property laws to no longer require the reporting of what is considered private health care information under HIPAA. Unclaimed property reform, therefore, may be the most direct path toward alleviating tension between state and federal law. However, reducing the body of information that health care organizations must report to state unclaimed property administrators will undoubtedly make it more difficult for administrators to reunite unclaimed property with its rightful owner. For instance, it is virtually impossible for the unclaimed property administrator to perform its duty without the name, address, and other identifiers that are patently PHI.

A middle-ground for reform at the state level could be to create an alternate procedure for health care organizations wherein they can report unclaimed property in a de-identified fashion, which is a permissible disclosure under HIPAA. Instead of publishing this property on the online, searchable database that currently exists, states could design a secure database that is accessible only by individuals with unclaimed property.[121]

Alternatively, if this degree of reform is unattainable, health care providers can implement internal mechanisms that would prevent property from becoming unclaimed and, therefore, subject to probative unclaimed property reporting. The upside to this less-uniform solution is two-fold: providers will save money because they will not have to hire an unclaimed property professional to compile unclaimed property reports or outsource this job to an outside company; and, consequently, the privacy of patients will be better preserved if their individually identifiable health care information is never disclosed to state treasury departments.

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[121] Bradley Malin, Office of Civil Rights, *Guidance on De-Identification of Protected Health Information*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES 6, HHS.GOV, (Nov. 26, 2012) https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/coveredentities/De-identification/hhs_deid_guidance.pdf [https://perma.cc/LT97-LBUH] ("Under [section 164.514(a)], health information is not individually identifiable if it does not identify an individual and if the covered entity has no reasonable basis to believe it can be used to identify an individual.").

A. State Level Reform: Pushing a Different Uniformity

1. The HIPAA Problem

The first issue is whether the transmission of PHI without patient authorization—which is what unclaimed property reporting statutes currently demand of health care organizations—is permissible under HIPAA. There are three ways in which HIPAA could deem unclaimed property reporting as a permissible disclosure of PHI: (1) if reporting unclaimed property qualifies as a "payment"[122] and therefore does not require prior authorization under HIPAA; (2) if state unclaimed property laws are not preempted by HIPAA; or (3) if transmission of PHI in unclaimed property reports falls into an exception under 45 C.F.R. § 164.512.[123]

First, reporting unclaimed property in accordance with state law may be a permitted disclosure under HIPAA, thus allowing PHI disclosure without authorization when the disclosure is for the purpose of "treatment, payment, and healthcare operations activities."[124] Recognized activities under this exception include "a range of management functions of covered entities, including quality assessment, practitioner evaluation, student training programs, insurance rating, auditing services, and business planning and development."[125]

Second, state unclaimed property laws may not be preempted by HIPAA. In general, HIPAA supersedes any contrary provision of state law.[126] However, it does offer two possible areas where state law may control. First, HIPAA "shall not supersede a contrary provision of State law" if the provision is necessary "(I) to prevent fraud and abuse; (II) to ensure appropriate State regulation of insurance and health plans; (III) for State reporting on health care delivery or costs; or (IV) for other purposes . . . ."[127] No court has yet determined that state unclaimed property reporting is necessary under this section. State unclaimed property laws could be permitted under this section if a determination was made that disclosure of individually identifiable health care information is necessary "to prevent

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[122] 45 C.F.R. § 164.502(a)(1)(ii)–(iii) (2000); *see, e.g.*, Paul D. Sullivan, *HIPAA v. State Escheat Law: Uncashed Reimbursement Checks*, 6 LAW. J. 6, 15 (2004) (asserting that unclaimed property reports are "payments" under the meaning of HIPAA, and that health care organizations are not liable under state escheat law).

[123] 45 C.F.R. § 164.512 (2000).

[124] *Id.* § 164.502(a)(1)(ii).

[125] Citizens for Health v. Leavitt, 428 F.3d 167, 174 (3d Cir. 2005) (citing 45 C.F.R. § 164.501 (2000)).

[126] 42 U.S.C. § 1320d-7(a)(1) (1935).

[127] *Id.* § 1320d-7(a)(2)(A)(i)(I)–(IV).

fraud and abuse."[128] In the unclaimed property context, the risk for fraud exists in instances where the property holder fails to report unclaimed property at all. If this is the type of fraud a state is worried about, it is not clear that disclosure of certain sensitive, private information of the property owner is necessary to ensure property holders comply with state statute. The threat of being audited and subsequently fined by the state unclaimed property administrator is incentive enough.[129]

State unclaimed property reporting procedures requiring the reporting of private health care information may be allowed under the exception providing for state regulatory reporting "for other purposes."[130] No court has yet addressed whether disclosure of individually identifiable health care information in state unclaimed property reports would be permitted under this state regulatory exception. State laws are typically not preempted under HIPAA in civil actions where a state law requires disclosure of protected health care information as a prerequisite to an action moving forward.[131] On the other hand, some courts have determined that other types of state laws unambiguously frustrate the federal objectives of HIPAA, particularly when the privacy standards imposed by the state statute or rule do not meet the objectives set forth by HIPAA.[132]

Third, in order to avoid penalties under HIPAA, a health care provider could also assert that unauthorized disclosure of private health care information was appropriate under 45 C.F.R. § 164.512. This section provides that "written authorization" of an individual is not required to disclose information when "[u]ses and disclosures [are] required by law,"[133] "[u]ses and disclosures [are] for public health activities,"[134] "[d]isclosures [are] about victims of abuse, neglect or domestic violence,"[135] "[u]ses and

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[128] *Id.* § 1320d-7(a)(2)(A)(i)(I).

[129] *See, e.g.*, W. VA. CODE ANN. § 36-8-24 (LexisNexis 2019).

[130] 42 U.S.C. § 1320d-7(a)(2)(A)(i)(IV) (1935).

[131] *See, e.g.*, Murphy v. Dulay, 768 F.3d 1360 (11th Cir. 2014) (requiring disclosure as a prerequisite to patient's negligence action not preempted by HIPAA); In the Interest of A.M., 856 N.W.2d 365 (Iowa 2014) (excluding testimony from parent's therapist not required under HIPAA); R.K. v. St. Mary's Med. Ctr., Inc., 735 S.E.2d 715 (W. Va. 2012) (holding that trial court erred in holding that patient's common law tort claims for wrongful disclosure of personal information was preempted by HIPAA).

[132] *See, e.g.*, Opis Mgmt. Res. LLC v. Sec'y Fla. Agency for Health Care Admin. 713 F.3d 1291 (11th Cir. 2013) (holding that the state statute was preempted in favor of more stringent privacy protections provided under HIPAA); Law v. Zuckerman, 307 F. Supp. 2d 705 (D. Md. 2004) (holding that state law did not afford patients adequate control over medical records and HIPAA preempted rule); Moreland v. Austin, 670 S.E.2d 68 (Ga. 2008) (holding that HIPAA controls *ex parte* communications between defense counsel and plaintiff's prior treating physicians and therefore preempts state regulation).

[133] 45 C.F.R. § 164.512(a) (2020).

[134] *Id.* § 164.512(b).

[135] *Id.* § 164.512(c).

disclosures [are] for health oversight activities,"[136] "[d]isclosures [are] for judicial and administrative proceedings,"[137] or "[d]isclosures [are] for law enforcement purposes."[138] Among these exceptions, the "disclosure required by law" exception and "disclosures required for health oversight purposes" are germane.[139] Neither exception has been addressed by a court or regulatory agency concerning unclaimed property laws.[140] It is unlikely that either of these exceptions would apply to health care providers submitting unclaimed property reports.

Although unclaimed property reports *are* mandated by law, they do not pass muster under the language of HIPAA. The relevant section states that uses and disclosures required by law allow a covered entity to:

> [U]se or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.[141]

Also under this section, "[a] covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section . . . ,"[142] meaning that, in order for disclosure to be permissible without the individual's authorization, the disclosure must either be related to victims of abuse, neglect, or domestic violence;[143] for judicial and administrative proceedings;[144] or for law enforcement purposes.[145] This heightened requirement for disclosures required by law likely would exclude the unauthorized disclosure of private healthcare information in unclaimed property reports.

Another possibility is that state unclaimed property reports could be treated as a form of health care oversight as permitted under 45 C.F.R. § 164.512(d). Health care oversight activities include:

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[136] *Id.* § 164.512(d).

[137] *Id.* § 164.512(e).

[138] *Id.* § 164.512(f); *see, e.g.*, State v. Mubita, 188 P.3d 867, 936 (Idaho 2008) (stating that "[HIPAA] permits such disclosures in compliance with an authorized investigative demand or similar process authorized by law provided that: (1) the information sought is relevant and material to a legitimate law enforcement inquiry; (2) the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and (3) de-identified information could not reasonably be used"), *abrogated by* Verska v. St. Alphonsus Reg'l Med. Ctr., 265 P.3d 502, 508 (Idaho 2011).

[139] Kendall Houghton & Matt Hedstrom, *Unclaimed Property Challenges in the Health Care Industry*, AHLA CONNECTIONS, Dec. 2018, at 24.

[140] *Id.*

[141] 45 C.F.R. § 164.512(a) (2020).

[142] *Id.* § 164.512(a)(2).

[143] *Id.* § 164.512(c).

[144] *Id.* § 164.512(e).

[145] *Id.* § 164.512(f).

> [A]udits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of: (i) [t]he health care system; (ii) [g]overnment benefit programs for which health information is relevant to beneficiary eligibility; (iii) [e]ntities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or (iv) [e]ntities subject to civil rights laws for which health information is necessary for determining compliance.[146]

However, a health oversight activity must "arise out of"[147] and "directly relate to"[148] "(i) [t]he receipt of health care; (ii) [a] claim for public benefits related to health; or (iii) [q]ualification for, or receipt of, public benefits or services . . . ."[149] Unclaimed property reporting has not been deemed by any court to be a healthcare oversight activity under HIPAA. While it is true that unclaimed property comes into possession of health care providers as an incident of the receipt of health care services, the reporting procedure itself does not arise out of the receipt of health care, nor does it relate to the receipt of health care. Furthermore, unclaimed property laws treat covered entities and uncovered entities equally.[150] It does not follow that every type of business—regardless of whether or not it is a health care organization—is required to report unclaimed property for the purpose of health care oversight. All business entities have the same obligation to report unclaimed property according to applicable state law.

There is no applicable exception or avenue for a health care provider to unauthorizedly disclose PHI in an unclaimed property report. Consequently, disclosing PHI to uncovered entities such as state unclaimed property administrators is a HIPAA violation. Yet, PHI is clearly required by the 1981 Uniform Act and the 2016 Uniform Act, and, therefore, by the states that have adopted versions of these acts. Only jurisdictions that permit inclusion of PHI are safe from double liability, but health care organizations could nonetheless be including this information in their reports due to a lack of

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[146] *Id.* § 164.512(d)(1)(i)–(iv).

[147] *Id.* § 164.512(d)(2).

[148] *Id.* § 164.512(d)(2).

[149] *Id.* § 164.512(d)(2)(i)–(iii).

[150] *See* Centers for Medicare & Medicaid Services, *Are You a Covered Entity?*, CMS.GOV (Aug. 20, 2020, 8:39 PM) https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/AreYouaCoveredEntity [https://perma.cc/FV3J-A7QY]. The distinction between "covered entities," "business associates," and uncovered entities that fall into neither category is solely made under HIPPA. *See id.*

clarity regarding the degree of their obligations under HIPAA, especially when an organization operates across multiple state jurisdictions.

2. The 2016 Uniform Act: An Improbable Solution

The first way in which states may be able to prevent unauthorized disclosure of personal information is by implementing reforms that improve security of information when it is utilized for unclaimed property reports. One possible, but unlikely, way to secure sensitive personal data is by pursuing a path of nationwide uniformity by means of the 2016 Uniform Act. As it is currently structured, the 2016 Uniform Act contains several major changes from its earlier iterations. First, it clarifies which states have a claim to certain kinds of unclaimed property;[151] second, it details when and how a property holder should report unique types of unclaimed property such as unused gift cards;[152] and third, it finally addresses how state administrators should handle confidential information included in the unclaimed property report.[153]

The third and final aspect of the 2016 Uniform Act may reveal problems with the implementation of federal law, specifically HIPAA, in conjunction with state unclaimed property laws that implement the 2016 Uniform Act. The section of the 2016 Uniform Act that addresses confidentiality of personal information is Article 14.[154] Part (a) of Section 1402 appears to reinforce the confidentiality of information disclosed by property holders to the administrator (usually the state treasury department to which unclaimed property reports are submitted) by imposing obligations on the *administrator*.[155] This section imposes a mandatory exemption on property administrators by making "personal information" exempt from "public inspection or disclosure."[156] Part (b) of this section extends the confidentiality to any "record or other information that is confidential under the law of this state other than this [act], another state, or the United States."[157] These records or other information are "are deemed to be sensitive and *must be kept confidential* in accordance with this Act and *other laws*."[158]

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[151] REVISED UNIF. UNCLAIMED PROP. ACT art. 3 (2016).
[152] *Id.* at § 207.
[153] *Id.* at art. 14.
[154] *Id.*
[155] *Id.* at § 207.
[156] *Id.* at art. 14, § 1402(a).
[157] REVISED UNIF. UNCLAIMED PROP. ACT art. 14 § 1402(b).
[158] *Id.* at § 1402, cmt. (emphasis added).

Importantly, this section of the 2016 Uniform Act does not make property holders exempt from disclosing personal information in their unclaimed property reports. In fact, the drafters of the Act acknowledged that "[c]ertain holders are obligated by law to maintain the confidentiality of non-public personal information in their possession"[159] and then specifically referred to HIPAA as an example of such an act that would require some property holders to maintain the confidentiality of certain information.[160] Identifying the beneficiary of this exemption is important, because HIPAA specifically places the burden of protecting individually identifiable health care information on *covered entities* first and foremost.[161] This section of the 2016 Uniform Act is saying that a state's treasury department is exempt from publicly disclosing confidential information contained in unclaimed property reports. It does not allow property holders—such as health care providers—to be exempt from including confidential information or other protected information protected by HIPAA in their annual unclaimed property reports.

Among other things, the 2016 Uniform Act provides that an unclaimed property report must contain a description of the property, the property owner's last known address, and the Social Security number or taxpayer identification number of the property owner.[162] This aspect of the 2016 Uniform Act fails to adequately address privacy concerns, because health care organizations are still required to report PHI to un-covered entities without prior authorization from the patient or insured. So while it may give the state administrator some leeway to conceal PHI in its notice publications, the HIPAA violation and breach of privacy remain center stage under the 2016 Uniform Act. The 2016 Uniform Act provides that a report must:

> (1) be signed by or on behalf of the holder and verified as to its completeness and accuracy;
> (2) be signed electronically, be in a secure format approved by the administrator which protects confidential information of the apparent owner in the same manner as required of the administrator and the administrator's agent under [Article] 14;
> (3) describe the property;
> (4) except for a traveler's check, money order, or similar instrument, contain the name, if known, last-known address, if known, and Social Security number or taxpayer identification number, if known or readily

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[159] *Id.*

[160] *Id.*

[161] *See* Office for Civil Rights, U.S. Dep't of Health & Human Servs., *Summary of the HIPPA Privacy Rule*, HHS.GOV, https://www.hhs.gov/hippa/for-professionals/privacy/laws-regulations/index.html [https://perma.cc/4TPZ-2TWP].

[162] REVISED UNIF. UNCLAIMED PROP. ACT art. 4, § 402(a)(3)–(4).

> ascertainable, of the apparent owner of property with a value of $[50] or more; . . .
>
> (c) A report under Section 401 may include personal information as defined in Section 1401 (a) about the apparent owner or the apparent owner's property to the extent not otherwise prohibited by federal law.[163]

If reported electronically—which is almost exclusively the practice for filing unclaimed property reports today—the report must be transmitted "in a secure format approved by the administrator which protects confidential information of the apparent owner in the same manner as required of the administrator and the administrator's agent."[164] However, the central issue regarding PHI disclosure from health care providers to state administrators is not whether security of the transmittal is stringent enough. The linchpin is exactly what types of disclosures are allowed by HIPAA. The 2016 Uniform Act would resolve the problem of double liability if it *reduced* the amount of information health care organizations are required to disclose on their unclaimed property reports. The 2016 Uniform Act neither reduces reporting requirements nor makes certain types of business entities, like health care organizations, exempt. Instead, the act gestures at HIPAA problem[165] and poses no solution for reducing the liability of the health care organizations nor the breach of patient or insured privacy that comes with it. Thus, the ULC's most recent iteration of unclaimed property law reform would not resolve the tension between compliance and privacy among health care organizations.

3. From "Must" to "May": Make Reporting PHI Permissive

Because the 2016 Uniform Act does not resolve the tension between states' unclaimed reporting guidelines and health care organizations' obligations under HIPAA, states are leaving the health care organizations operating in their states exposed to liability under federal law.[166] The severity of the liability depends upon the severity of the violation.[167] For instance, HIPAA classifies violations resulting from a lack of "reasonable diligence,"[168] violations made due to "reasonable cause and not to willful

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[163] *Id.* § 402 (a)(1)–(4), (c).

[164] *Id.* § 402 (a)(2).

[165] *Id.* 14 § 1401, cmt.

[166] *See Summary of the HIPAA Privacy Rule*, *supra* note 166 (discussing civil and criminal penalties for failure to comply with the Privacy Rule).

[167] C.F.R. § 160.404 (2016).

[168] *Id.* § 160.404(b)(2)(i); *see also id.* § 160.401 ("Reasonable diligence means the business care and prudence expected from a person seeking to satisfy a legal requirement under similar circumstances.").

neglect,"[169] violations resulting from "willful neglect"[170] that were corrected within thirty days,[171] and violations resulting from "willful neglect" that were not corrected within thirty days.[172] Regardless of the severity of the violation, all complaints go through the Office of Civil Rights (OCR).[173] The OCR then initiates an investigation of the entity that committed the HIPAA violation.[174] At the conclusion of the investigation, the OCR will require that the entity in violation to either (1) "[v]oluntarily comply with the HIPAA Rules,"[175] (2) "[t]ake corrective action,"[176] or "[a]gree to a settlement."[177]

At best, health care organizations that disclose PHI in state unclaimed property reports violate HIPAA for a lack of reasonable diligence, because they did not exercise "the business care and prudence" by failing to recognize that their compliance with state unclaimed property laws violates HIPAA.[178] At worst, health care organizations are aware of this conflict and intentionally violate HIPAA with "willful neglect" of their obligations by submitting unclaimed property reports that include PHI.[179] Such willful and intentional violations can result in both civil and criminal penalties.[180]

States that continue to require disclosure of PHI put the health care organizations operating within their jurisdictions in a difficult position. A hospital that does not submit a complete and accurate report to its state unclaimed property administrator risks costly audits and fines at the state level. A hospital that fully complies with the mandatory unclaimed property reporting procedures present in most states can be held to civil and even criminal liability under HIPAA. Compliance with both state and federal

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[169] *Id.* § 160.404(b)(2)(ii); *see also id.* § 160.401 ("Reasonable cause means an act or omission in which a covered entity or business associate knew, or by exercising reasonable diligence would have known, that the act or omission violated an administrative simplification provision, but in which the covered entity or business associate did not act with willful neglect.").

[170] *Id.* §160.401 ("Willful neglect means conscious, intentional failure or reckless indifference to the obligation to comply with the administrative simplification provision violated.").

[171] 45 C.F.R. § 160.404(b)(2)(iii) (2016).

[172] *Id.* § 160.404(b)(2)(iv).

[173] Office for Civil Rights, U.S. Dep't of Health & Human Servs., *Filing a Complaint*, HHS.GOV, https://www.hhs.gov/hipaa/filing-a-complaint/index.html [https://perma.cc/Z97F-52ZG].

[174] *Id.*

[175] Office for Civil Rights, U.S. Dep't of Health & Human Servs., *Filing a Complaint: What to Expect*, HHS.GOV, https://www.hhs.gov/hipaa/filing-a-complaint/what-to-expect/index.html [https://perma.cc/36BD-Q8AK].

[176] *Id.*

[177] *Id.*

[178] *See* 45 C.F.R. § 160.401 (defining "reasonable cause," "reasonable diligence," and "willful neglect" in the context of HIPAA violations).

[179] *Id.* ("Willful neglect means conscious, intentional failure or reckless indifference to the obligation to comply with the administrative simplification provision violated.").

[180] 42 U.S.C. § 1320d-6 (2018).

schemes is impossible in states where reporting PHI is required under the state's unclaimed property laws.

Rather than the ULC drafting yet another uniform unclaimed property act and going through the trouble of having states adopt it piecemeal—if ever—the ULC could revise a single provision that states could adopt across all jurisdictions. In states that have adopted the 2016 Uniform Act, for instance, businesses "must"[181] report "the name, if known, last-known address, if known, and Social Security number or taxpayer identification number, if known or readily ascertainable, of the apparent owner of property."[182] Older iterations of the Uniform Unclaimed Property Act likewise require some, if not all, of these personal identifiers because the state's aim is to reunify property with its apparent owner. However, in an effort to obtain enough information to reunite property owners with unclaimed property, health care organizations are *required* to supply information that could tie health care information—for instance, the fact that an individual sought a service from a particular health care facility—to the patient. In such instances, state unclaimed property laws *require* health care organizations to make unlawful disclosures in violation of HIPAA.

If the ULC provided that reporting PHI is permissive for HIPAA-covered entities, rather than required, then health care organizations would have discretion to prepare their unclaimed property reports in compliance with HIPAA without the threat of a state unclaimed property audit hanging over them. If a state felt that it needed PHI in order to reunite the property with its rightful owner, then the state could instead require that health care organizations submit de-identified information, which is a permissible disclosure under HIPAA.[183] This amendment would immediately give health care providers the opportunity to prioritize their federal obligations under HIPAA until legislatures develop a comprehensive solution that expeditiously reunites individuals with their unclaimed property, reduces civil and criminal liability for health care organizations, and assuages concerns with private information being disclosed and subsequently disseminated through an online, searchable unclaimed property database.

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[181] REVISED UNIF. UNCLAIMED PROP. ACT art. 4 § 402(a) (Unif. Law Comm'n 2016).

[182] *Id.* § 402(a)(4).

[183] Office for Civil Rights, U.S. Dep't of Health & Human Servs., *The De-Identification Standard*, HHS.GOV, https://www.hhs.gov/hippa/for-professionals/privacy/special-topics/de-identification/index.html#standard [https://perma.cc/LT97-LBUH].

B. Congressional Reform: Amend HIPAA to Allow Reporting of PHI Without Prior Authorization

Although a federal solution in the form of a federal regulation of unclaimed property is improbable, Congress could intervene to resolve this tension by amending HIPAA to address the unclaimed property problem. Congress could create a new exception under 45 C.F.R. § 164.512, wherein HIPAA provides the circumstances under which a covered entity may disclose PHI without the individual's prior written authorization. There are already six carveouts for activities that do not require prior authorization under HIPAA: "[u]ses and disclosures required by law,"[184] "[u]ses and disclosures for public health activities,"[185] "[d]isclosures about victims of abuse, neglect or domestic violence,"[186] "[u]ses and disclosures for health oversight activities,"[187] "[d]isclosures for judicial and administrative proceedings,"[188] or "[d]isclosures for law enforcement purposes."[189] An amendment could either carve out a seventh exception for unclaimed property reporting or include language explicitly providing that unclaimed property reporting falls into any of the existing exceptions. This would resolve the tension because it would allow health care organizations to submit state unclaimed property reports in compliance with any jurisdiction's laws without the risk of incurring liability under HIPAA.

A congressional amendment would alleviate the liability of health care organizations, but such an exception would ultimately run counter to the goals of HIPAA. Providing an exception for *unauthorized* disclosure would mean that health care organizations could freely report potential PHI to state unclaimed property administrators without notice to or consent from the patient or insured. Privacy is one of the pillars of HIPAA, with a major goal being "to assure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well being."[190] The flow of this information to un-covered entities—like state unclaimed property administrators—that do not promote a national vision of public health frustrates the goals of HIPAA. While the 2016 Uniform Act may place an obligation on state unclaimed property administrators to protect

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[184] 45 C.F.R. § 164.512(a) (2020).
[185] *Id.* § 164.512(b).
[186] *Id.* § 164.512(c).
[187] *Id.* § 164.512(d).
[188] *Id.* § 164.512(e).
[189] *Id.* § 164.512(f).
[190] *Summary of the HIPAA Privacy Rule*, *supra* note 166.

confidential information, this act has only been adopted in four jurisdictions.[191] Even if health care organizations are no longer at risk of double liability under this kind of amendment, the patient or the insured whose property becomes unclaimed remains exposed.

The dissonance within this possible solution is more poignant considering that all states, at the very least, are required to publish unclaimed property to give public notice to potential owners and heirs.[192] States that have adopted the 2016 Uniform Act, and other states with similar amendments, maintain a searchable database of unclaimed property that includes the name of the presumed owner, the organization that reported the unclaimed property, and an approximate value of the unclaimed property.[193] Amending HIPAA to permit even this level of disclosure without a patient's authorization would still frustrate HIPAA and its objectives.

C. Internal Solution: Possible Responses by Health Care Organizations

The final and most comprehensive measures that can resolve the tension between HIPAA and state unclaimed property laws can be accomplished by the health care organizations themselves. These measures assume that the HIPAA and state unclaimed property schemes go unchanged, but this is not to say that these measures could not be executed in conjunction with the aforementioned solutions, as well. The following practices are prophylactic in that they aim to prevent a tension between HIPAA and unclaimed property laws from ever forming.

1. Create an Unclaimed Property HIPAA Disclosure

The first preventative measure that health care organizations could implement is to improve notice of privacy practices[194] (NPP) by integrating

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[191] *Supra* Part II.C.1 (stating that only Colorado, Kentucky, Tennessee, and Utah have adopted the Revised Uniform Unclaimed Property Act at the time of this Note's publication).

[192] *See Due Diligence Basics*, UPPO: UNCLAIMED PROPERTY FOCUS (Feb. 1, 2018), https://www.uppo.org/blogpost/925381/293957/Due-Diligence-Basics [https://perma.cc/46R2-P39E] ("Unclaimed property due diligence is a specific type of communication deemed legally necessary by most states and territories to make individuals aware of the impending transfer of their property to another holder.").

[193] REVISED UNIF. UNCLAIMED PROP. ACT § 503(c)(2) (Unif. Law Comm'n 2016); *see also For States and Provinces Contact Information*, MISSINGMONEY.COM, (last visited Aug. 12, 2020), https://www.missingmoney.com/en/Home/StateContact [https://perma.cc/9SWV-GD5M] (listing states participating in MissingMoney.com searchable unclaimed property database).

[194] 45 C.F.R. § 164.520(a) (2020) ("[A]n individual has a right to adequate notice of the uses and disclosures of protected health information that may be made by the covered entity, and of the individual's rights and the covered entity's legal duties with respect to protected health information.").

an unclaimed property HIPAA authorization at the "point-of-service." The point-of-service is the point in the health care chain in which the organization delivers the health care service.[195] For medical facilities, the point-of-service is the hospital or doctor's office; and for insurance companies, the point-of-service is at the insured's time of enrollment.[196] At each of these points of service, the patient or insured is entitled to a notice of the health care organization's privacy practices, or an NPP.[197] The effect of an NPP is to put individuals on notice of how their personal information may be used by the health care organization in three potential areas without prior written authorization: "treatment, payment, and health care operations."[198] Unclaimed property reporting may qualify as a health care operation because unclaimed property reporting is an aspect of "[b]usiness management and general administrat[ion] . . . of the entity."[199]

The required elements of an NPP are comprehensive.[200] At the point-of-service, an individual will receive a document that clearly puts them on notice that they should review the document.[201] The NPP would be an ideal location for health care organizations to inform individuals that their PHI may be shared in the course of required unclaimed property reporting. But merely informing the individual that the unauthorized disclosure may occur is insufficient to comply with the HIPAA Privacy Rule. The notice must contain:

> (A) A description, including at least one example, of the types of uses and disclosures [made for] the following purposes: treatment, payment, and health care operations.
> (B) A description of each of the other purposes for which the covered entity is permitted or required . . . to use or disclose protected health information without the individual's written authorization.
> . . .
> (D) For each purpose described . . . , the description must include sufficient detail to place the individual on notice of the uses and disclosures that are permitted or required by this subpart and other applicable law.

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[195] William M. Sage, *Regulating Through Information: Disclosure Laws and American Healthcare*, 99 COLUM. L. REV. 1701, 1732 (1999).

[196] *Id.*

[197] 45 C.F.R. § 164.520(a).

[198] *Id.* § 164.520(b)(1)(ii)(A).

[199] *Id.* § 164.501(2)(6); *see also id.* (defining "health care operation" under HIPAA).

[200] *Id.* § 164.520(b)(1).

[201] *Id.* § 164.520(b)(1)(i) ("The notice must contain the following statement as a header or otherwise prominently display[]: 'THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY.'").

> (E) A description of the types of uses and disclosures that require an authorization . . . , a statement that other uses and disclosures not described in the notice will be made only with the individual's written authorization, and a statement that the individual may revoke an authorization . . . .[202]

Following the guidelines set forth by the HIPAA Privacy Rule, a health care organization could design a sufficient unclaimed property disclosure for their NPP by first explaining the nature and purposes of unclaimed property reporting and then providing a situation in which a patient's PHI could be disclosed in an effort to comply with state unclaimed property laws. For instance, a hospital could explain that there are instances in which patients are entitled to refunds and the hospital is unable to refund the credit balance to the patient. Under a period of time provided by an applicable state statute, the hospital is obligated to report the unclaimed credit balance to the appropriate state unclaimed property administrator as unclaimed intangible property. The hospital's disclosure could then explain that, under most state unclaimed property laws, reporting of the patient's name, Social Security number, address, and other PHI may be required. The hospital could then emphasize that unclaimed property reporting is not only necessary to normal business operations, but that the hospital is liable if its reporting is not complete and accurate. The disclosure could conclude with the other elements required by 45 C.F.R. § 164.520(b)(1).

Ideally, for the health care organization, the patient or insured would agree to the disclosure and provide a valid authorization for the health care organization to use PHI for unclaimed property reporting purposes, thus virtually eliminating their liability under HIPAA. The "[c]ore elements"[203] that embody a valid authorization include:

> (i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
> (ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
> (iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
> (iv) A description of each purpose of the requested use or disclosure . . . .
> (v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure . . . .

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[202] *Id.* § 164.520(b)(1)(ii)(A)–(B), (D)–(E).
[203] *See* 45 C.F.R. §164.520(b)(1) for an exhaustive list of the other elements.

(vi) Signature of the individual and date . . . .[204]

In addition to HIPAA requiring these elements to be in place, it also prohibits "compound authorizations,"[205] which refers to combining multiple authorizations into a single document. HIPAA requires that each discrete authorization be contained in its own document. This places conditions on authorization, such as health care organizations barring individuals from "treatment, payment, enrollment in the health plan, or eligibility for benefits"[206] based upon their authorization and disclosure of covered health care information after an individual revoked his or her authorization.[207]

Following these general parameters, a health care organization could construct an authorization to specifically permit disclosure of PHI for unclaimed property reporting. Such a disclosure should include in its own document: (1) a description of possible types of unclaimed property that could be subject to reporting to state administrators;[208] (2) the name of the organization authorized to make disclosures to state administrators, which may also include the agent of the health care organization (such as an unclaimed property auditing firm) that is responsible for compiling and sending required unclaimed property reports; (3) a notice that the information will be disseminated to the appropriate state unclaimed property administrator; (4) a notice that each state makes its own laws regarding how it uses the information contained in unclaimed property reports, and that some individually identifiable information could be published in print or online depending on the jurisdiction that has a right to the unclaimed property; (5) an expiration date or event for an authorization;[209] and (6) a place for the individual to sign his or her name along with the date of authorization.[210]

Of course, a new authorization would also mean a new document for health care organizations to manage. Organizations would likewise have to keep track of revocations of authorization and when authorizations expire. Furthermore, if and when an individual does not authorize disclosure, health

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[204] *Id.* § 164.508(c)(1)(i)–(vi).

[205] *Id.* § 164.508(b)(3).

[206] *Id.* § 164.508(b)(3)(iii).

[207] *Id.* § 164.508(b)(5).

[208] The unclaimed property that health care organizations possess will be in the form of overpayments, refunds, or miscellaneous account balances that the organization has otherwise failed to reunite with the presumed owner of that property.

[209] Health care organizations could require a new authorization every two years, which is about how long it takes for property to be unclaimed while in the possession of a property holder.

[210] Requirements under 45 C.F.R. § 164.508(c)(1)(i)–(vi) are adapted to meet the needs of health care organizations.

care organizations will be left in the exact same position had they not integrated an unclaimed property disclosure into their NPP. Regardless, such an authorization—if successfully implemented—would significantly limit HIPAA liability the longer the disclosure is in place.

2. Revenue Cycle Best Practices

The second preventative measure that health care organizations can take to limit their liability is to tackle unclaimed property from a revenue cycle angle. Health care organizations encounter the possibility of double liability because, as business entities, they are obligated to report unclaimed property to the appropriate state administrator. The risk of violating HIPAA by reporting unclaimed property without the patient or insured's prior written authorization arises out of the fact that health care organizations come into the possession of unclaimed property in the first place. Health care organizations could significantly limit their liability for unauthorized PHI disclosures if they reduced the body of unclaimed property in their possession. This would require the health care organization to return intangible unclaimed property such as refunds, reimbursements, or other account credit balances to the rightful owner before the dormancy period accrues and unclaimed property reporting requirements are triggered. This is easier said than done; however, there are "best practices" that could be implemented at an organizational level to (1) facilitate the reunion of intangible property with patients and insureds prior to the property becoming unclaimed and (2) make unclaimed property compliance more time and cost-efficient.

When auditing health care organizations, state unclaimed property administrators and their third-party auditors are well-aware of the types of property that become unclaimed, such as "accounts payable, payroll, accounts receivable (A/R) credit balances, open payables, unapplied cash, rebates, patient refunds, write-offs, benefits, and, especially, unpaid credit balances."[211] In the context of a health care provider, the health care organization may come into possession of the property because a patient overpaid on a bill, or because the patient had multiple insurance plans and one overpaid on the claim in question.[212] The unpaid credit balances, unapplied cash, and write-offs that result are often overlooked by a health

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[211] Eric J. Boggs et al., *Beyond Compliance: Consolidating Unclaimed Property Analysis and Reporting*, HEALTHCARE FINANCIAL MANAGEMENT, Feb. 2013, at 50.

[212] Caroline E. Reigart, *An Old Compliance Obligation in a Brave New Overpayment World*, 19 J. OF HEALTH CARE COMPLIANCE 21, 21 (2017).

care organization's unclaimed property division,[213] assuming that it has one. Furthermore, the burden to prove that these intangible forms of property are not unclaimed falls on the health care organization.[214] From an accounting standpoint, the property's dormancy period does not necessarily begin accruing on the date the money was most recently shifted around. For instance, somehow a patient's copay may become an overpayment, which then may be issued as a refund in the form of a check that the patient never cashes. The dormancy period does not begin to run when the check was issued, or even when the organization classified the copay as an overpayment. The dormancy period begins accruing from the date of the initial payment—most likely on the date of service.[215] In other words, intangible property could be in the possession of health care organizations for weeks or months before the organization's accounting department even realizes that a refund is owed to the patient.

Health care organizations should implement a series of "best practices" that limit unclaimed property liability, limit HIPAA liability, and ultimately save money. First, organizations should create or bolster in-house unclaimed property operations. Part of such an operation should be dedicated to catching intangible property at risk of becoming unclaimed. For good reason, there is an industry-wide focus on "collecting unpaid bills rather than working unpaid credit balances."[216] After all, the former generates income for health care organizations while the latter results in a net decrease in their cash-on-hand (even if the cash was not theirs to begin with). Although refunding overpayments and account credits does not intuitively save money, in the long run it does. Not only does this property becoming unclaimed trigger HIPAA liability complications, unclaimed property reporting also comes with a price tag[217]—not to mention the costs that accompany noncompliance.

An in-house unclaimed property professional could significantly reduce costs and liability for health care organizations by (1) efficiently creating internal mechanisms to streamline unclaimed property reporting and (2) identifying exemptions. When health care organizations report unclaimed property, often they are not reporting solely to the state in which they are

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[213] Boggs, *supra* note 211, at 50.

[214] *Id.* at 51.

[215] *Id.*

[216] *Id.*

[217] *See, e.g.*, *Purchasing Options*, UPEXCHANGE, https://up.eagletm.com/UPTiles/Pricing [https://perma.cc/KLJ6-BVBL]. Reporting unclaimed property will have a cost burden regardless of whether it is managed in-house or outsourced to an unclaimed property consulting firm. Furthermore, businesses that report to multiple jurisdictions may use reporting software that has its own price tag outside the labor costs. *Id.*

situated. *Texas v. New Jersey* established a set of prioritizations that dictates which states have a right to the unclaimed property and the order in which the property holder must report.[218] First, the property must be reported to the state of the rightful owner's last known address on file.[219] Second, if there is no known address on file for the rightful owner, the property must be reported to the state where the property holder is domiciled.[220] In the context of a health care organization, one can conceive of the possibility that even a small hospital in Kentucky could be required to submit numerous unclaimed property reports if it sees patients domiciled in Kentucky, Indiana, or Ohio. For a national health care organization with hundreds of thousands of patients or insureds, the unclaimed property reporting obligation—and the cost accompanying it—is seemingly boundless. Furthermore, ignorance of unclaimed property statutes is no excuse for noncompliance.[221]

Unclaimed property professionals can also develop a risk assessment plan individualized for the health care organization. In sectors intimately familiar with the looming threats of unclaimed property audits, risk management is considered "increasingly important but difficult."[222] Risk assessment and management may involve several facets, such as developing a "compliance calendar,"[223] generating organization-wide policies that facilitate interdepartmental communication,[224] and conducting state statutory research in all jurisdictions where the organization may have unclaimed property liability.[225] After health care organizations identify and take measures to reduce risk of liability, they can then dedicate resources to develop a savvy cost-savings plan. Unclaimed property professionals are well equipped to identify exemptions that vary from state to state, such as unclaimed property exemptions for tax-exempt hospitals, business-to-business transactions, managed care contracts, and *de minimis* amounts (in

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[218] Texas v. New Jersey, 379 U.S. 674, 680–82 (1965).

[219] *Id.* at 681–82 ("[S]ince a debt is property of the creditor, not of the debtor, fairness among the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records.").

[220] *Id.* at 682.

[221] Lori Furguson-Kenney, *Perils of Unclaimed Property*, CPA J. (April 2013), http://archives.cpajournal.com/2003/0403/features/f043403.htm [https://perma.cc/AEV8-DQMG].

[222] James A. Pihera & Anthony L. Andreoli, *Risk Management and Banking Companies*, ABA BANK COMPLIANCE at 14, 16 (Mar./Apr. 2004) (Business Source Premier database version, on file with author) (writing about the increasing unclaimed property liability in the banking industry).

[223] Moloian, *supra* note 120, at 64–65 (recommending that a "compliance calendar should capture all action steps and due dates for areas where there is a reporting responsibility").

[224] *Id.* (suggesting an "annual compliance kickoff meeting" at the beginning of the year followed up by "brief status meetings before each major step" in the process).

[225] *Id.*

most states, unclaimed property under $50).[226] Navigating the complex interstate unclaimed property network is not realistic for an ordinary accounting department; accurate and timely reporting requires health care organizations to lean on unclaimed property professionals solely dedicated to identifying exemptions that could result in an overall savings for the organization.[227]

IV. CONCLUSION

As states increasingly engage in unclaimed property audits,[228] health care organizations will undoubtedly be exposed to liability depending upon how they approach unclaimed property reporting at the state level and HIPAA compliance at the federal level. State legislatures, Congress, and health care organizations should be collaborating and generating a multifaceted approach that maintains the privacy of patients and insureds. In the absence of a statutory solution at the state or federal level, the onus falls on the health care organizations to limit their own liability. Millions of individuals entrust health care providers, insurance companies, and other covered entities with sensitive private information—some of which, if released, could be harmful to one's professional or personal life. It is unacceptable that a health care organization can flagrantly breach confidentiality due to a lack of due diligence. Yet, the current framework punishes due diligence because health care organizations will be held liable no matter what they do—either under state unclaimed property laws or under HIPAA. State and congressional action is needed to eliminate this problem, but in the meantime health care organizations should educate, train, and carefully report as little PHI as is required to be compliant until the law provides an adequate solution.

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[226] Boggs, *supra* note 211, at 52.

[227] *Id.* at 53.

[228] *See* Diane Green-Kelly, *Unclaimed Property: An Ancient Concept Creating Modern Liabilities*, 32 Franchise L.J. 41, 49 (2012); *see also*, Marc J. Musyl, *Unclaimed Property Audits: No Laughing Matter*, NAT'L L. REV. (Feb. 12, 2020), https://www.natlawreview.com/article/unclaimed-property-audits-no-laughing-matter [https://perma.cc/6WBA-T822].